

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN KLEIN, Personal Representative of
the Estate of NELSON KLEIN, Deceased,

UNPUBLISHED
February 8, 2007

Plaintiff-Appellant,

v

LAKE ORION NURSING CENTER, G. COOK,
and G. P. HITCHCOCK,

No. 266663
Oakland Circuit Court
LC No. 2004-061842-NH

Defendants-Appellees.

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo the circuit court's summary disposition ruling. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004), quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

"Whether a period of limitation applies to preclude a party's pursuit of an action constitutes a question of law that we review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

The parties dispute whether plaintiff's provision of notice of her intent to sue defendants, as required by MCL 600.2912b, tolled the applicable period for filing this wrongful death medical malpractice action. In *Waltz, supra* at 648-651, 655, the Michigan Supreme Court held that under the clear and unambiguous language of MCL 600.5856, the filing of a notice of intent to sue during the two-year malpractice period of limitation in MCL 600.5805(6) operates to toll

this period, but that the giving of notice does not toll the period in MCL 600.5852, which constitutes a wrongful death *saving period*, “an *exception* to the limitation period” and not a period of limitation itself. (Emphasis in original.) In *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), lv pending, a special conflict panel concluded that the Supreme Court’s decision in *Waltz* “applies retroactively in all cases.” More recently, in *Ward v Siano*, 272 Mich App ____; ____ NW2d ____ (Docket No. 265599, issued November 14, 2006), lv pending, another special conflict panel rejected the proposition that “a wrongful death plaintiff may rely upon equitable tolling to escape the retroactive effect of our Supreme Court’s decision in *Waltz v Wyse*.” *Ward, supra*, slip op at 1-3.

In this case, the decedent’s claims accrued by September 29, 2001, the date of his second fall at the nursing home, and thus the two-year period of limitation in MCL 600.5805(6) extended through September 29, 2003. But plaintiff’s appointment as personal representative on March 29, 2002, gave her until March 29, 2004, to commence this action within the wrongful death saving period. MCL 600.5852. Plaintiff gave notice of her intent to sue defendants on March 2, 2004, but the notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). *Waltz, supra* at 648-651, 655.¹ Consequently, plaintiff’s filing of this action on September 2, 2004, occurred more than five months after the wrongful death saving period expired.

Because the holding in *Waltz* applies retroactively to this case, *Mullins, supra* at 509, and because this Court’s decision in *Ward, supra*, slip op at 1-3, precludes the applicability of equitable or judicial tolling under the circumstances of this case, the circuit court correctly found that defendants were entitled to summary disposition pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ David H. Sawyer

/s/ Pat M. Donofrio

¹ This Court has rejected plaintiff’s contention that her giving of notice within the two-year period in MCL 600.5852 tolled this wrongful death saving period because she subsequently and timely filed suit within the three-year time limit also referenced in § 5852. “[T]he three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. Therefore, the fact that the three-year ceiling was not yet reached when [the plaintiff] filed suit is irrelevant.” *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 575; 703 NW2d 115 (2005).

Waltz squarely held that the notice tolling provision (MCL 600.5856(d)) explicitly applies only to the statute of limitations or repose, and therefore does not operate to toll the additional period permitted under (MCL 600.5852) for filing wrongful death actions. This holding clearly applies to the two-year period in the wrongful death saving provision (MCL 600.5852). [*Id.* at 575 (internal quotations omitted).]