

STATE OF MICHIGAN  
COURT OF APPEALS

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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UNPUBLISHED  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.

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

FITGERALD, J. (*concurring*).

I concur with the majority opinion because this Court is bound to follow *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), which this Court has held applies retroactively in all cases, *Mullins v St. Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), and because this Court is bound to follow *Ward v Siano*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 265599, issued November 14, 2006), which rejected the proposition that “a wrongful death plaintiff may rely upon equitable tolling to escape the retroactive effect of the *Waltz* decision.” *Ward*, *supra* at slip op pp 1 – 3.

However, I agree with Judge O’Connell’s partial dissenting opinion in *Turscan v Health Care & Retirement Corporation of America*, unpublished opinion per curiam of the Court of Appeals, Docket No. 261980 (issued January 11, 2007), slip op pp 1 – 2:

[F]or the reasons stated by Judge Murray in *Verbrugghe v Select Spec Hosp*, 270 Mich App 383, 389; 715 NW2d 72 (2006), I conclude that *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), “provides us no useful guidance.” As Judge Murray did, I would apply *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), to the facts of this case.<sup>1</sup>

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<sup>1</sup>I note that *Bryant v Oakpointe Villa*, 471 Mich 411, 432; 684 NW2d 864 (2004), may in fact control the outcome of all these cases (equitable tolling applies to MCL 600.5852 where the court determines “understandable confusion” exists).

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/s/ E. Thomas Fitzgerald

