

STATE OF MICHIGAN
COURT OF APPEALS

KIRT WREN, Personal Representative of the
Estate of HIRAM DENT, Deceased,

Plaintiff-Appellant,

v

SOUTHFIELD REHABILITATION COMPANY,
d/b/a GREAT LAKES REHABILITATION
HOSPITAL, and ST. JOHN RIVERVIEW
HOSPITAL,

Defendants-Appellees,

and

MOHAMMED S. SIDDIQUI,

Defendant.

UNPUBLISHED
March 13, 2007

No. 267024
Wayne Circuit Court
LC No. 04-425699-NH

Before: Servitto, P.J., and Talbot and Schuette, 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) (statute of limitations). 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 his intent to sue defendants, as required by MCL 600.2912b, tolled the applicable period for filing this wrongful death medical malpractice action.¹ 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), 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 715; ___ NW2d ___ (2006), 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*.” *Id.*

In this case, the decedent’s claims accrued by December 28, 2001, the date of his death, and thus the two-year period of limitation in MCL 600.5805(6) extended through December 28, 2003. But plaintiff’s appointment as personal representative on February 20, 2002, gave him until February 20, 2004, to commence this action within the wrongful death saving period. MCL 600.5852. Plaintiff gave notice of his intent to sue defendants on February 6, 2004, but the notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). *Waltz*, *supra* at 648-651, 655.² Consequently, plaintiff’s filing of this action on August 18, 2004, occurred nearly six months after the wrongful death saving period expired.

¹ For several reasons, we reject plaintiff’s assertion that defendants insufficiently stated their period of limitation/saving period affirmative defenses. First, defendants complied with MCR 2.111(F)(3)(a), given that they premised their summary disposition motions on plaintiff’s untimely filing of the complaint beyond the two-year medical malpractice period of limitation, a defense they specifically raised in their affirmative defenses to the complaint. And contrary to plaintiff’s characterization, MCL 600.5852 constitutes a saving period, not a period of limitation. *Waltz*, *supra* at 648-651. Second, to the extent that plaintiff suggests that defendants should have identified their saving period defense in the affirmative defenses, plaintiff offers no case law suggesting that MCR 2.111(F)(3) encompasses defenses involving statutory saving periods. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). Third, even assuming that defendants’ period of limitation defenses qualify as insufficient as stated, and thus technically violate MCR 2.111(F)(3) because they neglect to refer to *Waltz* or that MCL 600.5852 had expired, this insufficiency does not occasion a level of prejudice warranting reversal of the circuit court’s summary disposition order because plaintiff had the opportunity to raise before the circuit court his claims regarding the timeliness of the complaint and the inapplicability of *Waltz* to this case. MCR 2.613(A); *Hanon v Barber*, 99 Mich App 851, 855-856; 298 NW2d 866 (1980).

² This Court has rejected plaintiff’s contention that his giving of notice within the two-year
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We also reject plaintiff's claim that retroactively applying *Waltz* violates constitutional due process guarantees by significantly shortening the period of limitation governing the case after he had filed the complaint. The Michigan Supreme Court in *Waltz*, *supra* at 652 n 14, rejected the identical contention that its ruling had diminished the period of limitation by the mandatory 182-day post-notice tolling period:

We disagree with the dissent's assertion that our reading of the applicable statutes "effectively reduce(s)" by 182 days the two- and three-year periods provided for in § 5852. Plaintiff had a full two years after letters of authority were issued to commence her claim, as long as the claim was commenced within three years after the expiration of the two-year limitation period for medical malpractice actions. Additionally, plaintiff was entitled to a 182-day tolling period under § 5856(d), provided that she filed her notice of intent at some point before the expiration of that two-year limitation period. Potentially, then, under §§ 5805(5), 5852, and 5856(d), plaintiff had *five years plus 182 days* to commence her lawsuit following the accrual of her cause of action. However, because plaintiff waited until nearly five years had passed after her infant's death to file her notice of intent, there was simply no unexpired "statute of limitations" to toll. This analysis in no way shortens either the two-year extension period or the three-year ceiling provided for in § 5852. [Emphasis in original.]

See also *Ousley v McLaren*, 264 Mich App 486, 495-496; 691 NW2d 817 (2004) (favorably citing the Supreme Court's constitutional discussion in *Waltz*, *supra* at 652 n 14).

Because *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

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period in MCL 600.5852 tolled this wrongful death saving period because he 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).]

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/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette