

STATE OF MICHIGAN
COURT OF APPEALS

LISA D. WYATT, Successor Personal
Representative of the Estate of WILLIAM
NOLAN WYATT, Deceased,

Plaintiff-Appellee,

v

OAKWOOD HOSPITAL AND MEDICAL
CENTERS, a/k/a OAKWOOD HEALTHCARE,
INC., and THOMAS AUSTIN CHAPEL, M.D.,

Defendants,

and

PARVEZ KAHN, M.D.,

Defendant-Appellant.

UNPUBLISHED
September 11, 2007

No. 263370
Wayne Circuit Court
LC No. 04-402043-NH

LISA D. WYATT, Successor Personal
Representative of the Estate of WILLIAM
NOLAN WYATT, Deceased,

Plaintiff-Appellee,

v

OAKWOOD HOSPITAL AND MEDICAL
CENTERS, a/k/a OAKWOOD HEALTHCARE,
INC., and PARVEZ KAHN, M.D.,

Defendants,

and

THOMAS AUSTIN CHAPEL, M.D.,

Defendant-Appellant.

No. 263372
Wayne Circuit Court
LC No. 04-402043-NH

LISA D. WYATT, Successor Personal
Representative of the Estate of WILLIAM
NOLAN WYATT, Deceased,

Plaintiff-Appellee,

v

OAKWOOD HOSPITAL AND MEDICAL
CENTERS, a/k/a OAKWOOD HEALTHCARE,
INC.,

Defendant-Appellant,

and

PARVEZ KAHN, M.D., and THOMAS AUSTIN
CHAPEL, M.D.,

Defendants.

No. 263375
Wayne Circuit Court
LC No. 04-402043-NH

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as on leave granted¹ from circuit court orders denying their motions for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations). We reverse and remand. These appeals are being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a circuit court's summary disposition ruling. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

¹ In lieu of granting leave to appeal, our Supreme Court remanded this case to this Court for consideration as on leave granted. *Wyatt v Oakwood Hosp & Medical Ctrs*, 472 Mich 929; 697 NW2d 528 (2005). The Supreme Court directed this Court to consider "whether the statute of limitations bars an action from proceeding where the complaint was filed more than two years after the original letters of authority and before the subsequent letters of authority were issued." *Id.* The Supreme Court also instructed that this Court "is to give the holding of *Waltz v Wyse*, 469 Mich 642 (2004), full retroactive application." *Id.*

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 limitations applies to preclude a party’s pursuit of an action constitutes a question of law that we [also] review de novo.” *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

In this case, the decedent’s medical malpractice claims accrued by May 20, 2001, at the latest, and thus the two-year period of limitation in MCL 600.5805(6) extended through May 20, 2003. Sandra Wyatt, the estate’s original personal representative, did not file within this two-year period of limitation either a mandatory notice of her intent to sue, MCL 600.2912b, or a wrongful death complaint premised on medical malpractice.

The appointment of Sandra Wyatt as personal representative on September 6, 2001, however, gave her until September 6, 2003, to commence this action within the wrongful death saving period. MCL 600.5852. Wyatt gave notice of her intent to sue defendants on August 18, 2003, but her provision of this notice did not toll the wrongful death saving period under MCL 600.5856(c). *Waltz*, *supra* at 648-651, 655. Consequently, Wyatt’s filing of this action on January 23, 2004, occurred nearly five months after the wrongful death saving period had expired.

The circuit court found that at the time Sandra Wyatt gave defendants notice of her intent to sue, the giving of notice tolled the wrongful death saving period. The court declined to retroactively apply *Waltz*, *supra* at 648-651, 655, in which the Michigan Supreme Court held that under the clear and unambiguous language of MCL 600.5856, the giving of a notice of intent to sue does not toll the period in MCL 600.5852, which constitutes a wrongful death *saving period*, “an *exception* to the limitation period.” (Emphasis in original). As noted previously, the Supreme Court has mandated that we apply *Waltz* retroactively in this case. Furthermore, controlling decisions of this Court have determined that (1) the Supreme Court’s holding in *Waltz* “applies retroactively in all cases,” *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), lv gtd 477 Mich 1066 (2007), and (2) equitable or “judicial tolling should not operate to relieve wrongful death plaintiffs from complying with *Waltz*’s time restraints,”² *Ward v Siano*, 272 Mich App 715, 720; 730 NW2d 1 (2006), lv in abeyance ___ Mich ___; 729 NW2d 213 (2007).

² As summarized in *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 576 n 27; 703 NW2d 115 (2005) both the Michigan Supreme Court and this Court have rejected the notion that a retroactive application of *Waltz*, in a manner that renders an estate’s commencement of suit as untimely, qualifies as unconstitutional.

The estate contends that plaintiff's appointment as its successor personal representative on May 11, 2004, either rendered the original complaint timely or afforded her two additional years to pursue legal action, which she did timely by filing a first amended complaint in September 2004. The Michigan Supreme Court in *Eggleston v Bio-Medical Applications of Detroit, Inc.*, 468 Mich 29, 33; 658 NW2d 139 (2003), determined that the language of MCL 600.5852 "clearly allows an action to be brought within two years after letters of authority are issued to the personal representative." Because § 5852 "does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative," the Supreme Court held that the successor personal representative could timely file suit within two years after receiving his letters of authority, and "'within 3 years after the period of limitations ha(d) run.'" *Id.*, quoting § 5852. Finding *Eggleston* distinguishable, however, this Court has rejected the notion that the appointment of a successor personal representative revives a complaint untimely filed by an original personal representative. *Glisson v Gerrity*, 274 Mich App 525, 538-539; 734 NW2d 614 (2007); *McMiddleton v Bolling*, 267 Mich App 667, 671-674; 705 NW2d 720 (2005).

Furthermore, the Michigan Supreme Court's recent decision in *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007), undermines the estate's suggestion that notwithstanding the original personal representative's filing of an untimely complaint, plaintiff had the authority to timely file a complaint on behalf of the estate within two years of her appointment as its successor personal representative. In *Washington*, the original personal representative filed an untimely complaint that the circuit court dismissed pursuant to MCR 2.116(C)(7), and the plaintiff, a later-appointed successor personal representative, also filed a complaint on the estate's behalf. The Michigan Supreme Court held that *res judicata* barred the successor's action.

Application of the analysis in *Washington* to this case yields a conclusion that *res judicata* likewise bars plaintiff from pursuing a wrongful death medical malpractice action on the estate's behalf. First, the circuit court should have unconditionally ordered dismissal with prejudice of the complaint filed by Sandra Wyatt pursuant to MCR 2.116(C)(7), which order under MCR 2.504(B)(3) would amount to a dismissal on the merits. *Washington, supra*. Additionally, plaintiff shares privity with Wyatt because both represented the legal interest of the estate. *Id.* at 422. Regarding the third *res judicata* element, whether the matter raised in the second case was or could have been resolved in the first, a comparison of the initial complaint and the nearly identical first amended complaint filed by plaintiff reflects that (1) the only difference in the amended complaint appears in the caption and ¶¶ 1-2 and 31, which note plaintiff's appointment as the estate's successor personal representative, and (2) the allegations of negligence in the amended complaint encompass the same time period, the same defendants and the same maltreatment of the decedent as the allegations comprising the original complaint. The amended complaint thus involves the same operative facts as the basis for relief asserted in the original complaint. *Id.* at 420-421.

We conclude that the circuit court erred by denying defendants summary disposition pursuant to MCR 2.116(C)(7).

Reversed and remanded for entry of an order granting defendants summary disposition.
We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto