STATE OF MICHIGAN

COURT OF APPEALS

Estate of LINDA K. DEPRIEST, Deceased, by JILL M. LAVOY, Successor Personal Representative,

Plaintiff-Appellant,

v

MERCY MEMORIAL HOSPITAL CORPORATION, f/k/a MERCY-MEMORIAL HOSPITAL CORPORATION, ABDUL KABIR, M.D., NAVIN K. JAIN, M.D., and NAEEM LUGHMANI, M.D.,

Defendants-Appellees.

UNPUBLISHED
July 15, 2008

No. 259994
Monroe Circuit Court
LC No. 03-015958-NH

Estate of LINDA DEPRIEST, Deceased, by MELISSA G. MATIASH, Successor Personal Representative,

Plaintiff-Appellant,

v

SUSAN TRAPP, R.N., CHERYL L. MCCARTHY, P.T., and BARBARA E. MCNEIL,

Defendants-Appellees.

No. 268800
Monroe Circuit Court
LC No. 05-020121-NH

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In Docket No. 259994, plaintiff Jill M. Lavoy, successor personal representative of the estate of Linda DePriest, appeals as of right from the trial court's order granting summary disposition in favor of the defendants in LC No. 03-015958-NH under MCR 2.116(C)(7). Similarly, in Docket No. 268800, plaintiff Melissa G. Matiash, second successor personal representative of the estate of Linda DePriest, appeals as of right from the trial court's order

granting summary disposition in favor of the defendants in LC No. 05-020121-NH on the same basis. We reverse.

We review de novo a trial court's decision granting summary disposition under MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). In reviewing a motion for summary disposition under subrule (C)(7), we accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). In doing so, we consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Id.*

Lavoy argues that the trial court erred when it dismissed the estate's cause of action because the complaint was filed within the applicable statute of limitations pursuant to MCL 600.5852. After Lavoy filed her brief on appeal, this Court and our Supreme Court addressed in other cases many of the issues that she raises on appeal. Most notably, a conflict panel in *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), rev'd 480 Mich 948 (2007), held that *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), applies retroactively.[1] On appeal, however, our Supreme Court reversed this Court's decision, stating in pertinent part:

> We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567 (2000), was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided. All other causes of action are controlled by *Waltz*. In the instant case, because the plaintiff filed this action after *Omelenchuk* was decided and the saving period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided, *Waltz* is not applicable. [*Mullins v St Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007).]

Therefore, our Supreme Court provided a window within which *Waltz* does not apply. LC No. 03-015958-NH fits squarely within that window.

Omelenchuk v City of Warren, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz*, *supra*, was decided on March 28, 2000. In addition, the original co-personal representatives were appointed on September 15, 2000. Thus, the two-year saving period expired on September 15, 2002, well before *Waltz* was decided on April 14, 2004. MCL 600.5852. Pursuant to *Mullins*, *supra*, 480 Mich 948, because the co-personal representatives "filed this action after *Omelenchuk* was decided and the saving period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided, *Waltz* is not applicable." Thus, the March 13, 2003, complaint was timely filed. Because the

[1] In *Waltz*, *supra* at 650–651, our Supreme Court determined that a notice of intent does not toll the wrongful death savings period under MCL 600.5852.

complaint was timely and the trial court's ruling must be reversed, Lavoy's remaining arguments in Docket No. 259994 are moot.

In Docket No. 268800, Matiash argues that her complaint was timely and that her case is indistinguishable from *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383; 715 NW2d 72 (2006), vacated 481 Mich 874 (2008). In that case, the personal representative of the deceased's estate filed an action in circuit court that was ultimately dismissed on statute of limitations grounds. *Id.* at 384–385. The plaintiff, the successor personal representative, then filed a second action in the circuit court, which was also dismissed on statute of limitations grounds. *Id.* at 385. The plaintiff then appealed the dismissal of the second cause of action to this Court, which held that the "plaintiff's complaint was filed in strict compliance with MCL 600.5852" and was thus timely. *Id.* at 390. The *Verbrugghe* Court recognized that its conclusion was consistent with its decisions in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), and *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566; 703 NW2d 115 (2005). *Id.* The *Verbrugghe* Court rejected the analysis in *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), rev'd 480 Mich 978 (2007), on which defendants in the instant case rely, stating that "because *McLean* did not apply *Eggleston*, we find that *McLean* provides us no useful guidance." *Id.* at 389. The *Verbrugghe* Court also determined that res judicata did not bar the second action because a dismissal on statute of limitations grounds is not an adjudication on the merits. *Id.* at 393. Finally, the *Verbrugghe* Court determined that the successor personal representative was required to serve her own notice of intent on defendants and could not rely on her predecessor's notice of intent. *Id.* at 397.

Pursuant to MCR 7.215(J), this Court convened a special panel to resolve the conflict between *Verbrugghe* and *Braverman v Garden City Hosp*, 272 Mich App 72; 724 NW2d 285 (2006) (*Braverman I*), superseded in part 275 Mich App 705 (2007), aff'd 480 Mich 1159 (2008), regarding whether a successor personal representative could rely on her predecessor's notice of intent.[2] The special panel determined that a successor personal representative could rely on her predecessor's notice of intent and need not send her own notice of intent because "the term 'person' in MCL 600.2912b(1) includes a person acting in a representative capacity and includes the duly appointed personal representative of an estate, whoever that person may be at any given time." *Braverman v Garden City Hosp*, 275 Mich App 705, 716; 740 NW2d 744 (2007) (*Braverman II*), aff'd 480 Mich 1159 (2008).

Our Supreme Court affirmed this Court's decision in *Braverman II*, stating in pertinent part:

> Plaintiff initially contends that *Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007), saves her complaint. *Mullins*, however, does not apply to this case because the savings period did not expire "between the date that *Omelenchuk* [*v*

[2] Although Matiash filed a notice of intent and did not rely on the original co-personal representatives' notice of intent, the special panel's decision and our Supreme Court's order affirming that decision are otherwise relevant to this appeal.

> *City of Warren*, 461 Mich 567 (2000),] was decided and within 182 days after *Waltz* [*v Wyse*, 469 Mich 642 (2004),] was decided." *Mullins*, *supra* at 948. Nevertheless, plaintiff's complaint, filed by the successor personal representative within two years of his appointment, was timely under *Eggleston v BioMedical Applications of Detroit, Inc*, 468 Mich 29 (2003). Moreover, plaintiff, as successor personal representative, may rely on the notice of intent filed by the previous personal representative because the office of personal representative is a "person" under MCL 600.2912b. *Res judicata* does not bar plaintiff's complaint because no lawsuit filed prior to the present case was dismissed with prejudice. Moreover, the subsequent lawsuit was dismissed solely because the present lawsuit was pending. *Washington v Sinai Hosp*, 478 Mich 412 (2007). [*Braverman v Garden City Hosp*, 480 Mich 1159; 746 NW2d 612 (2008) (*Braverman III*) (brackets in original; footnote omitted).]

Pursuant to the foregoing authority and our Supreme Court's decision in *Eggleston*, Matiash's complaint was timely filed. The decedent died on July 22, 2000, within two years after her cause of action accrued, and Matiash's letters of authority were issued on January 12, 2005. She filed her complaint on July 14, 2005, less than two years after her appointment and within three years after the limitations period had run on July 19, 2002. Thus, under MCL 600.5852 and case law interpreting that provision, Matiash's complaint was timely.

We next consider whether res judicata bars Matiash's action. This is a question of law that we review de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). In *Washington*, *supra* at 418–422, our Supreme Court held that a dismissal pursuant to the statute of limitations constitutes adjudication on the merits and, accordingly, res judicata bars a subsequent action. However, because *Mullins*, *supra*, compels reversal of the trial court's prior dismissal, res judicata does not bar Matiash's claim "because no lawsuit filed prior to the present case was dismissed with prejudice." See *Braverman III*, *supra* at 1159. Accordingly, we reverse the trial court's order dismissing Matiash's complaint.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis