STATE OF MICHIGAN

COURT OF APPEALS

PAUL G. GREEN, II, Personal Representative of the Estate of PAUL GERALD GREEN,

Plaintiff-Appellant,

v

CHARLES G. PIERSON, M.D., BARBARA CARLSON, M.D., SOUTHWESTERN MEDICAL CLINIC, P.C., RICHARD KAMMENZIND, M.D., HEALTHCARE MIDWEST INTERNAL MEDICINE, THOMAS POW, M.D., GREAT LAKES HEART & VASCULAR INSTITUTE, P.C., and LAKELAND MEDICAL CENTER, ST. JOSEPH,

Defendants-Appellees.

UNPUBLISHED
November 30, 2006

No. 257802
Berrien Circuit Court
LC No. 04-003044-NH

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff Paul Green, II, the personal representative of the Estate of Paul Gerald Green, appeals by right the trial court's order granting defendants' motions for summary disposition and dismissing plaintiff's action as time-barred. We affirm.

This appeal concerns the applicability of *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), in which the Michigan Supreme Court held that the tolling provision of MCL 600.5856(c)[1] does not apply to the wrongful death savings statute, MCL 600.5852, which allows a personal representative two years from the date he receives his letters of authority in which to file a claim, but no later than three years after the period of limitations has run. The trial court

[1] At the time *Waltz* was decided, the general language of § 5856(c) was found in § 5856(d). Although there was some modification of the language, the principle remained essentially the same, i.e., the statute of limitations or repose is tolled when a claimant, in compliance with MCL 600.2912b, provides written notice of an intent to commence a medical malpractice action. For purposes of consistency and to avoid confusion, we shall simply refer to § 5856(c).

granted defendants' motions for summary disposition after concluding that *Waltz* applied such that the two-year period allowed under MCL 600.5852 was not tolled in the present case when plaintiff sent notice of his intent to sue defendants on the last day of the two-year period; therefore, the trial court determined that plaintiff's claim was time-barred because he filed his complaint six months after the two-year period expired.

Plaintiff argues that the Supreme Court's decision in *Waltz, supra,* should not be applied retroactively. We disagree on the basis of binding precedent. A trial court's decision on a motion for summary disposition is reviewed de novo, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), as is a trial court's determination regarding the timeliness of a claim and the retroactive or prospective application of a judicial decision, *Farley v Advanced Cardiovascular Health Specialists, PC,* 266 Mich App 566, 570-571; 703 NW2d 115 (2005).

This Court determined, in *Ousley v McLaren,* 264 Mich App 486, 494-495; 691 NW2d 817 (2004), that the *Waltz* decision applies retroactively. Although a special conflict panel was convened after the *Ousley* decision was challenged in *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586; 711 NW2d 448 (2006), vacated as to Part III of the opinion 269 Mich App 801 (2006), the special panel determined that *Waltz* is to be applied retroactively, not for the reasons given in *Ousley*, but because of summary orders issued by the Supreme Court on the subject, which the panel found to be binding. *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006). Plaintiff argues that the *Ousley* case is distinguishable from the present case because *Ousley* did not address whether the tolling statute applies to the two-year period established in MCL 600.5852 but only the five-year maximum. However, as noted by defendants in their supplemental authorities, this Court held in *Farley, supra* at 575, that the tolling statute does not toll the two-year period granted personal representatives in the wrongful death savings statute. The *Farley* panel stated:

> Further, Farley's contention that *Ousley* and *Waltz* only addressed whether the notice tolling provision tolled the five-year maximum in the wrongful death saving provision, thereby leaving open the question whether the notice tolling provision might toll the two-year period in that same provision, is inaccurate. *Waltz* squarely held that the notice tolling provision . . . "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 . . . . [Alteration in original.]

Accordingly, plaintiff's argument regarding the retroactive nature of *Waltz* fails.

Plaintiff also argues that application of the *Waltz* decision to his case violates his right to due process because it effectively shortened the applicable limitations period. However, as noted recently by this Court in *Farley, supra* at 576 n 27, both the Michigan Supreme Court in *Waltz, supra* at 652 n 14, and this Court in *Ousley, supra* at 496, have rejected plaintiff's argument that

the *Waltz* decision shortened the two-year savings period provided by MCL 600.5852. Therefore, there is no basis for plaintiff's constitutional argument regarding due process.[2]

Next, plaintiff argues that, by including the wrongful death savings statute, MCL 600.5852, in the list of times in which a medical malpractice claim can be filed as set forth in MCL 600.5838a, the Legislature established that the two-year period in the wrongful death savings statute is actually a limitations period in the context of medical malpractice claims. This is essentially an argument that the *Waltz* decision along with the Supreme Court's decision in *Miller v Mercy Mem Hosp*, 466 Mich 196; 644 NW2d 730 (2002), which stated that MCL 600.5852 is a savings statute and not a statute of limitations, were incorrectly decided. The Court of Appeals is without authority to overrule decisions of our Supreme Court. *Ferguson v Gonyaw*, 64 Mich App 685, 694; 236 NW2d 543 (1975). The argument that statutory interpretation mandates that MCL 600.5852 is a statute of limitations and that tolling applies has already been before the Supreme Court in *Waltz* and firmly rejected.

Finally, plaintiff argues that, even in the face of retroactive application of *Waltz*, this Court should allow his claim to survive summary disposition by way of equitable principles such as equitable or judicial tolling. Our Supreme Court essentially applied the principles of equitable tolling in a medical malpractice action in *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004), because of the "understandable confusion" in the case law regarding the difference in ordinary negligence and medical malpractice. Plaintiff argues that the same frustrating confusion noted in *Bryant* is found in the present case because of the confusion regarding the interplay between the tolling statute and the wrongful death savings statute caused by our Supreme Court's decision in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled in part in *Waltz, supra*.[3] While our Supreme Court noted that *Omelenchuk* did not specifically address the interplay between the tolling statute and wrongful death savings statute, it lamented its "imprecise choice of words in *Omelenchuk*" that provided a "source of confusion." *Waltz, supra* at 652-654. Furthermore, this Court in *Ousley, supra* at 494-495, noted that the decision in *Waltz* "actually overruled . . . confusing and imprecise dicta."

In *Mazumder v Univ of Michigan Bd of Regents*, 270 Mich App 42, 59; 715 NW2d 96 (2006), this Court held:

> In this case, plaintiff's "untimely" filing was not due to her miscalculation of the applicable limitations period. Plaintiff relied on the courts' repeated recognition and the general understanding among the bench and bar that tolling

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[2] The *Farley* panel stated that "both *Waltz* and *Ousley* rejected constitutional challenges based on the notion that the *Waltz* decision shortened the two-year wrongful death saving provision[.]" *Farley, supra* at 576 n 27.

[3] The *Waltz* Court overruled *Omelenchuk* to the extent that it "might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision[.]" *Waltz, supra* at 655.

applied under the circumstances of this case. Accordingly, in keeping with established precedent, equitable principles compel affirmance.

> The Supreme Court has generally recognized and applied equitable principles to avoid injustice in circumstances such as these. *Bryant, supra* at 432; *Pohutski* [*v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002)]. Given this precedent, including the recognition in *Waltz, supra* at 655, that *Omelenchuk* "might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision," we find the equitable principles applied by Justice MARKMAN in *Bryant, supra* at 432, a proper basis for reinstating plaintiff's action. In this case, as in *Bryant*, "[p]laintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights." *Id.*

However, in *Ward v Siano*, 270 Mich App 584; 718 NW2d 371 (2006), vacated in part 270 Mich App 801 (2006), the panel disagreed with *Mazumder*, opining that equitable principles could not be utilized to defeat the retroactive effect of *Waltz.* After this Court voted in favor of convening a special conflict panel on the issue, the special panel issued a decision rejecting *Mazumder* and finding in favor of the analysis and decision set forth in the first *Ward* ruling. *Ward v Siano*, __ Mich App __; __ NW2d __ (Docket No. 265599), issued November 14, 2006.[4] Accordingly, plaintiff's equitable or judicial tolling argument must be rejected.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff

[4] Although certain members of this panel have previously expressed views contrary to the holdings in *Mullins* and *Ward*, the issues have been resolved by the conflict panels in those appeals, and we are bound to follow them.