STATE OF MICHIGAN

COURT OF APPEALS

SUZANNE VERBRUGGHE, Personal Representative of the Estate of GEORGE VERBRUGGHE,

Plaintiff-Appellant,

v

SELECT SPECIALTY HOSPITAL-MACOMB COUNTY, INC.,

Defendant-Appellee,

and

MARIUS LAURINAITIS, M.D.,

Defendant.

UNPUBLISHED
December 9, 2010

No. 287888
Macomb Circuit Court
LC No. 2004-002665-NH

Before: GLEICHER, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

This medical malpractice case presents another installment in the litigation firestorm ignited by our Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). *Ward v Siano*, 272 Mich App 715, 721; 730 NW2d 1 (2006) (O'Connell, J., concurring), rev'd 480 Mich 979 (2007). Plaintiff appeals by leave granted a circuit court order denying her motion for relief from judgment. Because we are bound by this Court's recent conflict panel decision in *King v McPherson Hosp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 284436, issued 10/19/2010), we affirm.

In *Waltz*, 469 Mich 642, the Supreme Court held that MCL 600.5856(c)[1] did not operate to toll the wrongful death savings provision set forth in MCL 600.5852.[2] A "flurry" of litigation

[1] According to MCL 600.5856(c):

followed this ruling. *Ward*, 272 Mich App at 729 n 8. On the basis of our Supreme Court's decision in *Waltz*, this Court found appropriate the summary dismissal of more than 100 cases.[3] The plaintiffs in some of these cases filed applications for leave to appeal in the Supreme Court, which issued three separate orders emphasizing that its decision in *Waltz* demanded full retroactive application. *Wyatt v Oakwood Hosp & Med Ctrs*, 472 Mich 929; 697 NW2d 528 (2005), reh den 474 Mich 913 (2005), rev'd in part after remand 480 Mich 1073 (2008); *Evans v Hallal*, 472 Mich 929; 697 NW2d 526 (2005); *Forsyth v Hopper*, 472 Mich 929; 697 NW2d 526 (2005), rev'd after remand 480 Mich 979 (2007). In reliance on these orders plainly manifesting the Supreme Court's unwillingness to reconsider *Waltz*, many of the plaintiffs in dismissed cases elected not to pursue applications for leave to appeal.

On November 28, 2007, the Supreme Court entered the following order in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007):

> On order of the Court, leave to appeal having been granted, 477 Mich 1066; 728 NW2d 871 (2007), and the briefs and oral argument of the parties having been considered by the Court, we hereby REVERSE the July 11, 2006 judgment of the Court of Appeals. MCR 7.302(G)(1). We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), was decided in which the savings 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

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> The statutes of limitations or repose are tolled in any of the following circumstances . . .
>
> At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

[2] In its entirety, MCL 600.5852 reads:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

[3] A Westlaw search reveals that more than 100 cases in this Court have cited the central holding in *Waltz*.

> savings period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided, *Waltz* is not applicable. Accordingly, we REMAND this case to the Washtenaw Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order.

After the issuance of the order in *Mullins*, the plaintiffs in several cases dismissed in light of *Waltz* filed circuit court motions seeking to set aside the judgments against them. These plaintiffs had not filed applications for leave to appeal after losing their cases in this Court. The post-*Mullins* plaintiffs generally contended that the Supreme Court's order in *Mullins* limiting the retroactivity of *Waltz* supplied a justification for relief from judgment under MCR 2.612(C)(1)(f).

In *Kidder v Ptacin*, 284 Mich App 166, 171; 771 NW2d 806 (2009), and *Farley v Carp*, 287 Mich App 1, 7-8; 782 NW2d 508 (2010), this Court rejected that MCR 2.612(C)(1)(f) offered an avenue of relief to those plaintiffs who had not sought leave to appeal a *Waltz*-based ruling of dismissal rendered by this Court. Later, in *King v McPherson Hosp*, 287 Mich App ___; ___ NW2d ___ (Docket No. 284436, issued April 27, 2010) (*King I*), slip op at 9, three judges of this Court concluded that the *Mullins* order "established without equivocation a class of medical malpractice claimants entitled to relief from the retroactive application of *Waltz*." The Court in *King I* further observed, "The Supreme Court in its use of the words, 'any causes of action' did not limit the palliative nature of its [*Mullins*] order to only those cases still pending. And it is incongruous to impose the use of a finality rule or law of the case rule to prohibit the utilization of the discretion provided in MCR 2.612(C)(1)(f), to avoid the mandate of the [*Mullins*] order." *Id*. at 10. Because *Farley*, 287 Mich App 1, operated as binding precedent to the contrary, the Court in *King I* called for a conflict panel vote pursuant to MCR 7.215(J)(3)(a). A majority of this Court's judges agreed to convene a conflict panel.

On October 19, 2010, the conflict panel held that the prior panel's reasoning "cannot be squared with a clear and unequivocal rule" that "new legal principles, even when applied retroactively, do not apply to cases already closed." *King*, ___ Mich App ___ (Docket No. 284436, issued 10/19/2010) (*King II*), slip op at 3 (internal quotation omitted). Accordingly, the conflict panel held that "the partial retroactive application of *Waltz* that was granted in *Mullins* could not apply" to a closed case. *Id*. at 4.

We remain unable to distinguish the facts of the instant case from those presented in *King II*. In plaintiff's brief on appeal, she acknowledges that after this Court affirmed the dismissal of her case in *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 262748), she "failed to file an Application for Leave to Appeal with the Supreme Court." Under these circumstances, *King II* constrains us to affirm the circuit court's decision to deny plaintiff's motion for relief from judgment.

Plaintiff also contends that the denial of her motion for relief from judgment violates the Due Process and Equal Protection Clauses of the federal and Michigan constitutions. In granting leave to appeal, this Court limited its review to those issues raised in the application, and plaintiff

did not raise any constitutional issues in her application for leave to appeal to this Court. MCR 7.205(D)(4). Consequently, we decline to review plaintiff's constitutional claims.

Because plaintiff's appellate claims were not "devoid of arguable legal merit," MCR 2.625(A)(2); MCL 600.2591(3)(a)(*iii*), we deny Select Specialty's request for costs and sanctions.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder