

STATE OF MICHIGAN
COURT OF APPEALS

TIMOTHY JORDAN, Personal Representatives of
the Estate of SANDRA JORDAN, Deceased,

UNPUBLISHED
April 25, 2006

Plaintiffs-Appellants,

v

MERCY MEMORIAL HOSPITAL, DAVID
EUGENE SZYMANSKI, M.D., and SYED
HASSAN, M.D.,

No. 259224
Monroe Circuit Court
LC No. 04-017775-NH

Defendants-Appellees.

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting summary disposition for defendants and dismissing this wrongful death medical malpractice claim. We affirm.

The decedent was injured in an automobile accident on February 2, 2001, and was originally treated at defendant Mercy Memorial Hospital (Mercy). On February 22, 2001, she was transferred to another hospital and died on February 24, 2001. Timothy Jordan was appointed personal representative for the estate on October 12, 2001. Plaintiff's counsel provided defendants a notice of intent to file a claim, MCL 600.2912b, dated October 10, 2003, which included the notation: "Re: Michael Nagle, on behalf of the Estate of Sandra Jordan."¹ Jordan filed this wrongful death medical malpractice lawsuit on April 13, 2004.²

Mercy subsequently filed its motion for summary disposition—joined by defendants Szymanski and Hassan—arguing that the two-year statute of limitations provided in MCL 600.5805 lapsed on February 22, 2003, and that because the notice of intent was filed after the statute of limitations had already lapsed, the statute of limitations could not be tolled under MCL

¹ Nagle was not appointed successor personal representative until September 30, 2004.

² The summons and complaint are date-stamped April 13, 2004 by the lower court but also bear the typed date of April 12, 2004. This discrepancy is inconsequential because plaintiff's claim is time-barred even if the complaint were filed on April 12, 2004.

600.5856(d).³ Defendants also argued that the two-year period provided for in the wrongful death saving provision, MCL 600.5852, lapsed on October 12, 2003. Finally, defendants noted that our Supreme Court held in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004) that the tolling provision of MCL 600.5856(d) does not apply to the wrongful death saving provision. Therefore, defendants argued, plaintiff's claim was time-barred.

On September 30, 2004, before final arguments on defendants' motions, Michael Nagle was appointed successor personal representative. Plaintiff then filed a supplemental response to defendants' motions, arguing that summary disposition was moot because MCL 600.5852 gave Nagle two years from the issuance of his letters of authority to file a wrongful death claim.

The trial court concluded that the claim was time-barred and granted defendants summary disposition. The court reasoned that the statute of limitations had expired by February 22, 2003, and that the wrongful death saving period had expired on October 12, 2003. The trial court opined that the 182-day tolling provision in MCL 600.5856(d) could not extend the wrongful death saving provision of MCL 600.5852. The trial court also concluded that the appointment of a successor personal representative did not create a new two-year period under the wrongful death saving provision. We review de novo the trial court's decision regarding summary disposition. *Waltz, supra* at 647.

Waltz unequivocally held that the notice-tolling provision in MCL 600.5856(d) did not toll the wrongful death saving provision found in MCL 600.5856. *Waltz, supra* at 655. The *Waltz* Court reasoned that the saving provision was not a statute of limitations or repose within the meaning of the § 5856(d) tolling provision. *Id.* at 650-651.⁴ *Ousley v McLaren*, 264 Mich App 486, 495; 691 NW2d 817 (2005), concluded that *Waltz* applies retroactively.⁵ Plaintiffs argue that applying *Waltz* retroactively violates due process, citing *Morrison v Dickinson* 217 Mich App 308, 317-318; 551 NW2d 449 (1996). But *Morrison* is inapplicable because *Waltz*

³ This subsection has been modified and redesignated as MCL 600.5856(c). 2004 PA 87, effective April 22, 2004. We apply the former subsection, which provided: "If, during the applicable notice period under [MCL 600.2912b], a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b." See *Waltz v Wyse*, 469 Mich 642, 646, n 6; 677 NW2d 813 (2004).

⁴ Plaintiffs cite *Lentini v Urbancic*, 262 Mich App 552; 686 NW2d 510 (2004), vacated 472 Mich 885; 695 NW2d 66 (2005), for the proposition that the statute of limitations applicable to a wrongful death action does not begin to run until a personal representative is appointed. Our Supreme Court vacated this Court's decision in *Lentini*, and remanded for reconsideration in light of *Waltz*. *Lentini, supra*, 472 Mich at 885.

⁵ This Court has convened a special panel under MCR 7.215(J) to resolve the conflict whether *Waltz* should be given retroactive effect between *Ousley* and *Mullins v St. Joseph Mercy Hosp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 263210, issued January 31, 2006), vacated in part by order convening special panel, ___ Mich App ___ (February 23, 2006). We must follow *Ousley* until it is reversed or modified by the special panel or by our Supreme Court. MCR 7.215(J)(1); *Horace v City of Pontiac*, 456 Mich 744, 754; 575 NW2d 762 (1998).

neither ““extinguishe[d] the right to bring suit”” nor did it ““take[] away or impair[] vested rights acquired under existing laws.”” *Morrison, supra* at 317, quoting *Dyke v Richard*, 390 Mich 739, 746; 213 NW2d 185 (1973), and *In re Certified Questions*, 416 Mich 558, 572; 331 NW2d 456 (1982), respectively. Therefore, plaintiff’s due process argument is without merit. See *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 576 n 27; 703 NW2d 115 (2005).

Plaintiffs also argue that under *Eggleston v Bio-Medical Applications of Detroit*, 468 Mich 29; 658 NW2d 139 (2003) and MCL 600.5852, the successor personal representative had a fresh two-year period to bring a medical malpractice claim. Assuming plaintiff is correct in his reading of *Eggleston*, see *Verbrugghe v Select Specialty Hospital-Macomb Co, Inc*, ___ Mich App ___; ___ NW2d ___ (2006), his argument remains unavailing.

MCL 600.5852 provides as follows:

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.

“If the statute is unambiguous it must be enforced as written.” *Title Office, Inc v Van Buren Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004). The last sentence of MCL 600.5852 plainly requires that an action brought under its saving provision must be “commence[d] . . . within 3 years after the period of limitations has run.” Here, the applicable two-year period of limitations for an action charging medical malpractice expired on February 22, 2003. MCL 600.5805(6); *Lentini v Urbancic (On Remand)*, 267 Mich App 579, 580; 705 NW2d 701 (2005). Thus, in this case, the outer limit within which a personal representative could file a malpractice action under § 5852 is February 22, 2006. Additionally, § 5852 requires that a personal representative commence the action “within 2 years *after* letters of authority are issued.” The *Eggleston* Court held that “[t]he statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative.” *Eggleston, supra* at 33. So, as interpreted by *Eggleston*, § 5852 would have permitted Nagle, as successor personal representative, to commence a medical malpractice lawsuit after September 30, 2004 and before February 22, 2006. See, e.g., *McMiddleton v Bolling*, 267 Mich App 667, 673; 705 NW2d 720 (2005), opining, “the successor personal representative could have filed a complaint *after* her appointment, not *before* her appointment.”

Nevertheless, Nagle’s appointment as successor personal representative does not change the fact that Timothy Jordan was appointed personal representative of Sandra Jordan’s estate on October 12, 2001, and that he failed to commence this malpractice action before the expiration of both the general two-year statute of limitations and the extended two-year period of § 5852. Thus, the trial court properly dismissed the action Jordan commenced on April 13, 2004 because it was time-barred. *McMiddleton, supra* at 672-674.

Plaintiff also submits *Verbrugghe, supra*, as supplemental authority. Plaintiff's reliance on *Verbrugghe* is misplaced. In that case, this Court upheld a successor personal representative's filing a wrongful death medical malpractice lawsuit within the time constraints of § 5852 even though the original personal representative had untimely filed an identical lawsuit that the trial court properly dismissed. *Id.*, slip op at 1.⁶ The *Verbrugghe* Court held dismissal of the first lawsuit was proper even though, as in this case, the successor personal representative was appointed before the first lawsuit was dismissed. *Id.*, slip op at 2. Furthermore, the successor personal representative in *Verbrugghe* "specifically elected not to ratify the lawsuit brought by the initial personal representative, instead filing a new one."⁷ *Id.*, slip op at 6. Here, Nagle affirmatively argued that this lawsuit was timely and if untimely, saved by his appointment. Thus, Nagle sought to ratify, not reject this lawsuit. But, "applying MCL 600.5852 and the Supreme Court's ruling in *Eggleston*, it is clear that a successor personal representative cannot rely on [an] untimely filed complaint that was filed before [he] was appointed." *McMiddleton, supra* at 673.

Finally, plaintiff submits *Mazumder v University of Michigan Regents*, ___ Mich App ___, ___ NW2d ___ (No. 261331, February 23, 2006), and urges this Court to apply the doctrine of equitable tolling. Plaintiff did not present this argument to the trial court, so, of course the trial court did not address that as an issue. Generally, an issue is not properly preserved for appellate review if it has not been raised before and decided by the trial court. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Further, whether equitable tolling might apply on the facts of this case was not included in the statement of questions presented, which limits this Court's review. MCR 7.212(C)(5); *Persinger v Holst*, 248 Mich App 499, 507 n 2; 639 NW2d 694 (2001). Last, MCR 7.212(F)(1) precludes an appellant from raising new issues on appeal under the guise of submitting "supplemental authority." Consequently, we decline to address this issue.

For the reasons discussed *supra*, the trial court correctly granted defendants' motions for summary disposition.

We affirm.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello

⁶ See *Verbrugghe v Select Specialty Hospital-Macomb Co, Inc*, unpublished opinion per curiam of the Court of Appeals, decided March 23, 2006 (Docket No. 262748).

⁷ Apparently, Nagle filed a second lawsuit, but the viability of such a lawsuit is not before the Court in this case.