

STATE OF MICHIGAN
COURT OF APPEALS

PAUL BURT, Personal Representative of the
Estate of SOPHRONIA BURT, Deceased,

UNPUBLISHED
February 6, 2007

Plaintiff-Appellant,

v

No. 259109
Wayne Circuit Court
LC No. 03-323993-NO

ARNOLD NURSING HOME, a/k/a WEST
SEVEN MILE ROAD, L.L.C., YEVA D.
SOSKINA, M.D., DR. FRED GOLD, and EVA M.
DANIELS,

Defendants,

and

SINAI GRACE HOSPITAL,

Defendant-Appellee.

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals by leave granted, challenging a circuit court order granting defendant Sinai Grace Hospital's motion for summary disposition pursuant to MCR 2.116(C)(7). Because the filing of a notice of intent to sue does not toll the wrongful death saving period in MCL 600.5852, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review de novo the circuit court's summary disposition ruling. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

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

We initially observe that contrary to plaintiff’s contention, successor Judge Callahan possessed the authority to revisit Judge Tertzag’s ruling on Sinai Grace’s motion for summary disposition. “[A]n order entered by a trial court may be modified before entry of the final judgment, and a successor judge . . . is empowered to make a revision to reflect a more correct adjudication of the rights and liabilities of the litigants.” *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997).

The parties dispute whether plaintiff’s provision of notice of his intent to sue defendant, as required by MCL 600.2912b, tolled the applicable period for filing this wrongful death medical malpractice action. In *Waltz, supra* at 648-651, 655, the Michigan Supreme Court held that under the clear and unambiguous language of MCL 600.5856, the filing of a notice of intent to sue during the two-year malpractice period of limitation in MCL 600.5805(6) operates to toll this period, but that the giving of notice does not toll the period in MCL 600.5852, which constitutes a wrongful death *saving period*, “an *exception* to the limitation period” and not a period of limitation itself. After convening a special conflict panel to decide the question, this Court has concluded that the Supreme Court’s decision in *Waltz* “applies retroactively in all cases.” *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006). More recently, this Court convened a special conflict panel in *Ward v Siano*, ___ Mich App ___; ___ NW2d ___ (Docket No. 265599, issued November 14, 2006), which rejected the proposition that “a wrongful death plaintiff may rely upon equitable tolling to escape the retroactive effect of our Supreme Court’s decision in *Waltz v Wyse*.” *Ward, supra*, slip op at 1-3.

The decedent’s claims accrued by August 11, 2000, the date of her death. The two-year period of limitation in MCL 600.5805(6) extended through August 11, 2002. But plaintiff’s appointment as personal representative on February 14, 2001, gave him until February 14, 2003 to commence this action within the wrongful death saving period. MCL 600.5852. Plaintiff gave notice of his intent to sue Sinai Grace on January 16, 2003, but his provision of this notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). *Waltz, supra* at 648-651, 655.¹ Consequently, plaintiff’s filing of this action on July 22, 2003, occurred more than five months after the wrongful death saving period had expired.

¹ This Court has rejected plaintiff’s contention that his giving of notice within the two-year period in MCL 600.5852 tolled this wrongful death saving period because he subsequently and timely filed suit within the three-year time limit also referenced in § 5852. “[T]he three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. Therefore, the fact that the three-year ceiling was not yet reached when [the plaintiff] filed suit is irrelevant.” *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 575; 703 NW2d 115 (2005).

Waltz squarely held that the notice tolling provision (MCL 600.5856(d)) explicitly applies only to the statute of limitations or repose, and therefore does
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Because the holding in *Waltz* applies, *Mullins, supra* at 509, Sinai Grace was entitled to summary disposition pursuant to MCR 2.116(C)(7), irrespective of Judge Callahan's basis for granting the motion. See *FACE Trading, Inc v Dep't of Consumer & Industry Services*, 270 Mich App 653, 678; 717 NW2d 377 (2006) (observing that this Court will not reverse when the trial court reaches a correct result for the wrong reason).²

Affirmed.

/s/ David H. Sawyer

/s/ Pat M. Donofrio

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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 (MCL 600.5852). [*Id.* at 575 (internal quotations omitted).]

² Plaintiff offers no authority or analysis tending to explain how the identical allegations in ¶¶ 28 and 33 of his complaint sound in negligence as opposed to medical malpractice. Therefore, plaintiff has abandoned his claim that the circuit court erred by dismissing the negligence allegations. *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004).