

STATE OF MICHIGAN  
COURT OF APPEALS

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JILL ROMATZ, Personal Representative of the  
Estate of NICHOLAS ROMATZ,

UNPUBLISHED  
December 5, 2006

Plaintiff-Appellee,

v

No. 258771  
Macomb Circuit Court  
LC No. 04-000830-NH

ST. JOHN HEALTH SYSTEMS, INC., d/b/a ST.  
JOHN HOSPITAL & MEDICAL CENTER,  
SHEEKELA MIRZA, M.D., DALTON E.  
BLACK, M.D., EASTSIDE PEDIATRIC CLINIC,  
P.C., and ROMEO PLANK MEDICAL CLINIC,  
P.C.,

Defendants-Appellants.

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Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendants appeal by leave granted from a circuit court order denying their motion for summary disposition on the ground that plaintiff's complaint was time-barred. We reverse the circuit court's decision and lift the stay previously imposed. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). The questions of the applicable statute of limitations, whether the statute was tolled, and when the limitations period ended are questions of law, *Wickings v Arctic Enterprises, Inc.*, 244 Mich App 125, 147; 624 NW2d 197 (2000); questions of law are also reviewed de novo on appeal. *Wills v State Farm Ins Co*, 222 Mich App 110, 114; 564 NW2d 488 (1997).

Plaintiff's cause of action accrued on December 15, 1998, and the two-year statute of limitations for medical malpractice expired on December 15, 2000. MCL 600.5805(1), (6); MCL 600.5838a(1). Plaintiff filed her complaint in February 2004. Because she did not serve defendants with the requisite notice of intent until after the limitations period had expired, the limitations period was not tolled under MCL 600.5856. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 573; 703 NW2d 115 (2005).

Plaintiff was issued letters of authority appointing her personal representative of decedent's estate on January 17, 2003. Under the wrongful death savings provision, MCL 600.5852, she could file suit within two years of her appointment despite the expiration of the limitations period. However, because the suit must be commenced no later than three years after the limitations period expired (or within five years after the cause of action accrued), plaintiff had to file suit by December 15, 2003. The savings period allowed under § 5852 is not tolled by § 5856(d), *Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004), and *Waltz* applies retroactively. *Ousley v McLaren*, 264 Mich App 486, 494-495; 691 NW2d 817 (2004).

Because plaintiff filed her complaint after the expiration of the three-year ceiling, it was not saved by § 5852. *Farley, supra* at 573-574. Further, plaintiff may not generally rely on equitable or judicial tolling to escape the retroactive effect of *Waltz*. *Ward v Siano*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2006) (Docket No. 265599, issued November 14, 2006), slip op pp 1-2. Reliance on the pre-*Waltz* understanding of the law is alone insufficient to justify a litigant's failure to comply with *Waltz's* standards:

Equitable or judicial tolling ordinarily applies to a specific extraordinary situation in which it would be unfair to allow a statute of limitations defense to prevail because of the defendant's bad faith or other particular and unusual inequities. . . . Inequities that justify judicial tolling must arise independently of the plaintiff's failure to diligently pursue the claim in accordance with the statute. [*Id.*, slip op p 2 (citations omitted)].

We reject plaintiff's claim that defendants waived the right to rely on § 5852 by their failure to plead it as an affirmative defense. The statute of limitations is an affirmative defense, and defendants preserved it by including it as a defense in their answer to the complaint. MCR 2.111(F)(2), (3)(a); MCR 2.116(D)(2). Section 5852 is an exception to the limitations period by which a plaintiff may defeat a statute of limitations defense if the action is commenced within the time provided. *Waltz, supra* at 650-651. Because plaintiff did not file her complaint within the time permitted by § 5852, it was barred by the statute of limitations.

We also reject plaintiff's claim that defendants were estopped from asserting the statute of limitations defense on the ground that they failed to give notice of their intent not to settle, see MCL 600.2912b(9), in time to permit plaintiff to file suit by December 15, 2003. Defendants did not have an affirmative duty to advise plaintiff of their intentions regarding settlement, *Burton v Reed City Hosp Corp*, 259 Mich App 74, 81-82 n 5; 673 NW2d 135 (2003), rev'd on other grounds 471 Mich 745 (2005), and thus defendants' "failure to respond to plaintiff's notice does not result in a waiver of a statute of limitations defense before a suit is even filed." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 67; 642 NW2d 663 (2002).

Reversed; stay lifted.

/s/ Janet T. Neff  
/s/ Henry William Saad  
/s/ Richard A. Bandstra