

STATE OF MICHIGAN
COURT OF APPEALS

HELEN KENNEDY,

Plaintiff-Appellant,

v

FRANKWOOD MANAGEMENT CO., INC.,
WARRENWOODS APARTMENTS, INC.,
SATOVSKY FAMILY, L.L.C., SATOVSKY
INVESTMENTS, L.L.C., SATOVSKY
MANAGEMENT COMPANY, LESTER
SATOVSKY, ABRAHAM SATOVSKY, and
NEIL SATOVSKY,

Defendants-Appellees.

UNPUBLISHED

March 22, 2005

No. 251565

Wayne Circuit Court

LC No. 02-222435-NO

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition based on the statute of limitations, MCR 2.116(C)(7). The trial court determined that, although plaintiff filed her complaint within the applicable period of limitation, she failed to serve defendants or otherwise comply with former MCL 600.5856¹ within the applicable three-year period and, therefore, did not toll the statute of limitations as required by *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003). Plaintiff contests the trial court's determination that this case falls within the class of cases for which *Gladych* is retroactively effective. We reverse and remand.

In *Gladych*, the Supreme Court overruled prior precedent and held that the filing of a complaint does not necessarily toll the statute of limitations. Rather, a plaintiff must also comply with MCL 600.5856. Under the version at issue in *Gladych*, the statute of limitations was tolled

¹ The statute was amended effective April 22, 2004, but the amendment applies only to civil actions filed on or after its effective date, and for which the statute of limitations or repose has not expired. 2004 PA 87. The amendment does not apply to plaintiff's action, which was filed in 2002.

only if (1) the complaint is filed and a copy of the summons and complaint are served on the defendant, (2) the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but the tolling extends for no longer than ninety days, (3) jurisdiction over the defendant is otherwise acquired, or (4) “if, during the applicable notice period under MCL 600.2912b, a claim would be barred by the statute of limitations, but only for the number of days equal to that in the applicable notice period after notice is given in compliance with § 2912b.” *Gladych, supra*, p 599. The decision in *Gladych* was given limited retroactive effect, “applying only to cases in which this specific issue has been raised and preserved.” *Id.*, pp 607-608.

Following the decision in *Gladych*, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that plaintiff’s action was not timely because she failed to serve them or otherwise comply with § 5856 within the applicable three-year limitations period. In response, plaintiff conceded that this premises liability action was governed by a three-year statute of limitations, that the alleged injury occurred on July 7, 1999, and that she filed her complaint on June 28, 2002, but did not effect service until August 14, 2002. She did not assert that her action was timely pursuant to *Gladych* and former § 5856. Instead, she argued that *Gladych* was not retroactively applicable to her case. In reply, defendants asserted that they had adequately raised and preserved the *Gladych* issue by their affirmative defenses, filed on October 7, 2002, which stated, in pertinent part:

2. That Plaintiff’s claims are barred by the applicable statute of limitations.

3. That Plaintiff’s claims have not been tolled by the Michigan Tolling Statute.

The trial court agreed with defendants that *Gladych* was applicable to plaintiff’s action and, therefore, granted defendants’ motion.

Plaintiff argues that the trial court erred in determining that defendants’ boilerplate affirmative defenses sufficiently raised and preserved the specific *Gladych* issue. We agree.

In denying rehearing in an unrelated case, the Supreme Court explained the scope of its limited retroactive effect language in *Gladych*:

In order to avoid any potential misunderstanding regarding our limited retroactive holding in *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003), we note that *Gladych* applies retroactively only to cases in which the *specific issue* in *Gladych* was raised or preserved before *Gladych* was released on July 1, 2003. *The specific issue addressed in Gladych was the requirement that tolling of the relevant statute of limitations can only be accomplished by complying with the provisions of MCL 600.5856, which include service of process on the defendant prior to the expiration of the period of limitation.* Only pending cases that preserved *this particular statute of limitations challenge* as of July 1, 2003 are covered by the limited retroactive application of our holding in *Gladych*. In all other cases, *Gladych* has prospective application only to complaints filed on or after September 1, 2003. [*Collins v Comerica Bank*, 469 Mich 1223, 1223-1224; 668 NW2d 357 (2003) (emphasis added).]

Defendants claim that by pleading the tolling statute with adequate specificity, they preserved this affirmative defense, and thereby sufficiently raised and preserved the *Gladych* issue. But whether defendants adequately pleaded the defense is immaterial. The Supreme Court did not make the limited retroactive application of *Gladych* dependent on whether *the defense* was raised and preserved. Rather, the Court held that the “specific issue” must have been raised and preserved. *Gladych, supra*, pp 595, 607. In *Collins, supra*, the Court explicitly identified “the specific issue” that must be raised and preserved as “the requirement that tolling of the relevant statute of limitations can only be accomplished by complying with the provisions of MCL 600.5856, which include service of process on the defendant prior to the expiration of the period of limitation.” Defendants’ affirmative defenses did not raise and preserve this “specific issue.”

Defendants also assert that defense counsel discussed the issue with plaintiff’s counsel on many occasions and that plaintiff’s counsel was aware of the potential issue before *Gladych* was decided. However, counsel’s discussions and plaintiff’s awareness of the potential issue is not the equivalent of having properly raised and preserved the issue and, therefore, is immaterial to the determination whether *Gladych* has retroactive application to this case.

Defendants also argue that plaintiff “waived any challenge” to the “*Gladych* issue” by drafting and signing an agreement with defense counsel. This argument was not raised in the trial court and, therefore, is not properly before this Court. *S Abraham & Sons, Inc v Dep’t of Treasury*, 260 Mich App 1, 22 n 10; 677 NW2d 31 (2003). Although this Court may address an argument first raised on appeal if the issue concerns a question of law and the facts necessary for its resolution have been presented, *id.*, defendants here rely on a document that was not presented to the trial court and, therefore, is not part of the record on appeal. MCR 7.210(A); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Further, defendants’ motion to enlarge the record was previously denied by this Court. Therefore, we decline to consider defendant’s waiver argument.²

For the foregoing reasons, we conclude that the trial court erred in determining that *Gladych* is applicable to this case. The trial court’s order granting defendants’ motion for summary disposition is therefore reversed. In light of our disposition, we need not address plaintiff’s remaining issue on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White

² Despite this Court’s order, defendants have attached a copy of the document to their brief on appeal. We, of course, do not consider it in resolving this appeal.