

STATE OF MICHIGAN  
COURT OF APPEALS

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

Plaintiff-Appellant,

v

SELECT SPECIALTY HOSPITAL-MACOMB  
COUNTY, INC., ARSENIO V. DELEON, M.D.,  
and MARIUS LAURINAITIS, M.D.,

Defendants-Appellees,

and

JAVED ZIA, M.D.,

Defendant.

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UNPUBLISHED  
March 23, 2006

No. 262748  
Macomb Circuit Court  
LC No. 04-002665-NH

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in favor of defendants, based on the expiration of the applicable statute of limitations in this action for medical malpractice. We affirm.

I. Background

In the instant case, the decedent was released from care on October 14, 2001, and the decedent's date of death was on October 18, 2001. On December 26, 2001, Steven Verbrugghe was appointed the original personal representative. On December 2, 2003, Steven filed a notice of intent to file a claim pursuant to MCL 600.2912b. On June 24, 2004, Steven filed a complaint in this matter. Although not filed concurrently, defendants each filed a motion for summary disposition contending, at least in part, that plaintiff's claim was time barred under the applicable statute of limitations. Steven conceded that application of *Waltz* would result in dismissal of the claim, but informed the trial court that a successor personal representative had been "appointed to preserve the action on behalf of the estate." Plaintiff, Suzanne Verbrugghe, was appointed as the successor personal representative on September 27, 2004, while defendants' motions for

summary disposition remained pending. The trial court subsequently granted defendants' motions for summary disposition, concluding that wrongful death saving provision was not tolled under MCL 600.5856(c).

## II. Standard of Review

In this case, the trial court determined that summary disposition was proper, finding that the case was time barred under the applicable statute of limitations. This Court "reviews a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law." *Rinas v Mercer*, 259 Mich App 63, 67; 672 NW2d 542 (2003) (citation omitted). Without demonstration of a disputed issue of material fact, this Court determines de novo, as a question of law, whether a cause of action is precluded by a statute of limitations. *Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002). Additionally, this Court reviews de novo the constitutional question of whether a due process violation occurred. *Brandt v Brandt*, 250 Mich App 68, 72; 645 NW2d 327 (2002).

## III. Analysis

Plaintiff first argues that the trial court erred in applying *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), retroactively and holding that plaintiff untimely filed this action for medical malpractice.

In *Waltz*, our Supreme Court specifically held that MCL 600.5856(c), which explicitly applies only to statutes of limitation or repose, does not operate to toll the additional period permitted under MCL 600.5852 for filing wrongful death actions. *Id.* at 655; see also *McLean v McElhaney*, 269 Mich App 196, 198-199; \_\_\_ NW2d \_\_\_ (2005); *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 575; 703 NW2d 115 (2005). Thus, because plaintiff did not file the complaint in this case within either two years after letters of authority were issued, MCL 600.5852, or within the two-year medical malpractice statute of limitations period, MCL 600.5805(1), (6); MCL 600.5838a(2), the complaint was untimely.<sup>1</sup>

Plaintiff asserts that she relied to her detriment upon the ruling of the Michigan Supreme Court in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled in part, *Waltz, supra* at 642. Specifically, plaintiff contends that our Supreme Court has previously applied the notice tolling provision of MCL 600.5856(c) to MCL 600.5852. However, *Omelenchuk* dealt exclusively with the issue of whether the malpractice notice provision tolled the limitations period for a full 182 days or only 154 days, when a medical malpractice claimant does not receive a response to the notice of intent in accordance with MCL 600.2912b(7), (8). The *Omelenchuk* Court specifically noted that it was not required to evaluate the effect of tolling

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<sup>1</sup> Although the statute of limitations may be tolled under the notice tolling provision, MCL 600.5856(c), this provision is inapplicable in this case because plaintiff did not file a notice of intent before the two-year statute of limitations period expired.

on the wrongful death saving statute. *Id.* Further, in *Waltz*, the Court clarified its prior ruling in *Omelenchuk*, stating, in relevant part:

To the extent that our imprecise choice of words in *Omelenchuk* implied that § 5852 created a separate “limitation period,” we again clarify that § 5852 is not a statute of limitations, but a *saving* statute. [*Waltz, supra* at 654.]

This Court has consistently held that retroactive application of *Waltz* is appropriate. *McMiddleton v Bolling*, 267 Mich App 667; 705 NW2d 720 (2005); *Farley, supra* at 576 n 27; *Ousley v McLaren*, 264 Mich App 486, 496; 691 NW2d 817 (2004). More importantly, our Supreme Court has specifically directed this Court to give the holding in *Waltz* full retroactive application. *Evans v Hallal*, 472 Mich 929; 697 NW2d 526 (2005); *Forsyth v Hopper*, 472 Mich 929; 697 NW2d 526 (2005); *Wyatt v Oakwood Hosp & Medical Ctrs*, 472 Mich 929; 697 NW2d 527 (2005); see also *McLean, supra* at 200 (acknowledging the Supreme Court’s direction to give *Waltz* retroactive effect). As we are bound to follow decisions of the Supreme Court, we must give *Waltz* retroactive application. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

Plaintiff also argues that it is a violation of due process to apply *Waltz* retroactively, in that it would effectively alter the rules in the midst of her lawsuit. However, this Court, along with the Michigan Supreme Court, has consistently rejected constitutional due process challenges that *Waltz* serves to shorten “the two-year wrongful death saving provision.” *Farley, supra* at 576 n 27, citing *Waltz, supra* at 652 n 14, and *Ousley, supra* at 496.

The final issue in this appeal concerns plaintiff’s claim that the trial court erred in failing to recognize the timeliness of the lawsuit filed by the successor personal representative of the estate, in accordance with *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003). We decline to address this issue because it is not properly before us.

First, this case is an appeal from LC No. 04-002665-NH, and addresses the issues related to the complaint filed in this particular case. Second, this issue, although raised below, was not addressed by the trial court when it rendered its decision in this case. The issues related to that second complaint are not presently before this Court in this appeal but it was properly raised in a companion case, where it has received our full attention. *Verbrugge v Select Specialty Hospital*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2006).

Affirmed.

/s/ Christopher M. Murray  
/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly