STATE OF MICHIGAN

COURT OF APPEALS

JOHN VANDELUYSTER, Personal Representative of the Estate of ANGELYN VANDELUYSTER, Deceased,

Plaintiff-Appellant,

v

BARTHOLOMEW D. SAK, M.D. and DONALD M. FIX, M.D.,

Defendants-Appellees,

and

HOLLAND COMMUNITY HOSPITAL,

Defendant.

UNPUBLISHED
November 28, 2006

No. 257046
Ottawa Circuit Court
LC No. 02-042262-NH

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right the grant of summary disposition to defendants under MCR 2.116(C)(7). We must determine whether the savings provision in MCL 600.5852 permits a plaintiff to bring suit where more than 2 years have elapsed since letters of authority were initially issued, but less than 2 years have elapsed since letters of authority were re-issued to the same personal representative. We conclude that, pursuant to *Lindsay v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997), plaintiff is not permitted to bring suit where more than two years have elapsed since letters of authority were first issued to the personal representative, where subsequent constructively similar letters of authority are issued to the same personal representative. We affirm.

I. Facts and Procedure

Decedent died of a myocardial infarction on March 20, 1999. On September 28, 1999, the probate court register, after determining that plaintiff was the independent personal representative of the estate, issued him letters of authority set to expire in fifteen months.[1] On December 28, 2000, the date the letters of authority expired, the probate court "re-issued" letters of authority, with no expiration date.[2] On April 30, 2001, plaintiff filed notice of intent to file a claim under MCL 600.6912b, and, on January 20, 2002, filed a complaint.

Defendants moved for summary disposition arguing that the statute of limitations barred the claim. Plaintiff responded to these motions maintaining that his claim was not time barred under the holding of *Eggleston v Bio-Medical Applications of Detroit, Inc*, *supra*, because new letters of authority were issued to plaintiff on December 28, 2000 and therefore the savings period under MCL 600.5852 did not expire until December 28, 2002. The trial court then granted defendants' motions, concluding that "the renewal of the [l]etters of [a]uthority does not extend the savings period or trigger another two-year period."

II. Statute of Limitations

Plaintiff argues that the statute of limitations does not bar his claim.

A. Standard of Review

This Court reviews de novo under MCR 2.116(C)(7) whether a statute of limitations bars a claim. *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 419; 684 NW2d 864 (2004). "In making a decision under MCR 2.116(C)(7), we consider all documentary evidence submitted

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[1] The SCAO form PC 151 entitled, Independent Probate" on which the probate register issued plaintiff letters of authority instructs the probate register to set an expiration date "15 months from date of issue or less for a reopened estate." The form cites Former MCL 700.357(2), which provided that:

> If an estate in independent probate is not settled within 14 months, an independent personal representative shall file with the court, not later than 30 days after the fourteenth month, a detailed report of the estate's continuing pendency, and reasons for the delay in its closing and distribution. If the court then has good cause to believe that the continuing pendency of the estate is not reasonable under the circumstances, the court shall set a hearing, require notice to all interested persons, and determine if independent probate shall continue for the estate. If evidence at the hearing shows by its preponderance that no good reason exists for the continuing pendency of the estate, the court shall assume supervision of the estate and take any necessary steps to complete the administration.

[2] Between the two times letters of authority issued, our Legislature enacted the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., effective on April 1, 2000. Under EPIC, the probate court issues letters of authority. Compare Former MCL 700.312 with MCL 700.3601(1) and MCL 700.3103.

by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Id*. (Citations omitted).

B. Analysis

MCL 600.5852 states that:

> 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 language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) citing *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). "No further judicial construction is required or permitted. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *Sun Valley Foods Co, supra* citing *Luttrell v Dept't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).

Our Supreme Court addressed the above statute in *Eggleston v Bio-Medical Applications of Detroit, Inc, supra*. In *Eggleston*, the decedent died on June 21, 1996. Decedent's widow was appointed temporary personal representative, and issued letters of authority on April 4, 1997. He died before filing a claim. The son of the decedent and the temporary personal representative was appointed successor personal representative and issued letters of authority on December 8, 1998. He filed a complaint on June 9, 1999, which was more than two years after the first letters of authority had been issued. In addressing MCL 600.5852, the Court stated:

> The statute simply provides that an action may be commenced by the personal representative 'at any time within 2 years after letters of authority are issued although the period of limitations has run.' *Id*. The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The 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, quoting MCL 600.5852.]

Although we agree with plaintiff that *Eggleston*'s literal interpretation of MCL 600.5852 supports its claim, see *Verbrugghe v Select Specialty Hosp-Macomb County, Inc*, 270 Mich App 383, 389-390; 715 NW2d 72 (2006), we nonetheless conclude that *Lindsey v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997), addressed the specific question presented in this case. In *Lindsey*, our Supreme Court addressed "whether the statute of limitations savings provision began to run when the court issued [the] plaintiff letters of authority as temporary personal representative . . . or when the court issued [the] plaintiff letters of authority on personal representative." *Id*. at 61. The Court held that savings provision began to run when the court

issued the plaintiff letters of authority as temporary personal representative, and thus, the plaintiff's claim was time barred. *Id*. Specifically, *Lindsey* stated that "[b]ecause we find no constructive difference in the Revised Probate Code regarding the authority and responsibility of temporary personal representatives and that of personal representatives, we hold that the statute of limitations savings provision ran from . . . when plaintiff was appointed temporary personal representative." *Id.* at 67. Here, there is no constructive difference in regard to letters of authority issued to plaintiff. Rather, the probate court only "re-issued" letters of authority. Thus, *Lindsey* controls the instant case, and plaintiff's complaint is barred.

Retroactivity of *Waltz*

Plaintiff alternatively argues that *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), does not apply retroactively. *Waltz* held that, "[a] notice of intent does not toll the additional period permitted for filing wrongful death actions under the wrongful death saving provision, MCL 600.5852. MCL 600.5856(c)." *Woodard v Custer*, 476 Mich 545, 590; 719 NW2d 842 (2006). At the time of oral argument in this case, *Ousley v McLaren*, 264 Mich App 486, 493-495; 691 NW2d 817 (2004), controlled this issue, holding that *Waltz* did not overrule clear and uncontradicted case law or represent a change in law, and thus *Waltz* applied retroactively. *Id.* Subsequently, this Court issued *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586, 591-593; 711 NW2d 448 (2006), which disagreed with *Ousley* that *Waltz* applies retroactively. Pursuant to MCR 7.215(J)(3), this Court convened a special panel to resolve the conflict between the *Ousley, supra*, and *Mullins*, *Mullins v St. Joseph Mercy Hosp*, 271 Mich App 503; ___ NW2d ____, (2006) (*Mullins II*). The special panel of this Court in *Mullins II*, held that "the Michigan Supreme Court has plainly and unambiguously expressed its intent that the decision in *Waltz* applies retroactively," *Id.*, and reaffirmed the retroactivity conclusion reached in *Ousley*. Accordingly, *Waltz* applies retroactively.

4. Equitable Tolling

Plaintiff also argues that the trial court should have denied defendants' motions for summary disposition on the basis of equitable tolling. After oral argument in this case, this Court released *Mazumder v University of Michigan Regents*, 270 Mich App 42, 715 NW2d 96 (2006), which specifically addressed plaintiff's equitable tolling argument, holding that, "given the widespread recognition within the bench and bar of notice tolling during the saving period before the decision in *Waltz*, and the injustice that results from ignoring that recognition, plaintiff is entitled to equitable relief." *Mazumber, supra* at 48. Subsequently, this Court issued *Ward v Siano*, 270 Mich App 584, 585; 718 NW2d 371 (2006), which disagreed the "*Mazumder* holding that equitable tolling is appropriate in cases affected by the retroactive application of our Supreme Court's ruling in *Waltz*." Pursuant to MCR 7.215(J)(3), this Court convened a special panel to resolve the conflict between the *Mazumber, supra*, and *Ward, supra, Ward v Siano,* ___ Mich App ___; ___ NW2d ___ (2006) (*Ward II*). The special panel of this Court in *Ward II* held

that equitable tolling is not appropriate in cases affected by the retroactive application of our Supreme Court's ruling in *Waltz*. Accordingly, plaintiff is not entitled to equitable tolling.

Affirmed.

/s/ Brian K. Zahra

I concur in result only.

/s/ Janet T. Neff