STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

ROLAND ARTHUR VanCAMP, as Personal Representative of the Estate of FLORENCE MAY VanCAMP, Deceased,

Plaintiff,

v

File No. 03-23158-NM
HON. PHILIP E. RODGERS, JR.

MUNSON MEDICAL CENTERS AND HOSPITALS, a Michigan Corporation; MUNSON MEDICAL CENTER, a Michigan Corporation; BONNIE SCHREIBER, RN; JUDY SEAVER, RN; KATHY DEWAR, RN; ARDITH EISELE, RN; LAURA J. PARDISO, RN; DAVID MAJEWSKI, RN; DEBORAH MAJEWSKI RN; and JUANITA FAE WEBER, LPN; Individually and Severally,

Defendants.
_____/

Linda Turek (P53564)
Attorney for Plaintiff

David R. Johnson (P33822)
Attorney for Defendants

DECISION AND ORDER GRANTING DEFENDANTS' FIRST MOTION FOR SUMMARY DISPOSITION AND DISMISSING THE CASE

This is a medical malpractice/wrongful death action that arises out of the Defendants' alleged negligence in the care and treatment of the Plaintiff's Decedent who passed away on March 30, 2001.

On April 19, 2001, letters of authority were issued to Plaintiff VanCamp appointing him the personal representative of the estate of Florence VanCamp, deceased. On April 16, 2003, notices of intent to bring this malpractice action were mailed to the Defendants. The original Complaint was filed on October 16, 2003.

The Defendants filed a first motion for summary disposition, pursuant to MCR 2.116(C)(7), claiming that this action is barred by the applicable statute of limitations. The Defendants contend that the applicable statute of limitations, MCL § 600.5805(5), began to run on March 30, 2001 and expired on March 30, 2003. They acknowledge that the Plaintiff had two years from the date upon which the letters of authority were issued to file suit, pursuant to MCL § 600.5852, but they argue that the tolling provision of MCL § 600.5852d only applies if notice is given during the period of limitations and not during the savings period. In other words, it is their position that the Plaintiff's case was not timely filed because the Plaintiff gave notice of intent during the savings period when there was no statute of limitations to toll. The Defendants rely upon the Michigan Supreme Court's recent decision in *Waltz v Wyse*, Docket No. 122580 that was released on April 14, 2004.

The Relevant Statutes

MCL § 600.5805(5) states that "[e]xcept as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice." Pursuant to MCL § 600.2912b(1), "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL § 600.5856(d) provides that the statute of limitations is tolled "[i]f, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b." MCL § 600.5852 provides:

> 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.

Analysis

In *Waltz*, *supra*, the Court held that the notice of intent tolling provision, MCL § 600.5856(d), tolls only the applicable statute of limitations or repose, MCL § 600.5805(6) and 5838a, and not the MCL § 600.5852 wrongful death savings statute. Therefore, if a plaintiff does

not file a notice of intent within the two-year period of limitations, there is no limitations period to toll. Notice of Intent does not toll the wrongful death savings provision.

The Plaintiff concedes that this is the current state of the law, but argues that this is a significant change in the law that should be applied prospectively only. The Plaintiff relies on *Omelenchuk v City of Warren*, 461 Mich 567 (2000). In *Omelenchuk*, the Court made reference to § 5852 as creating a "limitation period" and based its calculations on the date the personal representatives were appointed when they should have been based on the accrual date of the cause of action.

However, *Omelenchuk* did not address the specific issue presented here. In *Omelenchuk*, the issue was whether the malpractice notice tolling provision tolled the statutory limitation period for a full 182 days or, instead for only 154 days, when a medical malpractice claimant does not receive the written response to the notice of intent contemplated under MCL § 600.2912b(7). The Court held that it was unnecessary to determine whether the 182-day notice tolling provision applied to the wrongful death saving provision because the plaintiffs filed their complaint well before expiration of the limitation period as extended by the tolling provision MCL § 600.5856(d). The Court expressly overruled *Omelenchuk* to the extent that certain language in *Omelenchuk* might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision.

In general, judicial decisions are applied retroactively. *Lincoln v General Motors Corp*, 461 Mich 483, 491; 607 NW2d 73 (2000); *Michigan Educational Employees Mut Ins Co v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999). Prospective application is limited generally to those decisions overruling clear and uncontradicted case law. *Id.*

Our Supreme Court has acknowledged that when determining whether a decision should not have retroactive application, the threshold question is "whether the decision clearly established a new principle of law." *Pohutski v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002), citing *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 645-646; 433 NW2d 787 (1988). The "first criterion that must be determined in deciding whether a judicial decision should receive full retroactive application is whether that decision is establishing a new principle of law . . . " *MEEMIC v Morris*, 460 Mich 180, 190; 596 NW2d 142 (1999). A judicial decision establishes a new principle of law if it overrules "clear past precedent on which the parties have relied . . ." *Id.*

Interpretation of a statute or court rule even involving a question of first impression does not establish a new principle of law. *Fetz Engineering Co v ECCo Systems, Inc*, 188 Mich App 362; 471 NW2d 85 (1991).

While *Waltz* was a case of first impression, it did not announce a new rule of law or change existing law. Rather, it merely gave an interpretation of a preexisting statute under facts which had not previously been the subject of an appellate court decision. This does not justify applying the decision prospectively only.

Conclusion

For the reasons stated herein, the Defendants' First Motion for Summary Disposition is granted and this case is dismissed with prejudice. This decision and order renders moot the Defendants' Second Motion for Summary Disposition and the First Request for Adjournment.

IT IS SO ORDERED.

This decision and order closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 9/27/04