STATE OF MICHIGAN

COURT OF APPEALS

DONALD MCLEAN and CHRISTINE MCLEAN, Personal Corepresentatives of the Estate of KAREN MCLEAN, Deceased,

Plaintiffs-Appellants,

v

ROBERT B. MCELHANEY, M.D.; MAUREEN, PHENIX, MSW, CSW; SAMUEL W. HARMA; and HIAWATHA BEHAVIORAL HEALTH,

Defendants-Appellees.

FOR PUBLICATION
December 13, 2005
9:00 a.m.

No. 257540
Chippewa Circuit Court
LC No. 03-006994-NH

Official Reported Version

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

O'CONNELL, P.J. (*dissenting*).

In my opinion, *Ousley v McLaren*, 264 Mich App 486, 490; 691 NW2d 817 (2004), was wrongly decided. I would reject it and hold that the limitations established in *Omelenchuk v City of Warren*, 461 Mich 567, 577; 609 NW2d 177 (2000), rather than those of *Waltz v Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004), apply to this case.[1] Accordingly, I would reverse the trial court and provide plaintiffs their day in court.

When plaintiffs filed their complaint, any attorney in Michigan would have assured them that their action was timely, even though the period of limitations had technically run, because their properly delivered notice of intent to sue had temporarily stopped all the legal clocks. That was the law according to our statutes and our Supreme Court's holding in *Omelenchuk*, *supra* at 577. *Omelenchuk* indicated that sending the statutorily mandated notice of intent to sue tolled the two-year period of the wrongful death saving statute, as well as the two-year period of limitations. This ruling made sense because the Legislature requires medical malpractice litigants to delay filing their lawsuits for approximately six months and also clearly intends

[1] Of course, if I were writing a majority opinion, I would be bound by *Ousley* and would be reduced merely to grumbling about it and declaring a conflict with it. As it is, I am free to give it the treatment it deserves.

wrongful death litigants to have a full two years to discover and bring any action on a decedent's behalf. Nevertheless, more than seven months after plaintiffs filed suit, our Supreme Court clarified that Michigan attorneys, including those that decided *Omelenchuk*, were only half right. *Waltz*, *supra* at 653-655.

Waltz held that the 182-day medical malpractice tolling provision tolled the period of limitations, but the clock tracking the wrongful death saving statute kept on ticking. *Id*. Therefore, if medical malpractice is severe enough to kill a patient, and the decedent's representatives are not appointed until six months have passed, the representatives effectively have eighteen months, rather than two years, to send their notice of intent and otherwise pursue their remedy. See *id.* In short, *Waltz* held that *Omelenchuk's* application of the 182-day tolling provision to the wrongful death saving statute was dicta and overruled it. Therefore, plaintiffs' complaint would have been untimely under *Waltz*. Imagine plaintiffs' relief when they realized that *Waltz* would have barred their claim if the Supreme Court had issued it only eight months earlier.

Unfortunately, our Court in *Ousley*, *supra* at 493-495, held that equity did not prevent the retroactive application of *Waltz*, notwithstanding the misperception and misapplication of the time limits by the entire bench and bar; the cryptic, arcane, and unforgiving procedural demands already facing medical malpractice litigants; and the pitiable state of wrongful death claimants who are often grieving, disoriented, and oblivious to their situation's paradoxical urgency. The panel in *Ousley* held that *Waltz* neither overruled clear and uncontradicted case law, nor decided an issue of first impression whose resolution was not clearly foreshadowed. *Id*. at 493. I disagree. "Although the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted when injustice might result from full retroactivity. For example, a holding that overrules settled precedent may properly be limited to prospective application." *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002) (citations omitted).

In this case, injustice clearly results from retroactive application of *Waltz*. Contrary to the assertions in *Ousley*, the time limits provided in *Omelenchuk* represented uncontradicted, black-letter law to litigants. Neither statutory amendment nor further opinions from the Supreme Court had altered or questioned them. In fact, the analysis in *Ousley*, *supra* at 493-494, only points to one pre-*Waltz* opinion, *Miller v Mercy Mem Hosp*, 466 Mich 196; 644 NW2d 730 (2002), to support its contention that the Supreme Court's decision in *Omelenchuk* was too eroded and unreliable to justify reliance on it. While *Miller*, *supra* at 202-203, quietly contradicted one of *Omelenchuk's* reasons for extending the wrongful death time limit, on the opinion's surface it merely restates that MCL 600.5852 is a saving statute. It did not challenge or question *Omelenchuk* and did not even cite it. Moreover, in *Waltz*, *supra* at 653-654, the Supreme Court candidly acknowledged that mistakes in *Omelenchuk* had confused the bench and bar, so *Miller* was hardly a polished lamp redirecting litigants away from *Omelenchuk* and clearly lighting the law's future course. *Waltz* did not even dispute the clarity or precedential value of *Omelenchuk*, but merely denigrated *Omelenchuk's* reasoning and declared its rule to be

dictum. That the Supreme Court and the panel in *Ousley* later found serious flaws in *Omelenchuk's* reasoning does not change the fact that it was the undisputed law at the time,[2] and litigants followed it accordingly. While the Supreme Court is certainly at liberty to regret a legal pronouncement and afterward categorize it as dictum, we should not advise, much less require, litigants to try their hand at predicting which viable Supreme Court opinions will later find the bottom of the dictum dustbin and which are actually law.

On the other side of the same coin, if *Omelenchuk* fails because its standards were pure dicta, then *Waltz* stands as the original pioneer of this issue of first impression, and *Omelenchuk's* clear but errant guidance belies any legitimate claim that the result in *Waltz* was "clearly foreshadowed." The finest legal augur with the keenest sight and all the birds in the autumn sky could not have anticipated *Waltz's* outcome with enough certainty to provide rudimentary counsel to a prospective client. This analysis would also lead to the conclusion that equity forbids retroactive application of *Waltz*.

Undeniably, *Omelenchuk* stood as an unchallenged and clear pronouncement of the controlling timetables until *Waltz* changed them. Plaintiffs responded to the original schedules by timely arriving at the station, buying an outrageously expensive ticket, and boarding the correct train. Fueled by even more money, the litigation engine pulled smoothly out of the station and chugged its way up to speed. Now *Ousley* ceremoniously presents plaintiffs with the Supreme Court's newly revised timetables; paternalistically explains to them how, under the new schedules, they were technically tardy to the station; warmly apologizes for the fallibility and humanness of the legal system; and demands that we unceremoniously throw plaintiffs from the speeding train.[3] I do not see any justice or equity in this course of action. *Ousley* should be disregarded, *Waltz* should only receive prospective application, and I would reverse.

/s/ Peter D. O'Connell

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[2] Timing is everything, after all. In this vein, I note that *Ousley's* lackluster impression of *Omelenchuk* was informed and prompted by *Waltz's* disparaging description of *Omelenchuk's* many defects. But *Waltz's* glance backward through the foggy lenses of remorse and self-doubt obfuscates the reality of what *Omelenchuk* meant to the bench and bar when it was released. Therefore, *Ousley* erroneously focused on the problems *Waltz* discovered through enlightened hindsight rather than on the seemingly fixed state of the law under *Omelenchuk* and the extent to which *Waltz* unexpectedly altered it.

[3] Having metaphorically stated my position, I concur with the majority opinion that the Supreme Court should grant leave in this case and address the issues raised in *Ousley*.