STATE OF MICHIGAN

COURT OF APPEALS

MONIKA MAZUMDER, Personal Representative of the Estate of DEEPIKA S. MAZUMDER, Deceased,

Plaintiff-Appellee/Cross-Appellee,

v

UNIVERSITY OF MICHIGAN BOARD OF REGENTS, ROBERT A. KOEPKE, PH.D., RAJIV TANDON, M.D., SATOSHI MINOSHIMA, M.D., WASHTENAW COUNTY COMMUNITY MENTAL HEALTH, JOSEPH YAROCH, M.D., MOONSON R. ELLIOTT ENINSCHE, B.A., R.S.W., C.S.M., and RICHARD PFOUTZ, M.S.W., C.S.W.,

Defendants,

and

MOHAMED AZIZ, M.D. and STEPHAN F. TAYLOR, M.D.,

Defendants-Appellants,

and

SRINIBAS MAHAPATRA, M.D.,

Defendant-Cross-Appellant.

FOR PUBLICATION
February 23, 2006
9:05 a.m.

No. 261331
Washtenaw Circuit Court
LC No. 04-001101-NM

MONIKA MAZUMDER, Personal Representative of the Estate of DEEPIKA S. MAZUMDER, Deceased,

Plaintiff-Appellee/Cross-Appellee,

v

No. 261333
Washtenaw Circuit Court
LC No. 04-001101-NM

UNIVERSITY OF MICHIGAN BOARD OF REGENTS, MOHAMED AZIZ, M.D., STEPHAN F. TAYLOR, M.D., ROBERT A. KOEPKE, PH.D., RAJIV TANDON, M.D., SATOSHI MINOSHIMA, M.D., and JOSEPH YAROCH, M.D.,

Defendants,

Official Reported Version

and

WASHTENAW COUNTY COMMUNITY MENTAL HEALTH, MOONSON R. ELLIOTT ENINSCHE, B.A., R.S.W., C.S.M., and RICHARD PFOUTZ, M.S.W., C.S.W.,

Defendants-Appellants,

and

SRINIBAS MAHAPATRA, M.D.,

Defendant-Cross-Appellant.

Before: Hoekstra, P.J., and Neff and Owens, JJ.

HOEKSTRA, P.J., (*concurring in part and dissenting in part*).

I agree with the majority that our Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), "retroactively foreclosed any statutory basis for tolling the two-year filing period in the saving statute, MCL 600.5852." *Ante* at ___. I respectfully dissent, however, from the majority's conclusion that the doctrine of equitable tolling may be applied here to uphold the trial court's denial of summary disposition in favor of defendants.

As noted by the majority, this case stems from the June 3, 2000, death of plaintiff's decedent, who committed suicide allegedly as a result of malpractice by defendants. Regarding the application of the principles of equity, plaintiff's sole argument on appeal is that summary disposition of the wrongful death medical malpractice suit subsequently brought by her as personal representative of the decedent's estate was properly denied because, "[a]t the time [her] cause of action arose . . ., *Omelenchuk* [*v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000)] was the controlling law in this state." Plaintiff asserts that she reasonably relied on *Omelenchuk*

in concluding that the tolling provision of MCL 600.5856(d)[1] applied to the two-year period for commencing a wrongful death action as personal representative of a decedent's estate set forth in MCL 600.5852. Thus, plaintiff requests that this Court invoke its equitable powers to alleviate the effects of retroactively applying the Supreme Court's subsequent decision in *Waltz* to the case at bar. As explained below, however, legal considerations and a diligent reading of the relevant precedents preclude this Court from applying principles of equity to judicially toll the period of limitations and, thereby, spare plaintiff from the admittedly harsh result of summary dismissal of her claim on the basis that *Omelenchuk* was controlling precedent.

Well before the decedent's death, our Supreme Court, in *Lindsey v Harper Hosp*, 455 Mich 56, 58-59; 564 NW2d 861 (1997), addressed whether the two-year period set forth in MCL 600.5852 began to run when the plaintiff was issued letters of authority as "temporary" personal representative, or when the plaintiff was later appointed as the permanent personal representative of the decedent's estate. In concluding that the period began to run at the issuance of the letters appointing the plaintiff temporary personal representative, and that, as a result, the plaintiff's claim for medical malpractice was time-barred, the Court made repeated references to MCL 600.5852 as a "saving provision" that, "as an exception to a statute of limitation, must be narrowly construed." *Id*. at 64-67, 69. Noting the generally arbitrary manner in which "all statutes of limitation set . . . time limits for legal claims," however, the Court declined to limit the retroactive effect of its holding despite the fact that the "plaintiff's claim may seem unfairly barred by [its] holding . . . ." *Id*. at 69.

Several years later, and only shortly before the death of plaintiff's decedent, our Supreme Court released its decision in *Omelenchuk*, *supra* at 571-577, in which it addressed whether the notice tolling provision of MCL 600.5856(d) tolled the period of limitations for a medical practice claim for a full 182 days, or only 154 days, when a medical malpractice claimant does not receive a written response to the notice of intent required by MCL 600.2912b. Declining to rewrite MCL 600.2912b, the Court held that while the statute allows the 182-day "no suit" waiting period to be "reduced to [154] days if the [defendant] fails to respond to the notice," the two-year limitations period applicable to a claim for medical malpractice nonetheless remains tolled in such circumstances for the full 182 days. *Id*. at 573, 575. In applying its holding, however, the Court calculated the "*limitation* period" at issue as beginning on the date of the appointment of the decedent's personal representative, rather than the date of the accrual of the claim. *Id*. at 577 (emphasis added). After then applying the notice tolling provision of MCL 600.5856(d) to this period, the Court reversed this Court's conclusion that the plaintiff's claim was time-barred. *Id*. at 577-578.

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[1] As recognized by the majority, MCL 600.5856 was amended by 2004 PA 87, effective April 22, 2004. As part of this amendment, MCL 600.5856(d) was reworded in a manner that does not change the substantive meaning of the provision, and reassigned as MCL 600.5856(c). Because many of the precedents discussed in this opinion and the events relevant to the timeliness of plaintiff's complaint occurred before the effective date of 2004 PA 87, I will refer to the arrangement of MCL 600.5856 before its amendment.

Approximately two years after the Court's decision in *Omelenchuk*, plaintiff was issued, on May 2, 2002, letters of authority appointing her personal representative of the decedent's estate. Although acknowledging that MCL 600.5852 expressly afforded her a period of two years from that date in which to file her claim, plaintiff asserts that the Supreme Court's holding in *Omelenchuk* provided her a reasonable basis to presume that this period could be extended by the notice tolling provision of MCL 600.5856(d). However, during the month following plaintiff's appointment as personal representative, the Supreme Court issued its opinion in *Miller v Mercy Mem Hosp*, 466 Mich 196; 644 NW2d 730 (2002). Unlike *Omelenchuk*, in which MCL 600.5852 was only tangentially implicated, in *Miller* the Court was asked to expressly address the provisions of MCL 600.5852. Specifically, the Court was asked to decide whether the six-month discovery rule of MCL 600.5838a(2) constituted a "period of limitations" within the meaning of MCL 600.5852. *Miller*, *supra* at 197. In concluding that it does, the Court strictly construed the plain language of MCL 600.5852, citing both *Lindsey* and the fact that "[s]ection 5852 is a saving statute, not a statute of limitations." *Miller*, *supra* at 202-203.

Two years after *Miller* was decided, and just weeks before plaintiff served defendants with notice of her intent to file a medical malpractice claim on April 27, 2004, the Court released its decision in *Waltz*, *supra* at 644, 650, in which it expressly addressed the question at issue here, i.e., whether MCL 600.5856(d) tolls the two-year period for commencing a wrongful death action provided for under MCL 600.5852. Noting that it "'need look no further than the language of the tolling statute to resolve this issue,'" the Court in *Waltz* held that the notice of intent tolling provision of MCL 600.5856(d) does not toll the two-year period for commencing an action as personal representative of a decedent's estate provided for by MCL 600.5852, but, "by its express terms, tolls only the applicable 'statute of limitations or repose.'" *Id*. at 649-650, quoting *Waltz v Wyse*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2002 (Docket No. 231324), slip op at 2, and MCL 600.5856(d). As support for its conclusion in this regard, the Court recalled its earlier pronouncements in both *Miller* and *Lindsey* that MCL 600.5852 is not itself a statute of limitations, but rather a "'statute of limitations *saving provision*' and an '*exception* to the statute of limitations' . . . ." *Id*. at 650, quoting *Lindsey*, *supra* at 61, 65. With respect to its characterization of MCL 600.5852 as creating a "limitation period" in *Omelenchuk*, the Court acknowledged that its "imprecise choice of words" in resolving the question before it in that case had resulted in some confusion. *Waltz*, *supra* at 653-654. The Court noted, however, that its "passing references to § 5852 as creating a 'limitation period,'" as well as its mistaken calculations of time in applying its holding were unnecessary to resolution of the issue in *Omelenchuk*. *Id*. at 653-655.

Relying on *Waltz*, defendants sought summary disposition of the medical malpractice claims alleged by plaintiff in the wrongful death action filed by her October 21, 2004. At about that same time, a panel of this Court approved for publication its decision in *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), in which it addressed whether the Supreme Court's decision in *Waltz* met the requirements for exception from the general rule that judicial decisions are to be given complete retroactive effect. In answering this question, the panel noted that for the exception to apply, the decision must either overrule clear and uncontradicted case law or decide an issue of first impression that was not clearly foreshadowed. *Id*. at 493. Noting further that the question whether the notice tolling provision of MCL 600.5856(d) applied to the wrongful death saving provision of MCL 600.5852 was not before the Court in *Omelenchuk*, the panel found that the only law *Waltz* might arguably have overruled was the admittedly confusing

and imprecise dicta used by the Court in applying its holding in *Omelenchuk*. *Id*. at 493-495. The panel further concluded that "to the extent that *Waltz* decided an issue of first impression in deciding that § 5856(d) does not toll § 5852, that resolution was 'clearly foreshadowed,' if not actually determined, by the [Supreme Court's] previous decision holding that § 5852 is a saving provision, not a statute of limitations or repose." *Id*. at 495, citing *Waltz, supra* at 653-654. Thus, the panel concluded that *Waltz* meets neither of the two exceptions to the general rule requiring retroactive application of judicial decisions and that its holding, therefore, applies retroactively. *Ousley, supra* at 495.

The trial court here found both *Waltz* and *Ousley* to be distinguishable on the grounds that the plaintiffs in those cases failed to file an action within the five-year outside limit set by MCL 600.5852. To the extent the majority concludes that the trial court erred in denying defendants' motions on these grounds, and that application of *Waltz* and its progeny renders plaintiff's complaint untimely, I concur. See *ante* at ___, ___. I do not agree, however, that the doctrine of equitable tolling is available to remedy the dismissal required by these conclusions.

The doctrine of equitable, or judicial, tolling may be applied to toll the running of a period of limitations in the interests of justice. See 51 Am Jur 2d, Limitation of Actions, § 174, p 563-564. Proper application of the doctrine, however, is limited to those instances in which a plaintiff has exercised reasonable diligence in pursuing a claim, but "is prevented in some extraordinary way from asserting his or her rights." *Id*. at 564. Here, plaintiff maintains that she reasonably relied on *Omelenchuk* to conclude that the notice tolling provisions of MCL 600.5856(d) apply to the period for commencing a wrongful death action under MCL 600.5852. However, as recognized by the courts in both *Waltz* and *Ousley*, any such implication by the Court in *Omelenchuk* was expressed in dicta that clearly contradicted the clear and unambiguous language employed in MCL 600.5856(d) and MCL 600.5852, as well as the characterization of MCL 600.5852 as a statute of limitations "saving provision" and an "exception" to the statute of limitations in *Lindsey*, which was decided before *Omelenchuk*, and in *Miller*, which was decided after *Omelenchuk*. *Waltz, supra* at 650; *Ousley, supra* at 492, 494-495. Under such circumstances, it cannot be said that plaintiff exercised reasonable diligence in the timely pursuit of her claim, in choosing to rely on *Omelenchuk* to afford the relevant statutes a broad interpretation not supported by the plain language of the statute, such that the interests of justice require application of the doctrine of equitable tolling. Indeed, as recognized by the Court in *Waltz, supra* at 650-651, and again by this Court in *Ousley, supra* at 495, a diligent and reasonable reading of the relevant precedents and statutory language plainly advises that a medical malpractice plaintiff's filing of a notice of intent to sue does not toll the wrongful death saving provision. Consequently, I do not believe that application of the doctrine of equitable tolling is warranted in this case.

Further, I disagree with the majority's conclusion that "equitable principles compel [our] affirmance" in this matter because "[p]laintiff relied on the courts' repeated recognition and the general understanding among the bench and bar that tolling applied under the circumstances of this case." *Ante* at ___. Setting aside the fact that plaintiff herself makes no such claim, but simply argues that *Omelenchuk* was controlling precedent, I nonetheless would conclude that even if this case were as the majority alleges, equitable tolling is not a remedy to which the plaintiff here, or those in other similarly situated cases, can look for relief.

In *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432-433; 684 NW2d 864 (2004), our Supreme Court applied the principles underlying the doctrine of equitable tolling to permit the plaintiff to proceed with medical malpractice claims filed by her as claims of ordinary negligence outside the period established by MCL 600.5805(6) and MCL 600.5852. Although observing that, "under ordinary circumstances," the plaintiff's claims for medical malpractice would be time-barred, the Court found that the "equities" of that case compelled a different result. *Bryant, supra* at 432. In doing so, the Court noted that "[t]he distinction between actions sounding in medical malpractice and those sounding in ordinary negligence [had] troubled the bench and bar," and thus found that the "[p]laintiff's failure to comply with the applicable statute of limitations [was] the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights." *Id*. The Court, therefore, applied its equitable power to permit the plaintiff's medical malpractice claims to proceed to trial along with her claim of ordinary negligence. *Id*.

The Court, however, recently clarified the limits of this equitable power in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590 n 5; 702 NW2d 539 (2005), in which, declining to apply these same principles to toll the one-year-back rule of MCL 500.3145(1), the Court explained that "a categorical redrafting of a statute in the name of equity violates fundamental principles of equitable relief and is a gross departure from the proper exercise of the 'judicial power,'" and, in doing so, distinguished its application of equity in *Bryant*:

> [I]n *Bryant*, there was no controlling statute negating the application of equity. Instead the disputed issue in *Bryant*—whether a claim sounds in medical malpractice or ordinary negligence—was controlled by this Court's case law. On the other hand, in the present case, there is a statute that controls the recovery of PIP benefits: § 3145(1). Section 3145(1) specifically states that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced," and this Court lacks the authority to say otherwise.

As in *Devillers*, an application of the doctrine of equitable tolling here would result in the "categorical redrafting" of the plain and unambiguous language employed in both MCL 600.5856(d) and MCL 600.5852. Therefore, such relief is beyond the authority of this Court.

Additionally, I note that although developed to alleviate an unjustly harsh result arising from the strict application of a statute of limitations, equitable tolling is a fact-based remedy driven by the unique circumstances of an individual case. See *Keenan v Bagley*, 400 F3d 417, 421 (CA 6, 2005) (the applicability of equitable tolling must be decided on a case-by-case basis). In contrast, where, as here, the alleged inequity or injustice arises from the judicial pronouncement of a rule of law, and thus applies broadly across a class of cases, the proper remedy lies in the determination whether the rule announced is to operate retroactively or only prospectively. See, e.g., *James B Beam Distilling Co v Georgia*, 501 US 529, 543; 111 S Ct 2439; 115 L Ed 2d 481 (1991) (opinion of Souter, J.) ("Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application."). With respect to such a determination, our Supreme Court did not, as it did in *Lindsey, supra* at 68-69, address the effect of its holding in *Waltz* on those cases pending at the time of its decision. It is evident from its precedent, however, that in those circumstances where the Court believes

that "injustice might result from full retroactivity," it has seen fit to limit retroactive application of its holdings. *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002); see also *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003). Rather than do so here, our Supreme Court has denied leave to appeal this Court's decision in *Ousley*, see 472 Mich 927 (2005), and has directed that this Court give its holding in *Waltz* "full retroactive application" in at least three other cases, *Wyatt v Oakwood Hosp & Medical Centers*, 472 Mich 929 (2005); *Evans v Hallal*, 472 Mich 929 (2005), and *Forsyth v Hopper*, 472 Mich 929 (2005). The Court's view on the matter thus seems clear, despite its failure to directly address the question of the retroactive application of *Waltz*. Although adherence to this view commands a harsh result for this plaintiff, and potentially a great number of other plaintiffs, we cannot ignore the Court's directives and, in any event, are bound to follow the holding in *Ousley*, MCR 7.215(J)(1), and apply *Waltz* retroactively to the case at bar.[2]

For all these reasons, and because to apply the doctrine of equitable tolling here is to afford *Waltz* only prospective application, I respectfully dissent from the majority's conclusion that the doctrine may validly be applied to uphold the trial court's denial of summary disposition in favor of defendants.

/s/ Joel P. Hoekstra

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[2] Despite my disagreement with the majority concerning the application of equitable tolling, I fully agree that the issues arising from *Waltz* "have consumed inordinate time and effort on the part of the bench and bar at various levels." *Ante* at ___. In this Court, the recent decision of *Mullins v St Joseph Mercy Hosp*, 269 Mich App ___; ___ NW2d ___ (2006), has invoked the conflict procedure, MCR 7.215(J)(2), regarding the holding in *Ousley*. See 269 Mich App 801 (2006). With its opinion today, the majority applies equitable tolling essentially as a substitute for prospective application, a decision that in my judgment may well result in another panel declaring a conflict. All the while that these issues swirl through this Court, litigants are faced with prolonged uncertainty regarding the viability of their claims. It seems to me that under these circumstances, it is incumbent on the Supreme Court to take up these issues and resolve them definitively. In this regard, I fully concur with the majority's reasoning in *McLean v McElhaney*, 269 Mich App 196, ___; ___ NW2d ___ (2005).