STATE OF MICHIGAN

COURT OF APPEALS

THELMA JOHNSON, Personal Representative of the Estate of CARL JOHNSON, Deceased,

Plaintiff-Appellant,

v

HURLEY MEDICAL GROUP, P.C., d/b/a HURLEY MEDICAL CENTER, and DR. MOONGILMADUGU INBA-VAZHVU,

Defendants-Appellees.

FOR PUBLICATION
April 13, 2006
9:05 a.m.

No. 262143
Genesee Circuit Court
LC No. 00-069254-NH

Official Reported Version

Before: Fort Hood, P.J., and White and O'Connell, JJ.

O'CONNELL, J. (*concurring in result only*).

I agree with the majority's result, but I cannot adopt its reasoning. Rather than apply the doctrine of judicial estoppel to reach the right result, I would, if writing on a clean slate, apply the rule set forth in *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002), and I urge the Michigan Supreme Court to do the same. In *Pohutski*, the Court held that the general rule is that judicial decisions are given full retroactive effect, however, "a more flexible approach is warranted where injustice might result from full retroactivity." *Id*. at 696.

As explained in my dissent in *McLean v McElhaney*, 269 Mich App 196, 204-208; ___ NW2d ___ (2005), and my majority opinion in *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586; ___ NW2d ___ (2006), I am of the opinion that injustice results from the retroactive application of *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Therefore, I urge our Supreme Court to apply the flexible approach it crafted in *Pohutski* to the rule it established in *Waltz*.

By means of illustration, in *Hardy v Maxheimer*, 429 Mich 422, 449; 416 NW2d 299 (1987),[1] Chief Justice Riley, writing in dissent, applied a textualist's approach to the wrongful death statute and concluded that "a cause of action under the wrongful death statute accrues at

[1] The *Hardy* decision is evidence that the confusion on the part of the bench and bar concerning the application of the saving provision is not of recent origin.

death." She explained that "a wrongful death action does not survive death, but arises because of it." *Id*. In accordance with this reasoning, she rejected the majority's conclusion that the saving provision, MCL 600.5852, applied to wrongful death actions. She disagreed with the majority, which she said held that the Legislature intended for MCL 600.5852 to "extend the statute of limitations in every wrongful death action. . . ." *Id.* at 441.

The majority, however, expressly rejected Justice Riley's interpretation of MCL 600.5852. It responded that the dissent, by refusing to apply the time extensions provided in MCL 600.5852 to the newly unified wrongful death action, "makes a nullity of the only statute specifically placing a *limitation* on actions for wrongful death." *Hardy*, *supra* at 439 n 16 (emphasis added). The Court added, "We are not willing to disregard the precedent of our own Court and the precise wording of § 2921 providing that all actions are survival actions in order to provide a more uniform statute of limitations. That is the Legislature's work." *Id*. at 439-440 n 16. It concluded that the wrongful death suit was timely, "because the personal representatives brought the action within two years of their appointment and within three years after the *initial period of limitation* had run." *Id*. at 441 (emphasis added). From this language it is clear that both sides of the issue in *Hardy* strictly interpreted the statute and agreed that if it applied to wrongful death actions at all, it extended the period of limitations on the underlying conduct and, essentially, operated as a new statute of limitations for wrongful death actions.

Therefore, it could be argued that MCL 600.5852 doubles as both a saving provision for the medical malpractice action and, ultimately, as a statute of limitations or repose for the wrongful death action. Cf. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 46; 709 NW2d 589 (2006) (holding that MCL 600.5839 is both a statute of limitations and a statute of repose). Although this argument appears to undermine the premise in *Waltz*, it actually complements *Waltz* by raising a legal issue that had previously gone unnoticed, an issue that fits squarely within the parameters of the rule *Waltz* recognized.

Adding to the current legal confusion, however, is the fact that in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), the Supreme Court applied the tolling provision to the saving provision in precise terms that indicated that the two statutes did operate together. *Omelenchuk's* presentation of MCL 600.5805(6)[2] and 600.5852 in tandem as alternative periods of limitations, and especially its explicit use of a date stemming from the latter in applying the tolling provision of MCL 600.5856(d), in my opinion, can only be interpreted as indicating that the tolling statute applies to the saving provision. Before *Waltz* was decided, a malpractice attorney seeking guidance on the operation of MCL 600.5852 and 600.5856(d) could hardly do other than consult *Omelenchuk* and conclude from it that the latter applied to the former.

In my opinion, the level of confusion and imprecise language surrounding this issue justifies the application of the flexible approach adopted in *Pohutski*.

/s/ Peter D. O'Connell

---

[2] *Omelenchuk* refers to this provision as subsection 4, reflecting the designation in effect at the time for claims covering malpractice. *Omelenchuk, supra* at 569 n 3.