STATE OF MICHIGAN

COURT OF APPEALS

MARY MULLINS, Personal Representative of the Estate of NINA F. MULLINS, Deceased,

Plaintiff-Appellee,

v

ST. JOSEPH MERCY HOSPITAL, d/b/a ST. JOSEPH MERCY HEALTH SYSTEM, JASON WHITE, M.D., RAFAEL J. GROSSMAN, M.D., and KIMBERLY STEWART, M.D.,

Defendants-Appellants,

and

JAMES R. BENGSTON and WALTER WHITEHOUSE, M.D.,

Defendants.

FOR PUBLICATION
July 11, 2006
9:10 a.m.

No. 263210
Washtenaw Circuit Court
LC No. 03-000812-NH

Official Reported Version

Before: Hoekstra, P.J., and Murphy, White, Talbot, Meter, Cooper, and Donofrio, JJ.

TALBOT, J.

This Court convened this special panel pursuant to MCR 7.215(J)(3) to resolve the conflict between vacated part III of the prior opinion in this case, *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586, 591-593; 711 NW2d 448 (2006), and *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004). Part III of the prior opinion disagreed with this Court's holding in *Ousley*, *supra* at 493-495, that the Supreme Court's holding in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), applies with full retroactivity. In light of the fact that the Michigan Supreme Court has plainly and unambiguously expressed its intent that the decision in *Waltz* applies retroactively, we reject the analysis in part III of the prior opinion in *Mullins*, and reaffirm the retroactivity conclusion reached in *Ousley*.

This conflict presents a narrow question concerning the state of the law governing the retroactivity of *Waltz* at the time this Court issued its prior opinion in *Mullins*. In *Ousley*, *supra* at 493-495, this Court first addressed the *Waltz* retroactivity question in a binding published opinion, MCR 7.215(J)(1), holding that *Waltz* applied with full retroactivity. The Michigan Supreme Court denied the plaintiff's application for leave to appeal. *Ousley v McLaren*, 472

Mich 927 (2005). The Supreme Court's order denying leave does not constitute binding precedent, MCR 7.321, but the timing of the order is a relevant background fact.[1]

On June 17, 2005, one day after the Michigan Supreme Court denied the plaintiff's application for leave to appeal in *Ousley*, the Supreme Court very clearly expressed its view regarding the extent to which courts should retroactively apply its holding in *Waltz, supra* at 648-655. In three consecutive orders, the Michigan Supreme Court offered the following, specific guidance:

> In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration, as on leave granted, of the question whether the statute of limitations bars an action from proceeding where the complaint was filed more than two years *after* the original letters of authority and *before* the subsequent letters of authority were issued. *That Court is to give the holding of* Waltz v Wyse, *469 Mich 642 (2004), full retroactive application.* [*Wyatt v Oakwood Hosp & Med Ctrs*, 472 Mich 929 (2005) (citation omitted; third emphasis added).]

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We find that the repeated and plain expressions of the Michigan Supreme Court in *Wyatt*, *Evans*, and *Forsyth*, which the majority in *Mullins* entirely failed to address, are dispositive of the *Waltz* retroactivity issue in this Court. Irrespective of the prior *Mullins* opinion's proffered disagreement with the analysis in *Ousley*, the panel in *Mullins* erred by disregarding these Supreme Court directives.

In recent supplemental briefing, plaintiff suggests that the orders in *Wyatt*, *Evans*, and *Forsyth* lack any precedential effect because they do not sufficiently explicate the Michigan Supreme Court's reasoning behind its directives to apply *Waltz* with full retroactivity. The requirement that a decision of our Supreme Court "shall contain a concise statement of the facts

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[1] In several subsequent published opinions, this Court adhered to the *Ousley* retroactivity analysis. See, e.g., *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 574; 703 NW2d 115 (2005); *McMiddleton v Bolling*, 267 Mich App 667, 671; 705 NW2d 720 (2005).

and reasons for each decision" derives from the Michigan Constitution. Const 1963, art 6, § 6. The Michigan Supreme Court has recognized that its summary disposition orders constitute binding precedent when they "contain[] a concise statement of the applicable facts and the reason for the decision." *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993). Similarly, this Court consistently has adhered to the principle that the Michigan Supreme Court's summary disposition orders constitute binding precedent when they finally dispose of an application and are capable of being understood, even by reference to other published decisions. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002); *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 591 n 8; 546 NW2d 690 (1996), remanded on other grounds 455 Mich 863 (1997).

Our treatment of the Supreme Court's orders in *Wyatt*, *Evans*, and *Forsyth* as binding precedent does not undermine Const 1963, art 6, § 6. First, the Supreme Court's orders in *Wyatt* and *Evans* each contain a concise statement of the operative facts where they state that "the complaint was filed more than two years after the original letters of authority and before the subsequent letters of authority were issued." (Emphasis omitted). Second, each of the three orders contains "reasons for each decision" through explicit reference to the Supreme Court's published decision in *Waltz*. Additionally, although the June 17, 2005, orders in *Wyatt*, *Evans*, and *Forsyth* do not specifically cite this Court's decision in *Ousley*, or other cases discussing principles of retroactivity, our Supreme Court was certainly cognizant of this Court's retroactivity analysis in *Ousley*, *supra* at 493-495, when it similarly concluded in *Wyatt*, *Evans*, and *Forsyth* that the decision in *Waltz* applies retroactively. We cannot forget or ignore that only the day before entry of the three June 17, 2005, orders, the Supreme Court had denied the *Ousley* plaintiff's application for leave to appeal, declining the opportunity to disturb this Court's conclusion that *Waltz* must apply with full retroactivity. When the Supreme Court entered the orders directing full retroactive application of *Waltz*, it essentially sanctioned the retroactivity conclusion reached by this Court in *Ousley*. Thus, considering the Supreme Court orders in *Wyatt*, *Evans*, and *Forsyth* in the context in which the Supreme Court entered them, the orders easily can be understood to contain "the facts and reasons for each decision" by reference to the full, published decisions in *Waltz* and *Ousley*, in satisfaction of the constitutional mandate. *Wechsler*, *supra* at 591 n 8, citing *Crall*, *supra* at 464 n 8.

In summary, the Supreme Court held in *Waltz*, *supra* at 648-655, that pursuant to then-applicable MCL 600.5856(d), now MCL 600.5856(c), a medical malpractice litigant's filing of a notice of intent does not toll the wrongful death saving period in MCL 600.5852, and this Court in *Ousley*, *supra* at 493-495, held that *Waltz* applies retroactively. When read together and in reference to *Waltz* and *Ousley*, we view the Supreme Court's orders in *Wyatt*, *Evans*, and *Forsyth* as complete and understandable. We, therefore, reject plaintiff's contention that the Supreme Court's one-sentence retroactivity statement in a single order, viewed alone and without context, lacks sufficient specificity to control the retroactivity question. We reiterate that the Supreme Court entered three separate orders in three distinct cases involving the issue of *Waltz's* retroactivity. Each of these cases plainly and unambiguously directed this Court to apply *Waltz* retroactively. We cannot reasonably characterize the Supreme Court's three consecutive June 17, 2005, orders, which identically directed the proper retroactive application of *Waltz*, as limited to the facts of their respective cases. The Supreme Court could not have more clearly expressed its conclusion that *Waltz* applies retroactively in all cases.

To the extent that we ideally might wish to have access to more fully developed guidance from the Supreme Court concerning the retroactivity of *Waltz*, the Supreme Court plainly found that the *Waltz* retroactivity question required no further analysis by it, and we simply cannot disregard the clear import of the guidance that the Supreme Court chose to offer in *Wyatt*, *Evans*, and *Forsyth*, specifically, that *Waltz* applies retroactively in all cases. A review of the Michigan Reports volumes reveals that the Supreme Court occasionally directs the retroactive reach of its prior decisions by orders of summary disposition.[2] In *Wyatt*, *Evans*, and *Forsyth*, the Supreme Court has repeatedly spoken through its orders instructing this Court to apply *Waltz* with full retroactivity, and, as an intermediate court, we are bound by the Supreme Court's clear directives. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993) (noting that this Court and all lower courts must adhere to Supreme Court authority); *People v Kennedy*, 384 Mich 339, 343; 183 NW2d 297 (1971) (observing that "it is axiomatic that a court [including an appellate court] speaks through its orders"). Because part III of the prior opinion in *Mullins* disregarded the binding Supreme Court precedent regarding the retroactive application of *Waltz*, we disavow the *Mullins* analysis. We need not consider the merits of *Mullins's* reliance on *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), rev'd in part in *Waltz*, *supra* at 652-655, or its criticism of the retroactivity analysis in *Ousley*, *supra* at 493-495.

We note that plaintiff and the amicus curiae argue at length that the retroactive application of *Waltz* inequitably deprives some personal representative litigants of otherwise valid medical malpractice claims. To the extent that we may empathize with this contention, we nonetheless may not properly consider the potential application of equitable principles because a separate conflict panel will be convened to consider whether equity may prevent the retroactive application of *Waltz*. *Ward v Siano*, 270 Mich App 801 (2006), vacating in part 270 Mich 584; 718 NW2d 371 (2006).

Lastly, with all due respect, the dissent by Judge Murphy misinterprets the scope of authority that the Michigan Court Rules plainly vest in a convened conflict panel. Judge Murphy correctly observes that in voting to convene a special panel to resolve the conflict between *Ousley* and vacated part III of the prior *Mullins* decision, the judges of this Court found that, regarding the retroactivity of *Waltz*, an "outcome-determinative question[]" existed under MCR 7.215(J)(3). But the dissent by Judge Murphy mistakenly asserts that the order convening a conflict panel in this case restricts the scope of this special panel's resolution of the present conflict.

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[2] See *People v O'Donnell*, 474 Mich 867 (2005) (directing that *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002), and *People v Scruggs*, 256 Mich App 303; 662 NW2d 849 (2003) "are to be given limited retroactive effect"); *Ewing v Detroit*, 468 Mich 886, 887 (2003) (ordering that "[f]or the reasons stated in the dissenting opinion in the Court of Appeals, *Robinson v Detroit*, 462 Mich 439 [613 NW2d 307] (2000), applies retroactively"); *People v Franklin*, 417 Mich 985 (1983) (reversing the defendant's conviction and sentence because his "guilty plea and sentence preceded the Supreme Court's decision in *Briggs* [sub nom *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982)] establishing the rule requiring the trial judge to permit a defendant to withdraw his plea in the event the trial judge chooses not to follow a plea-bargain sentence recommendation").

A review of MCR 7.215(J) reflects that subrules 1 through 4 prescribe the procedure pursuant to which this Court may declare and assemble a special panel to address an outcome-determinative question when a panel of this Court has declared its disagreement with the analysis contained in a prior published opinion of this Court. No language in subrules 1 through 4 purports to discuss the authority of the convened special panel to consider the substantive merits of the outcome-determinative question. The only subrule of MCR 7.215(J) that refers to the special panel's authority to consider the outcome-determinative question presented is subrule 5, in which the Supreme Court has provided as follows:

> An order directing the convening of a special panel must vacate only that portion of the prior opinion in the case at bar addressing the particular question that would have been decided differently but for the provisions of subrule (1). *The special panel shall limit its review to resolving the conflict that would have been created but for the provisions of subrule (1) and applying its decision to the case at bar*. The parties are permitted to file supplemental briefs, and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument. The special panel shall return to the original panel for further consideration any remaining, unresolved issues, as the case may require. [MCR 7.215(J)(5) (emphasis added).]

The clear and unambiguous language of subrule 5 simply imposes no restriction on the convened special panel's ability to consider and resolve the issue in conflict.[3] See *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004) (explaining that unambiguous court rule language must be enforced as plainly expressed, without further judicial construction). Consequently, if the Supreme Court orders in *Forsyth*, *Wyatt*, and *Evans* bind us and control the outcome of the conflict question, as we believe they do, we are both obligated by law to follow them and plainly authorized by MCR 7.215(J)(5) to do so.[4]

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[3] Subrules 6 and 7 of MCR 7.215(J) likewise pertain to procedure, specifically the publication of the special panel's decision and the time frame for seeking reconsideration or Supreme Court review of the special panel's decision.

[4] To the extent that Judge Murphy's dissent relies on *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 98-100; 706 NW2d 843 (2005), in support of the proposition that the order declaring a conflict operates as law of the case restricting the convened special panel's authority to consider the conflict question, the special panel's decision in *Health Call of Detroit* does not consider the unfettered authority to resolve conflict questions that MCR 7.215(J)(5) provides a convened special panel. Furthermore, the panel in *Health Call of Detroit* considered whether the facts in that case generated a conflict that the special panel should address and decide, *id*., while in this case, we face a pure question of law, specifically whether the Supreme Court's orders in *Forsyth*, *Wyatt*, and *Evans* constitute binding precedent and thus control resolution of the conflict question itself.

The dissent's suggestion that the order declaring a conflict in this case operates as law of the case governing this special panel's consideration of the outcome-determinative question presented not only lacks support in MCR 7.215(J), but constitutes a troubling proposition for a

(continued…)

Reversed and remanded for entry of summary disposition for defendants.

Hoekstra, P.J., and Meter and Donofrio, JJ., concurred.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

(…continued)

different reason. The dissent notes that at the time the prior *Mullins* decision expressed its disagreement with *Ousley* and the judges of this Court voted to convene this special panel, the Michigan Supreme Court had issued its orders in *Forsyth*, *Wyatt*, and *Evans*; the dissent reasons, therefore, that because "these orders were subject to consideration," this Court's "vote to convene a special panel despite the existence of the Supreme Court orders was essentially a determination that the orders were not binding precedent . . . ." *Post* at ___, ___. Even assuming that we could simply ignore the controlling nature of the Supreme Court orders in this case, the dissent's logic would require us to presume that the judges voting to convene the conflict panel considered the Supreme Court orders, of which the prior *Mullins* decision had made no mention. Given the absence of any mention of the Supreme Court orders in *Mullins*, no facts support the dissent's leap of logic.