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 STEWARD, M.D.,

Defendant-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.

WHITE, J. (*dissenting*).

For many of the reasons stated by Judge Murphy and Judge Cooper, I agree that the orders in *Evans v Hallal*, 472 Mich 929 (2005), *Forsyth v Hopper*, 472 Mich 929 (2005), and *Wyatt v Oakwood Hosp & Med Ctrs*, 472 Mich 929 (2005), are informative regarding the Supreme Court's thinking at the time they were entered, but are not precedential decisions on the question whether *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), should be applied retroactively. Because these orders are not precedential decisions, this Court is duty-bound to address the merits of the conflict between *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), and *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586; 711 NW2d 448 (2006). I conclude that *Ousley* was incorrectly decided.

The question whether a decision should be applied retroactively or prospectively only is an inquiry distinct and separate from the underlying decision. The United States Supreme Court rarely, if ever, decides the applicability of the new rule to other cases in the case in which it is announced. The Michigan Supreme Court has yet to decide whether *Waltz* should be applied prospectively only or retroactively. It is settled law that no inference can be drawn from the

Supreme Court's denial of leave to appeal in *Ousley*. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000); *People v Phillips (After Second Remand)*, 227 Mich App 28, 34-35; 575 NW2d 784 (1997). Further, the decision whether to grant leave to appeal and issue a law-making opinion, or to dispose of an individual case by entry of an order directing this Court or a circuit court how to proceed, is one made by the Supreme Court on the basis of a variety of considerations. In *Evans*,[1] *Forsyth*[2], and *Wyatt*,[3] this Court denied the defendants' applications for leave to appeal. The Supreme Court's orders in those cases, which were unanimous, are indicative only of a decision not to grant plenary consideration in those cases, and that rather than require those cases to proceed to final judgment before deciding the *Waltz* issue, this Court should consider those cases as on leave granted, and decide those cases giving full retroactive application to *Waltz*. That unanimous direction cannot properly be viewed as a decision by the Court on the separate question whether henceforth *Waltz*, as a matter of decided law and precedent, should be applied retroactively in all cases.[4] To be sure, the orders may indeed foreshadow the Supreme Court's ultimate decision on the retroactivity issue, but it is a disservice to the Court to assume that the retroactivity decision is a foregone conclusion, or that if the issue reaches the Court for plenary consideration, the justices will not undertake a careful and considered analysis, informed by briefing, argument, and the decisions of the *Ousley* and *Mullins* panels, and of this conflict panel.

From the time the requirement to provide a notice of intent (NOI) was first enacted in 1993, with the concomitant provision that the period of limitations is tolled when the NOI is filed, the provisions were interpreted by the bench and bar as providing for the tolling of the time periods set forth in MCL 600.5852. No case, until *Waltz*, held otherwise. While it is true that the Supreme Court's decision in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled in part by *Waltz, supra* at 655, did not involve an analysis of the issue presented in *Waltz*, it is equally accurate to observe that the Court included in its *Omelenchuk* decision an unambiguous application of MCL 600.5856(d), now 600.5856(c), to § 5852, and, as observed by Judge Murphy, clearly referred to the two years after the letters of authority were issued as "the two-year limitation period . . . ." *Omelenchuk, supra* at 577. This was not

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[1] *Evans v Hallal*, unpublished order of the Court of Appeals, entered February 11, 2005 (Docket No. 259580).

[2] *Forsyth v Hopper*, unpublished order of the Court of Appeals, entered March 9, 2005 (Docket No. 257907).

[3] *Wyatt v Oakwood Hosp*, unpublished order of the Court of Appeals, entered February 11, 2005 (Docket No. 258235).

[4] Respectfully, and without implying that any justice's decision is a foregone conclusion, I observe that given their opinions on the substantive issue in *Waltz, supra* at 655 (dissenting opinion by Cavanagh, J., concurred in by Kelly, J.), and on the retroactivity issue in *Lindsey v Harper Hosp*, 455 Mich 56, 70; 564 NW2d 861 (1997) (dissenting opinion by Kelly, J., concurred in by Cavanagh, J.), it is unlikely that Justices Cavanagh and Kelly, who joined in the *Evans, Forsyth*, and *Wyatt* orders, viewed the orders as precedential decisions on the retroactivity issue.

inadvertence or sloppiness; rather, it was a reflection of the fact that even after *Lindsey v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997), which itself repeatedly referred to § 5852 as "the statute of limitations savings provision," the bench and bar understood the statutes to operate as set forth in *Omelenchuk.*

Similarly, while *Miller v Mercy Mem Hosp*, 466 Mich 196; 644 NW2d 730 (2002), actually made the distinction that § 5852 is a saving provision and not a statute of limitations, the bench and bar did not conclude from that distinction that the tolling provision of § 5856(d) did not apply to the periods of § 5852. In *Fournier v Mercy Community Health Care Sys-Port Huron*, 254 Mich App 461; 657 NW2d 550 (2002), decided six months after *Miller,* this Court did exactly what the Supreme Court did in *Omelenchuk* and analyzed the case by applying § 5856(d) to § 5852. Further, while the complaint in *Omelenchuk* would have been timely under the *Omelenchuk* Court's decision without regard to whether § 5856(d) was properly applied to § 5852, this was not the case in *Fournier*. The *Fournier* Court could have disposed of the case with dispatch, without deciding whether the personal representative tolled the period of limitations by complying with the NOI provision, by observing that the tolling provision does not apply to § 5852. Instead, the Court discussed the operation of § 5852 as it relates to medical malpractice actions, concluded that "the period of limitation expired July 13, 2000, two years after the letters of authority were issued," *Fournier, supra* at 466-467, and went on to determine whether the notice was adequate to toll, under § 5856(d), the period of limitations resulting from application of § 5852. The Court concluded that notice had not been given in compliance with MCL 600.2912b and stated:

> In this case, Fournier died on July 7, 1998. The letters of authority were issued on July 13, 1998. Therefore, the two-year statutory period of limitation began on July 13, 1998, and extended to July 13, 2000. On July 12, 2000, plaintiff mailed six notices of intent to Bruer's residential address. Because plaintiff did not provide notice "in compliance with" MCL 600.2912b, the limitation period was not tolled by MCL 600.5856(d). Consequently, the limitation period expired on July 13, 2000. Plaintiff filed the complaint on January 10, 2001, well after the limitation period expired. [*Fournier, supra* at 468-469.]

Had this Court understood that *Miller* or *Lindsey* foreshadowed that the consistent and persistent interpretation of the bench and bar, and the consistent practice of both sides of the bar, during the nine years since the NOI and tolling provisions were enacted, including the apparent understanding of the Supreme Court as applied in *Omelenchuk*, would be rejected as incorrect by the Supreme Court, it would simply have stated that Fournier's complaint was filed too late under any analysis because the NOI was not sent within the two-year period of limitations, i.e., by July 7, 2000, and the complaint was not filed within two years after the letters of authority were issued.

At argument before the conflict panel, defense counsel characterized the issue presented here as whether this panel should follow the law on retroactivity or reject the correct legal disposition on the basis of vague and emotional considerations of whether retroactive application of *Waltz* causes hardship or feels right.[5] This ignores that retroactivity analysis is by its terms concerned with issues of justice. In *Lindsey, supra* at 68, the Supreme Court explained:

> The general rule is that judicial decisions are to be given full retroactive effect. *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). However, where injustice might result from full retroactivity, this Court has adopted a more flexible approach, giving holdings limited retroactive or prospective effect. This flexibility is intended to accomplish the "maximum of justice" under varied circumstances. *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984), citing *Williams v Detroit*, 364 Mich 231, 265-266; 111 NW2d 1 (1961).
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> Prospective application of a holding is appropriate when the holding overrules settled precedent or decides an "issue of first impression whose resolution was not clearly foreshadowed.'" [Citations omitted.]

While the *Lindsey* Court did not "find that the balance of justice demands prospective application in [that] case," *id.* at 69, the Court did so find in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), in which it applied the same flexible approach approved in *Lindsey* and sought to '"take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change"' in the law. *Id.* at 695, quoting *Placek v Sterling Hts*, 405 Mich 638, 665; 275 NW2d 511 (1979). Notwithstanding defendants' argument, neither this Court nor the Supreme Court should be reluctant to consider the "balance of justice" in determining the retroactivity issue. Such considerations are a necessary part of the reasoned and responsible application of the law of retroactivity.

The experience since the *Waltz* decision has been that defendants who had never thought to seek dismissal on this basis rushed to the courthouse to file their motions for summary disposition. Plaintiffs' lawyers who had carefully and meticulously computed and recorded the limitations periods in their cases, and who had sent NOIs within those limitations periods, and defense lawyers who had carefully and meticulously explored every possible defense on behalf

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[5] Defense counsel argued:

> This appears to be a debate between two competing positions, one of which says: read the established rules and principles regarding retroactivity and enforce them in this case, even though some might argue that it causes a hardship; the competing position being: we have a definite and firm conviction that somehow this just doesn't feel right regardless of what the rules might be regarding retroactivity. I admit that that position is appealing and has a certain emotional persuasiveness to it.

of their clients, and who had failed to identify and pursue the *Waltz* defense, suddenly learned that they, as well as all the judges who understood the statutes to operate as they did, were wrong. It is certainly within the province of the Supreme Court, indeed it is its duty, to correct errors in the interpretation of statutes. However, the experience of the bench and bar before and after *Waltz* makes clear that *Waltz* was a law-changing decision. We should not ignore as judges what is apparent to the entire medical malpractice bar, and to plaintiffs, medical defendants, and insurers alike—that all participants in the legal system believed that *Omelenchuk* correctly applied the law and that *Waltz* was the first time that understanding was challenged. The proper application of retroactivity law requires that *Waltz* be applied prospectively only.

/s/ Helene N. White