STATE OF MICHIGAN

COURT OF APPEALS

MATT WARD, Personal Representative of The Estate of HOWARD WARD, Plaintiff-Appellant, v JOHN C. SIANO, JR., M.D., LANSING INTERNAL MEDICINE ASSOCIATES, P.C., and EDWARD W. SPARROW HOSPITAL ASSOCIATION, Defendants-Appellees.	FOR PUBLICATION November 14, 2006 9:10 a.m. No. 265599 Ingham Circuit Court LC No. 03-001864-NH Official Reported Version

Before: Sawyer, P.J., and O'Connell, Saad, Wilder, Zahra, Owens, and Fort Hood, JJ.

PER CURIAM.

This Court convened this special panel pursuant to MCR 7.215(J)(3) to resolve a conflict that arose between our decision in *Mazumder v Univ of Michigan Regents*, 270 Mich App 42; 715 NW2d 96 (2006), and our later decision in this case, *Ward v Siano*, 270 Mich App 584; 718 NW2d 371 (2006), vacated in part 270 Mich App 801 (2006). Pursuant to our conflict resolution rules, this Court vacated those portions of *Ward* that conflicted with *Mazumder*. MCR 7.215(J)(5). We now address the issue that the original panel in *Ward* would have decided differently if it were not bound to follow *Mazumder*. MCR 7.215(J)(1), (2).

The issue is whether a wrongful death plaintiff may rely on equitable tolling to escape the retroactive effect of our Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). In *Waltz*, our Supreme Court stated that the two-year period contained in the wrongful death saving statute, MCL 600.5852, was not tolled by serving a medical malpractice defendant with a notice of intent to sue. *Waltz*, *supra* at 655. Our Court recently reaffirmed that *Waltz* applies retroactively, *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 507-510; 722 NW2d 666 (2006), so plaintiffs who filed before *Waltz*, but incorrectly and detrimentally relied on their notice of intent to sue to toll the running of the saving statute, are barred from pursuing their claims. In *Mazumder*, *supra* at 62, however, this Court applied the doctrine of equitable tolling to a plaintiff who had relied on her understanding of the law as it existed before *Waltz* was issued. The dissent in *Mazumder* pointed out that uniform application of equitable tolling to similar plaintiffs would effectively circumvent those decisions that applied *Waltz* retroactively.

Mazumder, *supra* at 71-72 (Hoekstra, P.J., concurring in part, dissenting in part). In our previous opinion in this case, this Court agreed that the retroactive application of *Waltz* could not coexist with a blanket exception of equitable tolling woven solely form the general unfairness of retroactively applying *Waltz*. We concur with that reasoning. Because our Court has held that *Waltz* applies retroactively, we resolve the conflict in favor of our initial opinion in this case. We reinstate its reasoning and adopt it as the rule of law.

Equitable or judicial tolling ordinarily applies to a specific extraordinary situation in which it would be unfair to allow a statute of limitations defense to prevail because of the defendant's bad faith or other particular and unusual inequities. See 51 Am Jur 2d, Limitation of Actions, § 174, pp 563-564. Absent statutory language allowing it, judicial tolling is generally unavailable to remedy a plaintiff's failure to comply with express statutory time requirements. See 51 Am Jur 2d, Limitation of Actions, § 177, p 565 ("Equitable tolling is not permissible if it is inconsistent with the text of the relevant statute."); see also *Secura Ins Co v Auto-Owners Ins Co*, 461 Mich 382, 387-388; 605 NW2d 308 (2000); *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 285 n 12; 696 NW2d 646 (2005). Inequities that justify judicial tolling must arise independently of the plaintiff's failure to diligently pursue the claim in accordance with the statute. See 51 Am Jur 2d, Limitation of Actions, § 174, pp 563-564, and § 177, p 565; see also *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586, 590-592; 702 NW2d 539 (2005).

In *Waltz*, *supra*, our Supreme Court held that the plain language of MCL 600.5856 prevented it from tolling the saving statute, MCL 600.5852. The Court resolved the dispute over the relevant time frames specifically on the basis of statutory interpretation. *Waltz*, *supra* at 651-652. Therefore, it essentially concluded that the Legislature never intended to allow a personal representative to bring a wrongful death claim outside the two-year period in MCL 600.5852, despite the filing of a notice of intent to sue. See *id*. at 651. In light of *Waltz*, any attempt on our part to excuse nonconformity with the statute would amount to amending the statute—in effect, legislating from the bench. See *Devillers*, *supra* at 590 n 65. This is not the function of the judiciary. *Id*.

Although a court may limit its novel interpretation of a statute to prospective application, *Pohutski v City of Allen Park*, 465 Mich 675, 696-697; 641 NW2d 219 (2002); see also *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004), this Court has held that *Waltz* has full retroactive effect. *Mullins*, *supra* at 507-510. To allow a wholesale disregard of *Waltz*'s retroactive application on the basis of individual "unfairness" to each plaintiff would allow the constant exceptions collectively to swallow the rule. See *Devillers*, *supra* at 586-587, 590 n 65. The delicate and specialized tool of judicial tolling is ill-suited to supplant the expansive, all-encompassing remedy of limiting a rule to prospective application. By proposing to apply judicial tolling to every medical malpractice wrongful death plaintiff who is "unfairly" subjected to the time limits clarified in *Waltz*, the rationale of *Mazumder* subverts, piecemeal, our decision that *Waltz* applies retroactively. Stated differently, if reliance on the pre-*Waltz* understanding of the law were alone sufficient to justify a litigant's failure to comply with *Waltz*'s standards, our appellate courts would have limited the decision to prospective application. They did not. In our original decision in this case, as in *Mazumder*, plaintiff failed to demonstrate any inequity independent of his unknowing failure to comply with the retroactive

time limits delineated in *Waltz*. This "inequity" is inadequate to sustain a claim for judicial tolling, because it is directly related to plaintiff's unassisted failure to comply with the retroactively applicable time restraints, not on intervening, external circumstances. See 51 Am Jur 2d, Limitation of Actions, § 174, pp 563-564, and § 177, p 565. Therefore, we adopt the reasoning contained in *Ward*, conclude that judicial tolling should not operate to relieve wrongful death plaintiffs from complying with *Waltz*'s time restraints, and overrule those portions of *Mazumder* that conflict with this opinion.

The circuit court's order granting summary disposition to defendants is affirmed.

Sawyer, P.J., and Saad, Zahra, and Owens, JJ., concurred.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Donald S. Owens

Fort Hood, J., concurred in the result only.

/s/ Karen M. Fort Hood