

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.

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

O'CONNELL, J.

FOR PUBLICATION
January 31, 2006
9:10 a.m.

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

Official Reported Version

Defendants-appellants appeal by leave granted the trial court's denial of defendant St. Joseph Mercy Hospital's motion for summary disposition. We reverse because we are required by MCR 7.215(J)(1) to follow the holding in *Ousley v McLaren*, 264 Mich App 486; 691 NW2d

817 (2004). Pursuant to MCR 7.215(J)(2), we declare a conflict with *Ousley* and state that if we were not obligated to follow *Ousley*, we would affirm.¹

I. Facts

The decedent went to defendant hospital for a heart catheterization on March 22, 1999. Following catheterization and an angioplasty procedure performed by defendants, the decedent suffered internal bleeding. On March 25, 1999, she suffered cardiac arrest and died. Her husband, Clyde Mullins, was appointed personal representative of her estate and was issued letters of authority on December 5, 2000. On June, 17, 2002, Mr. Mullins served defendants with notice of his intent to sue. Mr. Mullins filed this lawsuit on March 25, 2003. While trial was pending, Mr. Mullins was diagnosed with cancer. On January 13, 2004, plaintiff Mary L. Mullins replaced Mr. Mullins as decedent's personal representative, but plaintiff did not inform the trial court of the replacement. On June 2, 2004, defendant hospital moved for summary disposition, arguing that the two-year period of limitations had run before Mr. Mullins filed the complaint and that the two years allotted Mr. Mullins by the wrongful death saving statute had run as well.

Plaintiff responded to the motion on June 30, 2004, and moved the court to substitute her as plaintiff in Mr. Mullins's place. Plaintiff asked that the court grant retroactive (*nunc pro tunc*) effect to the substitution so that she would appear as plaintiff from the time she received her letters of authority on January 13, 2004. The trial court granted plaintiff's motion and denied defendant hospital's motion for summary disposition.

The trial court's denial of summary disposition was consistent with our Supreme Court's decision in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), but the trial court disregarded the fact that *Omelenchuk* was overruled on that issue by *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). In *Waltz, supra* at 650, the Supreme Court held that the tolling statute, MCL 600.5856, only tolled statutes of limitations or repose, and that MCL 600.5852 was not a statute of limitations, but a saving statute. Therefore, it held that a complaint filed outside the periods in the saving statute was untimely, regardless of whether the plaintiff tolled the period of limitations with a notice of intent. *Waltz, supra* at 651-652.

A request for leave to appeal followed the denial of defendant hospital's motion, and, in lieu of granting leave, this Court vacated the trial court's order and remanded the case for reconsideration in light of *Ousley*. Unpublished order, entered January 20, 2005 (Docket No. 258139). In *Ousley, supra* at 495, this Court held that *Waltz* applied retroactively. At the

¹ We reject *Ousley* for the reasons stated in Judge O'Connell's dissent in *McLean v McElhaney*, 269 Mich App 196, ___; ___ NW2d ___ (2005), and reiterated in this opinion. For a complete review of the legal development of this issue, we direct the reader to the *McLean* opinions.

hearing on reconsideration, the trial court ruled that *Ousley* and *Waltz* did not apply in this case because they dealt with the outer, three-year limit contained in MCL 600.5852, and the complaint in this case was filed within that outer limit. Defendants-appellants again requested leave to appeal, and this Court granted it.

II. *Nunc pro tunc* substitution of parties

Defendants-appellants argue that the trial court should have granted defendant hospital's motion for summary disposition. We agree. We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Shortly after the trial court issued its second order, this Court decided *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 574-575; 703 NW2d 115 (2005), which held that the two-year period in the wrongful death saving statute was independent of and separate from the statute's three-year outer limit for filing. According to *Farley*, a complaint is untimely if the personal representative files it more than two years after receiving letters of authority, even if three years have not yet elapsed since the period of limitations ran. *Id.* Therefore, the trial court erred when it held that the original complaint was timely.

Nevertheless, plaintiff argues that the appointment of a new personal representative renewed the two-year period in the wrongful death saving statute. She further argued that when the trial court allowed plaintiff to substitute *nunc pro tunc* for Mr. Mullins, the complaint was effectively filed on January 13, 2004. According to plaintiff, she could timely file the suit on January 13, 2004, because it was within two years after her letters of authority were issued, and it was not more than three years after the period of limitations had run (March 25, 2004). See MCL 600.5852. However, in *McMiddleton v Bolling*, 267 Mich App 667, 672-674; 705 NW2d 720 (2005), we recently held that a successor representative who does not file a separate complaint does not reap the benefits of the *opportunity* to file the complaint in a timely manner. Moreover, we held that MCL 700.3701, which applies certain legal fictions to a personal representative's premature actions, does not transform an earlier untimely action into a timely one. *McMiddleton, supra* at 674. We also rejected the plaintiff's reliance on Justice Markman's concurring statement in *Chernoff v Sinai Hosp of Greater Detroit*, 471 Mich 910 (2004).² *McMiddleton, supra* at 672 n 2. Therefore, applying *McMiddleton* and MCL 700.3701 to the case at bar, plaintiff's later addition to the suit did not constitute the filing of a new suit; rather,

² In his concurrence in *Chernoff*, Justice Markman indicates that the successive appointment of a personal representative *nunc pro tunc* to the date of the issuing of a notice of intent to sue would save a case, as long as the outer, three-year period in MCL 600.5852 had not yet expired. However, the concurrence merely joined a denial of leave to appeal, and the rationale behind Justice Markman's statement is sketchy. *Chernoff, supra* at 910-912. This exception would not technically apply in this case anyway, because the trial court did not retroactively appoint plaintiff, but retroactively named her plaintiff in this suit.

she was merely added as a party to an untimely suit. Plaintiff's appointment as successor personal representative and substitution as successor plaintiff did not transform the previous personal representative's untimely complaint into a timely one.

III. Retroactive application of *Waltz*

However, we agree with plaintiff that *Ousley* was wrongly decided and that *Waltz* should only be applied prospectively. But for the mandate in MCR 7.215(J)(1), we would not follow *Ousley*. Rather, we would only apply *Waltz* prospectively and would affirm the trial court's order denying summary disposition. Therefore, we declare a conflict with *Ousley*. MCR 7.215(J)(2).

Waltz should only be applied prospectively because, contrary to *Ousley's* assertions, the time limits provided in *Omelenchuk* reflected the current state of the law when the original personal representative, plaintiff's father, filed suit. The time limits set forth in *Omelenchuk* had definitively settled the time limits for medical malpractice wrongful death suits, and plaintiff's father filed this suit within those limits. Nevertheless, *Ousley, supra* at 494-495, found that *Waltz's* basis for overruling *Omelenchuk* (that it was confusing, erroneous dicta) doubled as a solid basis for applying *Waltz* retroactively. Although the Supreme Court classified *Omelenchuk's* holding as confusing, the classification was only accurate in light of the new, contrary approach adopted by the Court. The Supreme Court did not assert that *Omelenchuk* sent the bench and bar mixed messages, leading litigants to disregard or misunderstand it. On the contrary, the Supreme Court recognized the clear implications of *Omelenchuk* and overruled it precisely because it considered them erroneous and no longer wanted litigators and judges to rely on them. *Waltz, supra* at 654-655. Therefore, *Ousley's* adoption of *Waltz's* categorization of *Omelenchuk* as confusing dicta ignores the more pressing question: Was the rule in *Omelenchuk* sufficiently understood, accepted, followed, and entrenched as law so that suddenly and retroactively reversing course would inequitably and substantially prejudice otherwise compliant litigants? Our experience in reviewing the practices of the bench and bar tells us that it was.

In fact, our opinion in *Ousley, supra* at 493-494, only relied on one pre-*Waltz* decision, *Miller v Mercy Mem Hosp*, 466 Mich 196; 644 NW2d 730 (2002), but nevertheless contended that the Supreme Court's decision in *Omelenchuk* was too eroded to justify reliance. While *Miller, supra* at 202-203, was ultimately employed to undermine one of *Omelenchuk's* bases for extending the wrongful death time limit, the opinion itself merely explains that MCL 600.5852 is a saving statute. It did not challenge or question *Omelenchuk* and did not even cite it. Moreover, in *Waltz, supra* at 653-654, the Supreme Court admitted that errors in *Omelenchuk* had confused the bench and bar; it did not pretend that *Miller* had righted the wayward ship. Therefore, until *Waltz* changed the time schedules, *Omelenchuk* stood as an unchallenged and clear pronouncement of the controlling time limits. That the Supreme Court and the panel in

Ousley later found serious flaws in *Omelenchuk's* reasoning does not change the fact that it was the undisputed law at the time and was followed accordingly.³

Contrariwise, it stands to reason that if *Omelenchuk* was pure dicta, then *Waltz* blazed the trail as an issue of first impression, and *Omelenchuk* contradicts any presumption that the result in *Waltz* was "clearly foreshadowed" by precedent. Therefore, *Waltz* should only receive prospective application, and we begrudgingly follow *Ousley's* contrary directive.

Reversed.

Fitzgerald, P.J., concurred.

/s/ Peter D. O'Connell

/s/ E. Thomas Fitzgerald

³ As for inequity, this case represents the classic and all-too-common situation. A grieving husband with astute and competent counsel is told that an action, which was timely when he filed it, is now fatally tardy. The merits of his action are ignored, and his reliance on Supreme Court precedent is disregarded. Ironically, we apply *Harris* for the proposition that the later appointment of a personal representative will not render an untimely action timely, but we have no qualms telling plaintiff that a few, well-chosen words from us can transform her father's timely action into an untimely one. Plaintiff's father and his counsel relied on our Supreme Court's holding in *Omelenchuk*, so applying *Waltz* inequitably destroys plaintiff's wrongful death claim.