
Michigan Court of Appeals Continues Debate on Equitable Tolling in Waltz Cases

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In *Mazumder v University of Michigan Board of Regents*, 270 Mich App 42 (2006), the Michigan Court of Appeals utilized equitable tolling to save an untimely medical malpractice claim from dismissal pursuant to *Waltz v Wyse*, 469 Mich 642 (2004) and *Ousley v McLaren*, 264 Mich App 486 (2004).¹

Mazumder is a wrongful death claim in which the plaintiff alleged the decedent committed suicide as a result of the defendants' negligence in treating her mental illness. The letters of authority were issued on May 2, 2002. The plaintiff filed a notice of intent for the medical malpractice action on April 27, 2004, and subsequently filed her complaint on October 21, 2004, several months after the expiration of the savings period on May 2, 2004.

Presuming that the savings period was tolled during the 182-day notice period, the plaintiff incorrectly calculated that she had the remainder of the two-year saving period in which to timely file her complaint. The defendants moved for summary disposition relying primarily on *Waltz*. The Washtenaw Circuit Court denied the defendants' motions and an appeal ensued.

The appellate court in *Mazumder* agreed that the case was not timely filed. However, the court applied equitable tolling and held that "given the widespread recognition within the bench and the bar of notice tolling during the saving period before the decision in *Waltz*, and the justice that results from ignoring that recognition, the plaintiff is entitled to equitable relief."

The need for equitable tolling arises from the plaintiff bar's mistaken assumption that a notice of intent tolls the savings statute, as it would toll the statute of limitations. In support of this belief, plaintiff practitioners point to the Michigan Supreme Court's decision in *Omelenchuk v City of Warren*, 461 Mich 567 (2000), in which the court addressed a separate issue, but then applied the saving statute in a manner that gave an impression that the savings period is indeed tolled by a notice of intent. In *Waltz*, the court determined that its earlier decision in *Omelenchuk* "might be viewed as sanctioning application of the notice tolling provision to the wrongful death savings provision," and to that extent, overruled *Omelenchuk*.

To combat the post-*Waltz* flurry of dispositive motions filed by the defense bar based upon statute of limitations issues, the plaintiff bar argued that equitable tolling should be applied to shield wrongful death medical malpractice claims from dismissal pursuant to *Waltz* and *Ousley*. The plaintiff bar argued plaintiffs' "untimely" filings were not due to miscalculation of the applicable limitations period, but instead, as a result of a reliance upon "the court's repeated recognition and the general understanding among the bench and the bar that tolling applied under the circumstances" of the case. The plaintiffs'

¹ Equitable tolling is also referred to as judicial tolling and is usually discussed in the context of statute of limitations.

attorneys argued that they reasonably relied upon *Omelenchuk* in calculating the statute of limitations period.

This argument had been rejected in a series of pre-*Mazumder* unpublished decisions. See *Gainforth v Bay Health Care* (No. 260054, rel'd 08/11/05) (unpublished); *Washington v Jackson* (No. 263108, rel'd 12/13/05) (unpublished); and *Powell et. al v Oakwood Health Care* (No. 263639, rel'd 12/22/05) (unpublished).

Most recently, the equitable tolling issue was addressed in *Ward v Siano*, __ Mich App __ (2006), in which the Michigan Court of Appeals applied equitable tolling because it was forced to follow the *Mazumder* holding. The Ward court declared a conflict with *Mazumder* and stated that, if not so obligated to follow *Mazumder*, it would affirm the lower court's grant of summary disposition in the defendants' favor.² The Michigan Court of Appeals has now convened a conflict panel in *Ward* to resolve the equitable tolling conflict. Oral argument was heard on July 29, 2006.

Without question, *Mazumder* and *Ward* have created a great deal of debate among various practitioners on both sides of the bar, as well as among judges of the Michigan Court of Appeals. As evidenced by the convening of a conflict panel, the issue of equitable tolling with regard to Waltz cases is not settled. Ultimately, the Michigan Supreme Court will likely resolve the issue.

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² For an in-depth discussion of the conflict provision located in MCR 7.215(J), see the Plunkett & Cooney May 2006 Health Care Law Update "Michigan Court of Appeals Declares Conflict with *Ousley*" authored by Rob Kameneec and Emily Ballenberger. The article is also posted on-line on the firm's web site www.plunkettcooney.com.