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Michigan Court of Appeals Declares Conflict With *Ousley*

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Will plaintiffs who filed wrongful death cases prior to April 14, 2004 get the benefit of tolling during the notice of intent period? This issue was recently raised in *Mullins v St. Joseph Mercy Hosp*, 269 Mich App 586 (2006), in which the Michigan Court of Appeals declared a conflict with *Ousley v McLaren*, 264 Mich App 486 (2004).

This declaration triggers a conflict resolution process found in the Michigan court rules. Pursuant to MCR 7.215(J)(3), a conflict panel of the appellate court is currently deciding whether *Waltz v Wyse*, 469 Mich 642 (2004), will be applied retroactively for cases pending on April 14, 2004. Such a decision would not bind the Michigan Supreme Court, which has already ordered in several cases that Waltz be applied retroactively.

By way of background, the appellate court in *Ousley* held that the Supreme Court's decision in *Waltz* applies retroactively. In *Waltz*, the Supreme Court held that a notice of intent does not toll the wrongful death savings statute.

Absent such tolling, the two-year savings provision available in certain wrongful death cases expired before the plaintiffs filed timely lawsuits. The plaintiffs claim that *Waltz* overruled the court's earlier decision in *Omelenchuk v Warren*, 461 Mich 567 (2000), which some lawyers believed established that the wrongful death savings statute was tolled by the notice of intent tolling provision. In turn, the plaintiffs contend that *Waltz* should be applied on a prospective basis only and govern only those cases filed after April 14, 2004.

Once a conflict has been declared, the following process will occur: the appellate court must vote as to whether a conflict resolution panel should be convened pursuant to MCR 7.215(J)(3). This must occur within 28 days after release of an opinion indicating disagreement with a prior decision. The chief judge must poll the judges to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict. In this case, the polling has occurred and the court has decided to convene a special panel.

Now that it has been determined that a special panel should be convened, seven judges will be selected by lot and are appointed to serve on the panel. The judges who participated in either the controlling decision or the opinion in the case at bar may not be selected.

The special panel's decision will be restricted to whether *Waltz* should be applied retroactively. The special panel's decision must be published and will be binding on all panels of the appellate court unless reversed or modified by the Supreme Court.

Once the special panel process is completed, it is likely that an application for leave to appeal to the Supreme Court will be made by one of the parties.

As explained by Plunkett & Cooney's own appellate specialist, Robert G. Kamenec, in the Feb. 13, 2006 issue of "Michigan Lawyer's Weekly," this is a treacherous path. In the article, Mr. Kamenec points to several previous decisions by the Supreme Court, which indicate that the court has already decided that Waltz should be applied retroactively. For example, in *Waltz* itself, the Supreme Court denied the plaintiff's motion for reconsideration when prospective application was requested.

Mr. Kamenec included several more examples in his list of reasons why the Supreme Court has already decided this issue. In *Ousley*, the appellate court first decided the retroactivity issue, and the Supreme Court denied leave to appeal. Further, in *Evans v Hallal*, 472 Mich 929 (2005), *Wyatt v Oakwood Hospital and Medical Centers*, 472 Mich 929 (2005), and *Forsyth v Hopper*, 472 Mich 929 (2005), the Supreme Court unanimously ordered the appellate court to give the holding of *Waltz* full retroactive application.

Finally, in *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566 (2005), a case in which Mr. Kamenec successfully represented one of the defendants on appeal, the Supreme Court, when asked to review the retroactivity of the Waltz decision, denied the plaintiff's application for leave to appeal, explaining the court was not persuaded to review the question presented.