PLUNKETT & COONEY
Professional Corporation
Attorneys and Counsellors at Law
38505 Woodward Ave.
Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4000
Fax (248) 901-4040
www.plunkettcooney.com

A Comprehensive Guide to the Appellate Court Rulings on Key Medical Malpractice Issues in 2006

By Emily M. Ballenberger

February 2007

Statute of Limitations

Plaintiff May Not Rely Upon Equitable Tolling to Escape Retroactive Effect *Waltz v Wyse*

Ward v Siano, ___ Mich App ___ (2006)(rel'd for publication on Nov 14, 2006).

A conflict panel of the Michigan Court of Appeals in *Ward v Siano*, ___ Mich App ___ (rel'd for publication Nov 14, 2006), held that the doctrine of equitable tolling is not available to plaintiffs who wish to avoid the retroactive application of *Waltz v Wyse*, 469 Mich 642 (2004).

Court of Appeals Reaffirms Retroactivity of Waltz

Mullins v St. Joseph Mercy Hosp, 271 Mich App 503 (2006).

In a four to three decision the Michigan Court of Appeals Conflict Panel in *Mullins v St. Joseph Mercy Hosp*, 271 Mich App 503 (2006), held the Supreme Court' s ruling in *Waltz v Wyse*, 469 Mich 642 (2004), would continue to be applied with full retroactivity (i.e., the holding of *Waltz*, that a notice of intent does not toll the wrongful death savings provision, will continue to apply to cases filed before and after *Waltz* was decided).

Minor Disability Statute Cannot Save Minor Decedent's Claim

Vance v Henry Ford, 272 Mich App 426 (2006).

The Michigan Court of Appeals held the personal representative of a minor's estate may not rely on the minor disability provision, which would allow suit to be filed until the minor's 10th birthday. Instead, suit is only timely filed if it was filed within the two years allotted under the wrongful death statute.

Affidavit of Merit/Expert Qualifications:

Obstetrician Not Qualified to Testify About Midwifery Standards

McElhaney v Harper Hutzel Hosp, 269 Mich App 488 (2006).

The plaintiff claimed that the negligent actions of the defendant's nurse midwife caused her son's impairments, including mental retardation. The plaintiff filed a medical malpractice claim against the hospital for the actions of its "doctors, nurses, a nursing midwife and residents," and attached an affidavit of merit prepared by an obstetrician/gynecologist.

The dispositive issue was whether an obstetrician could testify about the standard of care applicable to a nurse midwife. The Michigan Court of Appeals held that an obstetrician cannot testify against a nurse midwife because each holds a different certification.

Reasonable Belief Does Not Validate Affidavit of Meritorious Defense

Brown v Hayes, 270 Mich App 491 (2006).

The Michigan Court of Appeals held a physical therapist is not qualified to execute an affidavit in support of an occupational therapist, but stated defendants reasonably believed that occupational therapists were precluded from signing an affidavit because they are unlicensed.

Matching Subspecialties and Certificates of Qualification Required

Woodard v Custer, 476 Mich 545 (2006).

In a combined appeal of two medical malpractice claims, the issue addressed by the Supreme Court was whether the plaintiff's experts were qualified.

The Supreme Court held as follows:

(1) if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician;
(2) a defendant's certificate of special qualification or certificate of added qualification is a board certificate that a proposed expert must match.

Specificity Required for NOI; Default Not Appropriate if Affidavit of Merit Not Tardy

Gawlik v Rengachary, 270 Mich App 1 (2006).

In choosing not to default the defendants, the Michigan Court of Appeals held the default judgment was not warranted because the affidavit of meritorious defense was not tardy or totally absent, but merely deficient.

The court also held that the patient's notice of intent was deficient because it lacked specificity with regard to the standard of care and how the defendants breached it.

Court Relaxes Affidavit of Merit Requirement for Family Practitioners

Robins v Garg, 270 Mich App 519 (2006).

Although in previous decisions the Michigan Court of Appeals strictly construed the statutory requirement that the defendant and plaintiff's experts must have matching specialties in order for an affidavit of merit to be valid, the court reversed this trend in Robins v Garg, 270 Mich App 519 (2006). The court held that an affidavit of merit signed by a family practitioner could be used against a general practitioner because of the large overlap between the two types of practice.

Miscellaneous:

'Present and Working' at Hospital is Not a Material Fact That Doctors are Employees

Miteen v Genesys Regional Medical Center, (No. 26410, rel'd 01/24/06) (unpublished)

The Michigan Court of Appeals reversed the trial court's ruling that a material fact existed with respect to the plaintiff's vicarious liability claim against the defendant hospital based on the principle of ostensible agency. It was insufficient to create agency that the plaintiff thought the doctor's were employees because they were present and working at the hospital when he was transferred from another hospital.

Patient's Comparative Fault Nixes Medical Liability Claims

Yax v Knapp, (No. 26007 rel'd 09/19/06) (unpublished).

The court reversed and remanded the trial court's decision to grant the plaintiff's motion for judgment notwithstanding the verdict (JNOV). It was not improper for the jury to believe the defendant doctor's testimony based on the evidence provided.

Informed Consent Does Not Include Surgeon's Success Rate

Wlosinski v Cohn, 269 Mich App 303 (2005).

The Michigan Court of Appeals held, as a matter of law, that defendants did not have a duty to disclose a surgeon's statistical history of kidney transplant failures to obtain decedent's informed consent.

Filing a Notice of Non-Party at Fault Can Increase Defendants' Exposure

Bell v Ren-Pharm, Inc, 269 Mich App 464 (2006).

The Michigan Court of Appeals held that under the general principles of joint and several liability, a defendant is liable for all damages, including those resulting from the acts of non-parties. Thus, the defendant's filing of a Notice of Non-Party at Fault did not reduce the amount it was liable for, despite a finding by the jury that a non-party was 70 percent at fault for the plaintiff's damages.

Court Says Surfing Web Sites Not Enough to Verify Expertise of Defendant Doctors

Lutz v Mercy Mt. Clemens Corp, et al., (No. 261465, rel'd 12/20/05) (unpublished).

The court held that the plaintiff's sole reliance on the defendant hospital's web site to determine whether the defendants had the same board certification as the plaintiff's expert was not sufficient to establish a

reasonable belief as required by MCL 600.2169(1). This decision is significant because it narrows when plaintiffs may argue they had a "reasonable belief" their expert was properly qualified.

Michigan Court of Appeals Held 'Bare Bones' Affidavit of Merit is Sufficient

James v W.A. Foote Memorial Hosp, (No. 262622, rel'd 01/19/06) (unpublished).

The Michigan Court of Appeals held that a "bare bones" affidavit of merit, which contained very minimal information, was sufficient under MCL 600.2912d. The practical effect of this case allows plaintiffs to be very vague in their affidavits of merit, thus giving their experts more room to change their opinions as the case develops.