

vital signs

DIAGNOSING THE CHANGING STATE OF MEDICAL MALPRACTICE & NURSING HOME LIABILITY

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The Michigan Court of Appeals Clarifies the Extension Provisions for Purpose of The Statute of Limitations For Medical Malpractice Claims Involving the Appointment of a Personal Representative

By Jeffrey H. Chilton

On October 13, 2004, the Michigan Court of Appeals printed its decision in the matter of *Ousley, Personal Representative of the Estate of White, Deceased v. Borgess Medical Center et. al.* (___ Mich. App. __ (Docket No 248972, rel'd 8/13/04). In *Ousley*, the Michigan Court of Appeals upheld the decision of the trial court that plaintiff's medical malpractice death claim was time barred and that the granting of summary disposition dismissing the case in its entirety was appropriate.

The underlying focus of this litigation was the death of plaintiff's mother as a result of alleged medical mismanagement on May 11, 1997. Letters of authority naming plaintiff as the personal representative of his mother's estate were issued on April 30, 2002. On May 2, 2002, plaintiff issued a notice of intent to the involved physicians and medical institution (see MCL 600.2912 b et seq.). Plaintiff claimed that since a notice of intent was filed and pending when the statute of limitations period expired, the time period was tolled during the notice of intent phase.

In *Ousley*, the Michigan Court of Appeals rejected plaintiff's argument. Generally, in a medical management dispute, a personal representative is allowed to bring an action within two years after letters of authority are issued as long as the lawsuit is brought within three years after the general two year period of limitations has ended (see MCL 600.5852).

SECRET WARDLE NOTES:

Whenever a notice of intent or a complaint is filed in a medical management dispute in which a personal representative has been appointed, such as any case involving death or significant incapacity, a potential dismissal of the action based upon the applicable statute of limitations should be considered. An analysis of whether a dispositive motion is warranted requires ascertaining the date in which letters of authority were issued in conjunction with a determination of the date in which the medical care complained of arose combined with an application of pertinent case law such as the *Ousley*, *Waltz* and *Miller* decisions.

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Applying the statute to the facts of this case, two years after the May 11, 1997 death that was the focus of this matter, would be May 11, 1999. The plaintiff was required to bring any such action three years following this date, or by May 11, 1999. Plaintiff's complaint was not issued until October 14, 2002 and was, therefore, time barred.

The Court cited *Miller v. Mercy Memorial Hospital*, 466 Mich. 196 (2002) in which the Michigan Supreme Court held that the extension of time provisions when a personal representative is appointed is not a statute of limitations per se. Likewise, the Court relied and applied retroactively the Michigan Supreme Court decision in *Waltz v. Wise*, 469 Mich. 642 (2004). In *Waltz*, the Court determined that the notice of intent provisions for medical malpractice actions do not toll the time period for filing an action in cases when a personal representative is appointed.

These decisions should be scrutinized and applied by all hospitals, physicians, their insurers and counsel to determine whether a motion for summary disposition can have a potentially high exposure medical malpractice claim dismissed outright based upon the applicable statutes.

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