Eggleston Weakened by Recent Appellate Court Decisions

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Ever since the Michigan Supreme Court issued the Waltz v Wyse, 469 Mich 642 (2004) decision, plaintiffs have been citing, with varied success, the case of Eggleston v Bio-Med Applications of Detroit, Inc., 468 Mich 29 (2003) in order to avoid summary disposition on the Waltz issue.

In *Waltz*, the Supreme Court held that since the wrongful death savings provision is not a statute of limitations or a statute of repose, the notice of intent tolling provision under MCL 600.5856(d) does not apply.

In *Eggleston*, the Supreme Court held that the statutory language of the wrongful death simply provided a two-year grace period, which is measured from the issuance of letters of authority (i.e., the court did not limit the estate to a single personal representative). Based on *Eggleston*, plaintiffs have argued that they are allowed to continually appoint personal representatives to "save" their case from being time barred.

During the summer of 2005, the Michigan Court of Appeals has issued a series of decisions, which have greatly weakened this argument. In all three cases, the appellate court chose to apply *Waltz*, and all three plaintiffs were forced to try to avoid dismissal via Eggleston. However, the court chose to distinguish each case from Eggleston on factual grounds.

In *King v. Michael Briggs, D.O., et. al.*, (Nos. 259136 and 259229, rel'd. 07/12/05) (unpublished), the court focused on the fact that the original personal representative in *King* had filed suit, whereas the original personal representative in *Eggleston* had not.

Relying on the fact that the original personal representative had filed suit, the court held that a personal representative who fails to diligently pursue a malpractice cause of action on behalf of an estate within the allotted time may not save the action from dismissal by substituting another personal representative. The court's focus on the "diligent pursuit" of a malpractice claim is particularly important because it suggests that a personal representative should not be allowed to be substituted for any or no reason at all, but instead for case specific reasons. For example, in *Eggleston*, the original personal representative died and a substitution of personal representative was made.

In *Gainforth v. Bay Health Care, et. al.*, (No. 260054, rel'd. 8/11/05) (unpublished), the personal representative had been issued two sets of letters of authority. She had not filed suit within two years of her first appointment, but she had filed suit within two years after her second appointment.

The court noted that if it allowed the savings period to run from the issuance of the second letters of authority this would allow an additional year beyond the two-year statutory savings period in which to

file the complaint. This was distinguishable from *Eggleston* where granting the plaintiff two years from his appointment as successor personal representative only allowed him two full years to file his complaint. Thus, *Gainforth* is valuable because it specifically prohibits the same personal representative from obtaining any more than the statutorily provided two-year time allotment.

Harris v. Steven F. Bolling, M.D., et al., (No. 261216 and 261219, rel'd. 8/16/05) is factually similar to King because in both cases the successor personal representative was appointed after the suit was filed. As it did in King, the court distinguished the case from Eggleston on this basis and chose not to apply it.

In doing so, the court rejected the plaintiff's argument that because under *Eggleston* she could have appointed a new personal representative, her case should not be dismissed. The court also rejected the plaintiff's contention that she did not need to file another complaint, because the previous personal representative had filed one. Further, the court held that the relation-back mechanism in MCL 700.3701 applies to those acts, which are beneficial to the estate.

Finally, in addition to the limitations they placed on the plaintiff's use of *Eggleston*, both *Gainforth* and *Harris* are valuable because they reaffirm the holding that *Waltz* is to be applied retroactively.