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STATE OF MICHIGAN
IN THE SUPREME COURT

KERAN ERNEST, Individually and as Personal Representative of the Estate of Maurice Ernest, Deceased.

Plaintiff-Appellant,

v

DR. PAUL W. BROWN JR., ELMAHDI M. SAEED, DR. FAROUK M. BELAL, MCLAREN HEALTH CARE CORPORATION, CYPRESS CARDIOLOGY PLLC,

Defendant-Appellee,

/

Supreme Court No. 168462
Court of Appeals Case No. 368566
Oakland County Circuit Court Case No. 2020-179077 NH

PLAINTIFF APPELLANT'S REPLY BRIEF IN RESPONSE TO THE SUPPLEMENTAL BRIEF OF DEFENDANT APPELLE ELMAHDI M. SAEED

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ORAL ARGUMENT REQUESTED

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ARGUMENT

As the supplemental brief of Defendant Saeed demonstrates, significant logical and interpretive gymnastics are required to avoid the decision in *Waltz* and his definitions of statute of limitations and savings clause. Reliance on dictionary definitions and out-of-State decisions without comparing them to the statutory framework unique to Michigan is unhelpful.

I. Waltz was Wrongly Decided

A. Defendant Saeed's Analysis of the Statutory Scheme is Incomplete and Incorrect

Defendant Saeed argues that there are "three temporal limitations" for medical malpractice actions, "the two-year statute of limitations in MCL 600.5805(8), and the six-year statute of repose and six-month 'discovery' statute of limitations in MCL 600.5838a(2)." **Saeed Supplemental Brief, p 5**. This ignores that only that the two-year period in § 5805 is described as a "period of limitations" by the Legislature. The six-year statute of repose is only identifiable from its effect, barring claims after a set date. MCL 600.5838a(2) ("the claim shall not be commenced later than six years after the date of the act or omission that is the basis for the claim."). The six-month discovery period is not termed a "period of limitations" at all, although this Court has held that it is. *Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196, 202 (2002). For its part, MCL 600.5856(c) uses the phrase "statute of limitations or repose . . ."

To narrow the scope of the Court's analysis, Defendant Saeed argues that § 600.5856(c) explicitly only tolls the statutes of limitations or repose and that the use of the term "2-year period under subsection (1)" in § 5852(2) rather than "the period of limitations" in § 5852(1) demonstrates a legislative intent that the two-year period is something other than a statute of limitations. **Saeed Supplemental Brief, p 6**. Defendant Saeed argues that there is a "commonsense distinction

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between statutes of limitations, statutes of repose, and savings periods",[1] but is unable to convincingly fit Michigan's legislative scheme into the definitions taken from dictionaries. Moreover, Defendant Saeed argues that the use of different words in different statutes denotes a difference, **Saeed Supplemental Brief, p 7** (citing *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14 (2009)**,** he glosses over the Legislature's choice to use "period of limitations" in §§§ 5805, 5838a, and 5852 and "statute of limitations" in § 5856(c). Nor can Defendant Saeed point to other areas of Michigan's Compiled Code that support any inference that the Legislature understood or acknowledges the distinction of a savings statute he argues for.[2]

Defendant Saeed argues that the Legislature's failure to amend the language of § 5856 in the 2004 amendment demonstrates acquiescence in the *Waltz* decision. **Saeed Supplemental Brief, p 8**. Unless the Legislature had a time machine allowing it to read the *Waltz* decision prior to its publication, that argument is meritless. *Compare* Senate Bill 990 of 2004, Michigan Legislature, *available at https://www.legislature.mi.gov/Bills/Bill?ObjectName=2004-SB-0990* (the bill amending § 5852 was passed and enrolled by the Legislature on April 1, 2004) *with Waltz v Wyse*, 469 Mich 642 (Apr 14, 2004). Defendant Saeed next discusses administrative orders issued by this Court during the COVID-19 pandemic. **Saeed Supplemental Brief, pp 8–9**. It is unclear how the language used by this Court in administrative orders from 2020 should bear on the interpretation of statutes last amended by the Legislature in 2004 and 2012.

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[1] **Saeed Supplemental Brief, p 7.**

[2] A search of the MCL on the Michigan Legislature's website for the terms "savings provision" and "savings statute" returns zero results, while a search for "savings clause" returns a single result, MCL 600.9905. Ironically, this appears to be a textbook example of a savings clause as it is "used in a repealing act to preserve rights and claims that would otherwise be lost." Black's Law Dictionary (12th ed).

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By focusing on the sections of compiled code in a vacuum, rather than the Public Act that created § 5856(c), Defendant Saeed overlooks the clear and unambiguous intent of the Legislature when it created the notice of intent requirement and corresponding tolling provision. *See* Public Act 78 of 1993. The Legislature recognized that it was reducing the relevant period to file a medical malpractice suit by 182 and to avoid that result, created the corresponding tolling provision to save those days in circumstances where they would result in a missed filing deadline. *See Waltz v Wyse*, 469 Mich 642, 667 (2004) (Corrigan, J., dissenting). The absurdity of Defendant's position is clear from the argument that "Both statutes of limitations and savings periods are used to determine the applicable 'period' for filing a medical malpractice claim, but only statutes of limitation (or repose) can be tolled by filing a notice of intent under MCL 600.5856(c)." **Saeed Supplemental Brief, p 10**. The Legislature never designated § 5852 as a savings statute, nor indicated that the period under that statute was to be treated other than a statute of limitations, but it did require that all medical malpractice plaintiffs file a notice of intent and tolled the running of the statutes of limitations and repose specifically for that purpose.

In his arguments concerning the applicability of *Waltz* to the six-month discovery period in § 5838a(2), Defendant Saeed asserts:

> Plaintiff ignores the second portion of the dictionary definition she quotes: a statute of limitation is a "law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred ***or was discovered)***
>
> **Appellee Saeed Supplemental Brief, pp 10–11** (emphasis original).

Plaintiff's Counsel did not "ignore" the second portion of the definition. Rather, Plaintiff's Counsel made the mistake of assuming that the Defendants read § 5838a and would understand why the date an injury was discovered is not an accrual date. MCL 600.5838a(1) ("accrues at the time of the act or omission that is the basis for the claim of medical malpractice, ***regardless of the time***

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the plaintiff discovers or otherwise has knowledge of the claim.") (emphasis added). Because the statute expressly states that claims do not accrue based on discovery, the reference to discovery in Black's law dictionary is irrelevant. *Haynes v Neshewat*, 477 Mich 29, 35 (2007) ("When a statute specifically defines a given term, that definition alone controls."). The six-month discovery rule therefore falls squarely into the "savings clause" definition from Black's Law Dictionary propounded by Defendant because it operates to exempt discovered medical malpractice claims from the operation of the general two-year statute of limitations and accrual rule for medical malpractice claims. The six-month discovery rule is thus untethered from the accrual of a medical malpractice claim and, "acts as an exception to the general bar of the statute of limitations." *Wilson v. Durrani*, 173 NE3d 448, 421 (Ohio 2020).[3]

Defendant asserts that it is difficult to imagine what usefulness savings periods would have if they were simply alternative statutes of limitation yet has failed to clearly articulate what a savings period is under Michigan law in a way that does not include the six-month discovery period or that a savings period cannot contain an alternate statute of limitations.

B. Defendant Saeed's reliance on out of state decisions is misplaced

To bolster his arguments concerning the distinction between savings statutes and statutes of limitations Defendant Saeed relies on the decisions of several out-of-State courts, but fails to compare the statutes at issue in those cases with § 5852, hoping instead that the mere invocation of a "savings statute" in a decision is sufficient to dictate how this Court should interpret § 5852 within the context of Michigan's medical malpractice statutory scheme. For example, the statutes at issue in *Rajvongs v Wright*, 432 SW3d 808 (Tenn 2013), *Saunders v Choi*, 466 NE2d 889 (Ohio 1984), and *Wilson v Durrani*, 173 NE3d (Ohio 2020) are strikingly dissimilar to § 5852. In

[3] Relied upon by Defendant Saeed at **pp 11–12** of his supplemental brief.

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Rajvongs the "savings statute" at issue was Tenn Code Ann § 28-1-105, which provides one year for a plaintiff to refile a case after a dismissal without prejudice. *Rajvongs supra*, at 810. Similarly, in *Saunders* and *Wilson*, the savings statute considered by the Ohio Supreme Court was Ohio Rev Code Ann § 2305.19 which permits the refiling of a claim that was dismissed without prejudice within one year. *Saunders v Choi*, 466 NE2d 889, 892 (Ohio 1984); *Wilson v Durrani*, 173 NE3d 448, 423 (Ohio 2020). It should be noted that not only does Ohio Rev Code Ann § 2305.19 bear the title "*saving* in case of reversal or failure otherwise upon the merits", but the Ohio Supreme Court has defined saving statutes as:

> Savings statutes may apply when a claim filed within the time required by a statute of limitations is dismissed without prejudice but the statute of limitations on the claim has already expired. Savings statutes operate to give a plaintiff a limited period of time in which to refile a dismissed claim that would otherwise be time-barred.
>
> *Int'l Periodic Distribs v Bizmart, Inc*, 768 NE2d 1167, (Ohio 2002) *superseded by statute as recognized by Keller Logistics Group v Navistar, Inc*, No 3:19 CV 735, 2020 US DIST LEXIS 146074 (Ohio Ct App Mar 20, 2020), *followed by Wilson v Durrani*, 173 NE3d 448, 453 (Ohio 2020).

It is little surprise that Defendant Saeed's supplemental brief provides little more than a drive-by analysis of the out-of-state cases upon which it relies. Proper analysis requires comparison of the underlying statutes within their context and the jurisprudence of the state.[4]

II. Principles of Stare Decisis are Insufficient to Save Waltz

A. Defendant's Doctrinal Reliance Arguments are Unpersuasive

Defendant Saeed argues that reversing *Waltz* would undermine the viability of other cases pointing to *Vega v Lakeland Hosp*, 479 Mich 243 (2007), *Ligons v Crittenton Hosp*, 490 Mich 61 (2011), and *Juliana v State Police*, ___ Mich App ___; ___ NW3d ___ (July 17, 2025) (Docket

[4] For example, in what form each state's notice of intent tolling statutes are (or were) drafted and their interaction with other statutes.

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No. 370427). **Saeed Supplemental Brief, p 15**. Defendant is incorrect. This Court's decision in *Vega* did not turn on whether § 5851 was a savings provision or statute of limitations, but rather interaction between §§ 5851(1) and 5851(7), and specifically the effect of the phrase "except as otherwise provided in subsection[] 7 . . ." *Vega supra* at 565. While it is true that the Court referred to §§ 5851(1), (7) as savings provisions, that term was not essential to the outcome of the case. Defendant's reliance on *Ligons* to demonstrate doctrinal reliance is unpersuasive because the ongoing viability of that decision is questionable after *Ottgen v Katranji*, 511 Mich 223, 244 (2023) which reversed *Scarsella v Pollak*, 461 Mich 547 (2000) *followed by Ligons v Crittenton Hosp*, 490 Mich 61, 72–75 (2011).

Finally, Defendant Saeed claims that in *Juliana v State Police*, ___ Mich App ___; ___ NW3d ___ (July 17, 2025) (Docket No. 370427), the Court of Appeals:

> [P]ointed to the clear status of § 5852 as a 'savings provision' that extends a 'statute of limitations' to find that the six-month notice requirement in MCL 600.6431 for claims against the state and its agencies could be extended by § 5852 in wrongful death cases, because the notice period operated like a statute of limitations.
>
> **Saeed Supplemental Brief, p 15**.

A review of the *Juliana* opinion does comport with this claim. First, while the *Juliana* Court did note that § 5852 "is commonly referred to as the wrongful-death savings period", *Juliana*, ___ Mich App___; slip op at 5, the moniker was not relevant to the outcome. Instead, the issue was whether § 5852 applied to the statutory notice period provided by MCL 600.6431, which is not a statute of limitations. *Id*. at 7 ("Our decision in *Rusha* acknowledged the technical distinction between statutory notice requirements and statutory limitations periods . . .). Ultimately, the Court of Appeals held that § 5852 was applicable to the statutory notice requirements of MCL 600.6431 based on the context of the relevant statutes and Legislative intent. *Id*. at 11. Far from supporting Defendant Saeed, the *Juliana* opinion supports Plaintiff's reading of the §§ 5852 and 5856. In

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particular, the Court of Appeals considered that the notice of intent requirement functioned very similarly to a statute of limitations to hold that § 5852 applied to extend the period within which notice could be sent. *Juliana*, *Juliana*, ___ Mich App___; slip op at 8. To the extent the two-year period set forth in § 5852(1) is not a statute of limitations, it is significantly more similar to one than the notice requirement set forth in MCL 600.6431. "A statute of limitations defines a temporal boundary for initiating civil claims, specifically establishing a deadline from the date of accrual." *Id*. slip op at 8 (quoting *Frank v Linkner*, 500 Mich 133, 142 (2017)). Section 5852 meets these requirements. Contrary to Defendant's assertion, § 5852 *is* based on accrual to the extent that the underlying statute of limitations is. MCL 600.5852(4) (tying the latest point to commence an action to the expiration of the underlying statute of limitations).

B. Workability

Defendant's argument that the application of § 5852 is just math and has been easily applied by the lower courts ignores Plaintiff's arguments concerning the doctrinal inconsistencies created by the Court of Appeals decision in *Vanslembrouck*, the inability to establish a standard for what a savings statute is that does not encompass the six-month discovery rule, and the ability of medical malpractice defendants to control whether a plaintiff can timely file a complaint by running out the 182 day non-suit period in § 2912b.

Defendant Saeed argues someone reading § 5852 would know that the two-year period in which to file a complaint is distinct from a period of limitations because the statute itself uses different terms. **Appellee Saeed Supplemental Brief, p 16**. How, and why, they would know this is unclear. Regardless, whether the two-year period is a statute of limitations or not, the statute would be rendered hopelessly confusing if the Legislature use the term "period of limitations" to describe two distinct time periods, the first being the underlying statute of limitations and the second being the two-year period provided in § 5852(1). Naturally, Defendant Saeed does not turn

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this reasoning on § 5838a to explain how a person would know that the six-month discovery period is a statute of limitations rather than a savings provision not subject to § 5856 tolling given that it is not referred to as a "period of limitations" despite the Legislature's clear ability to do so when it wished. *See generally* MCL 600.5805. A sharp-eyed reader might also see that § 5856 uses the term "statutes of limitations" instead of the "period of limitation" used elsewhere pertaining to the filing of a medical malpractice claim. *See, e.g.*, MCL 600.5805(8), MCL 600.5838a(2), MCL 600.5851(7), MCL 600.5852(1). As generally understood, statutes of limitation govern the time for a person to file their lawsuit and statutes of repose set the outer threshold for doing so and a person reading § 5852 will see a two-year period within which a claim may be filed as meeting that definition.

Defendant Saeed's brief underscores the issues created by the *Waltz* decision lurking in the background of this case. Defendant Saeed points to this Court's 2010 amendments to MCR 2.116 and 2.118 as ameliorating the harshness of *Ligons v Crittenton Hosp*, 490 Mich 61 (2011) and *Kirkbaldy v Rim*, 478 Mich 581 (2007). **Saeed Supplemental Brief, p 18**. It is unclear how the Court being compelled to change the Court rules to avoid the downstream consequences of the *Waltz* decision demonstrates the decision's workability, and as Justice Markman noted in his concurrence to the 2010 amendments, the rules are:

> [P]ermissive in nature . . . If a court permits an amended affidavit of merit, MCR 2.118(D) applies. The amended affidavit of merit relates back. If a court denies a request to amend a defective affidavit of merit, the *Kirkaldy* provides the appropriate course of action. The action is dismissed without prejudice.
>
> 485 Mich at cclxxix–cclxxx (Markman, J., concurring).

Defendant casts aspersions on Plaintiff's counsel for their "singular misunderstanding or ignorance of the law" to bolster his argument that the lack of tolling in wrongful death cases does not, in fact, reduce the time permitted to file. This smartly avoids discussion of the circumstances

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of the personal representative plaintiffs in wrongful death cases. These individuals, often family members of the deceased, must deal with the immediate fallout from the death of their loved one or family member before they begin to manage the affairs of the estate. They may be unaware that any medical malpractice has occurred and only learn about it much later on. In other cases, an estate might be opened a few months after death for purpose of probating the estate, unwittingly triggering the running of the two-year period provided by § 5852. In all cases, once medical malpractice is suspected, the personal representative must obtain the relevant medical records before locating an attorney to review them and agree to represent the estate in a medical malpractice action. Since medical malpractice tort reform passed, those attorneys must review the underlying medical records, submit a notice of intent, and retain experts to provide affidavits of merit. As explained by the Court of Appeals in *Juliana*, upon which Defendant Saeed relies, the "wrongful-death savings provision . . . is intended to safeguard plaintiff's rights in wrongful-death actions, particularly when confronting statutory deadlines." *Juliana v State Police*, ___ Mich App ___; ___ NW3d ___ (July 17, 2025) (Docket No. 370427); slip op at 11.

Defendant ends by citing *Waltz* to demonstrate that the rule does not shorten the time in which to file a medical malpractice claim, noting that the Court explained the plaintiff had "*five years plus 182 days* to commence her lawsuit following the accrual of her cause of action." **Appellee Saeed Supplemental Brief, p 20** (quoting *Waltz*, 469 Mich at 652 n 14). Not only is this unrealistic, it is still short of the six-year statute of repose for medical malpractice *that is* expressly tolled by § 5856(c).

CONCLUSION

WHEREFORE, Plaintiff Estate of Ernest Maurice respectfully requests that this Court GRANT its Application for Leave to Appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Plaintiff-Appellant's Application for Leave to Appeal complies with the type-volume limitation set forth in MCR 7.212(G). This brief uses a 12-point proportional font (Times New Roman), and the word count pursuant to MCR 7.212(G), based on the word count of the word-processing system used to produce this document, for this brief is [3175].

Date: January 23, 2026

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