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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 APPELLES MCLAREN HEALTH CARE CORPORATION AND DR. PAUL W. BROWN

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ORAL ARGUMENT REQUESTED

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ARGUMENT

Defendants McLaren and Dr. Brown (hereinafter "Defendants") do, as the other Appellees do, and ask this Court to focus on form over substance – but even their dedication to form only goes so far as it serves their purposes. Perhaps the Legislature was not relying on the definitions from Black's Law Dictionary when drafting the Revised Judicature Act.

I. Waltz was Wrongly Decided

A. Defendants Fail to Read the Medical Malpractice Legislative Scheme as a Whole

Defendants begin by asserting that the language and structure of the Revised Judicature Act "create[s] three analytically distinct timing mechanisms – statutes of limitation or repose, saving provisions and tolling provisions – each serving a different function. **Defendants' Supplemental Brief, p 9**. According to Defendants, "Because § 5856(c) tolls only statutes of limitation or repose, it cannot be read to toll a saving provision without collapsing these distinct statutory functions into one and rewriting the Legislature's framework." ***Id***. Defendants then explain that § 5852 is a saving provision because it "does not define when a claim expires, it assumes expiration and then permits filing anyway." *Id*. It is unclear how this analysis would also not apply to § 5838a(3) which permits filing of a claim after discovery and after the running of the statute of repose.

Defendants begin with a discussion of the plain language of § 5856, noting that it only applies to "statutes of limitation or repose" and that "[t]he phrases 'saving clause' or 'saving provision' are not found in § 5856." **Defendants' Supplemental Brief, p 15**. It must be noted that "saving provision" and "saving statute" are not found anywhere in the MCL.[1] Turning to the

[1] 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,

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language of § 5852, Defendants emphasize the use of the phrase "period of limitations" as evidence that section does not provide an alternative statute of limitations. **Defendants' Supplemental Brief, p 16**. Defendants gloss over the use of different terms in §§ 5856 and 5852, implicitly recognizing that despite the use of different language, the Legislature meant that "periods of limitation" are included within the phrase "statutes of limitation" *See* **Defendants' Supplemental Brief, p 18**. Urging this Court to "refrain from applying § 5856(c) where it was not intended to apply," *id*. at p 18, Defendants ignore the Legislature's clear intent for *all* medical malpractice cases to have a 182-day non-suit period with associated tolling to avoid any prejudice to the plaintiff and, despite arguing "courts may not expand statutes or distort legislative intent by inserting terms the legislature deliberately omitted," *id*. at p 15, Defendants ignore the Legislature's use of "period of limitations" in §§ 5805, 5838a, and 5852 but "statute of limitations" in § 5856(c). Plaintiff understands that "statutes of limitations" includes "periods of limitation" despite the use of different terms because it is the only thing that makes sense. But it is an example in this area of the MCL where it is possible to read too much into word choice, especially where there is no evidence the Legislature meant to deny wrongful death plaintiffs the tolling associated with the non-suit notice of intent period.

Defendants assert that the phrase "'although the period of limitations has run,' only has meaning if the statute is understood to save a claim that would otherwise be time-barred." **Defendants' Supplemental Brief, p 16**. However, it can also be easily understood as recognizing that § 5852 provides a period of limitations based on the underlying claim in wrongful death cases.

B. When Secondary Sources are Properly Reviewed, They Provide no Support to Defendants

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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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Defendants struggle to explain how, under their proposed definition, the six-month discovery period in § 5838a(2) is a statute of limitations rather than a saving provision. **Defendants' Supplemental Brief, pp 21–24**. For example, after providing their proposed definitions that, "a statute of limitations establishes when a claim is barred, while a saving provision operates to preserve a claim that would otherwise be barred," **Defendants' Supplemental Brief, p 20**, Defendants qualify this by asserting "[T]he defining feature of a limitations period is that it bars claims after accrual." *Id*. at p 23. To salvage their argument, Defendants claim that "§ 5838a(2) then creates a narrow exception to that accrual date by tying timeliness to discovery rather than the wrongful act." **Defendants' Supplemental Brief, p 22**. Unlike Defendant Saeed, Defendants here do not go so far as to claim that the six-month discovery period provides an alternate accrual date.[2] However, even this "exception" to accrual creates doctrinal problems for Defendants. *See* **Defendants' Supplemental Brief, p 20** ("Black's Law Dictionary defines [a saving clause] as '[a] statutory provision exempting from coverage something that would otherwise be included.'").

Defendants explain the purpose behind tolling statutes which, "exist to mitigate the harshness of statutes of limitation in circumstances where extending the time does not prejudice the defendant because the defendant already has notice of the claim . . ." **Defendants' Supplemental Brief, p 26** (citing *Carter v DTN Mgt Co*, 515 Mich 61, 86 (2024)). While that rationale would appear to support Plaintiff's argument that tolling under § 5856(c) applies to § 5852, Defendants simply argue that rationale does not apply to § 5852 "because tolling statutes are tailored to statutes of limitation, they do not automatically apply to saving statutes absent express legislative directive . . ." **Defendants' Supplemental Brief, p 9**. Section 5856(c) by its

[2] A position with no support in the plain language of § 5838a.

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express terms applies only in cases where a notice of intent pursuant to MCL 600.2912b is served, it is a very targeted tolling provision that is the corollary to the notice of intent requirement and non-suit period.

Finally, Defendants turn to the treatment of "savings statutes" in other jurisdictions and hope that Plaintiff does not read. For example, the statutes at issue in *Topazio v ACME Co*, 928 NE2d 469 (2010), *Richards v Vanderbilt Univ Med Ctr*, 706 SW3d 319 (Tenn 2025), *Davis v State*, 267 Or App 264 (2014), and *Wilson v Durrani*, 173 NE3d (Ohio 2020) are strikingly dissimilar to § 5852. In *Richards* 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. *Richards supra*, at 321. Similarly, in *Topazio* 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. *Topazio v ACME Co*, 928 NE2d 469, 471 (2010); *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).

Defendants' reliance upon *Davis v State*, is more perplexing. Once again, the savings statute at issue involved the ability of plaintiffs to refile a case dismissed without prejudice. *Davis*, 340 P3d at 716 (citing ORS 12.220). However, it appears that Defendants glossed over part of the opinion

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which explains that the Oregon Supreme Court has previously held that the three-year survival statute *is* a statute of limitations rather than a savings statute. *Id*. at 717 (citing *Bell v Tri-County Metro Transp Dist*, 301 P3d 901, 904 (Or 2013)). Proper analysis requires comparison of the underlying statutes within their context and the jurisprudence of the state[3] and contrary to Defendants assertion that "[a]lthough § 5852, operates within a defined window of time, it does not bar claims after accrual," **Defendants' Supplemental Brief, p 28**, § 5852(4) *is* based on the date of accrual for the underlying claim (as long as the underlying period of limitations is based on an accrual date). MCL § 5852(4) ("an action shall not be commenced under this section later than 3 years after the period of limitations has run.").

II. Principles of *Stare Decisis* are Insufficient to Save *Waltz*

A. Defendants fail to acknowledge the problems created by Waltz

Defendants argue that *Waltz* is workable and that reversing it would "replace a predictable deadline with a fluctuating one that depends on the timing and interaction of multiple statutory provisions." **Defendants' Supplemental Brief, p 32**. Considering that all other medical malpractice statutes of limitations already "depend[] on the timing and interaction of multiple statutory provisions," it is unclear what Defendants mean. It is also unclear how the current rule provides a "predictable deadline" rather than a fluctuating one, when under the current framework whether tolling applies depends on whether the claim is brought under the time period provided by §§ 5805, 5838a(2), or 5852 in wrongful death cases and the current rule requires plaintiff's counsel to identify the first issuance of letters of authority in respect to accrual of the cause of action, determine whether they fall within one of the "real" statutes of limitation for medical

[3] 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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malpractice cases, and if not, subtract 183 days[4] and use that as the last date to possibly file a notice of intent.

Defendants also ignore the workability problems created by *Waltz* and their proposed interpretations in terms of the six-month discovery period and the applicability of § 5856(c) tolling to claims brought under § 5851(7) which also meets their definition of a saving statute.

B. There are no reliance interests

Defendants' attempt to demonstrate the "significant" reliance interests in *Waltz* falls flat. First, Defendants argue "Plaintiffs' counsel have relied on Waltz to evaluate viable claims, calculate filing deadlines and determine the appointment of personal representatives." **Defendants' Supplemental Brief, p 33**. This is a bizarre argument. Overruling *Waltz* will not prejudice plaintiffs' attorneys because it will simplify statute of limitations calculations going forward *and* will harmonize the medical malpractice statutory scheme, avoiding the artificial distinction between otherwise timely claims based on the Court's determination that § 5852 is a savings statute and therefore, cannot provide a period of limitations. Defendants next note that they rely on *Waltz* to manage risk. *Id*. at p 34. That argument should hold no merit because other provisions permit medical malpractice claims to be filed *long* after the maximum three-year period[5] provided in § 5852(4). *See, e.g.*, MCL 600.5838a(2) (providing six year statute of repose for medical malpractice claims); MCL 600.5838a(3) (eliminating statute of repose in cases where fraudulent concealment or reproductive injury is at issue); MCL 600.5851(1) (permitting claims up to one year after the disability of insanity is removed); MCL 600.5851(7) (permitting medical malpractice claims up to a child's tenth birthday); (permitting medical malpractice claims up to

[4] Because absent tolling § 5856(c) tolling, a plaintiff cannot file the day after if it exceeds the time provided by § 5852.
[5] Five years including the underlying two-year period of limitations from § 5805(8).

fifteenth birthday if injury involves reproductive injury). Even one of the other Appellee's recognizes that there are no significant reliance interests. *See* **Cypress Supplemental Brief, p 25** ("[I]t is unlikely that overturning *Waltz* would result in the 'practical rea-world dislocations' or 'chaos' that trigger the reliance interest at issue in a stare decisis analysis . . .").

CONCLUSION

WHEREFORE, Plaintiff 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 [2187].

Date: January 23, 2026

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