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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 APPELLEE CYPRESS CARDIOLOGY

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. Defendant Cypress Fails to Demonstrate that *Waltz* Was Correctly Decided

In a case where its arguments rely on the meaning of the undefined terms "statutes of limitations or repose", it is impressive that Defendant Cypress managed to argue that "reading MCL 600.5838a(1) and (2), *together* demonstrates that the six-month discovery period provides an *alternative* time for accrual to that established in MCL 600.5838a(1)" **Appellee Cypress Supplemental Brief, p 11**, given that accrual is explicitly defined as ignoring the date of discovery. MCL 600.5838a(1). Where Plaintiff asks this Court to consider the language "statutes of limitations or repose" within the context of the medical malpractice legislative scheme, Defendant Cypress asks this Court to eschew the Legislative definition of accrual as set forth in § 5838a(1) in favor of an inconsistent dictionary definition. Were this Court to simply adopt the Black's Law Dictionary definition of statute of limitations,[1] § 5852 *meets* the criteria because it provides a final date within which claims must be filed predicated on the underlying statute of limitations and accrual. For example, in this case the cause of action accrued against Dr. Belal on July 17, 2020. **Appellee Cypress Supplemental Brief, p 3**. Regardless of when an estate was opened, the period provided by § 5852 would expire no later than July 17, 2025 because § 5852 adds, at most, three years to the statute of limitations. MCL 600.5852(4). If the cause of action accrued on July 18, 2020, the period provided by § 5852 would expire no later than July 18, 2025. Under the definition from Black's Law Dictionary, would seem to meet the definition of a statute of limitations.

Defendant Cypress attempts to avoid this result by noting the decision in *Miller* is consistent with the dictionary definition for a statute of limitations. **Appellee Cypress**

[1] Plaintiff does not advocate for this as it is inconsistent with the express language of the relevant statutes.

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Supplemental Brief, p 11. The reason Plaintiff raised the six-month discovery rule as an issue is that it represents a doctrinal split based on necessity. Under the *Waltz* standard, the six-month discovery period would seem to be a savings statute because it provides an exception to the underlying period of limitations. The *Miller* Court resolved this issue by simply holding:

> Contrary to defendants' assertions, the six-month discovery rule is a distinct period of limitation. It is a statutory provision that requires a person who has a cause of action to bring suit within a specified time. As an alternative to other periods of limitation, it is itself a period of limitation.
>
> *Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196, 202 (2002).

Defendant Cypress asserts that treating the two-year period in § 5852(1) as a statute of limitations would "essentially move the date of a medical-malpractice claim . . ." **Appellee Cypress Supplemental Brief, p 20**. This is incorrect as there is a single accrual date for *all* medical malpractice claims, "the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). Missing from § 5838a(1) that would support Defendant Cypress' arguments is "except as otherwise provided in this subsection" language that is found a few paragraphs later in § 5838a(2). Defendant Cypress also misunderstands *Miller*. *Compare* **Appellee Cypress Supplemental Brief, p 20** ("And MCL 600.5838a(2) provides an alternative accrual date and statute of limitations based on when a plaintiff discovered or should have discovered their claim.") *with Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196, 202 (2002) ("The plain language of § 5838a(2) provides two distinct periods of limitation: *two years after the accrual of the cause of action*, and six months after the existence of the claim was or should have been discovered . . .") (emphasis added).

Defendant Cypress wants to have its cake and eat it too. On the one hand, it argues that § 5852 is the filter for all wrongful death claims and is applicable beyond just medical malpractice

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and, on the other hand, Defendant Cypress argues that the Legislature could have included accrual language in § 5852 (presumably for medical malpractice claims). *Compare* **Appellee Cypress Supplemental Brief, p 20** *with* ***id.*** **at p 21.** Defendant Cypress asserts that "The Legislature expressly discusses accrual in MCL 600.5805 . . . But, there is no reference to accrual in MCL 6005.5852." *Id*. at p 21. It is unclear what "express" accrual language Defendant references in MCL 600.5805, because other than providing that plaintiffs must initiate a claim within the time periods prescribed by this section "after the claim first accrued", MCL 600.5805(1), there is no indication *when* a claim accrues in § 5805. Accrual generally is addressed by MCL 600.5827, while accrual for medical malpractice claims is set forth in § 5838a(1) and nowhere else. Section 5852's filtering of claims, **Appellee Cypress Supplemental Brief, p 20**, does nothing to explain why the tolling period for medical malpractice lawsuits applicable in all other circumstances would be stripped away when the corresponding non-suit period is not.

Defendant Cypress also points to the 2004 amendment to § 5856 as evidence of the Legislature's acquiescence in the characterization of § 5852 as a savings statute. **Appellee Cypress Supplemental Brief, p 22** ("In 2004, post-*Lindsey* and post-1993 tort reform, the Legislature amended MCL 600.5856."). While this is true, it ignores that the effect of designating § 5852 as a "savings statute" was unclear at best. Specifically, the *Lindsey* Court explained that "the statute of limitations savings provision operates *to suspend the running of the statute* until a personal representative is appointed . . ." *Lindsey v Harper Hosp*, 455 Mich 56, 61 (1997) (emphasis added). Elsewhere, the *Lindsey* Court explained "[t]he statute has the effect of *extending the period of limitations* set forth in MCL 600.5805 . . ." *Id*. at 64 (emphasis added). It is unclear how the Legislature could anticipate the ruling in *Waltz* given that there was no indication that the period

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provided in § 5852 would be treated as anything other than an extension to the underlying statute of limitations.

I. Stare Decisis is Insufficient to Save *Waltz*

Defendant Cypress appears to agree that reliance interests to not weigh in favor of retaining *Waltz*. **Appellee Cypress Supplemental Brief, p 24**. Defendant Cypress claims that there are no workability issues created by the *Waltz* decision because:

- The decision does not put timeliness in the hands of a defendant. **Appellee Cypress Supplemental Brief, pp 25–28.**
- To the extent that the six-month discovery period is a savings clause, the issues associated with that are for the Legislature, not the Court to resolve. *Id*. at pp 28–29.
- "Tensions" between § 5852 and the statute of repose are issues to be addressed by the Legislature. *Id*. at p 29.
- And the *Waltz* decision does not impermissibly limit the time provided by the Legislature within which to bring a claim. *Id*. at pp 29–32.

Plaintiff will address each argument in turn.

First, Defendant Cypress essentially argues that timeliness is in the hands of the plaintiff because they just need to ensure that the notice of intent is filed six months prior to the expiration of the two-year period provided by § 5852. **Appellee Cypress Supplemental Brief, p 27**. This ignores the thrust of Plaintiff's argument on this matter, which is under *Waltz* rather than having a bright line created by the Legislature, different plaintiffs pursuing a case under the § 5852 who file notices of intent less than six months before the end of the two-year period may obtain different outcomes based on the response (or lack thereof) of the defendants. **Plaintiff's Supplemental Brief, pp 15–16**. In normal cases, this outcome is avoided pursuant to the tolling provided by §

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5856(c). However, under *Waltz* in wrongful death cases – and following the logic of *Waltz*, cases brought under the six-month discovery period – defendants may be given the choice of whether a claim can be timely filed simply by responding. Defendant attempts to frame this in terms of what plaintiffs can, or should, do to avoid this outcome but does not deny that in some cases, defendants will be given the opportunity to determine whether a plaintiff can timely file a lawsuit. *See generally* **Appellee Cypress Supplemental Brief, p 25–28**.

This leads to Defendant Cypress' arguments concerning the six-month discovery rule. It is Plaintiff's point that the Legislature would not create a statutory scheme with such absurd and explicable outcomes, when the intent for tort reform was to create a uniform scheme to address medical malpractice litigation.

Plaintiff wants to clarify that she was not arguing that there was a "tension" between § 5852 and the six-year statute of repose. Instead, Plaintiff was noting that § 5856(c) serves to toll the statute of repose and relevant statutes of limitations for medical malpractice actions and that the time-period provided by § 5852 is still subject to the statute of repose. This creates a strange outcome where a plaintiff could toll the date for which any claim must be filed irrespective of the discovery of the claim and whether it is being brought pursuant to § 5852 but *not* toll the lesser limit provided by § 5852.

Concerning Defendant Cypress' argument that *Waltz* does not impermissibly limit the time for medical malpractice claimants to file a lawsuit, Plaintiff relies on her previous briefing and will simply highlight that under *Waltz*, a personal representative appointed after the underlying statute of limitations has run, has 18 months to initiate a lawsuit (by filing a notice of intent) where all

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other medical malpractice plaintiffs are entitled to the full period in which to serve a notice of intent.[2]

CONCLUSION

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

Respectfully submitted,

Date: January 23, 2026

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[2] Assuming that the six-month discovery period is a statute of limitations given Defendants' arguments concerning savings statutes. If it not, it does not work because it would be impossible for a plaintiff to identify an injury and get a notice of intent drafted and served on the same day to try and fit the 182-notice period into the six-month discovery period.

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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 [1781].

Date: January 23, 2026

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