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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,

Defendants-Appellees

Supreme Court No.168462
Court of Appeals Case No. 368566
Genesee County Circuit Court
Case No.23-119425-NH

APPENDIX OF EXHIBITS TO DEFENDANT-APPELLEE ELMAHDI M. SAEED'S ANSWER TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Nauts, McKinney, Dwaihy & Beach, PLLC
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Livonia, Michigan 48152

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APPENDIX OF EXHIBITS

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EXHIBIT 1

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

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

Plaintiffs,

vs.

File No. 2023-119425-NH

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

Hon. Celeste D. Bell
(P41453)

Defendants.

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bmacdonald@ccglawyers.com

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

At a session of Court held in the Genesee County Courthouse, Flint, Michigan.

PRESENT: HONORABLE CELESTE D. BELL
CIRCUIT JUDGE

A TRUE COPY
Genesee County Clerk

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This matter being before the Court on the Motions for Summary Disposition filed by Defendants Elmahdi Saeed, M.D., Dr. Farouk M. Belal, Dr. Paul W. Brown, Jr., and McLaren Health Care Corporation, and the Court having heard oral arguments on October 23, 2023, and being otherwise fully advised;

IT IS ORDERED that the Defendants' Motions for Summary Disposition are hereby GRANTED for the reasons set forth on the record, and Plaintiff's claims against all Defendants are dismissed with prejudice; and

IT IS FURTHER ORDERED that this is a final order which disposes of the last pending claim and closes this case.

CELESTE D. BELL
P-41453

CELESTE D. BELL, CIRCUIT JUDGE

Dated: 10-23-23

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EXHIBIT 2

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Order

Michigan Supreme Court
Lansing, Michigan

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

March 29, 2024

166495

KERAN ERNEST, Personal Representative of the ESTATE OF MAURICE ERNEST,
Plaintiff-Appellant,

v

SC: 166495
COA: 368566
Genesee CC: 2023-119425-NH

PAUL W. BROWN, JR., M.D., ELMAHDI M. SAEED, CYPRESS CARDIOLOGY, PLLC, and McLAREN HEALTH CARE CORPORATION,
Defendants-Appellees.

/

On order of the Court, the application for leave to appeal prior to decision by the Court of Appeals is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court before consideration by the Court of Appeals.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 29, 2024

Clerk

a0325

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EXHIBIT 3

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

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

Plaintiffs,

vs.

File No. 2023-119425-NH

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

Hon. Celeste D. Bell
(P41453)

Defendants.

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DEFENDANT ELMAHDI M. SAEED, M.D.'S MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant ELMAHDI SAEED, M.D., by his attorneys, SMITH, MARTIN, POWERS & KNIER, P.C., who, pursuant to MCR 2.116(C)(7), (8), and (10), hereby seeks summary disposition of Plaintiff's claims, stating as follows:

1. This is an action alleging medical malpractice arising out of care and treatment provided by Defendant on July 16, 2020.

2. A two-year statute of limitations applies to claims alleging medical malpractice. MCL 600.5805(6).

3. Plaintiff's complaint was filed on August 14, 2023.

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4. Plaintiff's complaint was not filed within the two-year statute of limitations.

5. Plaintiff's case alleges wrongful death.

6. Plaintiff was issued letters of authority by the Genesee County Probate Court on June 7, 2021.

7. Pursuant to MCL 600.5852, Plaintiff had two years from the date the letters of authority were issued by the Genesee County Probate Court, or until June 7, 2023, in which to commence this action.

8. The sending of a notice of intent to file claim does not toll the time to file suit under MCL 600.5852.

9. As more fully set forth in Defendant's brief in support, Plaintiff's claim is time barred, entitling Defendant to dismissal as a matter of law.

WHEREFORE, Defendant ELMAHDI SAEED, M.D., respectfully requests this Honorable Court grant his Motion for Summary Disposition and dismiss Plaintiff's claims against this Defendant, together with costs and attorney fees wrongfully incurred.

Dated: 9-13-23

SMITH, MARTIN, POWERS & KNIER, P.C.

BY _____

DOUGLAS C. SMITH (P30271)
ALAN R. SULLIVAN (P41613)
Attorneys for Defendant Saeed
900 Washington Avenue, P.O. Box 219
Bay City, MI 48707-0219
(989) 892-3924

PROOF OF SERVICE

On 9-13-23, I served via First Class Mail and electronic transmission a copy of the foregoing upon all counsel of record at their respective addresses and declare under penalty of perjury that this statement is true to the best of my knowledge, information and belief.

Violetta G. Smith

Violetta G. Smith

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

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

Plaintiffs,

vs. File No. 2023-119425-NH

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

Hon. Celeste D. Bell
(P41453)

Defendants.

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DEFENDANT ELMAHDI SAEED, M.D.'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

Introduction

In this medical malpractice action, Plaintiff's claims are time barred. The action was not filed within the two-year statute of limitations, nor is it timely under the savings provision of MCL 600.5852. Plaintiff's claims are time barred, entitling Defendant to dismissal as a matter of law.

Brief Factual Background

On July 16, 2020, Plaintiff's decedent Maurice Ernest presented to the emergency department at McLaren-Flint Hospital with complaints of chest pain. Mr. Ernest was evaluated and admitted for further

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evaluation. The patient was being worked up, and on July 17, 2020, Mr. Ernest passed away from a reported bilateral pulmonary embolism.

On June 7, 2021, Keran Ernest was appointed personal representative of the estate of Maurice Ernest by the Genesee County Probate Court. Letters of authority were issued at that time. **(Exhibit 1)** On February 10, 2023, a notice of intent to file claim was sent to Defendant Elmahdi Saeed, M.D., as well as others. **(Exhibit 2)** On August 14, 2023, Plaintiff filed a complaint, essentially alleging a failure to diagnose and treat the pulmonary embolism, which ultimately resulted in the patient's death.

Standard of Review

When deciding a motion under MCR 2.116(C)(7), the court considers all documentary evidence and accepts the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it. A motion under MCR 2.116(C)(7) is properly granted when the statute of limitations bars a claim. *Kuzner v Raksha Corp*, 41 Mich 169 (2008). Summary disposition is proper under MCR 2.116(C)(8) if the non-moving party has failed to state a claim upon which relief can be granted. Such claims must be so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Kuzner, supra.* A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. The court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152 (2019).

Claim Barred by Statute of Limitations

This is a medical malpractice action arising out of events occurring on July 16, 2020. MCL 600.5805(6) provides that a two-year statute of limitations applies to medical malpractice actions. Since the claims accrued on July 16, 2020, Plaintiff had until July 16, 2022, in which to timely file this action. It was not filed until more than a year later, on August 14, 2023. It is untimely.

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In certain circumstances, MCL 600.5856 allows tolling of the statute of limitations. Tolling would apply if a notice of intent is properly served prior to the expiration of the statute of limitations, but the notice period under MCL 600.2912b expires after the time for the statute of limitations. The notice of intent tolling does not apply in this case since the notice was not sent until after the statute of limitations had already expired.

The notice of intent to file claim was sent on February 10, 2023, approximately seven months after the statute of limitations had expired. Consequently, tolling pursuant to MCL 600.5856 does not apply, and Plaintiff's claim is untimely.

Savings Provision Expired Before Claim Filed

This is an action alleging wrongful death. MCL 600.5852 is a savings provision in wrongful death actions that allows additional time to bring an action, even though the statute of limitations has expired. In those situations, MCL 600.5852 allows a claim to be commenced within two years of issuance of the letters of authority to the personal representative of the estate. In this case, the letters of authority were issued to Plaintiff on June 7, 2021. Therefore, under the savings provision, the claim needed to be filed on or before June 7, 2023. Since the complaint was not filed until August 14, 2023, over two months later, the claim is untimely.

Although a notice of intent was sent on February 10, 2023, tolling does not apply. This issue is specifically addressed in *Waltz v Wyse*, 469 Mich 642 (2004). The Michigan Supreme Court in that case determined that the savings provision is not a statute of limitations, and that the notice of intent does not toll the time allowed under the savings provision to bring a claim. Consequently, the two years from issuance of the letters of authority under the savings provision cannot be tolled by the notice of intent.

The Supreme Court in *Waltz* was clear that Section 5852 is a savings provision and not a statute of limitations. The notice tolling provision in Section 600.5856 explicitly applies only to the statute of

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limitations. It does not operate to toll the additional period permitted under Section 600.5852 for filing wrongful death actions.

The courts have continued to apply the *Waltz* decision. In *Poniewierski v William Beaumont Hospital – Royal Oak*, unpublished Decision 356925 (2022) **(Exhibit 3)**, the Court of Appeals affirmed the trial court's decision applying *Waltz* and held that the service of a notice of intent did not toll the wrongful death savings provision under MCL 600.5852. In that case, the claim occurred no later than June 3, 2017, and the two-year statute of limitations would have expired by June 3, 2019. However, a personal representative was appointed on May 14, 2018, which would have allowed the claim on or before May 14, 2020. Although this particular case involved an issue with the COVID tolling provisions, the court continued to apply the decision in *Waltz* that the notice of intent did not extend the time allowed under the savings provision.

The present case does not involve any COVID tolling issues. Plaintiff had two years after the issuance of the letters of authority to the personal representative to bring this claim. Since it was not timely brought, dismissal is appropriate.

Conclusion

In this medical malpractice case, Plaintiff's claim is untimely. It has been brought beyond the two-year statute of limitations. It is also beyond the two-year time allowed under the savings provision contained in MCL 600.5856, which allows a claim two years after issuance of the letters of authority to the personal representative. Tolling does not apply. This claim is untimely, entitling Defendant to dismissal as a matter of law.

WHEREFORE, Defendant ELMAHDI SAEED, M.D., respectfully requests this Honorable Court grant his Motion for Summary Disposition and dismiss Plaintiff's claims against this Defendant, together with costs and attorney fees wrongfully incurred.

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Dated: 9-13-23

SMITH, MARTIN, POWERS & KNIER, P.C.

BY _____

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ALAN R. SULLIVAN (P41613)
Attorneys for Defendant Elmahdi Saeed, M.D.
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Bay City, MI 48707-0219
(989) 892-3924

PROOF OF SERVICE

On 9-13-23, I served via First Class Mail and electronic transmission a copy of the foregoing upon all counsel of record at their respective addresses and declare under penalty of perjury that this statement is true to the best of my knowledge, information and belief.

Violetta G. Smith

Violetta G. Smith

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EXHIBIT 1

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Approved, SCAO

STATE OF MICHIGAN PROBATE COURT COUNTY OF GENESEE	LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE

20212175060E

Estate of Maurice Ernest, deceased

TO: Name and address

Keran Ernest
3292 Jacque St.
Flint, MI 48532

Telephone no.
(810) 908-0582

You have been appointed and qualified as personal representative of the estate on 6-7-2021
Date

You are authorized to perform all acts authorized by law unless exceptions are specified below.

[ ] Your authority is limited in the following way:

[ ] You have no authority over the estate's real estate or ownership interests in a business entity that you identified on your acceptance of appointment.

[ ] Other restrictions or limitations are:

[ ]These letters expire: _____
Date

6-7-2021
Date

Nicole Johnson
~~Judge (formal proceedings)~~/Register (informal proceedings) Bar no.

SEE NOTICE OF DUTIES ON SECOND PAGE

CF Legal, PC
Craig R. Fiederlein P55842
Attorney name (type or print) Bar no.
302 E. Court St.
Address
Flint, MI 48502 (810) 232-1112
City, state, zip Telephone no.

I certify that I have compared this copy with the original on file and that it is a correct copy of the original, and on this date, these letters are in full force and effect.

6-7-2021
Date

Nicole Johnson
Deputy Register

Do not write below this line - For court use only

FILED
JUN 07 2021
GENESEE COUNTY
PROBATE COURT

MCL 700.3103, MCL 700.3307, MCL 700.3414, MCL 700.3504, MCL 700.3601,

PC 572 (2/13) LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE MCR 5.202, MCR 5.206, MCR 5.307, MCR 5.310

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EXHIBIT 1

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EXHIBIT 2

OLIVER LAW GROUP
ATTORNEYS AT LAW

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Alyson Oliver, Esq.
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aoliver@oliverlawgroup.com
www.oliverlawgroup.com

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February 10, 2023

Sent via USPS First Class Mail and USPS Certified Mail Delivery

McLaren Regional Medical Center
McLaren Health Care Corporation
401 S. Ballenger Hwy
Flint, MI 48532-3685

Dr. Paul W. Brown Jr.
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Lake Orion, MI 48359-1747

Cypress Cardiology PLLC
Attn: Farouk Belal
1286 S. Linden Road Suite A
Flint, MI 48532

Elmahdi M. Saeed
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Grand Blanc, MI 48439-7439

Cypress Cardiology PLLC
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Flint, MI 48532

Dr. Farouk M. Belal
6085 Westknoll Drive #403
Grand Blanc, MI 48439

RE: Estate of Maurice Ernest (DOB 4/29/1966/DOD 7/17/2020)

Dear Addressees:

You are hereby notified that the Estate of Maurice Ernest intends to file suit against you upon the expiration of 182 days from the above date. This notice is being provided pursuant to MCL 600.2912b (2) and (4). That same statute, under subsection (5) and (7), places certain obligations upon each of you as well. You are required to provide the undersigned with access to all of Maurice Ernest's medical records and images that are in your control; or, in the alternative, you are permitted to provide a copy of his medical records and images to the undersigned. Access to those records must be provided within 56 days after your receipt of this notice. The term

EXHIBIT 2

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"medical records" includes but is not limited to billing and payment records, any diagnostic test results, diagnostic imaging, any consultation reports, any photographs, any records that reflect contacts with Maurice Ernest or with a member of her family, prescription forms, and clinical notes. A formal request is accordingly hereby made for those records. Please produce all images in DICOM format.

Second, you are required to provide a notice of meritorious defense pursuant to MCL 600.2912b (7) within 154 days from the above date. If either of the above requirements is not met in a timely manner, the undersigned will seek appropriate sanctions from the court once this matter has been filed in Genesee County Circuit Court.

As stated above, MCL 600.2912b (5) specifically provides that "within 56 days…the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility." In addition, MCL 600.2912f specifically provides, "A person who has given notice under section 2912b…waives for purposes of that claim…the privilege created by section 2157 and any other similar privilege created by law with respect to a person or entity who was involved in the acts, transactions, events or occurrences that are the basis for the claim…or who provided care or treatment to the claimant…in the claim…for that condition or a condition related to the claim…either before or after those acts, transactions, events or occurrences, whether or not the person is a party to the claim…".

The Michigan legislature has defined the term "Medical Record" in MCL 333.26263 (i) as follows: "Medical record means information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the plaintiff's

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health". That definition certainly includes billing and payment information and images obtained during diagnostic testing, in addition to the records that would normally be maintained by the health professional or health facility. The HIPAA regulations also include billing and payment information in their definition of protected health information. The Michigan Supreme Court recently held that billing and payment records are part of a patient's medical records and must be produced by the health care professional pursuant to MCL 600.2912b (5).

In addition, MCL 333.26263 (a) defines an "Authorized Representative" as follows: "A person empowered by the patient by explicit written authorization to act on the patient's behalf to access, disclose, or consent to the disclosure of the patient's medical record, in accordance with this act". MCL 333.26265 (1) provides that, "a patient or his or her authorized representative has the right to examine or obtain the patient's medical record. Obviously, since I am the patient's attorney, those provisions permit me to request the patient's medical record, which I formally requested above. If for any reason you do not believe that I have been retained by the claimant, please contact the undersigned; a copy of the designation of representative form will be provided.

Recognizing that the Michigan Supreme Court has held that the most restrictive provisions of Michigan law or federal law control the release of medical records, it is appropriate to look at the HIPAA regulations regarding the release of medical records. 45 CFR 164.512 details the situations under which a health professional or health facility may disclose protected health information without a written authorization from the individual. Section 164.512 (a) provides: "A covered entity may use or disclose protected health information to the extent that *such use or disclosure is required by law and the use of the disclosure complies with and is limited to the relevant requirements of such law*". In addition, the HIPPA law clearly indicates that a covered entity *must* disclose protected health information to individuals when they request access. In the

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instant situation, MCL 600.2912b (5) requires that the health professional and the health facility provide the claimant's medical records within 56 days from when they receive this notice of intent; therefore, the requested medical records can, under federal law, be provided without an authorization from the patient if they are being provided pursuant to MCL 600.2912b (5). The same regulation under subpart (e) clearly states that "A covered entity may disclose protected health information in the course of any judicial or administrative proceeding". There can be no question that a notice of intent filed pursuant to MCL 600.2912b (4) constitutes the initial step in the judicial process required to maintain an action against a health professional or health facility. Anticipating that some might argue that a notice of intent filed under MCL 600.2912b (4) is not a court order as provided under subpart (e) (i), your attention should be directed to subpart (e) (ii) (A) which states: "In response to a legal subpoena, discovery request, *or other lawful process*, that is not accompanied by an order of a court or administrative tribunal, if: "The covered entity receives satisfactory assurance, as described in paragraph (e) (1) (iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is subject of the protected health information that has been requested has been given notice of the request". It should appear to any reasonable person that the claimant is aware that the undersigned is requesting his medical records in connection with this legally mandated Notice of Intent.

Given the time constraints imposed upon the undersigned to fully investigate this claim, a formal demand is made for the timely production of the medical records requested above. If the records are not provided in a timely manner, the undersigned may initiate a separate action for the production of those records with a request for sanctions for your failure to provide those records in a timely manner. Given the above authority, it is hoped that the records will be produced as soon

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as possible. The earlier the records are produced, the earlier a determination can be made regarding whether or not there is merit to these claims. Thus, everyone will be served by a prompt production of the subject documents.

Please also take notice that this claim will be filed as both a medical malpractice claim pursuant to MCL 600.2912 et. seq. and a wrongful death claim pursuant to MCL 600.2922.

Factual Basis of Claim

On July 16, 2020 Mr. Ernest, age 54, presented to the emergency department at McLaren Regional Medical Center in Flint, Michigan (hereinafter "McLaren" complaining of chest pain at 10:53. Mr. Ernest relayed that the onset of chest pain started two days prior and was abrupt, constant, and rated the pain as a six on a scale of one to ten. He noted the quality was heaviness and tightness without modifying factors. Mr. Ernest was noted to have obesity and hypertension and suffering with diaphoresis. He was taking metoprolol, a beta blocker that can mask an elevated heart rate, which is a warning sign for pulmonary embolism. He was seen in the emergency room by Dr. Paul W. Brown (hereinafter "Dr. Brown") and discharged from emergency to the cardiac unit for observation at 06:54, with Dr. Elmahdi M. Saeed (hereinafter "Dr. Saeed" attending. A single x-ray was ordered with findings on July 16, 2020 at 10:06 pm of enlarged heart, mild interstitial prominence of lungs, minimal perihilar/basilar opacities and an impression of mild congestion/edema; conditions that can be signs of pulmonary embolism. EKG was within normal limits according to the chart, and potassium was abnormal at 3.2. WBC was 11.8. Blood pressure was 170/89, and pulse was 59 on July 17, 2020 at 11:00. A consultation was placed for cardiology. Mr. Ernest was seen by Dr. Farouk M. Belal (hereinafter "Dr. Belal") who noted his provisional diagnosis was acute coronary syndrome and hypokalemia. Sinus brady cardia noted at 7/17/20 at 01:44. At no time was D-dimer tested. At no time was CT PE or ventilation-perfusion scan

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ordered. The chart does not mention shortness of breath generally, which Mr. Ernest was suffering from and complained about. The chart reflects only two vitals. On July 17, 2020 at 1357, while in the observation unit, Mr. Ernest died. Independent autopsy conducted at the Michigan Institute of Forensic Science & Medicine confirmed cause of death as bilateral pulmonary embolism an noted fresh and organizing emboli in pulmonary arteries and branches, pulmonary infarcts and pulmonary edema.

Standard of Care

The applicable standard of care required McLaren[1] to use reasonable care in hiring and/or credentialling, retaining and supervising physicians and to refrain from hiring and/or credentialling or retaining physicians who demonstrate a foreseeable threat of injury to patients.

The applicable standard of care required McLaren to follow the Joint Commission (JC) Accreditation Standard RC.01.01.01: maintain complete and accurate medical records for each individual patient.

The applicable standard of care for Drs. Brown, Saeed and Belal required that PERC protocol or Wells' criteria be utilized to rule out pulmonary embolism. Given Mr. Ernest's age of 54, utilization of PERC protocol would have indicated that pulmonary embolism must be part of Mr. Ernest's differential diagnosis. Given that Mr. Ernest exhibited clinical signs that pulmonary embolism was an equally likely diagnosis to heart attack, use of the Wells' criteria would have placed Mr. Ernest in the moderate range to suffer incidence of pulmonary embolism.

[1] This statement is made specifically as it relates to Dr. Farouk Belal, but will be pled as to other Defendants if it is later discovered to be applicable to them.

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The applicable standard of care for Drs. Brown, Saeed and Belal required that an order for D-dimer testing be placed for Mr. Ernest where pulmonary embolism was not ruled out and should have been part of the differential diagnosis.

The applicable standard of care for Drs. Brown, Saeed and Belal required that an order for CT PE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was as noted in the 'Factual Basis' section above.

The applicable standard of care for Drs. Brown, Saeed and Belal required that they review Mr. Ernest's vitals to the extent that it could be easily noticed that vitals were not being taken every four hours; and issue orders to correct same.

The applicable standard of care for Dr. Belal required that he timely and accurately review the EKG and, when making diagnoses issue orders commensurate with the diagnosis made.

Breach of the Standard of Care

McLaren breached the applicable standard of care when it failed to use reasonable care in hiring and/or credentialling, retaining and supervising physicians and to did not refrain from hiring and/or credentialling or retaining physicians who demonstrate a foreseeable threat of injury to patients.

McLaren breached the applicable standard of care when it failed to follow the Joint Commission (JC) Accreditation Standard RC.01.01.01: maintain complete and accurate medical records for each individual patient.

Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to utilize PERC protocol or Wells' criteria to rule out pulmonary embolism.

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Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to order D-dimer testing for Mr. Ernest where pulmonary embolism was not ruled out and should have been part of the differential diagnosis.

Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to order CT PE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was as noted in the 'Factual Basis' section above.

Drs. Brown, Saeed and Belal breached the applicable standard of care when they did not review Mr. Ernest's and take notice that vitals were not being taken every four hours; and issue orders to correct same.

Dr. Belal breached the applicable standard of care when he failed to timely and accurately review the EKG and, when making diagnoses, failed to issue orders commensurate with the diagnosis made.

Action that Should Have Been Taken to Achieve Compliance with the Standard of Care

To comply with the applicable standard of care McLaren should have used reasonable care in hiring and/or credentialling, retaining and supervising physicians and should have refrained from hiring and/or credentialling or retaining physicians who demonstrate a foreseeable threat of injury to patients.

To comply with the applicable standard of care McLaren should have followed the Joint Commission (JC) Accreditation Standard RC.01.01.01: maintain complete and accurate medical records for each individual patient.

To comply with the applicable standard of care, Drs. Brown, Saeed and Belal should have utilized the PERC protocol or Wells' criteria to rule out pulmonary embolism.

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To comply with the applicable standard of care, Drs. Brown, Saeed and Belal should have ordered testing for D-dimer where pulmonary embolism was not ruled out and should have been part of the differential diagnosis.

To comply with the applicable standard of care, Drs. Brown, Saeed and Belal should have ordered CT PE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was as noted in the 'Factual Basis' section above.

To comply with the applicable standard of care, Drs. Brown, Saeed and Belal should have reviewed Mr. Ernest's vitals to the extent that it could be easily noticed that vitals were not being taken every four hours; and issue orders to correct same.

To comply with the applicable standard of care, Dr. Belal should have timely and accurately review the EKG and, when making diagnoses issue orders commensurate with the diagnosis.

The Manner in Which the Breach was the Proximate Cause of the Claimed Injury

Because McLaren breached the applicable standard of care when it failed to use reasonable care in hiring and/or credentialling, retaining and supervising physicians and to did not refrain from hiring and/or credentialling or retaining physicians who demonstrate a foreseeable threat of injury to patients, it provided employment or privileges to Dr. Belal, who has an extensive disciplinary record that foretold the likelihood that patients such as Mr. Ernest would suffer neglect or injury in his care, and Mr. Ernest in fact did suffer neglect and injury in Dr. Belal's care at McLaren.

Because McLaren breached the applicable standard of care when it failed follow the Joint Commission (JC) Accreditation Standard RC.01.01.01: maintain complete and accurate medical

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records for each individual patient, Mr. Ernest's vitals and the flowchart that should have documented his care at McLaren are non-existent and thusly it can only be concluded that such care did not occur. Not taking vitals and not flow-charting care deprived Mr. Ernest's care providers of critical information that would have reflected Mr. Ernest's risk for pulmonary embolism – the untreated condition that in fact caused Mr. Ernest's death.

Because Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to utilize PERC protocol or Wells' criteria to rule out pulmonary embolism, pulmonary embolism was not addressed at all, and Mr. Ernest in fact died due to pulmonary embolism.

Because Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to order D-dimer testing for Mr. Ernest where pulmonary embolism was not ruled out and should have been part of the differential diagnosis, pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

Because Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to order CT PE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was as noted in the 'Factual Basis' section above, pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

Because Drs. Brown, Saeed and Belal breached the applicable standard of care when they did not review Mr. Ernest's and take notice that vitals were not being taken every four hours; and issue orders to correct same, vitals that would have provided more warning signs for pulmonary embolism did not exist, and pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

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Because Dr. Belal breached the applicable standard of care when he failed to timely and accurately review the EKG and, when making diagnoses, and failed to issue orders commensurate with the diagnosis made, pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

Statement of Vicarious and Institutional Liability

Please take notice that The Estate of Maurice Ernest intends to hold McLaren and any related Corporation directly liable for the negligence of Drs. Brown, Saeed and Belal as well as that of any other medical professional or other agent that was negligent as set forth in this notice pursuant to the doctrines of actual agency, apparent agency, ostensible agency, and joint venture or joint enterprise liability, as well as pursuant to MCL 333.21513(a).

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EXHIBIT 3

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2022 WL 17368761
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Matthew PONIEWIERSKI, Personal Representative of the Estate of Ashley Poniewierski, Plaintiff-Appellant,

v.

WILLIAM BEAUMONT HOSPITAL ROYAL OAK, Ascension St. John Macomb-Oakland Hospital, Michigan Healthcare Professionals, PC, doing business as Oakland Medical Group, Ronald Rasansky, D.O., Stephen Hoffman, D.O., Zuie C. Wakade, D.O., Tusar Desai, M.D., and Akriti Dewanwala, M.D., Defendants-Appellees.

No. 356925
December 1, 2022

Oakland Circuit Court, LC No. 2020-184202-NH

Before: Boonstra, P.J., and Gadola and Hood, JJ.

Opinion

Per Curiam.

*1 In this wrongful-death medical malpractice action, plaintiff, personal representative of the estate of Ashley Poniewierski (decedent), appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). Because the trial court, citing *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), correctly ruled that plaintiff's service of a notice pursuant to MCL 600.2912b did not toll the two-year wrongful-death saving period under MCL 600.5852, we affirm.

I. BACKGROUND

The relevant facts are not in dispute. At various times between February 17, 2017, and June 3, 2017, decedent was treated by defendants for chronic abdominal pain that she had been suffering for approximately one year. On June 12, 2017, decedent was found unresponsive in her home. An autopsy determined the cause of her death as inflammatory bowel disease and related complications.

Eleven months later, on May 14, 2018, plaintiff was appointed personal representative of decedent's estate under letters of authority issued by the Macomb Probate Court. On April 20, 2020, plaintiff served a notice of intent to file a medical malpractice claim (NOI) on defendants.

On October 23, 2020, plaintiff filed a complaint and affidavit of meritorious claim in the Oakland Circuit Court, alleging claims for medical malpractice and loss of consortium against all defendants. Defendants denied plaintiff's allegations as untrue and asserted, as affirmative defenses, that plaintiff's claims were barred by the applicable statute of limitations.

In three separate motions for summary disposition pursuant to MCR 2.116(C)(7), defendants asserted that the two-year limitations period applicable to medical malpractice actions, MCL 600.5805(8),[1] had expired before plaintiff served the NOI on defendants. Defendants recognized that the wrongful-death saving provision, MCL 600.5852, extended the time for filing a wrongful-death action for two years following the issuance of letters of authority, but, citing *Waltz*, defendants contended that the notice-tolling provision for medical malpractice cases, MCL 600.5856(c), did not apply to the wrongful-death saving provision, MCL 600.5852. Defendants asserted that plaintiff was required to file his complaint in this case not later than August 24 or 25, 2020; because the complaint was not filed until October 23, 2020, defendants contended that they were entitled to summary disposition as a matter of law.

Responding to these motions, plaintiff asserted that the various statutes governing medical malpractice and wrongful-death actions must be read *in pari materia* and construed as consistent with each other to implement the intent of the Legislature. Acknowledging that the two-year statute of limitations, MCL 600.5805(8), governed this medical malpractice action, plaintiff asserted that this period of limitations was extended by the wrongful-death saving

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provision, MCL 600.5852(1), and extended further pursuant to MCL 600.5856(c), tolling the limitations period following the service of the NOI. Citing MCL 600.5852(4), plaintiff contended that the deadline for commencing this action was April 20, 2022, and that this action was timely filed on October 23, 2020.

*2 Attempting to distinguish *Waltz* from this case, plaintiff asserted that, in *Waltz*, the plaintiff had failed to file her complaint within the maximum five-year period established by the statute of limitations and the wrongful-death saving provision, but the complaint in this case was filed 18 months before the expiration of that period. Contending that *Waltz* was incorrectly decided, plaintiff urged the trial court to instead apply the decisions of our Supreme Court in *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987) and *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Plaintiff argued that in *Waltz* the Supreme Court directly contravened MCL 600.2912b and ignored clear statutory language. Plaintiff argued that application of *Waltz* to this case was "essentially asking by judicial fiat to shorten the two-year extension provided under MCL 600.5852 to 18 months."

In reply, defendants rejected plaintiff's reliance on *Hardy* and *Omelenchuk*, asserting that our Supreme Court implicitly overruled *Hardy* and explicitly overruled *Omelenchuk* in *Waltz*. Defendants also observed that plaintiff could have served the NOI at any time between June 4, 2017, and November 14, 2019, but failed to do so, and asserted that the trial court could not adopt plaintiff's argument "without violating MCR 7.215(C)(2) and principles of stare decisis."

On March 31, 2021, the trial court heard oral arguments on the motions for summary disposition via Zoom videoconferencing. The trial court issued its opinion and order six days later. The court ruled that defendants were entitled to summary disposition, explaining that MCL 600.5852 requires a plaintiff to commence an action within two years after letters of authority are issued and that, in *Waltz*, "the Michigan Supreme Court held that the notice tolling provision does not operate to toll the additional period permitted under 600.5852." Thus, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

II. ANALYSIS

Plaintiff argues that the trial court erred by applying *Waltz*, which plaintiff asserts contradicts clear statutory language. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). A court reviewing a motion for summary disposition under MCR 2.116(C)(7) must consider "the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v City of Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013). Documentary evidence must be viewed in a light most favorable to the nonmoving party. *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). When the facts are undisputed, whether a claim is barred by the applicable statute of limitations is also reviewed de novo. *In re Gerald L Pollack Trust*, 309 Mich App 125, 134; 867 NW2d 884 (2015).

This case involves the interpretation of several statutes governing medical malpractice and wrongful-death actions. This Court's primary goal when interpreting statutes is "to ascertain and give effect to the intent of the Legislature." *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 136; 762 NW2d 178 (2009) (quotation marks and citation omitted). If the statutory language is clear and unambiguous, "the Legislature is presumed to have intended the meaning expressed and judicial construction is neither required nor permitted." *Id.* (Quotation marks and citation omitted).

*3 A medical malpractice claim accrues at the time of the act or omission that is the basis for the claim. MCL 600.5838a(1). The two-year period of limitations applicable to malpractice actions generally, MCL 600.5805(8), applies to medical malpractice actions. MCL 600.5838a(2). A saving provision also applies to wrongful-death actions: if a person dies before or within 30 days of the expiration of the period of limitations, an action may be commenced by the personal representative of the decedent's estate at any time within two years after letters of authority are issued. MCL 600.5852(1). In an action alleging medical malpractice, the two-year saving period runs from the date of appointment of the first personal representative of the estate. MCL 600.5852(2). However, MCL 600.5852(4) provides that an action may not be

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commenced under this saving provision more than three years after expiration of the period of limitations, thus establishing a maximum period of five years from the date of accrual of the cause of action in which to commence a wrongful-death action premised on alleged medical malpractice.

In addition, a plaintiff in a medical malpractice action is required to give written notice of intent to file a claim not less than 182 days before commencing the action. MCL 600.2912b(1). Giving notice under § 2912b tolls the statute of limitations "not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." MCL 600.5856(c).

Pursuant to MCL 600.5838a(1), in this case, plaintiff's claims against the various defendants accrued between February 17, 2017, when decedent was first treated by one of the defendants, and June 3, 2017, when decedent was last discharged from the hospital. Thus, pursuant to MCL 600.5805(8), the two-year malpractice limitations period expired no later than June 3, 2019. However, because decedent passed away before the limitations period expired, the wrongful-death saving provision, MCL 600.5852(2), extended the time for commencing an action to May 14, 2020, two years after the date plaintiff was appointed personal representative of decedent's estate. Thus, the original deadline for filing the complaint in this matter was May 14, 2020.

This deadline was extended at the onset of the COVID-19 pandemic. On March 10, 2020, the Governor issued Executive Order No. 2020-4, declaring a state of emergency across the state pursuant to the Emergency Management Act, MCL 30.401 *et seq.*, the Emergency Powers of the Governor Act, MCL 10.31 *et seq.*, and Const. 1963, art. 5, § 1. On March 23, 2020, our Supreme Court issued Administrative Order No. 2020-3, 505 Mich lxxxvi (2020), which suspended "all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110" and provided that "any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1)." The Supreme Court rescinded AO 2020-3, effective June 20, 2020, but ordered that "[f]or time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020." Administrative Order No. 2020-18, 505 Mich lxxxviii (2020).

When the state of emergency was declared on March 10, 2020, 65 days remained before the May 14, 2020 deadline for commencement of plaintiff's medical malpractice action. Thus, pursuant to AO 2020-18, plaintiff's deadline was extended to August 24, 2020. Plaintiff filed the complaint in this action on October 23, 2020, nearly two months after this deadline.

Plaintiff contends that this action was timely commenced on April 20, 2020, when the NOI mandated by MCL 600.2912b was served on defendants, because the two-year saving period for wrongful-death actions was tolled pursuant to MCL 600.5856(c), which provides that "statutes of limitation or repose" are tolled when "notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose...." MCL 600.5856(c). Upon service of notice, the period of limitations "is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." *Id.*

*4 However, in *Waltz*, 469 Mich at 644, our Supreme Court concluded that the notice-tolling provision does not apply to the wrongful-death saving provision. In that case, the plaintiff's infant son received medical treatment for several months before his death on April 18, 1994. *Id.* at 644-645. In January 1999, the plaintiff notified the defendants, pursuant to MCL 600.2912b, of her intent to file suit. *Id.* at 645. On May 27, 1999, the plaintiff was appointed personal representative of her son's estate. *Id.* On June 23, 1999, the plaintiff filed a complaint alleging wrongful-death medical malpractice. *Id.* The trial court granted summary disposition in favor of the defendants, ruling that the notice-tolling provision did not toll the wrongful-death saving period, and that the plaintiff had not been appointed personal representative until after the two-year limitations period and the wrongful-death saving period had both expired. *Id.* at 646-647. This Court affirmed the trial court, ruling that "by its express language, MCL 600.5856(d)[2] tolls the statute of limitations, not the extended limit in MCL 600.5852. Consequently, the trial court did not err because the statute of limitations barred plaintiff's claim." *Waltz*, 469 Mich at 649-650 (citation omitted; footnote added).

The Supreme Court granted leave to appeal, specifically to "determine whether § 5856(d), the medical malpractice notice tolling provision, tolls the additional period permitted for filing wrongful death actions under the wrongful death saving

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provision, § 5852." *Id.* at 644. The Supreme Court explained that MCL 600.5852 is neither a statute of limitations nor a statute of repose, but "a *saving* provision designed 'to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.' " *Id.* at 655, quoting *Lindsey v Harper Hosp*, 455 Mich 56, 66; 564 NW2d 861 (1997). Thus, the Supreme Court concluded that "the notice tolling provision, § 5856(d)—which explicitly applies only to 'the statute of limitations or repose'—does not operate to toll the additional period permitted under § 5852 for filing wrongful death actions." *Waltz*, 469 Mich at 655.

Plaintiff attempts to distinguish *Waltz* from this case, asserting that, in *Waltz*, the plaintiff had failed to file her complaint within five years of her son's death, thus exceeding the maximum extension established under MCL 600.5852(4). However, this distinction is irrelevant given the Supreme Court's unambiguous conclusions that § 5856 "explicitly applies only to 'the statute of limitations or repose' " and that § 5852 "is not a 'statute of limitations' or a 'statute of repose.' " *Id.* If § 5852 is neither a statute of limitations nor a statute of repose, then service of the NOI tolls neither the two-year saving period, MCL 600.5852(1), nor the three-year ceiling, MCL 600.5852(4).

Plaintiff urges this Court to ignore these unambiguous conclusions of the Supreme Court. However, this Court is required to follow decisions of the Supreme Court "except where those decisions have *clearly* been overruled or superseded...." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). Plaintiff does not contend that *Waltz* has been overruled or superseded, but argues that this Court should instead follow the Supreme Court's decisions in *Hardy* and *Omelenchuk*, two cases decided before *Waltz*. This argument has no merit.

Hardy did not involve a medical malpractice claim. Rather, in *Hardy*, the issues were "(1) whether MCL 600.5852 applies to wrongful death cases in which death was 'instantaneous,' and (2) whether death by drowning is instantaneous as a matter of law." *Hardy*, 429 Mich at 424-425. Our Supreme Court concluded that "the saving provision contained in MCL 600.5852 operates to toll the statute of limitations in both survival-type actions and death-type actions brought under MCL 600.2922, the wrongful death statute." *Id.* at 425. Plaintiff contends that this language shows that the Supreme Court "clearly used the terminology 'to toll the statute of limitations.' "

*5 However, in *Hardy*, the Supreme Court cautioned that the language used in a court's opinion "must be construed in light of the facts and issues involved in a case under consideration and should not be interpreted as going beyond the scope of matters for adjudication...." *Id.* at 431. Because the central issue in *Hardy* was whether the saving provision applied to both types of wrongful-death actions, and not the distinction between a statute of limitations and a saving statute, *Hardy* is irrelevant to the issues in this case. Moreover, this Court is "obligated to follow the most recent pronouncement of the Supreme Court on a principle of law." *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 703 NW2d 486 (2005).

Plaintiff's reliance on *Omelenchuk* is similarly misplaced. As the Supreme Court explained in *Waltz*, 469 Mich at 652, the issue in *Omelenchuk* "was whether the malpractice notice tolling provision tolled the statutory limitation period for a full 182 days or, instead, for only 154 days, when a medical malpractice claimant does not receive the written response to the notice of intent contemplated under MCL 600.2912b(7)." In addition, in *Omelenchuk*, the Court was not required to determine whether the notice-tolling provision extended the wrongful-death saving period because the complaint was filed within the two-year malpractice limitations period, as extended under the notice-tolling provision. *Id.* at 653.

Plaintiff correctly asserts that, in *Omelenchuk*, 461 Mich at 577, the Supreme Court described the wrongful-death saving period as a period of limitations, stating that the "two-year limitation period" was set to expire two years after the plaintiffs received their letters of authority. However, in *Waltz*, 469 Mich at 653, the Court described that language as "passing references to § 5852 as creating a 'limitation period.' " The Court then explained that "[t]o the extent that our imprecise choice of words in *Omelenchuk* implied that § 5852 created a separate 'limitation period,' we again clarify that § 5852 is not a statute of limitations, but a *saving* statute." *Id.* at 654. Concluding its analysis of *Omelenchuk*, the *Waltz* Court explained further: "To the limited extent that the above-quoted portion of *Omelenchuk* might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision, it is hereby overruled." *Id.* at 655.

Omelenchuk has been "clearly overruled" and is not binding precedent. *Associated Builders*, 499 Mich at 191-192. *Waltz* has not been overruled, and is binding on this Court, *id.*, as

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well as the trial court. *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 142; 863 NW2d 344 (2014). Thus, the trial court did not err by granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

III. CONCLUSION

Because plaintiff's service of the NOI did not extend the two-year wrongful-death saving period, the trial court did not err by granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

Affirmed.

Hood, J. (concurring.)

I concur in the majority opinion's analysis and conclusions because we are bound by the holding in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

All Citations

Not Reported in N.W. Rptr., 2022 WL 17368761

Footnotes

1 At the time plaintiff's claim accrued in this case, the two-year limitations period for malpractice actions was codified at MCL 600.5805(6); the statute was later amended by 2018 PA 183 and the two-year limitations period is now codified at MCL 600.5805(8).

2 Now codified at MCL 600.5856(c). See 2004 PA 87, effective April 22, 2004.

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EXHIBIT 4

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

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

Plaintiff,

2023-119425-NH

Vs.

Hon. Celeste D. Bell

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

Defendants.

/

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PLAINTIFF'S RESPONSE TO DEFENDANT ELMAHDI M. SAEED's MOTION FOR SUMMARY DISPOSITION

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10-13-23

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NOW COMES PLAINTIFF, the Estate of Maurice Ernest, by and through their personal representative KERAN ERNEST, by and through her attorney's OLIVER LAW GROUP P.C., in support of Plaintiff's Response to Defendant Elmahdi M. Saeed's Motion for Summary Disposition and for reasons further stated in the Plaintiff's accompanying Brief, states:

1. Admitted
2. Admitted
3. Admitted
4. Admitted
5. Admitted
6. Admitted
7. Admitted in part, denied in Part.
8. Denied as untrue.
9. Denied as untrue.

WHEREFORE, Plaintiff KERAN ERNEST, for reasons above and stated further within the Plaintiff's Brief in Support, requests that this Honorable Court deny the Defendants' Motion for Summary Disposition.

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Respectfully Submitted,

Oliver Law Group P.C.

Date: October 13, 2023

/s/ Alyson Oliver

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the **13th** day of **October, 2023** by:

☒U.S. Mail	☐Hand Delivery
☐UPS Overnight Air	☐Facsimile
☒Electronic Mail	☐E-Service

Signature: /s/ Grant Gabriel
Grant Gabriel

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

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

2023-119425-NH

Vs.

Hon. Celeste D. Bell

DR. PAUL W. BROWN JR., *et al.*

Defendants.

/

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/

PLAINTIFF'S BRIEF IN SUPPORT OF RESPONSE TO DEFENDANT BROWN & DEFENDANT MCLAREN'S MOTION FOR SUMMARY

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DISPOSITION, DEFENDANT BELAL'S MOTION FOR SUMMARY DISPOSITION, AND DEFENDANT SAEED'S MOTION FOR MOTION FOR SUMMARY DISPOSITION

Statement of Facts

This is a medical malpractice case where Plaintiff presented to McLaren Regional Medical Center in Flint on July 16, 2020. Plaintiff complained of chest pain, was seen by several different doctors and passed away on July 17, 2020, with the cause of death confirmed to be a bilateral pulmonary embolism. Defendant doctors were a direct and proximate cause of Plaintiff's death.

On June 7, 2021, Plaintiff Keran Ernest was issued letters of authority, appointing her as personal representative of the Estate of Maurice Ernest. Plaintiff then served a notice of intent to sue ("NOI"), as required by MCL 600.2912b on February 10, 2023. After waiting the requisite 182 days required by MCL 600.2912b(1), Plaintiff filed her complaint.

Defendants Dr. Belal, Saeed, Dr. Brown, and McLaren have since filed motions alleging that Plaintiff's suit is barred pursuant to MCR 2.116(C)(7), MCR 2.116(D) and MCR 2.116(C)(10) for failure to comply with the statute of limitations. Specifically, Defendants argue that the two-years provided under Michigan's wrongful death statute, MCL 600.5852(2), is not tolled by the filing of a NOI under MCL 600.2912b and therefore, Plaintiffs complaint was untimely because the necessary 182 days would not expire until after the two years provided by MCL 600.

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5852 had run. In support of their motions, Defendants all rely on *Waltz v. Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004), which holds that a wrongful death statute is a savings period, not a statute of limitations, and therefore not tolled by the filing of a NOI.

Applicable Legal Principles

Plaintiff recognizes the existence of the authority cited by defendants in their collective briefs.

Argument

Plaintiff's suit was commenced in a timely manner. Plaintiff served a written notice of intent on February 10, 2023, and filed her complaint on August 10, 2023. This filing complied with the requirements of MCL 600.5852 as it was 1) within two years of the insurance of letters of authority to personal representative Keran Ernest and 2) within two years from the expiration of the underlying three-year statute of limitations.

Furthermore, Plaintiff states that the case on which all Defendants chose to rely, *Waltz v. Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004) is contradictory to the plain meaning of the statutory requirements of filing a medical malpractice suit and ignores or contradicts relevant precedent, and thus should not be the deciding factor in determining whether Plaintiff's filing was timely or not.

A. Applicable Law

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The relevant Michigan statutes governing the timeliness of filing a wrongful death medical malpractice action include MCL 600.2922; MCL 600.58085; MCL 600.5838(a); MCL 600.2912(b); MCL 600.5856(c) and MCL 600.5852.

In interpreting a statute, the primary goal is to give effect to the intent of the legislature, *In Re MCR 460 Mich, 411 (1999)*. In order to resolve any facial inconsistencies or contradictions a long-standing maxim of statutory interpretation has been that such statutes should be construed as consistent to implement the legislature's intent. Every word of a statute should be read in such a way that should be given meaning. *Id at 414*. We are encouraged to read such provisions "*in pari materia*". In other words, we may use reference to different statutes dealing with the same subject or shaping part of the same system to interpret the provisions of statutes. *Jennings v. Southwood* 446 Mich 125, 130; 521 NW2d 230 (1994).

The current legal issue presents us an opportunity to employ this maxim. When dealing with medical malpractice/wrongful death actions we encounter statutory limitation provisions on both wrongful death actions and those pertaining to medical malpractice claims. It is paramount that we look to the clear intent of the legislature when trying to make sense of the interplay between these provisions.

B. Interplay Among Applicable Wrongful Death and Medical Malpractice Statutes

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In its early legal history, under the common law, causes of action were lost upon the death of either the claimant or the tortfeasor. Michigan Law addresses this issue in MCL 600.2922, the relevant part of which states:

> Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute of a felony.

The statute of limitations for a wrongful death action is governed by the statute of limitations for the underlying claim. *Larson v. Johns-Mansville Sales Corp* 427 Mich 301, 314, 399 NW2d 1 (1986). MCLA 600.6805(8) states:

> Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

MCL 600. 5856(c) states:

> (1) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856…

This specific reference to the tolling statute 5856 is critical to the issue before the court.

MCL 600.5856(c) states:

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> (c) At the time notice is given in compliance with the applicable notice period under section 2912(b), if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Thus, the tolling statute now leads us directly to another key statute, MCL 600.2912(b). In pertinent part, 2912(b) states:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

MCL 600.5852 so denominated the wrongful death savings provision states in relevant part:

> (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time **within 2 years after letters of authority are issued although the period of limitations has run.**

Subsection (4) of the statute states:

> (4) …an action shall not be commenced under this section later than 3 years after the period of limitations has run.

C. Synthesis

In summary, a Plaintiff has two years to file a medical malpractice claim after the act or omission. In case of a death, the statute of limitations is extended by two years after the Letters of Authority have been issued even though the initial

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statute of limitations has run. The filing may occur no later than three years after the statute of limitations has run.

When filing a medical malpractice case, the legislature requires Plaintiff to serve a written notice not less than 182 days before the complaint is filed. The legislature specifically tolls the statute of limitations during this period when the statute of limitations would have run. The statute is tolled by a number of days equal to or no longer than the number of days remaining in the applicable notice period after the date of notice is given.

Therefore, reading the applicable statutes with their plain language and applying it to the facts in this case, this court must conclude that the claim was filed in a timely manner. Our pertinent dates are listed below:

07/16/2020	Date of alleged malpractice
07/17/2020	Date of death of Maurice Ernest
06/7/2021	Letters of Authority issued to Keran Ernest appointing her personal representative.
07/17/2022	Application of two-year statute of limitations.
02/10/2023	Notice of Intent is served.
06/7/2023	Two years since letters of authority issued.
09/10/2023	Complaint is filed.
02/10/2025	Three years since the expiration of the statute of limitations.

D. Addressing the Applicability of Waltz v. Wyse

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The *Waltz* court stated:

> Under the savings provision, the personal representative of an estate may begin a lawsuit within two years after letters of authority are issued, as long as the lawsuit is brought within three years after the two-year general period of limitations ended. MCL 600.5852; *McNeil, supra at 202 489 NW2d 180.* This creates a maximum time of five years for filing suit unless the six-month discovery rule in MCL 600.5838(2) applies. *Waltz 677 NW2d 818.*

The Court then points out that the plaintiff in *Waltz* failed to file her complaint within five years after her son's death thus violating the maximum time allowed for filing the suit. In this case, the maximum time, which is three years from the expiration of the statute of limitations, would be February 10, 2025. The Complaint in this case was filed on August 10, 2023, more than a year and a half prior to the expiration of that time period.

E. Jurisprudence

Hardy v Maxheimer 429 Mich 422, 416 NW2d 299 (1987), addresses the application of MCL 600.5852 to wrongful death cases and actions brought pursuant to MCL 600.2922 under the Wrongful Death Statute is. *Hardy* examined whether or not the savings provision of MCL 600.5852 tolled the statute of limitations in survival type actions *and* death by actions brought under MCL 600.2922. The law as it existed made the distinction between instantaneous and non-instantaneous deaths, and the argument revolved around whether the savings provision would

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apply if the death were instantaneous thus arguably "not surviving" and thus precluding the applicability of the savings provision.

However, for purposes of its importance in the instant case, the Supreme Court clearly held that the savings provision of MCL 600.5852 "operates to toll the statute of limitations in both types of actions, whether denominated survival or death." Therefore, a Plaintiff may pursue a wrongful death action where it is brought within two years of the date of the personal representative's appointment and **"within three years after the initial period of limitation had run."** The *Hardy* court clearly used the terminology "to toll the statute of limitations."

The *Waltz* court neither examines, references nor refutes the *Hardy* ruling leaving us to assume that remains good law.

Next, the case of *Omelenchunck v. City of Warren*, 461 Mich 567, 609 NW2d 177 (2000), examined if a malpractice notice tolling provision tolled the statute of limitations for a full 182 days or for only 154 days when a medical malpractice claimant did not receive the response to the notice of intent under MCL 600.2912(b)(7). The Court held that the limitation period was tolled for the entire 182 days notwithstanding the fact that the plaintiffs could have commenced their lawsuit after 154 days. The *Omelenchuck* court clearly made reference to MCL 600.5852 as creating "a limitation period." *Omelenchuck supra at 577, 609 NW2d 177.* It was clear that in fact the savings provision was essentially another period of

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limitation which was extended in a death case by its clear statutory language. Further, *Omelenchuck* dealt with the tolling provisions of 600.2912(b) holding that such a plaintiff would have 182 days even if they could have filed it earlier. While the *Waltz* majority opinion attempted to walk this back by saying it had utilized "imprecise choice of words" and mistakenly calculated the at-issue time periods erroneously, Justice Cavanaugh in a most cogent and expansive opinion belied the faulty logic of the majority opinion.

Plaintiff urges this court to recognize the *Hardy* holding; one not addressed or overruled by *Waltz* that a savings provision does in fact toll the statute of limitations. Further, Plaintiff/Appellee urges the court to apply the unambiguous language of *Omelenchuck*, which did in fact apply the savings provisions of MCL 600.5852 in a wrongful death medical malpractice action specifically referring to the applicability of 2912b and the tolling provision therein, *Id. at 575, 609 NW2d 177.*

The *Waltz* majority is not in line with the clear statutory requirement of MCL 600.2912(b). The law **requires** a plaintiff in a medical malpractice case to serve written notice at least 182 days prior to filing its complaint. The *Waltz* court in what is actually an *ultra vires* manner ignores the clear language of two statutes. The logic (or better illogic) of its position is that plaintiff would have to file its notice 6 months prior to the 2-year extension of the savings provision, thereby re-writing the savings provision from allowing a 2-year period of time from the issuance of letters of

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authority to 18 months. It erroneously fails to apply the statutory interpretation maxim of "*in pari materia*."

Conclusion

The principles of statutory interpretation require this Court to apply an assessment which renders a consistent interpretation of the applicable statutes. The judiciary does not have discretion to ignore the plain language of a statute. The defense in asserting the applicability of the *Waltz* majority opinion asks this Court to do just that; i.e. to ignore the plain language of MCL 200.2912(b) and its unambiguous requirement that a plaintiff must serve a notice of intent 6 months prior to filing a Complaint. MCL 600.5838a(2), referring to a claim involving medical malpractice, specifically makes reference to the tolling provision of MCL 600.5856, which in turn specifically makes reference to MCL 600.2912(b). They are inextricably intertwined.

The defense would have this Court apply a result which essentially is asking by judicial fiat to shorten the two-year extension provided under MCL 600.5852 to 18 months. Essentially this means that MCL 600.2912(a), which requires the filing of a written notice, and then disallows the filing of a complaint for 182 days thereafter, has no legal standing. The defense just wants the Court to ignore it. This is directly contradictory to the application of the maxim of "*in pari materia*"; it is in direct contradiction to the plain reading of *Omelenchuck*; and it ignores *Hardy v*

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Maxheimer (not mentioned by the *Waltz* court); and it fails to serve the long-standing doctrine in this State of the liberal interpretation of cases and statutes to permit injured parties from seeking redress.

The clarity of the proposition that *Omelenchuck* affirmed the applicability of MCL 600.2912(b) tolling the applicable statute of limitations is its reference in the authoritative "Guide to the Michigan Statute of Limitations 2004 Edition" disseminated by ICLE, the Institute for Continuing Legal Education in the State of Michigan. Under a section of "Other Tolling Issues", page 24 of that source, it states in pertinent part:

> Also unique to medical malpractice lawsuits, plaintiff must give at least 182 days' notice to a potential defendant before filing a medical malpractice suit. MCL 600.2912(b). If the limitation expires after notice is given, but before the end of the 182 days (i.e., before the time the plaintiff can sue), the limitation period is tolled for 182 days after the notice is given, at which time the limitations period begins running again. *Omelenchuck v City of Warren, 461 Mich 567, 577-578, 609 NW2d 177 (2000)*. Finally, the plaintiff must meet all of the notice requirements in MCL 600.2912(b) before the limitation period is tolled.

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Clearly this authoritative source educated the members of the bar of the position Plaintiff/Appellee asserts before the Court in this matter.

This array of statutes and virtually all applicable Supreme Court precedents delimits a statutory scheme with which this Plaintiff complied. Mr. Ernest died due to malpractice that occurred on July 16 and 17, 2023. Letters of Authority were issued on June 7, 2021, thus giving the personal representative until June 7, 2023 to commence an action. Since a plaintiff cannot commence an action of malpractice without first serving a notice of intent, which by the clear language of the statute then tolls the statute of limitations for 182 days, the Plaintiff served the Notice of Intent on February 10, 2023, months prior to the expiration of the 2-year savings provision. All of this was well within the 5-year period provided under *Hardy*. The Complaint in this case was filed well in advance of the deadline. As such, this lawsuit was timely filed.

WHEREFORE, PLAINTIFF, KERAN ERNEST, Individually and as Personal Representative of the estate of Maurice Ernest, Deceased, by and through its counsel OLIVER LAW GROUP P.C., respectfully requests this Honorable Court deny Defendants collective Motions for Summary Disposition.

Respectfully Submitted,

Oliver Law Group P.C.

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Dated: October 13, 2023

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Attorneys for Plaintiff

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the **13th** day of **October, 2023** by:

☒U.S. Mail ☐Hand Delivery
☐UPS Overnight Air ☐Facsimile
☒Electronic Mail ☐E-Service

Signature: /s/ Grant Gabriel
Grant Gabriel

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EXHIBIT 5

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

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

Plaintiffs,

vs.

File No. 2023-119425-NH

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

Hon. Celeste D. Bell
(P41453)

Defendants.

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DEFENDANT ELMAHDI M. SAEED, M.D.'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Plaintiffs' answer in response to Defendant's motion for summary disposition does not change the fact that the Supreme Court unequivocally decided this issue in favor of Defendant. All of the arguments raised by Plaintiffs have been rejected by the Supreme Court. Plaintiffs' claim was not filed within the two-year statute of limitations, nor filed within the time allowed under

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the savings provision contained in MCL 600.5852. Since Plaintiffs' claim is untimely, Defendant is entitled to dismissal as a matter of law.

The Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), made it perfectly clear that the time allowed to commence an action under the savings provision, MCL 600.5852, is not tolled by the notice of intent tolling language contained in MCL 600.5856. The Supreme Court in *Waltz* recognized that the express language of the tolling statute only applied to statutes of limitation and statutes of repose. Since MCL 600.5852, the wrongful death savings provision, is not a statute of limitations or statute of repose, tolling of the time allowed under the savings provision is not extended by service of a notice of intent.

This decision has stood for nearly 20 years. Despite the multiple attempts to alter the decision as Plaintiffs argue, the Supreme Court has continued to reject the arguments. Plaintiffs would simply have this Court ignore the clear Supreme Court precedent and, instead, adopt the decision of *Omelenchuk v City of Warren*, 461 Mich 567 (2000), which was specifically overruled by the court in *Waltz*. Stare decisis does not allow this Court to act as Plaintiffs request.

Moreover, the case Plaintiffs rely on, *Hardy v Maxheimer*, 429 Mich 422 (1987), did not deal with application of the tolling provision in MCL 600.5856. Instead, *Hardy* dealt with the situation of whether the savings provision in MCL 600.5852 applied to instantaneous deaths, as well as non-instantaneous deaths. Interestingly, throughout the case, MCL 600.5852 is identified as a savings provision. The court in *Hardy* never considered the issue raised in our case.

It should be noted that the Supreme Court in *Miller v Mercy Memorial Hospital*, 466 Mich 196 (2002), indicated that the wrongful death provision in MCL 600.5852 is a "savings statute," not a statute of limitations. One of the rules of statutory interpretation is that the legislature,

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when enacting or amending a statute, is presumed to know of existing statutes and laws. *People v Ackah-Essien*, 311 Mich App 13 (2015). In 2004, the legislature amended the tolling provision of MCL 600.5856. The legislature is presumed to have known that MCL 600.5852 was not a statute of limitations, but a savings provision in the event of death. *Miller, supra;* see also *Lindsey v Harper Hospital*, 455 Mich 56 (1997). Despite this knowledge, the legislature chose not to change the applicability of the tolling provision from statutes of limitation and statutes of repose to include savings provisions, as well. In fact, the legislature over the last nearly 20 years could have amended the statute to include tolling of the savings provision. Yet, it has not.

Under the plain reading of the statute, a savings provision is not subject to notice of intent tolling. Plaintiffs did not file this action within the two-year statute of limitations or within the two years from the letters of authority, as allowed under the savings provision. It is untimely, and Defendant is entitled to summary disposition of Plaintiffs' claims.

WHEREFORE, Defendant ELMAHDI SAEED, M.D., respectfully requests this Honorable Court grant his Motion for Summary Disposition and dismiss Plaintiffs' claims against this Defendant, together with costs and attorney fees wrongfully incurred.

Dated: 10-19-23

SMITH, MARTIN, POWERS & KNIER, P.C.

BY _____

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PROOF OF SERVICE

On 10-19-23, I served via First Class Mail and electronic transmission a copy of the foregoing upon all counsel of record at their respective addresses and declare under penalty of perjury that this statement is true to the best of my knowledge, information and belief.

Violetta G. Smith

Violetta G. Smith

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EXHIBIT 6

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

ESTATE OF MAURICE ERNEST,
By PERSONAL REPRESENTATIVE
KERAN ERNEST,

Plaintiff,

Circuit Court No.
23-119425-NH

v

DR. PAUL W. BROWN, ELMAHDI
SAEED, DR. FAROUK BELAL,
CYPRESS CARDIOLOGY, PLLC, and
MCLAREN HEALTH CARE CORP.,

DIGITALLY RECORDED

Defendants.

_____/

MOTION HEARING

BEFORE THE HONORABLE CELESTE D. BELL, CIRCUIT JUDGE

Flint, Michigan - Monday, October 23, 2023

APPEARANCES:

For the Plaintiff:

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For the Defendant Dr. Belal:	LAURA M. MCLANE, (P-77695) 4000 Town Center, Floor 9 Southfield, Michigan 48075 (248) 663-7760
For the Defendant McLaren and Dr. Brown:	MEGAN R. MULDER, (P-77597) 503 South Saginaw Street, Suite 1000 Flint, Michigan 48502 (810) 232-3141
Transcribed By:	Tamara S. Johns, CER 8749 Certified Court Reporter (810) 252-6985

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WITNESSES: DEFENDANT	
NONE	

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NONE		

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Flint, Michigan

Monday, October 23, 2023 - 2:01 p.m.

THE COURT: This is case number 23-119425-NH, Keran Ernest as the PR for Maurice Ernest versus Dr. Paul Brown, et al.

Counsel, please state your appearances starting with the plaintiff.

MR. MATOUKA: Paul Matouka on behalf of the plaintiff, Your Honor.

MR. SULLIVAN: Alan Sullivan, Your Honor. I'm here on behalf of Dr. Saeed.

MS. MCLANE: Good afternoon, Your Honor. Laura McLane on behalf of Dr. Belal.

MS. MULDER: Good afternoon, Your Honor. Meg Mulder on behalf of McLaren and Dr. Brown.

THE COURT: Excellent. All right, thank you, counsel. We have three defense motions filed in lieu of answer. We also have--and so, I've got the motions, I've got the plaintiff's response and a couple of replies on those.

I also have the plaintiff's motion for a stay pending an application to the supreme court, and I'm going to do that one first.

MR. MATOUKA: If I may, Your Honor?

THE COURT: Yes.

MR. MATOUKA: The application was denied.

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THE COURT: I know.

MR. MATOUKA: Oh, okay. My apologies.

THE COURT: Yeah, no, no, I have the order here. It was issued October 6th. It was denied. So, that's why I wanted to do that one first. I think that it--well, first of all, it resolves the motion for the stay, but it also, in this Court's opinion, pretty much resolves the SD motions.

I don't think there's a whole lot for us to say, but I'm going to allow you to say whatever you'd like to place on the record, because again, I've got all afternoon. But it does seem pretty clear to this Court *Waltz* is still the law.

MR. MATOUKA: Your Honor, on behalf of plaintiff, you are correct. We're here to ensure that we preserve our argument that the supreme court wrongly decided *Waltz* in the first place so that we can take those up--

THE COURT: And three justices agreed with you. I wrote it down, Cavanagh, oh, Welch, and Bolden. They wanted to take it, but they were outvoted.

MR. MATOUKA: Yes, Your Honor, and hopefully, we will convince another justice to grant leave, and then two more to reverse, but until then, I would be more than happy to talk about the reasons why we think it's wrong, but I don't want to waste this Court's time.

THE COURT: I don't think it's necessary.

Counsel, is there anything you wish to place on the

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record?

MR. SULLIVAN: Your Honor, thank you, Alan Sullivan on behalf of Dr. Saeed. I think the Court's got, from the briefing, I think it laid everything out pretty well.

THE COURT: Yeah.

MR. SULLIVAN: I don't think there's much dispute given that *Waltz* has already been decided. It's been in place for 20 years.

THE COURT: Twenty years.

MR. SULLIVAN: I understand the Court noted that a couple of justices--or three of them--

THE COURT: Three.

MR. SULLIVAN: --decided potentially yes. What I thought was interesting about that was two of those justices were on the earlier case a year ago that was denied leave on the same issue, and they didn't speak up or say anything.

THE COURT: Then, okay.

MR. SULLIVAN: They let it go, as far as I can tell, unanimously--

THE COURT: Uh-huh.

MR. SULLIVAN: --or however that works up there--

THE COURT: Uh-huh.

MR. SULLIVAN: --I'm not exactly sure, but nobody came out and said, hey, I would have granted leave because of these reasons or whatever they are.

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THE COURT: Uh-huh. Uh-huh.

MR. SULLIVAN: I understand the dissent, or the reasons that they gave in that, but I think it's pretty clear that if you look at the language, even if they get to that point, I still think we're going to find out that *Waltz* is going to stay until the legislature changes it.

THE COURT: Until the legislature deals with it. No, that's--

MR. SULLIVAN: If they decide to do that.

THE COURT: --yeah.

MR. SULLIVAN: And that's where it's going to come from. I don't think it's going to come through the courts. But I believe under the circumstances and given the *Waltz* decision, summary disposition is appropriate.

THE COURT: Yeah, I agree with everything you just said. I think it is going to come from the legislature.

MS. MULDER: Uh-huh.

THE COURT: Who else would like to say something?

MS. MCLANE: Your Honor, I don't think that anything more needs to be said.

THE COURT: I don't either. The briefing was excellent, by the way. It's great for the Court to read well written briefs that lay out the law so clearly. Now admittedly, the issue here, it truly is, it's very, very black and white, which is, again, something that I get a kick out of

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up here because it just makes things a lot easier for me. But if there is nothing else to add, I have to grant the motions. I have to, based on *Waltz*, and the fact that the tolling aspect not being tolled.

So, if one of you would prepare an order granting? Who would like to take that? I think one order would suffice for all three motions.

MR. SULLIVAN: If I may, Your Honor, I do have one that would probably take care of everybody.

MS. MCLANE: Okay.

MR. SULLIVAN: Do you have one?

MS. MCLANE: I have one, but it just is specific to my client.

MR. SULLIVAN: Oh, okay.

MS. MCLANE: I don't know why I didn't think to do one for everybody.

MR. SULLIVAN: I did one for me and then I did one for everybody else just in case, so.

MS. MCLANE: Yeah.

THE COURT: Let Mr. Matouka take a look at it, and if he's all right with it, I will sign it right now and you can get it filed.

MR. SULLIVAN: Your Honor, it basically just says that the motion is granted for the reasons stated on the record, and then it dismisses all defendants in the case, and

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it's a final order and closes the case.

THE COURT: And closes the case. Okay.

MR. SULLIVAN: So that should take care of all of the issues for today's purposes.

THE COURT: All right. Excellent.

MR. MATOUKA: Your Honor--

THE COURT: Yes?

MR. MATOUKA: --plaintiff's review of the document appears to be what should be entered.

THE COURT: Okay, very good. Thank you. Yep, you're all listed. All right. Did you happen to have copies?

MR. SULLIVAN: I do, Your Honor.

THE COURT: Oh, then she can file it right here.

LAW CLERK: Yes.

THE COURT: And it does close the case.

LAW CLERK: All right. (inaudible)

THE COURT: Great. All right, that's all filed. Is there anything else that needs to be placed on the record? Nothing?

MS. MULDER: I don't think so.

MR. SULLIVAN: Your Honor, the only other thing I'd add is we've had the order entered and true copies, and I'll just give everybody--I've got enough copies to give everybody, so I'll just distribute the copies--

THE COURT: Great.

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MR. SULLIVAN: --today as well--

THE COURT: All right.

MR. SULLIVAN: --so everybody's got one.

THE COURT: Excellent. All right then.

MR. SULLIVAN: Other than that, Your Honor, I have nothing further.

THE COURT: Nothing further?

MR. MATOUKA: Nothing for the plaintiff, Your Honor.

THE COURT: Nothing?

MS. MULDER: Nothing further. Thank you, Your Honor.

THE COURT: Excellent.

MS. MCLANE: Nothing further, Your Honor.

THE COURT: Thank you, bye, bye. Have a good afternoon.

MS. MCLANE: You too.

THE COURT: We can go off the record, Brieanna. Thank you.

(At 2:10 p.m., proceedings concluded)

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I, Tamara S. Johns, do hereby certify that this transcript, consisting of 11 pages, is a complete, true, and correct transcript, to the best of my ability, of the digitally recorded proceedings taken in this case on Monday, October 23, 2023, before the Honorable Celeste D. Bell, Circuit Judge.

Dated: November 16, 2023 *Tamara S. Johns*

Tamara S. Johns, CER 8749
2428 East Wilson Road
Clio, Michigan 48420
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EXHIBIT 7

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2022 WL 17368761
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Matthew PONIEWIERSKI, Personal Representative of the Estate of Ashley Poniewierski, Plaintiff-Appellant,

v.

WILLIAM BEAUMONT HOSPITAL ROYAL OAK, Ascension St. John Macomb-Oakland Hospital, Michigan Healthcare Professionals, PC, doing business as Oakland Medical Group, Ronald Rasansky, D.O., Stephen Hoffman, D.O., Zuie C. Wakade, D.O., Tusar Desai, M.D., and Akriti Dewanwala, M.D., Defendants-Appellees.

No. 356925
1
December 1, 2022

Oakland Circuit Court, LC No. 2020-184202-NH

Before: Boonstra, P.J., and Gadola and N.P. Hood, JJ.

Opinion

Per Curiam.

***1** In this wrongful-death medical malpractice action, plaintiff, personal representative of the estate of Ashley Poniewierski (decedent), appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). Because the trial court, citing *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), correctly ruled that plaintiff's service of a notice pursuant to MCL 600.2912b did not toll the two-year wrongful-death saving period under MCL 600.5852, we affirm.

I. BACKGROUND

The relevant facts are not in dispute. At various times between February 17, 2017, and June 3, 2017, decedent was treated by defendants for chronic abdominal pain that she had been suffering for approximately one year. On June 12, 2017, decedent was found unresponsive in her home. An autopsy determined the cause of her death as inflammatory bowel disease and related complications.

Eleven months later, on May 14, 2018, plaintiff was appointed personal representative of decedent's estate under letters of authority issued by the Macomb Probate Court. On April 20, 2020, plaintiff served a notice of intent to file a medical malpractice claim (NOI) on defendants.

On October 23, 2020, plaintiff filed a complaint and affidavit of meritorious claim in the Oakland Circuit Court, alleging claims for medical malpractice and loss of consortium against all defendants. Defendants denied plaintiff's allegations as untrue and asserted, as affirmative defenses, that plaintiff's claims were barred by the applicable statute of limitations.

In three separate motions for summary disposition pursuant to MCR 2.116(C)(7), defendants asserted that the two-year limitations period applicable to medical malpractice actions, MCL 600.5805(8),[1] had expired before plaintiff served the NOI on defendants. Defendants recognized that the wrongful-death saving provision, MCL 600.5852, extended the time for filing a wrongful-death action for two years following the issuance of letters of authority, but, citing *Waltz*, defendants contended that the notice-tolling provision for medical malpractice cases, MCL 600.5856(c), did not apply to the wrongful-death saving provision, MCL 600.5852. Defendants asserted that plaintiff was required to file his complaint in this case not later than August 24 or 25, 2020; because the complaint was not filed until October 23, 2020, defendants contended that they were entitled to summary disposition as a matter of law.

Responding to these motions, plaintiff asserted that the various statutes governing medical malpractice and wrongful-death actions must be read *in pari materia* and construed as consistent with each other to implement the intent of the Legislature. Acknowledging that the two-year statute of limitations, MCL 600.5805(8), governed this medical malpractice action, plaintiff asserted that this period of limitations was extended by the wrongful-death saving

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provision, MCL 600.5852(1), and extended further pursuant to MCL 600.5856(c), tolling the limitations period following the service of the NOI. Citing MCL 600.5852(4), plaintiff contended that the deadline for commencing this action was April 20, 2022, and that this action was timely filed on October 23, 2020.

***2** Attempting to distinguish *Waltz* from this case, plaintiff asserted that, in *Waltz*, the plaintiff had failed to file her complaint within the maximum five-year period established by the statute of limitations and the wrongful-death saving provision, but the complaint in this case was filed 18 months before the expiration of that period. Contending that *Waltz* was incorrectly decided, plaintiff urged the trial court to instead apply the decisions of our Supreme Court in *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987) and *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Plaintiff argued that in *Waltz* the Supreme Court directly contravened MCL 600.2912b and ignored clear statutory language. Plaintiff argued that application of *Waltz* to this case was "essentially asking by judicial fiat to shorten the two-year extension provided under MCL 600.5852 to 18 months."

In reply, defendants rejected plaintiff's reliance on *Hardy* and *Omelenchuk*, asserting that our Supreme Court implicitly overruled *Hardy* and explicitly overruled *Omelenchuk* in *Waltz*. Defendants also observed that plaintiff could have served the NOI at any time between June 4, 2017, and November 14, 2019, but failed to do so, and asserted that the trial court could not adopt plaintiff's argument "without violating MCR 7.215(C)(2) and principles of stare decisis."

On March 31, 2021, the trial court heard oral arguments on the motions for summary disposition via Zoom videoconferencing. The trial court issued its opinion and order six days later. The court ruled that defendants were entitled to summary disposition, explaining that MCL 600.5852 requires a plaintiff to commence an action within two years after letters of authority are issued and that, in *Waltz*, "the Michigan Supreme Court held that the notice tolling provision does not operate to toll the additional period permitted under 600.5852." Thus, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

II. ANALYSIS

Plaintiff argues that the trial court erred by applying *Waltz*, which plaintiff asserts contradicts clear statutory language. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). A court reviewing a motion for summary disposition under MCR 2.116(C)(7) must consider "the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v City of Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013). Documentary evidence must be viewed in a light most favorable to the nonmoving party. *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). When the facts are undisputed, whether a claim is barred by the applicable statute of limitations is also reviewed de novo. *In re Gerald L. Pollack Trust*, 309 Mich App 125, 134; 867 NW2d 884 (2015).

This case involves the interpretation of several statutes governing medical malpractice and wrongful-death actions. This Court's primary goal when interpreting statutes is "to ascertain and give effect to the intent of the Legislature." *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 136; 762 NW2d 178 (2009) (quotation marks and citation omitted). If the statutory language is clear and unambiguous, "the Legislature is presumed to have intended the meaning expressed and judicial construction is neither required nor permitted." *Id.* (Quotation marks and citation omitted).

***3** A medical malpractice claim accrues at the time of the act or omission that is the basis for the claim. MCL 600.5838a(1). The two-year period of limitations applicable to malpractice actions generally, MCL 600.5805(8), applies to medical malpractice actions. MCL 600.5838a(2). A saving provision also applies to wrongful-death actions: if a person dies before or within 30 days of the expiration of the period of limitations, an action may be commenced by the personal representative of the decedent's estate at any time within two years after letters of authority are issued. MCL 600.5852(1). In an action alleging medical malpractice, the two-year saving period runs from the date of appointment of the first personal representative of the estate. MCL 600.5852(2). However, MCL 600.5852(4) provides that an action may not be

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commenced under this saving provision more than three years after expiration of the period of limitations, thus establishing a maximum period of five years from the date of accrual of the cause of action in which to commence a wrongful-death action premised on alleged medical malpractice.

In addition, a plaintiff in a medical malpractice action is required to give written notice of intent to file a claim not less than 182 days before commencing the action. MCL 600.2912b(1). Giving notice under § 2912b tolls the statute of limitations "not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." MCL 600.5856(c).

Pursuant to MCL 600.5838a(1), in this case, plaintiff's claims against the various defendants accrued between February 17, 2017, when decedent was first treated by one of the defendants, and June 3, 2017, when decedent was last discharged from the hospital. Thus, pursuant to MCL 600.5805(8), the two-year malpractice limitations period expired no later than June 3, 2019. However, because decedent passed away before the limitations period expired, the wrongful-death saving provision, MCL 600.5852(2), extended the time for commencing an action to May 14, 2020, two years after the date plaintiff was appointed personal representative of decedent's estate. Thus, the original deadline for filing the complaint in this matter was May 14, 2020.

This deadline was extended at the onset of the COVID-19 pandemic. On March 10, 2020, the Governor issued Executive Order No. 2020-4, declaring a state of emergency across the state pursuant to the Emergency Management Act, MCL 30.401 *et seq.*, the Emergency Powers of the Governor Act, MCL 10.31 *et seq*, and Const. 1963, art. 5, § 1. On March 23, 2020, our Supreme Court issued Administrative Order No. 2020-3, 505 Mich lxxxvi (2020), which suspended "all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110" and provided that "any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1)." The Supreme Court rescinded AO 2020-3, effective June 20, 2020, but ordered that "[f]or time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020." Administrative Order No. 2020-18, 505 Mich lxxxviii (2020).

When the state of emergency was declared on March 10, 2020, 65 days remained before the May 14, 2020 deadline for commencement of plaintiff's medical malpractice action. Thus, pursuant to AO 2020-18, plaintiff's deadline was extended to August 24, 2020. Plaintiff filed the complaint in this action on October 23, 2020, nearly two months after this deadline.

Plaintiff contends that this action was timely commenced on April 20, 2020, when the NOI mandated by MCL 600.2912b was served on defendants, because the two-year saving period for wrongful-death actions was tolled pursuant to MCL 600.5856(c), which provides that "statutes of limitation or repose" are tolled when "notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose...." MCL 600.5856(c). Upon service of notice, the period of limitations "is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." *Id.*

***4** However, in *Waltz*, 469 Mich at 644, our Supreme Court concluded that the notice-tolling provision does not apply to the wrongful-death saving provision. In that case, the plaintiff's infant son received medical treatment for several months before his death on April 18, 1994. *Id.* at 644-645. In January 1999, the plaintiff notified the defendants, pursuant to MCL 600.2912b, of her intent to file suit. *Id.* at 645. On May 27, 1999, the plaintiff was appointed personal representative of her son's estate. *Id.* On June 23, 1999, the plaintiff filed a complaint alleging wrongful-death medical malpractice. *Id.* The trial court granted summary disposition in favor of the defendants, ruling that the notice-tolling provision did not toll the wrongful-death saving period, and that the plaintiff had not been appointed personal representative until after the two-year limitations period and the wrongful-death saving period had both expired. *Id.* at 646-647. This Court affirmed the trial court, ruling that "by its express language, MCL 600.5856(d)[2] tolls the statute of limitations, not the extended limit in MCL 600.5852. Consequently, the trial court did not err because the statute of limitations barred plaintiff's claim." *Waltz*, 469 Mich at 649-650 (citation omitted; footnote added).

The Supreme Court granted leave to appeal, specifically to "determine whether § 5856(d), the medical malpractice notice tolling provision, tolls the additional period permitted for filing wrongful death actions under the wrongful death saving

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provision, § 5852." *Id.* at 644. The Supreme Court explained that MCL 600.5852 is neither a statute of limitations nor a statute of repose, but "a *saving* provision designed 'to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.' " *Id.* at 655, quoting *Lindsey v Harper Hosp*, 455 Mich 56, 66; 564 NW2d 861 (1997). Thus, the Supreme Court concluded that "the notice tolling provision, § 5856(d)—which explicitly applies only to 'the statute of limitations or repose'—does not operate to toll the additional period permitted under § 5852 for filing wrongful death actions." *Waltz*, 469 Mich at 655.

Plaintiff attempts to distinguish *Waltz* from this case, asserting that, in *Waltz*, the plaintiff had failed to file her complaint within five years of her son's death, thus exceeding the maximum extension established under MCL 600.5852(4). However, this distinction is irrelevant given the Supreme Court's unambiguous conclusions that § 5856 "explicitly applies only to 'the statute of limitations or repose' " and that § 5852 "is not a 'statute of limitations' or a 'statute of repose.' " *Id.* If § 5852 is neither a statute of limitations nor a statute of repose, then service of the NOI tolls neither the two-year saving period, MCL 600.5852(1), nor the three-year ceiling, MCL 600.5852(4).

Plaintiff urges this Court to ignore these unambiguous conclusions of the Supreme Court. However, this Court is required to follow decisions of the Supreme Court "except where those decisions have *clearly* been overruled or superseded...." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). Plaintiff does not contend that *Waltz* has been overruled or superseded, but argues that this Court should instead follow the Supreme Court's decisions in *Hardy* and *Omelenchuk*, two cases decided before *Waltz*. This argument has no merit.

Hardy did not involve a medical malpractice claim. Rather, in *Hardy*, the issues were "(1) whether MCL 600.5852 applies to wrongful death cases in which death was 'instantaneous,' and (2) whether death by drowning is instantaneous as a matter of law." *Hardy*, 429 Mich at 424-425. Our Supreme Court concluded that "the saving provision contained in MCL 600.5852 operates to toll the statute of limitations in both survival-type actions and death-type actions brought under MCL 600.2922, the wrongful death statute." *Id.* at 425. Plaintiff contends that this language shows that the Supreme Court "clearly used the terminology 'to toll the statute of limitations.' "

***5** However, in *Hardy*, the Supreme Court cautioned that the language used in a court's opinion "must be construed in light of the facts and issues involved in a case under consideration and should not be interpreted as going beyond the scope of matters for adjudication...." *Id.* at 431. Because the central issue in *Hardy* was whether the saving provision applied to both types of wrongful-death actions, and not the distinction between a statute of limitations and a saving statute, *Hardy* is irrelevant to the issues in this case. Moreover, this Court is "obligated to follow the most recent pronouncement of the Supreme Court on a principle of law." *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 703 NW2d 486 (2005).

Plaintiff's reliance on *Omelenchuk* is similarly misplaced. As the Supreme Court explained in *Waltz*, 469 Mich at 652, the issue in *Omelenchuk* "was whether the malpractice notice tolling provision tolled the statutory limitation period for a full 182 days or, instead, for only 154 days, when a medical malpractice claimant does not receive the written response to the notice of intent contemplated under MCL 600.2912b(7)." In addition, in *Omelenchuk*, the Court was not required to determine whether the notice-tolling provision extended the wrongful-death saving period because the complaint was filed within the two-year malpractice limitations period, as extended under the notice-tolling provision. *Id.* at 653.

Plaintiff correctly asserts that, in *Omelenchuk*, 461 Mich at 577, the Supreme Court described the wrongful-death saving period as a period of limitations, stating that the "two-year limitation period" was set to expire two years after the plaintiffs received their letters of authority. However, in *Waltz*, 469 Mich at 653, the Court described that language as "passing references to § 5852 as creating a 'limitation period.' " The Court then explained that "[t]o the extent that our imprecise choice of words in *Omelenchuk* implied that § 5852 created a separate 'limitation period,' we again clarify that § 5852 is not a statute of limitations, but a *saving* statute." *Id.* at 654. Concluding its analysis of *Omelenchuk*, the *Waltz* Court explained further: "To the limited extent that the above-quoted portion of *Omelenchuk* might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision, it is hereby overruled." *Id.* at 655.

Omelenchuk has been "clearly overruled" and is not binding precedent. *Associated Builders*, 499 Mich at 191-192. *Waltz* has not been overruled, and is binding on this Court, *id.*, as

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well as the trial court. *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 142; 863 NW2d 344 (2014). Thus, the trial court did not err by granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

III. CONCLUSION

Because plaintiff's service of the NOI did not extend the two-year wrongful-death saving period, the trial court did not err by granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

Affirmed.

N.P. Hood, J. (concurring.)

I concur in the majority opinion's analysis and conclusions because we are bound by the holding in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

All Citations

Not Reported in N.W. Rptr., 2022 WL 17368761

Footnotes

1 At the time plaintiff's claim accrued in this case, the two-year limitations period for malpractice actions was codified at MCL 600.5805(6); the statute was later amended by 2018 PA 183 and the two-year limitations period is now codified at MCL 600.5805(8).

2 Now codified at MCL 600.5856(c). See 2004 PA 87, effective April 22, 2004.

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EXHIBIT 8

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

KERAN ERNEST, Personal Representative of the ESTATE OF MAURICE ERNEST,

Plaintiff-Appellant,

v

PAUL W. BROWN, JR., M.D., ELMAHDI M. SAEED, CYPRESS CARDIOLOGY PLLC, and MCLAREN HEALTH CARE CORPORATION,

Defendants-Appellees,

and

DR. FAROUK M. BELAL,

Defendant.

UNPUBLISHED
March 20, 2025
11:19 AM

No. 368566
Genesee Circuit Court
LC No. 2023-119425-NH

Before: CAMERON, P.J., and GARRETT and MARIANI, JJ.

PER CURIAM.

In this action for wrongful death arising out of medical malpractice, plaintiff appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) (statute of limitations) to defendants because plaintiff's claims were untimely. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's decedent presented to the emergency room on July 16, 2020, complaining of chest pain. After being examined in the emergency room, decedent was moved to the cardiac unit for observation. He died the next day. Relevant to this appeal, on June 7, 2021, the Genesee County Probate Court issued letters of authority appointing Keran Ernest as the personal representative of decedent's estate. Plaintiff sent its notice of intent to defendants on February 10, 2023, and filed suit on August 14, 2023. Defendants moved for summary disposition under

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MCR 2.116(C)(7) (statute of limitations), arguing that plaintiff's complaint was time-barred. The trial court granted the motions and dismissed the case. Plaintiff now appeals.

II. STANDARD OF REVIEW

"This Court reviews de novo both the applicability of a statute of limitations and the trial court's ruling on a motion for summary disposition." *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 21; 896 NW2d 39 (2016) (citations omitted). "Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations." *Dep't of Environmental Quality*, 318 Mich App at 21 (quotation marks and citation omitted). "Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute." *Id.* (quotation marks and citation omitted).

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dep't of Environmental Quality*, 318 Mich App at 21 (quotation marks and citation omitted).]

III. ANALYSIS

The question in this appeal involves the application of three statutes: (1) the statute of limitations for medical malpractice claims, MCL 600.5805(8), (2) the wrongful death savings provision (the "savings provision"), MCL 600.5852, and (3) the notice-tolling provision, MCL 600.5856(c).

Generally, medical malpractice actions are subject to a two-year statute of limitations from the time the claim accrues. MCL 600.5805(8). A claim for medical malpractice accrues "at the time of the act or omission that is the basis for the claim[.]" MCL 600.5838a(1). A plaintiff alleging medical malpractice must give the defendant-provider written notice at least 182 days before filing suit. MCL 600.2912b(1). "At the time notice is given in compliance with the applicable notice period[,]" if the statute of limitations would have expired before the 182-day period elapsed, the limitations period "is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." MCL 600.5856(c). In this case, plaintiff's claim accrued when decedent allegedly received negligent medical care on July 16, 2020. Had plaintiff provided its notice of intent within two years of this date, the limitations period for bringing the claim under MCL 600.5805(8) would have been tolled, but plaintiff did not do so. Thus, when considered solely in the context of the original statute of limitations, plaintiff's claim expired on July 16, 2022, and its August 14, 2023 complaint was untimely.

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However, the savings provision provided plaintiff with additional time in which to file suit. Relevant to this appeal, MCL 600.5852 states:

> (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run.
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> (2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate. Except as provided in subsection (3), the issuance of subsequent letters of authority does not enlarge the time within which the action may be commenced.
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> (4) Notwithstanding subsections (1) to (3), an action shall not be commenced under this section later than 3 years after the period of limitations has run. [MCL 600.5852(1), (2), and (4).]

Plaintiff's letters of authority were issued on June 7, 2021. Thus, under MCL 600.5852, plaintiff had until June 7, 2023 to file suit, even though the original statute of limitations had already expired. Again, plaintiff did not file its complaint until August 14, 2023. So, plaintiff's complaint was still untimely even when the savings provision is considered.

Plaintiff argues that the notice of intent it provided on February 10, 2023 tolled the period in which it could file suit under the savings provision. According to plaintiff, the notice tolling provision applies to the savings provision, rendering its suit timely. Plaintiff's claim fails because, in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), our Supreme Court expressly rejected the application of the tolling provision in MCL 600.5856 to the savings provision in MCL 600.5852.

Plaintiff acknowledges that its argument is contrary to our Supreme Court's holding in *Waltz*, but asserts *Waltz*'s holding is contrary to the Legislature's intent. In its effort to side step *Waltz*'s holding, plaintiff spins two earlier cases from our Supreme Court to support its claim that the tolling provision in MCL 600.5856(c) applies to the savings provision: *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987), and *Omelenchuk v Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz*, 469 Mich at 642. Plaintiff argues that *Hardy* remains good law because it was not expressly overruled by *Waltz*, and urges this Court to "apply the unambiguous language" of *Omelenchuk* despite it having been overruled by *Waltz*.

In *Waltz*, our Supreme Court held that MCL 600.5856 does not toll the time frame provided in MCL 600.5852. *Waltz*, 469 Mich at 650-651. It reasoned that MCL 600.5856 applies to a "period of limitations[,]" and MCL 600.5852 "clearly provides that it is an *exception* to the limitation period," not a limitation period itself. *Waltz*, 469 Mich at 651. Thus, while MCL 600.5856 may serve to toll the two-year statute of limitations for the underlying medical-malpractice claim, it does not toll the two-year *exception* to the statute of limitations under MCL 600.5852.

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Because *Waltz* is binding on this Court, we lack the authority to consider plaintiff's argument regarding legislative intent. See *Assoc Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016) ("The Court of Appeals is bound to follow decisions by [our Supreme] Court except where those decisions have clearly been overruled or superseded") (emphasis omitted). As for plaintiff's argument regarding *Hardy* and *Omelenchuk*, *Waltz* explicitly overruled *Omelenchuk*, see *id.*, and *Hardy* predates *Waltz*, meaning we must follow *Waltz*, see *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 03 NW2d 486 (2005) (explaining that this Court is "obligated to follow the most recent pronouncement of the Supreme Court on a principle of law.").

Affirmed.

/s/ Thomas C. Cameron
/s/ Kristina Robinson Garrett
/s/ Philip P. Mariani

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