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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

ELMAHDI M. SAEED'S ANSWER TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER STATEMENT OF JURISDICTION

MCR 7.305(C)(2) allows an application within 42 days after a Court of Appeals Opinion. On March 20, 2025, the Court of Appeals issued its Opinion affirming the Trial Court's grant of Summary Disposition to the Defendant-Appellee finding that Plaintiff-Appellant's claim is untimely under *Waltz v Wyse, 469 Mich 642; 677 N.W.2d 813 (2004)*. Plaintiff-Appellant's Application was timely under MCR 7.305.

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COUNTER STATEMENT OF QUESTIONS PRESENTED

In *Waltz v Wyse, 469 Mich 642; 677 N.W.2d, 813 (2004*) held that the tolling under MCL 600.5856(c) for a Notice of Intent does not apply to actions brought under the wrongful death savings provision, MCL 600.5852. Is the Appellant's action untimely when it is filed after the 2-year Statute of Limitations and the time allowed under the savings provision has expired:

Court of Appeals Answer: Yes

The Trial Court Answer: Yes

Defendant-Appellees' Answers: Yes

Plaintiff-Appellants' answer: No

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INTRODUCTION

This is a medical malpractice action which was untimely filed. The issue raised is controlled by *Waltz v Wyse, 469 Mich 642; 677 N.W.2d, 813 (2004*). Plaintiff-Appellant seeks to apply the Notice of Intent tolling provision of MCL 600.5856 (c) to the wrongful death savings provision MCL 600.5852, on a proposition which was rejected in *Waltz, supra,* and consistently applied since.

This is not a case which involves any new or novel issues. This case does not present with any factual anomaly that makes this case unique. Appellants do not raise any argument on this issue that has not been previously addressed, considered and rejected by the courts. Appellants simply disagree with the decision in *Waltz*. Appellants' application should be denied.

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STATEMENT OF FACTS

On July 16, 2020, Appellants' Decedent, Maurice Earnest, presented to the emergency department at McLaren-Flint Hospital with complaints of chest pain. The emergency medical physician suspected acute coronary syndrome and the on-call Internist, Dr. Elmahdi M. Saeed, M.D., was contacted for admission purposes. The emergency department was advised to contact the Cardiologist for further evaluation and orders. The patient was seen by the cardiologist, as well as others. Evaluation and workup had continued. Mr. Ernest became unresponsive on July 17, 2020. A code blue was called, and there was an attempt to resuscitate the patient. Unfortunately, Mr. Ernest died. (Appellant's Appendix Exhibit G, Complaint, paragraphs 10-15, pages 37-38).

The Genesee County Probate Court, on June 7, 2021, issued Letters of Authority to Keran Earnest as Personal Representative to the estate (Appellees' Appendix, Exhibit 3, page 18). Appellant sent a Notice of Intent on February 10, 2023, to Appellee as well as others. The Notice of Intent raised allegations pertaining to the July 16, 2020, care at McLaren and the patient's death. An Amended Notice of Intent was sent on August 17, 2023.

PROCEDURAL COURSE

On August 14, 2023, Appellant filed a Complaint alleging a failure to diagnose and treat a pulmonary embolism. Appellant's claim was untimely as it was not filed within 2 years of the Statute of Limitations or within 2 years of issuance of the Letters of Authority. Therefore, Appellee Dr. Saeed filed a Motion for Summary Disposition (Appellee's Appendix Exhibit 3, page 8).

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On October 23, 2023, Genesee County Circuit Court Judge Celeste Bell heard oral arguments on the Summary Disposition Motion. The trial court examined MCL 600.5852, and the Supreme Court Decision in *Waltz* and found that the Appellants claim was untimely (Appellee's Appendix Exhibit 6, page 63). A final order was entered on October 23, 2023 (Appellee's Appendix Exhibit 1, page 4).

Appellant appealed the trial court's grant of Summary Disposition. Appellant then sought a decision from this court via a bypass application for leave to appeal (Supreme Court Docket No. 166495). This was denied (Appellee's Appendix Exhibit 2, page 7). Subsequently, the Court of Appeals heard arguments on Appellants Claim of Appeal and March 20, 2025, issued a decision affirming the trial court's order granting summary disposition finding Plaintiff's claims were untimely (Appellant's Appendix Exhibit 8, pages 80-85).

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ARGUMENT

IN *WALTZ V WYSE, 469 MICH 642; 677 N.W.2D, 813 (2004)* HELD THAT THE TOLLING UNDER MCL 600.5856(C) FOR A NOTICE OF INTENT DOES NOT APPLY TO ACTIONS BROUGHT UNDER THE WRONGFUL DEATH SAVINGS PROVISION, MCL 600.5852. THE APPELLANT'S ACTION IS UNTIMELY WHEN IT IS FILED AFTER THE 2-YEAR STATUTE OF LIMITATIONS AND THE TIME ALLOWED UNDER THE SAVINGS PROVISION HAS EXPIRED.

The decision in *Waltz v Wyse, 469 Mich 642; 677 N.W.2d, 813 (2004)* is controlling. Notice of Intent tolling does not apply to the wrongful death savings provision contained in MCL 600.5852. The 2-year Statute of Limitations had expired. Appellant's Notice of Intent was not sent until after the expiration of the 2-year Statute of Limitations. MCL 600.5856 does not apply. The wrongful death savings provision in MCL 600.5852 allows claims filed within two years of issuance of the Letters of Authority. The appellant's claim was not filed within two years of the Letters of Authority. Appellant's claim was untimely and Summary Disposition was properly granted to Appellee.

STANDARD OF REVIEW

Decisions regarding summary disposition motions are review de novo. *El-Khalil v Oakwood Healthcare, Inc., 504 Mich 152; 934 N.W.2d 665 (2019).* The court also reviews de novo questions of statutory interpretation. *Potter v McLeary, 484 Mich 397; 774 N.W.2d 1 (2009).*

APPELLANTS' CLAIM IS UNTIMELY

1. Statute of Limitations Expired

Medical malpractice is subject to a 2-year Statute of Limitations. MCL 600.5805(8), the claim accrues at the time the act or omission that is the basis for the claim of medical malpractice, regardless of the time Plaintiff discovers or otherwise has knowledge of the

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claim. MCL 600.5838(a). Appellee Dr. Saeed's only involvement in this case was on July 16, 2020, when the patient was admitted from the emergency department to the hospital and gave orders for a cardiology consult. The accrual date for the claim is therefore July 16, 2020. Appellants' action needed to be commenced within 2 years or by July 16, 2022. The Complaint was not filed until August 14, 2023, more than a year after the 2-year Statute of Limitations.

MCL 600.2912(b) provides that medical malpractice plaintiffs must give notice of intent to file a claim before commencing an action. Under that Section, the Plaintiff would need to wait up to 182 days after sending a notice of intent before an action can be commenced. If the Statute of Limitations would expire during this waiting period, MCL 600.5856 provides for tolling of the Statute of Limitations. In part, the Statute provides:

> The statutes of limitations or repose are tolled … (c) At the time 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 …

Since the Notice of Intent was not sent until February 10, 2023, and the 2-year statute of limitations had already expired on July 16, 2022, tolling allowed by MCL 600.5856(c) would not apply. Appellants' action was untimely under the 2-year Statute of Limitations. Appellant doesn't dispute this.

2. <u>Action Untimely Under Wrongful Death Savings Provision</u>

The Wrongful Death Savings Provision, MCL 600.5852 provides:

> (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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> (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.

Letters of Authority were issued to the Personal Representative on June 7, 2021. Under the plain language of the wrongful death savings provision, the action had to be commenced on or before June 7, 2023. Again, the Complaint was not filed until August 14, 2023, more than 2 months after the time allowed for bringing an action under the savings provision. This is not disputed by Appellant.

3. Notice of Intent Tolling Not Applicable

The Language of MCL 600.5856(c) and the decision in *Waltz, supra,* are dispositive of this issue. The language under the tolling statute only applies to Statutes of Limitation and Statutes of Repose. *Waltz* examined the statutory language and case law recognizing that the wrongful death savings provision is not a statute of limitations thereby concluding that the notice of intent tolling does not apply to actions commenced under the wrongful death savings provision. An action commenced more than two years after the letters of authority is untimely.

Applied here, Appellants Letters of Authority were issued on June 7, 2021. MCL 600.5852 would require commencement of an action on or before June 7, 2023. Appellants' Complaint filed on August 14, 2023, was untimely and Summary Disposition was appropriately granted.

4. *Waltz* Correctly Interpreted and Applied the Statutory Language

MCL 600.5856 States:

> The statutes of limitations or repose are tolled in any of the following circumstances…
> (c) At the time 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; …

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The statutory language is clear and unambiguous as to what is tolled. The rules of statutory construction are well established. The court begins by examining the language itself. *Tryc v Michigan Veterans Facility 451 Mich 129; 545 N.W.2d 642 (1996).* Where the language of the statute is unambiguous, the plain meaning reflects the legislators' intent, and the court applies the statute as written. Judicial construction is not permitted. *Id.* It has also been stated that a necessary corollary to these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the legislature as derived from the words of the statute itself. *Omne Financial, Inc. v Shacks, Inc., 460 Mich 305; 596 N.W.2d 591 (1999)*. The court may not speculate regarding the intent of the legislature beyond the words expressed in the statute. *Lash v Travers City, 479 Mich 180; 735 N.W. 2d, 628 (2007)*.

The language of Section 5856 is clear and unambiguous. There can be no doubt the tolling applies to Statute of Limitations Statutes of Repose. The intent of the legislature is plain, and the statute is enforced as written.

Interestingly, prior to 1993, the tolling statute only referenced statute of limitations. It did not include Statutes of Repose. Section 5856 was amended in 1993, when the Notice of Intent Statute, MCL 600.2912(b) was enacted. The tolling statute was amended to add notice of intent tolling during the 182-day waiting time. The legislature also added statutes of repose to the tolling language. Keep in mind, the wrongful death savings provision had been in place at this time. If the legislature had intended that the notice of intent tolling applied to all time periods to commence an action, it could have said so at that time. The legislature is presumed to be aware of, and thus to have considered the

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effect on, all existing statutes when enacting laws. *Walen v Department of Corrections, 443 Mich 240, 505 N.W.2d 519 (1993).*

Similarly, the language of MCL 600.5852, the wrongful death savings provision indicates it's not a statute of limitations. The language of the statute allows a claim to be commenced "although the period of limitations has run". There would be no reason to include language that the "period of limitation has run" if Section 5852 was creating a statute of limitations.

Instead, the courts have recognized differences between statute of limitations and savings provisions. In *Miller v Mercy Memorial Hospital Corp., 466 Mich 196; 644 N.W.2d 730 (2002)* Section 5852 was specifically noted as a savings statute and not a statute of limitations. In *Lindsey v Harper Hospital, 455 Mich 56; 564 N.W.2d 861 (1997)* the court again noted Section 5852 as a savings provision and an "exception to the statute of limitations". Even in the cases relied on by the Appellant refer to Section 5852 as a savings provision. See *Hardy v Maxheimer, 429 Mich 422; 416 N.W.2d 299 (1987)* wherein the court held "that the savings provision contained in MCL 600.5852" allowed an action to be commenced within two years of the Letters of Authority in both survival type actions and death type actions brough under the wrongful death statute.

The legislature is presumed to act with knowledge of judicial statutory interpretations. *Gordon Sel-Way, Inc. v Spence Brothers, Inc., 438 Mich 488; 475 N.W.2d 704 (1991).* The legislature was therefore aware that Section 5852 was a savings provision and not a statute of limitations. When the tolling statute was enacted and amended, the clear legislative intent was not to include the savings provision but instead allow notice of intent tolling for only statute of limitations and statutes of repose. *Waltz* applied these statutes consistent with their plain meaning and correctly applied them to

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conclude that notice of intent tolling does not apply to claims commenced based on the wrongful death savings provision.

5. **No Reason to Overturn *Waltz***

Since *Waltz* was correctly decided, there was no reason it should be overturned. Simply because one does not like or disagrees with a decision is not a basis to upend over 20 years of precedent.

It has been recognized that the purpose of MCL 600.5852 savings statute was to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions. *Miller, supra,* quoting *Lindsey v Harper Hospital, 455 Mich 56; 564 N.W.2d 861 (1997). Waltz* does not impact purpose. The wrongful death savings provision provides 2 years and up to 5 years to commence an action. *Waltz* does not prevent a plaintiff from this reasonable time allowed to pursue an action.

Similarly, contrary to Appellant's argument, a defendant does not have control over the timing. *Waltz* did not grant a defendant any greater rights to somehow trap the unwary. A defendant has no control over when a personal representative is appointed. Defendant has no control over when a notice of intent is sent. These are choices made by plaintiffs. We know in this case, Appellant had nearly 3 years to commence this action. Well within the reasonable time granted by the wrongful death savings provision to pursue an action.

Plaintiff wants this court to overrule case law by reading into the statute language which does not exist by relying on cases which are distinguishable. In *Hardy, supra*, the issue is not whether the tolling statue applied to the wrongful death savings statute. Instead, the court examined whether the wrongful death savings provision times for

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commencing an action applied in all types of death cases as opposed to separating out instantaneous verses non-instantaneous deaths.

In *Omelenchuck v City of Warren, 461 Mich 567; 609 N.W.2d 177 (2000),* the issue did not involve notice of intent tolling under the wrongful death savings provision. The issue involved the question of whether plaintiff has the benefit of the full 182 day waiting period when there was no response to the notice of intent thereby reducing the waiting period to 154 days. Missing from that case is any reliance on the wrongful death savings provision. Plaintiffs filed their claim within the time allowed under the 2-year statute of limitations as tolled by Section 5856. The wrongful death savings provision and any tolling under that statute was not involved or discussed. This case lends nothing to support the issue raised in this Application for Leave.

CONCLUSION AND RELIEF REQUESTED

Appellants' claim was untimely. It was not filed within the 2-year Statute of Limitations, nor within 2 years of the issuance of Letters of Authority. Notice of intent tolling does not apply. The decision in *Waltz, supra*, examined the clear and unambiguous language that notice of intent tolling applies only to Statute of Limitations and Statutes of Repose. The wrongful death savings provision MCL 600.5852 is not a statute of limitations and not subject to tolling. This was a correct decision consistent with the language of the statute and intent of the legislature. Courts have long recognized the distinction between statute of limitations and the savings provision. The statute plainly sets forth the death tolling applies to statute of limitations and statutes of repose. If the legislature intended

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something different it could have so stated. In fact, the tolling statute has been amended on a few occasions, and the legislature has not decided to expand notice of intent tolling.

This is not a case involving new or novel issues. Appellants do not raise any arguments on this issue that have not previously been addressed, considered, and rejected. Appellants simply disagree with the interpretation of *Waltz* which is not a basis for relief.

WHEREFORE, Appellee Elmahdi M. Saeed, M.D., respectively request this honorable court deny the Appellants' Application for Leave to Appeal.

Respectfully submitted,

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SIGNATURE OF COMPLIANCE

I hereby certify that Appellee-Defendant Elmahdi M. Saeed, M.D.'s Answer to Plaintiff-Appellant's Application for Leave to Appeal is in compliance with MCR 7.312 and MCR 7.212 as the word Count is 3318 according to the count generated by Microsoft word.

Respectfully submitted,

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