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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,

vs.

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

Defendants-Appellees
and

DR. FAROUK M. BELAL,

Defendant.

Docket No. 168462

Court of Appeals No. 368566

Genesee County Circuit Court
Case No. 23-119425-NH

Defendant-Appellee Cypress Cardiology's Appendix

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(*caption continued on next page*)

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& BEACH PLLC
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Appendix Index

Document	*Title*	*Appendix Pages*
1	Claim of appeal (excerpt)	2-3
2	Notice of intent	5-15
3	Register of actions	17-34
4	The Estate's response in opposition	36-49
5	Dr. Belal reply	51-54
6	Dr. Saeed reply	56-59
7	McLaren and Dr. Brown reply	61-63
8	Order denying the Estate's bypass application for leave to appeal	65
9	Order denying motion to affirm	67

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APPENDIX 1

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JIS Code: COA

STATE OF MICHIGAN JUDICIAL DISTRICT JUDICIAL CIRCUIT COUNTY Genesee ☑ IN THE COURT OF APPEALS	CLAIM OF APPEAL	CASE NO. CIRCUIT 2023-119425-NH DISTRICT PROBATE

Court address
201 W Big Beaver Rd #800, Troy, MI 48084

Court telephone no.
(248) 524-8700

Plaintiff's/Petitioner's name(s) and address(es) ☑ Appellant ☐ Appellee	v	Defendant's/Respondent's name(s) and address(es) ☐ Appellant ☑ Appellee
Keran Ernest, individually and as Personal Representative of the Estate of Maurice Ernest, (Deceased)		Dr. Paul W. Brown Jr., Elmahdi M. Saeed, McLaren Health Care Corporation, Cypress Cardiology PLLC
Plaintiff's attorney, bar no., address, and telephone no. Alyson Oliver (P55020) Paul Matouka (P84874) 50 W. Big Beaver Road, Suite 200, Troy, MI 48084 (248) 327-6556		Defendant's attorney, bar no., address, and telephone no. See Attachment for Full List of Defendants Attorney's

In the matter of Keran Ernest v. Dr. Paul W. Brown Jr., Elmahdi M. Saeed, Dr. Farouk M. Belal, et. al.

Other interested party(ies) of probate matter

1. Keran Ernest (Name) claims an appeal from a final judgment or final order entered on 10-23-23 (Date) in the Genesee County (Court name and number or county) Court of the State of Michigan,

by ☐ district judge ☑ circuit judge ☐ probate judge ☐ district court magistrate

Celeste D. Bell (P41453) .
Name of judge or district court magistrate — Bar no.

2. Bond on appeal is ☐ filed. ☐ attached. ☐ waived. ☑ not required.
3. ☑ a. The transcript has been ordered.
   ☐ b. The transcript has been filed.
   ☐ c. No record was made.
☐ 4. THIS CASE INVOLVES
   ☐ a. A CONTEST AS TO THE CUSTODY OF A MINOR CHILD.
   ☐ b. AN ADULT OR MINOR GUARDIANSHIP UNDER THE ESTATES AND PROTECTED INDIVIDUALS CODE OR UNDER THE MENTAL HEALTH CODE.
   ☐ c. AN INVOLUNTARY MENTAL HEALTH TREATMENT CASE UNDER THE MENTAL HEALTH CODE.
   ☐ d. A RULING THAT A PROVISION OF THE MICHIGAN CONSTITUTION, A MICHIGAN STATUTE, A RULE OR REGULATION INCLUDED IN THE MICHIGAN ADMINISTRATIVE CODE, OR ANY OTHER ACTION OF THE LEGISLATIVE OR EXECUTIVE BRANCH OF STATE GOVERNMENT IS INVALID.
   ☐ e. AN ADOPTION ORDER UNDER CHAPTER X OF THE PROBATE CODE.
   ☐ f. A FREEDOM OF INFORMATION ACT ISSUE.

11-8-23
Date

Alyson Oliver
Appellant/Attorney signature

Distribute form to:
Court of Appeals/Circuit court
Trial court
Appellee
Appellant

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Case No. 2023-119425-NH

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PROOF OF SERVICE

I certifiy that copies of this claim of appeal and bond (if required) were served on

_____ on _____ by ☐ personal service. ☐ first-class mail.
Name Date

_____ on _____ by ☐ personal service. ☐ first-class mail.
Name Date

_____ on _____ by ☐ personal service. ☐ first-class mail.
Name Date

_____ _____
Date Signature

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APPENDIX 2

OLIVER LAW GROUP
ATTORNEYS AT LAW

1.800.939.7878

50 W. Big Beaver Rd.
Suite 200
Troy, Michigan 48084

8951 Cypress Waters Blvd.
Suite 160
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248 327-6556
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.
726 Woodside Ct.
Lake Orion, MI 48359-1747

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

Elmahdi M. Saeed
8232 Pine Hollow Ct.
Grand Blanc, MI 48439-7439

Cypress Cardiology PLLC
Attn: Farouk Belal
1471 S. Elms Road
Flint, MI 48532

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

RE: Estate of Maurice Ernest (DOB[redacted]/DOD[redacted])

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

Defendant-Appellee's Appendix 005

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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.

Defendant-Appellee's Appendix 014

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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).

Name of Health Professionals, Entities and Facilities Notified:

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

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

Cypress Cardiology PLLC
Attn: Farouk Belal
1471 S. Elms Road
Flint, MI 48532

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

Elmahdi M. Saeed
8232 Pine Hollow Ct.
Grand Blanc, MI 48439-7439

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APPENDIX 3

Case Details

Additional Resources

Case ID
2023-0000119425-NH

Court Location
7th Circuit Court - Genesee

Case Entitlement
ERNEST V BROWN

Judge of Record
BELL,CELESTE D.,

Date Filed
08/14/2023

Case Status
CLOSED

Closed Date
10/23/2023

Balance

Parties (6)

Party Name
ERNEST,KERAN,

Party Type/Number
PLAINTIFF - 1

Attorney Name
ALYSON OLIVER

Alternate Name(s)
PER KERAN ERNEST

Answer Date

Service Date

Disposition

Disposition Date

Party Name
BROWN,PAUL,W,DR

Party Type/Number
DEFENDANT - 1

Attorney Name
J. BRIAN MACDONALD

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Alternate Name(s)

Answer Date

Service Date

Disposition
DISMISSED

Disposition Date
10/23/2023

Party Name
SAEED,ELMAHDI,M

Party Type/Number
DEFENDANT - 2

Attorney Name
DOUGLAS C. SMITH

Alternate Name(s)

Answer Date
09/19/2023

Service Date

Disposition
DISMISSED

Disposition Date
10/23/2023

Party Action(s)

Category	Action	Action Date	Action Due Date
PARTY ANSWER	ANSWER FILED	09/19/2023	

Party Name
BELAL,FAROUK,M,DR

Party Type/Number
DEFENDANT - 3

Attorney Name

Alternate Name(s)

Answer Date

Service Date

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Disposition
DISMISSED

Disposition Date
10/23/2023

Party Name
CYPRESS CARDIOLODGY PLLC,,

Party Type/Number
DEFENDANT - 4

Attorney Name

Alternate Name(s)

Answer Date

Service Date

Disposition
DISMISSED

Disposition Date
10/23/2023

Party Name
MCLAREN HEALTH CARE CORPORATION,,

Party Type/Number
DEFENDANT - 5

Attorney Name
J. BRIAN MACDONALD

Alternate Name(s)

Answer Date

Service Date

Disposition
DISMISSED

Disposition Date
10/23/2023

Bonds (0)

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Hearings (1)

Hearing Type
SUMMARY DISPOSITION

Hearing Date
10/23/2023

Hearing Officer
BELL, CELESTE D.

Financial Orders (0)

Events (62)

Event Date
11/01/2023

Description
PROOF OF SERVICE

Party/Count

Event No./Clerk
52 - KC

Comment
PROOF OF SERVICE FILED

Event Date
10/23/2023

Description
SUMMARY DISPOSITION

Party/Count
D1

Event No./Clerk
39 - JS

Comment

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ATTY'S PRESENT BEFORE THE COURT FOR DEFT'S SUMMARY DISPOSITION MOTION.

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D1

Event No./Clerk
39 - JS

Comment
MOTIONS HEARD. COURT GRANTED DEFT'S MOTION FOR SUMMARY DISPOSITION AS

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D1

Event No./Clerk
39 - JS

Comment
STATED. ORDER SIGNED AND SUBMITTED.

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D2

Event No./Clerk
40 - JS

Comment
ATTY'S PRESENT BEFORE THE COURT FOR DEFT'S SUMMARY DISPOSITION MOTION.

Judge
BELL,CELESTE D.,

Disposition

RECEIVED by MSC 6/4/2025 1:02:48 PM

RECEIVED by MCOA 11/10/2023 4:05:27 PM

DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D2

Event No./Clerk
40 - JS

Comment
MOTIONS HEARD. COURT GRANTED DEFT'S MOTION FOR SUMMARY DISPOSITION AS

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D2

Event No./Clerk
40 - JS

Comment
STATED. ORDER SIGNED AND SUBMITTED.

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D3

Event No./Clerk
41 - JS

Comment
ATTY'S PRESENT BEFORE THE COURT FOR DEFT'S SUMMARY DISPOSITION MOTION.

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

RECEIVED by MSC 6/4/2025 1:02:48 PM

RECEIVED by MCOA 11/10/2023 4:05:27 PM

Description
SUMMARY DISPOSITION

Party/Count
D3

Event No./Clerk
41 - JS

Comment
MOTIONS HEARD. COURT GRANTED DEFT'S MOTION FOR SUMMARY DISPOSITION AS

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D3

Event No./Clerk
41 - JS

Comment
STATED. ORDER SIGNED AND SUBMITTED.

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D4

Event No./Clerk
42 - JS

Comment
ATTY'S PRESENT BEFORE THE COURT FOR DEFT'S SUMMARY DISPOSITION MOTION.

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D4

Event No./Clerk
42 - JS

Comment

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MOTIONS HEARD. COURT GRANTED DEFT'S MOTION FOR SUMMARY DISPOSITION AS

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D4

Event No./Clerk
42 - JS

Comment
STATED. ORDER SIGNED AND SUBMITTED.

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D5

Event No./Clerk
43 - JS

Comment
ATTY'S PRESENT BEFORE THE COURT FOR DEFT'S SUMMARY DISPOSITION MOTION.

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D5

Event No./Clerk
43 - JS

Comment
MOTIONS HEARD. COURT GRANTED DEFT'S MOTION FOR SUMMARY DISPOSITION AS

Judge
BELL,CELESTE D.,

Disposition

RECEIVED by MSC 6/4/2025 1:02:48 PM

RECEIVED by MCOA 11/10/2023 4:05:27 PM

DISMISSED

Description
SUMMARY DISPOSITION

Party/Count
D5

Event No./Clerk
43 - JS

Comment
STATED. ORDER SIGNED AND SUBMITTED.

Judge
BELL,CELESTE D.,

Disposition
DISMISSED

Description
CLOSE CASE

Party/Count

Event No./Clerk
44 - JS

Judge
BELL,CELESTE D.,

Description
ORDER

Party/Count
D5

Event No./Clerk
50 - JS

Comment
ORDER GRANTING DEFTS' MOTIONS FOR SUMMARY DISP FILED

Event Date
10/20/2023

Description
MISCELLANEOUS

Party/Count
D2

Event No./Clerk
51 - JS

Comment
DEFT'S REPLY TO PLTFS' MOTION FILED

Event Date
10/18/2023

RECEIVED by MSC 6/4/2025 1:02:48 PM

RECEIVED by MCOA 11/10/2023 4:05:27 PM

Description
MISCELLANEOUS

Party/Count
D3

Event No./Clerk
45 - JS

Comment
DEFT'S BRIEF IN REPLY TO PTLF'S RESPONSE FILED

Description
MISCELLANEOUS

Party/Count
D1

Event No./Clerk
46 - JS

Comment
DEFT'S REPLY TO PTLFS' RESPONSE TO DEFT'S MOTION FILED

Description
MISCELLANEOUS

Party/Count
D5

Event No./Clerk
47 - JS

Comment
DEFT'S REPLY TO PTLFS' RESPONSE TO DEFT'S MOTION FILED

Description
PROOF OF SERVICE

Party/Count

Event No./Clerk
48 - JS

Comment
PROOF OF SERVICE FILED

Event Date
10/17/2023

Description
RESPONSE

Party/Count
P1

Event No./Clerk
49 - JS

Comment
PTLF'S RESPONSE TO DEFT'S MOTION FILED

Event Date

RECEIVED by MSC 6/4/2025 1:02:48 PM

RECEIVED by MCOA 11/10/2023 4:05:27 PM

10/09/2023

Description
JUDGE NOTES

Party/Count

Event No./Clerk
27 - SY

Comment
PLTF/STAY MOTION WITHDRAWN BY COUNSEL BY PHONE.

Judge
BELL,CELESTE D.,

Event Date
10/04/2023

Description
MISCELLANEOUS

Party/Count
D1

Event No./Clerk
28 - JS

Comment
DEFT'S CONCURRENCE W/OPPOSITION TO PLTF'S MOTION FILED

Description
MISCELLANEOUS

Party/Count
D2

Event No./Clerk
29 - JS

Comment
DEFT'S CONCURRENCE W/OPPOSITION TO PLTF'S MOTION FILED

Description
MISCELLANEOUS

Party/Count
D5

Event No./Clerk
30 - JS

Comment
DEFT'S CONCURRENCE W/OPPOSITION TO PLTF'S MOTION FILED

Description
PROOF OF SERVICE

Party/Count

Event No./Clerk
31 - JS

Comment

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RECEIVED by MCOA 11/10/2023 4:05:27 PM

PROOF OF SERVICE FILED

Event Date
10/02/2023

Description
MISCELLANEOUS

Party/Count
D2

Event No./Clerk
32 - JS

Comment
DEFT'S ANSWERT TO PTLFS' MOTINO FOR STAY PENDING RESOLUTION FILED

Description
MISCELLANEOUS

Party/Count
D2

Event No./Clerk
33 - JS

Comment
DEFT'S BRIEF IN OPPOSITION TO PTLFS' MOTION FILED

Event Date
09/27/2023

Description
SET CASE ON CALENDAR

Party/Count

Event No./Clerk
26 - JS

Comment
REMOVED ON 2023-10-09 BY YOUNGLOS01

Judge
BELL,CELESTE D.,

Next Hearing
10/09/2023 2:00 PM - MOTION HEARING
Hearing Officer - BELL,CELESTE D.,
Location - 308
Comment - PLTF/STAY

Description
MOTION FILED

Party/Count

Event No./Clerk

RECEIVED by MSC 6/4/2025 1:02:48 PM

RECEIVED by MCOA 11/10/2023 4:05:27 PM

P1 34 - JS

Comment
NOTICE OF HEARING FILED

Description
MISCELLANEOUS

Party/Count P1
Event No./Clerk 35 - JS

Comment
PTLFS' BRIEF IN SUPPORT OF MOTION FOR A STAY FILED

Description
MOTION FILED

Party/Count P1
Event No./Clerk 36 - JS

Comment
PTLFS' MOTION FOR A STAY PENDING RESOLUTION FILED

Description
MISCELLANEOUS

Party/Count P1
Event No./Clerk 37 - JS

Comment
CONCURRENCE FILED

Description
PROOF OF SERVICE

Party/Count
Event No./Clerk 38 - JS

Comment
PROOF OF SERVICE FILED

Event Date
09/19/2023

Description
ANSWER FILED

Party/Count D2
Event No./Clerk 13 - JS

Judge

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RECEIVED by MCOA 11/10/2023 4:05:27 PM

BELL,CELESTE D.,

Attorney
SMITH,DOUGLAS C.,

Description
SET CASE ON CALENDAR

Party/Count

Event No./Clerk
14 - JS

Judge
BELL,CELESTE D.,

Next Hearing
10/23/2023 2:01 PM - SUMMARY DISPOSITION
Hearing Officer - BELL,CELESTE D.,
Location - 308
Comment - DEFT-SAEED/SUMMARY DISP.

Description
APPEARANCE

Party/Count
D2

Event No./Clerk
21 - JS

Comment
APPEARANCE FILED

Description
MOTION FILED

Party/Count
D2

Event No./Clerk
22 - JS

Comment
NOTICE OF HEARING FILED

Description
MOTION FILED

Party/Count
D2

Event No./Clerk
23 - JS

Comment
DEFT' BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISP FILED

Description
MOTION FILED

Party/Count

Event No./Clerk

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RECEIVED by MCOA 11/10/2023 4:05:27 PM

D2 24 - JS

Comment
DEFT'S MOTION FOR SUMMARY DISPOSITION FILED

Description
ANSWER FILED

Party/Count D2
Event No./Clerk 25 - JS

Event Date
09/14/2023

Description
SET CASE ON CALENDAR

Party/Count
Event No./Clerk 12 - JS

Judge
BELL,CELESTE D.,

Next Hearing
10/23/2023 2:00 PM - SUMMARY DISPOSITION
Hearing Officer - BELL,CELESTE D.,
Location - 308
Comment - DEFT'S MCLAREN/P.BROWNS/SUMMARY DISP.

Description
APPEARANCE

Party/Count D1
Event No./Clerk 15 - JS

Comment
APPEARANCE FILED

Description
APPEARANCE

Party/Count D5
Event No./Clerk 16 - JS

Comment
APPEARANCE FILED

Description
MOTION FILED

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Party/Count
D1

Event No./Clerk
17 - JS

Comment
NOTICE OF HEARING FILED

Description
MOTION FILED

Party/Count
D5

Event No./Clerk
18 - JS

Comment
NOTICE OF HEARING FILED

Description
MOTION FILED

Party/Count
D1

Event No./Clerk
19 - JS

Comment
DEFTS MOTION FOR SUMMARY DISPOSITION FILED

Description
MOTION FILED

Party/Count
D5

Event No./Clerk
20 - JS

Comment
DEFTS MOTION FOR SUMMARY DISPOSITION FILED

Event Date
09/08/2023

Description
SET CASE ON CALENDAR

Party/Count

Event No./Clerk
7 - JS

Judge
BELL,CELESTE D.,

RECEIVED by MSC 6/4/2025 1:02:48 PM

RECEIVED by MCOA 11/10/2023 4:05:27 PM

Next Hearing
10/23/2023 2:00 PM - SUMMARY DISPOSITION
Hearing Officer - BELL,CELESTE D.,
Location - 308
Comment - DEFT DR BELAL/SUMMARY DISP.

Description
MOTION FILED

Party/Count
D3

Event No./Clerk
8 - JS

Comment
NOTICE OF HEARING FILED

Description
NOTICE

Party/Count
D3

Event No./Clerk
9 - JS

Comment
ATTACHMENT TO NOTICE OF HEARING FILED

Description
MOTION FILED

Party/Count
D3

Event No./Clerk
10 - JS

Comment
MOTION FOR SUMMARY DISPOSITION FILED

Description
MOTION FILED

Party/Count
D3

Event No./Clerk
11 - JS

Comment
DEFT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION FILED

Event Date
08/14/2023

Description
COMPLAINT

Party/Count

Event No./Clerk

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P1 1 - JS

Comment
COMPLAINT FILED

Description
SUMMONS AND COMPLAINT

Party/Count **Event No./Clerk**
D1 2 - JS

Comment
SUMMONS FILED

Description
SUMMONS AND COMPLAINT

Party/Count **Event No./Clerk**
D2 3 - JS

Comment
SUMMONS FILED

Description
SUMMONS AND COMPLAINT

Party/Count **Event No./Clerk**
D3 4 - JS

Comment
SUMMONS FILED

Description
SUMMONS AND COMPLAINT

Party/Count **Event No./Clerk**
D4 5 - JS

Comment
SUMMONS FILED

Description
SUMMONS AND COMPLAINT

Party/Count **Event No./Clerk**
D5 6 - JS

Comment
SUMMONS FILED

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APPENDIX 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., *et al*.

Defendants.

_____/

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Paul Matouka (P84874)
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Richard.joslin@ceflawyers.com

_____/

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.

Dated: October 13, 2023

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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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APPENDIX 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,

Plaintiff,

Case No: 2023-119425-NH
Hon. Celeste D. Bell

vs.

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

Defendants.

_____/

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_____/

DEFENDANT BELAL'S BRIEF IN REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

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Argument

All of the defendants in this case have filed motions for summary disposition because plaintiff Estate of Maurice Ernest filed its medical malpractice case too late. Plaintiff has now filed its response.

It is not a model of clarity. The opening paragraph of the argument section alone contains several misstatements of fact and law. Plaintiff says that "Plaintiff served a written notice of intent on February 10, 2023, and filed her complaint on August 10, 2023."[1] This is wrong. The complaint was actually filed on August 14, 2023.[2] This may simply be a typo but in a case involving the statute of limitations, dates matter.

The next sentence says that "This filing complied with the requirements of MCL 600.5852 as it was 1) within two years of the insurance (sic) of the letters of authority to personal representative Keran Ernest and 2) within two years from expiration of the underlying three-year statute of limitations."[3] But, we know that the filing of the complaint was not within two years of the issuance of letters of authority because the Estate concedes that the letters were issued on June 7, 2021.[4] And we know that the "underlying" statute of limitations for medical malpractice is two years from the date of the alleged malpractice, not three years. MCL 600.5805(8).

[1] Plaintiff's Brief at 3.
[2] Exhibit 5, Docket Sheet.
[3] Plaintiff's Brief at 3.
[4] Plaintiff's Brief at 2 and Exhibit 3 to Defendant's Brief.

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The Estate urges this court to ignore *Waltz v Wyse*, 469 Mich 650 (2004).[5] But *Waltz* and its progeny have been the law of the land for 19 years. This is a fact which the Estate recognized when it filed a motion to stay this case in the hopes that the Michigan Supreme Court would grant leave to appeal the Court of Appeals decision in *Poniewierski v William Beaumont Hospital Royal Oak*, 2022 WL 17368761 (unpublished COA No. 356925, 2022).

But those hopes were dashed. The Michigan Supreme Court did not grant leave. As such, *Waltz* clearly remains the law and all lower courts are bound by its holding. *Paige v City of Sterling Heights*, 476 Mich 495, 524 (2006).

The Estate also seems to argue that subsection (4) of MCL 600.5852 somehow saves this action. That argument is misguided. Subsection (4) provides:

> (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.

As the Michigan Court of Appeals explained in *Braverman v Garden City Hosp.*, 275 Mich App 705 (2007), the "three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself." *Id. at 711 (citation omitted).* The three-year ceiling prevents putative plaintiffs from waiting for six years to appoint a personal representative and then try to take advantage of the wrongful death savings provision. Subsection (4) has no application here.

[5] Plaintiff's Brief at 3.

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Conclusion and Relief Requested

WHEREFORE, because the Estate's case against Dr. Farouk Belal is time-barred, defendant moves this court for an order GRANTING his motion for summary disposition pursuant to MCR 2.116(C)(7) and DISMISSING this case with prejudice.

Respectfully submitted,

COLLINS EINHORN FARRELL PC

/s/ Richard A. Joslin
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Dated: October 17, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 17, 2023, she served the above on all counsel of record listed on the above-referenced caption via email and first class.

/s/ Tammie DeJaeghere
TAMMIE DEJAEGHERE

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APPENDIX 6

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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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Defendant-Appellee's Appendix 057

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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

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Defendant-Appellee's Appendix 059

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APPENDIX 7

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

KERAN ERNEST, Individually and as Personal Representative for the Estate of MAURICE ERNEST, deceased

Plaintiffs,

-vs-

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

Defendants.

Case No. 23-119425-NH
Hon. Celeste Bell

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DEFENDANTS MCLAREN HEALTH CARE CORPORATION AND PAUL BROWN, JR., MD'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION IN LIEU OF ANSWER TO PLAINTIFFS' COMPLAINT

NOW COME Defendants, McLaren Health Care Corporation and Paul Brown, Jr., MD, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., specifically, J.

Brian MacDonald and Megan R. Mulder, and for their Reply to Plaintiff's Response to Their Motion for Summary Disposition in Lieu of Answer to Plaintiff's Complaint, hereby state as follows:

These Defendants concur with the arguments made in Defendant Dr. Belal's Brief in Reply to Plaintiff's Response to Defendant's Motion for Summary Disposition and hereby incorporate said brief as though more fully set forth herein.

As is accurately stated in Dr. Belal's Brief, the three year savings provision is not an independent period in which a Plaintiff may file suit. (Dr. Belal's Brief, Page 4, Citing *Braverman v Garden City Hosp.*, 275 Mich App 705, 711 (2007). This notion bears repeating here because it is exactly this sentiment that is brought to the forefront in the case upon which Plaintiff mistakenly relies, *Hardy v Maxheimer*, 429 Mich 422, 416 NW2d 299 (1987). The Court in *Hardy* held that the suit in that matter could commence because "the personal representatives brought the action within two years of their appointment **and** within three years after the initial period of limitation had run." *Id.* at 441 (*emphasis added*). Plaintiff attempts to break these two elements up, suggesting that the three year period following the expiration of the underlying statute is an independent period. However, the use of the word "and" indicates the Court did not mean for these two elements to be separate and distinct from each other.

As Plaintiff concedes, the letters of authority were issued on June 7, 2021, appointing Keran Ernest as personal representative. Suit was filed on August 14, 2023. Plaintiff was required to file suit by June 7, 2023, the two-year period after the letters of

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authority were issued. Plaintiff is not entitled to a three year savings provision independent of when the letters of authority were issued. Stated another way, if the personal representative had been appointed on August 15, 2021, instead of June 7, 2021, the lawsuit would have been timely because it would have been brought within two years of the appointment of the personal representative **and** within three years after the initial period of limitation had run. Since Plaintiff did not bring the lawsuit within the two-year period of the appointment of the personal representative, the lawsuit is untimely.

WHEREFORE Defendants, McLaren Health Care Corporation and Dr. Paul Brown, respectfully request this Honorable Court enter an Order Granting their Motion for Summary Disposition and dismissing Plaintiff's Complaint in its entirety, with prejudice.

Respectfully submitted,

CLINE, CLINE & GRIFFIN, P.C.

Dated: October 18, 2023

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APPENDIX 8

Order

Michigan Supreme Court
Lansing, Michigan

March 29, 2024

166495

Elizabeth T. Clement,
Chief Justice

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

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

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APPENDIX 9

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Court of Appeals, State of Michigan

ORDER

ESTATE OF MAURICE ERNEST V PAUL W BROWN JR MD

Docket No. 368566

LC No. 2023-119425-NH

Colleen A. O'Brien
Presiding Judge

Kristina Robinson Garrett

Philip P. Mariani
Judges

The motion to affirm pursuant to MCR 7.211(C)(3) is DENIED for failure to persuade the Court that it is manifest that the questions to be reviewed are so unsubstantial as to need no argument or formal submission or were not properly raised.

Colleen A. O'Brien
Presiding Judge

O'Brien, P.J., would have granted the motion to affirm.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

May 30, 2024
Date

Jerome W. Zimmer Jr.
Chief Clerk