

STATE OF MICHIGAN
IN THE SUPREME COURT

MARK VANSLEMBROUCK, a minor
by and through her Mother and Next Friend
KIMBERLY A. VANSLEMBROUCK, and
KIMBERLY A. VANSLEMBROUCK, Individually,

Plaintiffs-Appellees,

v

S.C. No. 135893
C.A. No. 273551
L.C. No. 06-074585-NH

ANDREW JAY HALPERIN, M.D., MICHIGAN
INSTITUTE OF GYNECOLOGY AND
OBSTETRICS, P.C., a Domestic Professional Service
Corporation, and WILLIAM BEAUMONT HOSPITAL,
a Domestic Nonprofit Corporation,

Defendants-Appellants.

REPLY BRIEF ON APPEAL - APPELLANTS

PROOF OF SERVICE

PLUNKETT COONEY

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STATEMENT OF THE QUESTION PRESENTED

WHETHER MCL 600.5851(7) IS A SAVINGS PROVISION, TO WHICH NOTICE OF INTENT TOLLING IS INAPPLICABLE UNDER *WALTZ v WYSE*, 469 MICH 642; 677 NW2d 813 (2004), RATHER THAN A STATUTE OF LIMITATIONS, WHICH IS SUBJECT TO NOTICE OF INTENT TOLLING UNDER MCL 600.5856(c)?

Defendants-Appellants say “yes.”

Plaintiffs-Appellees say “no.”

The trial court did not address this question (although it was presented to the trial court).

The Michigan Court of Appeals says “no.”

STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellants Andrew Jay Halperin, M.D., Michigan Institute of Gynecology and Obstetrics, P.C., and William Beaumont Hospital (“defendants”) refer this Court to the corresponding section in their Brief on Appeal.

STATEMENT OF FACTS

At page 2 of their brief on appeal, plaintiffs contend that defendants conceded that the notice of intent letter in this case tolled the statute for 182 days (brief in support of motion for summary disposition, page 10; Apx at 41a). This is a statement taken out-of-context by plaintiffs. In the lower courts, defendants argued alternatively that plaintiffs' complaint was not timely filed even if notice of intent tolling was provided. All the while, defendants maintained that MCL 600.5851(7) is a savings provision, as demonstrated by following page of the lower court brief:

“In the instant case, as in *Waltz* [*v Wyse*, 469 Mich 642; 677 NW2d 813 (2004)], MCL 600.5851(7) is a savings provision, and not a statute of limitations. Thus, pursuant to the Court's holding in *Waltz*, the claimant serving a second notice of intent letter did not serve to toll the time period set forth in the savings provision on MCL 600.5851(7). Accordingly, the time provided for filing a lawsuit pursuant to the savings provision of MCL 600.5851(7) elapsed on December 1, 2005.”

(brief in support of motion for summary disposition, page 11; Apx at 42a).

ARGUMENT

MCL 600.5851(7) IS A SAVINGS PROVISION, TO WHICH NOTICE OF INTENT TOLLING IS INAPPLICABLE UNDER *WALTZ v WYSE*, 469 MICH 642; 677 NW2d 813 (2004), RATHER THAN A STATUTE OF LIMITATIONS, WHICH IS SUBJECT TO NOTICE OF INTENT TOLLING UNDER MCL 600.5856(c).

At pages 5-6 of their brief on appeal, plaintiffs suggest that MCL 600.5851(7) must carry tolling effect because plaintiffs were required to wait the notice of intent period under Michigan law, MCL 600.2912b. According to plaintiffs, absent this tolling effect, the 10th birthday period would have expired during the notice of intent period, and that plaintiffs should not be placed in such situations. The flaw in this logic is that no one forced plaintiffs to wait until the last half of the last of ten years before sending the requisite notice of intent. A finding that section 5851(7) is a savings statute, not a statute of limitations subject to notice of intent tolling under MCL 600.5856(c) (or 5856(d), in an earlier version), does not create a substantive limitation on a plaintiff's ability to comply with notice of intent and to file a timely lawsuit under section 5851(7). Here, the dates and events were fully within plaintiffs' control.

At page 7 of their brief on appeal, plaintiffs state that the defendants' argument of no tolling is based "exclusively on the Michigan Supreme Court's decision in *Waltz*." This is flatly incorrect. Throughout their principal brief on appeal, defendants analyze the terms of section 5851(7), in conjunction with the introductory phrase of section 5856, which provides: "[t]he statutes of limitation or repose are tolled in any of the following circumstances... ." Questions of statutory interpretation abound in this case. *Waltz* simply establishes the principle of law that tolling under section 5856 is inapplicable to a savings provision, as opposed to statutes of

limitations or statutes of repose. The question before the Court is to be resolved on the basis of statutory interpretation and related doctrines.

At pages 7-10 of their brief on appeal, plaintiffs present as their central argument that section 5851(7) must be a statute of limitations because that section is referenced in MCL 600.5838a(2).¹ Plaintiffs' argument rests on the premise that reference to "sections 5851 to 5856" found in MCL 600.5838a(2), the medical malpractice statute of limitations, renders those time periods malpractice *limitation* periods. The difficulty with this argument is that the descriptive term used by the Legislature for sections 5851 to 5856 is "period," rather than "limitations period." In *Waltz*, this Court found that the saving statute is not a period of *limitation*, although acknowledging expressly that it is a "period" of time. The mere mention of sections 5851 to 5856 in the medical malpractice statute of limitations, with a modifier "period," does not suggest, let alone render, section 5851(7) a "limitations period," to which notice of intent may apply. Clearly sections 5851 to 5856 constitute *exceptions* to the statute of limitations.²

In this regard, plaintiffs' argument is circular and creates an absurd result. If exceptions to the statute of limitations are statute of limitations themselves, then a saving period would be considered a nullity. For example, the death savings statute, MCL 600.5852, applies only if the person dies before the period of limitations has run or 30 days thereafter, which would never

¹ "(2) 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, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later" MCL 600.5838a(2) (emphasis supplied).

² Plaintiffs' position is derived primarily from the dissent of Justice Cavanagh in *Waltz*, 469 Mich at 662-665, in which it is reasoned that this Court's case law prior to *Waltz* leads to the conclusion that section 5852 must be considered a limitation period. This reasoning was rejected by the majority in *Waltz*, which in turn demonstrates that plaintiffs' position is based on reasoning previously rejected by this Court.

occur if the internal reference sought by plaintiff is adopted. Nor would there be a need for the two-year saving period itself, which applies “although the period of limitations has run,” and which would never occur if the saving statute, as an exception to the statute of limitations, is a statute of limitations. Plaintiffs’ view creates a construction that would render the saving statute surplusage and nugatory, which is prohibited under Michigan rules of statutory interpretation. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). In turn, rendering the entirety of the saving statute a legal nullity cannot be interpreted in a way that best advances its legislative purpose, and is thus prohibited. *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996).

If, as plaintiffs contend, the phrase “sections 5851 to 5856” signifies statute of limitations designation, rather than a savings statute, how can plaintiff explain this Court’s decision in *Vega v Lakeland Hospitals at Niles and St Joseph, Inc*, 479 Mich 243; 736 NW2d 561 (2007), in which the Court determined that section 5851(1) is a savings statute? Indeed, at page 15 of their brief on appeal, plaintiffs acknowledge that a portion of section 5851 constitutes a savings statute (“the insanity savings provision of §5851(1) may apply”).

At page 8 of their brief on appeal, plaintiffs cite *Casey v Henry Ford Health System*, 235 Mich App 449; 597 NW2d 840 (1999) because the Court of Appeals labeled section 5851(7) as a statute of limitations. A close reading of *Casey* reveals that the Court of Appeals juxtaposed the statute of limitations on one hand, found in section 5838a(2), and the savings statute found in section 5851(7):

“Because plaintiff commenced this action more than six years after the claim accrued but before her son’s fifteenth birthday, at issue is whether subsection 5851(7) preserves this litigation despite its being commenced beyond the period of limitation provided for in subsection 5838a(2).”

Casey, 235 Mich App at 452.

At pages 8-9 of their brief on appeal, plaintiffs argue that this Court's decision in *Miller v Mercy Memorial Hospital*, 466 Mich 196; 654 NW2d 730 (2004) supports the view that section 5851(7) is a statute of limitations. This is incorrect, as explained in defendants' principal brief on appeal, pages 12-14.

At page 9 of their brief on appeal, plaintiffs argue that section 5851(7) must be a statute of limitations because any other reading would negate the Legislature's reference to section 5851 in the medical malpractice statute of limitations statute, MCL 600.5838a. This is a curious and misplaced argument. It relies on the doctrine of *ipsa dixit*. No authority is cited for this proposition. As previously referenced, mere reference to section 5851(7) in section 5838a(2), modified by the word "period," rather than "limitations," makes little sense in light of the *Vega* decision issued by this Court. Just because plaintiffs say something is true does not render it correct.

At page 9 of their brief on appeal, plaintiffs contend that the failure to classify section 5851(7) as a statute of limitations would render "nugatory" its reference to section 5838(a). This argument lacks merit upon realizing that the Legislature simply referred to "the applicable periods," rather than statutes of limitations or savings statutes periods.

At pages 10-16 of their brief on appeal, plaintiffs finally analyze the language of section 5851(7) and suggest that several features of the language used by the Legislature demonstrate this is a limitations rather than a savings period. Plaintiffs first argue that section 5851(7) is limited to a specific type of case, medical malpractice, and is thus distinguishable from savings statutes, which have a broader application. Plaintiffs divine significance from this distinguishing factor, without citation to any case law or even a principle of statutory

interpretation. In addition, the original premise is wrong. For example, the wrongful death savings statute, MCL 600.5852, applies to cases in which the claimant/plaintiff has died. It is limited in its scope, does not have universal application, yet constitutes a savings statute by all accounts. Similarly, MCL 600.5851(1), the insanity savings provision, applies only to those persons who are insane at the time the claim accrues. So too does section 5851(1) limit its application to persons under 18 years of age for purposes of the minority savings statute. The distinguishing factor sought to be established by plaintiffs has no legal significance.

At pages 12-14 of their brief on appeal, plaintiffs contend that section 5851(7) must be a savings statute because it is discretionary in nature, and does not mandate when a cause of action must be filed. Plaintiffs contrasted the terms of the wrongful death savings statute, that an action which survives by law “may” be commenced, with the provisions of section 5851(7), which creates a prohibition on filing an action after a certain point of time (the minor’s 10th birthday). Once again, no case law or rule of statutory interpretation is cited in support of this novel proposition. Plaintiffs’ position is otherwise discredited by the terms of section 5851(1), which contains the very “prohibition” language that plaintiffs contend is reserved for statute of limitations (the person or those claiming under the person “shall” have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action...).

At pages 14-15 of their brief on appeal, plaintiffs discuss case law which they contend directly or inferentially supports a finding that section 5851(7) is a statute of limitations. In *Smith v Bordelove*, 63 Mich App 384; 234 NW2d 535 (1975), the Michigan Court of Appeals did not discuss section 5851(7), for the simple reason that the 10th birthday provision was not in effect in 1975, the year the *Smith* case was released. To the extent the *Smith* court referred to the infancy provision as a “statute of limitations,” the classification is invalidated by this Court’s opinion in *Vega*, by which section 5851(1) is clearly a savings provision. The same infirmities apply to

plaintiffs' citation to *Lemson v General Motors Corporation*, 66 Mich App 94; 238 NW2d 414 (1975). Finally, plaintiffs' citation to *Bissell v Kommareddi*, 202 Mich App 578; 509 NW2d 542 (1994), is appropriate but insignificant. In *Bissell*, the Court of Appeals did not address the question of whether section 5851(7) is a savings or a limitations period.

At page 15 of their brief on appeal, plaintiffs contend that the defendants misplace reliance on *Vega, supra*, because the *Vega* Court did not address whether section 5851(7) is a savings or a limitations period. Plaintiffs miscomprehend the value of *Vega* with respect to this question. This Court determined clearly that section 5851(1) is a savings statute. Defendants argue that section 5851(7) is an exception to section 5851(1), and accordingly should be interpreted as a savings statute. There is no authority for the proposition that an exception to a savings statute is rendered a statute of limitations. Plaintiffs reject defendants' suggestion for symmetry in this regard, all the while relying on the notion of symmetry when arguing that the phrase "sections 5851 to 5856" must be read in symmetry in the statute of limitations' provision of MCL 600.5838a(2).

At pages 16-17 of their brief on appeal, plaintiffs refrain from addressing on the merits defendants' citation to out-of-state cases under the assumed notion that other jurisdictions' savings statutes are worded differently than section 5851(7). Defendants refer this Court to their brief on appeal, pages 18-22, to determine whether plaintiffs are correct to rest their argument on this slender reed.

At pages 16-20 of their brief on appeal, plaintiffs make the remarkable argument that the defendants' "concession" that the "statute of limitations" (as opposed to the savings statute) expired on December 1, 2005, in turn carries the necessary corollary that notice of intent tolling must be provided under the express terms of MCL 600.5856(c). Plaintiffs invert the analytical

equation by starting with the proposition that notice of intent tolling must apply because, according to the defendants' "concession," the "statute of limitations" expired on December 1, 2005. *A fortiori* tolling must be provided because the statute of limitations would have expired within the notice of intent period, measured from November 10, 2005.

This argument lacks merit on many fronts. First, section 5856 applies, if at all, only if the period in question constitutes a statute of limitations or of repose. It is analytically flawed to argue that the statute under which plaintiffs seek tolling defines whether the period to be tolled constitutes a statute of limitations or repose. In addition, it is inaccurate to say that the defendants "conceded" that the statute of limitations expired on December 1, 2007. A review of the lower court motion for summary disposition, supporting brief, and reply brief, makes clear that defendants considered section 5851(7) a savings statute, which was not subject to tolling. Nor it is accurate to assert that defendants conceded that section 5851(7) is a statute of limitations simply because the defendants moved for summary disposition under the terms of MCR 2.116(C)(7) (motion for summary disposition, page 1; Apx 25a). Although this court rule does apply specifically to situations where the claim was barred because of "statute of limitations," it also applies where there is to be made an "other disposition of the claim before commencement of the action." In this case, the statute of limitations, separate and distinct from section 5851(7), had expired. Defendants argued in their motion that the claim on the merits could be disposed of before the commencement of the action because it was time-barred, which includes plaintiffs' failure to file within the terms of the savings statute, section 5851(7). Therefore, it is inaccurate to read significance into the fact that the defendants move for summary disposition under 2.116(C)(7).

RELIEF

WHEREFORE, defendants-appellants request this Court reverse and remand to the Oakland County Circuit Court with instructions that summary disposition be entered in favor of the defendants and against plaintiffs, together with the recovery of all costs and attorney fees so wrongfully sustained on appeal.

Respectfully submitted,

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Date: December 9, 2008

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

MONIQUE M. VANDERHOFF, being first duly sworn, deposes and says that she is an employee with the law firm of Plunkett Cooney, and that on December 9, 2008, she caused to be served two (2) copies of Reply Brief on Appeal – Appellants and Proof of Service, upon the following counsel of record:

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