S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MARKELL VANSLEMBROUCK, a Minor, by his Next Friend KIMBERLY A. VANSLEMBROUCK, Individually,

Plaintiff-Appellant,

v

ANDREW JAY HALPERIN, M.D., MICHIGAN INSTITUTE OF GYNECOLOGY & OBSTETRICS, P.C., and WILLIAM BEAUMONT HOSPITAL,

Defendants-Appellees.

FOR PUBLICATION
January 15, 2008
9:15 a.m.

No. 273551
Oakland Circuit Court
LC No. 2006-074585-NH

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting summary disposition in defendants' favor. Because the affidavits of merit attached to plaintiff's compliant comply with statutory requirements and because plaintiff's complaint was filed within the statutory limitation period, we reverse.

This medical malpractice action arose as a result of injuries incurred by Markell Vanslembrouck during her birth and as a result of the birth process. According to the complaint, Markell was diagnosed with hypoxic-ischemic encephalopathy and cerebral palsy shortly after her birth. Plaintiff contends that these medical conditions occurred as a result of defendants' negligence. Defendants denied the allegations and thereafter moved for summary disposition, arguing that the affidavits of merit attached to plaintiff's complaint were legally insufficient and that plaintiff's complaint was untimely. The trial court agreed and granted summary disposition in defendants' favor.

This Court reviews a trial court's grant or denial of summary disposition under MCR 2.116(C)(7) de novo. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). Summary disposition is appropriate under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . statute of limitations." In reviewing a motion submitted under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). "Whether a claim is

barred by a statute of limitations is a question of law that this Court reviews de novo." *Scherer v Hellstrom,* 270 Mich App 458, 461; 716 NW2d 307 (2006). This Court also reviews questions of statutory interpretation and questions of law relating to the sufficiency of an affidavit of merit de novo. See *McElhaney v Harper-Hutzel Hosp,* 269 Mich App 488, 490 n 1; 711 NW2d 795 (2006).

On appeal, plaintiff first contends that the out-of-state affidavits of merit submitted with her complaint complied with statutory requirements and thus did not serve as a basis for dismissing her complaint. We agree.

To commence a medical malpractice action, a plaintiff must file a complaint and an affidavit of merit. *Young v Sellers,* 254 Mich App 447, 451; 657 NW2d 555 (2002). When a medical malpractice complaint is filed without an affidavit of merit, the complaint is ineffective and fails to toll the limitation period. *Scarsella v Pollak,* 461 Mich 547, 553; 607 NW2d 711 (2000).

MCL 600.2912d(1) provides, in relevant part:

> [T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following. . .

An affidavit of merit must be "confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000).

Pursuant to MCL 600.2102, the signature of an out-of-state notary public must be authenticated. The statute provides in relevant part:

> In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:
>
> * * *
>
> (4) If such affidavit be taken in any other of the United States or in any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits therein, or before any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. The signature of such notary public or justice of the peace, and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public or justice of the peace, shall be

certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court.

In the instant matter, plaintiff attached affidavits of merit executed by Jeffrey Soffer, M.D., Patricia Romo, R.N., and Ronald Gabriel[1], M.D., to the complaint. Soffer, a board certified obstetrician-gynecologist, executed his affidavit in the State of New Jersey. It bore the signature and seal of Francine Arthur, a New Jersey notary public. Arthur's signature was certified by Bradley Abela, the Treasurer of New Jersey. Romo, a registered nurse, executed her affidavit in the State of Arizona. It bore the sign and seal of Dawn L. Carney, an Arizona notary public. Carney's signature was certified by Janice K. Brewer, Arizona's Secretary of State.

Defendants successfully argued before the trial court that the affidavits of merit executed by Soffer and Romo failed to comply with MCL 600.2102 because the affidavits, while notarized, were not accompanied by a certificate signed by any clerk of the court of record in the county were the affidavit was executed. Therefore, defendants claim, because plaintiff failed to attach a legally sufficient affidavit of merit to her complaint, the complaint was null and void. Our Supreme Court's recent decision in *Apsey v Memorial Hosp*, 477 Mich 120; 730 NW2d 695 (2007), however, dictates otherwise.

In *Apsey*, the plaintiffs filed a medical malpractice action and attached to their complaint an affidavit of merit prepared in Pennsylvania, and containing the signature of a notary public from that state. A normal notarial seal appeared on the affidavit, but no other certification accompanied the seal. The trial court granted the defendants' motion for summary disposition, finding that plaintiffs' failure to provide further certification as required by MCL 600.2102(4) rendered the out-of-state notarization insufficient. It ruled that the affidavit was a nullity, that without the affidavit plaintiffs' complaint was not complete, and that their cause of action failed for never having been properly commenced.

On appeal, a panel of this Court was required to decide whether, as argued by plaintiffs, MCL 565.262, "the general statute concerning notarial acts," governed affidavits of merit in medical malpractice cases or whether MCL 600.2102, with its "more demanding requirements" governed (*Apsey v Memorial Hosp*, 266 Mich App 666; 702 NW2d 870 (2005)). This Court held that the more specific requirements of MCL 600.2102 controlled over the general requirements of MCL 565.262 of the URAA and that the affidavits attached to the plaintiffs' complaint were therefore defective. The *Apsey I* panel gave the decision prospective effect.

Apsey proceeded to our Supreme Court, which was called upon to review the interplay between the Uniform Recognition of Acknowledgement Act (URAA), MCL 565.261 *et seq,* and MCL 600.2102(4). Specifically at issue was whether MCL 565.262 conflicted with MCL 600.2102(4), as they require different certifications for out-of-state affidavits. The Court noted that MCL 565.262(a) defines "notarial acts" under the URAA as ""acts that the laws of this state authorize notaries public of this state to perform, including the administering of oaths and

[1] Gabriel's affidavit of merit is not at issue in the instant appeal.

affirmations, taking proof of execution and acknowledgments of instruments, and attesting documents. Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by the following persons authorized pursuant to the laws and regulations of other governments in addition to any other person authorized by the laws of this state.'" *Apsey v Memorial Hosp*, 477 Mich at 128. The Court also noted that:

> In MCL 565.268, the Legislature indicated how the URAA was meant to interact with MCL 600.2102. MCL 565.268 provides:
>
> A notarial act performed prior to the effective date of this act is not affected by this act. This act provides an additional method of proving notarial acts. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state.
> *Id.* at 129.

According to our Supreme Court, "because the two methods are alternative and coequal, the URAA does not diminish or invalidate 'the recognition accorded to notarial acts by other laws of this state.' MCL 565.268. Simply, MCL 600.2102(4) is not invalidated by the URAA. It remains an additional method of attestation of out-of-state affidavits. Because the two methods exist as alternatives, a party may use either to validate an affidavit." *Id*. at 130.

Here, the affidavit of merit executed by Soffer bears the signature and notary seal of a New Jersey notary public. The affidavit of merit executed by Romo bears the signature and notary seal of an Arizona notary public. An out-of-state notarial act performed by a notary public who is authorized to perform notarial acts has the same effect as if a Michigan notary public performed the act. MCL 656.262(a)(i). "The signature and title of the person performing the act are prima facie evidence that he is a person with the designated title and that the signature is genuine." MCL 565.263(4). Thus, the affidavits of merit submitted by plaintiff met the requirements of the URAA and, because a party in a medical malpractice action may validate an out-of-state notarial act using the URAA, *Apsey, supra*, 477 Mich 130, the trial court erroneously concluded that the affidavits of merit executed by Soffer and Romo were defective. Because we agree that plaintiff's affidavits were in compliance and did not serve as a basis for summary disposition, we need not consider her remaining arguments with respect to the affidavits of merit.

The above conclusions do not, however, resolve this entire appeal. This is necessarily so, as defendants have presented an alternative argument that, even if the affidavits of merit are deemed sufficient, plaintiff's complaint was barred by the statute of limitations because the complaint was not timely filed. While defendants did not file a cross-appeal, this issue is properly before the Court, an appellee is not required to file a cross-appeal to urge an alternative ground for affirming the trial court's order. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998), lv den 459 Mich 986 (1999). Accordingly, defendants, who raised this issue below and are seeking only to have the trial court's decision affirmed (rather than to obtain a decision more favorable than was rendered by the lower court) were not required to file a cross-appeal in order to have this issue properly before the Court.

Pursuant to MCL 600.5851(7), if a medical malpractice claim accrues[2] to a person under the age of eight years, the person has until her tenth birthday to bring her claim. Defendants contend that plaintiff did not file the medical malpractice claim before Markell reached her tenth birthday and that her claim is thus barred. Defendant further asserts that the November 10, 2005 notice of intent to sue did not toll the ten-year provision set forth in MCL 600.5851(7). (See MCL 600.5658(c) which tolls the period of limitations in a medical malpractice action under certain circumstances). Defendants' argument is based on the premise that the ten-year provision of MCL 600.5851(7) is a saving provision, rather than a statute of limitations, as the notice tolling provision in MCL 600.5856(c), does not toll a saving provision. See *Waltz v Wyse*, 469 Mich 642, 650-652; 677 NW2d 813 (2004) (the notice tolling provision does not toll the wrongful death saving provision, MCL 600.5852). Whether defendant is correct appears to be an issue of first impression.

The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The first criterion in ascertaining the intent of the Legislature is the language of the statute. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the language of the statute is clear and unambiguous, the Court must assume the Legislature intended its plain meaning, and enforce the statute as written. *Id.* Every word of the statute must be given meaning, and the Court should avoid a construction that would render any part of the statute surplusage or nugatory. *Id.*

MCL 600.5805(6) provides: "Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice." MCL 600.5838a(2) provides in pertinent part:

> [A]n action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in [MCL 600.5805] or [MCL 600.5851 through MCL 600.5856], or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, except as otherwise provided in [MCL 600.5851(7) and (8)], the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim.

MCL 600.5851(7) provides:

> Except as otherwise provided in subsection (8),[3] if, at the time a claim alleging medical malpractice accrues to a person under [MCL 600.5838a] the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the

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[2] A claim for medical malpractice accrues "at the time of the act or omission that is the basis for the claim." MCL 600.5838a(1).

[3] Section 8 does not apply to the present case. It relates to injuries to reproductive systems. There is no claim that the alleged malpractice resulted in an injury to Markell's reproductive system.

> person's tenth birthday or within the period of limitations set forth in [MCL 600.5838a], whichever is later. If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has reached his or her eighth birthday, he or she is subject to the period of limitations set forth in section 5838a.

According to defendants, the ten-year provision under MCL 600.5851(7) is not a statute of limitations but is a saving provision when the cause of action accrues and the minor is less than 8 years old. To support this assertion, defendants cite *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006). However, nowhere in the *Cameron* opinion did the Supreme Court address the ten-year provision of MCL 600.5851(7); much less did it hold that the ten-year provision was a saving provision, rather than a limitation period.

We find better guidance on this issue by looking at our Supreme Court's decision in *Miller v Mercy Memorial Hosp Corp*, 466 Mich 196; 644 NW2d 730 (2002). In *Miller*, the Supreme Court concluded that the six-month discovery provision in MCL 600.5838a(2)[4] was incorporated in the wrongful death statute as a period of limitation. It explained:

> The plain language of § 5838a(2) provides two distinct periods of limitation: two years after the accrual of the cause of action, and six months after the existence of the claim was or should have been discovered by the medical malpractice claimant. MCL 600.5852[] simply refers to "the" period of limitation. The provision does not limit or qualify which period of limitation applies, the two-year period of limitation rooted in § 5805(5), or the six-month discovery period found in § 5838a(2). As a saving statute, § 5852 applies to whatever period of limitation is or may be applicable in a given case, be it a professional malpractice claim or a breach of contract action. Indeed, . . . "[t]he period of limitation in a wrongful death action is governed by the statute of limitations applicable to the underlying claim." As the trial court acknowledged in this case, the underlying claim here was a medical malpractice action brought under the six-month discovery period. Thus, it is the latter period of limitation that the wrongful death saving statute incorporates here. Contrary to defendants' assertions, the six-month discovery rule is a distinct period of limitation. It is a statutory provision that requires a person who has a cause of action to bring suit within a specified time. As an alternative to the other periods of limitation, it is itself a period of limitation. [*Id.*]

Following the *Miller* Court's logic, we believe the ten-year provision of MCL 600.5851(7) is a period of limitation, rather than a saving provision. It is a "statutory provision that requires a person who has a cause of action to bring suit within a specified time." *Id.* MCL

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[4] "[A]n action involving a claim based on medical malpractice may be commenced at any time . . . within six months after the plaintiff discovers or should have discovered the existence of the claim."

600.5851(7) provides that, if a medical malpractice claim accrues before the claimant has reached her eighth birthday, the claimant must bring her claim before she reaches her tenth birthday or within the period of limitations set forth in MCL 600.5838a(2), whichever is later. The period of limitations set forth in MCL 600.5838a is either the two years after the claim accrues or the six months after the claim was or should have been discovered. *Miller, supra*, 466 Mich 196. Therefore, pursuant to the plain language of MCL 600.5851(7), there are three alternative periods of limitation for a medical malpractice claim whose claim accrues before a child reaches her eighth birthday: (1) before her tenth birthday; (2) two years after the claim accrued; or (3) six months after she discovered or should have discovered her claim. Thus, the ten-year provision of MCL 600.5851(7) is a distinct period of limitation. As an alternative to the limitation periods set forth in MCL 600.5838a(2), the ten-year provision should be viewed as a period of limitation, rather than a saving provision. *Miller, supra*, 466 Mich 202. See also *Vega v Lakeland Hospitals at Niles and St. Joseph, Inc*, 479 Mich 243, 249; 736 NW2d 561 (2007)("'Clearly, the first part of MCL 600.5851(7) sets out a specific time that a person under the age of eight must file his or her claim, i.e., before the tenth birthday if the claim accrued before the age of eight'"). Because the ten-year provision is a statute of limitations, it is subject to the notice tolling provision. *Waltz, supra,* 469 Mich 649. Therefore, defendants' claim that plaintiff's November 10, 2005 notice of intent did not toll the ten-year provision of MCL 600.5851(7) is incorrect.

Defendants' contention that because they did not respond to plaintiff's November 10, 2005 notice of intent, plaintiff was only entitled to a tolling period of 154 days, rather than a tolling period of 182 days, is also incorrect. A plaintiff may not commence a medical malpractice action without providing the notice required by MCL 600.2912b. *Omelenchuk v Warren*, 461 Mich 567, 572; 609 NW2d 177 (2000), overruled in part on other grounds *Waltz, supra*, 469 Mich 642. MCL 600.2912b(1) provides as follows:

> 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.

Within 154 days after receipt of the notice, the health professional or health facility against whom the claim is made must furnish to the claimant a written response. MCL 600.2912b(7). If the health professional or health facility fails to provide a written response within the 154-day period, the claimant may commence her medical malpractice action at the end of the 154-day period. MCL 600.2912b(8).

Pursuant to MCL 600.5856, the applicable statute of limitations is tolled during the required notice period. The statute states:

> The statutes of limitations or repose are tolled in any of the following circumstances:
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> * * *

> (c) At the time notice is given in compliance with the applicable notice period under [MCL 600.2912b], 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. [MCL 600.5856.]

In *Omelenchuk v City of Warren*, *supra*, the Supreme Court held that, once the required notice is given, the limitation period is tolled for 182 days even if the alleged negligent health professional or health facility fails to provide a written notice and the claimant, pursuant to MCL 600.2912b(8), is permitted to commence her medical malpractice action 154 days after she provided notice. See also, *Waltz, supra*, 469 Mich 653 ("We held [in *Omelenchuk*] that the plaintiffs were entitled to a tolling period of a full 182 days, rather than only 154 days, even though under MCL 600.2912b(8) they *could* have filed suit after 154 days").

Here, the notice of intent was filed on November 10, 2005. One hundred eighty-two days from November 10, 2005 is May 12, 2006. Because the statute of limitations would have expired on December 1, 2005 (Markell's tenth birthday), the ten-year provision was tolled, beginning on November 10, 2005, for 182 days. Plaintiff is also entitled to the number of days that remained in the ten-year period when she served the November 10, 2005 NOI—21 days. Thus, when the 182-day tolling period ended, plaintiff was entitled to another 21 days before Markell's claim for medical malpractice would be time barred. Twenty-one days from May 11, 2006, was June 2, 2006. Plaintiff filed her complaint on May 15, 2006. Accordingly, plaintiff's claim was not barred by the statute of limitations.

According to defendants, the Legislature's act of amending and recodifying MCL 600.5856(d) at MCL 600.5856(c) was "to counter the *Omelenchuk* [C]ourt's monolithic application of 182 days of notice of intent tolling" However, like MCL 600.5856(d), MCL 600.5856(c) links the tolling period to the applicable notice period. *Omelenchuk, supra* at 575. It states: "[T]he statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period." Thus, like MCL 600.5856(d), MCL 600.5856(c) does not link the tolling period to the period in which the claimant may not file suit. *Id.* Therefore, even though defendants did not respond to plaintiff's November 10, 2005 NOI, plaintiff was entitled to a tolling period of 182 days.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ David H. Sawyer

STATE OF MICHIGAN

COURT OF APPEALS

MARKELL VANSLEMBROUCK, a Minor, by his Next Friend KIMBERLY A. VANSLEMBROUCK, Individually,

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MURRAY, J. (*concurring*).

The majority opinion correctly concludes that plaintiffs' affidavits of merit were valid under Michigan statutory law. *Apsey v Memorial Hosp*, 477 Mich 120; 730 NW2d 695 (2007). It is also correct in holding that MCL 600.5851(7) is a statute of limitations, rather than a savings provision. And, although I agree with the rationale offered by the majority, I write separately to expound upon my view that the answer to this question is anchored in the text of the statute.

Our Court has referred to MCL 600.5851(7) as both a "saving clause", *Vance v Henry Ford Hosp System*, 272 Mich App 426, 431; 726 NW2d 78 (2006), and a statute of limitations, *Bissell v Kommareddi*, 202 Mich App 578, 580-581; 509 NW2d 542 (1993). As the majority notes, however, no Michigan case has actually analyzed what type of statute is codified at MCL 600.5851(7). A savings statute is a statutory provision that allows a claimant to file suit even though the statute of limitations for that claim has expired. See, e.g., *Lindsey Harper Hospital*, 455 Mich 56, 66; 564 NW2d 861 (1997). To the contrary, as the majority notes, a statute of limitations is a "statutory provision that requires a person who has a cause of action to bring suit within a specified time." *Miller v Mercy Memorial Hosp Corp*, 466 Mich 196, 202; 644 NW2d 730 (2002).

In *Waltz v Wyse*, 469 Mich 645; 677 NW2d 813 (2004)[1], the Supreme Court addressed whether MCL 600.5852 was a savings provision. That statute provides:

> If a person dies before the *period of limitations* has run or within 30 days after the *period of limitations* has run, an action which 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.* But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the *period of limitations* has run. [Emphasis supplied.]

The *Waltz* Court held that "[by] its own terms, § 5852 is operational only within the context of the *separate* 'period of limitations' that would otherwise bar an action. Section 5852 clearly provides that it is an *exception* to the limitation period, allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired." *Id.* at 651.[2]

This Court has recognized that MCL 600.5851(1) is a saving provision. *Liptow v State Farm Mut Auto Ins Co,* 272 Mich App 544, 551; 726 NW2d 442 (2006), citing *Cameron v Auto Club Ins Ass'n,* 476 Mich 55, 61-62; 718 NW2d 784 (2006). MCL 600.5851(1), like MCL 600.5852, has language linking it's application to situations where the statute of limitations has expired. It provides in relevant part:

> [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, 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 *although the period of limitations has run.* [Emphasis supplied.]

MCL 600.5851(7), however, contains no language indicating that it applies only when a statute of limitations has expired, or when some disability has been removed. Instead, it contains language indicating that if a medical malpractice claim accrues before the child's eighth birthday, then the claim has to be brought within a specific time, i.e., *either* before the child turns 10, or the two-year provision expires, *whichever is later*:

> Except as otherwise provided in subsection (8), if, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, *a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday or*

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[1] Neither party has suggested in their supplemental briefs that the Supreme Court order in *Mullins v St Joseph Mercy Hosp*, __ Mich __; 741 NW2d 300 (2007), applies to this case.

[2] Actually, the Supreme Court was merely reaffirming it's decision in *Lindsey, supra* at 60-61, where the Court held that MCL 600.5852 was a savings provision, not a statute of limitations.

> *within the period of limitations set forth in section 5838a, whichever is later.* If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has reached his or her eighth birthday, he or she is subject to the period of limitations set forth in section 5838a. [Emphasis supplied.]

Compare *Vega v Lakeland Hospitals,* 479 Mich 243, 249; 736 NW2d 561 (2007), where the Court recognized that the first part of MCL 600.5851(7) establishes a specific time that a person under the age of eight must file a claim, with *Miller*, *supra* at 202, which defines a statute of limitations as a statute requiring a person to bring a claim within a specified time. In other words, statutes like MCL 600.5851(1) and MCL 600.5852 contain language that "saves" a claim which may otherwise be barred, while the language within MCL 600.5851(7) "gives" two distinct time periods in which this particular class of claimants may file suit.

Thus, the plain language of MCL 600.5851(7) provides an alternative limitations period (the tenth birthday rule) that, depending on the facts of a particular case, may provide a plaintiff with more time than the "general" two-year period to sue. *Miller, supra* at 202 (holding that the discovery rule within MCL 600.5838a(2) is "an alternative to the other periods of limitation, [and] it is itself a period of limitation."). Key to this conclusion is both that the legislature stated that the applicable period is that which gives the claimant more time to file ("whichever is later"), indicating that the tenth birthday limitation coexists and works in harmony with the general two year limitation, and the absence of "savings" language that is found in savings statutes like MCL 600.5851(1) and MCL 600.5852. And, although it is certainly true that MCL 600.5851(7) can provide a person under the age of eight with more than two years to file a medical malpractice claim, that fact does not by itself cause the statute to be a savings provision. *Miller, supra*.

Finally, I agree with Judge Hoekstra that the elimination of the word "remaining" within MCL 600.5856(d) (now MCL 600.5856[c]) did not affect the meaning of the statute as read by the Court in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000). See *Mazumder v Univ of Michigan Hosp*, 270 Mich App 42, 64 n. 1; 715 NW2d 96 (2006) (Hoekstra, J., concurring in part, dissenting in part), overruled on other grounds *Ward v Siano*, 272 Mich App 715; 730 NW2d 1 (2006). The *Omelenchuk* Court did not rely on the word "remaining" for its legal conclusion, so in my view, its elimination from the statute – no matter what the reason for it – does not impact the *Omelenchuk* holding.

/s/ Christopher M. Murray