STATE OF MICHIGAN

COURT OF APPEALS

MARKELL VANSLEMBROUCK, a Minor, by and Through her Mother and Next Friend KIMBERLY A. VANSLEMBROUCK, and KIMBERLY A.VANSLEMBROUCK, Individually,	FOR PUBLICATION January 15, 2008 9:15 a.m.
Plaintiffs-Appellants,	
v	No. 273551 Oakland Circuit Court
ANDREW JAY HALPERIN, M.D., MICHIGAN INSTITUTE OF GYNECOLOGY & OBSTETRICS, P.C., and WILLIAM BEAUMONT HOSPITAL,	LC No. 06-074585-NH
Defendants-Appellees.	Advance Sheets Version

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

MURRAY, J. (*concurring*).

The majority opinion correctly concludes that plaintiffs' affidavits of merit were valid under Michigan statutory law. *Apsey v Mem 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 saving 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 Sys*, 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 saving statute is a statutory provision that allows a claimant to file suit even though the period of limitations for that claim has expired. See, e.g., *Lindsey Harper Hosp*, 455 Mich 56, 66; 564 NW2d 861 (1997). In contrast, 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 Mem Hosp*, 466 Mich 196, 202; 644 NW2d 730 (2002).

In *Waltz v Wyse*, 469 Mich 642, 650-651; 677 NW2d 813 (2004),[1] the Supreme Court addressed whether MCL 600.5852 was a saving 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 "[b]y 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." *Waltz, supra* at 651 (emphasis in original).[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 its application to situations where the period 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.* [MCL 600.5851(1) (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 before the general two-year limitation period 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 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

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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*, 480 Mich 948 (2007), applies to this case.

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

> 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 at Niles & St Joseph, Inc*, 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 in which 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 that may otherwise be barred, while the language within MCL 600.5851(7) "gives" two distinct 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 saving 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 saving provision. *Miller*, *supra*.

Finally, I agree with Judge HOEKSTRA that the elimination of the word "remaining" within former MCL 600.5856(d) (now MCL 600.5856[c]) did not affect the meaning of the statute as construed by the Court in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000). See *Mazumder v Univ of Michigan Bd of Regents*, 270 Mich App 42, 64 n 1; 715 NW2d 96 (2006) (HOEKSTRA, J., concurring in part and dissenting in part), overruled in part on other grounds *Ward v Siano*, 272 Mich App 715 (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 the reason for it—does not affect the *Omelenchuk* holding.

/s/ Christopher M. Murray