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STATE OF MICHIGAN
IN THE SUPREME COURT

VERNON BOWMAN, as Personal Representative of the Estate of KELLY BOWMAN, and VERNON BOWMAN, Individually,

Plaintiffs-Appellants,

v.

ST. JOHN HOSPITAL AND MEDICAL CENTER, ASCENSION MEDICAL GROUP MICHIGAN, d/b/a ROMEO PLANK DIAGNOSTIC CENTER and TUSHAR S. PARIKH, M.D., Jointly and Severally,

Defendants-Appellees.

SC No.: 160291-2
COA Nos.: 341640, 341663
LC No. 2017-002159-NH
Macomb County Circuit Court
Hon. Richard L. Caretti

AMICI CURIAE BRIEF OF AMERICAN MEDICAL ASSOCIATION AND MICHIGAN STATE MEDICAL SOCIETY

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QUESTIONS PRESENTED DISCUSSED IN THIS BRIEF

As reflected in Defendants'-Appellees' Brief on Appeal, the questions presented discussed in this brief include:

1. Whether this Court's decision in *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997) adopted the correct standard for application of the six-month discovery rule set forth in MCL 600.5838a(2)?

2. If *Solowy* did not adopt the correct standard, what standard should the Court adopt?

STATEMENT OF INTEREST[1]

The American Medical Association ("AMA") and Michigan State Medical Society ("MSMS") and their members are concerned that disturbing well-settled law and expanding the time the Legislature and the Court have set forth for filing a medical liability claim will undermine longstanding efforts to maintain rational limits on medical liability in the State. Such a result could have a significant, unwelcomed negative impact on the provision of health care in Michigan.

AMA is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical

[1] No counsel for a party authored the brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

societies and other physician groups, substantially all United States physicians, residents and medical students are represented in the AMA's policymaking process. The AMA, founded in 1847, promotes the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including Michigan, and every medical specialty.

MSMS is a professional association representing more than 15,000 physicians and medical students in Michigan. Incorporated in 1866, MSMS is a non-profit, membership organization of physicians, graduates completing residency programs, and medical school students. MSMS has frequently been afforded the privilege of acting as *amicus curiae* with respect to legal issues of significance to the medical profession.

AMA and MSMS appear on their own behalves and as representatives of the AMA Litigation Center. The Litigation Center is a coalition among the AMA and the medical societies of every state. The Litigation Center is the voice of America's medical profession in legal proceedings across the country. The mission of the Litigation Center is to represent the interests of the medical profession in the courts. It brings lawsuits, files amicus briefs, and otherwise provides support or becomes actively involved in litigation of general importance to physicians.

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STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This appeal arises out of a medical negligence claim by Ms. Kelly Bowman and her husband Mr. Vernon Bowman as the personal representative of her estate. The essential facts of this case are not in controversy. As explained in the Court of Appeals ruling, in June 2013, Ms. Bowman, who had identified a lump in her breast, underwent a mammogram and an ultrasound to determine if it was cancerous. Dr. Parikh interpreted the mammogram as benign, indicating that "non[-]calcified lesions might be obscured" and recommending Ms. Bowman undergo mammograms annually to monitor the lump closely. Her mammogram the following year in 2014 was also interpreted as benign.

In April 2015, Ms. Bowman reported the lump increased in size and underwent her next annual mammogram and ultrasound. This time, a biopsy was performed and the lump was determined to be cancerous. In May 2015, Ms. Bowman underwent a bilateral mastectomy, with a lymph node testing positive for cancer as well. More than a year later, in July 2016, it was discovered the cancer had metastasized to her bone marrow. In August 2016, her physician at the time told her that he believed her 2013 mammogram had been misread and should have been interpreted as positive or suspicious for cancer.

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In December 2016, Ms. Bowman's attorney served notice upon Dr. Parikh and other Defendants of her intent to pursue a medical negligence claim related to the June 2013 diagnosis. The Bowmans filed this suit in June 2017. Defendants sought summary disposition under the applicable six-month statute of limitations pursuant to the discovery rule. *See* MCL 600.5838a(2). The trial court denied the motion. The Court of Appeals reversed, finding the claim time-barred.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves well-settled Michigan law. Decades ago, in personal injury cases such as the one at bar, a person's right to bring a claim would expire two years after the alleged misconduct, even if the person could not have known of the possible cause of action. *See Dyke v Richard*, 390 Mich 739, 744; 213 NW2d 185 (1973). In the 1960s and 1970s, the Court developed the "discovery rule" to avoid this unfair situation. *See id.* Under this rule, the start of the limitations period is delayed until a person discovers or, through the exercise of reasonable care, should have discovered the wrongful act. *Id*. at 733. This rule is a limited exception to the traditional statute of limitations and has been applied only in cases, such as over medical or latent injuries, when it is not knowable at the time of the alleged misconduct that a person may have a legal claim.

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The Michigan Legislature, in 1975 and again in 1986, responded by limiting the discovery rule in medical negligence claims to create more certainty in these cases. *See* MCL 600.5838; MCL 600.5838a(2). It imposed two requirements at issue here. First, if a person relies on the discovery rule to toll the traditional two-year statute of limitations, he or she must bring the claims within six months from when he or she should have discovered a potential claim. *See* MCL 600.5838a(2). Second, "[t]he burden of proving that the plaintiff . . . neither discovered nor should have discovered the existence of the claim at least six months before the expiration of the period otherwise applicable to the claim is on the plaintiff." *Id.* The Court has been "sympathetic to those who miss the deadline," but equally resolute that the "the legitimate legislative purposes behind the rather stringent medical malpractice limitation provisions are honored." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 226; 230, 561 NW2d 843 (1997).

Here, the Court of Appeals properly followed the Legislature's enactment and the Court's longstanding jurisprudence. After considering the doctrine of reasonableness, Plaintiffs' obligation to exercise due diligence, and the totality of the circumstances—all as instructed in *Solowy*, *see id.* at 230—the Court of Appeals found the limitations period for any claim over the June 2013 diagnosis began to run when Ms. Bowman was diagnosed with cancer in April 2015. "At

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that point, she had sufficient information to trigger the running of the discovery rule period" and determine whether she had a claim over the 2013 diagnosis. *Id.* at *6. Because she did not meet her burden to show otherwise, she had six months from then to file this claim. She waited more than 17 months before serving her notice of intent, so the claim was ruled time-barred. *See id*. at *5.

Amici respectfully urge the Court to uphold the ruling below. Patients and physicians must be able to rely on Michigan courts to follow sound, established precedent and produce just outcomes, even in difficult situations. The discovery rule already creates a more lenient application of the otherwise applicable statute of limitations. It is inappropriate to look for ways to delay its running after the record shows a plaintiff should have known of the potential claim.

ARGUMENT

I. The Court of Appeals Ruling Is a Straight-Forward Application of the Legislature's Statute of Limitations and the Court's Consistent Precedent.

Plaintiffs urge the Court to upend this well-settled law. Primarily, Plaintiffs argue the Court should directly overturn *Solowy* and its predecessor case *Moll v Abbott Labs*, 444 Mich 1; 506 NW2d 816 (1993). *See* Br. at *7-11. Alternatively, Plaintiffs ask the Court to contort the medical malpractice statute of limitations to effectively eliminate the "should have discovered" portion of the test. *See id.* at

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*12-14. They argue the limitations period should not start before a person "discovers" an actual claim. *Id.* The dissent below likewise suggests the test should be whether events "immediately" informed Plaintiff of a claim. Op. at *11. The Court should not accept either invitation; they have no foundation in the law.

Since the Court first implemented the discovery rule, which was codified for medical liability claims, the rule has never required the limitations period to be tolled until the subjective date a person discovers the cause of action. Rather, it sets forth an objective test, where given the circumstances a person "by exercise of reasonable care" could learn of the potential for a claim. *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963). As the Court explained in *Dyke*, this standard creates "a charge on the person who would assert a claim." 390 Mich 739, 746; 213 NW2d 185 (1973). "It requires action on his part within a legislatively specified time, or obliges him to forego [the claim] altogether." *Id.* Accordingly, Michigan's lower courts have long ensured that plaintiffs "act diligently in discovering his cause of action and cannot simply sit back and wait for others to inform him of his possible claim." *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986); *Turner v Mercy Hosp & Health Servs of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

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In *Moll*, one of the cases Plaintiffs seek to overturn, the Court clarified this standard in applying the discovery rule to a pharmaceutical products liability action. It stated that the "statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence should have discovered that he has a possible cause of action." 444 Mich at 29. The Court explained that the cause of action accrues on this date, even when "a subjective belief regarding the injury occurs at a later date," which is the situation at bar. *Id*. at 18. The Court found this standard properly balanced the competing interests. It "advances the Court's concern regarding preservation of a plaintiff's claim when the plaintiff is unaware of an injury or its cause," while "promot[ing] the Legislature's concern for finality and encouraging a plaintiff to diligently pursue a cause of action." *Id.* at 23-24. Extending the deadline until a plaintiff actually learns of the potential misconduct, as Plaintiffs suggest here, is the exact type of subjective test the Court stated would "vitiate the statute of limitations defense." *Id*. at 16.

In *Solowy*, the Court properly applied *Moll* to the discovery rule in medical malpractice cases under MCL 600.5838a(2). To be clear, there has never been a separate test for when or how the discovery rule applies for medical liability cases. All MCL 600.5838a(2) did was reduce the length of the statute of limitations period when it is determined the discovery rules applies, as well as

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ensure the burden of proof for invoking the rule and amount of delay is on the plaintiff. Thus, as in other cases involving the discovery rule, Plaintiffs here "need not know for certain that [they] had a claim" for the limitations period to begin. *Solowy*, 454 Mich at 221. They need only be "equipped with the necessary knowledge to preserve and diligently pursue" a claim. *Id.* at 223. The Court of Appeals found this occurred in the case at bar when Ms. Bowman received her cancer diagnosis in April 2015.

The case at bar is hardly the first time a plaintiff has been frustrated by the statute of limitations or tried to find ways around it. For example, as here, people have sought to toll the limitations period until after certain consequences of an injury are known—here, when Ms. Bowman learned her cancer spread to her bone marrow in August 2016. The Court has been equally clear, though, that the "discovery rule applies to the discovery of an injury, not to the discovery of later realized consequence of the injury." *Moll*, 444 Mich at 18. The Court has consistently rejected those efforts and should do so again here.

II. The Legislature's Statute of Limitations for Medical Liability Claims Supports a Strong Health Care System and Should Be Given Its Full Effect.

This Court has long recognized that the "general power of the legislature to pass statutes of limitation is not doubted." *Dyke*, 390 Mich at 746 (citing *Price v Hopkins*, 13 Mich 318, 324 (1865)). The Legislature is entitled to provide its

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judgment as to the time a plaintiff may have to investigate and bring a cause of action. *See Moll*, 444 Mich at 17. There is no magic number as to what is a fair length of time to bring a lawsuit. Types of claims have shorter or longer statutes of limitations primarily due to the nature of the evidence and the public policies a legislature sought to achieve. In enacting MCL 600.5838a(2), the Legislature clearly decided that a limitations period of six months for a plaintiff needing to invoke the discovery rule in a medical malpractice action provides sufficient time for a person, through due diligence to determine if a cause of action exists.

This statute, like other statutes of limitation, is designed to promote the prompt and fair adjudication of claims by patients. Statutes of limitations are an essential element of a fair and well-ordered civil justice system. As this Court has recognized, such time limits "compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend." *Bigelow v Walraven*, 392 Mich 566, 576, 221 NW2d 328 (1974). They "relieve a court system from dealing with stale claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured, and to protect potential defendants from protracted fear of litigation." *Id.* So, while a plaintiff must have an adequate opportunity to bring a claim, a defendant and the courts must be protected from cases in which the search for the truth may be impaired.

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As with the case at bar, tort claims, by their very nature, can deal with tragic situations – accidents resulting in serious injuries that have a dramatic impact on a person's life, negligence in the workplace or a defective product that causes such injury, or, as here, allegations of medical negligence. One of the most difficult tasks in medical negligence cases like the one here is for the courts to "differentiate between adverse events and medical errors." David Sohn, *Negligence, Genuine Error, and Litigation*, 6 Int'l J. Gen. Med. 49, 50 (2013). According to a Harvard Public Health Study, only about 27 percent of adverse events are caused by negligence. *See* T. A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients*, 13 Qual. Saf. Health Care 145, 146 (2004). The more time that elapses between the event and the lawsuit, the more challenging it becomes to determine whether the physician failed to meet the appropriate standards of care and whether any such failure caused the alleged injury. Statutes of limitations help make sure these assessments are made before evidence and expert testimony becomes stale and unreliable. *Cf*. 2 Am. Law Med. Malp. § 7:8 (2005) (discussing statutes of limitations for medical claims).

The concern with cases filed years after the alleged act of malpractice is that juries would be predisposed to hindsight bias. *See* Eric J. Thomas & Laura A. Petersen, *Measuring Errors and Adverse Events in Health Care*, 18 J. Gen. Intern

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Med. 61, 63 (2003) (recognizing hindsight bias in medical liability claims); Hal R. Arkes, *The Consequences of the Hindsight Bias in Medical Decision Making*, 22 Current Directions in Psychol. Sci. 356, 358 (2013). Scholars have explained that when a patient experiences a poor outcome, "a hindsight observer" is predisposed to conclude the negative outcome resulted from "incompetence, folly, or worse." Michael A. Haskel, *A Proposal for Addressing the Effects of Hindsight and Positive Outcome Biases in Medical Malpractice Cases*, 42 Tort & Ins. Prac. L.J. 895, 906 (2007). Thus, hindsight bias can make it "difficult for finders of fact to evaluate [causation] fairly (e.g., without reference to whether the decision, in retrospect, turned out to be the right choice)." *Id.* at 905. Here, Dr. Parikh may have met his standard of care in 2013, but his diagnosis may have a different appearance in hindsight given the severity of Ms. Bowman's cancer.

Allowing excessive time for patients to file claims also increases the likelihood that medical negligence claims will be brought for non-medical reasons, such as frustration with a physician, personality differences or negative outcomes. As a general matter, the filing of a lawsuit alleging malpractice is often a poor indicator of whether malpractice actually occurred. *See* Barry F. Schwartz & Geraldine M. Donohue, *Practicing Medicine in Difficult Times: Protecting Physicians from Malpractice Litigation* 47, 49 (Jones & Bartlett Publishers, 2009)

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(poor communication, not malpractice, is the largest factor for filing a claim). Thus, upholding *Solowy* and the Court of Appeals ruling here is essential to maintaining the veracity of medical liability litigation in the State.

III. Reversing the Court of Appeals Ruling and the Court's Well-Settled Precedent Would Reverse Decades of Efforts to Maintain Rational Boundaries on Medical Liability Claims.

The Legislature enacted the statute of limitations reform at issue here in direct response to the medical liability crises in the 1970s and 1980s. Indeed, the Court has recognized this "medical malpractice crisis" on many occasions.[2] For example, in the mid-1980s there was an increase in medical malpractice lawsuits of 150 percent in six years, causing insurance rates to double and some doctors to stop providing care in risky specialties. *See* Trial Lawyers Inc.: Michigan Update, Center for Legal Policy at the Manhattan Institute, No. 4. June 2008, at 2.[3] The objective of the 1986 liability reform package, which included MCL 600.5838a(2), was to secure adequate, affordable health care for Michigan residents.[4]

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[2] *See, e.g., Friedman v Dozore*, 412 Mich 1; 312 NW2d 585 (1981); *McKinstry v Valley Obstetrics-Gynecologv Clinic*, 428 Mich 167; 405 NW2d 88 (1987).

[3] https://media4.*manhattan*-institute.org/sites/default/files/tli_update_4.pdf

[4] *Bissell v Kommareddi*, 202 Mich App 578, 581; 509 NW2d 542 (1993), leave denied, 446 Mich 861 (1994) (upholding constitutionality of 1986 liability reform amendment to statute of limitations).

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Concerns over excessive medical liability have been an ongoing problem in this State, as well as nationally. The Michigan Legislature, like others, has sought to provide boundaries to balance patients' access to justice, while maintaining the integrity of the State's health care system. In 1993 and 1995, the Legislature adopted two new rounds of legislation, 1993 PA 78, 1995 PA 161 and 1995 PA 249, aimed at ensuring the veracity of expert witnesses testimony. *See* MCL 600.2955; MSA 27A.2955. Other safeguards include a pre-filing notice requirement (MCL 600.2912b), an expedited means for the exchange of releases and medical records (MCL 600.2912b(5)), the requirement that complaints and answers be supported by an affidavit of merit (MCL 600.2912d(1)), a statute of repose (MCL 600.5838a), and a cap on noneconomic damages (MCL 600.1483).

Michigan courts have upheld these enactments because of the Legislature's legitimate interest in enacting liability reforms to improve access to affordable health care. *See e.g., Solowy*, 454 Mich at 228 ("We are also mindful of the enhanced responsibilities placed on medical malpractice plaintiffs."); *McDougall v Schanz*, 461 Mich 15, 18, 597 NW2d 148, 150 (1999) (upholding validity of statute providing strict requirements for the admission of expert testimony in medical malpractice cases brought against specialists); *Morris v Metriyakool*, 418 Mich 423, 442; 344 NW2d 736, 743 (1984) (Williams, C.J., concurring) ("The provision of

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medical services is one of the most important and, in many aspects, one of the most difficult concerns of our day. . . . Medical malpractice litigation, as many will remember, reached crisis proportions. The consequences of the failure to adequately address this situation seemed incalculable.").[5]

Continued diligence is required, as the effort to ensure a properly functioning medical liability system remains an important, bi-partisan objective. For example, earlier this year in response to medical liability concerns over Covid-19, Governor Whitmer signed an Executive Order to ensure that health care providers could not be subject to liability while being on the front-lines of this public health crisis. *See* Mich Exec Orders, No. 2020-30 (March 29, 2020) and No. 2020-61 (Apr. 26, 2020). The Court should continue to support these important safeguards by upholding the Court of Appeals ruling and rejecting Plaintiffs' invitation expand the limitations period and overturn *Moll* and *Solowy*.

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[5] *See also Bissell*, 202 Mich App at 581 ("the state unquestionably has a legitimate interest in securing adequate and affordable health care for its residents"); *Sills v Oakland General Hosp*, 220 Mich App 303, 313; 559 NW2d 348 (1996) ("Michigan has a legitimate interest in supporting affordable and adequate health care for its residents"); *Neal v Oakwood Hosp*, 226 Mich App 701, 720; 575 NW2d 68 (1997) (notice period "is rationally related to the Legislature's objective because it is reasonable to assume that claims informally resolved or settled without resort to formal litigation will help reduce the cost of formal medical malpractice litigation").

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CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request this Court to vacate the order granting leave to appeal or affirm the Court of Appeals decision.

Respectfully submitted,

Dated: September 28, 2020

PLUNKETT COONEY

By /s/ Robert G. Kamenec

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STATE OF MICHIGAN
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VERNON BOWMAN, as Personal Representative of the Estate of KELLY BOWMAN, and VERNON BOWMAN, Individually,

Plaintiffs-Appellants,

v.

ST. JOHN HOSPITAL AND MEDICAL CENTER, ASCENSION MEDICAL GROUP MICHIGAN, d/b/a ROMEO PLANK DIAGNOSTIC CENTER and TUSHAR S. PARIKH, M.D., Jointly and Severally,

Defendants-Appellees.

SC No.: 160291-2
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LC No. 2017-002159-NH
Macomb County Circuit Court
Hon. Richard L. Caretti

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF MACOMB)

Robert G. Kamenec, being duly sworn, deposes and says that he is an employee of the law firm of Plunkett Cooney, and that on September 28, 2020, he caused to be served a copy of the Amicus Curiae Brief By American Medical Association and Michigan State Medical Society, and Proof of Service/Statement Regarding E-Service as follows:

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