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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,

v

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

Defendants-Appellees.

Supreme Court No. 168462

Court of Appeals No. 368566

Genessee County Circuit Court
Case No. 23-119425-NH
Hon. Celeste D. Bell

DEFENDANT-APPELLEE ELMAHDI M. SAEED'S SUPPLEMENTAL BRIEF

*** **ORAL ARGUMENT REQUESTED** ***

APPENDIX FOR DEFENDANT-APPELLEE ELMAHDI M. SAEED'S SUPPLEMENTAL BRIEF
(Attached Separately)

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STATEMENT OF QUESTIONS PRESENTED

I. Whether *Waltz v Wyse*, 469 Mich 642 (2004) correctly held that MCL 600.5856(c) does not toll the additional period permitted for filing wrongful-death actions provided in MCL 600.5852?

Plaintiff- Appellant says "No."

Defendant-Appellee Dr. Saeed says "Yes."

The trial court did not reach this issue.

The Court of Appeals did not reach this issue.

II. Whether if *Waltz* was incorrectly decided, it should nonetheless be retained under principles of *stare decisis*, *Robinson v City of Detroit*, 462 Mich 439, 463-468 (2000)?

Plaintiff- Appellant says "No."

Defendant-Appellee Dr. Saeed says "Yes."

The trial court did not reach this issue.

The Court of Appeals did not reach this issue.

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INTRODUCTION

Plaintiff invites this Court to reverse its prior determination in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004) that the wrongful death savings period in MCL 600.5852 cannot be extended by the tolling provided in MCL 600.5856(c) (formerly MCL 600.5856(d)) when a notice of intent is filed in a medical malpractice case. The ruling in *Waltz* stems from a very simple matter of statutory interpretation: does the savings period in § 5852 constitute a "statute of limitations or repose" that can be tolled by filing a notice of intent under § 5856(c)? Based on its prior decisions in *Lindsey v Harper Hosp*, 455 Mich 56, 64-67; 564 NW2d 861 (1997) and *Miller v Mercy Mem Hosp*, 466 Mich 196, 202-203; 644 NW2d 730 (2002) holding that the two-year period established in § 5852 is a "savings period," and not a "statute of limitations," the *Waltz* Court determined that the tolling available to "statutes of limitations or repose" under § 5856 was not available to extend the wrongful death savings period. *Waltz* was correctly decided and remains so today. Courts in other states have likewise distinguished between savings periods and statutes of limitations and have refused to apply tolling measures to extend savings periods.

Plaintiff complains that this distinction between litigants who rely on the two-year savings period and litigants who file under the normal two-year medical malpractice statute of limitations is unfair and unworkable. But the remedy for such unfairness lies with the Legislature, which has declined to change the language of the relevant statutes in the two decades since *Waltz* was issued. The Legislature was not required to confer every possible extension of time upon wrongful death plaintiffs that is otherwise available in a medical malpractice action.

Moreover, notice of intent tolling is still available to wrongful death plaintiffs who file their lawsuits within the normal two-year medical malpractice statute of limitations, meaning that those plaintiffs either get the benefit of 182 days of notice of intent tolling under normal medical

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malpractice rules, or an extra 2-3 years to file their complaints without notice of intent tolling if they utilize the savings period. Both options were available to Plaintiff in this case, but she waited too long to send her notices of intent. Timing mistakes of this nature are rarely made post-*Waltz*, and Plaintiff has provided no reason why she could not have served her notices of intent earlier to comply with *Waltz*.

This Court should reject Plaintiff's call to overturn *Waltz*. Unlike other recent cases where this Court has corrected misinterpretations of statutes or brought clarity to confusing aspects of the law, the rule of *Waltz* is simple and has been consistently applied by litigants and lower courts for the last two decades. There are no intervening changes in the law or facts which warrant its reversal—in fact, the Legislature's refusal to amend the relevant statutes to apply notice of intent tolling to savings periods suggests that *Waltz's* reading is entirely consistent with legislative intent. Reliance interests also favor retaining *Waltz*, because this Court and the Court of Appeals have applied the distinction between statutes of limitation and savings periods in other areas of the law. Plaintiff's resort to a hypothetical scenario which still fails to demonstrate that *Waltz* is unworkable only underscores the fact that, two decades later, filing cases in compliance with *Waltz* is not just possible—it is routine. *Waltz* no longer presents a "trap for the unwary," and to the extent the wrongful death medical malpractice filing scheme presents such a trap, it was set by the Legislature and can only be fixed by the Legislature. This Court should deny all relief requested by Plaintiff.

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STATEMENT OF FACTS

The medical facts are not relevant to the issues addressed in this supplemental brief, but they can be found at pages 1-2 of the Court of Appeals opinion (**1b-2b**). Procedurally, the decedent passed away on July 17, 2020 after receiving treatment from Defendants at McLaren Flint Hospital on July 16-17, 2020 (Id., **1b**). Letters of authority were issued to Plaintiff as personal representative on June 7, 2021 (Id.). For reasons unknown, Plaintiff waited until February 10, 2023 to send her notices of intent to Defendants, and filed suit on August 14, 2023 (Id).

The trial court granted Defendants' motions for summary disposition under MCR 2.116(C)(7), rejecting Plaintiff's argument that notice of intent tolling applied to extend the two-year wrongful death savings period, which had expired on June 7, 2023. The Court of Appeals affirmed under *Waltz*, and this Court granted oral argument on the issues of whether *Waltz* was correctly decided and, if not, whether it should be retained under *stare decisis*.

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STANDARD OF REVIEW

Decisions regarding summary disposition motions are reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152; 934 NW2d 665 (2019). The Court also reviews de novo questions of statutory interpretation. *Potter v McLeary*, 484 Mich 397; 774 NW2d 1 (2009).

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ARGUMENT

I. This Court's prior opinion in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004) was correctly decided because the notice of intent tolling provision in MCL 600.5856(c) applies only to extend statutes of limitations and repose, and does not apply to the savings period contained in MCL 600.5852.

A. The notice of intent tolling provision in MCL 600.5856(c) explicitly applies only to "statutes of limitations or repose," not to the savings provision in MCL 600.5852.

Michigan has three temporal limitations on the filing of a medical malpractice action: the two-year statute of limitations in MCL 600.5805(8), and the six-year statute of repose and six-month "discovery" statute of limitations in MCL 600.5838a(2).

Under MCL 600.2912b, a person may not commence a medical malpractice action unless the person has provided the defendant with a presuit notice of intent. The plaintiff must then wait 182 days after sending the notice of intent to file a complaint against the defendant. MCL 600.2912b(1).[1]

If the applicable statute of limitations or statute of repose is set to expire during the "no-suit" period, MCL 600.5856(c) provides that the statute of limitations is tolled "at the time notice is given:"

> The ***statutes of limitations or repose*** are tolled in any of the following circumstances:
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section 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.

[1] If the defendant does not provide a written response to the notice of intent, the waiting period is reduced to 154 days. MCL 600.2912b(8). However, the plaintiff is still entitled to 182 days of notice tolling.

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MCL 600.5856(c) (emphasis supplied).

By its plain language, MCL 600.5856(c) tolls only a "statute of limitations or repose" when a notice of intent is served. As this Court held in *Waltz*, it does not toll MCL 600.5852, which is the two-year wrongful death savings period. The plain language of MCL 600.5852 states that, as a savings period, it allows a complaint to be filed after an otherwise applicable "period of limitations" would expire in cases involving a deceased plaintiff:

> (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.
>
> (2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate. Except as provided in subsection (3), the issuance of subsequent letters of authority does not enlarge the time within which the action may be commenced.
>
> (3) If a personal representative dies or is adjudged by a court to be legally incapacitated within 2 years after his or her letters are issued, the successor personal representative may commence an action alleging medical malpractice that survives by law within 1 year after the personal representative died or was adjudged by a court to be legally incapacitated.
>
> (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.

MCL 600.5852 (emphasis supplied). The current version of the statute explicitly distinguishes between the "period of limitations" that is disregarded due to a plaintiff's death (bolded and italicized above), and the two-year "period" of filing measured from the date letters of authority are issued (underlined above).[2] By allowing a personal representative to commence an action after

[2] The version of the statute interpreted by the *Waltz* Court stated: "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.

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a "period of limitations" has expired, MCL 600.5852 creates an exception to statutes of limitation or repose, rather than a separate limitations period applicable to actions where the plaintiff has died.

In *Waltz*, this Court recognized that the two-year savings period (and the three-year ceiling or cap on that period) created by MCL 600.5852 was not a statute of limitations or a statute of repose, and therefore could not be tolled by service of a notice of intent under MCL 600.5856(c):

> Section 5852 is a saving provision designed "to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions." *Lindsey*, *supra* at 66 [*Lindsey v Harper Hosp*, 455 Mich 56, 66; 564 NW2d 861 (1997)]. ***It is not a "statute of limitations" or a "statute of repose."*** Thus, the *notice tolling provision*, § 5856[c] ***which explicitly applies only to "the statute of limitations or repose" does not operate to toll the additional period permitted under § 5852 for filing wrongful death actions.*** Because plaintiff did not file her complaint until well after the expiration of both the two-year limitation period for malpractice actions and the grace period provided for in § 5852, the lower courts properly determined that the action was time-barred.

469 Mich at 655 (emphasis supplied). This plain language, commonsense distinction between statutes of limitation, statutes of repose, and savings periods is consistent with the Legislature's choice to use different words in different statutes, and to not include a "savings period" amongst the periods that can be tolled by serving a notice of intent. See *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009) (noting that "the use of different terms within similar statutes generally implies that different meanings were intended," and "[i]f the Legislature had intended the same meaning in both statutory provisions, it would have used the same word").

Indeed, the Legislature has maintained this distinction despite making other amendments to the relevant statutes in the decades since *Waltz* was decided. See 2012 PA 609, effective March

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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."

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28, 2013 (amending MCL 600.5852 to add subsection (2) which distinguishes the 2-year savings "period" created in subsection (1) from the "period of limitations" referenced elsewhere in the statute); 2004 PA 87, effective April 22, 2004 (amending MCL 600.5856). Notably, the 2004 amendment of MCL 600.5856 retained the original reference to "statutes of limitations or repose" despite the conclusion in *Waltz* by both the Court of Appeals and this Court that that term did not encompass the savings period of MCL 600.5852, and this Court's previous conclusion in *Lindsey v Harper Hosp*, 455 Mich 56, 64-67; 564 NW2d 861 (1997) and *Miller v Mercy Mem Hosp*, 466 Mich 196, 202-203; 644 NW2d 730 (2002) that § 5852 was a savings period, not a statute of limitation. "It is a well-established principle of statutory construction that the Legislature is presumed to act with knowledge of statutory interpretations by the Court of Appeals and this Court." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991). This Court must assume that the Legislature knew this Court treated savings periods differently from statutes of limitation when it declined to amend § 5856(c) and/or § 5852 to apply the former to the latter. "When statutory provisions are construed by the court and the Legislature reenacts the statute, it is assumed that the Legislature acquiesced to the judicial interpretation." *GMAC LLC v Treasury Dep't*, 286 Mich App 365, 373; 781 NW2d 310 (2009), citing *Smith v Detroit*, 388 Mich 637, 650-651; 202 NW2d 300 (1972).

This Court itself demonstrated how to craft tolling language broadly to include the wrongful death savings period when it issued AO 2020-3 and AO 2020-18 to extend all filing deadlines during the COVID-19 pandemic. These administrative orders stated that "all deadlines applicable to the commencement of all civil and probate case types" and "all deadlines pertaining to case initiation and the filing of initial responsive pleadings" would be "extended" during the state of emergency declared by the Governor related to COVID-19. This tolling of all "deadlines"

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for case commencement (but not time periods that must elapse before the commencement of an action or proceeding) has uniformly been interpreted by the Court of Appeals to include the two-year wrongful death savings period, due to its broad and inclusive language. See *Poniewierski v William Beaumont Hospital Royal Oak*, unpublished opinion per curiam of Court of Appeals, issued December 1, 2022 (Docket No. 356925), lv den, 513 Mich 859; 995 NW2d 353 (2023) (**5b-9b**); *Olds v Ambulatory Surgery Associates, LLC*, unpublished opinion per curiam of Court of Appeals, issued April 11, 2024 (Docket No. 360780), lv den, 12 NW3d 422 (2024) (**10b-21b**); *Petipren v Rivers of Grosse Pointe-SNF*, unpublished opinion per curiam of Court of Appeals, issued September 18, 2025 (Docket No. 367609) (**22b-33b**) (all applying AO 2020-3 tolling to extend the savings period under § 5852). Conversely, notice tolling under MCL 600.5856(c) expressly applies only to "statutes of limitation and repose"—a limitation which has remained unaltered by the Legislature in the 22 years since *Waltz* was decided.

Plaintiff invites this Court to look past the plain language of MCL 600.5856(c) and instead find that the notice tolling provision must also apply to the savings period of MCL 600.5852 because both statutes govern the filing of medical malpractice actions. That MCL 600.5838a authorizes litigants to file a medical malpractice action within the "period prescribed in section 5805 or section 5851 to 5856," does not mean that all of those "periods" are periods of limitation to which notice tolling applies, rather than periods of limitation ***and*** savings periods. For instance, MCL 600.5851(1) is an infancy/insanity saving provision that may apply "although the period of limitations has run," see *Vega v Lakeland Hosps*, 479 Mich 243, 245; 763 NW2d 561 (2007). MCL 600.5855 is another savings provision that allows the plaintiff to commence an action within two years after discovering a claim that was fraudulently concealed by the defendant, "although the action would otherwise be barred by the period of limitations." Courts do not apply notice of

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intent tolling under MCL 600.5856(c) to extend the savings periods in those statutes. Instead, as this Court recently observed in *Carter v DTN Mgmt Co*, 515 Mich 61, 86; --- NW3d --- (2024), a tolling statute "interrupts the running of a statute of limitations," not another period of time like a savings period or the non-suit period under MCL 600.2912b.

In her attempt to categorize every statutory filing "period" referenced in MCL 600.5838a as a statute of limitations, Plaintiff overreads the doctrines of *in pari materia* and *noscitur a sociis*, which both must yield to the plain language of the statutes at issue. See *Voorhies v Judge of Recorder's Court*, 220 Mich 155, 157-158; 189 NW 1006 (1922) (refusing to apply *in pari materia* "for the reason that the language of the statute is clear and unambiguous"). Both statutes of limitations and savings periods are used to determine the applicable "period" for filing a medical malpractice claim, but only statutes of limitation (or repose) can be tolled by filing a notice of intent under MCL 600.5856(c).

Plaintiff cites Justice Corrigan's dissenting opinion from the denial of leave to appeal in *Vanslembrouck v Halperin*, 483 Mich 965; 763 NW2d 919 (2009), and its discussion of how to define a "statute of limitations" separately from a "savings period," as evidence that Michigan courts have failed to sufficiently distinguish between the two (Supp Brief, pp 10-12). Plaintiff's primary criticism appears to be that, under the definition for "statute of limitations" used by Justice Corrigan (taken from Black's Law Dictionary), the six-month "discovery rule" exception to the general two-year medical malpractice statute of limitations cannot itself be a separate "statute of limitations," because it runs from the date the claim was discovered, not the date on which the injury occurred. But Plaintiff ignores the second portion of the dictionary definition she quotes: a statute of limitations is "a law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury

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occurred ***or was discovered***") (Supp Brief, p 10, quoting Black's Law Dictionary (12th ed) (emphasis supplied)). As Plaintiff's chosen definition (which Plaintiff notes was recently cited with approval by this Court) shows, a "statute of limitations" includes periods for filing that run from the date a claim was discovered, in addition to the more traditional injury-based date of accrual. Conversely, a "savings period" is a period for filing that runs from some other event (i.e., the issuing of letters of authority). Applied to MCL 600.5852, the rule set forth in Justice Corrigan's dissenting opinion in *Vanslembrouck* is consistent and not at all circular. Its potential application to MCL 600.5851(7) is not relevant in this case, and this Court has never reached the issue of whether MCL 600.5851(7) is a savings provision or a statute of limitations.

Plaintiff's statutory interpretation argument boils down to the alleged unfairness of treating the two-year death savings period differently from statutes of limitation and repose that are extended by filing a notice of intent. But that alleged unfairness stems from the Legislature's choice to limit application of MCL 600.5856(c) to "statutes of limitation and repose"—a choice that can only be remedied by legislative action and not by this Court.

B. Other states also distinguish between savings periods and statutes of limitations.

The *Waltz* Court is not alone in finding that Michigan's savings period cannot be extended by tolling that otherwise applies to statutes of limitation or repose, including tolling that occurs when a presuit notice is filed in a medical malpractice action. In *Rajvongs v Wright*, 432 SW3d 808 (Tenn 2013), the Supreme Court of Tennessee ruled that 120 days of presuit notice tolling under Tenn Code Ann § 29-26-121(c) did not operate to extend Tennessee's one-year savings statute, Tenn Code Ann § 28-1-105, because the savings statute was not a "statute of limitations" or "statute of repose" referenced in the tolling statute. "We have long recognized that the saving statute is not a statute of limitations or a statute of repose and that it operates independently." *Id.*

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at 813. Similar to what this Court did in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007), the *Rajvongs* Court carved out a narrow exception for plaintiffs who had filed their original complaint before the notice requirement statute was enacted, allowing them the benefit of notice tolling so that they could timely file the newly-required notice and then refile their complaint.

In *Pugh v St Paul Fire & Marine Ins Co*, 877 SW2d 577 (Ark 1994), the Arkansas Supreme Court held that a notice requirement statute with 60 and 90-day tolling periods did not extend the time for filing a medical malpractice complaint under Arkansas' saving statute because the saving statute was not expressly mentioned in the notice statute.[3]

In *Saunders v Choi*, 466 NE2d 889 (Ohio 1984), the Supreme Court of Ohio ruled that a defendant's absence from Ohio did not allow for statutory tolling of Ohio's one-year savings statute. Tolling under the absent defendant statute applied expressly to "period[s] of limitation" that did not include the savings statute.

In *Wilson v Durrani*, 173 NE3d 448 (Ohio 2020), the Supreme Court of Ohio refused to apply Ohio's savings statute as an exception to its four-year statute of repose for medical malpractice claims.

All of these courts have had no difficulty finding that their respective savings statutes are not statutes of limitation. "In contrast to statutes of limitations and statutes of repose, both of which limit the time in which a plaintiff may file an action, saving statutes extend that time." *Wilson*, 173 NE3d at 421. They "act[] as an exception to the general bar of the statute of

[3] The entire notice statute, including the tolling periods, was found invalid and ineffective to extend the statute of limitations in *Thomas v Cornell*, 872 NW2d 370 (Ark 1994).

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limitations." *Id.* at 422. That savings periods themselves have an upper limit on the additional time available to file an action does not transform them into statutes of limitation, as Plaintiff suggests (Supp Brief, pp 12-13). While Plaintiff does not explicitly argue that savings periods do not exist separate and apart from statutes of limitation, that is the practical and logical effect of Plaintiff's argument that any temporal limit on filing a cause of action must constitute a statute of limitation. It is difficult to imagine what "usefulness" a savings period would retain if, as Plaintiff believes, they are simply alternative statutes of limitation (Id. at 13). Courts in other states do not treat savings periods and statutes of limitation as interchangeable, and neither should this Court.

II. If this Court finds that *Waltz* was not correctly decided, it should still be retained under *stare decisis*.

This Court is by now familiar with the analysis for overturning its past decisions set forth in *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), having done so on multiple occasions in the recent past. It should resist the temptation to do so in this case, because the distinction between savings periods and statutes of limitation is well-developed and consistently applied by lower courts, and nothing has changed which warrants overturning *Waltz*.

"*Stare decisis* is generally the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson*, 462 Mich at 463 (cleaned up). The doctrine "attempts to balance two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors." *Peterson v Magna Corp*, 484 Mich 300, 314; 773 NW2d 564 (2009).

"[O]verturning precedent requires more than a mere belief that a case was wrongly decided." *Lansing School Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 368; 792 NW2d 686

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(2010). To decide whether a prior decision should be overturned, this Court considers: (1) "whether changes in the law or facts no longer justify the questioned decision;" (2) "whether reliance interests would work an undue hardship;" and (3) "whether the decision at issue defies 'practical workability.'" *Robinson*, 462 Mich at 464. Both separately and together, these factors favor retaining the bright-line, straightforward rule developed in *Waltz* and applied unerringly by courts over the past 22 years.

A. There are no changes in the law or facts which warrant overturning *Waltz*.

Plaintiff has not identified any changes in the law or facts which call into question the holding in *Waltz*. In fact, as set forth herein, the Legislature has had 22 years to second-guess the wisdom of *Waltz* and has steadfastly refused to amend the relevant statutes to "fix" any perceived injustice. This indifferent response to *Waltz* should weigh heavily in favor of retaining it, as the remedy for an unfair statutory scheme lies with the Legislature, not this Court. While Justices Cavanagh and Kelly expressed concern in *Waltz* that this Court's interpretation of § 5852 and § 5856(c) would prejudice wrongful death plaintiffs in a way unintended by the Legislature, the Legislature itself has remained conspicuously silent. It certainly has not given any indication that the result in *Waltz* was "unintended."

When the Legislature did amend MCL 600.5852 in 2012, it made the wrongful death savings period more restrictive by ending the ability of plaintiffs to "tack" savings periods by appointing successor personal representatives (absent death or legal incapacity). MCL 600.5852(2)-(3); see *Eggleston v Bio-Medical Applications of Detroit, Inc*; 468 Mich 29; 658 NW2d 139 (2003) (confirming that, prior to amendment, savings period could run from the time a successor personal representative was appointed, even though initial letters of authority had previously been issued to the original personal representative more than two years earlier).

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Overruling *Waltz* would not be responsive to any apparent legislative intent to make it easier for wrongful death medical malpractice plaintiffs to file their lawsuits.

B. Doctrinal reliance interests weigh in favor of retaining *Waltz*.

Defendant Saeed agrees with Plaintiff that the reliance interests in *Waltz* are largely limited to the medico-legal world, and not society at large. However, Plaintiff is wrong that "reversing *Waltz* [will not] create a cascade where other lines of cases are brought into question, eliminating any doctrinal reliance" (Supp Brief, p 18). This is because other decisions have relied on the *Waltz* Court's distinction between statutes of limitations and savings periods, most notably in *Vega*, 479 Mich at 245, where this Court found that MCL 600.5851(1) is an infancy/insanity saving provision that cannot be tolled by MCL 600.5856(c). In *Ligons v Crittenton Hosp*, 490 Mich 61, 75; 803 NW2d 271 (2011), this Court rejected an opportunity to overturn *Waltz* and instead applied it to find that the timely filing of a medical malpractice complaint with a defective affidavit of merit could not toll the wrongful death savings period under MCL 600.5856(a), because tolling under that rule likewise applied only to statutes of limitation and repose, not savings periods. In *St Juliana v State Police*, --- Mich App ---; --- NW3d --- (July 17, 2025) (Docket No. 370427), the Court of Appeals pointed to the clear status of § 5852 as a "saving provision" that extends a "statute of limitations" to find that the six-month notice requirement in MCL 600.6431 for claims against the state and its agencies could be extended by § 5852 in wrongful death cases, because the notice period operated like a statute of limitations. MCL 600.5852's identity as a savings period that operates on statutes of limitations is embedded within Michigan law.

C. *Waltz* provides a workable and straightforward standard that has been consistently applied by courts for over two decades.

Perhaps the strongest argument in favor of retaining *Waltz* is the consistency with which lower courts have applied it over the last two decades. Considerations that are relevant to the

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"practical workability" prong of *stare decisis* "include whether the decision [has] been met with criticism, whether its application has been contested or difficult, and, in the context of statutory interpretation, whether a reader of the underlying statute would be unable to rely on its plain meaning in light of the decision's departure from that meaning." *Ottgen v Katranjii*, 511 Mich 223, 240; 999 NW2d 359 (2023).

Beginning with the last consideration, unlike the "specialty/subspecialty" distinction which this Court recently jettisoned in *Stokes v Swofford*, 514 Mich 423; 22 NW3d 97 (2024) because it was both inconsistent with the plain language of the governing statute and had created confusing and "untenable" interpretations for courts and litigants, there is nothing "contested or difficult" about the rule in *Waltz*: it's just math. A medical malpractice complaint is either filed within the original two-year statute of limitations (extendable by § 5856(c)), within the two-year wrongful death savings provision measured from the time the letters of authority are issued (not extendable by § 5856(c), and capped by the three-year ceiling of § 5852), or it is untimely. Nothing in MCL 600.5852 identifies the wrongful death savings period as a "statute of limitation or repose" that would be tolled by a notice of intent under the plain language of MCL 600.5856(c). Indeed, § 5852(1) establishes a separate two-year period that only commences if and when "the period of ***limitations*** has run" (emphasis supplied). Someone reading MCL 600.5852 would know that the "2-year period under subsection (1)" is not a "period of limitations" that "has run," because by the plain terms of subsection (2), that 2-year period "runs from the date letters of authority are issued..." In turn, MCL 600.5856's reference to tolling of "statutes of limitations or repose" does not include that "2-year period" whose distinction from "period[s] of limitations" has been established by § 5852.

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Plaintiff posits a hypothetical which allegedly illustrates the "unworkability" of *Waltz* (Supp Brief, pp 16-17). The plaintiff attorney in Plaintiff's hypothetical could have timely filed the wrongful death medical malpractice action within the two-year wrongful death savings period had the notice of intent been served in the first ***eighteen months*** after the letters of authority were issued (during which time, Plaintiff admits, the hypothetical cause of action was known).[4] Plaintiff presents no facts indicating that this would be impossible for her hypothetical plaintiff attorney; instead, like Plaintiff's own attorney, this attorney simply waited too long and was apparently unaware of the holding in *Waltz*. Ignorance of the rule does not demonstrate a lack of workability. Moreover, the fact that Plaintiff had to come up with her own hypothetical fact pattern to demonstrate that *Waltz*'s rule is unworkable (and still failed to make that point), rather than identify a real-life example in the 22 years since *Waltz* was issued, strongly suggests that the rule is, in fact, quite workable.

Plaintiff characterizes the Legislature's decision to allow notices of intent to toll statutes of limitation and repose but not savings periods as "disjointed," "without cause or explicit intent," and a "trap for the unwary" (Supp Brief, p 17). The Legislature does not need to justify differing treatment that does not implicate a constitutionally protected class. And the Legislature does not need to provide every possible extension of time to a wrongful death plaintiff, when it already provides an extra two (and a maximum of five) years to file an action "although the limitations period has run." The holding in *Waltz* that notice of intent tolling does not apply to extend the

[4] Plaintiff incorrectly suggests that, without notice of intent tolling, the six-year medical malpractice statute of repose would have expired before the wrongful death savings period in her hypothetical. Absent notice of intent tolling, both the wrongful death savings period and the statute of repose would expire on January 2, 2025, which is two years after the letters of authority were issued on January 2, 2023 and six years (plus one holiday day, see MCR 1.108) after the underlying malpractice was committed on January 1, 2019.

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wrongful death savings period can no longer be considered a "trap for the unwary" two decades after it was issued. Again, the Legislature has had the opportunity to correct the alleged injustice wrought by *Waltz*, but has declined to do so—and in fact, has only amended MCL 600.5852 to make it more difficult for wrongful death plaintiffs to file medical malpractice actions. It is the Legislature that needs convincing, not this Court.

Another "unworkability" challenge Plaintiff raises involves aspects of the holding in *Ligons* that have already been overturned by changes to the court rules (Supp Brief, p 15). A defective affidavit of merit can now be "amended" (i.e., replaced) pursuant to MCR 2.112(L)(2)(b), and will relate back to the original date of filing. So, as long as the complaint is timely filed within the savings period, any defect in the affidavit of merit will not result in dismissal with prejudice due to expiration of the savings period, as happened in *Ligons*.

Finally, Plaintiff alleges that *Waltz* gives defendants "an unprecedented advantage" by allowing them to wait out the notice period and leave a wrongful death claimant without sufficient time to file a complaint (Supp Brief, pp 15-16). Again, Plaintiff provides no evidence that in this case—or any other case—it was impossible to serve the notice of intent (thereby starting the notice period) ***earlier*** than 182 days before the end of the two-year savings period. In every medical malpractice case, it is the plaintiff who decides when to serve the notice of intent that starts the notice period that must expire before the complaint is filed. And in every medical malpractice case, that notice of intent must be served with the statute of limitations or savings period (and any applicable tolling) in mind. That the calculation is different in death cases versus non-death cases does not make it unfair or unworkable. In turn, if Plaintiff or plaintiff attorneys are truly worried about a defendant "waiting out" the notice period in a wrongful death case, they can prevent any timeliness issues simply by serving the notice of intent more than 182 days before the savings

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period expires. In many cases, they can also serve the notice of intent within the original two-year statute of limitations and thereby take advantage of tolling under MCL 600.5856(c). Those plaintiffs need not rely at all on the two-year wrongful death savings period or worry about its restrictions. The Court of Appeals makes this point in its opinion: "Had plaintiff provided its notice of intent within two years of [the alleged medical malpractice on July 16, 2020], the limitations period for brining the claim under MCL 600.5805(8) would have been tolled, but plaintiff did not do so" (**2b**). This Court should not act to overturn *Waltz* in a case where it was entirely possible for Plaintiff to have filed her claim timely under *Waltz*, but for her attorney's singular misunderstanding or ignorance of the law.

The relative dearth of recent appellate opinions applying *Waltz* to situations like the one in this case is itself evidence that most plaintiff attorneys are able to calculate and apply the deadlines for filing wrongful death medical malpractice actions without any difficulty. Cf *Stokes*, 514 Mich at 452 n 21 (finding prior decision defies practical workability because "[t]he application of its standard has led to inconsistent and untenable results in subsequent cases," and listing recent cases). In other words, most medical malpractice attorneys aren't making the same mistake plaintiff counsel made in this case. They understand the relevant statutes and this Court's opinion in *Waltz* applying those statutes, and they serve their notices of intent more than 182 days before the end of the two-year savings period, if they rely on that savings period at all.

In light of the foregoing, Plaintiff has not shown that declining to apply notice of intent tolling to the wrongful death savings period fails "to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions." *Miller*, 466 Mich at 203, quoting *Lindsey*, 455 Mich at 66. In *Waltz*, the Court pointed out that its analysis, based on the plaintiff's own choice to wait until five years after her infant's death to file her notice

of intent, "in no way shortens either the two-year extension period or the three-year ceiling provided for in § 5852." 469 Mich at 652 n 14. Instead, the applicable statutes collectively gave her "*five years plus 182 days* to commence her lawsuit following the accrual of her cause of action." *Id*. (emphasis original). Here too, Plaintiff had more than enough time to file her lawsuit timely within the extended period for doing so under § 5852, even without the benefit of notice of intent tolling. There is no evidence to the contrary, and this Court should be reluctant to overturn well-established precedent under these less-than-compelling circumstances.

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CONCLUSION AND RELIEF REQUESTED

Waltz was correctly decided according to the plain language of the statutes at issue. Its holding has been consistently applied by lower courts for the past two decades, and the Legislature has declined to amend the relevant statutes to remedy the alleged unfairness created by that holding. This Court should not intervene to "fix" a statutory scheme that the Legislature has decided is not problematic, and which the vast majority of attorneys follow without difficulty. Defendant Saeed respectfully requests this Court deny all relief requested by Plaintiff.

Respectfully submitted,

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