Appendix
Exhibit 1

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Approved, SCAO

STATE OF MICHIGAN PROBATE COURT COUNTY OF GENESEE	LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE	2021217506DE

Estate of Maurice Ernest, deceased

TO:

Name and address	Telephone no.
Keran Ernest 3292 Jacque St. Flint, MI 48532	(810) 908-0582

You have been appointed and qualified as personal representative of the estate on 6-7-2021 (Date).

You are authorized to perform all acts authorized by law unless exceptions are specified below.

[ ] Your authority is limited in the following way:

[ ] You have no authority over the estate's real estate or ownership interests in a business entity that you identified on your acceptance of appointment.

[ ] Other restrictions or limitations are:

[ ] These letters expire: _____ (Date)

6-7-2021
Date

Nicole Johnson
~~Judge (formal proceedings)~~/Register (informal proceedings) Bar no.

SEE NOTICE OF DUTIES ON SECOND PAGE

CF Legal, PC
Craig R. Fiederlein P55842
Attorney name (type or print) Bar no.
302 E. Court St.
Address
Flint, MI 48502 (810) 232-1112
City, state, zip Telephone no.

I certify that I have compared this copy with the original on file and that it is a correct copy of the original, and on this date, these letters are in full force and effect.

6-7-2021
Date

Nicole Johnson
Deputy Register

Do not write below this line - For court use only

FILED
JUN 07 2021
GENESEE COUNTY
PROBATE COURT

MCL 700.3103, MCL 700.3307, MCL 700.3414, MCL 700.3504, MCL 700.3601, MCR 5.202, MCR 5.206, MCR 5.307, MCR 5.310

Appendix
Exhibit 2

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OLIVER LAW GROUP
ATTORNEYS AT LAW

1.800.939.7883

50 W. Big Beaver Rd.
Suite 200
Troy, Michigan 48084

8951 Cypress Waters Blvd.
Suite 160
Dallas, Texas 75019

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Alyson Oliver, Esq.
248 327-6556
aoliver@oliverlawgroup.com
www.oliverlawgroup.com

February 10, 2023

Sent via USPS First Class Mail and USPS Certified Mail Delivery

McLaren Regional Medical Center
McLaren Health Care Corporation
401 S. Ballenger Hwy
Flint, MI 48532-3685

Dr. Paul W. Brown Jr.
726 Woodside Ct.
Lake Orion, MI 48359-1747

Cypress Cardiology PLLC
Attn: Farouk Belal
1286 S. Linden Road Suite A
Flint, MI 48532

Elmahdi M. Saeed
8232 Pine Hollow Ct.
Grand Blanc, MI 48439-7439

Cypress Cardiology PLLC
Attn: Farouk Belal
1471 S. Elms Road
Flint, MI 48532

Dr. Farouk M. Belal
6085 Westknoll Drive #403
Grand Blanc, MI 48439

RE: Estate of Maurice Ernest (DOB 4/29/1966/DOD 7/17/2020)

Dear Addressees:

You are hereby notified that the Estate of Maurice Ernest intends to file suit against you upon the expiration of 182 days from the above date. This notice is being provided pursuant to MCL 600.2912b (2) and (4). That same statute, under subsection (5) and (7), places certain obligations upon each of you as well. You are required to provide the undersigned with access to all of Maurice Ernest's medical records and images that are in your control; or, in the alternative, you are permitted to provide a copy of his medical records and images to the undersigned. Access to those records must be provided within 56 days after your receipt of this notice. The term

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"medical records" includes but is not limited to billing and payment records, any diagnostic test results, diagnostic imaging, any consultation reports, any photographs, any records that reflect contacts with Maurice Ernest or with a member of her family, prescription forms, and clinical notes. A formal request is accordingly hereby made for those records. Please produce all images in DICOM format.

Second, you are required to provide a notice of meritorious defense pursuant to MCL 600.2912b (7) within 154 days from the above date. If either of the above requirements is not met in a timely manner, the undersigned will seek appropriate sanctions from the court once this matter has been filed in Genesee County Circuit Court.

As stated above, MCL 600.2912b (5) specifically provides that "within 56 days…the health professional or health facility shall allow the claimant access to all medical records related to the claim that are in the control of the health professional or health facility." In addition, MCL 600.2912f specifically provides, "A person who has given notice under section 2912b…waives for purposes of that claim…the privilege created by section 2157 and any other similar privilege created by law with respect to a person or entity who was involved in the acts, transactions, events or occurrences that are the basis for the claim…or who provided care or treatment to the claimant…in the claim…for that condition or a condition related to the claim…either before or after those acts, transactions, events or occurrences, whether or not the person is a party to the claim…".

The Michigan legislature has defined the term "Medical Record" in MCL 333.26263 (i) as follows: "Medical record means information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the plaintiff's

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health". That definition certainly includes billing and payment information and images obtained during diagnostic testing, in addition to the records that would normally be maintained by the health professional or health facility. The HIPAA regulations also include billing and payment information in their definition of protected health information. The Michigan Supreme Court recently held that billing and payment records are part of a patient's medical records and must be produced by the health care professional pursuant to MCL 600.2912b (5).

In addition, MCL 333.26263 (a) defines an "Authorized Representative" as follows: "A person empowered by the patient by explicit written authorization to act on the patient's behalf to access, disclose, or consent to the disclosure of the patient's medical record, in accordance with this act". MCL 333.26265 (1) provides that, "a patient or his or her authorized representative has the right to examine or obtain the patient's medical record. Obviously, since I am the patient's attorney, those provisions permit me to request the patient's medical record, which I formally requested above. If for any reason you do not believe that I have been retained by the claimant, please contact the undersigned; a copy of the designation of representative form will be provided.

Recognizing that the Michigan Supreme Court has held that the most restrictive provisions of Michigan law or federal law control the release of medical records, it is appropriate to look at the HIPAA regulations regarding the release of medical records. 45 CFR 164.512 details the situations under which a health professional or health facility may disclose protected health information without a written authorization from the individual. Section 164.512 (a) provides: "A covered entity may use or disclose protected health information to the extent that *such use or disclosure is required by law and the use of the disclosure complies with and is limited to the relevant requirements of such law*". In addition, the HIPPA law clearly indicates that a covered entity *must* disclose protected health information to individuals when they request access. In the

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instant situation, MCL 600.2912b (5) requires that the health professional and the health facility provide the claimant's medical records within 56 days from when they receive this notice of intent; therefore, the requested medical records can, under federal law, be provided without an authorization from the patient if they are being provided pursuant to MCL 600.2912b (5). The same regulation under subpart (e) clearly states that "A covered entity may disclose protected health information in the course of any judicial or administrative proceeding". There can be no question that a notice of intent filed pursuant to MCL 600.2912b (4) constitutes the initial step in the judicial process required to maintain an action against a health professional or health facility. Anticipating that some might argue that a notice of intent filed under MCL 600.2912b (4) is not a court order as provided under subpart (e) (i), your attention should be directed to subpart (e) (ii) (A) which states: "In response to a legal subpoena, discovery request, *or other lawful process*, that is not accompanied by an order of a court or administrative tribunal, if: "The covered entity receives satisfactory assurance, as described in paragraph (e) (1) (iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is subject of the protected health information that has been requested has been given notice of the request". It should appear to any reasonable person that the claimant is aware that the undersigned is requesting his medical records in connection with this legally mandated Notice of Intent.

Given the time constraints imposed upon the undersigned to fully investigate this claim, a formal demand is made for the timely production of the medical records requested above. If the records are not provided in a timely manner, the undersigned may initiate a separate action for the production of those records with a request for sanctions for your failure to provide those records in a timely manner. Given the above authority, it is hoped that the records will be produced as soon

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as possible. The earlier the records are produced, the earlier a determination can be made regarding whether or not there is merit to these claims. Thus, everyone will be served by a prompt production of the subject documents.

Please also take notice that this claim will be filed as both a medical malpractice claim pursuant to MCL 600.2912 et. seq. and a wrongful death claim pursuant to MCL 600.2922.

Factual Basis of Claim

On July 16, 2020 Mr. Ernest, age 54, presented to the emergency department at McLaren Regional Medical Center in Flint, Michigan (hereinafter "McLaren" complaining of chest pain at 10:53. Mr. Ernest relayed that the onset of chest pain started two days prior and was abrupt, constant, and rated the pain as a six on a scale of one to ten. He noted the quality was heaviness and tightness without modifying factors. Mr. Ernest was noted to have obesity and hypertension and suffering with diaphoresis. He was taking metoprolol, a beta blocker that can mask an elevated heart rate, which is a warning sign for pulmonary embolism. He was seen in the emergency room by Dr. Paul W. Brown (hereinafter "Dr. Brown") and discharged from emergency to the cardiac unit for observation at 06:54, with Dr. Elmahdi M. Saeed (hereinafter "Dr. Saeed" attending. A single x-ray was ordered with findings on July 16, 2020 at 10:06 pm of enlarged heart, mild interstitial prominence of lungs, minimal perihilar/basilar opacities and an impression of mild congestion/edema; conditions that can be signs of pulmonary embolism. EKG was within normal limits according to the chart, and potassium was abnormal at 3.2. WBC was 11.8. Blood pressure was 170/89, and pulse was 59 on July 17, 2020 at 11:00. A consultation was placed for cardiology. Mr. Ernest was seen by Dr. Farouk M. Belal (hereinafter "Dr. Belal") who noted his provisional diagnosis was acute coronary syndrome and hypokalemia. Sinus brady cardia noted at 7/17/20 at 01:44. At no time was D-dimer tested. At no time was CT PE or ventilation-perfusion scan

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ordered. The chart does not mention shortness of breath generally, which Mr. Ernest was suffering from and complained about. The chart reflects only two vitals. On July 17, 2020 at 1357, while in the observation unit, Mr. Ernest died. Independent autopsy conducted at the Michigan Institute of Forensic Science & Medicine confirmed cause of death as bilateral pulmonary embolism an noted fresh and organizing emboli in pulmonary arteries and branches, pulmonary infarcts and pulmonary edema.

Standard of Care

The applicable standard of care required McLaren[1] to use reasonable care in hiring and/or credentialling, retaining and supervising physicians and to refrain from hiring and/or credentialling or retaining physicians who demonstrate a foreseeable threat of injury to patients.

The applicable standard of care required McLaren to follow the Joint Commission (JC) Accreditation Standard RC.01.01.01: maintain complete and accurate medical records for each individual patient.

The applicable standard of care for Drs. Brown, Saeed and Belal required that PERC protocol or Wells' criteria be utilized to rule out pulmonary embolism. Given Mr. Ernest's age of 54, utilization of PERC protocol would have indicated that pulmonary embolism must be part of Mr. Ernest's differential diagnosis. Given that Mr. Ernest exhibited clinical signs that pulmonary embolism was an equally likely diagnosis to heart attack, use of the Wells' criteria would have placed Mr. Ernest in the moderate range to suffer incidence of pulmonary embolism.

[1] This statement is made specifically as it relates to Dr. Farouk Belal, but will be pled as to other Defendants if it is later discovered to be applicable to them.

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The applicable standard of care for Drs. Brown, Saeed and Belal required that an order for D-dimer testing be placed for Mr. Ernest where pulmonary embolism was not ruled out and should have been part of the differential diagnosis.

The applicable standard of care for Drs. Brown, Saeed and Belal required that an order for CT PE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was as noted in the 'Factual Basis' section above.

The applicable standard of care for Drs. Brown, Saeed and Belal required that they review Mr. Ernest's vitals to the extent that it could be easily noticed that vitals were not being taken every four hours; and issue orders to correct same.

The applicable standard of care for Dr. Belal required that he timely and accurately review the EKG and, when making diagnoses issue orders commensurate with the diagnosis made.

Breach of the Standard of Care

McLaren breached the applicable standard of care when it failed to use reasonable care in hiring and/or credentialling, retaining and supervising physicians and to did not refrain from hiring and/or credentialling or retaining physicians who demonstrate a foreseeable threat of injury to patients.

McLaren breached the applicable standard of care when it failed to follow the Joint Commission (JC) Accreditation Standard RC.01.01.01: maintain complete and accurate medical records for each individual patient.

Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to utilize PERC protocol or Wells' criteria to rule out pulmonary embolism.

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Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to order D-dimer testing for Mr. Ernest where pulmonary embolism was not ruled out and should have been part of the differential diagnosis.

Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to order CT PE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was as noted in the 'Factual Basis' section above.

Drs. Brown, Saeed and Belal breached the applicable standard of care when they did not review Mr. Ernest's and take notice that vitals were not being taken every four hours; and issue orders to correct same.

Dr. Belal breached the applicable standard of care when he failed to timely and accurately review the EKG and, when making diagnoses, failed to issue orders commensurate with the diagnosis made.

Action that Should Have Been Taken to Achieve Compliance with the Standard of Care

To comply with the applicable standard of care McLaren should have used reasonable care in hiring and/or credentialling, retaining and supervising physicians and should have refrained from hiring and/or credentialling or retaining physicians who demonstrate a foreseeable threat of injury to patients.

To comply with the applicable standard of care McLaren should have followed the Joint Commission (JC) Accreditation Standard RC.01.01.01: maintain complete and accurate medical records for each individual patient.

To comply with the applicable standard of care, Drs. Brown, Saeed and Belal should have utilized the PERC protocol or Wells' criteria to rule out pulmonary embolism.

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To comply with the applicable standard of care, Drs. Brown, Saeed and Belal should have ordered testing for D-dimer where pulmonary embolism was not ruled out and should have been part of the differential diagnosis.

To comply with the applicable standard of care, Drs. Brown, Saeed and Belal should have ordered CT PE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was as noted in the 'Factual Basis' section above.

To comply with the applicable standard of care, Drs. Brown, Saeed and Belal should have reviewed Mr. Ernest's vitals to the extent that it could be easily noticed that vitals were not being taken every four hours; and issue orders to correct same.

To comply with the applicable standard of care, Dr. Belal should have timely and accurately review the EKG and, when making diagnoses issue orders commensurate with the diagnosis.

The Manner in Which the Breach was the Proximate Cause of the Claimed Injury

Because McLaren breached the applicable standard of care when it failed to use reasonable care in hiring and/or credentialling, retaining and supervising physicians and to did not refrain from hiring and/or credentialling or retaining physicians who demonstrate a foreseeable threat of injury to patients, it provided employment or privileges to Dr. Belal, who has an extensive disciplinary record that foretold the likelihood that patients such as Mr. Ernest would suffer neglect or injury in his care, and Mr. Ernest in fact did suffer neglect and injury in Dr. Belal's care at McLaren.

Because McLaren breached the applicable standard of care when it failed follow the Joint Commission (JC) Accreditation Standard RC.01.01.01: maintain complete and accurate medical

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records for each individual patient, Mr. Ernest's vitals and the flowchart that should have documented his care at McLaren are non-existent and thusly it can only be concluded that such care did not occur. Not taking vitals and not flow-charting care deprived Mr. Ernest's care providers of critical information that would have reflected Mr. Ernest's risk for pulmonary embolism – the untreated condition that in fact caused Mr. Ernest's death.

Because Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to utilize PERC protocol or Wells' criteria to rule out pulmonary embolism, pulmonary embolism was not addressed at all, and Mr. Ernest in fact died due to pulmonary embolism.

Because Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to order D-dimer testing for Mr. Ernest where pulmonary embolism was not ruled out and should have been part of the differential diagnosis, pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

Because Drs. Brown, Saeed and Belal breached the applicable standard of care when they failed to order CT PE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was as noted in the 'Factual Basis' section above, pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

Because Drs. Brown, Saeed and Belal breached the applicable standard of care when they did not review Mr. Ernest's and take notice that vitals were not being taken every four hours; and issue orders to correct same, vitals that would have provided more warning signs for pulmonary embolism did not exist, and pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

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Because Dr. Belal breached the applicable standard of care when he failed to timely and accurately review the EKG and, when making diagnoses, and failed to issue orders commensurate with the diagnosis made, pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

Statement of Vicarious and Institutional Liability

Please take notice that The Estate of Maurice Ernest intends to hold McLaren and any related Corporation directly liable for the negligence of Drs. Brown, Saeed and Belal as well as that of any other medical professional or other agent that was negligent as set forth in this notice pursuant to the doctrines of actual agency, apparent agency, ostensible agency, and joint venture or joint enterprise liability, as well as pursuant to MCL 333.21513(a).

Name of Health Professionals, Entities and Facilities Notified:

McLaren Regional Medical Center
McLaren Health Care Corporation
401 S. Ballenger Hwy
Flint, MI 48532-3685

Cypress Cardiology PLLC
Attn: Farouk Belal
1286 S. Linden Road Suite A
Flint, MI 48532

Cypress Cardiology PLLC
Attn: Farouk Belal
1471 S. Elms Road
Flint, MI 48532

Dr. Paul W. Brown Jr.
726 Woodside Ct.
Lake Orion, MI 48359-1747

Elmahdi M. Saeed
8232 Pine Hollow Ct.
Grand Blanc, MI 48439-7439

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Dr. Farouk M. Belal
6085 Westknoll Drive #403
Grand Blanc, MI 48439

OLIVER LAW GROUP P.C.

Date: February 10, 2023

/s/ Alyson Oliver, Esq.
Alyson Oliver, Esq. (P55020)
50 W. Big Beaver Rd. Ste. 200
Troy, MI 48064
T: (248) 327-6556
E: notifications@oliverlawgroup.com

Appendix
Exhibit 3

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

KERAN ERNEST,
Individually and as Personal Representative
Of the Estate of Maurice Ernest,
Deceased.
Plaintiff,

Vs.

2023 119425 -NH

CELESTE D. BELL
P-41453

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

Defendants.

/

A TRUE COPY
Genesee County Clerk

Alyson Oliver (P55020)
Paul Matouka (P84874)
Attorneys for Plaintiff
50 W. Big Beaver Road, Suite 200
Troy, MI 48084
(248) 327-6556
notifications@oliverlawgroup.com

/

COMPLAINT

There is no pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

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NOW COMES PLAINTIFF, KERAN ERNEST, Individually and as Personal Representative of the Estate of Maurice Ernest, Deceased, by and through its counsel OLIVER LAW GROUP PC, and in support of their Complaint states as follows:

Introduction

This case arises from Defendants' medical malpractice, leading to the wrongful death of the Plaintiff.

Parties

1. Plaintiff Keran Ernest is the duly appointed personal representative by the Genesee Probate Court of the Estate of Maurice Ernest. **Exhibit A**.
2. Prior to his death, Maurice Ernest was an adult resident of Flint Township, County of Genesee, State of Michigan.
3. Upon information and belief, Defendant Brown is a resident of the City of Lake Orion, County of Oakland, State of Michigan.
4. Upon information and belief, Defendant Saeed is a resident of the City of Grand Blanc, County of Genesee, State of Michigan.
5. Upon information and belief, Defendant Belal is a resident of the City of Grand Blanc, County of Genesee, State of Michigan.

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6. Defendant McLaren Health Care Corporation is an incorporated business located in the City of Flint, County of Genesee, State of Michigan.

7. Defendant Cypress Cardiology PLLC is an incorporated business located in the City of Flint, County of Genesee, State of Michigan.

Jurisdiction/Venue

8. Jurisdiction and venue are proper in Genesee County Circuit Court because the transactions giving rise to the allegations in this Complaint occurred in Genesee County, Michigan and the amount in controversy exceeds $25,000.00.

Facts

9. Plaintiff incorporates the preceding paragraphs as if fully restated herein.

10. On July 16, 2020, Maurice Ernest presented to the emergency department at Defendant McLaren Regional Health Corporation's McLaren Regional Medical Center in Flint, Michigan, complaining of chest pain at 10:53 AM.

11. Maurice Ernest relayed that the onset of chest pain started two days prior and was abrupt, constant, and rated the pain as a six on a scale of one to ten. He noted the quality was heaviness and tightness without modifying factors. He was noted to have obesity and hypertension and suffering with diaphoresis. He was taking metoprolol, a beta blocker that can mask an elevated heart rate, which is a warning sign for pulmonary embolism.

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12. Maurice Ernest was seen in the emergency room by Defendant Brown and discharged from emergency to the cardiac unit for observation at 6:54 PM, with Defendant Saeed attending. At no time was D-dimer tested. At no time was CTPE or ventilation-perfusion scan ordered.

13. A single X-Ray was ordered with findings on July 16, 2020, at 10:06 PM of enlarged heart, mild interstitial prominence of lungs, minimal perihilar/basilar opacities and an impression of mild congestion/edema; conditions that can be signs of pulmonary embolism. EKG was within normal limits according to the chart, and potassium was abnormal at 3.2. WBC was 11.8. Blood pressure was 170/89, and pulse was 59 on July 17, 2020, at 11:00 AM. A consultation was placed for cardiology.

14. Maurice Ernest was seen by Defendant Belal, who noted his provisional diagnosis was acute coronary syndrome and hypokalemia. Sinus bradycardia noted at 7/17/2020 at 1:44 PM. At no time was D-dimer tested. At no time was CTPE or ventilation-perfusion scan ordered. The chart does not mention shortness of breath generally, which Maurice Ernest was suffering from and complained about. The chart reflects only two vitals.

15. On July 17, 2020, at 1:57 PM, while in the observation unit, Maurice Ernest died. Independent autopsy conducted at the Michigan Institute of Forensic Science & Medicine confirmed cause of death as bilateral pulmonary embolism

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and noted fresh and organizing emboli in pulmonary arteries and branches, pulmonary infarcts and pulmonary edema.

Count I – Medical Malpractice

16. Plaintiff incorporates the preceding paragraphs as if fully restated herein.

17. Notice of Intent was served on all Defendants herein on February 10, 2023.

A. Defendant McLaren Health Care Corporation

18. Plaintiff incorporates the preceding paragraphs as if fully restated herein.

19. The Affidavit of Merit of Richard Bays, is attached as **Exhibit B**.

20. The applicable standard of care required that Defendant McLaren Health Care Corporation is that which a reasonably prudent and careful hospital staff, being or ordinary learning, judgment, and skill would or would not do under the same or similar circumstances.

21. The applicable standard of care applicable to McLaren Regional Medical Center required it to provide Maurice Ernest with reasonable care and the care that a reasonably prudent hospital would follow including:

a. Following the PUBLIC HEALTH CODE Act 368 of 1978 [333.21521 Minimum standards and rules; practices. - Sec. 21521.] which states that: A hospital shall meet the minimum standards and rules authorized by this article and shall endeavor to carry out practices that will further protect the public health and safety,

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prevent the spread of disease, alleviate pain and disability, and prevent premature death;

b. Following the Joint Commission (JC) Accreditation Standards that McLaren Regional Medical Center is required including but not limited to:

   i. Standard LD. 04.03.01 – The hospital provides services that meet patient needs;

   ii. Standard LD.04.03.09 – Care, treatment, and services provided through contractual agreement are provided safely and effectively [See also §CFR §482.12e];

   iii. Standard HR.01.06.01 Staff are competent to perform their responsibilities [Also see CFR§ 482.23];

   iv. Standard MS.03.01.03 The management and coordination of each patient's care, treatment, and services is the responsibility of a practitioner with appropriate privileges;

   v. Standard MS.07.01.01 The organized medical staff provides oversight for the quality of care, treatment, and services by recommending members for appointment to the medical staff;

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vi. Standard LD.03.09.01 The hospital has an organizational-wide, integrated patient safety program within its performance improvement activities;

vii. Standard RI.01.01.01 - The hospital respects, protects, and promotes patient rights. The hospital treats the patient in a dignified and respectful manner that supports his or her dignity;

viii. Standard PC.01.02.01 – The hospital assesses and reassesses its patients; and

ix. Standard RC.01.01.01 - The hospital maintains complete and accurate medical records for each individual patient; provides full, complete and medical records for each individual patient,

c. Following the Emergency Medical Treatment and Labor Act (EMTALA) [a federal law enacted in 1986] that requires anyone coming to an emergency department to be stabilized and treated, regardless of their insurance status or ability to pay [42 U.S.C. §1395dd]. EMTALA requires Medicare-participating hospitals with emergency departments, such as McLaren Regional Medical Center, to screen and treat the emergency medical conditions of patients in a non-discriminatory manner [id]. An emergency medical condition

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is defined as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the individual's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of bodily organs" [id]. When an emergency medical condition exists, treatment must be provided until the emergency medical condition is resolved or stabilized. If the hospital does not have the capability to treat the emergency medical condition, an "appropriate" transfer of the patient to another hospital must be done in accordance with the EMTALA provisions;

d. Following the Federal Level Medicare Condition of Participation requirements that McLaren Regional Medical Center is required to comply with, including but not limited to:

   i. § 482.12(e) Condition of Participation: Contracted Services - The governing body must be responsible for services furnished in the hospital whether or not they are furnished under contracts.,

   ii. §482.11 Condition of Participation: Compliance with Federal, State and Local Laws - The hospital must ensure that

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all applicable Federal, State and local law requirements are met. [Including Public Health Code Act 368 of 1978 [333.21521 Minimum standards and rules; practices. - Sec. 21521];

iii. §482.12(a) Standard: Medical Staff. The governing body must: Determine, in accordance with State law, which categories of practitioners are eligible candidates for appointment to the medical staff;

iv. §482.12(a)(2) Appoint members of the medical staff after considering the recommendations of the existing members of the medical staff - Only the hospital's governing body has the authority to grant a practitioner privileges to provide care in the hospital;

v. §482.12(a)(5) Ensure that the medical staff is accountable to the governing body for the quality of care provided to patients - The governing body must ensure that the medical staff as a group is accountable to the governing body for the quality of care provided to patients. The governing body is responsible for the conduct of the hospital and this conduct includes the quality of care provided to patients;

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vi. §482.12(a)(6) Ensure the criteria for selection are individual character, competence, training, experience, and judgment;

vii. §482.22 Condition of Participation: Medical Staff - The hospital must have an organized medical staff that operates under bylaws approved by the governing body, and which is responsible for the quality of medical care provided to patients by the hospital;

viii. §482.55 Condition of Participation: Emergency Services - The hospital must meet the emergency needs of patients in accordance with acceptable standards of practice; and

ix. §482.55(a) - [If emergency services are provided at the hospital] (2) The services must be integrated with other departments of the hospital; Emergency Services integration would include at a minimum: 1) The immediate availability of services, equipment, personnel, and resources of other hospital departments/services to emergency patients; and 2) That the provision of services, equipment, personnel and resources of other hospital departments/services to emergency department patients is within timeframes that

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protect the health and safety of patients and is within acceptable standards of practice.

22. Defendant McLaren Health Care Corporation deviated from the standard of care in their treatment of Maurice Ernest by failing to do the following:

23. Failing to follow the Joint Commission (JC) Accreditation Standards that McLaren Health Care Corporation are required to, including but not limited to:

a. Standard LD.04.03.01 – The hospital provides services that meet patient needs;

b. Standard LD.04.03.09 - Care, treatment, and services provided through contractual agreement are provided safely and effectively [See also CFR §482.12e];

c. Standard HR.01.06.01 Staff are competent to perform their responsibilities [Also see CFR§ 482.23];

d. Standard MS.03.01.03 The management and coordination of each patient's care, treatment, and services is the responsibility of a practitioner with appropriate privileges;

e. Standard MS.07.01.01 The organized medical staff provides oversight for the quality of care, treatment, and services by recommending members for appointment to the medical staff;

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f. Standard LD.03.09.01 The hospital has an organizational-wide, integrated patient safety program within its performance improvement activities;

g. Standard RI.01.01.01 - The hospital respects, protects, and promotes patient rights. The hospital treats the patient in a dignified and respectful manner that supports his or her dignity;

h. Standard RC.01.01.01 - The hospital maintains complete and accurate medical records for each individual patient; provides full, complete and medical records for each individual patient

i. Standard PC.01.02.01 – The hospital assesses and reassesses its patients.

24. Failing to follow the Federal Level Medicare Condition of Participation requirements that McLaren Health Care Corporation are required to comply with, including but not limited to:

a. Failing to follow § 482.12(e) Condition of Participation: Contracted Services – The governing body must be responsible for services furnished in the hospital whether or not they are furnished under contracts.,

b. §482.11 Condition of Participation: Compliance with Federal, State and Local Laws - The hospital must ensure that all applicable

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Federal, State and local law requirements are met. [Including Public Health Code Act 368 of 1978 [333.21521 Minimum standards and rules; practices. - Sec. 21521];

c. §482.12(a) Standard: Medical Staff. The governing body must: Determine, in accordance with State law, which categories of practitioners are eligible candidates for appointment to the medical staff; §482.12(a)(2) Appoint members of the medical staff after considering the recommendations of the existing members of the medical staff - Only the hospital's governing body has the authority to grant a practitioner privileges to provide care in the hospital; §482.12(a)(5) Ensure that the medical staff is accountable to the governing body for the quality of care provided to patients - The governing body must ensure that the medical staff as a group is accountable to the governing body for the quality of care provided to patients. The governing body is responsible for the conduct of the hospital and this conduct includes the quality of care provided to patients; §482.12(a)(6) Ensure the criteria for selection are individual character, competence, training, experience, and judgment;

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d. §482.22 Condition of Participation: Medical Staff - The hospital must have an organized medical staff that operates under bylaws approved by the governing body, and which is responsible for the quality of medical care provided to patients by the hospital;

e. §482.55 Condition of Participation: Emergency Services - The hospital must meet the emergency needs of patients in accordance with acceptable standards of practice; and §482.55(a) - [If emergency services are provided at the hospital] (2) The services must be integrated with other departments of the hospital; Emergency Services integration would include at a minimum: 1) The immediate availability of services, equipment, personnel, and resources of other hospital departments/services to emergency patients; and 2) That the provision of services, equipment, personnel and resources of other hospital departments/services to emergency department patients is within timeframes that protect the health and safety of patients and is within acceptable standards of practice.

f. The Emergency Medical Treatment and Labor Act (EMTALA) [a federal law enacted in 1986] that requires anyone coming to an emergency department to be stabilized and treated, regardless of their insurance status or ability to pay [42 U.S.C. §1395dd].

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> EMTALA requires Medicare-participating hospitals with emergency departments, such as McLaren Regional Medical Center, to screen and treat the emergency medical conditions of patients in a non-discriminatory manner [*id*]. An emergency medical condition is defined as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the individual's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of bodily organs" [*id*]. When an emergency medical condition exists, treatment must be provided until the emergency medical condition is resolved or stabilized. If the hospital does not have the capability to treat the emergency medical condition, an "appropriate" transfer of the patient to another hospital must be done in accordance with the EMTALA provisions.

25. To comply with the standard of care McLaren Health Care Corporation were required to comply with the standards, acts, conditions and guidance set forth above, and refrain from failing to follow all or any of them.

26. Defendant McLaren Regional Medical Center's failure to comply with the standard of care was a proximate cause of Maurice Ernest's death where strict

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adherence to same would have resulted in treatment for the pulmonary embolism which ultimately took his life.

B. Defendant Paul W. Brown Jr.

27. Plaintiff incorporates the preceding paragraphs as if fully restated herein.

28. The Affidavit of Merit of Ken Zafren is attached as **Exhibit C**.

29. The applicable standard of care for Defendant Paul W. Brown Jr. is that of a reasonably prudent emergency medicine specialist of ordinary learning, judgment, or skill confronted with the same or similar circumstances.

30. The applicable standard of care for Defendant Paul W. Brown Jr. (hereinafter Dr. Brown), an emergency medicine specialist required that the pulmonary embolism be included in the differential diagnosis for Mr. Ernest, whose symptoms included chest pain and shortness of breath.

31. The standard of care required that Defendant Paul W. Brown Jr. to:

a. Use a pulmonary embolism scoring system or clinical gestalt to rule pulmonary embolism in or out;

b. Order testing for D-dimer when pulmonary embolism was not ruled out and pulmonary embolism should have remained part of the differential diagnosis until it was ruled out;

c. Order a CTPE or other appropriate testing when pulmonary embolism was not ruled out and pulmonary embolism should have

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remained part of the differential diagnosis for Mr. Ernest until it was ruled out;

d. Initiated anticoagulation to treat pulmonary embolism.

32. Dr. Brown deviated from the standard of care by:

a. Failing to use a pulmonary embolism scoring system or clinical gestalt to evaluate the risk of pulmonary embolism.

b. Failing to order D-dimer testing for Mr. Ernest when pulmonary embolism was not ruled out and should have remained part of the different diagnosis.

c. Failing to order a CTPE or other test to rule pulmonary embolism in or out. Dr. Brown deviated from the standard of care by not ruling pulmonary embolism in or out.

d. Failing to initiate anticoagulation for treatment of pulmonary embolism.

33. To comply with the applicable standard of care Dr. Brown should have done the following:

a. Used a pulmonary embolism scoring system or clinical gestalt to rule pulmonary embolism in or out.

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b. Ordered testing for D-dimer when pulmonary embolism was not ruled out and pulmonary embolism should have remained part of the differential diagnosis.

c. Ordered a CTPE or other appropriate testing when pulmonary embolism was not ruled out and pulmonary embolism should have remained part of the differential diagnosis for Mr. Ernest, who had symptoms or chest pain and shortness of breath without a definite diagnosis of heart attack.

d. Initiated anticoagulation to treat pulmonary embolism.

34. Dr. Brown's breach of the standard of care was a proximate cause of Plaintiff's injuries for the following reasons:

a. Failing to use a pulmonary embolism scoring system or clinical gestalt to rule our pulmonary embolism. Mr. Ernest died from a pulmonary embolism.

b. Failing to order D-dimer testing for Mr. Ernest when pulmonary embolism was not ruled out and should have remained part of the differential diagnosis. Dr. Brown failed to detect the pulmonary embolism. Mr. Ernest died from a pulmonary embolism.

c. Failing to order a CTPE or other appropriate testing for pulmonary embolism. Pulmonary embolism was not ruled out and should have

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remained part of the differential diagnosis for Mr. Ernest who had chest pain and shortness of breath. Dr. Brown failed to diagnose and treat the pulmonary embolism. Mr. Ernest died from a pulmonary embolism.

d. Failing to timely initiate anticoagulation to treat pulmonary embolism. Dr. Brown did not initiate anticoagulation. Mr. Ernest died from pulmonary embolism.

C. Defendant Elmahdi M. Saeed

35. Plaintiff incorporates the preceding paragraphs as if fully restated herein.

36. The Affidavit of Merit of Vince Faridani is attached as **Exhibit D.**

37. The applicable standard of care for Defendant Elmahdi M. Saeed is that of a reasonably prudent internal medicine specialist of ordinary learning, judgment, or skill confronted with the same or similar circumstances.

38. The applicable standard of care for Defendant Dr. Elmahdi M. Saeed (hereinafter Dr. Saeed), an internal medicine specialist required:

a. PERC protocol or Wells criteria be utilized to rule out pulmonary embolism. Given Mr. Ernest's age of 54, utilization of PERC protocol would have indicated that pulmonary embolism must be part of Mr. Ernest's differential diagnosis. Given that Mr. Ernest exhibited clinical signs that pulmonary embolism was an equally

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likely diagnosis to heart attack, use of the Wells' criteria would have placed Mr. Ernest in the moderate range to suffer incidence of pulmonary embolism.

b. An order for D-dimer testing be placed for Mr. Ernest where pulmonary embolism was not ruled out and should have been part of the differential diagnosis.

c. An order for CTPE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was suffering, complaining of shortness of breath and chest pain.

d. Initiate parenteral anticoagulation using the parenteral anticoagulant heparin, which is commonly used to treat pulmonary embolism.

39. Dr. Saeed deviated from the standard of care and treatment of Maurice Ernest by:

a. Failing to utilize PERC protocol or Wells' criteria to rule out pulmonary embolism.

b. Failing to order D-dimer testing for Mr. Ernest where pulmonary embolism was not ruled out and should have been part of the different diagnosis.

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c. Failing to order CTPE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's condition was as listed above.

d. Failing to initiate parenteral anticoagulation using the parenteral anticoagulant heparin.

40. To comply with the applicable standard of care Dr. Saeed should have done the following:

a. Utilized the PERC protocol or Wells' criteria to rule out pulmonary embolism.

b. Ordered testing for D-dimer where pulmonary embolism was not ruled out and should have been part of the differential diagnosis.

c. Ordered CTPE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernest's presentation was as listed above.

d. Failing to initiate parenteral anticoagulation using the parenteral anticoagulant heparin.

41. Dr. Saeed's breach of the standard of care was a proximate cause of Plaintiff's injuries for the following reasons:

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a. Failing to utilize PERC protocol or Wells' criteria to rule out pulmonary embolism, pulmonary embolism was not addressed at all, and Mr. Ernest in fact died due to pulmonary embolism.

b. Failing to order D-dimer testing for Mr. Ernest when pulmonary embolism was not ruled out and should have been part of the differential diagnosis, pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

c. Failing to order CTPE or ventilation-perfusion scan be placed where pulmonary embolism was not ruled out and should have been part of the differential diagnosis and where Mr. Ernests's presentation was as listed above, pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

d. Failing to timely initiate parenteral anticoagulants using parenteral anticoagulants such as heparin to address pulmonary embolism, parenteral anticoagulants were not administered and Mr. Ernest in fact died due to same.

D. Defendant Farouk M. Belal

38. The Affidavit of Merit of Thomas C. Hilton is attached as **Exhibit E**.

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42. The applicable standard of care for Defendant Farouk M. Belal is that of a reasonably prudent cardiologist of ordinary learning, judgment, or skill confronted with the same or similar circumstances.

43. The applicable standard of care for Dr. Farouk M. Belal (hereinafter Dr. Belal) required that:

    a. Mr. Ernest be recognized as a 54-year-old morbidly obese, hyperlipidemic male with hypertension, hypertensive cardiovascular disease and left ventricular hypertrophy with a history of right leg trauma with vascular injury for which he had undergone right anterior tibial artery aneurysm repair with graft 12/18/2018. As such he was at increased risk both for coronary heart disease and for venous thromboembolic disease with pulmonary embolism.

    b. Order appropriate testing for both coronary heart disease and for venous thromboembolic disease with pulmonary embolism be completely urgently on admission to the hospital. When the ECG and cardiac enzymes failed to confirm a diagnosis of myocardial infarction the standard of care was to rule out pulmonary embolism with a CTA of the chest or a V/Q lung scan.

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c. To initiate a D-dimer test in this case where more probably than not it would have been abnormal and would have prompted additional diagnostic testing that would have confirmed the diagnosis of bilateral pulmonary embolism.

d. To initiate standard therapy for both unstable angina and for possible pulmonary embolism. For both conditions appropriate management requires prompt initiation of parenteral anticoagulation.

e. To prescribe antiplatelet therapy with aspirin and a platelet P2y12 receptor blocked, parenteral anticoagulation, high intensity statin therapy, beta blockers, unless contraindications existed upon establishing an initial diagnosis of unstable angina.

44. Defendant Belal breached the applicable standard of care when he:

a. Failed to recognize Mr. Ernest as a 54-year-old morbidly obese, hyperlipidemic male with hypertension, hypertensive cardiovascular disease and left ventricular hypertrophy with a history of right leg trauma with vascular injury for which he had undergone right anterior tibial artery aneurysm repair with graft 12/18/2018 that was at increased risk both for coronary heart disease and for venous thromboembolic disease with pulmonary embolism.

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b. Failed to order appropriate testing for both coronary heart disease and for venous thromboembolic disease with pulmonary embolism be completed urgently on admission to the hospital.

c. Failed to rule out pulmonary embolism with a CTA of the chest or a V/Q lung scan when the ECG and cardiac enzymes failed to confirm a diagnosis of myocardial infarction.

d. Failed to initiate a D-dimer test in this case which more probably than not would have been abnormal and would have prompted additional diagnostic testing that would have confirmed the diagnosis of bilateral pulmonary embolism.

e. Failed to initiate standard therapy both for unstable angina and for possible pulmonary embolism with prompt initiation of parenteral anticoagulation.

f. Failed to treat Mr. Ernest appropriately for initial diagnosis of unstable angina by initiating Antiplatelet therapy with aspirin and a platelet P2y12 receptor blocked, parenteral anticoagulation, high intensity statin therapy, beta blockers.

35. To comply with the applicable standard of care, Dr. Belal should have:

a. recognized Mr. Ernest as a 54-year-old morbidly obese, hyperlipidemic male with hypertension, hypertensive cardiovascular disease and left

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ventricular hypertrophy with a history of right leg trauma with vascular injury for which he had undergone right anterior tibial artery aneurysm repair with graft 12/18/2018. As such he was at increased risk both for coronary heart disease and for venous thromboembolic disease with pulmonary embolism.

b. Ordered appropriate testing for both coronary heart disease and for venous thromboembolic disease with pulmonary embolism be completely urgently on admission to the hospital. When the ECG and cardiac enzymes failed to confirm a diagnosis of myocardial infarction the standard of care was to rule out pulmonary embolism with a CTA of the chest or a V/Q lung scan.

c. Initiated a D-dimer test in this case where more probably than not it would have been abnormal and would have prompted additional diagnostic testing that would have confirmed the diagnosis of bilateral pulmonary embolism.

d. Initiated standard therapy for both unstable angina and for possible pulmonary embolism. For both conditions appropriate management requires prompt initiation of parenteral anticoagulation.

e. Prescribe antiplatelet therapy with aspirin and a platelet P2y12 receptor blocked, parenteral anticoagulation, high intensity statin therapy, beta

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blockers unless contraindications existed upon establishing an initial diagnosis of unstable angina.

36. Dr. Belal's breach of the standard of care was a proximate cause of Plaintiff's injuries for the following reasons:

    a. By failing to recognize and appreciate Mr. Ernest's presentation and order D-dimer, CTA chest or VQ lung scan for Mr. Ernest, pulmonary embolism was not detected and treated, and Mr. Ernest in fact died due to same.

    b. failing to timely initiate antiplatelet therapy with aspirin and a platelet P2Y12 receptor blocker, high intensity statin, beta blockers and parenteral anticoagulants contributed to Mr. Ernest's death.

Count II – Wrongful Death

37. Plaintiff incorporates the preceding paragraphs as if fully restated herein.

38. The breaches of the standard of care by all Defendants stated herein were a proximate cause of the Plaintiff's untimely and painful death.

Vicarious and Institutional Liability

39. Plaintiff incorporates the preceding paragraphs as if fully restated herein.

40. Defendants McClaren Health Care Corporation and Cypress Cardiology PLLC are vicariously liable for the negligence of the individual defendants within their employ, agency or joint ventures pursuant to the doctrines of

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actual agency, apparent agency, ostensible agency, joint venture, joint enterprise liability as well as MCL 333.21513(a)[1].

Damages

41. Plaintiff incorporates the preceding paragraphs as if fully restated herein.

42. Due to Defendant's unlawful conduct as set forth herein, Plaintiff has been damaged as follows:

a. Economic damages

b. Non-economic damages

c. Attorney fees, cost of suit and interest;

d. All other damages that this Court finds appropriate.

Respectfully submitted;

Date: August 10, 2023

/s/Alyson Oliver
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Troy, MI 48084
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aoliver@oliverlawgroup.com
Attorneys for Plaintiff

[1] MCL 333.21513(a) is applicable to Defendants who own, operate, or are the governing body of a hospital licensed under MCL 333.20101 et. seq only.

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

KERAN ERNEST,
Individually and as Personal Representative
Of the Estate of Maurice Ernest,
Deceased.
Plaintiff,

Vs. 2023- -NH

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

Defendants.

_____/

Alyson Oliver (P55020)
Paul Matouka (P84874)
Attorneys for Plaintiff
50 W. Big Beaver Road, Suite 200
Troy, MI 48084
(248) 327-6556
notifications@oliverlawgroup.com

_____/

JURY DEMAND

Plaintiff demands a trial by jury.

Respectfully submitted;

Date: August 10, 2023

/s/Alyson Oliver
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Troy, MI 48084
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Fax: (248) 436-3385
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Attorneys for Plaintiff

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Appendix
Exhibit 4

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

KERAN ERNEST, Individually and as Personal Representative for the Estate of MAURICE ERNEST, deceased

Plaintiffs,

-vs-

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

Defendants.

Case No. 23-119425-NH
Hon. Celeste Bell

OLIVER LAW GROUP
ALYSON OLIVER (P-55020)
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Attorneys for Plaintiffs
50 W. Big Beaver Road, Suite 200
Troy, MI 48084
(248) 327-6556

CLINE, CLINE & GRIFFIN, P.C.
J. BRIAN MACDONALD (P-25887)
MEGAN R. MULDER (P-77597)
Attys for Defs Dr. Brown and McLaren
503 South Saginaw Street, Suite 1000
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DEFENDANTS MCLAREN HEALTH CARE CORPORATION AND DR. PAUL BROWN'S MOTION FOR SUMMARY DISPOSITION IN LIEU OF ANSWER TO PLAINTIFFS' COMPLAINT

NOW COME Defendants, McLaren Health Care Corporation and Dr. Paul Brown, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., specifically, J. Brian MacDonald and Megan R. Mulder, and for their Motion for Summary Disposition in Lieu of Answer to Plaintiff's Complaint, hereby state as follows:

1. The instant motion is brought pursuant to MCR 2.116(C)(7) and/or MCR 2.116(D).

2. On or about August 14, 2023, Plaintiff filed her Complaint alleging that Defendants, McLaren Health Care Corporation and Dr. Paul Brown

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(hereinafter "these Defendants"), committed medical malpractice on or about July 16, 2020. (Exhibit 1).

3. The statute of limitations for a claim of medical malpractice is two years from the date of accrual. MCL 600.5805(8).

4. "Accrual" is the date of the act or omission that is the basis for the claim of malpractice. MCL 600.5853a(1).

5. In this matter, the date of accrual was July 16, 2020, meaning the two-year statute of limitations ran on July 16, 2022.

6. Mr. Ernest passed away on July 17, 2020.

7. In a claim for wrongful death, MCL 600.5852 states in pertinent part as follows:

> (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.

8. Letters of authority were issued by the Genesee County Probate Court on June 7, 2021. (Exhibit 2). This was the first personal representative to be appointed.

9. Pursuant to MCL 600.5852, Plaintiff had until June 7, 2023 to file suit.

10. Suit was not filed until August 14, 2023, well past the June 7, 2023 deadline.

11. On or about February 10, 2023, prior to the filing of the Complaint, Plaintiff filed a Notice of Intent, which contained allegations of malpractice against Defendants, McLaren Health Care Corporation and Dr. Paul Brown.

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12. Notably, the Notice of Intent was filed after the expiration of the two-year statute of limitations period, which means the wrongful death savings provision outlined in MCL 600.5852 comes into play.

13. Since the Notice of Intent was filed on February 10, 2023, after the expiration July 16, 2022 two-year statute of limitations period, there is no tolling.

14. Furthermore, the Courts have made clear that MCL 600.5856 does not provide for tolling of a savings provision, and MCL 600.5852 is a savings provision. *Waltz v Wyse,* 469 Mich 642; 677 NW2d 813 (2004). *See also Lentini v Urbancic,* 267 Mich App 579; 705 NW2d 701 (2005).

15. As such, Plaintiff is not entitled to the benefit of tolling because the Notice of Intent was filed after the expiration of the two-year statute of limitations period for malpractice and tolling does not apply to the wrongful death savings provision.

16. Ultimately, Plaintiff had until June 7, 2023 to file the Complaint in the instant matter.

17. Plaintiff's lawsuit was filed on August 14, 2023, well after the expiration of the statute of limitations and summary disposition is warranted.

WHEREFORE Defendants, McLaren Health Care Corporation and Dr. Paul Brown, respectfully request this Honorable Court enter an Order Granting their Motion for Summary Disposition and dismissing Plaintiff's Complaint in its entirety, with prejudice.

Respectfully submitted,

CLINE, CLINE & GRIFFIN, P.C.

Dated: September 13, 2023

Megan Mulder

J. Brian MacDonald P-25887
Megan R. Mulder P-77597
Attys for Defs Dr. Brown and McLaren

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(810) 232-3141

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DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

NOW COME Defendants, McLaren Health Care Corporation and Dr. Paul Brown, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., specifically, J. Brian MacDonald and Megan R. Mulder, and in support of their Motion for Summary Disposition in Lieu of Answer to Plaintiff's Complaint, hereby state as follows

INTRODUCTION AND FACTUAL BACKGROUND

Plaintiff failed to file the instant matter timely, which warrants dismissal with prejudice. Pursuant to MCL 600.5852, Plaintiff had two years from the date the letters of authority were issued to file the instant matter. Here, the letters of authority were issued on June 7, 2021. (Exhibit 2). This means Plaintiff had until June 7, 2023 to file suit. However, Plaintiff did not file suit until August 14, 2023, well after the June 7, 2023 deadline.

Plaintiff's Notice of Intent was filed after the expiration of the two-year statute of limitations period for malpractice so the filing of the Notice of Intent did not trigger tolling. Additionally, MCL 600.5856(c) does not provide for tolling of a savings provision. The Court in *Waltz v Wyse* made clear that MCL 600.5852 is a savings provision. *Waltz v Wyse,* 469 Mich 642; 677 NW2d 813 (2004). *See also Lentini v Urbancic*, 267 Mich App 579; 705 NW2d 701 (2005). As such, there is no tolling here.

In the instant matter, it is clear the deadline for Plaintiff to file a Complaint was June 7, 2023. However, Plaintiff did not file the Complaint until August 14, 2023, well

after the deadline. Since there is no tolling, there is no extension of the June 7, 2023 deadline. As such, Defendants are entitled to summary disposition.

STANDARD OF REVIEW

MCR 2.116(C)(7) provides, in part, for summary disposition where a claim is barred by a statute of limitations. In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Brennan v Edward D Jones & Co,* 245 Mich App 156, 157 (2001). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law. *Id.*

If a claim is time-barred, then the complaint should be dismissed with prejudice. *Holmes v. Michigan Capital Medical Center*, 242 Mich App 703, 707; 620 NW2d 319 (2000).

LAW AND ARGUMENT

MCL 600.5805(8) provides that the statute of limitations for medical malpractice claims is two years from the date of the accrual of the claim. The wrongful death savings provision, as detailed in MCL 600.5852, states:

> (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.

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> (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.

The "period of limitations" referred to in MCL 600.5852 is the underlying statute of limitations applicable to the particular cause of action. *Ligons v Crittenton Hosp.*, 490 Mich. 61 (2011).

Here, the date of the alleged malpractice is July 16, 2020. Accordingly, the underlying statute of limitations in this matter ran on July 16, 2022. However, since Mr. Ernest passed away on July 17, 2020, the wrongful death savings provision, as outlined in MCL 600.5852, is applicable.

Letters of authority, appointing a personal representative, are issued on the date on which they are signed by the probate judge. *Estate of Jesse v Lakeland Specialty Hosp at Berrien Ctr*, 328 Mich App 142, 936 NW2d 705 (2019). Here, letters of authority were issued to the first personal representative on June 7, 2021. (Exhibit 2). As such,

pursuant to MCL 600.5852, Plaintiff had until June 7, 2023 to file suit. Plaintiff failed to do so. Rather Plaintiff did not file suit until August 14, 2023.

There is one exception to the above. Specifically, a successor personal representative may bring an action alleging medical malpractice within one year after the death or incapacitation of the initial personal representative so long as it is not more than three years after the period of limitations has run. That is not the case here. Indeed, the first personal representative is the person who is bringing the instant matter, and thus she is certainly alive and not legally incapacitated. As such, the exception does not apply here.

Michigan Courts have dealt with issues similar to the instant matter. Most notably, in *Waltz v Wyse*, the Court addressed the wrongful death savings provision and the applicability of tolling. That court stated as follows:

> 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, 564 N.W.2d 861. It is not a "statute of limitations" or a "statute of repose." Thus, the notice tolling provision, § 5856(d)—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.

Waltz v Wyse, 469 Mich 642, 655; 677 NW2d 813 (2004)

The court went on to state:

> In order to toll the period under § 5856(d), plaintiff was required to provide notices of intent in compliance with the provisions of M.C.L. § 600.2912b before the expiration of the two-year limitation period. Had she done so, the limitation period would have been tolled for 182 days.

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> However, plaintiff did not provide her notices of intent until January 1999, well after the expiration of the two-year limitation period. As we have explained, the three-year ceiling provided in the wrongful death saving provision was not "tolled" following plaintiff's *652 provision of the notices of intent. Thus, plaintiff's June 23, 1999, complaint was time-barred. [citations omitted].

Waltz v Wyse, 469 Mich 642, 651–52; 677 NW2d 813 (2004)

The Court in *Waltz v Wyse* ultimately determined that since Plaintiff failed to file the lawsuit within the applicable statute of limitations period or within the wrongful death savings provision deadlines, as provided for in MCL 600.5852, the lower court properly and appropriately dismissed the lawsuit. *Waltz v Wyse,* 469 Mich 642; 677 NW2d 813 (2004). Other courts have come to the same conclusion. *Lentini v Urbancic*, 267 Mich App 579; 705 NW2d 701 (2005).

The instant matter is very similar. Specifically, the alleged malpractice occurred on July 16, 2020 making the two-year statute of limitations July 16, 2022. Letters of authority were issued to the first personal representative on June 7, 2021. There is no tolling of the wrongful death savings provision. As such, the last date Plaintiff could file suit in the instant matter was June 7, 2023, or two years from the date the letters of authority were issued to the first personal representative. Plaintiff failed to do so, waiting until August 14, 2023 to file suit.

It is anticipated Plaintiff will argue that the filing of the Notice of Intent provided for tolling, which is separate and distinct from the tolling of a savings provision. However, Plaintiff filed the Notice of Intent on February 10, 2023, well after the two-year statute of limitations of July 16, 2022 period expired. As such, Plaintiff is not

entitled to the benefit of tolling based upon the filing of the Notice of Intent because it was not filed within the initial two-year statute of limitations period.

As such, this lawsuit is improperly before this court and this matter is ripe for dismissal. Defendants respectfully request this Court grant their Motion for Summary Disposition and dismiss Plaintiff's Complaint with prejudice.

CONCLUSION

WHEREFORE Defendants, McLaren Health Care Corporation and Dr. Paul Brown, respectfully request this Honorable Court enter an Order Granting their Motion for Summary Disposition and dismissing Plaintiff's Complaint in its entirety, with prejudice.

Respectfully submitted,

CLINE, CLINE & GRIFFIN, P.C.

Dated: September 13, 2023

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Appendix
Exhibit 5

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

KERAN ERNEST,
Individually and as Personal Representative
Of the Estate of Maurice Ernest,
Deceased.
Plaintiff,

2023-119425-NH

Vs.

Hon. Celeste D. Bell

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

Defendants.

/

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/

PLAINTIFF'S RESPONSE TO DEFENDANTS MCLAREN HEALTH CARE CORPORATION AND PAUL BROWN'S MOTION FOR SUMMARY DISPOSITION

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NOW COMES PLAINTIFF, the Estate of Maurice Ernest, by and through their personal representative KERAN ERNEST, by and through her attorney's OLIVER LAW GROUP P.C., in support of Plaintiff's Response to Defendants McLaren Health Care Corporation and Paul Brown's Motion for Summary Disposition and for reasons further stated in the Plaintiff's accompanying Brief, states:

1. Admitted
2. Admitted
3. Admitted
4. Admitted
5. Admitted
6. Admitted
7. Admitted
8. Admitted
9. Denied as untrue.
10. Admitted in part, denied in part.
11. Admitted
12. Admitted
13. Denied as this is a point of law that Plaintiff's contest.
14. Denied as this is a point of law that Plaintiff's contest.
15. Denied as this is a point of law that Plaintiff's contest.

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16. Denied as this is a point of law that Plaintiff's contest.

17. Admitted in part, denied in part.

WHEREFORE, Plaintiff KERAN ERNEST, for reasons above and stated further within the Plaintiff's Brief in Support, requests that this Honorable Court deny the Defendants' Motion for Summary Disposition.

Respectfully Submitted,

Oliver Law Group P.C.

Date: October 13, 2023

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the **13th** day of **October, 2023** by:

☒U.S. Mail	☐Hand Delivery
☐UPS Overnight Air	☐Facsimile
☒Electronic Mail	☐E-Service

Signature: /s/ Grant Gabriel
Grant Gabriel

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

KERAN ERNEST,
Individually and as Personal Representative
Of the Estate of Maurice Ernest,
Deceased.
Plaintiff,

2023-119425-NH

Vs.

Hon. Celeste D. Bell

DR. PAUL W. BROWN JR., *et al.*

Defendants.

/

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/

PLAINTIFF'S BRIEF IN SUPPORT OF RESPONSE TO DEFENDANT BROWN & DEFENDANT MCLAREN'S MOTION FOR SUMMARY

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DISPOSITION, DEFENDANT BELAL'S MOTION FOR SUMMARY DISPOSITION, AND DEFENDANT SAEED'S MOTION FOR MOTION FOR SUMMARY DISPOSITION

Statement of Facts

This is a medical malpractice case where Plaintiff presented to McLaren Regional Medical Center in Flint on July 16, 2020. Plaintiff complained of chest pain, was seen by several different doctors and passed away on July 17, 2020, with the cause of death confirmed to be a bilateral pulmonary embolism. Defendant doctors were a direct and proximate cause of Plaintiff's death.

On June 7, 2021, Plaintiff Keran Ernest was issued letters of authority, appointing her as personal representative of the Estate of Maurice Ernest. Plaintiff then served a notice of intent to sue ("NOI"), as required by MCL 600.2912b on February 10, 2023. After waiting the requisite 182 days required by MCL 600.2912b(1), Plaintiff filed her complaint.

Defendants Dr. Belal, Saeed, Dr. Brown, and McLaren have since filed motions alleging that Plaintiff's suit is barred pursuant to MCR 2.116(C)(7), MCR 2.116(D) and MCR 2.116(C)(10) for failure to comply with the statute of limitations. Specifically, Defendants argue that the two-years provided under Michigan's wrongful death statute, MCL 600.5852(2), is not tolled by the filing of a NOI under MCL 600.2912b and therefore, Plaintiffs complaint was untimely because the necessary 182 days would not expire until after the two years provided by MCL 600.

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5852 had run. In support of their motions, Defendants all rely on *Waltz v. Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004), which holds that a wrongful death statute is a savings period, not a statute of limitations, and therefore not tolled by the filing of a NOI.

Applicable Legal Principles

Plaintiff recognizes the existence of the authority cited by defendants in their collective briefs.

Argument

Plaintiff's suit was commenced in a timely manner. Plaintiff served a written notice of intent on February 10, 2023, and filed her complaint on August 10, 2023. This filing complied with the requirements of MCL 600.5852 as it was 1) within two years of the insurance of letters of authority to personal representative Keran Ernest and 2) within two years from the expiration of the underlying three-year statute of limitations.

Furthermore, Plaintiff states that the case on which all Defendants chose to rely, *Waltz v. Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004) is contradictory to the plain meaning of the statutory requirements of filing a medical malpractice suit and ignores or contradicts relevant precedent, and thus should not be the deciding factor in determining whether Plaintiff's filing was timely or not.

A. Applicable Law

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The relevant Michigan statutes governing the timeliness of filing a wrongful death medical malpractice action include MCL 600.2922; MCL 600.58085; MCL 600.5838(a); MCL 600.2912(b); MCL 600.5856(c) and MCL 600.5852.

In interpreting a statute, the primary goal is to give effect to the intent of the legislature, *In Re MCR 460 Mich, 411 (1999)*. In order to resolve any facial inconsistencies or contradictions a long-standing maxim of statutory interpretation has been that such statutes should be construed as consistent to implement the legislature's intent. Every word of a statute should be read in such a way that should be given meaning. *Id at 414*. We are encouraged to read such provisions "*in pari materia*". In other words, we may use reference to different statutes dealing with the same subject or shaping part of the same system to interpret the provisions of statutes. *Jennings v. Southwood* 446 Mich 125, 130; 521 NW2d 230 (1994).

The current legal issue presents us an opportunity to employ this maxim. When dealing with medical malpractice/wrongful death actions we encounter statutory limitation provisions on both wrongful death actions and those pertaining to medical malpractice claims. It is paramount that we look to the clear intent of the legislature when trying to make sense of the interplay between these provisions.

B. Interplay Among Applicable Wrongful Death and Medical Malpractice Statutes

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In its early legal history, under the common law, causes of action were lost upon the death of either the claimant or the tortfeasor. Michigan Law addresses this issue in MCL 600.2922, the relevant part of which states:

> Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute of a felony.

The statute of limitations for a wrongful death action is governed by the statute of limitations for the underlying claim. *Larson v. Johns-Mansville Sales Corp* 427 Mich 301, 314, 399 NW2d 1 (1986). MCLA 600.6805(8) states:

> Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

MCL 600. 5856(c) states:

> (1) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856…

This specific reference to the tolling statute 5856 is critical to the issue before the court.

MCL 600.5856(c) states:

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> (c) At the time notice is given in compliance with the applicable notice period under section 2912(b), 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.

Thus, the tolling statute now leads us directly to another key statute, MCL 600.2912(b). In pertinent part, 2912(b) states:

> (1) 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.

MCL 600.5852 so denominated the wrongful death savings provision states in relevant part:

> (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.**

Subsection (4) of the statute states:

> (4) …an action shall not be commenced under this section later than 3 years after the period of limitations has run.

C. Synthesis

In summary, a Plaintiff has two years to file a medical malpractice claim after the act or omission. In case of a death, the statute of limitations is extended by two years after the Letters of Authority have been issued even though the initial

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statute of limitations has run. The filing may occur no later than three years after the statute of limitations has run.

When filing a medical malpractice case, the legislature requires Plaintiff to serve a written notice not less than 182 days before the complaint is filed. The legislature specifically tolls the statute of limitations during this period when the statute of limitations would have run. The statute is tolled by a number of days equal to or no longer than the number of days remaining in the applicable notice period after the date of notice is given.

Therefore, reading the applicable statutes with their plain language and applying it to the facts in this case, this court must conclude that the claim was filed in a timely manner. Our pertinent dates are listed below:

07/16/2020	Date of alleged malpractice
07/17/2020	Date of death of Maurice Ernest
06/7/2021	Letters of Authority issued to Keran Ernest appointing her personal representative.
07/17/2022	Application of two-year statute of limitations.
02/10/2023	Notice of Intent is served.
06/7/2023	Two years since letters of authority issued.
09/10/2023	Complaint is filed.
02/10/2025	Three years since the expiration of the statute of limitations.

D. Addressing the Applicability of Waltz v. Wyse

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The *Waltz* court stated:

> Under the savings provision, the personal representative of an estate may begin a lawsuit within two years after letters of authority are issued, as long as the lawsuit is brought within three years after the two-year general period of limitations ended. MCL 600.5852; *McNeil, supra at 202 489 NW2d 180*. This creates a maximum time of five years for filing suit unless the six-month discovery rule in MCL 600.5838(2) applies. *Waltz 677 NW2d 818*.

The Court then points out that the plaintiff in *Waltz* failed to file her complaint within five years after her son's death thus violating the maximum time allowed for filing the suit. In this case, the maximum time, which is three years from the expiration of the statute of limitations, would be February 10, 2025. The Complaint in this case was filed on August 10, 2023, more than a year and a half prior to the expiration of that time period.

E. Jurisprudence

Hardy v Maxheimer 429 Mich 422, 416 NW2d 299 (1987), addresses the application of MCL 600.5852 to wrongful death cases and actions brought pursuant to MCL 600.2922 under the Wrongful Death Statute is. *Hardy* examined whether or not the savings provision of MCL 600.5852 tolled the statute of limitations in survival type actions *and* death by actions brought under MCL 600.2922. The law as it existed made the distinction between instantaneous and non-instantaneous deaths, and the argument revolved around whether the savings provision would

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apply if the death were instantaneous thus arguably "not surviving" and thus precluding the applicability of the savings provision.

However, for purposes of its importance in the instant case, the Supreme Court clearly held that the savings provision of MCL 600.5852 "operates to toll the statute of limitations in both types of actions, whether denominated survival or death." Therefore, a Plaintiff may pursue a wrongful death action where it is brought within two years of the date of the personal representative's appointment and **"within three years after the initial period of limitation had run."** The *Hardy* court clearly used the terminology "to toll the statute of limitations."

The *Waltz* court neither examines, references nor refutes the *Hardy* ruling leaving us to assume that remains good law.

Next, the case of *Omelenchunck v. City of Warren*, 461 Mich 567, 609 NW2d 177 (2000), examined if a malpractice notice tolling provision tolled the statute of limitations for a full 182 days or for only 154 days when a medical malpractice claimant did not receive the response to the notice of intent under MCL 600.2912(b)(7). The Court held that the limitation period was tolled for the entire 182 days notwithstanding the fact that the plaintiffs could have commenced their lawsuit after 154 days. The *Omelenchuck* court clearly made reference to MCL 600.5852 as creating "a limitation period." *Omelenchuck supra at 577, 609 NW2d 177*. It was clear that in fact the savings provision was essentially another period of

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limitation which was extended in a death case by its clear statutory language. Further, *Omelenchuck* dealt with the tolling provisions of 600.2912(b) holding that such a plaintiff would have 182 days even if they could have filed it earlier. While the *Waltz* majority opinion attempted to walk this back by saying it had utilized "imprecise choice of words" and mistakenly calculated the at-issue time periods erroneously, Justice Cavanaugh in a most cogent and expansive opinion belied the faulty logic of the majority opinion.

Plaintiff urges this court to recognize the *Hardy* holding; one not addressed or overruled by *Waltz* that a savings provision does in fact toll the statute of limitations. Further, Plaintiff/Appellee urges the court to apply the unambiguous language of *Omelenchuck*, which did in fact apply the savings provisions of MCL 600.5852 in a wrongful death medical malpractice action specifically referring to the applicability of 2912b and the tolling provision therein, *Id. at 575, 609 NW2d 177.*

The *Waltz* majority is not in line with the clear statutory requirement of MCL 600.2912(b). The law **requires** a plaintiff in a medical malpractice case to serve written notice at least 182 days prior to filing its complaint. The *Waltz* court in what is actually an *ultra vires* manner ignores the clear language of two statutes. The logic (or better illogic) of its position is that plaintiff would have to file its notice 6 months prior to the 2-year extension of the savings provision, thereby re-writing the savings provision from allowing a 2-year period of time from the issuance of letters of

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authority to 18 months. It erroneously fails to apply the statutory interpretation maxim of "*in pari materia*."

Conclusion

The principles of statutory interpretation require this Court to apply an assessment which renders a consistent interpretation of the applicable statutes. The judiciary does not have discretion to ignore the plain language of a statute. The defense in asserting the applicability of the *Waltz* majority opinion asks this Court to do just that; i.e. to ignore the plain language of MCL 200.2912(b) and its unambiguous requirement that a plaintiff must serve a notice of intent 6 months prior to filing a Complaint. MCL 600.5838a(2), referring to a claim involving medical malpractice, specifically makes reference to the tolling provision of MCL 600.5856, which in turn specifically makes reference to MCL 600.2912(b). They are inextricably intertwined.

The defense would have this Court apply a result which essentially is asking by judicial fiat to shorten the two-year extension provided under MCL 600.5852 to 18 months. Essentially this means that MCL 600.2912(a), which requires the filing of a written notice, and then disallows the filing of a complaint for 182 days thereafter, has no legal standing. The defense just wants the Court to ignore it. This is directly contradictory to the application of the maxim of "*in pari materia*"; it is in direct contradiction to the plain reading of *Omelenchuck*; and it ignores *Hardy v*

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Maxheimer (not mentioned by the *Waltz* court); and it fails to serve the long-standing doctrine in this State of the liberal interpretation of cases and statutes to permit injured parties from seeking redress.

The clarity of the proposition that *Omelenchuck* affirmed the applicability of MCL 600.2912(b) tolling the applicable statute of limitations is its reference in the authoritative "Guide to the Michigan Statute of Limitations 2004 Edition" disseminated by ICLE, the Institute for Continuing Legal Education in the State of Michigan. Under a section of "Other Tolling Issues", page 24 of that source, it states in pertinent part:

> Also unique to medical malpractice lawsuits, plaintiff must give at least 182 days' notice to a potential defendant before filing a medical malpractice suit. MCL 600.2912(b). If the limitation expires after notice is given, but before the end of the 182 days (i.e., before the time the plaintiff can sue), the limitation period is tolled for 182 days after the notice is given, at which time the limitations period begins running again. *Omelenchuck v City of Warren, 461 Mich 567, 577-578, 609 NW2d 177 (2000)*. Finally, the plaintiff must meet all of the notice requirements in MCL 600.2912(b) before the limitation period is tolled.

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Clearly this authoritative source educated the members of the bar of the position Plaintiff/Appellee asserts before the Court in this matter.

This array of statutes and virtually all applicable Supreme Court precedents delimits a statutory scheme with which this Plaintiff complied. Mr. Ernest died due to malpractice that occurred on July 16 and 17, 2023. Letters of Authority were issued on June 7, 2021, thus giving the personal representative until June 7, 2023 to commence an action. Since a plaintiff cannot commence an action of malpractice without first serving a notice of intent, which by the clear language of the statute then tolls the statute of limitations for 182 days, the Plaintiff served the Notice of Intent on February 10, 2023, months prior to the expiration of the 2-year savings provision. All of this was well within the 5-year period provided under *Hardy*. The Complaint in this case was filed well in advance of the deadline. As such, this lawsuit was timely filed.

WHEREFORE, PLAINTIFF, KERAN ERNEST, Individually and as Personal Representative of the estate of Maurice Ernest, Deceased, by and through its counsel OLIVER LAW GROUP P.C., respectfully requests this Honorable Court deny Defendants collective Motions for Summary Disposition.

Respectfully Submitted,

Oliver Law Group P.C.

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Dated: October 13, 2023

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the **13th** day of **October, 2023** by:

☒U.S. Mail	☐Hand Delivery
☐UPS Overnight Air	☐Facsimile
☒Electronic Mail	☐E-Service

Signature: /s/ Grant Gabriel
Grant Gabriel

Appendix
Exhibit 6

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

KERAN ERNEST, Individually and as Personal Representative for the Estate of MAURICE ERNEST, deceased

Plaintiffs,

-vs-

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

Defendants.

Case No. 23-119425-NH
Hon. Celeste Bell

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DEFENDANTS MCLAREN HEALTH CARE CORPORATION AND PAUL BROWN, JR., MD'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION IN LIEU OF ANSWER TO PLAINTIFFS' COMPLAINT

NOW COME Defendants, McLaren Health Care Corporation and Paul Brown, Jr., MD, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., specifically, J.

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Brian MacDonald and Megan R. Mulder, and for their Reply to Plaintiff's Response to Their Motion for Summary Disposition in Lieu of Answer to Plaintiff's Complaint, hereby state as follows:

These Defendants concur with the arguments made in Defendant Dr. Belal's Brief in Reply to Plaintiff's Response to Defendant's Motion for Summary Disposition and hereby incorporate said brief as though more fully set forth herein.

As is accurately stated in Dr. Belal's Brief, the three year savings provision is not an independent period in which a Plaintiff may file suit. (Dr. Belal's Brief, Page 4, Citing *Braverman v Garden City Hosp.*, 275 Mich App 705, 711 (2007). This notion bears repeating here because it is exactly this sentiment that is brought to the forefront in the case upon which Plaintiff mistakenly relies, *Hardy v Maxheimer*, 429 Mich 422, 416 NW2d 299 (1987). The Court in *Hardy* held that the suit in that matter could commence because "the personal representatives brought the action within two years of their appointment **and** within three years after the initial period of limitation had run." *Id.* at 441 (*emphasis added*). Plaintiff attempts to break these two elements up, suggesting that the three year period following the expiration of the underlying statute is an independent period. However, the use of the word "and" indicates the Court did not mean for these two elements to be separate and distinct from each other.

As Plaintiff concedes, the letters of authority were issued on June 7, 2021, appointing Keran Ernest as personal representative. Suit was filed on August 14, 2023. Plaintiff was required to file suit by June 7, 2023, the two-year period after the letters of

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authority were issued. Plaintiff is not entitled to a three year savings provision independent of when the letters of authority were issued. Stated another way, if the personal representative had been appointed on August 15, 2021, instead of June 7, 2021, the lawsuit would have been timely because it would have been brought within two years of the appointment of the personal representative **and** within three years after the initial period of limitation had run. Since Plaintiff did not bring the lawsuit within the two-year period of the appointment of the personal representative, the lawsuit is untimely.

WHEREFORE Defendants, McLaren Health Care Corporation and Dr. Paul Brown, respectfully request this Honorable Court enter an Order Granting their Motion for Summary Disposition and dismissing Plaintiff's Complaint in its entirety, with prejudice.

Respectfully submitted,

CLINE, CLINE & GRIFFIN, P.C.

Dated: October 18, 2023

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Appendix
Exhibit 7

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

KERAN ERNEST, Individually and as Personal Representative of the Estate Of Maurice Ernest, Deceased,

Plaintiffs,

vs.

File No. 2023-119425-NH

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

Hon. Celeste D. Bell (P41453)

Defendants.

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ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

At a session of Court held in the Genesee County Courthouse, Flint, Michigan.

PRESENT: HONORABLE CELESTE D. BELL
CIRCUIT JUDGE

A TRUE COPY
Genesee County Clerk

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This matter being before the Court on the Motions for Summary Disposition filed by Defendants Elmahdi Saeed, M.D., Dr. Farouk M. Belal, Dr. Paul W. Brown, Jr., and McLaren Health Care Corporation, and the Court having heard oral arguments on October 23, 2023, and being otherwise fully advised;

IT IS ORDERED that the Defendants' Motions for Summary Disposition are hereby GRANTED for the reasons set forth on the record, and Plaintiff's claims against all Defendants are dismissed with prejudice; and

IT IS FURTHER ORDERED that this is a final order which disposes of the last pending claim and closes this case.

CELESTE D. BELL
P-41453

CELESTE D. BELL, CIRCUIT JUDGE

Dated: 10-23-23

Appendix
Exhibit 8

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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, CYPRESS CARDIOLOGY PLLC,

Defendant-Appellee,

Supreme Court No.
Court of Appeals Case No. 368566
Oakland County Circuit Court Case No. 2020-179077 NH

/

PLAINTIFF APPELLANT'S BYPASS APPLICATION FOR LEAVE TO APPEAL

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS i
INDEX OF AUTHORITIES ii
STATEMENT OF JURISDICTION iii
STATEMENT OF QUESTIONS PRESENTED iv
STATUTE INVOLVED v
INTRODUCTION AND REASONS FOR GRANTING BYPASS APPLICATION 1
STATEMENT OF FACTS AND PROCEEDINGS 2
A. The Incident Giving Rise to Suit 2
B. Procedural Chronology 2
STANDARD OF REVIEW 4
ARGUMENT 4
I. *Waltz* was Wrongly Decided 4
II. Stare Decisis is Not Enough to Save *Waltz* 9
CONCLUSION 12
CERTIFICATE OF COMPLIANCE 12

RECEIVED by MSC 6/4/2025 5:52:12 PM
RECEIVED by MSC 12/26/2023 10:01:41 PM

INDEX OF AUTHORITIES

Page

CASES

Ardt v. Titans Ins Co., 233 Mich App 658, 688; 593 NW2d 215 (1999)……..4

Detroit Edison Co v Dep't of Treasury, 498 Mich 28 (2015)…….4

Lansing Sch Educ Ass'n v Lansing Bd of Educ, 487 Mich 349 (2010)……..9

Maples v State, 507 Mich 461 (2021)……..5

McAuley v GMC, 457 Mich 513, 518 (1998)……..5

Miller v Mercy Mem'l Hosp, 466 Mich 196 (2002)…….6

Sun Valley Foods Co v Ward, 460 Mich 230, 236 (1999)……..……..5

Waltz v Wyse, 469 Mich 642; 677 NW2d 813 (2004)……..……..…passim

STATUTES

MCL 600.2912b…..……..……..…… ……passim

MCL 600 5856…..……..……..…… ……..passim

MCL 600.5805…….1

MCL 600. 5852…..……..……..…… ……passim

RECEIVED by MSC 6/4/2025 5:52:12 PM
RECEIVED by MSC 12/26/2023 10:01:41 PM

STATEMENT OF JURISDICTION

Plaintiff-Appellants, Keran Ernest, individually and as Personal representative of the Estate of Maurice Ernest, files this bypass Application for Leave to Appeal under MCR 7.305, seeking to appeal the October 23, 2023, order of the Circuit Court for the County of Genesee. That order granted the motions for summary disposition of the three Defendants determining that the tolling provisions under MCL 600.2912b do not apply to the wrongful death statute of limitations, MCL 600.5852.

Appellant filed a timely Claim of Appeal in the Court of Appeals on November 10, 2023, and meets the grounds for this timely bypass application under MCR 7.305.

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the tolling provision for the statute of limitations for medical malpractice claims in MCL 600.2912b, toll the running of the statute of limitations given pursuant to the wrongful death statute, MCL 600.5852.

   Plaintiff-Appellants' answer: Yes

   Defendant-Appellee's answer: No

   Court of Appeals' answered: Has not yet decided this issue.

   Trial Court's answered: No.

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STATUTE INVOLVED

MCL 600.5852. Death before period of limitations has run or within 30 days thereafter; commencement of action; death or legal incapacitation of personal representative; limitation on commencement of action.

(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.

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INTRODUCTION AND REASONS FOR GRANTING BYPASS APPLICATION

The issue presented in this bypass Application for Leave to Appeal is a straightforward question of law. Ordinarily, individuals have two years from the date the claim accrues to file a claim alleging medical malpractice. MCL 600.5805. However, before they can file a complaint, a plaintiff must serve a Notice of Intent on the Defendants and wait 182-days before filing suit. MCL 600.2912b(1). If, at any time during that period, the defendants inform the plaintiff that they "do[] not intend to settle the claim" the claimant may immediately file their complaint. MCL 600.2912b(9). Alternatively, if the defendants fail to respond to the notice of intent within 154-days as required by MCL 600.2912b(7), the plaintiff may also file their complaint before the expiration of the full 182-days. MCL 600.2912b(8). To prevent the statute of limitations from running during the notice period, the Legislature also enacted a provision to toll the statute of limitations or repose during the pendency of notice. MCL 600.5865(b).

In 2004, this Court issued its opinion in *Waltz v Wyse*, 469 Mich 642 (2004), holding that the tolling provision of MCL 600.5856(b) does not apply to actions brought pursuant to Michigan's wrongful death statute, MCL 600.5852(2). *Waltz supra*, at 648–650. Specifically, this Court held that the wrongful death statute was a saving statute as opposed to a statute of limitations or repose. *Id*. at 650. The *Waltz* decision was incorrectly decided because it simply classified MCL 600.5852 as a saving statute, and therefore outside the bounds of the tolling provisions of MCL 600.5856. This failure resulted in a decision contrary to the unambiguous intent of the Legislature.

Because the Court of Appeals is bound to follow *Waltz*, and the only question presented in Plaintiff's Appeal was decided by this Court in *Waltz* a bypass application is appropriate for purposes of judicial and party economy.

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STATEMENT OF FACTS AND PROCEEDINGS

A. The Incident Giving Rise to Suit

On July 16, 2020 Mr. Ernest, age 54, presented to the emergency department at McLaren Regional Medical Center in Flint, Michigan complaining of chest pain. He was seen in the emergency room by Dr. Paul W. Brown and discharged to the cardiac unit for observation with Dr. Elmahdi M. Saeed attending. A single x-ray showed an enlarged heart, mild interstitial prominence of lungs, minimal perihilar/basilar opacities and an impression of mild congestion/edema; conditions that can be signs of pulmonary embolism. A consultation was placed for cardiology, and Mr. Ernest was seen by Dr. Farouk M. Belal who noted his provisional diagnosis was acute coronary syndrome and hypokalemia. At no time during his stay was D-dimer tested. At no time was CT PE or ventilation-perfusion scan ordered. The chart does not mention shortness of breath generally, which Mr. Ernest was suffering from and complained about. The patient chart reflects only two vitals.

Thus, on July 17, 2020, at 13:57, while in the observation unit, Mr. Ernest died. Independent autopsy conducted at the Michigan Institute of Forensic Science & Medicine confirmed cause of death as bilateral pulmonary embolism and noted fresh and organizing emboli in pulmonary arteries and branches, pulmonary infarcts and pulmonary edema.

B. Procedural Chronology

This is a medical malpractice/wrongful death action.

The pertinent dates are as follows:

07/16/2020	Date of alleged malpractice.
07/17/2020	Date of death of Maurice Ernest.
06/7/2021	Letters of Authority issued to Keran Ernest.

07/16/2022	Expiration of two-year statute of limitations.
02/10/2023	Notice of Intent is served.
06/7/2023	Two years since letters of authority issued.
09/10/2023	Complaint is filed.
10/23/2023	The Genesee County Circuit Court grants Defendants' Motions for Summary Disposition pursuant to *Waltz v Wyse*, 469 Mich 642 (2004).
11/10/2023	Plaintiff submitted their claim of appeal to the Court of Appeals.
12/26/2023	42 days after the filing of Plaintiff's claim of appeal excluding holidays of the courts and weekends.
07/06/2025	Three years since the expiration of the statute of limitation.

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STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition presents a question of law that this Court review *de novo*. *Ardt v Titan Ins Co*, 233 Mich App 658, 688 (1999). Questions of statutory interpretation are also reviewed *de novo*. *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 35 (2015). This appeal, and the trial court motion practice that preceded it, present a pure question of law as the underlying facts are not disputed.

ARGUMENT

Plaintiff-Appellant asserts that she commenced this case timely by serving a written notice of intent on (2/10/2023) as mandated by MCL 2912(b) within the time periods allotted by MCL 600.5852: (1) within two years of the issuance of letters of authority to the personal representative (6/7/2023) and (2) within three years from the expiration of the underlying two-year statute of limitations (2/10/2025).

Plaintiff-Appellant asserts that the case upon which Defendant/Appellee's rely, *Walt v. Wyse* is ill-reasoned and directly contradicts the plain meaning of the statutory requirements of filing a medical malpractice death case; further ignores or contradicts other relevant statutory Supreme Court decisions, thereby not overruling them and thus should not be determinative of the timeliness of the filing of this case.

I. *Waltz* was Wrongly Decided

The rules of statutory interpretation are well settled:

> As always, our primary task is to determine and give effect to the Legislature's intent. *Id.* at 14-15. The most reliable indicator of intent is usually the statute's text. *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014). When a term in that text is undefined, we apply its plain and ordinary meaning. *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 305-306; 952 NW2d 358 (2020). And we analyze the ordinary meaning of statutory language in the context of the entire statute, *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich

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> 333, 339; 952 NW2d 384 (2020), to give it "the reasonable construction that best accomplishes the purpose of the statute," *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010) (quotation marks and citation omitted).
>
> *Maples v State*, 507 Mich 461, 470 (2021).

Furthermore, statutes are to be construed in a manner so as to avoid absurd results. *McAuley v GMC*, 457 Mich 513, 518 (1998) (citation omitted). All these canons have a single purpose – its complexity belied by its simple mandate – to give effect to the intent of the Legislature. *See, e.g.*, *Maples v State*, 507 Mich 461, 470 ("As always, our primary task is to determine and give effect to the Legislature's intent.") (citation omitted); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236 (1999) ("The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature.") (citation omitted). By failing to consider the absurd results caused by its interpretation or the interplay of the relevant statutes,[1] *Waltz* failed to identify or implement the intent of the legislature.

The relevant analysis that *Waltz* is contained in a single paragraph, adopting the holding of the Court of Appeals:

> We need look no further than the language of the tolling statute to resolve this issue. MCL 600.5856(d) expressly tolls the "statute of limitations." The Supreme Court has said recently that MCL 600.5852 is not a statute of limitations, but rather a savings statute. *Miller v Mercy Mem'l Hosp*, 466 Mich 196 (2002). Therefore, by its express language, MCL 600.5856 tolls the statute of limitations, not the extended limit in MCL 600.5852.
>
> *Waltz v Wyse*, 469 Mich 642, 649 (2004) (quoting the lower court).

Using the name given by a court years before,[2] the first step of statutory interpretation came to a single conclusion, that the period of limitation provided by the wrongful death statute could

[1] *See, e.g.*, *People v Mazur*, 497 Mich 302, 313 (2015); *Feld v Robert & Charles Beauty Salon*, 435 Mich 360 (1990).

[2] The citation to *Miller* leads to an earlier decision. *Miller v Mercy Mem'l Hosp*, 466 Mich 196 (2002) (citing *Lindsey v Harper Hosp*, 455 Mich 56, 66 (1997)) ("Section 5852 is a saving statute, not a statute of limitations.").

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not be tolled by MCL 600.5852, because it was not a statute of limitations or repose. However, neither the Court of Appeals nor this Court inquired as to the Legislative intent or the comprehensive statutory scheme. This was the error of *Waltz* – beyond the name "saving provision", there is nothing that supports a conclusion that the Legislature intended to leave a trap for the personal representative of an estate.

The text is always the first stop in statutory interpretation. Here, the relevant statutory provisions are:

MCL 600.5852	(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. *** (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 600.2912b	(1) 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. *** (7) Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response . . . (8) If the claimant does not receive the written response required under subsection (7) within the required 154-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 154-day period. (9) If at any time during the applicable notice period under this section a health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility

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	does not intend to settle the claim within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health professional or health facility, so long as the claim is not barred by the statute of limitations.
MCL 600.5856	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.

MCL 600.5856(c) was unambiguously intended to prevent the running of the statute of limitations while the mandatory notice period of MCL 600.2912b ran. MCL 600.5852 was unambiguously intended to provide an estate to bring an action on behalf of the decedent, despite the running of the statute of limitations. MCL 600.2912b was enacted to reduce the volume and increase the quality of medical malpractice litigation. The most prominent feature of MCL 600.2912b is the requirement that a plaintiff serve a notice of intent on the defendants. MCL 600.2912b((1). However, the statute also requires the exchange of information relevant to the case. *See id*. at (5) (requiring the plaintiff to provide access to relevant medical records); (7) (requiring substantive response by defendants); (8) (permitting an earlier filing of the complaint if no response is received); and (9) (permitting the earlier filing of a complaint if the defendants declare an intent not to settle in the 182-day period). Justice Michael Cavenaugh identified these issues in his dissent from *Waltz*. 469 Mich at 665–672.

An analysis past the focus on the designation of MCL 600.5852 as a saving statue lays bare the errors of *Waltz*. To begin with, *Waltz* failed to consider MCL 600.5852 *in pari materia*e. While the *Waltz* opinion did discuss the interplay between the relevant statutes, it held that because MCL 600.5856 only tolled the statute of limitations or repose, it could not serve to toll a saving statute. *Waltz*, 469 Mich at 648–650. However, this fundamentally undermines the normal statutory regime

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in which the mandatory notice provision of MCL 600.2912b tolls the statute of limitations. Moreover, in many cases it will leave the timeliness of a lawsuit not up to the plaintiff but rather on the defendant and whether they timely respond to the notice or indicate their intent not to settle. MCL 600.2912b(8)–(9).

When considering the relevant statutes together, as they should be, the Legislature's intent is clear. First, plaintiffs in medical malpractice cases must provide notice of their potential claims 182 days before filing a lawsuit. MCL 600.2912b. This provides the parties to communicate and exchange materials relevant to the lawsuit. If the lawsuit is not resolved within 182 days, the plaintiff may proceed with litigation. *Id*. To ensure that the notice period is effective and does not create an independent bar to meeting the statutory deadlines, the Legislature created a tolling provision. MCL 600.5856. In the event that the plaintiff died as a result of the malpractice, the Legislature sought to ensure that the claim would survive by law and allowed the personal representative to continue the claim. MCL 600.5852.

The *Waltz* decision threw this scheme into disarray. Now, instead of having two years after obtaining letters of authority to file a case as expressly provided by MCL 600.5852, estate plaintiffs have approximately 18 months.[3] This assumes, of course, that the estate plaintiff *knows* that they have a case when they open the estate. If they do not, the 18 months starts becoming a very short time-frame to: 1) learn of the medical malpractice; 2) obtain relevant medical records; 3) retain an attorney; and 4) draft and serve a notice of intent. For plaintiffs who survive their medical malpractice, they are in a much better position to know of the claim and obtain their own medical records. Imposing additional limitations on their loved ones who have less access to information is inconsistent with the purpose of the statutes involved.

[3] Two years less the 182-day notice period.

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In sum, the Legislature intended for the personal representative of an estate to have the ability to bring a claim against medical malpractice defendants, not to force a personal representative watch the clock run out on the statute of limitations while the mandatory notice period was pending.

II. Stare Decisis is Not Enough to Save *Waltz*

As discussed above, *Waltz* was wrongly decided. However, as this Court has cautioned "overturning precedent requires more than a mere belief that a case was wrongly decided." *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 367 (2010) (citation omitted). The Court has emphasized that:

> The importance of stare decisis is well-established, for, as Alexander Hamilton stated, to 'avoid an arbitrary discretion in the courts, it is indispensable that [courts] should be abound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . ."
>
> *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 366 (2010) (citation omitted).

This Court has identified the following factors as relevant to this inquiry: 1) whether the rule in question has proved unworkable; 2) the reliance interests in the rule; 3) whether upholding the rule will result in serious detriment prejudicial to public interests; and 4) whether the prior decision was an abrupt and largely unexplained departure from precedent. *Id*. at 369. All four factors weigh heavily in favor of overruling *Waltz*.

Waltz is unworkable for three primary reasons. First, it serves as a trap for unwitting personal representatives of an estate. Second, it passes control over the statutes of limitations to the defendants. And third, it undermines the medical malpractice legislative framework. These factors are all discussed *supra*. However, it is worth focusing on the third factor again. Legislation is complex work, as evidenced by the numerous interrelated statutes at issue in this case. The Legislature clearly passed MCL 600.2912b in order to reduce the quantity and improve the quality

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of medical malpractice lawsuits. This is the Legislature's prerogative. The *Waltz* decision creates an unwieldy system where estate cases require *two* statutes of limitation. The first is 182 days prior to the running of the two, or three, year period identified in MCL 600.5856(b) or (c). If a notice of intent is not filed by this day, the statute of limitations has effectively run.[4] The second statute of limitations runs at the expiration of the two, or three, year period identified by MCL 600.5856. There is also the uncertainty[5] created by the ability of the defendants to shorten the required notice period by failing to respond or informing the plaintiff that they do not intend to settle. MCL 600.2912b(8)–(9). Thus, *Waltz* created an unworkable rule.

There is also very little in the way of reliance in the *Waltz* decision or a risk that overruling the case will harm the public interest. This case turns on a 182-day notice period that – while critically important to the Plaintiff in this case and *Poniewierski*[6] – will not cause any injury to any defendant or impair the public interest. Rather, overruling *Waltz* will create a cohesive and readily understandable scheme for interpreting the relevant statute of limitations for *all* medical malpractice cases. On the other hand, two years is a short span in litigation, especially so when a family member has died and medical records are needed. It is arguably in the public interest to grant grieving family members the same tolling benefit that their deceased would have benefited from for this very reason.

Finally, *Waltz* was an abrupt and little explained departure from precedent. As Justice Cavanaugh explained in great detail in his dissent, *Waltz* overruled prior cases,[7] and as discussed

[4] Unless a defense attorney wants to open themselves up to a legal malpractice claim by informing the plaintiff that they do not intend to settle.
[5] A word that should never be found in the vicinity of a statute of limitations.
[6] Which presents the same issue. https://www.courts.michigan.gov/c/courts/coa/case/356925.
[7] *See Waltz*, 469 Mich at 660–661 (Cavanaugh, j dissenting) (discussing *Omelenchuk v City of Warren*, 461 Mich 567 (2000)).

supra, did so with very little in the way of reasoning. In Justice Cavanaugh's words, "In *Omelenchuk*, nearly all the aforementioned statutory provisions were implicated. Thus, the majority's newfound wisdom and its avoid that decision necessitate a thorough examination." *Waltz*, 469 Mich at 822 (Cavanaugh, j dissenting).

For all these reasons, this Court should overrule *Waltz v Wyse*.

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CONCLUSION

WHEREFORE, Defendant-Appellant respectfully requests that this Honorable Court grant their Bypass Application for Leave to Appeal and reverse the Court of Appeals' decision.

Respectfully submitted,

Date: December 26, 2023

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CERTIFICATE OF COMPLIANCE

I certify that the Plaintiff-Appellant's Bypass Application for Leave to Appeal complies with the type-volume limitation set forth in MCR 7.212(B). This brief uses a 12-point proportional font (Times New Roman), and the word count, based on the word count of the word-processing system used to produce this document, for this brief is 3580.

Date: December 26, 2023

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Appendix
Exhibit 9

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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,

-vs-

Dr. Paul W. Brown Jr., Dr. Elmahdi M. Saeed, Dr. Farouk M. Belal, McLaren Health Care Corporation and Cypress Cardiology, PLLC,

Defendants/Appellees.

Supreme Court No.
Court of Appeals Case No. 368566
Genesee County Case No: 23-119425-NH
Honorable: Celeste D. Bell

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PAUL W. BROWN, JR., MD AND MCLAREN HEALTH CARE CORPORATION'S RESPONSE TO PLAINTIFF-APPELLANT'S BYPASS APPLICATION FOR LEAVE TO APPEAL

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

NOW COME DEFENDANTS-APPELLEES, Paul W. Brown, Jr., MD and McLaren Health Care Corporation, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., specifically J. Brian MacDonald and Megan R. Mulder, and hereby submit Defendants-

Appellees Paul W. Brown, Jr., MD and McLaren Health Care Corporation's Response to Plaintiff-Appellant's Bypass Application for Leave to Appeal.

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TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

APPENDIX/EXHIBITS vi

COUNTER-STATEMENT OF APPELLATE JURISDICTION vi

COUNTER-STATEMENT OF QUESTIONS PRESENTED vii

STATEMENT OF FACTS AND PROCEDURAL HISTORY 1

STANDARD OF REVIEW 3

ARGUMENT 3

I. THE CIRCUIT COURT PROPERLY GRANTED DEFENDANTS-APPELLEES' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCL 600.5852 AND *WALTZ V WYSE* 3

CONCLUSION AND RELIEF REQUESTED 6

RECEIVED by MSC 6/27/2024 3:39:34 PM

TABLE OF AUTHORITIES

Cases

Brennan v. Edward D. Jones & Co.,
245 Mich. App. 156; 626 N.W.2d 917 (2001).....3

El-Khalil v. Oakwood Healthcare, Inc.,
504 Mich. 152; 934 N.W.2d 665 (2019).....3

Estate of Jesse v Lakeland Specialty Hosp at Berrien Ctr,
328 Mich App 142; 936 NW2d 705 (2019).....7

Gorman v. Am. Honda Motor Co.,
302 Mich. App. 113; 839 N.W.2d 223 (2013).....3

Holmes v Michigan Capital Medical Center,
242 Mich App 703; 620NW2d 319 (2000).....3

Lentini v Urbancic,
267 Mich App 579; 705 NW2d 701 (2005).....1, 7

Mulholland v. DEC Int'l Corp.,
432 Mich. 395; 443 N.W.2d 340 (1989).....3

Poniewierski v William Beaumont Hospital Royal Oak,
995 NW2d 535 (Mich, 2023).....1, 4

Waltz v Wyse,
469 Mich 642; 677 NW2d 813 (2004)..... 1, 2, 4, 5, 6, 7, 8

Statutes

MCL 600.5805(8).....3, 4

MCL 600.5852..... 1, 3, 4, 5, 7

MCL 600.5856(c).....1

Rules

MCR 2.116(C)(7).....3

MCR 7.305 vi

MCR 7.212(B).....9

RECEIVED by MSC 6/12/2024 3:52:34 PM

APPENDIX/EXHIBITS

Exhibit 1 Defendant's Motion for Summary Disposition

Exhibit 2 Plaintiffs' Response to Motion for Summary Disposition

Exhibit 3 Defendant's Reply to Plaintiff's Response to Motion for Summary Disposition, including Exhibits

Exhibit 4 Genesee County Circuit Court Order dated October 23, 2023

Exhibit 5 Letters of Authority

Exhibit 6 Order Denying Leave in *Poniewierski v William Beaumont Hospital Royal Oak, et al* dated October 6, 2023

COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellee McLaren Flint states this Court has jurisdiction to consider Plaintiff-Appellant's Bypass Application for Leave and the instant Response to Plaintiff-Appellant's Bypass Application for Leave under MCR 7.305.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court erred when it granted Defendants' Motion for Summary Disposition in Lieu of an Answer by applying the holding of *Waltz v Wise* to conclude Plaintiff's Complaint was time barred and dismissed Plaintiff's claims?

Plaintiff-Appellant Answers: "Yes"

Defendant-Appellee Answers: "NO"

This Court Should Answer: "NO"

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Introduction

Plaintiff failed to file the instant matter timely, which warranted dismissal with prejudice by the Genesee County Circuit Court. Pursuant to MCL 600.5852, Plaintiff had two years from the date the letters of authority were issued to file suit. Here, the letters of authority were issued on June 7, 2021, giving Plaintiff until June 7, 2023 to file suit. (Exhibit 5). However, Plaintiff did not file suit until August 14, 2023, well after the June 7, 2023 deadline.

Plaintiff's Notice of Intent was filed after the expiration of the two-year statute of limitations period for malpractice so the filing of the Notice of Intent did not trigger tolling. Additionally, MCL 600.5856(c) does not provide for tolling of a savings provision. The Court in *Waltz v Wyse* made clear that MCL 600.5852 is a savings provision. *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). *See also Lentini v Urbancic*, 267 Mich App 579; 705 NW2d 701 (2005). As such, there is no tolling here.

Now that Plaintiff's Complaint was properly dismissed pursuant to Michigan Statutes and the holding in *Waltz v Wyse*, Plaintiff now comes before this Court to attempt to persuade it that *Waltz* should be overturned. In light of this Court's decision to deny leave in a recent case dealing with a similar question, *Poniewierski v William Beaumont Hosp Royal Oak*, 995 NW2d 353 (Mich), reconsideration den 998 NW2d 202 (Mich, 2023), Defendants-Appellees request this Court take a similar position. (Exhibit 6). There are no facts in the instant matter to support that *Waltz* was wrongly decided. Simply because Plaintiff's Complaint was dismissed by the Genesee County Circuit Court, thus leaving Plaintiff with a less than ideal outcome, does not mean that case law, which has been effect for approximately 20 years, should be overturned.

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Factual Background

On July 16, 2020, Mr. Ernest presented to McLaren Flint with complaints of chest pain and diaphoresis. His pain began two days prior to presentation. He was seen in the emergency department and then transferred to the cardiac unit for observation in the early morning hours of July 17, 2020.

Mr. Ernest was monitored and underwent a cardiology consult while in the observation unit. Sadly, Mr. Ernest's condition deteriorated and he was pronounced dead on July 17, 2020.

Procedural History

Letters of authority were issued by the Genesee County Probate Court on June 7, 2021. (Exhibit 5). This was the first personal representative to be appointed. Plaintiff filed the Notice of Intent on or about February 10, 2023. Plaintiff filed suit on or about August 14, 2023.

Defendants-Appellees filed a Motion for Summary Disposition in Lieu of an Answer on or about September 14, 2023. (Exhibit 1) Co-Defendants in this matter filed similar motions. Plaintiff filed a Response on or about October 13, 2023. (Exhibit 2). Defendants-Appellees filed a Reply to Plaintiff's Response on or about October 18, 2023. Oral argument occurred on October 23, 2023 before Genesee County Circuit Court Judge Celeste Bell. Judge Bell granted Defendants-Appellees' Motion for Summary Disposition in Lieu of an Answer, along with the motions for summary disposition filed by the other named defendants, and an order was entered that same day. (Exhibit 4)

Plaintiff-Appellant has now requested leave from this Court alleging that *Waltz v Wise* was wrongly decided. As will be discussed in the instant brief, Defendants-Appellants maintain that *Waltz v Wise* was not wrongly decided and in keeping with that holding, the Genesee County Circuit Court appropriately granted their Motion for Summary Disposition in Lieu of an Answer.

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STANDARD OF REVIEW

The standard of review for an order denying or granting summary disposition is de novo. *El-Khalil v. Oakwood Healthcare, Inc.*, 504 Mich. 152, 159, 934 N.W.2d 665 (2019); *Gorman v. Am. Honda Motor Co.*, 302 Mich. App. 113, 115, 839 N.W.2d 223 (2013). A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason. *Mulholland v. DEC Int'l Corp.*, 432 Mich. 395, 411, 443 N.W.2d 340 (1989) n. 10.

MCR 2.116(C)(7) provides, in part, for summary disposition where a claim is barred by a statute of limitations. In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157 (2001). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law. *Id.*

If a claim is time-barred, then the complaint should be dismissed with prejudice. *Holmes v. Michigan Capital Medical Center*, 242 Mich App 703, 707; 620 NW2d 319 (2000).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED DEFENDANTS-APPELLEES' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCL 600.5852 AND *WALTZ V WISE*.

The lower court was correct in entering an order dismissing Plaintiff's Complaint in its entirety because the Complaint was time barred pursuant to MCL 600.5805(8) and MCL 600.5852.

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A. *Waltz v Wise* should not be overturned.

A case may be overturned if a Court determined it did not accurately interpret a statue or precedent. Plaintiff attempts to suggest that occurred in *Waltz v Wyse*, but her argument is flawed. A plain reading of the applicable statutes and the opinion of the Court in *Waltz v Wyse* suggests the Court came to an appropriate conclusion. In fact, the *Waltz* holding has faced challenges over the years, all without success. Most recently, the case of *Poniewierski v William Beaumont Hosp Royal Oak*, 995 NW2d 353 (Mich) attempted to challenge the *Waltz* holding. The Court of Appeals upheld *Waltz* and this Court denied leave. (Exhibit 6). Certainly, the same result should occur here.

In looking at the applicable statutes here, MCL 600.5805(8) provides that the statute of limitations for medical malpractice claims is two years from the date of the accrual of the claim. The wrongful death savings provision, as detailed in MCL 600.5852, states:

> (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.

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A plain reading of the above statute clearly supports that a savings provision is not subject to notice of intent tolling. The Court in *Waltz v Wyse* correctly identified that MCL 600.5852 was a savings provision, not a statute of limitations or statute of repose, and thus not subject to tolling. The instant matter presents no facts to support that the application of *Waltz* to the instant matter defies legislative intent and leads to an inappropriate result. The dismissal of Plaintiff's complaint is not enough to support that legislative intent was not achieved by the decision in *Waltz v Wyse*.

In the instant matter, the personal representative had ample time to file suit. Specifically, the alleged malpractice occurred on or about July 16, 2020. Mr. Ernest died the following day on July 17, 2020. The personal representative was appointed on June 7, 2021 and thus, under the wrongful death savings provision, had until June 7, 2023 to file suit. This left the personal representative three years to explore the potential merits of this claim and file a notice of intent and complaint. These Defendants-Appellants are hard pressed to believe that two years did not afford the personal representative ample time to explore the merits of this claim, and thus further the legislative intent of ensuring a lawsuit does not die with the death of the original claimant.

Importantly, Waltz was decided approximately 20 years ago. If the legislature was concerned that *Waltz* hindered the intent behind the statute of limitations applicable in lawsuits alleging wrongful death as a result of medical malpractice, additional legislation could have been passed. Similarly, if the legislature opined that *Waltz* made the statute unworkable or harmed the public interest, it could have acted by passing additional legislation. The silence of the legislature over the nearly 20 years since the holding in *Waltz* speaks volumes. Certainly, the holding in *Waltz* conforms with the legislative intent of ensuring that a personal representative

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has ample time to file a claim and/or promoting the quality of medical malpractice claims in general.

Plaintiff's argument that the *Waltz* holding reduces the wrongful death savings provision from two years to 18 months is a complete misinterpretation of the holding. *Waltz* in no way reduced the savings provision from the statutorily defined two years form the date the letters of authority were issued. Rather, *Waltz* confirmed that the savings provision is not afforded the benefit of tolling, which is a far cry from reducing the length of time a savings provision allots for the filing of a lawsuit.

Waltz was correctly decided and it upheld the intent of the legislature. As such, this Court should deny Plaintiff's Bypass Application for Appeal.

B. *Waltz v Wise* is applicable to the instant matter, and warrants dismissal of Plaintiff-Appellant's Complaint as it was time barred.

Given the above, *Waltz v Wyse* should not be overturned by this Court. Instead, its holding should be applied to the instant matter, resulting in the Genesee County Circuit Court's Order dismissing Plaintiff's claims in their entirety to be upheld.

The Court in *Waltz v Wyse* stated as follows:

> 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, 564 N.W.2d 861. It is not a "statute of limitations" or a "statute of repose." Thus, the notice tolling provision, § 5856(d)—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.

Waltz v Wyse, 469 Mich 642, 655; 677 NW2d 813 (2004)

The court went on to state:

> In order to toll the period under § 5856(d), plaintiff was required to provide notices of intent in compliance with the provisions of M.C.L. § 600.2912b before the expiration of the two-year limitation period. Had she done so, the limitation period would have been tolled for 182 days.

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> However, plaintiff did not provide her notices of intent until January 1999, well after the expiration of the two-year limitation period. As we have explained, the three-year ceiling provided in the wrongful death saving provision was not "tolled" following plaintiff's *652 provision of the notices of intent. Thus, plaintiff's June 23, 1999, complaint was time-barred. [citations omitted].

Waltz v Wyse, 469 Mich 642, 651–52; 677 NW2d 813 (2004)

The Court in *Waltz v Wyse* ultimately determined that since Plaintiff failed to file the lawsuit within the applicable statute of limitations period or within the wrongful death savings provision deadlines, as provided for in MCL 600.5852, the lower court properly and appropriately dismissed the lawsuit. *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Other courts have come to the same conclusion. *Lentini v Urbancic*, 267 Mich App 579; 705 NW2d 701 (2005).

In the instant matter, the alleged malpractice occurred on July 16, 2020 making the two-year statute of limitations July 16, 2022. Letters of authority, appointing a personal representative, are issued on the date on which they are signed by the probate judge. *Estate of Jesse v Lakeland Specialty Hosp at Berrien Ctr*, 328 Mich App 142, 936 NW2d 705 (2019). Here, letters of authority were issued to the first personal representative on June 7, 2021. (Exhibit 5). As such, pursuant to MCL 600.5852, Plaintiff had until June 7, 2023 to file suit. Plaintiff failed to do so. The one exception, i.e. that a successor personal representative may bring an action alleging medical malpractice within one year after the death or incapacitation of the initial personal representative, is not applicable here.

Plaintiff filed the Notice of Intent on February 10, 2023, well after the two-year statute of limitations of July 16, 2022 period expired. As such, Plaintiff is not entitled to the benefit of tolling based upon the filing of the Notice of Intent because it was not filed within the initial two-

year statute of limitations period. In other words, Plaintiff is not entitled to a three-year savings provision independent of when the letters of authority were issued. Stated another way, if the personal representative had been appointed on August 15, 2021, instead of June 7, 2021, the lawsuit would have been timely because it would have been brought within two years of the appointment of the personal representative and within three years after the initial period of limitation had run.

As such, Defendants-Appellees respectfully request this Court deny Plaintiff-Appellant's Bypass Application for Leave to Appeal and leave the *Waltz v Wyse* decision intact.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Defendant-Appellee McLaren Flint requests that Plaintiff-Appellant's Bypass Application for Leave to Appeal be denied in its entirety and that an order affirming the Circuit Court's rulings be entered.

Respectfully Submitted,

CLINE, CLINE & GRIFFIN, P.C.

Date: January 23, 2024

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CERTIFICATE OF COMPLIANCE

I certify that Defendants-Appellees' Response to Plaintiff-Appellant's Bypass Application for Leave to Appeal complies with the type-volume limitation set forth in MCR 7.212(B). This Brief uses a 12-point proportional font (Times New Roman), and the word count, based upon the word count of the word-processing system, for this brief is 3057.

Date: January 23, 2024

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Appendix
Exhibit 10

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Order

Michigan Supreme Court
Lansing, Michigan

March 29, 2024

Elizabeth T. Clement,
Chief Justice

166495

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

KERAN ERNEST, Personal Representative of the ESTATE OF MAURICE ERNEST,
Plaintiff-Appellant,

v

SC: 166495
COA: 368566
Genesee CC: 2023-119425-NH

PAUL W. BROWN, JR., M.D., ELMAHDI M. SAEED, CYPRESS CARDIOLOGY, PLLC, and McLAREN HEALTH CARE CORPORATION,
Defendants-Appellees.

_____/

On order of the Court, the application for leave to appeal prior to decision by the Court of Appeals is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court before consideration by the Court of Appeals.

a0325

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 29, 2024

Clerk

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Appendix
Exhibit 11

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2022 WL 17368761
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Matthew **PONIEWIERSKI**, Personal Representative of the Estate of Ashley **Poniewierski**, Plaintiff-Appellant,

v.

WILLIAM BEAUMONT HOSPITAL ROYAL OAK, Ascension St. John Macomb-Oakland Hospital, Michigan Healthcare Professionals, PC, doing business as Oakland Medical Group, Ronald Rasansky, D.O., Stephen Hoffman, D.O., Zuie C. Wakade, D.O., Tusar Desai, M.D., and Akriti Dewanwala, M.D., Defendants-Appellees.

No. 356925
|
December 1, 2022

Oakland Circuit Court, LC No. 2020-184202-NH

Before: Boonstra, P.J., and Gadola and N.P. Hood, JJ.

Opinion

Per Curiam.

***1** In this wrongful-death medical malpractice action, plaintiff, personal representative of the estate of Ashley **Poniewierski** (decedent), appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). Because the trial court, citing *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), correctly ruled that plaintiff's service of a notice pursuant to MCL 600.2912b did not toll the two-year wrongful-death saving period under MCL 600.5852, we affirm.

I. BACKGROUND

The relevant facts are not in dispute. At various times between February 17, 2017, and June 3, 2017, decedent was treated by defendants for chronic abdominal pain that she had been suffering for approximately one year. On June 12, 2017, decedent was found unresponsive in her home. An autopsy determined the cause of her death as inflammatory bowel disease and related complications.

Eleven months later, on May 14, 2018, plaintiff was appointed personal representative of decedent's estate under letters of authority issued by the Macomb Probate Court. On April 20, 2020, plaintiff served a notice of intent to file a medical malpractice claim (NOI) on defendants.

On October 23, 2020, plaintiff filed a complaint and affidavit of meritorious claim in the Oakland Circuit Court, alleging claims for medical malpractice and loss of consortium against all defendants. Defendants denied plaintiff's allegations as untrue and asserted, as affirmative defenses, that plaintiff's claims were barred by the applicable statute of limitations.

In three separate motions for summary disposition pursuant to MCR 2.116(C)(7), defendants asserted that the two-year limitations period applicable to medical malpractice actions, MCL 600.5805(8),[1] had expired before plaintiff served the NOI on defendants. Defendants recognized that the wrongful-death saving provision, MCL 600.5852, extended the time for filing a wrongful-death action for two years following the issuance of letters of authority, but, citing *Waltz*, defendants contended that the notice-tolling provision for medical malpractice cases, MCL 600.5856(c), did not apply to the wrongful-death saving provision, MCL 600.5852. Defendants asserted that plaintiff was required to file his complaint in this case not later than August 24 or 25, 2020; because the complaint was not filed until October 23, 2020, defendants contended that they were entitled to summary disposition as a matter of law.

Responding to these motions, plaintiff asserted that the various statutes governing medical malpractice and wrongful-death actions must be read *in pari materia* and construed as consistent with each other to implement the intent of the Legislature. Acknowledging that the two-year statute of limitations, MCL 600.5805(8), governed this medical malpractice action, plaintiff asserted that this period of limitations was extended by the wrongful-death saving

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provision, MCL 600.5852(1), and extended further pursuant to MCL 600.5856(c), tolling the limitations period following the service of the NOI. Citing MCL 600.5852(4), plaintiff contended that the deadline for commencing this action was April 20, 2022, and that this action was timely filed on October 23, 2020.

***2** Attempting to distinguish *Waltz* from this case, plaintiff asserted that, in *Waltz*, the plaintiff had failed to file her complaint within the maximum five-year period established by the statute of limitations and the wrongful-death saving provision, but the complaint in this case was filed 18 months before the expiration of that period. Contending that *Waltz* was incorrectly decided, plaintiff urged the trial court to instead apply the decisions of our Supreme Court in *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987) and *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by*Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Plaintiff argued that in *Waltz* the Supreme Court directly contravened MCL 600.2912b and ignored clear statutory language. Plaintiff argued that application of *Waltz* to this case was "essentially asking by judicial fiat to shorten the two-year extension provided under MCL 600.5852 to 18 months."

In reply, defendants rejected plaintiff's reliance on *Hardy* and *Omelenchuk*, asserting that our Supreme Court implicitly overruled *Hardy* and explicitly overruled *Omelenchuk* in *Waltz*. Defendants also observed that plaintiff could have served the NOI at any time between June 4, 2017, and November 14, 2019, but failed to do so, and asserted that the trial court could not adopt plaintiff's argument "without violating MCR 7.215(C)(2) and principles of stare decisis."

On March 31, 2021, the trial court heard oral arguments on the motions for summary disposition via Zoom videoconferencing. The trial court issued its opinion and order six days later. The court ruled that defendants were entitled to summary disposition, explaining that MCL 600.5852 requires a plaintiff to commence an action within two years after letters of authority are issued and that, in *Waltz*, "the Michigan Supreme Court held that the notice tolling provision does not operate to toll the additional period permitted under 600.5852." Thus, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

II. ANALYSIS

Plaintiff argues that the trial court erred by applying *Waltz*, which plaintiff asserts contradicts clear statutory language. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). A court reviewing a motion for summary disposition under MCR 2.116(C)(7) must consider "the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v City of Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013). Documentary evidence must be viewed in a light most favorable to the nonmoving party. *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). When the facts are undisputed, whether a claim is barred by the applicable statute of limitations is also reviewed de novo. *In re Gerald L Pollack Trust*, 309 Mich App 125, 134; 867 NW2d 884 (2015).

This case involves the interpretation of several statutes governing medical malpractice and wrongful-death actions. This Court's primary goal when interpreting statutes is "to ascertain and give effect to the intent of the Legislature." *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 136; 762 NW2d 178 (2009) (quotation marks and citation omitted). If the statutory language is clear and unambiguous, "the Legislature is presumed to have intended the meaning expressed and judicial construction is neither required nor permitted." *Id.* (Quotation marks and citation omitted).

***3** A medical malpractice claim accrues at the time of the act or omission that is the basis for the claim. MCL 600.5838a(1). The two-year period of limitations applicable to malpractice actions generally, MCL 600.5805(8), applies to medical malpractice actions. MCL 600.5838a(2). A saving provision also applies to wrongful-death actions: if a person dies before or within 30 days of the expiration of the period of limitations, an action may be commenced by the personal representative of the decedent's estate at any time within two years after letters of authority are issued. MCL 600.5852(1). In an action alleging medical malpractice, the two-year saving period runs from the date of appointment of the first personal representative of the estate. MCL 600.5852(2). However, MCL 600.5852(4) provides that an action may not be

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commenced under this saving provision more than three years after expiration of the period of limitations, thus establishing a maximum period of five years from the date of accrual of the cause of action in which to commence a wrongful-death action premised on alleged medical malpractice.

In addition, a plaintiff in a medical malpractice action is required to give written notice of intent to file a claim not less than 182 days before commencing the action. MCL 600.2912b(1). Giving notice under § 2912b tolls the statute of limitations "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(c).

Pursuant to MCL 600.5838a(1), in this case, plaintiff's claims against the various defendants accrued between February 17, 2017, when decedent was first treated by one of the defendants, and June 3, 2017, when decedent was last discharged from the hospital. Thus, pursuant to MCL 600.5805(8), the two-year malpractice limitations period expired no later than June 3, 2019. However, because decedent passed away before the limitations period expired, the wrongful-death saving provision, MCL 600.5852(2), extended the time for commencing an action to May 14, 2020, two years after the date plaintiff was appointed personal representative of decedent's estate. Thus, the original deadline for filing the complaint in this matter was May 14, 2020.

This deadline was extended at the onset of the COVID-19 pandemic. On March 10, 2020, the Governor issued Executive Order No. 2020-4, declaring a state of emergency across the state pursuant to the Emergency Management Act, MCL 30.401 *et seq.*, the Emergency Powers of the Governor Act, MCL 10.31 *et seq.*, and Const. 1963, art. 5, § 1. On March 23, 2020, our Supreme Court issued Administrative Order No. 2020-3, 505 Mich lxxxvi (2020), which suspended "all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110" and provided that "any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1)." The Supreme Court rescinded AO 2020-3, effective June 20, 2020, but ordered that "[f]or time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020." Administrative Order No. 2020-18, 505 Mich lxxxviii (2020).

When the state of emergency was declared on March 10, 2020, 65 days remained before the May 14, 2020 deadline for commencement of plaintiff's medical malpractice action. Thus, pursuant to AO 2020-18, plaintiff's deadline was extended to August 24, 2020. Plaintiff filed the complaint in this action on October 23, 2020, nearly two months after this deadline.

Plaintiff contends that this action was timely commenced on April 20, 2020, when the NOI mandated by MCL 600.2912b was served on defendants, because the two-year saving period for wrongful-death actions was tolled pursuant to MCL 600.5856(c), which provides that "statutes of limitation or repose" are tolled when "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...." MCL 600.5856(c). Upon service of notice, the period of limitations "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." *Id.*

***4** However, in *Waltz*, 469 Mich at 644, our Supreme Court concluded that the notice-tolling provision does not apply to the wrongful-death saving provision. In that case, the plaintiff's infant son received medical treatment for several months before his death on April 18, 1994. *Id.* at 644-645. In January 1999, the plaintiff notified the defendants, pursuant to MCL 600.2912b, of her intent to file suit. *Id.* at 645. On May 27, 1999, the plaintiff was appointed personal representative of her son's estate. *Id*. On June 23, 1999, the plaintiff filed a complaint alleging wrongful-death medical malpractice. *Id.* The trial court granted summary disposition in favor of the defendants, ruling that the notice-tolling provision did not toll the wrongful-death saving period, and that the plaintiff had not been appointed personal representative until after the two-year limitations period and the wrongful-death saving period had both expired. *Id.* at 646-647. This Court affirmed the trial court, ruling that "by its express language, MCL 600.5856(d)[2] tolls the statute of limitations, not the extended limit in MCL 600.5852. Consequently, the trial court did not err because the statute of limitations barred plaintiff's claim." *Waltz*, 469 Mich at 649-650 (citation omitted; footnote added).

The Supreme Court granted leave to appeal, specifically to "determine whether § 5856(d), the medical malpractice notice tolling provision, tolls the additional period permitted for filing wrongful death actions under the wrongful death saving

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provision, § 5852." *Id.* at 644. The Supreme Court explained that MCL 600.5852 is neither a statute of limitations nor a statute of repose, but "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.' " *Id.* at 655, quoting *Lindsey v Harper Hosp*, 455 Mich 56, 66; 564 NW2d 861 (1997). Thus, the Supreme Court concluded that "the notice tolling provision, § 5856(d)—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." *Waltz*, 469 Mich at 655.

Plaintiff attempts to distinguish *Waltz* from this case, asserting that, in *Waltz*, the plaintiff had failed to file her complaint within five years of her son's death, thus exceeding the maximum extension established under MCL 600.5852(4). However, this distinction is irrelevant given the Supreme Court's unambiguous conclusions that § 5856 "explicitly applies only to 'the statute of limitations or repose' " and that § 5852 "is not a 'statute of limitations' or a 'statute of repose.' " *Id*. If § 5852 is neither a statute of limitations nor a statute of repose, then service of the NOI tolls neither the two-year saving period, MCL 600.5852(1), nor the three-year ceiling, MCL 600.5852(4).

Plaintiff urges this Court to ignore these unambiguous conclusions of the Supreme Court. However, this Court is required to follow decisions of the Supreme Court "except where those decisions have *clearly* been overruled or superseded...." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). Plaintiff does not contend that *Waltz* has been overruled or superseded, but argues that this Court should instead follow the Supreme Court's decisions in *Hardy* and *Omelenchuk*, two cases decided before *Waltz*. This argument has no merit.

Hardy did not involve a medical malpractice claim. Rather, in *Hardy*, the issues were "(1) whether MCL 600.5852 applies to wrongful death cases in which death was 'instantaneous,' and (2) whether death by drowning is instantaneous as a matter of law." *Hardy*, 429 Mich at 424-425. Our Supreme Court concluded that "the saving provision contained in MCL 600.5852 operates to toll the statute of limitations in both survival-type actions and death-type actions brought under MCL 600.2922, the wrongful death statute." *Id.* at 425. Plaintiff contends that this language shows that the Supreme Court "clearly used the terminology 'to toll the statute of limitations.' "

***5** However, in *Hardy*, the Supreme Court cautioned that the language used in a court's opinion "must be construed in light of the facts and issues involved in a case under consideration and should not be interpreted as going beyond the scope of matters for adjudication...." *Id.* at 431. Because the central issue in *Hardy* was whether the saving provision applied to both types of wrongful-death actions, and not the distinction between a statute of limitations and a saving statute, *Hardy* is irrelevant to the issues in this case. Moreover, this Court is "obligated to follow the most recent pronouncement of the Supreme Court on a principle of law." *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 703 NW2d 486 (2005).

Plaintiff's reliance on *Omelenchuk* is similarly misplaced. As the Supreme Court explained in *Waltz*, 469 Mich at 652, the issue in *Omelenchuk* "was whether the malpractice notice tolling provision tolled the statutory limitation period for a full 182 days or, instead, for only 154 days, when a medical malpractice claimant does not receive the written response to the notice of intent contemplated under MCL 600.2912b(7)." In addition, in *Omelenchuk*, the Court was not required to determine whether the notice-tolling provision extended the wrongful-death saving period because the complaint was filed within the two-year malpractice limitations period, as extended under the notice-tolling provision. *Id.* at 653.

Plaintiff correctly asserts that, in *Omelenchuk*, 461 Mich at 577, the Supreme Court described the wrongful-death saving period as a period of limitations, stating that the "two-year limitation period" was set to expire two years after the plaintiffs received their letters of authority. However, in *Waltz*, 469 Mich at 653, the Court described that language as "passing references to § 5852 as creating a 'limitation period.' " The Court then explained that "[t]o the extent that our imprecise choice of words in *Omelenchuk* implied that § 5852 created a separate 'limitation period,' we again clarify that § 5852 is not a statute of limitations, but a *saving* statute." *Id.* at 654. Concluding its analysis of *Omelenchuk*, the *Waltz* Court explained further: "To the limited extent that the above-quoted portion of *Omelenchuk* might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision, it is hereby overruled." *Id.* at 655.

Omelenchuk has been "clearly overruled" and is not binding precedent. *Associated Builders*, 499 Mich at 191-192. *Waltz* has not been overruled, and is binding on this Court, *id.*, as

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well as the trial court. *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 142; 863 NW2d 344 (2014). Thus, the trial court did not err by granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

III. CONCLUSION

Because plaintiff's service of the NOI did not extend the two-year wrongful-death saving period, the trial court did not err by granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

Affirmed.

N.P. Hood, J. (concurring.)

I concur in the majority opinion's analysis and conclusions because we are bound by the holding in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

All Citations

Not Reported in N.W. Rptr., 2022 WL 17368761

Footnotes

1 At the time plaintiff's claim accrued in this case, the two-year limitations period for malpractice actions was codified at MCL 600.5805(6); the statute was later amended by 2018 PA 183 and the two-year limitations period is now codified at MCL 600.5805(8).

2 Now codified at MCL 600.5856(c). See 2004 PA 87, effective April 22, 2004.

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Appendix
Exhibit 12

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Order

Michigan Supreme Court
Lansing, Michigan

October 6, 2023

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

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165172

MATTHEW PONIEWIERSKI, Personal Representative of the ESTATE OF ASHLEY PONIEWIERSKI,
Plaintiff-Appellant,

v

SC: 165172
COA: 356925
Oakland CC: 2020-184202-NH

WILLIAM BEAUMONT HOSPITAL ROYAL OAK, ASCENSION ST. JOHN MACOMB-OAKLAND HOSPITAL, MICHIGAN HEALTHCARE PROFESSIONALS, PC, d/b/a OAKLAND MEDICAL GROUP, RONALD RASANSKY, D.O., STEPHEN HOFFMAN, D.O., ZUIE C. WAKADE, D.O., TUSAR DESAI, M.D., and AKRITI DEWANWALA, M.D.,
Defendants-Appellees.

_____/

On order of the Court, the application for leave to appeal the December 1, 2022 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

WELCH, J., (*dissenting*).

I respectfully dissent from the Court's decision to deny leave to appeal in this matter. I believe important questions have been raised by the plaintiff about whether *Waltz v Wyse*, 469 Mich 642 (2004), interpreted MCL 600.5852 correctly. Specifically, MCL 600.5852 provides the personal representative of a decedent additional time to file a medical malpractice lawsuit after they receive letters of authority. Although providing a notice of intent (NOI) tolls the running of the usual two-year statute of limitations period for medical malpractice actions, *Waltz* held that an NOI does not toll the additional time period granted to a personal representative of a decedent filing a lawsuit. I question whether *Waltz*'s holding is contrary to the text of the statute and intent of the Legislature. As a result, I would have ordered additional briefing and oral argument in this matter.

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Under MCL 600.5805(8), plaintiffs generally have two years to bring a medical malpractice claim. And under MCL 600.2912b, plaintiffs are required to provide an NOI to defendants in medical malpractice cases at least 182 days prior to filing a complaint. The running of the two-year statute of limitations period is tolled during the 182-day NOI period—meaning that if the NOI is provided towards the end of the two-year period of limitations, the time within which the complaint must be filed will extend beyond the limitations period up to the balance of the 182-day NOI period. MCL 600.5856(c).

When someone has died allegedly because of medical malpractice and a personal representative takes legal action, MCL 600.5852 provides additional time for the lawsuit to be filed. MCL 600.5852 provides that when a decedent dies before the statute of limitations period has run, or within 30 days of it running, the personal representative has an additional two years to commence a lawsuit from the date the letters of authority are issued, not to exceed three years after the statute of limitations period has run. MCL 600.5852.

In *Waltz*, the Court held that the NOI tolling provision in MCL 600.5856(d) applied only to the two-year statute of limitations. It concluded that since the additional time period provided in MCL 600.5852 to file a lawsuit constituted a saving statute (akin to a grace period), an NOI provided during the saving time period did not toll the time period within which plaintiff had to file a lawsuit. *Waltz*, 469 Mich at 649-650, citing *Miller v Mercy Mem Hosp Corp*, 466 Mich 196 (2002) (holding that 600.5852 "is a saving statute, not a statute of limitations"), and *Lindsey v Harper Hosp*, 455 Mich 56, 65 (1997) (holding that MCL 500.5852 is an "exception to the statute of limitations").

Justice CAVANAGH dissented and was joined by Justice KELLY. The dissent emphasized that the Court's new interpretation of MCL 600.5856 and MCL 600.5852 prejudiced wrongful death plaintiffs in a way unintended by the Legislature. Justice CAVANAGH noted that wrongful death plaintiffs are bound by the MCL 600.2912b NOI mandate, and therefore, the majority had effectively curtailed the period the Legislature expressly permitted for wrongful death plaintiffs by 182 days. *Waltz*, 469 Mich at 669 (CAVANAGH, J., dissenting). He emphasized that "the two years expressly provided [to a personal representative of a decedent] under the saving provision are effectively reduced to one-and-a-half years . . . ." *Id.* at 671.

In this case, the alleged malpractice happened between February 25 and April 20, 2017. The decedent died on June 12, 2017. Plaintiff was appointed as the personal representative of the decedent's estate on May 14, 2018; provided defendants with an NOI on April 20, 2020; and, relying on the two-year wrongful death saving provision set forth in MCL 600.5852, filed this lawsuit on October 23, 2020. The trial court dismissed plaintiff's lawsuit as untimely because, pursuant to *Waltz*, it concluded that the NOI tolling provision did not apply to cases commenced under MCL 600.5852. In other words, the April 20, 2020 NOI did not toll the wrongful death statute's two-year saving provision.

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The lawsuit had to be filed within two years of May 14, 2018. Since it was filed in October 2020, it was deemed untimely.

I question the differing treatment of the tolling effect of an NOI between a case where someone has died (MCL 600.5852) and a case where someone has not died (MCL 600.5805). The dissenting justices in *Waltz* may be correct that the distinction between a saving statute and a statute of limitations adopted by the majority is contrary to the plain meaning of MCL 600.5852. Until *Waltz*, this Court acknowledged differences between statutes of limitations and saving provisions, but it recognized that the *purpose* of the MCL 600.5852 saving statute was " '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 (emphasis added).

I believe plaintiff's request for us to relook at *Waltz* has potential merit. For the above-mentioned reasons, I respectfully dissent from this Court's decision.

CAVANAGH and BOLDEN, JJ., join the statement of WELCH, J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 6, 2023

Clerk

a1003

Appendix
Exhibit 13

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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,
CYPRESS CARDIOLOGY PLLC,,

Defendant-Appellee,

COA No.: 368566

Genesee County Circuit Court
No: 2020-179077 NH

Plaintiff-Appellant's Brief on Appeal

ORAL ARGUMENT NOT REQUESTED

/

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PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

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RECEIVED by MCOA 4/15/2024 4:28:30 PM

TABLE OF CONTENTS

Page

Index of Authorities……..……..…… Pg. ii-iii

Statement of Jurisdiction…….……. Pg. iv

Statement of Questions Presented…….……... Pg. v

Statute Involved……..……..… Pg. vi

Introduction and Reasons for Granting Appeal……..……..… ……Pg. 8

Statement of Facts and Proceedings…….…….. .Pg. 8

Standard of Review……..Pg. 11

Argument……..Pg. 11

I. Plaintiff's suit was commenced in a timely manner and in compliance with the requirements of MCL 600.5852…….…….....….. Pg. 11

II. The Defendant-Appellees reliance on Waltz v. Wyse is contradictory to the plain meaning of the statutory requirements of filing a medical malpractice suit and relevant precedent. ……..……..……... Pg. 10

Conclusion and Relief Requested…….…..……. Pg. 20

Certificate of Compliance…….…….……. Pg. 21

Exhibit 1: Record of Appeal

RECEIVED by MSC 6/4/2025 3:52:12 PM

RECEIVED by MCOA 4/15/2024 4:28:30 PM

INDEX OF AUTHORITIES

Page

CASES

Hardy v. Maxheimer,

429 Mich 422, 416, 433 NW2d 299 (1987)……..….Pg. 9, 10, 11

Jennings v. Southwood,

446 Mich 125, 130; 521 NW2d 230 (1994)……Pg. 6

Larson v. Johns-Mansville Sales Corp,

427 Mich 301, 314, 399 NW2d 1 (1986)…… Pg. 6, 7

McNeil,

supra at 202, 489 NW2d 180.…….…..…… Pg. 8

Omelenchuck v City of Warren,

461 Mich 567, 609 NW2d 177 (2000)……..……..…….Pg. 9, 10, 11

Waltz v Wyse,

469 Mich 642; 677 NW2d 813 (2004)……..…… passim

Ardt v. Titans Ins Co.,

233 Mich App 658, 688; 593 NW2d 215 (1999)……..…….Pg. 4

Downey v Charlevoix Cnty Bd of Rd Comm'rs,

227 Mich App 621, 625; 227 NW2d 712 (1998)…….……..Pg. 4

Chandler v Dowell Schlumberger Inc.,

456 Mich 395, 397; 576 NW 2d 210 (1998)…….……..Pg. 4

Lowrey v LMPS & LMPJ, Inc.,

500 Mich 1, 7; 890 NW2d 344 (2016)……..Pg. 5

West v General Motors Corp,

469 Mich 177, 183; 665 NW2d 468 (2003)…….……Pg. 5

STATUTES

MCL 600.2912(b)……..……..…… passim

MCL 600.5856…….Pg.6,7,11

MCL 600.5805…….Pg.7

MCL 600.5852…….passim

MCL 600.2922…….Pg.6, 9

MCL 600.5838a(2) …….Pg.6, 9, 11

Other Authorities

Rules

MCR 2.116(G)(5)……Pg. 5
MCR 2.116(C)(10)……. Pg. 4, 5
MCR 7.212(B) ……..certificate
MCR 7.205 ……..….. Pg. 2

RECEIVED by MSC 6/4/2025 3:52:12 PM

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal of right from the October 23, 2023, order of the Genesee County Circuit Court granting Plaintiffs' Motions for Summary Disposition.

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STATEMENT OF QUESTIONS PRESENTED

1. Does the tolling provision for the notice of intent mentioned in MCL 600.2912b, apply to the wrongful death statute of limitations, MCL 600.5852?

   Plaintiff-Appellants' answer: Yes

   Defendant-Appellee's answer: No

   Trial Court's Answer: Yes, because *Waltz v. Wyse* is binding.

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INTRODUCTION AND REASONS FOR INTERLOCUTORY REVIEW

The issue presented in this Appeal of Right is as follows: Ordinarily, the statute of limitations for medical malpractice is two years. MCL 600. 2912b imposes a mandatory 182-day notice requirement on the claimant. The filing of this Notice of Intent then tolls the statute of limitations. Additionally, MCL 600.5852 states that if a claimant dies before the state of limitations has run that a personal representative of the deceased may file within 2 years after the letters of authority are issued. Thus, the primary question put forward by this case and others similarly situated is whether or not the tolling of the statute of limitations by the service of the Notice of Intent under 2912b applies to the two-year statute of limitations that begins ticking upon the grant of letter of authority under 5852.

Appellant contends that it does as this was the intention of the legislature and the interpretation of the courts in a pre-*Waltz v. Wyse* world. However, the Michigan Supreme Court, in its 2004 *Waltz* ruling stated that the savings provision is not a statute of limitations, and that the Notice of Intent does not toll the time allowed under the savings provision to bring a claim. Therefore, the two years from the issuance of letters of authority under the savings provision is not tolled by the Notice of Intent. In doing so, the Supreme Court noted that MCL 600.5856 only applied to the statute of limitations and does not operate to toll the additional period permitted under MCL 600.5852 for the filing of wrongful death actions, *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

In reply, Appellants state that this reading contradicts the pain meaning of the statutory requirements of filing a medical malpractice case as the language used with regards to the tolling provisions is unambiguous, and ignores or contradicts other relevant decisions from the High Court.

Appellants also rely on the detailed historical argument advanced by the dissenting voice in *Waltz,* Justice Cavanaugh who called the decision an impermissible rewrite of the Revised Judicial Act, *Id.* at 672.

Given that this issue is vital to the surviving family members who seeks to file wrongful death actions, and that recent cases before the Supreme Court evidence the great need for reconsideration of this issue; given Appellant's timely compliance with the laws governing the Notice of Intent in wrongful death, medical malpractice suits, the rational points made by the Supreme Courts dissenting opinion in *Wyse*, Plaintiff-Appellants are filing this Appeal of Right.

A bypass application was previously filed to the Michigan Supreme Court under the auspices of MCR 7.305. On March 29, 2024, the Michigan Supreme Court denied the bypass application. (**Pl's App'x, Exh. A**). Prior to the filing however, Plaintiff-Appellant had also filed a claim of appeal with this Court in a timely fashion as required by 7.204(A). (**Pl's App'x, Exh. B**). Plaintiff-Appellant now submits this brief to the Court of Appeals in order to comply with outstanding obligations imposed by MCR 7.205.

For the reasons stated herein, Plaintiff-Appellant requests that this Court grant this Appeal of Right and reconsider its previous position in *Waltz v. Wyse* ruling and reverse remand to the trial court for further action consistent with its decision.

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STATEMENT OF FACTS AND PROCEEDINGS

I. PROCEDURAL HISTORY

A. The Incident Giving Rise to Suit

On July 16, 2020 Mr. Ernest, age 54, presented to the emergency department at McLaren Regional Medical Center in Flint, Michigan complaining of chest pain. He was seen in the emergency room by Dr. Paul W. Brown and discharged to the cardiac unit for observation with Dr. Elmahdi M. Saeed attending. A single x-ray showed an enlarged heart, mild interstitial prominence of lungs, minimal perihilar/basilar opacities and an impression of mild congestion/edema; conditions that can be signs of pulmonary embolism. A consultation was placed for cardiology, and Mr. Ernest was seen by Dr. Farouk M. Belal who noted his provisional diagnosis was acute coronary syndrome and hypokalemia. At no time during his stay was D-dimer tested. At no time was CT PE or ventilation-perfusion scan ordered. The chart does not mention shortness of breath generally, which Mr. Ernest was suffering from and complained about. The patient chart reflects only two vitals.

Thus, on July 17, 2020, at 13:57, while in the observation unit, Mr. Ernest died. Independent autopsy conducted at the Michigan Institute of Forensic Science & Medicine confirmed cause of death as bilateral pulmonary embolism and noted fresh and organizing emboli in pulmonary arteries and branches, pulmonary infarcts and pulmonary edema (**Pl's App'x, Exh. C**).

B. Pre-Suit History

This is a medical malpractice/wrongful death action. The alleged medical malpractice occurred on 07/16/2020 and Maurice Ernest passed the following day on 07/17/2020. Letters of Authority (**Pl's App'x, Exh. D**) were issued to Keran Ernest the following year on 06/7/2021, and

the Notice of Intent was served on 2/10/2023. Finally, the complaint itself was filed on 09/10/2023 **(Pl's App'x, Exh. E).**

C. The Circuit Court's Decision

On October 23, 2023, the Honorable Celeste D. Bell of the Circuit Court for the County of Genesee granted the motions for summary disposition of Defendants Elmahdi Saeed, M.D., Dr. Farouk M. Belal, Dr. Paul W. Brown, Jr., and McLaren Health Care Corporation **(Pl's App'x, Exh. F,G,H**.)

In support of their motions for summary disposition/judgment, the Appellee's all stated that Appellant's claim was barred by the statute of limitations as the savings provision offered by MCL 600.5852 had expired before the filing of the claim on September 10, 2023. In so arguing, each motion specifically raised the Michigan Supreme Court's ruling in *Waltz v. Wyse*, 469 Mich 642 (2004) which held that the savings provision does not operate as a separate statute of limitations and that the notice of intent does not toll the clock that begins ticking under the savings provision.

STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition presents a question of law that this Court review *de novo*. *Ardt v. Titan Ins Co*., 233 Mich App 658, 688; 593 NW2d 215 (1999). A motion for summary disposition under MCR 2.116(c)(10) tests the factual support for a claim. *Downey v Charlevoix Cnty Bd of Rd Comm'rs*, 227 Mich App 621, 625; 227 NW2d 712 (1998). In ruling on the motion, the court must consider not only the pleadings but also any depositions, affidavits, admissions, or other documentary evidence the parties submit. MCR 2.116(G)(5). The court must review such affidavits and documentary evidence in the light most favorable to the nonmoving party. *Chandler v Dowell Schlumberger Inc.*, 456 Mich 395, 397; 576 NW 2d 210

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(1998). However, a moving party may satisfy its burden under MCR 2.116(C)(10) by demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich 1, 7; 890 NW2d 344 (2016). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact. *West v General Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003).

ARGUMENT

Plaintiff-Appellant asserts that she commenced this case timely by serving a written notice of intent on (2/10/2023) as mandated by MCL 2912(b) within the time periods allotted by MCL 600.5852: (1) within two years of the issuance of letters of authority to the personal representative (6/7/2023) and (2) within three years from the expiration of the underlying two-year statute of limitations (2/10/2025).

Plaintiff-Appellant asserts that the case upon which Defendant/Appellee's rely, *Walt v. Wyse* is ill-reasoned and directly contradicts the plain meaning of the statutory requirements of filing a medical malpractice death case; further ignores or contradicts other relevant statutory Supreme Court decisions, thereby not overruling them and thus should not be determinative of the timeliness of the filing of this case.

I. PLAINTIFF'S SUIT WAS COMMENCED IN A TIMELY MANNER AND IN COMPLIANCE WITH THE REQUIREMENTS OF MCL 600.5852

The relevant Michigan statutes governing the timeliness of filing a wrongful death medical malpractice action include MCL 600.2922; MCL 600.58085; MCL 600.5838(a); MCL 600.2912(b); MCL 600.5856(c) and MCL 600.5852.

In interpreting a statute, the primary goal is to give effect to the intent of the legislature, *In Re MCR 460 Mich*, 411 (1999). In order to resolve any facial inconsistencies or contradictions a

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long-standing maxim of statutory interpretation has been that such statutes should be construed as consistent to implement the legislature's intent. Every word of a statute should be read in such a way that should be given meaning. Id at 414. We are encouraged to read such provisions "in pari materia". In other words, we may use reference to different statutes dealing with the same subject or shaping part of the same system to interpret the provisions of statutes. *Jennings v. Southwood* 446 Mich 125, 130; 521 NW2d 230 (1994).

The current legal issue presents an opportunity to employ this maxim. When dealing with medical malpractice/wrongful death actions we encounter statutory limitation provisions on both wrongful death actions and those pertaining to medical malpractice claims. It is paramount that we look to the clear intent of the legislature when trying to make sense of the interplay between these provisions.

In its early legal history, under the common law, causes of action were lost upon the death of either the claimant or the tortfeasor. Michigan Law addresses this issue in MCL 600.2922, the relevant part of which states:

> Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute of a felony.

The statute of limitations for a wrongful death action is governed by the statute of limitations for the underlying claim. *Larson v. Johns-Mansville Sales Corp* 427 Mich 301, 314; 399 NW2d 1 (1986). MCL 600.6805(8) provides, "Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice." The pertinent provision of MCL 600. 5856(c)(1) states: "Except as otherwise provided in this subsection, an action involving

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a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856…" This specific reference to the tolling statute 5856 is central to the issue before the court as MCL 600.5856(c) provides:

> At the time notice is given in compliance with the applicable notice period under section 2912(b), 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.

The tolling statute incorporates by reference another key statute, MCL 600.2912(b) which states:

> (1) 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.

MCL 600.5852 so denominated the wrongful death savings provision states in relevant part:

> (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.**
>
> ****
>
> (4) …an action shall not be commenced under this section later than 3 years after the period of limitations has run.

In summary, a Plaintiff has two years to file a medical malpractice claim after the act or omission. In case of a death, the statute of limitations is extended by two years after the Letters of Authority have been issued even though the initial statute of limitations has run. The filing may occur no later than three years after the statute of limitations has run.

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When filing a medical malpractice case, the legislature requires Plaintiff to serve a written notice not less than 182 days before the complaint is filed. The legislature specifically tolls the statute of limitations during this period when the statute of limitations would have run. The statute is tolled by a number of days equal to or no longer than the number of days remaining in the applicable notice period after the date of notice is given.

Therefore, reading the applicable statutes with their plain language and applying it to the facts in this case, this court must conclude that the claim was filed in a timely manner. The relevant dates are listed below:

07/16/2020	Date of alleged malpractice.
07/17/2020	Date of death of Maurice Ernest.
06/7/2021	Letters of Authority issued to Keran Ernest.
07/17/2022	Application of two-year statute of limitations.
02/10/2023	Notice of Intent is served.
06/7/2023	Two years since letters of authority issued.
09/10/2023	Complaint is filed.
02/10/2025	Three years since the expiration of the statute of limitations.

II. THE DEFENDANT-APPELLEES RELIANCE ON WALTZ V. WYSE IS CONTRADICTORY TO THE PLAIN MEANING OF THE STATUTORY REQUIREMENTS OF FILING A MEDICAL MALPRACTICE SUIT AND RELEVANT PRECEDENT

The *Waltz* court held:

> Under the savings provision, the personal representative of an estate may begin a lawsuit within two years after letters of authority are issued, as long as the lawsuit is brought within three years after the two-year general period of limitations ended. MCL 600.5852; McNeil, supra at 202 489 NW2d 180. This creates a maximum time of five years for filing suit unless the six-month discovery rule in MCL 600.5838(2) applies.
>
> *Waltz*, 469 Mich. 649

The *Waltz* Court then points out that the plaintiff failed to file her complaint within five years after her son's death thus violating the maximum time allowed for filing the suit. In this case,

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the maximum time, which is three years from the expiration of the statute of limitations, would be February 10, 2025. The Complaint in this case was filed on August 10, 2023, more than a year and a half prior to the expiration of that time period.

A. Jurisprudence

Hardy v Maxheimer, 429 Mich 422, 416 NW2d 299 (1987), addresses the application of MCL 600.5852 to wrongful death cases and actions brought pursuant to MCL 600.2922 under the Wrongful Death Statute is. *Hardy* considered whether the savings provision of MCL 600.5852 tolled the statute of limitations in survival type actions and death by actions brought under MCL 600.2922. The law as it existed made the distinction between instantaneous and non-instantaneous deaths, and the argument revolved around whether the savings provision would apply if the death were instantaneous thus arguably "not surviving" and thus precluding the applicability of the savings provision.

However, for purposes of its importance in the instant case, the Supreme Court clearly held that the savings provision of MCL 600.5852 "operates to toll the statute of limitations in both types of actions, whether denominated survival or death." *Id*. Therefore, a Plaintiff may pursue a wrongful death action where it is brought within two years of the date of the personal representative's appointment and "within three years after the initial period of limitation had run." The *Hardy* court clearly used the terminology "to toll the statute of limitations." The Waltz court neither examines, references nor refutes the Hardy ruling leaving us to assume that remains good law.

Next, the case of *Omelenchunck v. City of Warren*, 461 Mich 567, 609 NW2d 177 (2000), examined if a malpractice notice tolling provision tolled the statute of limitations for a full 182 days or for only 154 days when a medical malpractice claimant did not receive the response to the

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notice of intent under MCL 600.2912(b)(7). The Court held that the limitation period was tolled for the entire 182 days notwithstanding the fact that the plaintiffs could have commenced their lawsuit after 154 days. The *Omelenchuck* court clearly made reference to MCL 600.5852 as creating "a limitation period." *Omelenchuck* supra at 577, 609 NW2d 177. It is clear that the savings provision was another period of limitation which was extended in a death case by statute. Further, *Omelenchuck* dealt with the tolling provisions of 600.2912(b) holding that such a plaintiff would have 182 days even if they could have filed it earlier. While the *Waltz* majority opinion attempted to walk this back by saying it had utilized "imprecise choice of words" and mistakenly calculated the at-issue time periods erroneously, Justice Cavanaugh in a most cogent and expansive opinion belied the faulty logic of the majority opinion.

The Court should recognize the *Hardy* holding; one not addressed or overruled by *Waltz* that a savings provision does in fact toll the statute of limitations. Further, Plaintiff/Appellee urges the court to apply the unambiguous language of *Omelenchuck*, which did in fact apply the savings provisions of MCL 600.5852 in a wrongful death medical malpractice action specifically referring to the applicability of 2912b and the tolling provision therein, Id. at 575, 609 NW2d 177.

The Waltz majority is not in line with the clear statutory requirement of MCL 600.2912(b). The law requires a plaintiff in a medical malpractice case to serve written notice at least 182 days prior to filing its complaint. The *Waltz* Court exceeded its Constitutional authority by ignoring the clear language of two statutes. The logic, or illogic, of the Court's decision is that a plaintiff would have to file its notice 6 months prior to the 2-year extension of the savings provision, thereby re-writing the savings provision from allowing a 2-year period of time from the issuance of letters of authority to 18 months. It erroneously fails to apply the statutory interpretation maxim of "in pari materia."

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CONCLUSION AND REQUESTED RELIEF

The principles of statutory interpretation require this Court to apply an assessment which renders a consistent interpretation of the applicable statutes. The judiciary does not have discretion to ignore the plain language of a statute. The defense in asserting the applicability of the Waltz majority opinion asks this Court to do just that; i.e. to ignore the plain language of MCL 200.2912(b) and its unambiguous requirement that a plaintiff must serve a notice of intent 6 months prior to filing a Complaint. MCL 600.5838a(2), referring to a claim involving medical malpractice, specifically makes reference to the tolling provision of MCL 600.5856, which in turn specifically makes reference to MCL 600.2912(b). They are inextricably intertwined.

The defense would have this Court apply a result which essentially is asking by judicial fiat to shorten the two-year extension provided under MCL 600.5852 to 18 months. Essentially this means that MCL 600.2912(a), which requires the filing of a written notice, and then disallows the filing of a complaint for 182 days thereafter, has no legal standing. The defense just wants the Court to ignore it. This is directly contradictory to the application of the maxim of "in pari materia"; it is in direct contradiction to the plain reading of *Omelenchuck*; and it ignores *Hardy* v *Maxheimer* (not mentioned by the *Waltz* court); and it fails to serve the long-standing doctrine in this State of the liberal interpretation of cases and statutes to permit injured parties from seeking redress.

The clarity of the proposition that *Omelenchuck* affirmed the applicability of MCL 600.2912(b) tolling the applicable statute of limitations is its reference in the authoritative "Guide to the Michigan Statute of Limitations 2004 Edition" disseminated by ICLE, the Institute for Continuing Legal Education in the State of Michigan. Under a section of "Other Tolling Issues", page 24 of that source, it states in pertinent part:

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> Also unique to medical malpractice lawsuits, plaintiff must give at least 182 days' notice to a potential defendant before filing a medical malpractice suit. MCL 600.2912(b). If the limitation expires after notice is given, but before the end of the 182 days (i.e., before the time the plaintiff can sue), the limitation period is tolled for 182 days after the notice is given, at which time the limitations period begins running again. *Omelenchuck v City of Warren*, 461 Mich 567, 577- 578, 609 NW2d 177 (2000). Finally, the plaintiff must meet all of the notice requirements in MCL 600.2912(b) before the limitation period is tolled.

This array of statutes and virtually all applicable Supreme Court precedent delimits a statutory scheme with which this Plaintiff complied. Mr. Ernest died due to malpractice that occurred on July 16 and 17, 2023. Letters of Authority were issued on June 7, 2021, thus giving the personal representative until June 7, 2023, to commence an action. Since a plaintiff cannot commence an action of malpractice without first serving a notice of intent, which by the clear language of the statute then tolls the statute of limitations for 182-days, the Plaintiff served the Notice of Intent on February 10, 2023, months prior to the expiration of the 2-year savings provision. All of this was well within the 5-year period provided under *Hardy*. The Complaint in this case was filed well in advance of the deadline. As such, this lawsuit was timely filed.

WHEREFORE, Plaintiff-Appellant respectfully requests that this Honorable Court grant their Appeal of Right and reverse the lower Court's decision.

Respectfully submitted,

Date: April 15, 2024

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CERTIFICATE OF COMPLIANCE

I certify that the Plaintiff-Appellant's Appeal of Right complies with the type-volume limitation set forth in MCR 7.212(B). This brief uses a 12-point proportional font (Times New Roman), and the word count, based on the word count of the word-processing system used to produce this document, for this brief is 4283.

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Appendix
Exhibit 14

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

KERAN ERNEST, Individually and,
as Personal Representative,
of the Estate of Maurice Ernest, Deceased,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

Court of Appeals No. 368566

Genesee County Circuit Court
Case No. 23-119425-NH

PAUL W. BROWN, JR., MD AND MCLAREN HEALTH CARE CORPORATION'S RESPONSE TO PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

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

NOW COME DEFENDANTS-APPELLEES, Paul W. Brown, Jr., MD and McLaren Health Care Corporation, by and through their attorneys, CLINE, CLINE & GRIFFIN, P.C., specifically J. Brian MacDonald and Megan R. Mulder, and hereby submit Defendants-Appellees Paul W. Brown, Jr., MD and McLaren Health Care Corporation's Response to Plaintiff-Appellant's Brief on Appeal.

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RECEIVED by MCOA 7/15/2024 2:01:06 PM

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

APPENDIX/EXHIBITS v

COUNTER-STATEMENT OF APPELLATE JURISDICTION vi

COUNTER-STATEMENT OF QUESTIONS PRESENTED vii

STATEMENT OF FACTS AND PROCEDURAL HISTORY 1

STANDARD OF REVIEW 3

ARGUMENT 4

I. THE CIRCUIT COURT PROPERLY GRANTED DEFENDANTS-APPELLEES' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCL 600.5852 AND *WALTZ V WYSE* 4

CONCLUSION AND RELIEF REQUESTED 9

RECEIVED by MSC 6/4/2025 3:52:12 PM

RECEIVED by MCOA 7/15/2024 2:01:06 PM

TABLE OF AUTHORITIES

Cases

Brennan v. Edward D. Jones & Co.,
245 Mich. App. 156; 626 N.W.2d 917 (2001) 3, 4

El-Khalil v. Oakwood Healthcare, Inc.,
504 Mich. 152; 934 N.W.2d 665 (2019) 3

Estate of Jesse v Lakeland Specialty Hosp at Berrien Ctr,
328 Mich App 142; 936 NW2d 705 (2019) 5

Farley v Advanced Cardiovascular Health Specialist, P.C.,
266 Mich App 566; 703 NW2d 115 (2005) 7

Gorman v. Am. Honda Motor Co.,
302 Mich. App. 113; 839 N.W.2d 223 (2013) 3

Hardy v Maxheimer,
429 Mich 422; 416 NW2d 299 (1987) 7

Holmes v Michigan Capital Medical Center,
242 Mich App 703; 620NW2d 319 (2000) 4

Lentini v Urbancic,
267 Mich App 579; 705 NW2d 701 (2005) 1, 7

Mulholland v. DEC Int'l Corp.,
432 Mich. 395; 443 N.W.2d 340 (1989) 3

Omelenchuck v City of Warren,
461 Mich 567; 609 NW2d 177 (2000) 7

Poniewierski v William Beaumont Hospital Royal Oak,
995 NW2d 535 (Mich, 2023) 7, 8

Waltz v Wyse,
469 Mich 642; 677 NW2d 813 (2004) ..... vi, 1, 3, 5, 6, 7, 8

Statutes

MCL 600.5805(8) 1, 4

MCL 600.5852 ..... vi, 1, 4, 5

MCL 600.5856(c) 6

Rules

MCR 2.116(C)(7)..... 3

MCR 7.203(A)(1) v

MCR 7.204..... v

RECEIVED by MSC 6/4/2025 3:52:12 PM

RECEIVED by MCOA 7/15/2024 2:01:06 PM

RECEIVED by MSC 6/4/2025 3:52:12 PM

APPENDIX/EXHIBITS

Exhibit 1	Defendants' Motion for Summary Disposition
Exhibit 2	Plaintiff's Response to Motion for Summary Disposition
Exhibit 3	Defendants' Reply to Plaintiff's Response to Motion for Summary Disposition, including Exhibits
Exhibit 4	Genesee County Circuit Court Order dated October 23, 2023
Exhibit 5	Letters of Authority
Exhibit 6	Plaintiff's Notice of Intent
Exhibit 7	Plaintiff-Appellant's Bypass Application for Leave
Exhibit 8	Defendants' Response to Plaintiff-Appellant's Bypass Application for Leave
Exhibit 9	Order Denying Plaintiff-Appellant's Bypass Application for Leave
Exhibit 10	*Poniewierski v William Beaumont Hospital Royal Oak, et al*, unpublished per curiam opinion of the Court of Appeals, issued December 1, 2022
Exhibit 11	Order Denying Leave in *Poniewierski v William Beaumont Hospital Royal Oak, et al* dated October 6, 2023

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellee McLaren Flint states this Court has jurisdiction to consider Plaintiff-Appellant's appeal pursuant to MCR 7.203(A)(1) and MCR 7.204.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is Plaintiff-Appellant's Complaint time barred when it was filed after the two-year statute of limitations period and after the time allowed under the Wrongful Death Savings Provision based upon MCL 600.5852 and *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004)?

Plaintiff-Appellant Answers: "No"

Defendant-Appellee Answers: "YES"

This Court Should Answer: "YES"

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Introduction

The Estate failed to file its Complaint timely. The date of accrual was July 16, 2020. The statute of limitations for a claim of medical malpractice is two years from the date of accrual, making the deadline to file suit July 16, 2022. MCL 600.5805(8). Plaintiff's complaint was filed on August 14, 2023, well after the two year statute of limitations passed.

Given this is a claim brought under the Wrongful Death Act, the Wrongful Death Savings Provision is applicable. The Wrongful Death Savings Provision provides that a Plaintiff must file suit within two years after the letters of authority are issued to the first personal representative. MCL 600.5852. Here, letters of authority were issued by the Genesee County Probate Court on June 7, 2021. Under the Wrongful Death Savings Provision, the Estate had until June 7, 2023 to file suit. (Exhibit 5). However, the Estate did not file suit until August 14, 2023, well after the June 7, 2023 deadline. As such, even with the Wrongful Death Savings Provision, Plaintiff-Appellant's Complaint was untimely.

Finally, Plaintiff-Appellant's Notice of Intent was filed on February 10, 2023, well after the expiration of the two-year statute of limitations period for malpractice (July 16, 2022) so the filing of the Notice of Intent did not trigger tolling. The Court in *Waltz v Wyse* made clear that MCL 600.5852 is a savings provision and is not afforded the benefit of tolling. *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). *See also Lentini v Urbancic*, 267 Mich App 579; 705 NW2d 701 (2005). As such, Plaintiff-Appellant does not receive the benefit of any tolling based upon the filing of the Notice of Intent.

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Plaintiff-Appellant's Complaint was properly dismissed by the Genesee County Circuit Court because it was clearly filed after the statute of limitations had expired and after the period set forth by the Wrongful Death Savings Provision.

Factual Background

On July 16, 2020, Mr. Ernest presented to McLaren Flint with complaints of chest pain and diaphoresis. His pain began two days prior to presentation. He was seen in the emergency department and then transferred to the cardiac unit for observation in the early morning hours of July 17, 2020.

Mr. Ernest was monitored and underwent a cardiology consult while in the observation unit. Sadly, Mr. Ernest's condition deteriorated and he was pronounced dead on July 17, 2020.

Procedural History

Letters of authority were issued by the Genesee County Probate Court on June 7, 2021. (Exhibit 5). This was the first personal representative to be appointed. Plaintiff filed the Notice of Intent on or about February 10, 2023. Plaintiff filed suit on or about August 14, 2023.

Defendants-Appellees, McLaren Flint and Dr. Brown, filed a Motion for Summary Disposition in Lieu of an Answer on or about September 14, 2023. (Exhibit 1). Co-Defendants filed similar motions. Plaintiff-Appellant filed a Response on or about October 13, 2023. (Exhibit 2). Defendants-Appellees filed a Reply on or about October 18, 2023. (Exhibit 3). Oral argument occurred on October 23, 2023 before Genesee County Circuit Court Judge Celeste Bell. Judge Bell granted Defendants-Appellees' Motion for Summary Disposition in Lieu of an Answer, along with the motions for summary disposition filed by the other named defendants, and an order was entered that same day. (Exhibit 4)

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On or about November 8, 2023, Plaintiff-Appellant filed a Claim of Appeal with the Court of Appeals. On December 26, 2023, Plaintiff-Appellant filed a Bypass Application for Leave to Appeal before the Michigan Supreme Court. (Exhibit 7). The instant Defendants-Appellants filed a Response to Plaintiff-Appellant's Bypass Application for Leave on January 23, 2024. (Exhibit 8). In addition, the other named Defendants also filed responses. On March 29, 2024, the Michigan Supreme Court denied Plaintiff-Appellant's Bypass Application. (Exhibit 9).

Plaintiff-Appellant now turns to the instant appeal alleging that the tolling provisions discussed in MCL 600.2912b are applicable and the complaint was timely filed. Defendants-Appellants maintain there is no tolling here and *Waltz v Wyse* was correctly decided. Defendants-Appellants request this Court deny Plaintiff-Appellant's Appeal and affirm the ruling of the Genesee County Circuit Court.

STANDARD OF REVIEW

The standard of review for an order denying or granting summary disposition is de novo. *El-Khalil v. Oakwood Healthcare, Inc.*, 504 Mich. 152, 159, 934 N.W.2d 665 (2019); *Gorman v. Am. Honda Motor Co.*, 302 Mich. App. 113, 115, 839 N.W.2d 223 (2013). A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason. *Mulholland v. DEC Int'l Corp.*, 432 Mich. 395, 411, 443 N.W.2d 340 (1989) n. 10.

MCR 2.116(C)(7) provides, in part, for summary disposition where a claim is barred by a statute of limitations. In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157 (2001). Where there are no factual

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disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law. *Id.*

If a claim is time-barred, then the complaint should be dismissed with prejudice. *Holmes v. Michigan Capital Medical Center*, 242 Mich App 703, 707; 620 NW2d 319 (2000).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED DEFENDANTS-APPELLEES' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCL 600.5852 AND *WALTZ V WYSE*.

Plaintiff's Complaint is time barred pursuant to MCL 600.5805(8) and MCL 600.5852. Furthermore, *Waltz v Wyse* is directly on point and is binding precent. As such, Defendants-Appellees request this Court deny Plaintiff-Appellant's Appeal and affirm the ruling of the Genesee County Circuit Court.

A. *Plaintiff-Appellant's Complaint is time barred because the statute of limitations ran prior to its filing and tolling is not applicable.*

MCL 600.5805(8) provides that the statute of limitations for medical malpractice claims is two years from the date of the accrual of the claim. The Estate's claim accrued against McLaren Flint and Dr. Brown on July 16, 2020 when Mr. Ernest presented to the McLaren Flint Emergency Department. As such, the two year statute of limitations is July 16, 2022. There is no dispute the Estate filed its lawsuit on August 14, 2023, which was well after the initial two-year statute of limitations period. Therefore, the Estate's claim is time barred under MCL 600.5805(8).

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Since Plaintiff-Appellant's claim was brought under the Wrongful Death Act, the savings provision comes into play. The Wrongful Death Savings Provision, as detailed in MCL 600.5852, states:

> (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.

Pursuant to the above, Plaintiff-Appellant has two years from the date the letters of authority were issued to file suit. Letters of authority appointing a personal representative are issued on the date on which they are signed by the probate judge. *Estate of Jesse v Lakeland Specialty Hosp at Berrien Ctr*, 328 Mich App 142, 936 NW2d 705 (2019). In the instant matter, letters of authority were issued to the first personal representative on June 7, 2021. (Exhibit 5). Pursuant to the above statute, the Estate had until June 7, 2023 to file suit. Suit was not filed until August 14, 2023, well beyond the June 7, 2023 deadline under the Wrongful Death Savings Provision. As such, the Estate's claim is time barred.

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Plaintiff-Appellant argues it is entitled to tolling based upon the filing of the Notice of Intent. Given that Plaintiff-Appellant's Notice of Intent was filed on February 10, 2023, well after the initial two-year statute of limitations of July 16, 2022, tolling is not warranted. MCL 600.5856(c). Furthermore, MCL 600.5852 is a savings provision, and thus not subject to tolling. *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Since there is no tolling, the Wrongful Death Savings Provision mandated Plaintiff-Appellant's lawsuit be filed by June 7, 2023. There is no doubt the Estate did not file suit until well after the June 7, 2023 deadline. As such, Plaintiff-Appellant's Complaint is time barred and was appropriately dismissed by the Genesee County Circuit Court.

B. *Waltz v Wyse is directly on point and binding.*

In *Waltz v Wyse*, the Michigan Supreme Court addressed the issue of whether the Wrongful Death Savings Provision is subject to tolling. The Court held that the Wrongful Death Savings Provision is not subject to tolling. *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). In reaching that conclusion, the Court stated as follows:

> 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, 564 N.W.2d 861. It is not a "statute of limitations" or a "statute of repose." Thus, the notice tolling provision, § 5856(d)—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.

Id. at 655.

The court went on to state:

> In order to toll the period under § 5856(d), plaintiff was required to provide notices of intent in compliance with the provisions of M.C.L. § 600.2912b before the expiration of the two-year limitation period. Had she done so, the limitation period would have been tolled for 182 days.
>
> However, plaintiff did not provide her notices of intent until January 1999, well after the expiration of the two-year limitation period. As we

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> have explained, the three-year ceiling provided in the wrongful death saving provision was not "tolled" following plaintiff's *652 provision of the notices of intent. Thus, plaintiff's June 23, 1999, complaint was time-barred. [citations omitted].

Id. at 651–52.

As indicated above, the Court clearly distinguished the statute of limitations from a savings provision. In doing so, the Court held that the Wrongful Death Savings Provision is not afforded the benefit of tolling. *Id.* Other courts have followed *Waltz v Wyse*. See *Lentini v Urbancic*, 267 Mich App 579; 705 NW2d 701 (2005). See also *Farley v Advanced Cardiovascular Health Specialist, P.C.*, 266 Mich App 566; 703 NW2d 115 (2005).

The instant matter is very similar to *Waltz*. The alleged malpractice in the instant matter occurred on July 16, 2020. Letters of authority were issued to the first personal representative on June 7, 2021. Pursuant to the Wrongful Death Savings Provision, Plaintiff had two years from the date the letters of authority were issued to the first personal representative to file suit, meaning suit must be filed on or before June 7, 2023. Plaintiff did not file suit until August 14, 2023, well after the deadline set by the Wrongful Death Savings Provision.

Plaintiff-Appellant suggests that instead of *Waltz v Wyse, Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987) and *Omelenchuck v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000) control. Plaintiff-Appellant's arguments must fail. The *Waltz* holding has faced challenges over the years, all without success. Most recently, the case of *Poniewierski v William Beaumont Hosp Royal Oak*, unpublished opinion of the Court of Appeals, issued December 1, 2022 (Docket No. 356925) attempted to challenge the *Waltz* holding. (see Exhibit 10). In that case, the Court addressed Plaintiff's argument that *Hardy* and *Omelenchuck* control as opposed to *Waltz*. The Court explained that *Hardy* dealt with whether MCL 600.5852 applied to cases in which death was instantaneous and did not involve the distinction between a savings provision

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and statute of limitations. *Poniewierski v William Beaumont Hosp Royal Oak*, unpublished opinion of the Court of Appeals, issued December 1, 2022 (Docket No. 356925), 2022 WL 17368761, p *5. The Court differentiated *Omelenchuck* by explaining that *Omelenchuck* dealt with whether the notice of intent tolling provision was 182 days or 154 days when a defendant did not provide a written response to the notice of intent and did not decide whether the Wrongful Death Savings Provision could be tolled. *Id.* The Court of Appeals ultimately upheld *Waltz* and the Michigan Supreme Court denied leave. See *Poniewierski*, supra. (See Exhibits 10 & 11). At the present, *Waltz* remains authoritative and is applicable to the instant matter.

Despite Plaintiff-Appellant's arguments, there are no facts to support the application of *Waltz* to the instant matter defies legislative intent and leads to an inappropriate result. In the instant matter, the personal representative had ample time to file suit. Specifically, the alleged malpractice occurred on or about July 16, 2020. Mr. Ernest died the following day on July 17, 2020. The personal representative was appointed on June 7, 2021 and thus, under the Wrongful Death Savings Provision, had until June 7, 2023 to file suit. This left the Estate three years to explore the potential merits of this claim and file a notice of intent and complaint. As such, the legislative intent of ensuring a lawsuit does not die with the death of the original claimant was certainly met here.

Furthermore, Waltz was decided approximately 20 years ago. If the legislature was concerned that *Waltz* hindered the intent behind the statute of limitations applicable in lawsuits alleging wrongful death as a result of medical malpractice, additional legislation could have been passed. Similarly, if the legislature opined that *Waltz* made the statute unworkable or harmed the public interest, it could have acted by passing additional legislation. In the 20 years since *Waltz*

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has been decided the legislature has taken no such action, suggesting *Waltz* does not defy the intent of the statute.

Plaintiff-Appellant's argument that the *Waltz* holding reduces the Wrongful Death Savings Provision from two years to 18 months is inaccurate. *Waltz* in no way reduced the savings provision. Rather, *Waltz* confirmed the savings provision is not afforded the benefit of tolling. Since there is no tolling of the Wrongful Death Savings Provision, the Estate's Complaint is untimely in the instant matter. As such, this Court should deny Plaintiff-Appellant's Appeal and affirm the decision of the Genesee County Circuit Court.

CONCLUSION AND RELIEF REQUESTED

The letters of authority in this matter were issued on June 7, 2021, appointing the first personal representative, Keran Ernest. Under the Wrongful Death Savings Provision, Plaintiff-Appellant was required to file suit by June 7, 2023, or within two years after the letters of authority were issued. Plaintiff-Appellant failed to do so. Suit was not filed until August 14, 2023, well after the June 7, 2023 deadline. Since Plaintiff did not bring the lawsuit within the two-year period of the appointment of the first personal representative, the lawsuit is untimely.

WHEREFORE, Defendants-Appellees, Paul W. Brown, Jr., MD and McLaren Health Care Corporation, request that Plaintiff-Appellant's Appeal be denied in its entirety and that an order affirming the Circuit Court's rulings be entered.

Respectfully Submitted,

CLINE, CLINE & GRIFFIN, P.C.

Megan Mulder

Date: July 15, 2024

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Megan R. Mulder P-77597
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CERTIFICATE OF COMPLIANCE

I certify that Defendants-Appellees' Response to Plaintiff-Appellant's Brief on Appeal complies with the type-volume limitation set forth in MCR 7.212(B). This Brief uses a 12-point proportional font (Times New Roman), and the word count, based upon the word count of the word-processing system, for this brief is 3367.

Date: July 15, 2024



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Appendix
Exhibit 15

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

KERAN ERNEST, Personal Representative of the ESTATE OF MAURICE ERNEST,

Plaintiff-Appellant,

v

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

Defendants-Appellees,

and

DR. FAROUK M. BELAL,

Defendant.

UNPUBLISHED
March 20, 2025
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No. 368566
Genesee Circuit Court
LC No. 2023-119425-NH

Before: CAMERON, P.J., and GARRETT and MARIANI, JJ.

PER CURIAM.

In this action for wrongful death arising out of medical malpractice, plaintiff appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) (statute of limitations) to defendants because plaintiff's claims were untimely. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's decedent presented to the emergency room on July 16, 2020, complaining of chest pain. After being examined in the emergency room, decedent was moved to the cardiac unit for observation. He died the next day. Relevant to this appeal, on June 7, 2021, the Genesee County Probate Court issued letters of authority appointing Keran Ernest as the personal representative of decedent's estate. Plaintiff sent its notice of intent to defendants on February 10, 2023, and filed suit on August 14, 2023. Defendants moved for summary disposition under

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MCR 2.116(C)(7) (statute of limitations), arguing that plaintiff's complaint was time-barred. The trial court granted the motions and dismissed the case. Plaintiff now appeals.

II. STANDARD OF REVIEW

"This Court reviews de novo both the applicability of a statute of limitations and the trial court's ruling on a motion for summary disposition." *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 21; 896 NW2d 39 (2016) (citations omitted). "Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations." *Dep't of Environmental Quality*, 318 Mich App at 21 (quotation marks and citation omitted). "Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute." *Id.* (quotation marks and citation omitted).

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dep't of Environmental Quality*, 318 Mich App at 21 (quotation marks and citation omitted).]

III. ANALYSIS

The question in this appeal involves the application of three statutes: (1) the statute of limitations for medical malpractice claims, MCL 600.5805(8), (2) the wrongful death savings provision (the "savings provision"), MCL 600.5852, and (3) the notice-tolling provision, MCL 600.5856(c).

Generally, medical malpractice actions are subject to a two-year statute of limitations from the time the claim accrues. MCL 600.5805(8). 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). A plaintiff alleging medical malpractice must give the defendant-provider written notice at least 182 days before filing suit. MCL 600.2912b(1). "At the time notice is given in compliance with the applicable notice period[,]" if the statute of limitations would have expired before the 182-day period elapsed, the limitations period "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(c). In this case, plaintiff's claim accrued when decedent allegedly received negligent medical care on July 16, 2020. Had plaintiff provided its notice of intent within two years of this date, the limitations period for bringing the claim under MCL 600.5805(8) would have been tolled, but plaintiff did not do so. Thus, when considered solely in the context of the original statute of limitations, plaintiff's claim expired on July 16, 2022, and its August 14, 2023 complaint was untimely.

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However, the savings provision provided plaintiff with additional time in which to file suit. Relevant to this appeal, MCL 600.5852 states:

> (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.
>
> * * *
>
> (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(1), (2), and (4).]

Plaintiff's letters of authority were issued on June 7, 2021. Thus, under MCL 600.5852, plaintiff had until June 7, 2023 to file suit, even though the original statute of limitations had already expired. Again, plaintiff did not file its complaint until August 14, 2023. So, plaintiff's complaint was still untimely even when the savings provision is considered.

Plaintiff argues that the notice of intent it provided on February 10, 2023 tolled the period in which it could file suit under the savings provision. According to plaintiff, the notice tolling provision applies to the savings provision, rendering its suit timely. Plaintiff's claim fails because, in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), our Supreme Court expressly rejected the application of the tolling provision in MCL 600.5856 to the savings provision in MCL 600.5852.

Plaintiff acknowledges that its argument is contrary to our Supreme Court's holding in *Waltz*, but asserts *Waltz*'s holding is contrary to the Legislature's intent. In its effort to side step *Waltz*'s holding, plaintiff spins two earlier cases from our Supreme Court to support its claim that the tolling provision in MCL 600.5856(c) applies to the savings provision: *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987), and *Omelenchuk v Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz*, 469 Mich at 642. Plaintiff argues that *Hardy* remains good law because it was not expressly overruled by *Waltz*, and urges this Court to "apply the unambiguous language" of *Omelenchuk* despite it having been overruled by *Waltz*.

In *Waltz*, our Supreme Court held that MCL 600.5856 does not toll the time frame provided in MCL 600.5852. *Waltz*, 469 Mich at 650-651. It reasoned that MCL 600.5856 applies to a "period of limitations[,]" and MCL 600.5852 "clearly provides that it is an *exception* to the limitation period," not a limitation period itself. *Waltz*, 469 Mich at 651. Thus, while MCL 600.5856 may serve to toll the two-year statute of limitations for the underlying medical-malpractice claim, it does not toll the two-year *exception* to the statute of limitations under MCL 600.5852.

Because *Waltz* is binding on this Court, we lack the authority to consider plaintiff's argument regarding legislative intent. See *Assoc Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016) ("The Court of Appeals is bound to follow decisions by [our Supreme] Court except where those decisions have clearly been overruled or superseded") (emphasis omitted). As for plaintiff's argument regarding *Hardy* and *Omelenchuk*, *Waltz* explicitly overruled *Omelenchuk*, see *id*., and *Hardy* predates *Waltz*, meaning we must follow *Waltz*, see *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 03 NW2d 486 (2005) (explaining that this Court is "obligated to follow the most recent pronouncement of the Supreme Court on a principle of law.").

Affirmed.

/s/ Thomas C. Cameron
/s/ Kristina Robinson Garrett
/s/ Philip P. Mariani

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