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STATE OF MICHIGAN
IN THE SUPREME COURT

KERAN ERNEST, 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. 168462
Court of Appeals Case No. 368566
Oakland County Circuit Court Case No. 2020-179077 NH

/

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED

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

Plaintiff-Appellant says "No."

Defendants-Appellants say "Yes."

The trial court did not address this issue.

The Court of Appeals did not address this issue.

II. Whether *Waltz v Wyse*, 469 Mich 642 (2004), should be retained under principles of stare decisis outlined in *Robinson v City of Detroit*, 462 Mich 439, 463–468, even though it was wrongly decided?

Plaintiff-Appellant says "No."

Defendants-Appellants say "Yes."

The trial court did not address this issue.

The Court of Appeals did not address this issue.

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INTRODUCTION

Twenty-one years ago, the Michigan Supreme Court issued its opinion in *Waltz v Wyse*, upending the statutory scheme for medical malpractice actions established by the Legislature. 469 Mich 642 (2004). Since then, *Waltz* has remained an outlier even within the context of medical malpractice caselaw. Critically, *Waltz* actively undermines the Legislatures intent in enacting the notice of intent requirement and corresponding tolling provisions by applying one portion of that scheme to claims brought by the personal representatives of deceased persons. This Court should take this opportunity to apply the normal canons of statutory interpretation to correct the mistake of *Waltz* and reharmonize the statutory scheme created by the Legislature.

STATEMENT OF FACTS

The medical facts specific to this case are not relevant to the issues which this Court ordered the parties to address in their supplemental briefs, but can be found at pages three to four of Plaintiff-Appellant's Application for Leave to Appeal.

STANDARD OF REVIEW

Questions of statutory interpretation are reviewed *de novo*. *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 35 (2015). While this Court generally adheres to principles of *stare decisis*, it will reexamine precedent where legitimate questions have been raised about the correctness of the decision. *Bezeau v Palace Sports & Entm't*, 487 Mich 455, 466; 795 NW2d 797 (2010), citing *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000).

ARGUMENT

Waltz' interpretation of the medical malpractice period of limitations framework is unworkable, inequitable, and inconsistent with the language of the statutes it purports to interpret. As this Court has previously held a statute of limitations is "a statutory provision that requires a person who has a cause of action to bring suit within a specified time." *Miller v Mercy Mem'l Hosp*

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Corp, 466 Mich 196, 202 (2002). While the *Waltz* court called MCL 600.5852 a savings provision, it meets the very clear definition of a statute of limitations. The *Waltz* Court reversed prior precedents in a decision that eschewed established canons of statutory interpretation and the decision is contrary to the Legislative intent and purpose of the notice of intent requirements enacted during tort reform. Given the wrongness of *Waltz* and the lack of reliance interests or other justification to preserve it under principles of *stare decisis*, this Court should overrule *Waltz*.

I. *Waltz* was Wrongly Decided Because it is Inconsistent with the Plain Language of the Medical Malpractice Statutory Scheme

A. Applicable Law

The rules of statutory interpretation are well settled and recently explained by this Court in *Maples v State*:

> [O]ur 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 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).

When interpreting statutes with overlapping subject matter, the Court reads statutes *in pari materia*, i.e., "statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law." *People v Mazur*, 497 Mich 302, 313 (2015) (citation omitted). And where two provisions address the same issue, the specific controls over the general. *Safdar v Aziz*, 501 Mich 213, 218 (2018) (citing *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 648 (2012)).

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The question presented involves the interplay between a number of statutes in the Revised Judicature Act of 1961:

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. 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 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. (9) If at any time during the applicable notice period under this section a health professional or health facility receiving a notice under this section informs the claimant in writing that the health professional or health facility 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 600.5805	(8) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.
MCL 600.5838a	(2) 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 described in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovery or should have discovery the existence of the claim, whichever is later.
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

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	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 600.5856	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.

Application of the well-established principles of statutory construction to the medical malpractice statutory scheme demonstrates that *Waltz* was incorrectly decided.

B. Correct Application of the Rules of Statutory Construction Demonstrate that *Waltz* was Wrongly Decided

The *Waltz* Court determined that the tolling provisions of MCL 600.5856 do not apply to wrongful death cases because the wrongful death statute is a saving statute or saving provision[1] and "[B]y its own terms, § 5852 is operational only within the context of the *separate* 'period of limitation' that would otherwise bar an action. Section 5852 clearly provides that it is an *exception* to the limitation period . . ." 469 Mich 642, 651 (2006) (emphasis original).

At its core, *Waltz* incompletely interpreted the relevant statutes by failing to examine them in *pari materia*. A review of the majority opinion in *Waltz* demonstrates a blinkered view of the overall medical malpractice scheme. The majority focused almost exclusively on § 5852, adopting the Court of Appeals' reasoning of the that, "We need look no further than the language of the

[1] Depending on whether the Court was quoting *Miller* or *Lindsay*. *See Waltz v Wyse*, 469 Mich 642, 650 (2006).

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tolling statute to resolve this issue. MCL 600.5856(d) expressly tolls the 'statute of limitations.'" The Supreme Court has recently said that MCL 600.5852 is not a statute of limitations, but rather a savings statute." *Waltz*, 469 Mich at 649 (quoting the Court of Appeals below).

But the dissent in *Waltz* wisely cautioned, "[b]ecause the various statutory provisions implicated in this case relate to the same subject matter, the terms of the provisions should be read *in pari materia*." *Waltz*, 462 Mich 665–666 (Cavanaugh, J., dissenting). There can be no argument that §§ 5805, 5838a, and 5851–5856 relate to the same subject matter, *ie, the timing applicable to the filing of* medical malpractice claims. The Legislature undoubtedly intended such an interplay as evidenced by the explicit language contained in § 5838a(2), which incorporates by reference the provisions of § 5805 and §§ 5851–5856. *Cf. Adkins v Annapolis Hosp*, 420 Mich 87, 93–95 (1984) (holding that hospitals were subject to the two-year statute of limitations in § 5805 because of their inclusion in § 5838).

Before addressing the *in pari materia* reading of these statutes, it is important to understand how the Michigan Legislature authored personal/property injury statutes of limitations other than medical malpractice. MCL 600.5805 sets forth the general statutes of limitations. Of the eleven discrete statutes of limitations identified in that section,[2] only *one* references periods of limitations outside of the section, the malpractice provision. MCL 600.5805(8) ("Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice."). This demonstrates the Legislature's intent to create a more complex and nuanced scheme for malpractice claims.

[2] MCL 600.5805(2)–(13). The provision concerning architectural or engineering malpractice point to the general malpractice statute of limitations that Plaintiff does not count that as a separate statute of limitations for purposes of this analysis. MCL 600.6805(13).

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Within the realm of malpractice claims, medical malpractice stands alone. The statutory scheme for medical malpractice periods of limitations consists of MCL 600.5805, MCL 600.5838, MCL 600.5838a, MCL 600.5838b, and "sections 5851 to 5856 . . ." MCL 600.5838a(2). And § 5856 expressly references the notice of intent provisions in § 2912b. MCL 600.5856(c). These statutes all serve the same general purpose and relate to the same subject and therefore, "must be read together." *People v Mazur*, 497 Mich 302, 321–322 (2015) (citations and internal quotation omitted).

Waltz focused on the language in MCL 600.5852 that, "the period of limitations has run." *Waltz*, 469 Mich at 651. But it ignored the specific language in MCL 600.5838a(2) which provides that, "an action involving a claim for medical malpractice may be commenced at any time within the applicable *period* prescribed in section 5805 *or section 5851 to 5856*, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5838a(2) (emphasis added). By listing §§ 5851–5856 between § 5805 and the six-month discovery period in § 5838a(2), The Legislature identified § 5852 as a period of limitations for medical malpractice actions. *See Ally Fin, Inc v State Treasurer*, 502 Mich 484, 498 n 31 (2018) ("The [associated-words canon (*noscitur a sociis*)] applies where words or phrases are associated in a context suggesting that the words [or phrases] have something in common, and they should be assigned a permissible meaning that makes them similar.") (first alteration added, internal citation and quotation omitted). The *Waltz* Court's review of just the language of § 5852 missed this. As this Court has recognized, "the six-month discovery rule is a distinct period of limitation. It is a statutory provision that requires a person who has a cause of action to bring suit within a specified time." *Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196, 202 (2002). There is no textual basis to treat the six-month discovery rule in § 5838a(2) any differently than the "applicable period

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in section 5805 or sections 5851 to 5856 . . .” MCL 600.5838a(2). This is where the doctrine of *noscitur a sociis* provides guidance on interpretation. *Ally Fin, Inc v State Treasurer*, 502 Mich 484, 498 n 31 (2018); *Tyler v Livonia Pub Schs*, 459 Mich 382, 391 (1999). Section 5838a(2) treats the periods provided by § 5805, §§ 5851–5856, and the six-month discovery rule without distinction and this Court should do the same.

Whether a medical malpractice claim is filed using the general two-year statute of limitations, the six-month discovery statute of limitations, or the two-year wrongful death period, it is subject to the same procedural requirements. Plaintiffs *must* file a notice of intent and wait the prescribed period. They must follow the procedures governing affidavits of merit. And regardless of the statute of limitations used, they are subject to the six-year statute of repose. *See Burton v Macha*, 303 Mich App 750, 756 (Ct App 2014) (applying the six-year statute of repose to claims brought using the wrongful death statute). *Waltz* created a disharmony in this statutory scheme by establishing a different rule for notice of intent tolling which is only applicable for claims brought using the wrongful death statute. It is notable that the rule from *Waltz* does not apply to the provisions of § 5851(7) which uses similar language to § 5852. *See Vanslembrouck v Halperin*, 483 Mich 965, 967 (2009) (Corrigan, J. dissenting). The refusal to extend *Waltz* to its logical conclusions both demonstrates the weakness of the reasoning in that case *and* creates a inexplicable disconnect within the medical malpractice statutory scheme where similar provisions are given different effect.

The general language used by the Legislature to establish all other statutes of limitations is also consistent with large portions of the wrongful death statute. Section 5805(1) provides that a “person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through who the plaintiff claims,

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the action *is commenced within the periods of time* prescribed in this section." MCL 600.5805(1) (emphasis added). And § 5838a(2) similarly provides that 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 . . ." MCL 600.5838a(2) (emphasis added). Turning to § 5852, it provides that, "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 . . ." MCL 600.5852(1) (emphasis added).

The tolling provisions of § 5856(c) are also more specific than the two-year time limit for wrongful death actions set forth in § 5852(1) in the context of medical malpractice because § 5856(c) exclusively addresses tolling for medical malpractice cases, while § 5852(1) applies to all wrongful death actions. While § 5852(2) does specifically address medical malpractice claims, it concerns the tacking of additional time from subsequently issued letters of authority. Under the doctrine that more specific statutory provisions govern over the more general, § 5856(c) operates to toll the two-year period set forth in the wrongful death statute.

Where the Legislature sought to avoid enlargement of the time provided by the wrongful death statute, it did so explicitly and in reference to medical malpractice.

> (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.
>
> MCL 600.5852(2)–(3).

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Unlike the limits on tacking successive personal representatives, there is no similar provision barring the application of the tolling provisions in MCL 600.5856. And "While 'the Legislature is presumed to be aware of, and thus to have considered the effect [of statutory enactment] on, all *existing* statutes,' it makes no sense to presume knowledge of a potential future conflict without a context in which such knowledge would arise." *Mays v. Snyder*, 323 Mich App 1; 916 NW2d 227, 251 (Mich App 2018) (internal citation omitted, alteration original) (aff'd *Mays v Gov of Mich*, 506 Mich 157 (2020)). This guidance is particularly appropriate where, as Justice Cavanagh recognized in his dissent in *Waltz*, "[t]he saving provision remained unchanged in the face of tort reform . . ." *Waltz*, 469 Mich at 667 (Cavanagh, J., dissenting).

The basis used for excluding the wrongful death period from the scope of § 5856 tolling provisions of is the phrase, "although the period of limitations has run" in § 5852(1). *See Waltz*, 469 at 651. This language alone is insufficient to categorize the statute as something other than one of limitations, particularly when every action brought pursuant to the two-year period set forth in § 5852 has a discreet underlying statute of limitations. Instead, § 5852 provides an alternate statute of limitations applicable to all wrongful death actions to provide time for personal representatives to get affairs in order and then pursue claims that survive by law. "The Revised Judicature Act, MCL 600.101 *et seq.*, does not define 'statute of limitations' or saving provision.'" *Vanslembrouck v Halperin*, 483 Mich 965,968 (Corrigan, J., dissenting). The *Waltz* Court held that the language in *Omelenchuk v City of Warren*, 461 Mich 567 (2000), that § 5852 was a statute of limitations was dicta but overruled it to the extent that it held that § 5852 provided a statute of limitations. *Waltz*, 469 Mich 653–654. Yet *Omelenchuk*'s "passing references"[3] holding that § 5852

[3] *Waltz*, 469 at 653. *But see id.* at 661 (Cavanagh, J., dissenting) ("Thus, this Court, in a unanimous decision, unquestionably applied § 5856(d) to the limitation period provided under § 5852.").

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creates a separate statute of limitations is the best and most natural reading of the two-year period provided there. *Omelenchuk v City of Warren*, 461 Mich 567, 577 (2000).

C. The Term "Savings Provision" Lacks a Consistent Meaning Under Current Jurisprudence

Because the *Waltz* Court relied on the distinction between a savings provision and statute of limitations, its holding is only workable to the extent that savings provision has a well-defined meaning by which people can organize their behaviors and conduct. And given the interaction between statutes of limitations and savings provisions created by *Waltz*, it is also necessary to understand what a statute of limitations is under Michigan law.

The Revised Judicature Act does not define statute of limitations. Black's Law Dictionary defines a statute of limitations as, "A law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." Statute of Limitations, BLACK'S LAW DICTIONARY (12th ed). This Court recently cited portions of this definition[4] with approval. *Frank v Linkner*, 500 Mich 133, 142 (2017) ("A 'statute of limitations' is a 'law that bars claims after a specified period; specif[ically], a statute establishing a time limit for suing in a civil case, based on the date when the claim *accrued*.'") (emphasis original) (quoting *Black's Law Dictionary* (10th ed)). Within the medical malpractice statutory scheme, however, many of statutes of limitation are *not* tethered to the date of accrual such as the six-month discovery period, § 5838a(2), the fraudulent concealment and reproductive injury period, § 5838a(3), and the infancy periods. MCL 600.5851(7)–(8).[5] Thus, at least within the context of the scheme created by the Legislature for medical malpractice claims, there are more exceptions to rule that a statute of limitations is based

[4] From a previous edition but the language appears identical.
[5] While these periods do reference the accrual of the claim, the period within which a plaintiff may file is based exclusively on their age.

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on the date of accrual than periods of limitations that follow it. In *Omelenchuk v City of Warren*, this Court applied the two-year period provided by § 5852 as a statute of limitations. 461 Mich 567, 577 (2000). The majority of the *Waltz* Court found this to be a "passing reference" or "imprecise choice of words," *Waltz*, 469 Mich at 653–654, but the limited discussion in *Omelenchuk* was actually indicative of the unambiguous effect and intent of the two-year period in § 5852. As Justice Cavanagh wrote in his dissent from *Waltz*, "because § 5852 requires a plaintiff to bring suit within a specified time, § 5852 must be considered a limitation period." 469 Mich at 664 (Cavanagh, J., dissenting).

There is no reliable definition of a 'savings provision' in Michigan case law or other legal sources. Black's Law Dictionary (12th ed) does not contain a definition for 'savings provision' or 'saving provision.' The most recent attempt by the Michigan Supreme Court to distinguish a statute of limitations from a savings provision that Plaintiff identified comes from the dissent in *Vanslembrouck v Halperin*, 483 Mich 965 (2009). However, the explanation provided by the dissent in *Vanslembrouck* is highly circular and does not provide a consistent rule that can be reliably applied.

In her dissent in *Vanslembrouck*, Justice Corrigan relied heavily on this definition to argue that § 5851(7) is another savings provision and therefore, not subject to tolling pursuant to § 5856(c). *Vanslembrouck v Halperin*, 483 Mich 965, 968 (2009) (Corrigan, J. dissenting). However, the second part of this definition – the portion consistent with Justice Corrigan's usage – renders the six-month discovery period *not* a statute of limitations because § 5838a(1) expressly establishes the accrual date for medical malpractice claims as "the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." Justice Corrigan argued:

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> MCL 600.5838a(2) further specifies: "an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in [MCL 600.5805 or [MCL 600.5851 to 600.5856]." Section 5805 generally establishes the limitations periods for civil actions; § 5805(6) establishes the two-year period for malpractice actions that generally begins to run "at the time of the act or omission that is the basis for the claim of medical malpractice," § 5838a(1) The remaining sections, 5851 to 5856, provide alternative times for the commencement of the suit under specific circumstances. Significantly, none of these sections describe alternative statutes of limitations measured from the date when the claim accrued. Rather, each rule appears to do one of two things: it either establishes a saving period that permits a plaintiff to bring his claim *although the period of limitations has run*, or it delays the running of the established limitations period by measuring that period not from the date of accrual, but from some point after accrual, under specified unusual circumstances.
>
> *Vanslembrouck v Halperin*, 483 Mich 965, 969 (2009) (Corrigan, J. dissenting) (alterations original).

This approach creates more problems than it solves. Starting with the obvious, the six-month discovery period in § 5838a(2) simply does not "describe alternative statutes of limitations measured from the date when the claim accrued" because it runs from the date the claimant discovered or should have discovered the claim. MCL 600.5838a(1) itself expressly provides that the accrual date for a medical malpractice claim runs from the date of the act or omission "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." The six-month discovery period, however, *must* be a statute of limitations subject to § 5856(c) tolling or it would be entirely useless as the notice of intent period would run before a plaintiff was able to file their complaint. *See State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.") (citation omitted).

Building on the first problem, the *Vanslembrouck* dissent and *Waltz* majority never explain how a period in which a claimant is entitled to file a lawsuit is *not* a period of limitations beyond simply stating that it is an exception to the statute of limitations. The common understanding, consistent with the first part of the Black's Law Dictionary definition is that a statute of limitations

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defines the period in which a person may file a claim. Nor does *Waltz* or any other case explain why a savings provision itself cannot provide a distinct period of limitations in which a claimant may file their case.

In *Lindsey v Harper Hosp*, 455 Mich 56 (1997), this Court described the effect of § 5852 as "the statute of limitations saving provision operates to suspend the running of the statute until a personal representative is appointed to represent the interests of the estate." 455 Mich at 61. The *Waltz* Court built upon the definition in *Lindsey* explaining that, "[s]ection 5852 clearly provides that it is an *exception* to the limitation period, allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired." *Waltz*, 469 Mich at 651. A better approach to savings provisions and statutes of limitations is that they are not mutually exclusive. Rather, savings provisions are exceptions to the general statutes of limitations and themselves provide an "alternative statute of limitations" as is the case with the six-month discovery period. Savings provisions would retain some usefulness in describing statutory provisions without sowing chaos into the already complex medical malpractice statute of limitations. For these reasons, *Waltz* was wrongly decided and the doctrine of *stare decisis* is insufficient to save it.

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

The doctrine of stare decisis is an important element of the rule of law "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson v City of Detroit*, 462 Mich 439, 465 (2000).

Even though the *Waltz* decision was wrong, "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." *Robinson v City of Detroit*, 462 Mich 439, 465 (2000). In addition to finding that a prior case was wrongly decided, the principles

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of stare decisis require the Court assess whether the prior decision defies practicable workability, the reliance interests in question, and whether overruling the prior decision would cause undue hardship. *Id*. at 464–465.

A. The Decision in Waltz is Unworkable

The *Waltz* decision creates several distinct problems. First, it acts a trap for the unwary. Second, it shortens the time provided by the Legislature for people to file claims in an uneven and inequitable manner. Third, it provides unprecedented power to defendants by letting them decide in certain cases whether a claim can be timely filed. Fourth, it creates a single and inexplicable statutory outlier in the overall medical malpractice framework by applying all the requirements of a medical malpractice claim to wrongful death actions but none of the corresponding benefits. All of these are contrary to the plain language and intent of the statutory scheme created by the Legislature.

Waltz creates a trap for the unwary as it alters the tolling provisions provided by § 5856 in a manner that is unexpected. Most claimants will assume that if a statute tolls the statutes of limitations *and* repose for filing a medical malpractice action, it would include the lesser period for medical malpractice claims set forth in § 5852. This is critical for those people who have lost loved ones and family members and are trying to pick up the pieces and move forward. In all such cases, an estate must be opened for purposes of filing a wrongful death case. The personal representative may have no notice that there is a potential medical malpractice claim until months after the death, and they then must obtain relevant medical records and get to an attorney in time for the necessary leg-work to be done in preparing a notice of intent and serving it upon the potential defendants. Coupled with the required probate filings, these claimants have a greater lift than any other civil litigant. The artificial reduction of time with which to bring these claims created by *Waltz* is inequitable.

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Waltz also impermissibly shortens the time provided by the Legislature for people to file medical malpractice claims. Section 5856 explicitly and unambiguously tolls the running of the statutes of limitations and repose during the 182-day notice of intent period for medical malpractice claims. MCL 600.5856(c). Within the context of the statutory scheme for medical malpractice claims, this makes perfect sense as service of a notice of intent is a condition precedent to the filing of a claim and, absent tolling the effective statute of limitations, would be eighteen months. However, this is not the only way the *Waltz* decision singles out claims brought on behalf of the deceased. As a direct and natural extension of *Waltz*, this Court subsequently held that the filing of a complaint and service of process *also* does not toll the running of the two-year period in the wrongful death statute. *Ligons v Critterton Hosp*, 490 Mich 61, 74–75 (2011). Putting these limitations together demonstrates the unworkability of *Waltz*. If a personal representative is appointed after the running of the two-year statute of limitations, they immediately lose six months to file the lawsuit because they must file a notice of intent and wait 182 days without the benefit of tolling. Assuming the personal representative can obtain the medical records and an attorney in time to timely file the notice of intent, complaint, and affidavit(s) of merit within the two-year period provided by § 5852, they must pray that no filing defect sufficient to warrant dismissal is present or they will almost certainly be unable to refile.

Third, *Waltz* gives defendants an unprecedented advantage during the notice of intent waiting period . As this Court has previously recognized, "[t]he advance-notice requirement encourages settlement of a dispute in lieu of costly litigation, and rigid interpretations of MCL 600.2912b do not foster or encourage the statute's goal of advancing settlement and reducing litigation costs." *DeCosta v Gossage*, 486 Mich 116, 123 (2010). MCL 600.2912b(1) requires a claimant to serve notice of intent on a potential defendant and wait 182 days before filing a

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complaint. That 182 day requirement is eliminated if, at any point during that period, the defendants state in writing that they do not intend to settle the claim. MCL 600.2912b(9). The 182 period is also reduced to just 154 days if the defendants fail to respond to the notice of intent. MCL 600.2912b(8). In cases where the plaintiff is still living, these deadlines merely reflect the Legislature's desire to attempt to reduce litigation costs by encouraging settlement because, if the defendant is not going to settle or respond during the relevant period the plaintiff can simply proceed to filing. However, in wrongful death cases, *Waltz* creates the situation where a defendant can win a case simply by responding to the notice of intent within 154 days and refraining from informing the plaintiff that they do not intend to settle. In circumstances where there is a meritorious claim that will be barred by *Waltz*, defense counsel can simply wait until the expiration of the notice period without ever considering settling the case so long as they do not put that strategy in writing. Not only is this contrary to the articulated legislative purpose of the notice requirement, but it provides disproportionate power to the defendant of the type not seen in other type cases. In this case, for example, Plaintiff served its notices of intent on February 10, 2023, and the two-year period provided by § 5852 expired on August 11, 2023. Had Defendants not responded after 154 days, Plaintiff would have been able to timely file her complaint on, or after, July 14, 2023. This power given to defendants by *Waltz* is directly contrary to the purpose of the notice of intent requirements because rather than incentivizing negotiations and settlement, it incentivizes defendants to wait until the wrongful death period of limitations expires to make their intentions known.

A hypothetical is useful in demonstrating the unworkability of the *Waltz* decision. Claimant went to Dr. Defendant submitted to a CT scan for persistent respiratory symptoms on January 1, 2019, and which Dr. Defendant interprets as COPD. Claimant receives treatment for COPD from

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other providers for the next four years. On January 1, 2023, Dr. Capable performs a CT scan, comparing it to the one performed three years earlier, and identifies a cancerous mass on both; now enlarged and with spread to nearby lymph nodesand identifies the cancerous mass that Dr. Defendant failed to recognize. Claimant dies on January 1, 2023, and the next day letters of authority are issued to Percy Representative. Because the potential medical malpractice was not discovered until January 1, 2023, the six-month alternate statute of limitations provides the underlying period of limitations for purposes of § 5852. Now, Percy Representative collects medical records, finds an attorney, and on October 1, 2024, serves a notice of intent on Dr. Defendant. As of October 1, 2024, there are 92 days left six-year statute of repose and 93 days left in the period of limitations provided by § 5852. Under *Waltz*, Percy Representative's claim will be barred by the wrongful death period but not the statute of repose. This hypothetical demonstrates that the *Waltz* decision does not promote the evenhanded administration of justice or consistent development of legal principles.

Finally, *Waltz* creates a disjointed statutory scheme where wrongful death plaintiffs are treated differently, without cause or explicit intent. Moreover, given this Court's refusal to take up a *Waltz* style challenge to the infancy and disability provisions in § 5851, *Vanslembrouck v Halperin*, 483 Mich 965 (2009), there are two sets of rules for similar provisions. This inconsistency only serves to undermine the predictability and reliability of the rule of law and is inconsistent with notions of fairness.

As this Court recently reaffirmed, "[t]he Legislature surely did not intend its tolling provision as a trap for the unwary . . ." *Haksluoto v Mt Clemens Reg'l Med Ctr*, 500 Mich 304, 322 (2017) (alterations original) (quoting *Omelenchuk v City of Warren*, 461 Mich 567, 576 n 19

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(2000)). Neither did the Legislature intend prejudice wrongful death claimants by imposing arbitrary rules concerning medical malpractice actions that apply in no other circumstances.

B. There are no Reliance Issues

This Court considers both the interests of groups, individuals, the government, and the public at large. *Ottgen v Katranji*, 511 Mich 223, 243 (2022) (citation omitted). Here, because the issue involves "a procedural rule pertaining to civil litigation between private plaintiffs . . . there is no apparent reliance by governmental institutions or the public at large. *Id*. Particularly given the subject matter, the *Waltz* decision has not become "ingrained in American consciousness . . ." Kozel, *Stare decisis as a Judicial Doctrine*, 67 WASH & LEE L REV 411, 462 (2010). Nor will reversing *Waltz* create a cascade where other lines of cases are brought into question, eliminating any doctrinal reliance. *Id*. at 459.

The only entities arguably relying on the *Waltz* decision are medical providers and facilities who are potentially subject to medical malpractice actions. However, the scope of the reliance interest is so narrow that it effectively amounts to nothing. To begin with, *Waltz* is only relevant in cases involving a wrongful death. It is not even every wrongful death case that presents this issue, only those in which a claimant relied on the tolling provisions of § 5856 to permit the filing of a complaint after expiration of the 182-day notice period *after* the running of the two years provided in § 5852. To put the reliance interests in perspective, it is a difference of at most 182 days in a very narrow subset of medical malpractice claims. It is not even within a time-frame that medical providers can write off potential liabilities as claims can still be brought after this period using the discovery rule from § 5838a(2) and tolling the statute of repose with § 5856.

Plaintiff-Appellant is not unsympathetic to the argument of reliance on *Waltz* and *stare decisis*. But plaintiffs throughout Michigan have long been subject to decisions which changed the playing field, including *Waltz* itself. And reliance on a flawed opinion is not a sound reason to

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keep it in place. As this Court noted in *Robinson v City of Detroit*, "We must also recognize that *stare decisis* is a 'principle of policy' rather than 'an inexorable command,' and that the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned." 462 Mich 439, 464 (2000) (quoting *Helvering v Hallock*, 309 US 106, 119 (1940)).The effect of overruling *Waltz* would be that where, as here, the dispositive strategy of silence with respect to pre-suit settlement while waiting out the statute of limitations would no longer deprive a plaintiff from going forward with an expert-supported medical malpractice wrongful death case.

The reliance interests in the ongoing viability of *Waltz* do not support maintaining the rule set forth in that case.

C. *Waltz* was an Abrupt Departure from Prior Precedent

Waltz an abrupt departure from prior precedent and it implicitly overruled portions of the very cases it relied on for its holding. As Justice Cavanagh recognized in his dissent from *Waltz*:

> In an attempt to further distance itself from the result reached in *Omelenchuk*, the majority now asserts that we misspoke when we referred to § 5852 as a limitation period. Instead, the majority simply contends that § 5852 is not a statute of limitation, but a saving provision, in order to justify its current holding. This point of law, however, was settled long before our decision in *Omelenchuk*. *Hardy v Maxheimer*, 429 Mich 422, 425; 416 NW2d 299 (1987); *Lindsey v Harper Hosp*, 455 Mich 56, 60–61; 564 NW2d 861 (1997). Further, while not formally labeled a statute of limitations, it is clear from our prior decisions that § 5852 is a limitation period because it sets forth its own period of limitations.
>
> *Waltz*, 469 Mich at 632–633 (Cavanagh, J., dissenting).

For example, the *Waltz* Court cited portions of *Lindsey* to explain that § 5852 was a saving statute. *Waltz*, 469 Mich at 650 (quoting *Lindsey v Harper Hosp*, 455 Mich 56, 60–61 (1997)) ("See also *Lindsey v Harper Hosp*, in which we explained that § 5852, as 'the statute of limitations *saving provision*' and an 'exception to the statute of limitations,' operated 'to suspend the running of the statute until a personal representative is appointed to represent the interests of the estate.'"). The obvious problem here is that under *Lindsey*, *Waltz* cannot be as correct, because suspending

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the running of a statute of limitations would mean that the underlying period of limitations *did not run*. Plaintiff does not argue that the *Lindsey* Court is correct to the extent it held that the wrongful death statute operates to toll the running of the underlying statute of limitations because it clearly provides a distinct period of limitations *irrespective* of the underlying period. However, *Waltz* was an abrupt departure from prior precedents in that it, for the first time, held that because the period in which to bring a claim was provided for by a so called "savings provision", that it could not also provide an independent statute of limitations. As noted above, *Omelenchuk v City of Warren*, had the best reading that the time period provided in § 5852 provided a statute of limitations. 461 Mich 567, 577 (2000). The fallout created by the *Waltz* decision further demonstrates the abrupt departure from precedent and common understanding. *See Mullins v St Joseph Mercy Hosp*, 480 Mich 948 (2007) (order exempting cases filed after *Omelenchuk* was decided but before the decision in *Waltz* from its retroactive application).

CONCLUSION AND REQUESTED RELIEF

The *Waltz* decision creates an unworkable aberration in the already complex area of medical malpractice litigation. It actively undermines the notice of intent requirement, which was created by the Legislature to encourage pre-suit settlement and reduce costly litigation, and the broad wrongful death statute. A proper reading of § 5852 *in pari materia* results in a more harmonious, consistent, and equitable medical malpractice framework while giving effect to the intent of the Legislature. For these reasons, Plaintiff respectfully requests that this Court overrule *Waltz v Wyse*.

Respectfully submitted,

Date: November 6, 2025

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CERTIFICATE OF COMPLIANCE

I certify that the Plaintiff-Appellant's 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 7,724 inclusive of all portions.

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