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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 APPLICATION FOR LEAVE TO APPEAL

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Plaintiff-Appellants, Keran Ernest, individually and as Personal representative of the Estate of Maurice Ernest, files this Application for Leave to Appeal under MCR 7.305, seeking to appeal the March 20, 2025, order of the Court of Appeals. That order affirmed the trial court's grant of summary disposition to the three Defendants holding that the tolling provisions under MCL 600.2912b do not apply to the wrongful death statute of limitations, MCL 600.5852.

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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: No.

   Trial Court's answered: No.

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INTRODUCTION AND REASONS FOR GRANTING APPLICATION

The issue presented in this 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.

In 2003, this Court issued its opinion in *Gladych v New Family Homes, Inc*, 468 Mich 594 (2003), overruling *Buscaino v Rhodes*, 385 Mich 474 (1971), holding that the plain language of MCL 600.5856 did not toll the statute of limitations upon filing of a complaint. *Gladych supra*, at 605. 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 only question put forward by this case is whether or not

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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.

In the pre-*Waltz* world, this was the case. Appellant contends that this interpretation by the courts was the result more in line with the intentions of the legislature. However, this 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.

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, the designation of 5852 as a savings statute is arbitrary and that this ignores or contradicts other relevant decisions from this Court.

Given that this issue is vital to the surviving family members who seeks to file wrongful death actions and Appellant's timely compliance with the laws governing the Notice of Intent in wrongful death, medical malpractice suits, the arguments put forwards in Justice Cavanaugh's dissenting opinion in *Waltz*, Plaintiff-Appellants file this Application for Leave to Appeal. This is a case of substantial legal and public import, MCR 7.305(B)(1)-(3) and warrants review by this Court. Many potentially sound legal complaints for medical malpractice have been barred by the erroneous ruling of *Waltz* and more are at risk if the errant ruling is not reversed.

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

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:

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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. MCL 600.5805(8).
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).
07/16/2025	Expiration of the three-year period beyond the running of the original statute of limitations wherein a plaintiff may file a claim under the wrongful death statute. MCL 600.5852(4).

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. A**.)

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

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limitations and that the notice of intent does not toll the clock that begins ticking under the savings provision. A bypass application for leave to appeal to this Court was filed on December 26, 2023, and was denied on March 29, 2024. Plaintiff's Appeal of Right was filed on April 15, 2024, and was denied on March 20, 2025.

STANDARD OF REVIEW

Appellant courts review grants of summary judgment *de novo*. Questions of statutory interpretation are likewise reviewed *de novo*. *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 35 (2015). Questions of *de novo* are reviewed independently and without deference to the lower court. *Co of Ingham v Mich Co Rd Comm Self-Insurance Pool*, 508 Mich 461, 476 975 NW2d 826 (2021). This appeal presents a pure question of law as the underlying facts are not disputed. **(Pl's App, Ex. B pp 1-2, Ex. C pp 4, Ex. D pp 1-3.)**

ARGUMENT

The current interpretation of MCL 600.5852 creates an unworkable, inequitable, and confusing standard for plaintiffs to follow, creating a trap for the unwary. Moreover, the current interpretation is contrary to normal cannons of statutory interpretation.

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

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filing a medical malpractice death case; relies on an arbitrary distinction 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

A. Applicable Law

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 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, when application of the normal rules of construction leads to absurd results. *Salas v Clements*, 399 Mich 103, 109–110 (1976). Application of these rules of construction leads to a single result, *Waltz* was incorrectly decided.

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, *Neal v Wilkes*, 470 Mich 661, 665 685 NW2d 648 (2004). To resolve any facial inconsistencies or contradictions, a long-standing maxim of statutory interpretation has been that such statutes should be construed in a way to give effect to the Legislature's intent. "Every word of a statute should be read in such a way that should be given meaning." *Ameritech Mich v PSC (In re MCI)*,

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460 Mich 396, 414; 596 NW2d 164 (1999). Courts are also to interpret statutes addressing the same issue in harmony pursuant to the doctrine of *in pari materia*. *People v Mazur*, 497 Mich 302, 313 (2015).

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.

Under the common law, causes of action were lost upon the death of either the claimant or the tortfeasor. *Estate of Shinholster v Annapolis Hosp*, 471 Mich 540, 595, 685 NW2d 275 (2004). The Michigan Legislature displaced this common law rule by enacting MCL 600.2922 which provides:

> 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) 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:

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> (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:

> (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 provides, "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

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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.

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 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.
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.

(Pl's App'x, Exh. E, F, G)

It is also important to note the absurd result created by the *Watlz* interpretation of the legislatures statutory scheme.

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

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Having articulated the relevant rules of statutory construction, the time for application is at hand. The text is always the first stop in statutory interpretation. *Maples v State*, 507 Mich 461, 470 (2021). In this case, 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 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

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	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 600.5838a	(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.

Starting with the plain language, there is no express language demonstrating that MCL 600.5852 is a "savings statute" nor is there any express language indicating that the tolling provisions of MCL 600.5856 do not apply to the time periods set forth in MCL 600.5852. As Judge O'Connell noted in 2006, shortly after the *Waltz* decision, "Although the particular tolling provision in Section 5856 made no direct reference to the saving statute or its limitations period, such a direct reference did not appear necessary under the classification adopted in *Hardy*, and the statute well predates *Miller's* unassuming, unsupported, and one-sentenced distinction that forever pigeonholed the statute." *Ward v Siano*, 272 Mich App 715, 729 (Mich Ct App 2006) (O'Connell, J., concurring). The *Watlz* Court, focused on references to the "period of limitations" found in Section 5852 as evidence that the section itself did not provide a period of limitations, but rather "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.

The *Waltz* Court itself relied upon *Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196 (2002), for the conclusion that Section 5852 is a saving statute. *Waltz*, 469 Mich at 650 (citing *Miller*, *supra* at 202). *Miller* itself provides only limited analysis as to why Section 5852 is not a statute of limitations and, more critically, why that should change the relationship between

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Sections 5852, 2192b, and 5856. *See Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196, 201–203 (2002). Additionally, the *Miller* Court found that the discovery rule of Section 5838a(2) was a period of limitation because "The plain language of § 5838a(2) provides two distinct periods of limitation: two years after thee accrual of the cause of action, and six months after the existence of the claim was or should have been discovered by the medical malpractice claimant." *Id*. at 202. The analysis provided here is cursory. The Courts reasoning does not create any real distinction between the discovery rule of Section 5838a and Section 5852. Certainly, Section 5856 tolling *must* apply to the discovery rule of Section 5838a because if it did not it would be impossible for claimants to file a notice of intent and wait for 182 days to expire before filing a lawsuit. But this does not explain why the period of limitations in Section 5838a is treated differently than the two-year period of Section 5852. In fact, Section 5838a itself treats Section 5852 as a period of limitation, ". . . within the applicable period described in section 5805 or sections 5851 to 5856 . . ."

The stiflingly narrow reading of Section 5852 and its relationship with Section 5856 creates disharmony within the medical malpractice statutory scheme. One example of this is that a notice of intent filed during the period set forth in Section 5852 does not toll the running of the two-year period set forth there but *does* toll the running of the related statute of repose. MCL 600.5856(c). Another example is that, in some cases, the *Waltz* decision gives defendants the ability to choose whether a plaintiff will be able to timely file a Complaint. This is due to MCL 600.2912b(8)–(9). Section 2912b(8) permits a plaintiff to file a complaint just 154 days after filing notice if they do not receive a timely response to their notice of intent. Section 2912b(9) permits a plaintiff to file their complaint at any time after serving the notice of intent if the defendant(s) notify the plaintiff "in writing that the health professional or health facility does not

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intend to settle . . .” In situations, such as the case at bar, where the two-year period provided by Section 5852 expires during the 182-day notice period, defendants are given control as to whether a plaintiff can timely file a complaint. Here, the Defendants are sure that the period of limitations has run and theoretically could have informed Plaintiff at any time that they were not going to settle because they believed the claim would be time-barred, permitting Plaintiff to file sooner and meet the strictures of *Waltz*. Plaintiff is unaware of any similar statutory scheme in the Michigan code which results in such equally absurd outcomes.

Moreover, this construction undermines the legislative purpose behind the notice period. *Bush v Shabahang*, 484 Mich 156, 174 (2009) (“The stated purpose of § 2912b was to provide a mechanism for ‘promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs . . .’”) (citation omitted). Permitting medical malpractice defendants to game the notice period to obtain dismissal based on the statute of limitations running during the pendency of the notice period undermines that legislative purpose.

In sum, *Waltz* was wrongly decided as it failed to consider the statutes *in para materiae*, leads to absurd results, and is inconsistent with the purpose of the statutory scheme.

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:

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> 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*.

A. The Decision in Waltz is Unworkable

First, *Waltz* creates significant issues with the timing and filing of medical malpractice claims. Plaintiffs file their notice of intent as required by MCL 600.2912b with the understanding that the Legislature would not pull the rug out from under them during the 182-days they must wait. If, at any point, the defendants inform the plaintiff that they do not intend to settle, the plaintiff may proceed by filing their complaint. MCL 600.2912b(9). In circumstances such as these, this provides the defendants with the choice of whether a plaintiff is, or is not, able to timely file a complaint under *Waltz*. For example, in this case, Plaintiff's Notice of Intent was served on February 10, 2023, and the two-year period provided by MCL 600.5852(2) expired on July 17, 2023. Had the Defendants in this case informed Plaintiff that they did not intend to settle the matter at any point before July 17, 2023 – Plaintiff would have been able to file her claim before the expiration of the two-year period.[1] A defense attorney who informed a plaintiff that

[1] Plaintiff is not implying any improper or bad faith conduct on the part of the Defendants. Plaintiff has no reason to believe that Defendants were attempting to game the statute of limitations.

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they did not intend to settle under these conditions would likely be liable for legal malpractice. Plaintiff is not aware of any statute that provides a defendant with the ability to *choose* whether a plaintiff can file a timely complaint except MCL 600.5852 as interpreted by *Waltz*. There are also the ethical implications for attorneys to consider. *Waltz* creates an inherent conflict between a defense attorney's ethical obligations under MRPC 1.2 to abide by the client's wishes regarding settlement and MRPC 1.1 and 1.3 to provide competent representation and to act with reasonable diligence.

The *Waltz* opinion creates disharmony within the statutory scheme for medical malpractice claims as discussed above. In particular, there is little to no relevant textual difference between the discovery period of Section 5838a and the period of limitations provided in Section 5852.

B. There are no Reliance Issues

Unlike the decision in *Waltz* which suddenly barred many claims based on reliance that Section 5856 tolled the period provided in Section 5852, there are no similar reliance issues here. As Judge O'Connell wrote in 2006, "I am further persuaded that the two-year and three-year time periods in MCL 600.5852 contain the essential elements of a statute of repose, so that, before *Waltz*, practitioners would have reasonably expected MCL 600.5856 to toll those periods." *Ward v Siano*, 272 Mich App 715, 726–727 (Mich Ct App 2006) (O'Connell, J., concurring). Were this Cour to overrule *Waltz* the only effect is that medical malpractice claimants would be entitled to tolling during the pendency of the notice period. No plaintiff would lose their right to bring an action and the only thing defendants would lose is the ability to obtain dismissal of cases where the notice of intent was timely served before the period set forth in Section 5852.

C. Overruling *Waltz* is in the Public Interest

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As noted above, "[t]he stated purpose of § 2912b was to provide a mechanism for 'promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded from recovery because of litigation costs . . .'" *Bush v Shabahang*, 484 Mich 156, 174 (2009)) (citation omitted). Plaintiff has already explained how the *Waltz* decision undermines this purpose by giving medical malpractice defendants the ability to game the notice period, not for the purposes of resolving the case on the merits, but rather for forcing a procedural dismissal. Remedying this defect is a core duty of this Court in interpreting statutes. *Maples v State*, 507 Mich 461, 470 (2021) ("As always, our primary task is to determine and give effect to the Legislature's intent.").

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

Even without the benefit of hindsight, Waltz was recognized as a departure from established principles. Seventeen years prior in *Hardy v Maxheimer,* 429 Mich 422, 416 NW2d 299 (1987), this Court 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 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

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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." Curiously, the *Waltz* court neither examined, referenced nor refuted the Hardy ruling.

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 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. 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. In his dissent Justice Cavanaugh analyzed the *Omelenchuk* opinion in great detail and stated, "I find the majority's attempts to evade *Omelenchuk* unacceptable," while also acknowledging that avoidance was "necessary to support its overly narrow construction of § 5856(d)." *Id.* at 664-665.

Plaintiff-Appellant, unsurprisingly finds Justice Cavanaugh's argument to be persuasive. The language the Court chooses in *Waltz* steps around both the precedents set forwards by both *Hardy* and *Omelenchuk* instead of confronting either. Coupled with the clear statutory requirement of MCL 600.2912(b) illustrates that the *Waltz* court forwent calling simple balls and

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strikes, and instead struck out on a more innovative path, an abrupt departure from prior precedent.

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.

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

Respectfully submitted,

Date: May 1, 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 [6391].

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