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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., ELMAHDI M. SAEED,
MCLAREN HEALTH CARE CORPORATION,
CYPRESS CARDIOLOGY PLLC

Defendants-Appellees
and

DR. FAROUK M. BELAL,

Defendant.

Docket No. 168462

Court of Appeals No. 368566

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

Defendant-Appellee Cypress Cardiology's Answer to Plaintiff-Appellant's Application for Leave to Appeal

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Order Appealed From and Jurisdictional Statement

The Estate of Maurice Ernest appeals the trial court's October 23, 2023 order granting summary disposition in defendants' favor.[1]

The Estate filed a claim of appeal with the Court of Appeals on November 10, 2023, naming only defendants Dr. Brown, Dr. Saeed, McLaren, and Cypress Cardiology PLLC as appellees.[2] The Estate did not name defendant Dr. Belal as an appellee.[3]

On March 20, 2025, the Court of Appeals issued its opinion affirming the trial court's grant of summary disposition.[4] The Estate seeks leave to appeal the Court of Appeals' opinion.[5]

Defendant-appellee Cypress Cardiology does not contest this Court's jurisdiction to consider the Estate's application for leave to appeal as to Cypress Cardiology. However, as the Estate did not name Dr. Belal as an appellee in this case, this Court does not have jurisdiction over Dr. Belal.

The Estate served counsel for Cypress Cardiology with its application for leave to appeal on May 7, 2025 via e-mail. Cypress Cardiology's answer is timely filed under MCR 7.305(D).

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[1] AT Appx. 4-5, Trial court order.

[2] **Cypress Cardiology Appendix ("Cypress Appendix") 2-3**, Claim of appeal (excerpt).

[3] *Id.*

[4] Saeed Appx., 80-83, *Estate of Ernest v Brown*, unpublished opinion of the Court of Appeals, issued March 20, 2025 (Docket No. 368566).

[5] See generally The Estate's application for leave to appeal ("Application").

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Statement of Question Presented

> The tolling provision for a notice of intent to sue, MCL 600.5856(c), doesn't apply to MCL 600.5852, the wrongful death savings provision. *Waltz v Wyse*, 469 Mich 642, 644; 677 NW2d 813 (2004). The Estate mailed its notice of intent to sue after the limitation period expired. It filed its complaint about two months after the savings period expired. Is the Estate's claim time-barred?

The trial court answered, yes.

The Court of Appeals answered, yes.

Plaintiff-appellant answers, no.

Defendant-appellee Cypress Cardiology answers, yes.

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Introduction

The Estate seeks leave appeal because it wants this Court to overturn its long-standing precedent in *Waltz v Wyse*, 469 Mich 642; 777 NW2d 813 (2004). In *Waltz*, this Court held that the tolling provision of MCL 600.5856(c), doesn't apply to the wrongful death savings statute, MCL 600.5852. Here, the Estate didn't mail its notice of intent to sue until *after* the two-year medical-malpractice statute of limitations expired. And the Estate didn't file suit until *after* the two-year wrongful death savings provision expired. MCL 600.5852. So, under *Waltz*, the Estate's case is time-barred.

This Court's holding in *Waltz* is consistent with the plain language of the tolling provision and the wrongful death savings statute. It's consistent with this Court's prior precedent. And it's consistent with the broader legislative scheme governing wrongful death and medical-malpractice claims. This Court should reject the Estate's attempt to overturn its precedent.

Further, overruling *Waltz* wouldn't change the result in this case. The Estate didn't name Dr. Belal as an appellee. Its only claim against Cypress Cardiology is one of vicarious liability. So, on any potential remand because Dr. Belal (the agent) is no longer party to this case, the claims against Cypress Cardiology (the principal) would fail as a matter of law. This Court should deny the Estate's application for leave to appeal.

Statement of Facts and Relevant Procedural History

A. The Estate files suit against Dr. Belal, Cypress Cardiology, and their co-defendants.

On July 16, 2020, at about 11:00 a.m., Maurice Ernest went to the emergency department at McLaren Regional Medical Center in Flint,

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Michigan, complaining of chest pain.[6] On July 17, 2020, at about 2:00 p.m., Ernest died while still admitted to the hospital.[7]

On June 7, 2021, the Genesee county probate court issued letters of authority, appointing Keran Ernest as the Estate's personal representative.[8]

On February 10, 2023, Ernest's estate mailed a notice of intent to sue to Dr. Belal (one of Ernest's treating physicians during his hospitalization) and Cypress Cardiology (Dr. Belal's practice).[9]

On August 14, 2023, the Estate filed this case against Dr. Belal, Cypress Cardiology, and their co-defendants.[10] In pertinent part, the Estate alleges that Dr. Belal was professionally negligent when he treated Ernest on July 17, 2020.[11] The Estate's only claim against Cypress Cardiology alleges that the practice is vicariously liable for Dr. Belal's alleged negligence.[12]

B. The trial court granted Dr. Belal's motion for summary disposition, finding that, under *Waltz*, the Estate's claim was time-barred.

On September 8, 2023, Dr. Belal moved for summary disposition under MCR 2.116(C)(7), arguing that the medical-malpractice statute of limitations barred the Estate's claim.[13] In pertinent part, Dr. Belal argued that under *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), the Estate's

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[6] AT Appx. 37, Complaint, p 3 ¶ 10.
[7] AT Appx. 38, *Id.* at p 4 ¶ 15.
[8] AT Appx. 32, Letters of authority.
[9] **Cypress Appendix 5-15**, Notice of intent; AT Appx. 38, Complaint at ¶ 14.
[10] See generally AT Appx. 35-64, Complaint; **Cypress Appendix 33**, Register of actions, p 17 (attached to the Estate's claim of appeal) (showing that the Estate filed its complaint on August 14, 2023).
[11] AT Appx. 38, Complaint, p 4 ¶ 14.
[12] AT Appx. 61-62, *Id.* at p 27-28 ¶ 40.
[13] See generally AT Appx. 11-15, Dr. Belal MSD.

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February 10, 2023 notice of intent didn't toll the savings period that expired on June 7, 2023—two years after the probate court issued letters of authority to Keran Ernest.[14] So, the Estate's August 14, 2023 complaint was time-barred.[15]

Co-defendants Dr. Saeed, Dr. Brown, and McLaren filed their own motions for summary disposition, also arguing that the Estate's claims were time-barred.[16] The Estate opposed these motions, arguing that it timely filed suit and that this Court wrongly decided *Waltz*.[17] Dr. Belal and his co-defendants' filed reply briefs in support of their motions.[18]

On October 23, 2023, after hearing oral argument, the trial court granted summary disposition in favor of all the defendants.[19] The trial court found that the Estate's claim was time-barred under *Waltz*.[20]

C. The Estate appeals the trial court's ruling.

The Estate filed a claim of appeal with the Court of Appeals on November 10, 2023, naming only Dr. Brown, Dr. Saeed, McLaren, and Cypress Cardiology as appellees.[21] The Estate didn't name Dr. Belal as an appellee.[22]

In December 2023, the Estate sought leave from this Court to bypass the Court of Appeals proceedings. Cypress Cardiology and its co-defendants-appellees opposed the Estate's application and the Estate filed

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[14] *Id.*
[15] See generally AT Appx. 35-62, Complaint.
[16] See generally AT Appx. 7-9, Dr. Saeed MSD; AT Appx. 17-20, McLaren and Dr. Brown MSD.
[17] **Cypress Appendix 36-49**, The Estate's Response in Opposition.
[18] See generally **Cypress Appendix 51-54,** Dr. Belal reply; **Cypress Appendix 56-59**, Dr. Saeed reply; **Cypress Appendix 61-63**, McLaren and Dr. Brown reply.
[19] See generally AT Appx. 4-5, Trial court order; Saeed Appx. 63-73, Summary disposition hearing transcript ("Transcript").
[20] Saeed Appx. 67, 69-70, Transcript, p 5, 7-8.
[21] Cypress Appx. 2, Claim of appeal.
[22] *Id.*

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a reply in support of its application. This Court denied the Estate's bypass application.[23]

In May 2024, Cypress Cardiology and its co-defendants-appellees moved the Court of Appeals to peremptorily affirm the trial court's grant of summary disposition. The Estate opposed this motion. The Court of Appeals denied Cypress Cardiology and its co-defendants-appellees' motion.[24]

In March 2025, the Court of Appeals affirmed the trial court's grant of summary disposition in a unanimous, unpublished opinion. [25] The Court held that the Estate's claims were time-barred under *Waltz*. The Estate now seeks this Court's leave to appeal the Court of Appeals' decision.

Standard of Review

This Court reviews summary-disposition rulings de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court reviews "questions of statutory interpretation de novo." *People v Flick*, 487 Mich 1, 9; 790 NW2d 295 (2010).

Argument

A. The Court of Appeals correctly held that the Estate's medical-malpractice claims are time-barred.

Medical-malpractice claims have a two-year statute of limitations. MCL 600.5805(8). The claim accrues "at the time of the act or omission that is the basis for the claim." MCL 600.5838a(1). Here, the Estate alleges that Dr. Belal treated Ernest on July 17, 2020.[26] So, the two-year statute of limitations on the Estate's medical-malpractice claim expired on July 17, 2022, at the latest. MCL 600.5805(8); MCL 600.5838a(1). Because the Estate

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[23] **Cypress Appendix 65**, Order denying the Estate's bypass application for leave to appeal.
[24] **Cypress Appendix 67**, Order denying motion to affirm.
[25] See generally Saeed Appx. 80-83, *Estate of Ernest*.
[26] AT Appx. 75-76, Complaint, ¶ 14.

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didn't file suit against Dr. Belal and Cypress Cardiology until August 14, 2023 – over a year after the statute of limitations expired – its claim is time-barred.[27]

Because this case is a medical-malpractice and alleged wrongful-death suit, the statute of limitations itself isn't the end of the analysis as to whether the Estate's claim is timely. As explained further below, this Court must also consider the medical-malpractice notice requirement (MCL 600.2912b), the tolling provision (MCL 600.5856), and the wrongful-death savings statute (MCL 600.5852). The Estate's claim is untimely under each of these provisions.

1. **The Estate's claim is time-barred under the notice requirement and the tolling provision.**

MCL 600.2912b requires would-be plaintiffs in a medical-malpractice action to give would-be defendants notice before filing suit. After giving notice, plaintiffs must generally wait 182 days to file their complaint. *Id.*

MCL 600.5856(c) tolls "[t]he statutes of limitations or repose" if it would expire during the 182-day notice period:

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[27] See generally *Id.*; Cypress Appx. 33, Register of actions, p 17 (showing that the Estate filed its complaint on August 14, 2023). The Estate states that it filed its complaint on *September* 10, 2023. Application, p 4, 9. The Estate likely means to state that it filed its complaint on *August* 10, 2023, which is when its complaint is dated. AT Appx. 62, Complaint, p 28. However, the relevant date for when an action is "commenced" under the statute of limitations is the filing date; here that date is August 14, 2023. MCL 600.5805(1); MCL 600.1901 ("A civil action is commenced by filing a complaint with the court."); MCR 2.101 (same); *People v Madigan*, 223 Mich 86, 89; 193 NW 806 (1923) ("It is a well-recognized general rule that a paper or document is filed, so far as the rights of the parties are concerned, when it is delivered to and received by the proper officer to be kept on file, and the indorsement of the officer with whom it is filed is but evidence of the time of filing.").

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> 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.

The statute of limitations or repose is tolled up to the number of days required in the applicable notice period under MCL 600.2912b – that is, 182-days. *Waltz v Wyse*, 469 Mich 642, 649; 677 NW2d 813 (2004).

The Estate didn't mail its notice of intent to Dr. Belal and Cypress Cardiology until February 10, 2023.[28] Because the Estate didn't send its notice until after the statute of limitations on the Estate's claim expired on July 17, 2022, MCL 600.5856(c) didn't toll the Estate's claim. So, again, the Estate's medical-malpractice suit against Dr. Belal is time-barred.

2. The Estate's claim is time-barred under the wrongful death savings statute.

The Estate asserts that it timely filed its suit under MCL 600.5852, the wrongful death savings statute.[29] The wrongful death savings statute provides, in pertinent part, that if a medical-malpractice plaintiff dies before the limitation period expires, the first personal representative of their estate may file suit within two years of the probate court's issuing letters of authority "although the period of limitations has run":

[28] Cypress Appx. 5-15**,** Notice of intent.
[29] See, e.g., Application, p 18.

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> (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. . . [MCL 600.5852(1), (2).]

The statute further provides that the latest an estate may file suit is three years after the "period of limitations has run." MCL 600.5852(4).

Here, the probate court issued letters of authority on June 7, 2021, over a year *before* the statute of limitations expired on July 17, 2022.[30] MCL 600.5805(8); MCL 600.5838a(1). But, the Estate didn't mail its notice of intent to sue to Dr. Belal and Cypress Cardiology until February 10, 2023, six-months *after* the statute of limitations expired.[31] The Estate argues that its suit is timely because the notice-tolling provision of MCL 600.5856 applies to the savings period of MCL 600.5852. According to the Estate, its suit is timely because it mailed its notice of intent within two years of the probate court appointing a personal representative to Ernest's estate.[32] So, the Estate argues, MCL 600.5856 tolled its claim. The Estate also argues that its suit is timely because it filed suit within three-years of the two-

[30] AT Appx. 32, Letters of authority; AT Appx. 37, Complaint, p 3 ¶ 10 (stating that Ernest died on July 17, 2020).
[31] Cypress Appx. 5-15, Notice of intent.
[32] See, e.g., Application, p 5.

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year statute of limitations expiring.[33] MCL 600.5852(4). Both of the Estate's arguments fail under this Court's holding in *Waltz*.

In *Waltz*, this Court held that MCL 600.5852, the wrongful death savings statute, is an *exception* to the medical-malpractice statute of limitations, *not* a statute of limitations. *Waltz*, 469 Mich at 650-651. In turn, this Court held that MCL 600.5856 doesn't toll claims under MCL 600.5852 because MCL 600.5856 only tolls "statutes of limitations or repose." *Id.* at 655.

Further, this Court held that the three-year period described in MCL 600.5852(4) is a *ceiling* as to when an estate may file a wrongful-death claim. See *Id.* at 651-652 ("As we have explained, the three-year ceiling provided in the wrongful death saving provision was not 'tolled' following plaintiff's provisions of the notices of intent."); *Id.* at 651 ("[MCL 600.5852] 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.") (emphasis altered). MCL 600.5852(4) must be read with MCL 600.5852(1) and (2). MCL 600.5852(4) isn't a separate period of time under which an estate may file suit. See *Farley v Advanced Cardiovascular Health Specialists PC*, 266 Mich App 566, 573 n 16, 575; 703 NW2d 115 (2005) (explaining that "the three-year ceiling in the [wrongful-death savings provision, MCL 600.5852,] does not establish an independent period during which a personal representative may bring suit," but, rather, "it is only a limitation on the two-year saving provision itself.").

Here, the probate court issued letters of authority to the Estate's personal representative on June 7, 2021 (over a year *before* the statute of limitations expired).[34] So, under MCL 600.5852, the Estate had until June 7, 2023 to file suit. But, the Estate didn't file suit until August 14, 2023 – over two months after the filing deadline that MCL 600.5852 creates as an

[33] *Id.*

[34] AT Appx. 32, Letters of authority.

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exception to the statute of limitations.[35] *Waltz*, 469 Mich at 650-651 (describing MCL 600.5852 as an exception to the statute of limitations). The Estate's mailing its notice of intent on February 10, 2023 didn't preserve its claim because MCL 600.5856 doesn't apply to MCL 600.5852 – that is, mailing notices of intent doesn't toll the time for filing a claim under the wrongful death savings statute. *Id.* at 655. Further, the three-year ceiling period doesn't save its claim because it is a ceiling as to when a plaintiff may file a claim, not a separate extension of time. *Id.* at 651. So, the Estate's claim is time-barred.

B. This Court correctly decided *Waltz*.

The Estate's argument that this Court wrongly decided *Waltz* fails. Contrary to the Estate's assertions, this Court *did* consider the relevant statutory scheme and the Legislature's intent when deciding *Waltz*.[36]

In *Waltz*, this Court reviewed the plain language of MCL 600.5852 to determine that, because the statute expressly referenced a separate "period of limitations," it was not a statute of limitations or repose. *Waltz*, 469 Mich at 651, 655; *Maples v State*, 507 Mich 461, 470; 968 NW2d 446 (2021) ("The most reliable indicator of intent is usually the statute's text."). Rather, this Court held that MCL 600.5852 was a savings statute or a grace period. *Waltz*, 469 Mich at 650, 650 n 12. As explained in the following sections, this holding fits with this Court's prior precedent and the broader legislative scheme. This Court should deny the Estate's application for leave to appeal.

1. This Court in *Waltz* correctly held that MCL 500.5852 is a savings provision, not a statute of limitations.

In *Waltz*, this Court looked to its prior precedent in *Miller v Mercy Mem Hosp Corp*, 466 Mich 196; 644 NW2d 730 (2002) and *Lindsey v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997), in addition to the text of the

[35] See generally AT Appx. 35-62, Complaint; Cypress Appx. 33, Register of actions, p 17.
[36] See, e.g., Application, p 16.

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statute, to hold that MCL 600.5852 was a savings statute or a grace period, *not* a separate statute of limitations. *Waltz*, 469 Mich at 650, 650 n 12.

In *Miller*, this Court considered whether the reference to the "period of limitations" in MCL 600.5852, the wrongful death savings statute, incorporated the six-month discovery rule codified in MCL 600.5838a(2). *Miller*, 466 Mich at 197. This Court held that the wrongful death savings statute incorporated the six-month discovery rule because the six-month discovery rule is one of two statutes of limitations applicable to medical-malpractice actions. *Id.* at 200, 202. This Court stated that "[t]he plain language of § 5838a(2) provides two distinct periods of limitation: two years after the 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, citing MCL 600.5805(8) and MCL 600.5838a(2).[37]

In so holding, this Court reasoned that "*as a saving statute*, § 5852 applies to whatever period of limitation is or may be applicable in a given case, be it professional malpractice or a breach of contract action." *Id.* at 202 (emphasis added). This Court in *Miller* looked to its prior holding in *Lindsey* to support its understanding that MCL 600.5852 is a *savings* statute, not a statute of limitations. *Id.* at 203. In *Lindsey*, this Court explained that MCL 600.5852 was a "statute of limitations saving provision," an "exception to the statute of limitations," and operated to "suspend the running of the statute [of limitations] until a personal representative is appointed to represent the interests of the estate." *Lindsey*, 455 Mich at 60-61, 65.

The Estate argues that this Court's analysis in *Miller* doesn't meaningfully distinguish between considering the six-month discovery rule a statute of limitations and considering the wrongful death savings

[37] At the time this Court decided *Miller*, the two-year malpractice statute of limitations was codified in MCL 600.5805(5), not MCL 600.5805(8). See, e.g., *Miller*, 466 Mich at 199, citing MCL 600.5805(5). For consistency, this brief will refer to the two-year medical-malpractice statute of limitations as codified in MCL 600.5805(8).

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statute as a savings statute.[38] The Estate also argues that the text of MCL 600.5838a treats the wrongful death savings provision as a period of limitations.[39] These arguments fail.

In *Miller*, this Court considered the text of MCL 600.5838a(2), including the statute's reference to the wrongful death savings provision, when concluding that there are *two* statutes of limitations relevant to medical-malpractice claims: two years after the 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. *Miller*, 466 Mich at 199, 202. MCL 600.5838a(2) provides, in pertinent part, that:

> 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, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. [*Id.*].

The Estate focuses on the reference to "sections 5851 to 5856" to argue that MCL 600.5852 is a statute of limitations, not a savings provision.[40] The Estate's argument fails to consider the definition of a statute of limitations. And it fails to consider the substance of the referenced statutes.

A statute of limitations is "[a] law that bars claims after a specified period; [specifically], 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*)." *Black's Law Dictionary* (12th ed) (emphasis added); *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008) ("A legal term of art, however, must be construed in accordance with its peculiar and appropriate legal meaning."); MCL 8.3a (stating, in pertinent

[38] Application, p 12.
[39] *Id.*
[40] *Id.*

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part, "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning").

Sections 5851 to 5856 do not establish a time for filing suit based on when the claim accrued or when the claim was discovered. These statutes, generally, allow for the commencement of a cause of action based on other triggering events. MCL 600.5851 (governing, generally, the commencement of an action when various disabilities are at issue); MCL 600.5852 (wrongful death savings statute); MCL 600.5853 (commencement of a claim when a person is absent from the state when a claim accrues against them); MCL 600.5854 (commencement of an action in times of war); MCL 600.5855 (commencement of an action when fraudulent concealment is at issue); MCL 600.5856 (notice tolling provision).

MCL 600.5838a(2)'s reference to MCL 600.5856, the notice tolling provision, particularly highlights the issues with the Estate's reference argument. Under the Estate's own logic, because MCL 600.5838a(2) references the notice tolling provision of MCL 600.5856, the tolling statute should be a statute of limitations. Accordingly, these statutes do not qualify as statutes of limitations.

The Estate further argues that understanding MCL 600.5852 as a savings statute conflicts with this Court's prior precedent in *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987) and *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000).[41] These arguments fail. In *Hardy*, this Court considered whether the wrongful death savings statute applied to survival-type actions brought under MCL 600.2922, the wrongful-death statute. *Hardy*, 429 Mich at 425. This Court held that the wrongful death savings statute "operates to toll the statute of limitations in both survival-type actions and death-type actions." *Id. Hardy* did not involve a medical-malpractice claim. *Hardy* did not involve the application of MCL 600.5856(c), the notice tolling provision. And this Court in *Hardy* did not hold that MCL 600.5852 is a statute of limitations or repose. In fact,

[41] Application, p 16-18.

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this Court in *Hardy* repeatedly described MCL 600.5852 as a "saving provision." See, e.g., *Id.* at 425, 428-429.

Nonetheless, the Estate asserts that this Court's holding in *Hardy* is in conflict with its holding in *Waltz*, arguing that the language in *Hardy* that the wrongful death savings provision "toll[s] the statute of limitations" somehow saves the Estate's claim.[42] *Hardy* was a bit loose with its language. A tolling statute "'interrupts the running of a statute of limitations.'" *Carter v DTN Mgmt Co*, __ Mich __; __ NW3d __ (2024) (Docket No. 165425), quoting *Black's Law Dictionary* (11th ed). The wrongful death savings provision doesn't interrupt the limitation period; it sets its own period. Here, for example, the probate court issued letters of authority before the limitation period expired, so the limitation period and the savings period overlapped. But, even if the savings provision were accurately described as "tolling" the limitation period, it wouldn't help the Estate. The notice-tolling statute applies to "statutes of limitations or repose," not other tolling statutes. MCL 600.5856.

The point remains: the Estate did not file suit within two years after the probate court issued letters of authority.[43] MCL 600.5852(1). And under its plain language the three-year period described in MCL 600.5852(4) is a *ceiling* for when a claim may be brought. MCL 600.5852(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.") (emphasis added); *Miller*, 466 Mich at 200 n 3 (referencing a "*maximum* three-year cutoff for personal representatives to bring a surviving cause of action under § 5852") (emphasis added); *Maples*, 507 Mich at 470.

The Estate's arguments involving *Omelenchuk* are similarly misplaced. In *Omelenchuk*, this Court considered whether the notice tolling provision of MCL 600.5856 tolled the statute of limitations for a full 182-days or 154-days when a medical-malpractice claimant doesn't receive a

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[42] *Id.* at p 17.

[43] AT Appx. 32, Letters of authority (showing the probate court issued letters of authority on June 7, 2021); Cypress Appx. 33, Register of actions (showing the Estate filed suit on August 14, 2023).

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response to their notice of intent under MCL 600.2912b(7). See *Omelenchuk*, 461 Mich at 575. This Court held that the notice tolling provision tolls the statute of limitation for a full 182 days, regardless of whether medical-malpractice defendants respond to the notice of intent. *Id.*

Like *Hardy*, *Omelenchuk* did not involve applying the notice tolling provision to the wrongful death savings statute. Nonetheless, the Estate argues that the passing reference to a "limitation period" in *Omelenchuk* is at odds with this Court's holding in *Waltz*.[44] But, this Court in *Waltz* addressed, and rejected, this exact argument. *Waltz*, 469 Mich at 652-654. This Court in *Waltz* expressly overruled any language in *Omelenchuk* that "might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision." *Waltz*, 469 Mich at 655. The Estate acknowledges that this Court overruled *Omelenchuk* to this extent.[45] Yet, the Estate asks this Court to *again* reverse its position and overrule language it overruled twenty years ago.[46]

The Estate also seemingly asserts that MCL 600.5852 is, alternatively, a statute of repose under MCL 600.5856.[47] The Estate does not support this assertion and, accordingly, it is not preserved for this Court's review. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant must first adequately prime the pump; only then does the appellate well begin to flow."). This assertion also fails.

A statute of repose is "[a] statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* (12th ed). Medical-

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[44] Application, p 17.
[45] *Id.*
[46] *Id.* at 17-18.
[47] *Id.* at 12, 15.

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malpractice claims have a six-year statute of repose, which starts on "the date of the act or omission." MCL 600.5838a(2). It's a definitive end point or cap for provisions that would otherwise extend the time to file.

MCL 600.5852, under its plain language, does not limit a personal representative's ability to bring a claim based on a defendant's actions. This Court in *Waltz*, *Miller*, and *Lindsey*, properly considered MCL 600.5852 as a *savings* statute because, under its plain language, it is an *exception* to the statute of limitations. MCL 600.5852(1) (". . . although the period of limitations has run."); *Lindsey*, 455 Mich at 65 (stating that a savings provision is an exception to a statute of limitations). In short, the wrongful-death savings provision *extends* the time to file. It's not a statue of repose.

This Court correctly held in *Waltz* that MCL 600.5852 is a savings statute, *not* a statute of limitations or repose. *Waltz*, 469 Mich at 655. In turn, this Court correctly held that the notice tolling provision of MCL 600.5856(c) does not apply to MCL 600.5852 because the notice tolling provision only tolls "[t]he statutes of limitations or repose." *Id.* This Court should deny the Estate's application for leave to appeal.

2. Understanding MCL 600.5852 as a savings provision, not a statute of limitations, fits within the greater statutory scheme.

Despite the Estate's assertions to the contrary, understanding MCL 600.5852 as a savings provision, not a statute of limitations or repose, fits within the context of the greater statutory scheme. [48]

The wrongful-death act, generally, allows a decedent's estate to bring a claim when the decedent's death or injuries resulting in death would have allowed the decedent to bring their own claim. MCL 600.2922(1), (2). The wrongful-death act and the wrongful death savings statute apply to claims based in more than just medical-malpractice. See *Miller*, 466 Mich at 202; *Wesche v Mecosta Co Road Comm*, 480 Mich 75, 88; 746 NW2d 847 (2008) (stating "the wrongful-death act is essentially a 'filter' through which the underlying claim may proceed"). And the

[48] See, e.g., Application, p 16-18.

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governing statute of limitations in a wrongful-death action is the statute of limitations for the underlying claim. *Waltz*, 469 Mich at 642, citing *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 314; 399 NW2d 1 (1986).

MCL 600.5805(8) establishes the two-year statute of limitations for a medical-malpractice claim. MCL 600.5838a(1) establishes when medical-malpractice claims accrue. Holding that MCL 600.5852 is a statute of limitations rather than a savings or grace period would undermine the two-year statute of limitations for medical-malpractice actions that MCL 600.5805 creates. *And* interpreting MCL 600.5852 as a statute of limitations essentially moves the accrual date of a medical-malpractice claim from the time the act or omission that is the basis of the claim occurred, as provided under MCL 600.5838a(1), to the date that a personal representative is first appointed to an estate. MCL 600.5852(1), (2); *Waltz,* 469 Mich at 654 (noting that, in *Omelenchuk*, this Court mistakenly calculated the date of accrual from the date the personal representatives were appointed, instead of the date of the decedent's death). If the Legislature intended for MCL 600.5852 to be a statute of limitations, as opposed to a savings provision, the Legislature could have included the language of MCL 600.5852 as a subsection to MCL 600.5805. But, it didn't.

The Legislature's actions (and inactions) support this Court's holding in *Waltz*. This Court decided *Waltz* in 2004. The Legislature amended MCL 600.5852 in 2013. This amendment, generally, clarified that the two-year savings period under the statute begins to run in a medical-malpractice case when letters of authority are issued to the *first* personal representative of an estate. 2012 SB 1118; Cf. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 33; 658 NW2d 139 (2003) (holding that the prior version of MCL 600.5852 "does not provide that the two-year period is measured from the date letters of authority are issued to the *initial* personal representative") (emphasis added). The amendment also provided a one-year extension of the saving period if a personal representative of an estate dies or becomes legally incapacitated. *Id.* The Legislature didn't take this amendment process as an opportunity to state that MCL 600.5852 was a statute of limitations or that MCL 600.5856 applies to MCL 600.5852. *GMAC LLC v Treasury Dept*, 286 Mich App 365,

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373; 781 NW2d 310 (2009) ("When statutory provisions are construed by the court and the Legislature reenacts the statute, it is assumed that the Legislature acquiesced to the judicial interpretation."), citing *Smith v Detroit*, 388 Mich 637, 650-651; 202 NW2d 300 (1972).

Further, this Court decided *Lindsey* in 1997. Again, in *Lindsey*, this Court described MCL 600.5852 as a savings provision and an exception to the statute of limitations. See, e.g., *Lindsey*, 455 Mich at 65. And this Court in *Waltz*, looked to *Lindsey*, among other authority, when holding that MCL 600.5856 did not apply to MCL 600.5852 because it was a savings provision, not a statute of limitations or repose. See, e.g., *Waltz*, 469 Mich at 650, 655.

In 2004, the Legislature amended MCL 600.5856. This amendment, generally, removed the 90-day tolling for when a plaintiff files a complaint pending service. 2004 SB 990. The Legislature didn't include that MCL 600.5856 applies to savings provisions along with statutes of limitations or repose. The Legislature's omission supports this Court's conclusion in *Waltz* that MCL 600.5856 doesn't apply to MCL 600.5852. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991) ("It is a well-established principle of statutory construction that the Legislature is presumed to act with knowledge of statutory interpretations by the Court of Appeals and this Court."); *Walen v Dept. of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993) ("It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.").

The Estate argues that *Waltz*'s holding that the tolling provision of MCL 600.5856 doesn't apply to MCL 600.5852, the wrongful death savings provision undermines the purpose of the wrongful death savings statute.[49] But, again, the wrongful death savings statute applies to a broad variety of claims, not only medical-malpractice claims. If there is tension (there's not) between the tolling provision of MCL 600.5856(c), the notice requirement of MCL 600.2912b, and the wrongful death savings statute of

[49] Application, p 13.

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MCL 600.5852, that is for the Legislature to address. But, it has declined to do so.

Here, the probate court issued letters of authority on June 7, 2021, over a year *before* the statute of limitations expired on July 17, 2022.[50] MCL 600.5805(8); MCL 600.5838a(1). But, the Estate didn't mail its notice of intent to sue to Dr. Belal and Cypress Cardiology until February 10, 2023, six-months *after* the statute of limitations expired.[51] *Waltz*, 469 Mich at 650 n 12 ("Plaintiff's claim is not time-barred under the *saving* provision. Rather, it is barred by the two-year statute of limitations for medical malpractice actions. The saving provision simply does not *save* plaintiff's claim because she did not file her complaint until after the *grace period* provided for in the saving provision had expired.") (emphasis in original).

The Estate's arguments that this Court wrongly decided *Waltz* fail. This Court should deny the Estate's application for leave to appeal.

C. Stare decisis favors upholding *Waltz*.

Stare decisis means "[t]o abide by, or adhere to, decided cases." *Robinson v City of Detroit*, 462 Mich 439, 463 n 20; 613 NW2d 307 (2000) (internal citations and quotations omitted). "Stare decisis is generally the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 463 (internal quotations and citations omitted). While stare decisis "is not to be applied mechanically," this Court must still carefully consider whether stare decisis supports overturning precedent. *Id.*; *Peterson v Magna Corp*, 484 Mich 300, 314; 773 NW2d 564 (2009) ("Stare decisis attempts to balance two competing considerations: the need of the community for stability in legal rules and decisions and the need of courts to correct past errors.").

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[50] AT Appx. 32, Letters of authority; AT Appx. 37, Complaint, p 3 ¶ 10 (stating that Ernest died on July 17, 2020).

[51] Cypress Appx. 5-15, Notice of intent.

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"[O]verturning precedent requires more than a mere belief that a case was wrongly decided." *Lansing School Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 368; 792 NW2d 686 (2010). When deciding whether to overturn precedent this Court considers (1) "whether changes in the law or facts no longer justify the questioned decision"; (2) "whether reliance interests would work an undue hardship"; and (3) "whether the decision at issue defies 'practical workability." *Robinson*, 462 Mich at 464.

Here, although the reliance interest at issue in *Robinson* is likely not invoked, there are no changes to the law or facts relevant to this Court's holding in *Waltz*. And there are no workability issues with *Waltz*. Balancing the *Robinson* factors should lead this Court to uphold *Waltz*. This Court should deny the Estate's application for leave to appeal.

1. **There are no changes in the law or facts relevant to this Court's holding in *Waltz*.**

Here, as discussed earlier in this brief, this Court correctly decided *Waltz*. This Court's holding in *Waltz* adheres to this Court's prior precedent. And this Court's holding in *Waltz* fits within the broader statutory scheme. There's no changes in the law or facts that justify overturning *Waltz*. In fact, the Legislature has not amended provisions of either MCL 600.5852, the wrongful death savings provision, or MCL 600.5856, the tolling statute, that are relevant to the holding in *Waltz*, despite otherwise amending these statutes. So, the first *Robinson* factor supports upholding *Waltz*.

2. **Reliance interests would not work an undue hardship.**

This Court decided *Waltz* over twenty years ago. In the years since, this Court and the Court of Appeals have repeatedly applied this Court's holding in *Waltz*. See, e.g., *Ligons v Crittenton Hosp*, 490 Mich 61, 76, 90; 803 NW2d 271 (2011) (applying *Waltz*, among other authority, to a medical-malpractice case involving defective affidavits of merit); *Farley v Advanced Cardiovascular Health Specialists PC*, 266 Mich App 566, 575; 703 NW2d 115 (2005) (holding that the plaintiff's filing their notice of intent "did not toll the two-year period in which to file suit under the wrongful death saving

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provision"); *Ousley v McLaren*, 264 Mich App 486, 492-495; 691 NW2d 817 (2004) (holding that *Waltz* applied retroactively and that, under *Waltz*, the plaintiff's issuing a notice of intent didn't toll their claim). And because *Waltz* is settled precedent, the plaintiffs' bar is aware of the relevant interplay among the medical-malpractice statute of limitations, notice of intent requirements, the notice tolling provisions, and the wrongful death savings statute. MCL 600.5805(8); MCL 600.5838a; MCL 600.2912b; MCL 600.5856(c); MCL 600.5852.

While it is unlikely that overturning *Waltz* would result in the "practical real-world dislocations" or "chaos" that trigger the reliance interest at issue in a stare decisis analysis, *Waltz* also isn't causing any chaos. *Robinson*, 462 Mich 439, 466, 466 n 26. Indeed, here, the issue is of the Estate's own making since it sat on its claim for twenty months after the probate court issued letters of authority. Simply put, the Estate's inaction created its own need for tolling.

3. *Waltz* doesn't defy practical workability.

Applying *Waltz* doesn't, as the Estate argues, put the timeliness of a plaintiff's claim in the defense's hands.[52] If a plaintiff serves their notice of intent before the statute of limitations expires, the plaintiff's claim is tolled for a full 182-days under MCL 600.5856. *Omelenchuk*, 461 Mich at 575; See *Waltz*, 469 Mich at 655.

Here, the probate court issued letters of authority on June 7, 2021, over a year *before* the statute of limitations expired on July 17, 2022.[53] MCL 600.5805(8); MCL 600.5838a(1). But, the Estate didn't mail its notice of intent to sue to Dr. Belal and Cypress Cardiology until February 10, 2023, six-months *after* the statute of limitations expired.[54]

[52] See, e.g., Application, p 12, 14.
[53] AT Appx. 32, Letters of authority; AT Appx. 37, Complaint, p 3 ¶ 10 (stating that Ernest died on July 17, 2020).
[54] Cypress Appx. 5-15, Notice of intent.

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The Estate argues that a defendant's answer (or lack of answer) to a notice of intent dictates when a plaintiff can sue.[55] But, it's not a defendant's responsibility to ensure that a plaintiff timely serves their notices of intent. And a plaintiff's failing to file a notice of intent within the *two-year* statute of limitations doesn't warrant interpreting MCL 600.5852 as a separate statute of limitations.

The medical-malpractice notice provision requires defendants to respond to a plaintiff's notice "[w]ithin 154 days after receipt of notice." MCL 600.2912b(7). If a plaintiff doesn't receive a written response from a defendant within the 154-day time period, the plaintiff "may commence an action alleging medical malpractice upon the expiration of the 154-day period." MCL 600.2912b(8). Further, the notice provision allows a plaintiff to immediately file suit if a defendant informs them that they do not intend to settle "so long as the claim is not barred by the statute of limitations." MCL 600.2912b(9).

The notice provision doesn't, as the Estate suggests defendants should, *require* defendants to affirmatively inform plaintiffs that they do not intend to settle a claim.[56] And the notice provision expressly provides that upon learning that a defendant does not intend to settle, a plaintiff may immediately file their claim *so long as the statute of limitations doesn't bar the plaintiff's claim*.

Here, Cypress Cardiology didn't respond to the Estate's notice of intent. So, the Estate could've chosen to file suit 154-days after mailing its notice of intent. The Estate mailed its notice of intent on February 10, 2023.[57] And the 154-day period expired on July 14, 2023. This date is *still* after the wrongful death savings provision expired on June 7, 2023.

The Estate argues that its claim could've been saved if defendants informed the Estate that they wouldn't settle before 154-days passed.[58] MCL 600.2912b(9). This argument fails. Again, there's no affirmative

[55] See, e.g., Application, p 13, 14-15.
[56] See, e.g., *Id.* at p 13.
[57] Cypress Appx. 5-15, Notice of intent.
[58] Application, p 13, 14-15.

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responsibility for a defendant to inform a plaintiff that they will not settle a claim. And there's no affirmative responsibility for a defendant to respond to a plaintiff's notice of intent earlier than 154-days after receiving notice.

Again, here, the probate court issued letters of authority on June 7, 2021, over a year *before* the statute of limitations expired on July 17, 2022.[59] MCL 600.5805(8); MCL 600.5838a(1). But, the Estate didn't mail its notice of intent to sue to Dr. Belal and Cypress Cardiology until February 10, 2023, six-months *after* the statute of limitations expired.[60] The issue of the timeliness of the Estate's complaint is of the Estate's own making. The Estate doesn't dispute that it discovered or knew about the claim in time to file it. But it sat on its claim for *twenty* months after the probate court issued letters of authority. The Estate alone controlled when it could file its complaint. Its blame-shifting argument is misguided.

Finally, this Court in *Waltz* rebutted the dissent's concern that its holding reduces the time a personal representative has to file suit to 18-months. This Court explained that, reading the statute of limitations, the wrongful death savings provision, and the tolling provision together, gives a plaintiff five years plus 182-days to file suit. *Waltz*, 469 Mich at 652 n 14, citing MCL 600.5805, MCL 600.5852, and MCL 600.5856.

Waltz does not pose any workability issues. So, the third *Robinson* factor supports upholding *Waltz*. This Court should deny the Estate's application for leave to appeal.

D. Even if this Court overturns *Waltz*, the Estate's claims against Dr. Belal and Cypress Cardiology still fail because the Estate hasn't named Dr. Belal as an appellee in this case.

The Estate's only claim against Cypress Cardiology is one of vicarious liability based on Dr. Belal's alleged professional negligence.[61]

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[59] AT Appx. 32, Letters of authority; AT Appx. 37, Complaint, p 3 ¶ 10 (stating that Ernest died on July 17, 2020).
[60] Cypress Appx. 5-15, Notice of intent.
[61] AT Appx. 61-62, Complaint, p 27-28 ¶ 40.

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"Vicarious liability is indirect responsibility imposed by operation of law." *Laster v Henry Ford Health Sys*, 316 Mich App 726, 735; 892 NW2d 442 (2016) (internal quotations and citations omitted). To establish a vicarious liability claim, a plaintiff must show that the principal's agent acted negligently. *Id.* "The principal is only liable because the law creates a practical identity with his agents, so that he is held to have done what they have done." *Cox ex rel Cox v Board of Hosp Mangers for City of Flint*, 467 Mich 1, 11; 651 NW2d 356 (2002) (internal quotations and citations omitted).

Here, Dr. Belal is Cypress Cardiology's agent. And the Estate's only claim against Cypress Cardiology is one of vicarious liability.[62] In its claim of appeal, the Estate named Cypress Cardiology as an appellee, but it didn't name Dr. Belal.[63] Accordingly, Dr. Belal isn't a party to this appeal. And the time has passed for the Estate to file an appeal as of right. MCR 7.204(A)(1). So has the time for the Estate to file a delayed application for leave to appeal. MCR 7.205(A)(4).

Even if this Court grants the Estate's application, overturns *Waltz*, and remands this case to the trial court, the Estate's claims against Dr. Belal and Cypress Cardiology *still* fail. Because the Estate didn't appeal the trial court's grant of summary disposition as to Dr. Belal, any potential reversal and remand of this case doesn't affect Dr. Belal – reversal and remand would only affect Cypress Cardiology because it's a named appellee.

Because the trial court dismissed Dr. Belal with prejudice and that won't change, the Estate's vicarious liability claim against Cypress Cardiology (the principal) fails as a matter of law. *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 295-296; 731 NW2d 29 (2007) ("Plaintiff consequently is unable to show that the remaining defendants are vicariously liable for the acts of [the agent], because the dismissal of the claims against [the agent] prevents plaintiff from arguing the merits of the negligence claim against [the agent]."); *Grimmer v Lee*, 310 Mich App 95,

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[62] *Id.*

[63] Cypress Appx. 2-3, Claim of appeal.

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102; 872 NW2d 725 (2015) ("When a litigant chooses to proceed against an agent 'and has been defeated, he is thereby barred from litigating the same cause of action against the principal. It follows that a determination of the issue in a suit brought against the principal bars an action against the agents.'"), quoting *DePolo v Greig*, 338 Mich 703, 709-710; 62 NW2d 441 (1954); *Cox*, 467 Mich at 11. So, even if this Court reverses the trial court's grant of summary disposition and remands this case to the trial court, the Estate's claims against Dr. Belal and Cypress Cardiology fail as a matter of law.

Conclusion and Relief Requested

The Estate didn't mail its notice of intent to sue until *after* the two-year medical-malpractice statute of limitations expired. And the Estate didn't file suit until *after* the two-year wrongful death savings provision expired. So, the Estate's claim is time-barred under this Court's long-standing precedent in *Waltz*.

This Court should reject the Estate's attempt to overturn *Waltz*. This Court's holding in *Waltz* is consistent with the plain language of the tolling provision and the wrongful death savings statute. And it's consistent with prior precedent and the broader statutory scheme. Stare decisis also favors upholding *Waltz*. This Court should deny the Estate's application for leave to appeal.

Further, even if this Court overturns *Waltz*, this reversal wouldn't change the result in this case. The Estate didn't name Dr. Belal as an appellee in this case. So, on any potential remand because Dr. Belal (the agent) is no longer party to the case, the claims against Cypress Cardiology (the principal) would fail as a matter of law. This Court should deny the Estate's application for leave to appeal.

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Certificate of Compliance

I certify that Defendant-Appellee Cypress Cardiology, PLLC's Answer to the Estate's Application for Leave to Appeal complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this brief. This brief uses a 12-point proportional font (Book Antiqua), and the word count for this brief is 7,700.

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