STATE OF MICHIGAN

COURT OF APPEALS

MARCIA DOWNS, formerly known as MARCIA DOUGLAS, as Personal Representative of the Estate of NATASHA DOUGLAS, Deceased,

Plaintiff-Appellant,

v

MARILYN S. KEEBLER, formerly known as MARILYN S. MORRIS, DEBBIE PLUIM, formerly known as DEBRA PLUIM, JEFFREY W. WILDER, DANIEL J. VERBURG, DANIEL VERBURG M.D., P.C., doing business as BAY VIEW OBSTETRICS & GYNOCOLOGY, also known as BURNS CLINIC OBSTETRICS & GYNEGOLOGY, and NORTHERN MICHIGAN HOSPITAL, INC., doing business as NORTHERN MICHIGAN HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
November 28, 2006

No. 253611
Emmet Circuit Court
LC No. 03-007681-NH

MARCIA CRYDERMAN, also known as MARCIA DOUGLAS, as Personal Representative of the Estate of NATASHA DOUGLAS, Deceased,

Plaintiff-Appellant,

v

DANIEL J. VERBURG, doing business as BAY VIEW OBSTETRICS & GYNECOLOGY, JEFFREY W. WILDER, NORTHERN MICHIGAN HOSPITAL, DEBBIE PLUIM, also known as DEBRA PLUIM, and MARILYN KEEBLER, also known as MARILYN S. MORRIS,

Defendants-Appellees.

No. 255045
Emmet Circuit Court
LC No. 02-007011-NH

MARCIA DOWNS, formerly known as MARCIA DOUGLAS, as Personal Representative of the Estate of NATASHA DOUGLAS, Deceased,

Plaintiff-Appellant,

v

MARILYN S. KEEBLER, formerly known as MARILYN S. MORRIS, DEBBIE PLUIM, also known as DEBRA PLUIM, JEFFREY W. WILDER, and DANIEL J. VERBURG, doing business as DANIEL VERBURG M.D., P.C., doing business as BAY VIEW OBSTETRICS & GYNECOLOGY, also known as BURNS CLINIC OBSTETRICS & GYNECOLOGY,

Defendants-Appellees.

No. 256422
Emmet Circuit Court
LC No. 04-008032-NH

MARCIA DOWNS, formerly known as MARCIA DOUGLAS, as Personal Representative of the Estate of NATASHA DOUGLAS, Deceased,

Plaintiff-Appellant,

v

NORTHERN MICHIGAN HOSPITALS, INC., doing business as NORTHERN MICHIGAN HOSPITAL,

Defendants-Appellee.

No. 256462
Emmet Circuit Court
LC No. 04-008040-NH

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

In Docket No. 253611, plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition regarding plaintiff's second medical malpractice suit against defendants. In Docket No. 255045, plaintiff appeals by leave granted from the trial court's order granting partial summary disposition in favor of defendants regarding plaintiff's first medical malpractice suit against defendants. In Docket No. 256422, plaintiff appeals as of right from the trial court's order granting summary disposition for defendants Keebler, Pluim,

Dr. Verburg, Dr. Wilder, and Bay View regarding plaintiff's third medical malpractice suit against these defendants. In Docket No. 256462, plaintiff appeals as of right from the trial court's order granting summary disposition for defendant Northern Michigan Hospital in regard to plaintiff's third medical malpractice suit against this defendant. These four appeals were consolidated by order of this Court.[1] In Docket Nos. 255045, 256422, and 256462, we affirm the trial court's orders granting defendants summary disposition. In Docket No. 253611, we reverse the trial court's order granting summary disposition to Northern Michigan Hospital, and affirm in all other respects.

I. Facts and Procedure

In February 2000, plaintiff learned that she was pregnant. In March 2000, plaintiff began prenatal care at defendant Bay View Obstetrics & Gynecology (Bay View). On October 23, 2000, plaintiff was admitted to defendant Northern Michigan Hospital for induction of labor. After Cytotec was administered to induce labor, plaintiff's baby, Natasha Douglas, went into fetal distress. A Cesarean section was performed on plaintiff, and Natasha was born at 10:54 a.m.. At 7:42 p.m., Natasha died as a result of hypoxia and severe birth asphyxia.

On July 18, 2001, plaintiff mailed a notice of her intent to sue Dr. Verburg, Dr. Wilder, Bay View, and Northern Michigan Hospitals. On August 9, 2001, letters of authority were issued to plaintiff to act as personal representative for Natasha's estate. On April 4, 2002, plaintiff filed a complaint alleging medical malpractice and wrongful death against Dr. Verburg, Dr. Wilder, Bay View, and Northern Michigan Hospital.[2] On July 16, 2002, plaintiff mailed a notice of her intent to sue Keebler and Pluim, who were nurse midwives.

Defendants filed motions for summary disposition, arguing, *inter alia*, that the affidavits of merit filed with the complaint were insufficient to satisfy the requirements of MCL 600.2912d. Attached to plaintiff's response to defendants' motions for summary disposition was a new, more detailed, affidavit of merit signed by Dr. Berke.

On March 27, 2003, the trial court issued an opinion dismissing plaintiff's claims, concluding that plaintiff's affidavits of merit were "grossly nonconforming." The court explained that: (1) plaintiff's affidavits "fail to include any specific opinions that any particular health professional or health facility violated applicable standards of care" and (2) the language purporting to specify the duties and breaches was vague and alleges no specific facts or actions taken or omitted by the defendants that was required in order to comply with the applicable standard of care.

On May 27, 2003, plaintiff filed a second complaint alleging medical malpractice and wrongful death against Keebler, Pluim, Dr. Verburg, Dr. Wilder, Bay View, and Northern

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[1] *Downs v Keebler*, unpublished order of the Court of Appeals, entered December 15, 2004 (Docket Nos. 253611, 255045, 256422, and 256462).

[2] *Cryderman v Verburg*, Emmet County Docket No. 02-007011-NH.

Michigan Hospital.[3] Paintiff then filed a motion to determine the sufficiency of the notices of intent and affidavits of merit, arguing that her notices of intent complied with MCL 600.2912b and her affidavits of merit complied with MCL 600.2912d.

The trial court held that plaintiff's notices of intent did not comply with MCL 600.2912b because they were "devoid of any factual content that addresses the standard of care" and "there are no specific facts alleged with regard to how it is plaintiff claims the defendants have breached the standard of care." The court explained that the notices were not individualized and merely contained generic allegations that were the same or substantially the same as those in the complaint. The trial court dismissed without prejudice plaintiff's claims against all of the defendants except for Northern Michigan Hospital. The court stated that it would take under advisement whether Northern Michigan Hospital waived the notices of intent issue. The trial court subsequently held that although Northern Michigan Hospital waived its right to be heard at the hearing, it did not waive its right to ever object to the notices of intent or to rely on the court's ruling regarding the notices of intent. The court explained that Northern Michigan Hospital's statement that the notices of intent "appear sufficient on their faces" was not an unequivocal agreement that such notices were sufficient. Accordingly, the trial court ordered that plaintiff's claims against Northern Michigan Hospital were dismissed without prejudice.

On January 6, 2004, plaintiff filed a third complaint alleging medical malpractice and wrongful death against Keebler, Pluim, Dr. Verburg, Dr. Wilder, and Bay View.[4] Plaintiff filed her third complaint against Northern Michigan Hospital on January 16, 2004.[5] Defendants filed motions for summary disposition in both cases, arguing that plaintiff's claims were barred by the statute of limitations.

On April 21, 2004, the trial court issued an opinion and order granting defendants' motions for summary disposition in both cases. The court first held that because plaintiff was appointed personal representative of Natasha's estate on August 9, 2001, the wrongful death saving provision in MCL 600.5852 only extended plaintiff's ability to file suit until August 9, 2003. Next, the court, relying on *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), held that the malpractice tolling provision in MCL 600.5856(d)[6] cannot be applied to further extend the wrongful death saving provision provided in MCL 600.5852. The court held that because plaintiff did not file her claims within the two-year limitation period, defendants were entitled to summary disposition under MCR 2.116(C)(7).

On May 19, 2004, plaintiff filed motions for reconsideration, arguing: (1) the statute of limitations was tolled under MCL 600.5856(a); (2) the Michigan Supreme Court's decision in *Waltz* is not applicable to the facts of this case; (3) *Waltz* does not apply retroactively; (4) the

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[3] *Downs v Keebler*, Emmet County Docket No. 03-007681-NH.

[4] *Downs v Keebler*, Emmet County Docket No. 04-008032-NH.

[5] *Downs v Northern Michigan Hospitals, Inc*, Emmet County Docket No. 04-008040-NH.

[6] This section was amended by 2004 PA 87, effective April 22, 2004, but that amendment does not apply to this case.

statute of limitations should be tolled under the doctrine of judicial tolling; (5) MCL 600.2912b and MCL 600.5856(d), as interpreted by *Waltz*, are unconstitutional, as they deny plaintiff's right to due process. On June 8, 2004, the trial court issued an opinion and order denying plaintiff's motion for reconsideration. In regard to the tolling of the statute of limitations under MCL 600.5856(a), the court held that plaintiff abandoned the issue at oral argument and was bound by her admission that her first two suits did not toll the statute of limitations. In regard to *Waltz*, the court held that (1) *Waltz* clearly applied to this case, (2) under *Waltz*, the statute of limitations in this case was not tolled, and (3) *Waltz* is consistent with prior cases and thus applies retroactively. In regard to the constitutionality of MCL 600.2912b and MCL 600.5856(d), the court held that the statutes did not violate plaintiff's due process rights, as plaintiff had failed to accompany her two previous lawsuits with the requisite notices of intent and affidavits of merit.

II. Analysis

A. Docket No. 255045

Plaintiff argues that the trial court erred in granting defendant's motions for summary disposition in her first suit against defendants based on its conclusion that plaintiff's affidavits of merit did not comply with MCL 600.2912d.[7] This Court reviews de novo a trial court's grant or denial of summary disposition. *Burton v Reed City Hosp Corp*, 471 Mich 745, 750; 691 NW2d 424 (2005).

1. Sufficiency of Affidavits of Merit

MCL 600.2912d(1) provides, in pertinent part:

> [T]he plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.

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[7] Pluim asserts that this Court lacks jurisdiction to grant plaintiff the relief she requests in regard to Pluim. First, Pluim points out that plaintiff dismissed her claims against Pluim by voluntary stipulation. Second, Pluim argues that the April 21, 2003, order appealed by plaintiff granted summary disposition only to Dr. Verburg, Dr. Wilder, and Keebler. Pluim is correct that plaintiff's claims against her were dismissed by an April 22, 2003, stipulation and order of dismissal. Because this Court's September 22, 2004, order granting plaintiff's application for leave to appeal limited the issues to those raised in the application, any decision of this Court regarding the April 21, 2003, order does not pertain to Pluim. Nevertheless, this Court's jurisdiction over the April 21, 2003, order is unaffected.

> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

The purpose of this statute is to prevent frivolous medical malpractice claims. *Scarsella v Pollak*, 461 Mich 547, 551; 607 NW2d 711 (2000), quoting *Gregory v Heritage Hosp*, decided sub nom *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47-48; 594 NW2d 455 (1999). If a medical malpractice plaintiff's affidavit of merit is "grossly nonconforming" to the requirements of MCL 600.2912d(1), the affidavit of merit is insufficient to commence the lawsuit and does not toll the statute of limitations. *Mouradian v Goldberg*, 256 Mich App 566, 573-575; 664 NW2d 805 (2003).

In *Mouradian, supra* at 573-575, this Court held that a timely filed affidavit of merit that is grossly nonconforming to the requirements of MCL 600.2912d(1) does not constitute an effective affidavit of merit and does not toll the statute of limitations. In *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003), this Court clarified that any affidavit of merit that is defective, whether or not it is "grossly nonconforming," does not constitute an effective affidavit of merit for the purposes of MCL 600.2912d(1), and therefore is not sufficient to commence a medical malpractice action. The *Geralds* holding "effectively razed" "[a]ny wall between nonconforming affidavits and grossly nonconforming affidavits." *Kirkaldy v Choon Soo Rim, M.D. (On Remand)*, 266 Mich App 626, 635; 702 NW2d 686 (2005).

Here, affidavits of merit from Dr. Michael Berke, Bernadette Smith, R.N., and Elizabeth Hill-Karbowski, CNM MSN, were attached to plaintiff's complaint in her first suit. In regard to the applicable standard of practice or care, all three affidavits state as follows:

> The reasonable care, diligence and skill ordinarily and/or reasonably exercised and possessed by similarly staffed and equipped hospitals under the circumstances.
>
> The degree of reasonable care, diligence, learning, judgment and skill ordinarily and reasonably exercised and possessed by [physicians, nurses and/or nurse midwives[8]] under similar circumstances. [Appendix I.]

[8] Dr. Berke's affidavit referred to physicians, Smith's affidavit referred to nurses, and Hill-Karbowski's affidavit referred to nurses and/or nurse midwives.

All three affiants gave the following statement regarding how they believed the applicable standard of practice or care was breached: "In my opinion, the applicable standard of practice or care was breached by one or more of the health professionals and/or health facilities who received the Notice of Intent to file claim under MCLA 600.2912b." Dr. Berke stated that, in order to have complied with the applicable standard of care, the health professional/facility should have taken or omitted the following actions:

> a. Properly diagnose and discover the patient's condition and properly treat the patient;
>
> b. Conduct proper or complete examination of the patient, which examinations would have disclosed the patient's condition.
>
> c. Properly observe and report the condition of the patient;
>
> d. Disclose to and inform the patient of all material elements of the risks involved in connection with his or her care and treatment, including the nature and possible consequences of the treatment, the prospects of success, the prognosis if the procedures were not performed, and alternative methods of treatment available;
>
> e. Conduct such tests and examinations as were necessary to the proper diagnoses and care of the patient.
>
> f. Provide the patient with reasonably prudent and proper medical care, treatment and services;
>
> g. Diagnose, care for, treat, and/or discover the patient's condition.
>
> h. Keep the patient under proper observation;
>
> i. Conduct proper or complete examinations of the patient, which examinations would have disclosed the patient's condition.

Smith and Hill-Karbowski's affidavits contain identical statements regarding the actions that defendants should have been taken or omitted:

> a. Conduct proper or complete examinations of the patient, which examinations would have disclosed the patient's condition.
>
> b. Properly observe and report the condition of the patient;
>
> c. Disclose to and inform the patient of all material elements of the risks involved in connection with her nursing care and treatment, including the nature and possible consequences of the treatment, the prospects of success, the prognosis if the procedures were not performed, and alternative methods of treatment available;

d. Provide the patient with reasonably prudent and proper care, treatment and services;

e. Properly recognize, care for, and/or discover the patient's condition.

Finally, with regard to how the alleged breach proximately caused the alleged injury, the affidavits all stated, "As a direct and proximate cause of the imprudent acts and omissions as described herein, Marcia Douglas' baby died due to and as a consequence of hypoxia and severe birth asphyxia."

Plaintiff argues that her affidavits of merit were sufficient to comply with the statute, because MCL 600.2912d(1) only requires the affidavits to include nonspecific statements. We disagree. In *Mouradian, supra* at 568, the plaintiffs alleged in their complaint that a defendant, Dr. Goldberg, and two anesthesiologists committed medical malpractice by administering anesthesia inappropriately during a second surgery on the plaintiff. This Court stated that the plaintiff's affidavit of merit "not only fails to contend that Dr. Goldberg inappropriately injected the anesthetic during the second surgery, the affidavit also fails to certify any merit to the assertion in the complaint that Dr. Goldberg breached any standard of care in the second surgery. Rather, the statements in the affidavit concerning the second surgery refer only to other defendants." *Id.* at 573. This Court pointed to the requirements of MCL 600.2912d(1), emphasizing that the affidavit of merit must contain: "(b) The health professional's opinion that the applicable standard of practice or care was breached by *the health professional* or health facility *receiving the notice*" and "(c) The actions that should have been taken or omitted by *the health professional* or health facility . . . ." *Mouradian, supra* at 573-574 (Emphasis in *Mouradian*). This Court concluded that the plaintiff's affidavit of merit was "grossly nonconforming" to the requirements of the statute because it did not "contain the requisite statements concerning the claims of Dr. Goldberg's alleged malpractice." *Id.* at 574. Thus, the plaintiff's filing of the affidavit of merit did not toll the statute of limitations and the plaintiff's claim was time-barred. *Id.* at 574-575.

In *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 700-701; 684 NW2d 711 (2004), our Supreme Court discussed the specificity required in a *notice of intent* required by MCL 600.2912b:

> Under MCL 600.2912b(4), a medical malpractice claimant is required to provide potential defendants with notice that includes a "statement" of each of the statutorily enumerated categories of information. Although it is reasonable to expect that some of the particulars of the information supplied by the claimant will evolve as discovery and litigation proceed, the claimant is required to make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings. The information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them. This is not an onerous task: all the claimant must do is specify what it is that she is *claiming* under each of the enumerated categories in § 2912b(4). Although there is no one method or format in which a claimant must set forth the required information, that information

> must, nevertheless, be specifically identified in an ascertainable manner within the notice. [Emphasis in *Roberts*.]

Although *Roberts* discussed the specificity required in a notice of intent, we conclude that the same reasoning applies to an affidavit of merit required under MCL 600.2912d(1). Although neither MCL 600.2912d(1) nor MCL 600.2912b specifically state that an affidavit of merit or a notice of intent must contain a *particularized* statement relating to the facts of that particular case, our Supreme Court in *Roberts* explained that a certain degree of specificity is required to comply with the statutory requirements.

Here, plaintiff's affidavits merely contain broad, nonspecific statements regarding the standards of care, the standards of care that were breached, the actions that should have been taken or omitted, and the manner in which the breach of the standard of care proximately caused the injury. The affidavits do not identify a specific standard of practice or care applicable to any particular defendant. Further, the affidavits do not identify defendants and do not state that the applicable standards of care that were breached by each particular defendant. Additionally, the affidavits do not indicate the specific actions or omissions that should have been taken by each defendant. Therefore, because plaintiff's affidavits of merit do not specifically include the requisite statements concerning each particular defendant's malpractice, plaintiff's affidavits are defective and do not constitute effective affidavits for the purpose of MCL 600.2912d(1).

Further, unlike *Wood v Bedialo*, ___ Mich App___; ___ NW2d___ (2006), and *VandenBerg v VandenBerg*, 231 Mich App 497; 586 NW2d 570 (1998), Dr. Berke's initial affidavit of merit did not contain sufficient substantive content to satisfy MCL 600.2912d. As opposed to the mere technical or procedural defect in the *Wood* affidavit, the initial affidavit here did not "otherwise me[e]t the legal and medical requirements of the statute," in regard to "its sufficiency." *Wood, supra*, slip op at 3. Accordingly, defendants here did not have "access to the affidavit of merit from the moment they received the complaint." *Id.* at 503. Thus, in plaintiff's first suit, she effectively filed a complaint without an affidavit of merit sufficient to commence a medical malpractice action. *Geralds, supra* at 240.

2. Dr. Berke's Affidavit

Plaintiff also argues that, in granting defendants' motions for summary disposition, the trial court erred in failing to consider a new affidavit of merit signed by Dr. Berke on February 24, 2003, which was attached by plaintiff to her response to defendants' motions for summary disposition. We disagree. MCL 600.2912d(1) provides that "the plaintiff in an action alleging medical malpractice . . . *shall file with the complaint* an affidavit of merit signed by a health professional . . . ." (Emphasis added.) In *Scarsella, supra* at 549, our Supreme Court explained that the Legislature's "[u]se of the word 'shall' indicates that an affidavit accompanying the complaint is mandatory and imperative." MCL 600.2912d(2) provides for an extension of time in which to file the affidavit of merit: "Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff . . . an additional 28 days in which to file the affidavit required under subsection (1)." In *Scarsella, supra* at 550, the Supreme Court held that a plaintiff cannot "amend" the complaint by supplementing the filing with an affidavit at some later date:

> Plaintiff contends that he should have been allowed to amend his September 22, 1996, complaint by appending the untimely affidavit of merit. He reasons that such an amendment would relate back, see MCR 2.118(D), making timely the newly completed complaint. We reject this argument for the reason that it effectively repeals the statutory affidavit of merit requirement. *Were we to accept plaintiff's contention, medical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and "amend" by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1), that the plaintiff "shall file with the complaint an affidavit of merit," as well as the legislative remedy of MCL 600.2912d(2), allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint.* [Emphasis added.]

Thus, under *Scarsella*, plaintiff cannot "amend" the complaint by filing the affidavit at some later date.

"[A] plaintiff who files a medical malpractice complaint without the required affidavit is subject to a dismissal without prejudice, and can refile properly at a later date." *Scarsella, supra* at 551-552. However, this Court also noted that:

> "In *VandenBerg [supra* at 502], the Court of Appeals found that the purpose of the statute was to prevent frivolous medical malpractice claims. In that case, plaintiff did not file an affidavit of merit at the time of filing the complaint; however, the defendants did receive an affidavit of merit at the same time they were served with the summons and the complaint. The Court of Appeals found that defendants did not suffer any prejudice because "they had access to the affidavit of merit from the moment they received the complaint." *Id.* at 503. In the present case, plaintiff's complaint was unaccompanied by an affidavit of merit at the time of filing and service upon the defendant, and at no time has plaintiff ever supplemented her complaint with an affidavit of merit. Under these circumstances, we hold that dismissal without prejudice would be the appropriate sanction for plaintiff's failure to comply with § 2912d." [*Scarsella, supra* at 551, quoting *Gregory, supra* at 47-48.]

Here, plaintiff filed Dr. Berke's second affidavit of merit before the expiration of the limitations period. However, Dr. Berke's initial affidavit of merit did not contain sufficient content to satisfy MCL 600.2912d, and thus, defendants did not have "access to the affidavit of merit from the moment they received the complaint." *VandenBerg, supra* at 503. Therefore, *VandenBerg* exception does not apply, and the trial court did not err in granting defendants' motions for summary disposition regarding plaintiff's first suit against defendants.

B. Docket No. 253611

Plaintiff argues that the trial court erred in granting summary disposition for defendants in regard to plaintiff's second suit on the ground that plaintiff's notices of intent were legally deficient. We disagree. This Court reviews de novo a trial court's grant or denial of summary

disposition. *Burton, supra* at 750. Additionally, "the question of what constitutes a waiver is a question of law." *MacInnes v MacInnes*, 260 Mich App 280, 283; 677 NW2d 889 (2004).

1. Sufficiency of the Notices of Intent

MCL 600.2912b(1) precludes a medical malpractice claimant from commencing suit against a health professional or health facility unless written notice is provided before commencement of the action:

> 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 600.2912b(1).]

MCL 600.2912b(4) enumerates the specific topics that the claimant is required to address in the notice of intent:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim. [MCL 600.2912b(4).]

MCL 600.2912b(4) requires that the required information must be separately identified and enumerated. *Roberts, supra* at 696.

Here, the trial court determined that plaintiff properly set forth the factual basis for the claim under MCL 600.2912b(4)(a), but determined that the notice of intent was deficient in other regards because they were not individualized and did not set forth sufficient particularized facts regarding the nature of the alleged malpractice. Plaintiff argues that the trial court erred, because MCL 600.2912b(4) does not require the statements in the notice of intent to be individualized or made with specificity. Plaintiff asserts that a notice of intent need not include something more specific than generic allegations. However, our Supreme Court rejected a similar argument in *Roberts*. In *Roberts, supra* at 700-701, our Supreme Court explained the degree of specificity MCL 600.2912b(4) requires in a notice of intent:

> Under MCL 600.2912b(4), a medical malpractice claimant is required to provide potential defendants with notice that includes a "statement" of each of the statutorily enumerated categories of information. Although it is reasonable to expect that some of the particulars of the information supplied by the claimant will evolve as discovery and litigation proceed, the claimant is required to make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings. The information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them. This is not an onerous task: all the claimant must do is specify what it is that she is *claiming* under each of the enumerated categories in § 2912b(4). Although there is no one method or format in which a claimant must set forth the required information, that information must, nevertheless, be specifically identified in an ascertainable manner within the notice. [Emphasis in *Roberts*.]

We agree with the trial court that plaintiff's notices of intent do not comply with MCL 600.2912b(4). Specifically, we agree with the trial court that plaintiff's notices of intent do not comply with the requirements of MCL 600.2912b(4)(b), (c), (d) or (e).

In order to comply with MCL 600.2912b(4)(b), the plaintiff must "make a good faith effort to aver the specific standard of care that she is claiming to be applicable to each particular professional or facility that is named in the notice." *Roberts, supra* at 692 (emphasis omitted). Here, the notice of intent to sue Dr. Verburg, Dr. Wilder, Bay View, and Northern Michigan Hospital states as follows regarding the standard of care:

> The reasonable care, diligence and skill ordinarily and/or reasonably exercised and possessed by similarly staffed and equipped hospitals under the circumstances.
>
> The degree of reasonable care, diligence, learning, judgment and skill ordinarily and reasonably exercised and possessed by physicians under similar circumstances.

The notice of intent to sue Pluim and Keebler states as follows regarding the standard of care:

> The degree of reasonable care, diligence, learning, judgment and skill ordinarily and reasonably exercised and possessed by nurse midwives under similar circumstances.

These notices of intent do not state a standard of care for each individual defendant, but merely state a general standard for each class of defendant (physicians, nurses, and hospitals). Accordingly, plaintiff's notices fail to claim "*the specific standard of care . . . applicable to each particular professional or facility* that is named in the notice." *Roberts, supra* at 692 (Emphasis supplied). Further, a general standard for each class of defendant is "not adequately *responsive* to the statutory requirement that the claimant allege an applicable standard of practice or care" relevant to the defendants. *Id.* (Emphasis added). We conclude that these statements do not

constitute a good faith effort to aver the specific standard of care applicable to each defendant. *Roberts, supra* at 692.

In order to comply with MCL 600.2912b(4)(c), the plaintiff must identify the manner in which the various defendants breached the applicable standards of care. *Roberts, supra* at 696-697. Here, plaintiff's notice of intent to sue Dr. Verburg, Dr. Wilder, Bay View, and Northern Michigan Hospital allege thirty ways in which the standard of care was breached, and her notice of intent to sue Pluim and Keebler states twenty-six ways in which the standard of care was breached. Although the statements are generalized and do not identify how each particular defendant breached the applicable standard of care. Therefore, plaintiff's statements are not minimally compliant with MCL 600.2912b(4)(b).

In order to comply with MCL 600.2912b(4)(d), the plaintiff must identify particular actions that each defendant should have taken in order to achieve compliance with the standard of care. *Roberts, supra* at 698, 701. Here, plaintiff's notices of intent merely reiterate the same ways in which the standard of care was breached, except to change each statement to their present tense. Plaintiff's notices of intent are wholly "tautological and unresponsive." *Roberts, supra* at 694. Further, plaintiff's notices of intent fail to identify specific actions that each particular defendant should have taken. Therefore, plaintiff's notices of intent are not minimally compliant with MCL 600.2912b(4)(d).

In order to comply with MCL 600.2912b(4)(e), the plaintiff must make state how each particular defendant's breach of the standard of care proximately caused the injury. *Roberts, supra* at 699, 701. Here, plaintiff's notices of intent both state the following regarding proximate cause:

> As a direct and proximate cause of the imprudent acts and omissions as described herein, Marcia Douglas' baby died due to and as a consequence of hypoxia and severe birth asphyxia.

This statement refers to the improperly alleged nonparticularized breaches of the standards of care set forth earlier in the notices of intent. "With no specific allegations regarding the conduct of any of the named defendants, the notices are insufficient to meet the particularized requirements of § 2912b(4)(e)." *Roberts, supra* at 699-700. Further, the allegations are readily categorized as "tautological and unresponsive." *Roberts, supra* at 694.

"The information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them." *Roberts, supra* at 701. Here, the notices of intent consist of numerous general allegations and defendants could not have gleaned the nature of the claim against them. All that is learned from the notices of intent is that shortly after birth Natasha died of hypoxia and severe birth asphyxia. While plaintiff alleges numerous theories that sound in medical negligence, none "explain the manner in which" any of the defendants' negligence caused or contributed to Natasha's death. MCL 600.2912(4)(c), (d) and (e). In conclusion, the trial court did not err in determining that plaintiff's notices of intent did not comply with MCL 600.2912b(4).

2. Waiver

Plaintiff also argues that even if the trial court correctly determined that plaintiff's notices of intent were legally deficient, the trial court erred in granting summary disposition for Northern Michigan Hospital because Northern Michigan Hospital waived its right to contest the legal sufficiency of plaintiff's notices of intent. We agree.

A waiver is a voluntary and intentional abandonment of a known right. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003).

Here, after plaintiff filed a motion to determine the sufficiency of notices of intent and affidavits of merit, the attorney for Northern Michigan Hospital sent a letter to plaintiff, which indicated, in pertinent part:

> We are in receipt of the Notice of Hearing regarding your Motion to Determine the Sufficiency of Notices of Intent and Affidavits. This correspondence should serve to inform you that your Affidavits and Notice appear sufficient on their faces, respectively. Therefore, we are not objecting to your Notices of Intent or Affidavits that are the subject of your Motion set for hearing on August 4, 2003, nor will we be appearing on the August 4, 2003[,] to dispute the same.

We conclude that by writing this letter, Northern Michigan Hospital waived its right to rely on the trial court's subsequent holding that plaintiff's notices of intent were legally deficient. The letter clearly indicates that the notices of intent "appear sufficient on their faces." This is essentially a concession that the notices are sufficient under MCL 600.2912b.

Further, the letter suggested that Northern Michigan Hospital would not rely on the trial court's later determination that the notices of intent were legally deficient.

Therefore, the trial court did not err determining that Northern Michigan Hospital did not waive its right to rely on the trial court's holding that plaintiff's notices of intent were legally deficient. Thus, the trial court did not err in granting summary disposition in favor of defendants, including Northern Michigan Hospital.

C. Docket Nos. 256422 & 256462

Plaintiff argues that the trial court erred for several reasons in holding that plaintiff's third suit against defendants was barred by the statute of limitations. Decisions regarding summary disposition are reviewed de novo. *Waltz, supra* at 647. "In the absence of disputed facts, whether a cause of action is barred by the statute of limitations is a question of law that is reviewed de novo." *Ward v Rooney-Gandy*, 265 Mich App 515, 517; 696 NW2d 64 (2005). The trial court granted defendants' motions for summary disposition under MCR 2.116(C)(7) (claim is barred because of the statute of limitations).

> "When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. If no facts are in dispute, and reasonable minds

> could not differ on the legal effect of those facts, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate." [*Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997), quoting *Baker v DEC Int'l*, 218 Mich App 249, 252-253; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247; 580 NW2d 894 (1998).]

1. MCL 600.5856(a)

First, plaintiff asserts that plaintiff's claims against Dr. Verburg, Dr. Wilder, and Northern Michigan Hospital were timely filed under MCL 600.5856(a), which provides that the statute of limitations is tolled at the time the complaint is filed.

Here, the alleged malpractice took place on October 23, 2000. The period of limitation for a malpractice action is two years. MCL 600.5805(6). Thus, the statute of limitations expired on October 23, 2002. Plaintiff filed her final complaints against defendants in January 2004. However, plaintiff argues that her final complaints were timely filed within the statute of limitations, because the limitation period was tolled under MCL 600.5856(a) when she filed her first complaint on April 4, 2002, and her second complaint on May 27, 2003. We disagree.

As discussed, plaintiff's first complaint (filed on April 4, 2002) was properly dismissed because the affidavits of merit did not comply with MCL 600.2912d(1). A complaint that is filed with an affidavit of merit that does not conform with MCL 600.2912d(1) does not toll the statute of limitations. *Mouradian, supra* at 573. Plaintiff's second complaint (filed on May 27, 2003) was, in part, properly dismissed because the notices of intent did not comply with MCL 600.2912b(4). Because the notices of intent did not comply with MCL 600.2912b, the filing of the notices did not toll the statute of limitations. *Roberts, supra* at 686, 702. Therefore, the statute of limitations was not tolled under MCL 600.5856(a) because plaintiff's first two complaints were not legally sufficient to commence the lawsuit. *Mouradian, supra* at 574.

2. MCL 600.5852 and MCL 600.5856(d)

Next, plaintiff argues that her final complaint was timely filed under the wrongful death provision, MCL 600.5852, as extended by the notice tolling provision, MCL 600.5856(d). MCL 600.5852 provides:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

Because plaintiff's letters of authority were issued on August 9, 2001, plaintiff was permitted under MCL 600.5852 to commence the action against defendants at any time before August 9, 2003. Plaintiff did not file her final complaints until January 2004. However, plaintiff argues

that the two year grace period set forth in MCL 600.5852 was tolled by operation of MCL 600.5856(d), which provides that the statutes of limitations or repose are tolled:

> If, during the applicable notice period under [MCL 600.2912b], a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

"Under this provision, the limitation period is tolled for 182 days if the plaintiff provides a valid notice of intent before the limitation period expires." *Waltz, supra* at 646 n 6, citing MCL 600.2912b and *Omelenchuck v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000). However, because MCL 600.5852 is a saving statute and not a statute of limitations, MCL 600.5856(d) does not extend the limits set forth in MCL 600.5852. *Waltz, supra* at 649-651.

Here, the trial court correctly determined that plaintiff's notices of intent did not comply with MCL 600.2912b(4). In order to toll the period under MCL 600.5856(d), a plaintiff is required to provide *a valid* notice of intent *in compliance with the provisions of MCL 600.2912b* before expiration of the limitations period. *Waltz, supra* at 646 n 6, 651. "[I]n order to toll the limitation period under § 5856(d), the claimant is required to comply with all the requirements of § 2912b" *Roberts, supra* at 686. Because plaintiff's notices of intent did not comply with MCL 600.2912b, the statute of limitations was not tolled under MCL 600.5856(d).

Furthermore, our Supreme Court in *Waltz, supra* at 648-652, 655, held that MCL 600.5856(d) does not toll the grace period set forth in MCL 600.5852. Even if plaintiff's notices of intent complied with MCL 600.2912b, these notices only tolled the statute of limitations for 182 days under MCL 600.5856(d). Thus, because plaintiff's notice of intent to Keebler and Pluim was dated July 16, 2002, the statute of limitations would have been tolled 182 days to January 15, 2003.

Under MCL 600.5852, the running of the statute of limitations was suspended two years from August 9, 2001, the time the letters of authority were issued to plaintiff, to August 9, 2003. Therefore, MCL 600.5852 allowed plaintiff to file her complaint later than MCL 600.5856(d). Nonetheless, plaintiff did not file her final complaints before either of these dates, as she filed her final complaints in January 2004. As discussed, MCL 600.5856(d) does not toll the saving provision set forth in MCL 600.5852. *Waltz, supra* at 648-652, 655; see also *Lentini v Urbancic*, 267 Mich App 579, 582; 705 NW2d 701 (2005) ("because MCL 600.5852 is not a statute of limitation, but rather a saving provision, MCL 600.5856(d) does not toll the two-year period within which a personal representative may file a claim on behalf of a decedent under MCL 600.5852").

We reject plaintiff's argument that under *Waltz*, the statute of limitations for plaintiff's claims against Pluim and Keebler expired on February 7, 2004. In arguing that the expiration of the saving period set forth in MCL 600.5852 (August 9, 2003) should be extended by 182 days under MCL 600.5856(d) because of the notice of intent mailed to Pluim and Keebler on July 16, 2002, plaintiff points to *Waltz, supra* at 652 n 14, where our Supreme Court stated:

> We disagree with the dissent's assertion that our reading of the applicable statutes "effectively reduces" by 182 days the two- and three-year periods

> provided for in § 5852. See *post* at 21. Plaintiff had a full two years after letters of authority were issued to commence her claim, as long as the claim was commenced within three years after the expiration of the two-year limitation period for medical malpractice actions. Additionally, plaintiff was entitled to a 182-day tolling period under § 5856(d), provided that she filed her notice of intent at some point before the expiration of that two-year limitation period. Potentially, then, under §§ 5805(5), 5852, and 5856(d), plaintiff had *five years plus 182 days* to commence her lawsuit following the accrual of her cause of action. However, because plaintiff waited until nearly five years had passed after her infant's death to file her notice of intent, there was simply no unexpired "statute of limitations" to toll. This analysis in no way shortens either the two-year extension period or the three-year ceiling provided for in § 5852.

This footnote does not stand for the proposition that MCL 600.5856(d) tolls the grace period set forth in MCL 600.5856, but merely explains that it is possible (if unlikely) that a plaintiff could have five years plus 182 days to commence his lawsuit under the operation of both statutes. This is possible even under the Court's holding that MCL 600.5856(d) does not toll the grace period set forth in MCL 600.5856.[9] Therefore, under *Waltz*, the trial court properly determined that plaintiff's final complaints should be barred because of the expiration of the statute of limitations.

3. Retroactivity of *Waltz*

Next, plaintiff argues that our Supreme Court's holding in *Waltz*, that MCL 600.5856(d) does not operate to toll the savings period in MCL 600.5852, should not apply retroactively to his case. However, this Court recently reaffirmed the retroactivity of *Waltz* by a conflict panel. *Mullins v St. Joseph Mercy Hosp*, 271 Mich 503; 722NW2d 666 (2006). We are bound to follow the precedent set in *Mullins*, and therefore, plaintiff's argument must fail.

4. Equitable Tolling

Plaintiff next argues that the trial court should have denied defendants' motions for summary disposition on the basis of equitable tolling. Plaintiff did not raise this issue in response to defendants' motions for summary disposition, but only raised it in her motion for

[9] For example, plaintiff's claim accrued on October 23, 2000. If she had filed a valid notice of intent on October 23, 2002, the two-year statute of limitations would have been tolled for 182 days under MCL 600.5856(d), to expire on April 22, 2003. But if plaintiff's letters of authority were not issued until April 22, 2004, plaintiff would have been permitted under MCL 600.5852 to file her complaint at any time before April 22, 2006 (two years after the letters of authority were issued and three years after the expiration of the statute of limitations). Under these circumstances, plaintiff could have had five years plus 182 days after the date of the malpractice to commence her action, even without MCL 600.5856(d) tolling the saving provision under MCL 600.5852. Such a possible scenario was contemplated in *Waltz*, *supra* at 652 n 14, but does not exist in the present case.

reconsideration. Therefore, this issue is preserved only in the context of plaintiff's motion for reconsideration. We review a trial court's decision regarding denial of a motion for reconsideration for an abuse of discretion. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004). In order to succeed in a motion for reconsideration, "The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3).

Limitation statutes are not entirely rigid and allow for equitable tolling under certain rare circumstances. *Ward v Rooney-Gandy*, 265 Mich App 515, 518, 520; 696 NW2d 64 (2005). "Although courts undoubtedly possess equitable power, such power has traditionally [been] reserved for 'unusual circumstances' such as fraud or mutual mistake." *Devillers v Auto Club Ins Assoc*, 473 Mich 562, 590; 702 NW2d 539 (2005) (2005). This Court extensively discussed equitable tolling in *Ward, supra* at 517-520:

> "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff." 51 Am Jur 2d, Limitation of Actions, § 174, p 563. "In order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations, provided it is in conjunction with the legislative scheme." 54 CJS, Limitations of Actions, § 86, p 122.
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> * * *
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> Equitable tolling has been applied where "the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass." Am Jur 2d, *supra* at 563. While equitable tolling applies principally to situations in which a defendant actively misleads a plaintiff about the cause of action or in which the plaintiff is prevented in some extraordinary way from asserting his rights, the doctrine does not require wrongful conduct by a defendant. *Id.* at 564. An element of equitable tolling is that a plaintiff must exercise reasonable diligence in investigating and bringing his claim. *Id.* at § 175, p 564. In *Irwin v Dep't of Veterans Affairs*, 498 US 89, 96; 111 S Ct 453; 112 L Ed 2d 435 (1990), the United States Supreme Court noted that it had "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period[.]" In support, the Supreme Court cited, in part, *Burnett v New York Central R Co*, 380 US 424; 85 S Ct 1050; 13 L Ed 2d 941 (1965), in which the plaintiff filed a timely complaint, but in the wrong court. *Irwin, supra* at 96 n 3.

Plaintiff argues that she is entitled to equitable tolling because she did not mail her notice of intent until August 5, 2003, which was four days before grace period allowed under MCL 600.5852 expired. Plaintiff explains that she was precluded from timely filing her complaint because she was compelled by MCL 600.2912b(1) to wait 182 days after mailing her notice of

intent before she could file her complaint. Plaintiff contends that under these circumstances, strict application of the statute of limitations would be inequitable. We disagree.

First, there is no dispute that this is not a case where plaintiff was induced or tricked by defendants' misconduct into allowing the filing deadline to pass.

Second, this case does not involve a diligent plaintiff whose claim was barred by the statute of limitations because of a clerical error. In *Ward, supra* at 522-524, this Court applied the doctrine of equitable tolling when the statute of limitations expired after the plaintiff timely prepared a proper affidavit of merit for his medical malpractice claim, but mistakenly filed the wrong affidavit due to a clerical error. The *Ward* panel clarified, however, that while equitable tolling applied because the plaintiff timely prepared a legally sound affidavit of merit, the doctrine of equitable tolling would not apply where the timely prepared or filed affidavit was legally deficient. *Id.* at 525. The *Ward* panel pointed to *Mouradian* and *Geralds* as cases where equitable tolling would not apply because a legally sound affidavit of merit was not prepared within the limitations period. *Ward, supra* at 525. In the present case, plaintiff's complaint was barred by the statute of limitations because the affidavits of merit and notices of intent in her previous cases were legally deficient. Therefore, equitable tolling does not apply under *Ward*.

Third, this case does not involve a situation where the requirement that a plaintiff comply with MCL 600.2912b(1) unjustly deprives the plaintiff of her day in court due to the statute of limitations, as in *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996). Here, plaintiff's medical malpractice claims were not vitiated by a statutory amendment imposing a requirement with which she could not effectively comply. Rather, MCL 600.5856(d) gave plaintiff 182 days after mailing a notice of intent to file her complaint. Here, unlike in *Morrison*, it was possible for plaintiff to provide defendants with the 182-day notice of her claims and still file her complaint within the statute of limitations.

Fourth, plaintiff's failure to comply with the statute of limitations was not caused by an understandable confusion about the legal nature of her claim, as in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 684 NW2d 864 (2004). In the present case, there is no confusion about the nature of plaintiff's claims. Plaintiff's claims against defendants are time-barred because of plaintiff's failure to meet the medical malpractice statutory requirements.

Furthermore, this Court has rejected any assertion by plaintiff that the law regarding the interplay between MCL 600.5852 and MCL 600.5856(d) was confusing before our Supreme Court's decision in *Waltz*. In *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), this Court held that the decision in Waltz that MCL 600.5856(d) does not toll MCL 600.5852 "was 'clearly foreshadowed,' if not actually determined, by the previous decision holding that § 5852 is a saving provision, not a statute of limitations or repose." Therefore, the doctrine of equitable tolling does not apply in the present case. See also *Ward v Siano*, ___ Mich ___; ___ NW2d ___ (2006)

5. Due Process

Next, plaintiff argues that MCL 600.5856(d) and MCL 600.5852, as interpreted by *Waltz*, denied plaintiff her right to due process. Plaintiff raised this issue in her motion for reconsideration, so we review this issue for an abuse of discretion. *Ensink, supra* at 540.

Plaintiff cites *Dyke v Richard*, 390 Mich 739, 746; 213 NW2d 185 (1973), where our Supreme Court quoted *Price v Hopkin*, 13 Mich 318, 324 (1865):

> It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought [citations omitted] and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.

"[A] statute which extinguishes the right to bring suit cannot be enforced as a law of limitation." *Dyke, supra* at 746. In *Price, supra* at 324-328, our Supreme Court held that the plaintiff's due process rights were violated when the Legislature shortened a statute of limitations from twenty to fifteen years, thus annihilating a vested right without permitting a reasonable time to bring the lawsuit.

Plaintiff argues that our Supreme Court's holding in *Waltz* that MCL 600.5856(d) does not toll the grace period set forth in MCL 600.5852 effectively shortened the limitation period that applied to plaintiff under *Omelenchuk*. We disagree. Neither MCL 600.5856(d), nor MCL 600.5852, nor the interaction between the two statutes as interpreted by *Waltz* extinguished plaintiff's right to bring her suit. The present case is distinguishable from cases like *Morrison*, where enforcement of the statutes would vitiate an accrued medical malpractice claim.

In the present case, plaintiff's medical malpractice claims were not vitiated by *Waltz* imposing a requirement with which she could not effectively comply. Rather, even under *Waltz*, plaintiff had the opportunity to file her claims within the statute of limitations. Furthermore, in *Ousley, supra* at 493-495, this Court held that *Waltz* did not overrule clear and uncontradicted case law or represent a change in the law. Rather, the decision in *Waltz* that MCL 600.5856(d) does not toll MCL 600.5852 "was 'clearly foreshadowed,' if not actually determined, by the previous decision holding that § 5852 is a saving provision, not a statute of limitations or repose." *Ousley, supra* at 495. *Waltz* did not change the law or "shorten" the limitations period as alleged by plaintiff, but merely clarified the limitation period in light of MCL 600.5856(d) and MCL 600.5852. Therefore, plaintiff cannot complain that her due process rights were violated by application of *Waltz*. This trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

6. Stare Decisis

Finally, plaintiff argues that the Michigan Supreme Court's analysis in *Waltz* is incorrect and should be revisited and reversed. "Under the rule of stare decisis, the Court of Appeals must follow decisions of our Supreme Court . . . ." *Fletcher v Fletcher*, 200 Mich App 505, 511; 504

NW2d 684 (1993), rev'd in part on other grounds 447 Mich 871; 526 NW2d 889 (1994). Therefore, this Court does not have the authority to grant plaintiff the relief she seeks.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens