STATE OF MICHIGAN

COURT OF APPEALS

MONIKA MAZUMDER, Personal Representative of the Estate of DEEPIKA S. MAZUMDER, Deceased,

Plaintiff-Appellee/Cross-Appellee,

v

UNIVERSITY OF MICHIGAN BOARD OF REGENTS, ROBERT A. KOEPKE, PH.D., RAJIV TANDON, M.D., SATOSHI MINOSHIMA, M.D., WASHTENAW COUNTY COMMUNITY MENTAL HEALTH, JOSEPH YAROCH, M.D., MOONSON R. ELLIOTT ENINSCHE, B.A., R.S.W., C.S.M., and RICHARD PFOUTZ, M.S.W., C.S.W.,

Defendants,

and

MOHAMED AZIZ, M.D., and STEPHAN F. TAYLOR, M.D.,

Defendants-Appellants,

and

SRINIBAS MAHAPATRA, M.D.,

Defendant-Cross-Appellant.

FOR PUBLICATION
February 23, 2006
9:05 a.m.

No. 261331
Washtenaw Circuit Court
LC No. 04-001101-NM

MONIKA MAZUMDER, Personal Representative of the Estate of DEEPIKA S. MAZUMDER, Deceased,

Plaintiff-Appellee/Cross-Appellee,

No. 261333
Washtenaw Circuit Court
LC No. 04-001101-NM

v

UNIVERSITY OF MICHIGAN BOARD OF REGENTS, MOHAMED AZIZ, M.D., STEPHAN F. TAYLOR, M.D., ROBERT A. KOEPKE, PH.D., RAJIV TANDON, M.D., SATOSHI MINOSHIMA, M.D., and JOSEPH YAROCH, M.D.,

Defendants,

Official Reported Version

and

WASHTENAW COUNTY COMMUNITY MENTAL HEALTH, MOONSON R. ELLIOTT ENINSCHE, B.A., R.S.W., C.S.M., and RICHARD PFOUTZ, M.S.W., C.S.W.,

Defendants-Appellants,

and

SRINIBAS MAHAPATRA, M.D.,

Defendant-Cross-Appellant.

Before: Hoekstra, P.J., and Neff and Davis, JJ.

NEFF, J.

In these consolidated appeals involving a wrongful death medical malpractice action, defendants appeal by leave granted an order of the trial court denying their motions for summary disposition pursuant to MCR 2.116(C)(7) on the grounds that plaintiff 's action was time-barred.[1] Dr. Srinibas Mahapatra also challenges on cross-appeal the order denying summary disposition. We affirm, although not on the basis cited by the trial court.

I

[1] Drs. Mohamed Aziz and Stephan F. Taylor appeal by leave granted in Docket No. 261331, and Washtenaw County Community Mental Health; Moonson R. Elliott Eninsche, B.A., R.S.W., C.S.M.; and Richard Pfoutz, M.S.W., C.S.W., appeal by leave granted in Docket No. 261333.

This case is one of numerous appeals prompted by the Michigan Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642, 648-650; 677 NW2d 813 (2004), and more particularly, this Court's decision in *Ousley v McLaren*, 264 Mich App 486, 494-495; 691 NW2d 817 (2004), which determined that *Waltz* warrants retroactive application.[2] The question in this case is whether plaintiff's wrongful death medical malpractice action is properly dismissed after the decision in *Waltz* because the 182-day statutory tolling period, MCL 600.5856, on which plaintiff relied in calculating the period of limitations for filing her action was no longer applicable, and thus the saving period for filing a wrongful death action, MCL 600.5852, expired during the required 182-day statutory notice period for filing a medical malpractice action, MCL 600.2912b. We conclude that principles of equity require affirmance under the circumstances of this case.

II

In *Waltz*, the Supreme Court held that wrongful death actions filed by personal representatives under MCL 600.5852 were subject to the 182-day statutory waiting period for filing a medical malpractice action, MCL 600.2912b(1), but were not entitled to the concomitant 182-day statutory tolling of the limitations period under MCL 600.5856. Before the decision in *Waltz*, the bench and bar in Michigan, including a significant portion of this Court, generally functioned with the understanding that the notice period and the notice tolling provision operated together so that the two-year saving period permitted for filing a wrongful death action by a personal representative would be tolled during the 182-day waiting period. Consequently, after the decision in *Ousley* holding that *Waltz* applied retroactively, numerous cases pending in the lower courts were summarily dismissed as time-barred because the plaintiffs had filed the actions presuming a statutory tolling period, which under *Waltz* no longer applied. Like the proverbial deer in the headlights, the plaintiffs' causes of action have been frozen in time and space by the retroactive application of *Waltz* by *Ousley*, leaving them with no recourse or remedy.

The legal fallout from the decision in *Waltz* has been significant. This Court has been presented with numerous appeals of nearly identical issues of time-bar dismissal, all disputing the correctness and reach of *Waltz* and its progeny. These issues have consumed inordinate time and effort on the part of the bench and bar at various levels. For defense counsel, *Waltz* and *Ousley* were essentially a windfall in pending cases. For the plaintiffs' counsel, and their clients, the decisions had serious repercussions.[3]

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[2] See also *Forsyth v Hopper*, 472 Mich 929 (2005); *Wyatt v Oakwood Hosp & Med Centers*, 472 Mich 929 (2005); *Evans v Hallal*, 472 Mich 929 (2005); *McMiddleton v Bolling*, 267 Mich App 667, 671; 705 NW2d 720 (2005); *Lentini v Urbancic (On Remand)*, 267 Mich App 579, 582 n 3; 705 NW2d 701 (2005).

[3] Not only were the cases dismissed, but the grounds of dismissal call into question the adequacy of counsel's representation; a statute of limitations error on the part of trial counsel is the most rudimentary error.

Viewing *Waltz* and *Ousley* as *correct*, the fact that so many members of this state's bench and bar committed such rudimentary errors would be a discredit to the profession. Viewing *Waltz* or *Ousley* as *incorrect*, the fact that members of the bench and bar can ignore the inequities in these circumstances is a discredit to our sense of fairness and justice. Either way, permitting the summary dismissal of these legitimately filed claims is an indictment of our legal system, not merely the plaintiffs' lawyers. The Supreme Court has generally recognized and applied equitable principles to avoid injustice in circumstances such as these. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 432; 684 NW2d 864 (2004); *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003); *Pohutski v City of Allen Park*, 465 Mich 675, 698-699; 641 NW2d 219 (2002). We conclude that the application of principles of equity is similarly warranted in this case to reinstate plaintiff's action.

III

Plaintiff Monika Mazumder filed this action as personal representative of the estate of the decedent, Deepika S. Mazumder, following Deepika's death on June 3, 2000. According to plaintiff's complaint, Deepika committed suicide as a result of defendants' negligence in treating her mental illness.

Personal representative letters of authority were issued for Deepika's estate on May 2, 2002.[4] Plaintiff filed a notice of intent for the medical malpractice action on April 27, 2004, and subsequently filed her complaint on October 21, 2004. Presuming that the saving period was tolled during the 182-day notice period, plaintiff calculated that she had the remainder of the two-year saving period in which to file her complaint, and thus the complaint was timely filed.[5]

Waltz was decided on April 14, 2004. Under the analysis in *Waltz*, plaintiff's action would be time-barred because *Waltz* held that the notice tolling provision, MCL 600.5856, did not toll the wrongful death saving period, MCL 600.5852, and therefore the saving period expired May 2, 2004, during the 182-day waiting period following her notice of intent. This Court subsequently held that *Waltz* applied retroactively; thus, the analysis in *Waltz* became applicable to plaintiff's case. *Ousley, supra* at 494-495.

IV

Defendants argue that the trial court erred in denying their motions for summary disposition on the basis that plaintiff timely filed her complaint within the "five-year ceiling" permitted for filing a wrongful death action under MCL 600.5852. We agree for reasons discussed below.

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[4] Although plaintiff apparently is the successor personal representative, she relies on the date the initial personal representative, Bhaskar Mazumder, was appointed.

[5] The number of days from April 27, 2004, to May 2, 2004, added to the 182 days.

Further, it seems clear that applying the analyses in *Waltz* and subsequent cases would result in the dismissal of plaintiff's case in hindsight because plaintiff could not meet the 182-day waiting period following her notice of intent, during which she was precluded from filing suit, and still file her complaint before the end of the two-year saving period under MCL 600.5852. However, given the widespread recognition within the bench and bar of notice tolling during the saving period before the decision in *Waltz*, and the injustice that results from ignoring that recognition, plaintiff is entitled to equitable relief. *Bryant, supra* at 432; *Apsey v Mem Hosp (On Reconsideration)*, 266 Mich App 666, 681-682; 702 NW2d 870 (2005); see also *Ward v Rooney-Gandy*, 265 Mich App 515, 517-520; 696 NW2d 64 (2005) (setting forth principles for equitable tolling), rev'd 474 Mich 917 (2005). No principled basis exists for denying plaintiff her right to proceed with her pending action.

A

Whether a period of limitations applies in particular circumstances constitutes a legal question that this Court considers de novo. *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

> We [also] review de novo decisions regarding summary disposition motions. Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz, supra* at 647-648, quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

This Court considers de novo the applicability of equitable doctrines. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004).

B

The trial court denied defendants' motions for summary disposition on the grounds that plaintiff's complaint was timely filed in light of what the court perceived as a "five-year ceiling" in MCL 600.5852. We disagree.

MCL 600.5852 sets forth a saving period in which a personal representative may pursue a wrongful death action:

> 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.

The trial court reasoned that under the wrongful death saving provision, plaintiff had three years from the time she was issued letters of authority in which to file her complaint, or until June 3, 2005. However, as this Court noted in *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 573 n 16; 703 NW2d 115 (2005), the three-year period referenced in the second sentence of MCL 600.5852 does not establish a wrongful death saving period separate from the period of two years after the issuance of letters of authority:

> We note that the three-year ceiling in this provision does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it.

Consequently, plaintiff's action is not saved by the three-year ceiling in MCL 600.5852, and the trial court erred in granting summary disposition on this basis.

C

The period of limitations applicable to a wrongful death action is generally the period applicable to the underlying theory of liability. *Waltz, supra* at 648. The limitations period for a medical malpractice action is two years from the date the claim first accrued.[6] MCL 600.5805(1) and (5);[7] *Farley, supra* at 571. However, MCL 600.5852 sets forth a saving period in which a personal representative may pursue a wrongful death action:

> 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.

Accordingly, "a personal representative may file a medical malpractice suit on behalf of a deceased person for two years after letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired." *Farley*, *supra* at 572-573.

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[6] The six-month discovery rule, MCL 600.5838a(2), does not apply in this case.

[7] Effective March 31, 2003, former MCL 600.5805(5) was renumbered as subsection 6. 2002 PA 715. Because subsection 5 prescribed the period of limitations applicable at the time this action accrued, MCL 600.5838a(1), this opinion refers to subsection 5.

In 1993, the Legislature enacted a number of changes to the Revised Judicature Act, including a 182-day notice provision for medical malpractice actions, MCL 600.2912b(1), and a provision for tolling the period of limitations during the 182-day notice period, MCL 600.5856(d). 1993 PA 78; *Morrison v Dickinson*, 217 Mich App 308, 311-312; 551 NW2d 449 (1996). The purpose of the notice requirement is "to encourage settlement without the need for formal litigation." *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 715; 575 NW2d 68 (1997).

MCL 600.2912b(1) provides:

> 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 600.5856 provides:

> The statutes of limitations or repose are tolled:
>
> * * *
>
> (d) If, during the applicable notice period under section 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.[8]

Under the statutory scheme for notice, "filing a notice of intent to sue will toll any period of limitations or repose, if such period . . . would otherwise bar the claim, for the time set out in the written notice of intent provision (MCL 600.2912b[1]), that is, for a period not longer than 182 days." *Farley, supra* at 572.

In *Waltz*, the Supreme Court held that the medical malpractice notice tolling provision did not toll the saving period under MCL 600.5852 for filing a wrongful death action:

> Section 5856(d), by its express terms, tolls only the applicable "statute of limitations or repose." As we recently stated in *Miller* [*v Mercy Mem Hosp*, 466 Mich 196, 202; 644 NW2d 730 (2002)], the wrongful death provision, § 5852, "is a *saving statute*, not a statute of limitations." (Emphasis supplied.) See also *Lindsey v Harper Hosp* [455 Mich 56, 60-61, 65; 564 NW2d 861 (1997)], in which we explained that § 5852, as "the statute of limitations *saving provision*" and an "*exception* to the statute of limitations," operated "to suspend the running

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[8] Effective April 22, 2004, MCL 600.5856 was amended, relettering subsection d as c, and making other changes that do not affect this appeal. 2004 PA 87. This opinion cites the former subsection for consistency.

of the statute until a personal representative is appointed to represent the interests of the estate."

> The plain language of § 5852 wholly supports our conclusion that it is not itself a "statute of limitations." . . . By its own terms, § 5852 is operational only within the context of the *separate* "period of limitations" that would otherwise bar an action. Section 5852 clearly provides that it is an *exception* to the limitation period, allowing the commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired. [*Waltz, supra* at 650-651.]

D

The parties do not dispute the timing of the following relevant events in this case: (1) The decedent died on June 3, 2000, after alleged acts of malpractice by defendants beginning on March 3, 2000; (2) the probate court issued letters of authority appointing a personal representative of the decedent's estate on May 2, 2002;[9] and (3) the personal representative gave defendants notice of the estate's intent to pursue medical malpractice claims against them on April 27, 2004.

Plaintiff filed suit on October 21, 2004, nearly six months after the expiration of the grace period for filing a medical malpractice action pursuant to the wrongful death saving statute. Under the analysis in *Waltz* and its progeny, plaintiff's complaint would be considered untimely. *Waltz*, *supra* at 651; *Farley*, *supra* at 573-575.

E

The decision in *Waltz*, and subsequent decisions, essentially retroactively foreclosed any statutory basis for tolling the two-year filing period in the saving statute, MCL 600.5852. *Waltz* was decided on April 14, 2004, less than two weeks before the notice of intent in this case on April 27, 2004, and less than three weeks before the two-year saving period expired on May 2, 2004. Under pre-*Waltz* decisions, our courts clearly applied the notice tolling provision to the two-year saving period in the wrongful death statute. Plaintiff proceeded accordingly in this case. If *Waltz* had not "eliminated" the tolling period, plaintiff's complaint, filed on October 21, 2004, would have been timely in light of the 182-day notice tolling provision. Given the timing of the *Waltz* decision, it was not possible for plaintiff to alter the course of the litigation to protect her right to a cause of action.

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[9] Plaintiff argues that the wrongful death saving provision in MCL 600.5852 began to run on May 2, 2002, the date that her predecessor personal representative, Bhaskar Mazumder, was issued letters of authority. Plaintiff does not argue that the wrongful death saving period should recommence on the date that she received letters of authority appointing her as the successor personal representative, and thus we do not address this consideration.

In rendering its decision in *Waltz*, the Supreme Court acknowledged that its earlier decision in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), "might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision," and to that extent overruled *Omelenchuk*. *Waltz, supra* at 655. In *Omelenchuk, supra* at 577, a unanimous Court referred to MCL 600.5852 as a "limitation period," and calculated the limitations period on the basis of the date the personal representative was appointed, February 14, 1994, rather than the accrual date of the cause of action, February 13, 1994. See *Waltz, supra* at 654. Accordingly, in *Omelenchuk, supra* at 577, the Court observed that "the two-year limitation period was set to expire on February 14, 1996," two years after the personal representative was appointed, indicating that the two-year period was tolled during the statutory notice period, i.e., the wrongful death saving period under MCL 600.5852. See *Waltz, supra* at 654.

Although in *Waltz* the Court determined that the dates in *Omelenchuk* were miscalculated and should have been based on the accrual date of the cause of action, February 13, 1994, rather than on the date the personal representative was appointed, February 14, 1994, the fact remains that *Omelenchuk* undeniably applied the tolling provision to the wrongful death saving provision, even if contrary to the plain language of the statute. The bench and bar subsequently relied on the analysis in *Omelenchuk* and the dates as calculated. See, e.g., *Waltz v Wyse*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2002 (Docket No. 231324), slip op, p 3 n 2 ("To the extent that plaintiff relies on *Omelenchuk, supra* at 577, we find that case distinguishable. In that case, the Supreme Court added the 182-day tolling period to the two-year limitation periods that started when the personal representative was appointed . . . .").

In addition to *Omelenchuk*, pre-*Waltz* published decisions of this Court similarly recognized tolling with respect to the required 182-day notice period.[10] In *Fournier v Mercy*

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[10] A review of both published and unpublished decisions in which this Court recognized that tolling applied during the statutory notice period reveals that at least 17 members of this Court presumed that tolling applied to the wrongful death saving statute. *Fournier v Mercy Community Health Care System-Port Huron*, 254 Mich App 461; 657 NW2d 550 (2002) (authored by Judge Kelly, joined by Judges Smolenski and Hood); *Lentini v Urbancic*, 262 Mich App 552; 686 NW2d 510 (2004) (authored by Judge Smolenski and joined by Judges White and Kelly), vacated and remanded, 472 Mich 885 (2005), on remand 267 Mich App 579 (2005); *Crockett v Fieger Fieger Kenney & Johnson, PC*, unpublished opinion per curiam of the Court of Appeals, issued October 28, 2003 (Docket No. 240863) (Judges Bandstra, Hoekstra, and Borrello); *Waltz v Wyse*, unpublished opinion per curiam of the Court of Appeals, issued October 1, 2002 (Docket No. 231324) (Judges Cooper, Hoekstra, and Markey); *Chernoff v Sinai Hosp of Greater Detroit*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2002 (Docket No. 228014) (Judges Neff, Fitzgerald, and Talbot); *Gillary v Sisters of Mercy Health Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 10, 2001 (Docket No. 221665) (Judges Saad, Holbrook, and Murphy); *Williams v Spohn*, unpublished opinion per curiam of the Court of Appeals, issued December 12, 2000 (Docket No. 212792) (Judges Wilder,

(continued…)

Community Health Care System-Port Huron, 254 Mich App 461; 657 NW2d 550 (2002), the Court clearly based its analysis and decision on the premise that the tolling provision, MCL 600.5856, applied to the wrongful death saving provision, MCL 600.5852. The Court held that because the plaintiff failed to comply with requirements for the notice of intent under MCL 600.2912b, the notice of intent did not toll the "statutory period of limitation," which expired two years after the probate court issued letters of authority appointing the plaintiff personal representative. *Fournier, supra* at 468-469. In *Fournier,* the decedent died on July 7, 1998. The plaintiff was appointed personal representative on July 13, 1998. The plaintiff mailed six notices of intent on July 12, 2000, next-day delivery, all of which were mistakenly sent to one recipient who was not named as a defendant. *Id*. at 463. The Court noted that "under the particular facts of this case, the *period of limitation* expired July 13, 2000, two years after the letters of authority were issued." *Id*. at 466-467 (emphasis added).

Likewise, in *Lentini v Urbancic*, 262 Mich App 552; 686 NW2d 510 (2004), vacated and remanded, 472 Mich 885 (2005), on remand 267 Mich App 579 (2005), the "Court accepted that MCL 600.5856(d) tolled the period described under MCL 600.5852 . . . ." *Lentini, supra,* 267 Mich App 581. In the initial opinion, the Court addressed the question of "when" the letters of authority were considered "issued" for the purposes of tolling the period of limitations. The Court held that the letters are "issued" on the date they are signed by the probate judge. *Id*. The decedent died on April 11, 1999. The letters of authority were signed on October 15, 1999, and certified and mailed to the plaintiff on October 19, 1999. On October 12, 2001, the plaintiff filed a notice of intent. *Id*. at 580-581. In its initial decision, the Court stated:

> If the date of issuance of the letters of authority is fixed as October 15, 1999, plaintiff had three days remaining under the statute of limitations when he tolled the running of the statutory period on October 12, 2001. The saving provision would give plaintiff three days to timely file his malpractice complaint when the tolling provision expired on April 12, 2002, or until April 15, 2002. But if the date of issuance of the letters of authority is deemed to be October 19, 1999, plaintiff had seven days remaining under the statute of limitations at the time it was tolled, and, therefore, when the tolling provision expired on April, 12, 2002, plaintiff had until April 19, 2002, to timely file his complaint. Plaintiff filed his complaint on April 17, 2002. Thus, whether plaintiff's complaint survives is wholly dependent on the date the letters of authority were "issued." [*Lentini, supra*, 262 Mich App 554-555.]

No matter which date the letters of authority were considered "issued," the Court recognized that the tolling period applied to the wrongful death saving statute. Pre-*Waltz* decisions by lower courts likewise applied the tolling provision to the wrongful death saving provision.

(…continued)

Holbrook, and McDonald). Our review indicates that, before the holding in *Ousley*, no panel had indicated a contrary view and, further, that defense counsel as well generally held the view that tolling applied to the saving period. See, e.g. *Chernoff, supra,* slip op, p 1 and n 1.

Moreover, in *Morrison*, this Court addressed the statutory scheme for the notice of intent requirement, MCL 600.2912b, and the tolling provision, MCL 600.5856, as enacted under 1993 PA 78. Because of the effective date and the enacting provisions of the public act, the plaintiffs' case was subject to the notice requirement, but not the tolling provision. The Legislature enacted the notice provision and the tolling provision, both effective April 1, 1994. *Id*. at 311. The act, however, provided that the tolling provision did not apply to causes of action arising before October 1, 1993, whereas the notice provision applied to cases filed on or after October 1, 1993. *Id*. at 312.

In *Morrison*, the plaintiffs' malpractice action arose on May 21, 1992, with respect to a childbirth; however, the plaintiffs provided their notice of intent on April 28, 1994, and filed their complaint on May 19, 1994. *Id*. at 310. The defendants claimed that they were entitled to summary disposition because the plaintiffs failed to give the required 182-day notice. The *Morrison* Court held that although the plaintiffs failed to comply with the notice requirement, they could not be denied the tolling period, even though technically it did not apply to their cause of action because "enforcement would vitiate an accrued medical malpractice claim without providing the potential plaintiff the benefit of the 182-day tolling provision." *Id*. at 318. The Court held that the plaintiffs, as well as all similarly situated plaintiffs, were free to refile their suits following the dismissal of their actions. *Id*. at 319. *Morrison* clearly recognized that the Legislature's intent was that the 182-day notice provision would be counterbalanced by the 182-day tolling provision. *Id*. at 315-316.

F

In this case, plaintiff's "untimely" filing was not due to her miscalculation of the applicable limitations period. Plaintiff relied on the courts' repeated recognition and the general understanding among the bench and bar that tolling applied under the circumstances of this case.[11] Accordingly, in keeping with established precedent, equitable principles compel affirmance.

The Supreme Court has generally recognized and applied equitable principles to avoid injustice in circumstances such as these. *Bryant*, *supra* at 432; *Pohutski*, *supra* at 698-699. Given this precedent, including the recognition in *Waltz*, *supra* at 655, that *Omelenchuk* "might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision," we find the equitable principles applied by Justice Markman in *Bryant*, *supra* at 432, a proper basis for reinstating plaintiff's action. In this case, as in *Bryant*, "[p]laintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights." *Id*.

[11] The number of recent and pending appeals presenting nearly identical issues of time-bar dismissal in the context of the wrongful death saving provision, MCL 600.5852, is further evidence of this general understanding.

The fact that the language of the statute plainly refers to a "statute of limitations" or a "statute of repose," see *Waltz, supra* at 651, 655, does not change this result. In *Pohutski*, considering similar equities, Justice Corrigan, writing for the majority, obtained a similar result under the same reasoning. The Court held that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity," but nonetheless determined that it would be inequitable to apply the holding to pending cases. *Id*. at 689-690. Justice Corrigan concluded:

> Thus, if we applied our holding in this case retroactively, the plaintiffs in cases currently pending would not be afforded relief under *Hadfield* [*v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988)] or 2001 PA 222. Rather, they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing.
>
> Accordingly, this decision will be applied only to cases brought on or after April 2, 2002. In all cases currently pending, the interpretation set forth in *Hadfield* will apply. [*Pohutski, supra* at 698-699.]

Although Justice Corrigan's statements were made in the context of retroactivity, there is no principled basis for failing to similarly uphold the "administration of justice" in this case. *Id.* at 699; see also *Gladych, supra* at 606. The equities do not change merely because of the nature of the action. Plaintiff 's circumstances are no less worthy of equity, fairness, or justice with respect to her right of action.

Even absent this Supreme Court precedent, the doctrine of judicial or equitable tolling should be invoked to prevent the unjust forfeiture of plaintiff 's cause of action. *Ward, supra* at 520. In *Ward*, this Court set forth the principles of equitable or judicial tolling:

> "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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> This Court in *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1, 6; 489 NW2d 115 (1992), noted that "Michigan and federal case law provides precedent for the principle that limitation statutes are not entirely rigid, allowing judicial tolling under certain circumstances[.]"
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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. [*Id.* at 517-520.]

The doctrine of equitable or judicial tolling "must and should be rarely invoked" only "to ensure fundamental practicality and fairness and to prevent the unjust technical forfeiture of a cause of action . . . ." *Id*. at 520; see also *Apsey, supra* at 681-682. Such circumstances exist in this case.

Although the Supreme Court recently reversed the majority decision in *Ward* in lieu of granting leave to appeal for the reasons stated in the dissent in *Ward*, see 474 Mich 917 (2005), the *Ward* dissent did not eschew the doctrine of equitable tolling, but concluded that it did not apply in the circumstances of that case because the affidavit was grossly nonconforming and the filing of the defective affidavit did not toll the period of limitations. *Ward, supra* at 529. Contrasting *Bryant, supra* at 432, the dissent concluded that the plaintiff's filing of an affidavit regarding the wrong patient "was undoubtedly 'the product' of a 'negligent failure' rather than an 'understandable confusion . . . .'" *Ward, supra* at 528-529. In this case, to the contrary, there is no indication that the timing of plaintiff's complaint resulted from any negligent failure; rather, it was based on the confusion among the bench and bar concerning the existing law in Michigan. *Apsey, supra* at 681.

Plaintiff's failure to comply with the statute of limitations was the product of an understandable misinterpretation of the notice tolling provision, resulting from not only the appellate courts' interpretation of the statutes at issue, but also from the presumed legislative intent. We hold that plaintiff is entitled to equitable relief. Accordingly, we affirm the trial court's order denying defendants' motions for summary disposition pursuant to MCR 2.116(C)(7).

V

Regardless of whether the decision in *Waltz* reached a correct result reading the plain language of MCL 600.5856, this result could not have been intended by the Legislature. In this case, as in *Morrison*, plaintiff is subject to the notice provision, but not the tolling provision, which is contrary to the legislative intent as set forth in *Morrison*. The notice of intent tolling provision, MCL 600.5856, should apply to the wrongful death saving period, MCL 600.5852, because it is the only way to harmonize the statutes and thereby effectuate the plain enactments of the Legislature.

In effect, *Waltz* established a judicial obstacle to a cause of action that the Legislature established pursuant to the strict requirement of a 182-day waiting period to file a medical malpractice action. The 182-day waiting period is used as a sword to shorten the two-year

saving period. Wrongful death medical malpractice actions are generally time-consuming and difficult to evaluate; personal representatives should at least have the benefit of the two-year minimal period for filing a cause of action that the Legislature has determined is appropriate for medical malpractice actions generally. We urge the Legislature to respond legislatively to restore the two-year saving period for a wrongful death cause of action to eliminate confusion.

Affirmed.

Davis, J., concurred.

/s/ Janet T. Neff
/s/ Alton T. Davis