STATE OF MICHIGAN

COURT OF APPEALS

MARY MULLINS, Personal Representative of the Estate of NINA F. MULLINS, Deceased,

Plaintiff-Appellee,

v

ST. JOSEPH MERCY HOSPITAL, d/b/a ST. JOSEPH MERCY HEALTH SYSTEM, JASON WHITE, M.D., RAFAEL J. GROSSMAN, M.D., and KIMBERLY STEWART, M.D.,

Defendants-Appellants,

and

JAMES R. BENGSTON and WALTER WHITEHOUSE, M.D.,

Defendants.

FOR PUBLICATION
July 11, 2006
9:10 a.m.

No. 263210
Washtenaw Circuit Court
LC No. 03-000812-NH

Official Reported Version

Before: Hoekstra, P.J., and Murphy, White, Talbot, Meter, Cooper, and Donofrio, JJ.

MURPHY, J. (*dissenting*).

I respectfully disagree with the majority that *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), should be given full retroactive effect, as was held in *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004). Our Supreme Court's orders in *Wyatt v Oakwood Hosp & Med Ctrs*, 472 Mich 929 (2005), *Evans v Hallal*, 472 Mich 929 (2005), and *Forsyth v Hopper*, 472 Mich 929 (2005), and the Court's denial of the application for leave in *Ousley*, 472 Mich 927 (2005), do not, in my opinion, constitute binding precedent. And I am firmly of the opinion that *Waltz* was wrongly decided and that a sound analysis of the principles governing the determination of whether a judicial decision should be given retroactive effect, as opposed to prospective effect only, leads to but one reasonable conclusion: *Waltz* should not be applied

retroactively. I would settle the conflict in favor of *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586; 711 NW2d 448 (2006), vacated in part 269 Mich App 801 (2006). Accordingly, I dissent.[1]

The Supreme Court orders cited above are clear, concise, and understandable, and they are not controlled by, nor do they turn on, the particular facts of the case. The legal principle declared, that *Waltz* is to be given full retroactive application, is broad and effectively all-encompassing and not subject to variant interpretations. But the orders do not technically comply with the test set forth in *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993), in which the Court, addressing an issue regarding the precedential value of its orders, stated:

> In its opinion in this case, the Court of Appeals characterized our order in [*People v Bailey*, 439 Mich 897 (1991)] as "not binding precedent." There is no basis for this conclusion. The order in *Bailey* was a final Supreme Court disposition of an application, and the order contains a concise statement of the applicable facts and the reason for the decision. Const 1963, art 6, § 6.[2]

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[1] I recognize that in *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), I concurred in an opinion that declined to call for a conflict panel in light of the orders issued by the Supreme Court, which I believed indicated the Court's stance on whether *Waltz* should be applied retroactively despite a lack of expressed reasoning. Taking into consideration judicial economy and resources, along with the "handwriting on the wall" as reflected in the orders, I thought it more prudent to defer to the Supreme Court with respect to its apparent position on the retroactivity issue and let it make any change in this position if desired, rather than to involve this Court in the laborious conflict process. However, now that a conflict panel has in fact been convened after this Court found that an outcome-determinative issue existed requiring resolution of whether *Ousley* was correctly decided despite the existence of the Supreme Court orders, I find it appropriate to voice my substantive position and address the merits of applying *Waltz* retroactively.

[2] A line of cases from this Court has developed that indicates that a final dispositional order issued by the Supreme Court is binding precedent simply when it can be understood. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 165-166; 712 NW2d 731 (2005); *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002); *Brooks v Engine Power Components, Inc*, 241 Mich App 56, 61-62; 613 NW2d 733 (2000), overruled by *Kurtz v Faygo Beverages, Inc*, 466 Mich 186 (2002); *People v Phillips (After Second Remand)*, 227 Mich App 28, 38 n 11; 575 NW2d 784 (1997); *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996). *Fannon* and *Evans* relied on *Brooks*, *Phillips*, and *Edgett*, while *Brooks* relied on *Phillips*. In *Phillips* and in *Edgett*, this Court cited *Crall, supra* at 464 n 8, for the proposition that "Supreme Court peremptory orders are binding precedent when they can be understood." *Phillips, supra* at 38 n 11; *Edgett, supra* at 693 n 6. However, a review of *Crall, supra* at 464 n 8, reveals no such ruling. Rather, as quoted above, *Crall* held that an order was binding precedent, when the order was a final dispositional order regarding an application and the order contained "a concise statement of the applicable facts and the reason for the decision." *Id.* Other cases from this Court have honored the actual language of *Crall*. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483-484; 633 NW2d 440 (2001); *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 591 n 8; 546 NW2d 690 (1996), remanded 455 Mich 863 (1997). I
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The need for a concise statement of the facts and a recitation of the reasons for the decision is compelled by, as recognized in *Crall*, the Michigan Constitution.

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent. [Const 1963, art 6, § 6.]

The Legislature similarly mandated the inclusion of language touching on the facts and the reasons for a ruling in Supreme Court decisions, as reflected in MCL 600.229, which provides:

> Decisions of the supreme court, including all cases of mandamus, quo warranto, and certiorari, shall be in writing, with a concise statement of the facts and reasons for the decisions; and shall be signed by the justices concurring in the opinion. Any justice dissenting from a decision shall give the reasons for his dissent in writing under his signature. All opinions and dissents shall be filed in the office of the clerk of the supreme court, and copies of them shall be delivered to the supreme court reporter at the same time.

If the necessity to supply the "reasons" for a decision is satisfied by simply enunciating a legal conclusion, i.e., *Waltz* is to be given full retroactive application, as opposed to providing some legal analysis in support of the conclusion, and if the "decision" in the relevant orders is deemed the directive that the cases be remanded as on leave granted, with the reference to *Waltz* and retroactivity constituting the "reasons" for that decision, then the orders at issue partially satisfy the constitutional and statutory mandates. In my opinion, however, some or all of these assumptions cannot be made. First, the "decision" that is of relevance to us in these orders is the finding that *Waltz* is fully retroactive, and there are no reasons given for that decision or conclusion in any of the orders.[3] Next, if the "decision" in these orders is indeed the remand

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note that the *Brooks* panel, although citing the language from *Phillips* regarding orders that can be understood, additionally and correctly cited the language from *Crall*. *Brooks, supra* at 62.

[3] The pertinent language of *Wyatt* and *Evans, supra* at 929, is identical and states:

> In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration, as on leave granted, of the question whether the statute of limitations bars an action from proceeding where the complaint was filed more than two years *after* the original letters of authority and *before* the subsequent letters of authority were issued. MCR 7.302(G)(1). That Court is to give the holding of *Waltz v Wyse*, 469 Mich 642 (2004), full retroactive application. [Emphasis in original.]

The relevant language of *Forsyth, supra* at 929, simply provides: "In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave

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directive, the reference to *Waltz* and retroactive application does not appear to be the "reason" for that decision; rather, the language is merely part of the Court's instruction and guidance to this Court with respect to the analysis on remand. Moreover, it is indisputable that the reference to *Waltz* does not constitute the "reason" why *Waltz* applies retroactively, considering that this issue was not broached in *Waltz*. It would certainly be preferable to have the Supreme Court give some minimal explanation or provide even some cursory analysis relative to its legal conclusion that *Waltz* is fully retroactive before these orders are deemed binding precedent, resulting in substantively meritorious cases being sent to the legal graveyard. I think it possible that if the Supreme Court actually prepared a full opinion on the topic, which would force and require consideration and analysis of the principles controlling a retroactivity determination, a majority of the Court might well conclude that *Waltz* applies prospectively only, or, minimally, resolution of the issue would be difficult.

The majority is forced to speculate that, even though *Ousley* is not mentioned in any of the Supreme Court orders, it is clear that the Supreme Court was cognizant of *Ousley* and its retroactivity analysis, and the Court therefore implicitly sanctioned *Ousley*'s retroactivity analysis in entering the orders. The basis for this reasoning focuses on the fact that the denial of leave in *Ousley* was entered the day before the three orders at issue were entered by the Court. We should not rely on speculation, especially considering the large number of applications presented to the Supreme Court and the involvement of commissioners and staff in preparing the orders, nor should we rely on any implication that the Court sanctioned *Ousley* if this would be inconsistent with the constitutional and statutory provisions cited above, which provide that the reasons for the decision "shall be in writing." Const 1963, art 6, § 6; MCL 600.229. It would have been a simple matter for the Court to have expressly referenced and adopted *Ousley* in the three orders. This is exactly what the Supreme Court did in an order cited favorably by the majority, *Ewing v Detroit*, 468 Mich 886-887 (2003), in which the Court ruled, "For the reasons stated in the dissenting opinion in the Court of Appeals, *Robinson v Detroit*, 462 Mich 439 [613 NW2d 307] (2000), applies retroactively." In another order cited by the majority, *People v O'Donnell*, 474 Mich 867 (2005), the Supreme Court cited two previous opinions in support of its ruling regarding limited retroactivity. I have no qualms with the concept of incorporation by reference, but finding incorporation by speculation and implication is not appropriate.

Even if one determines that the orders include the "reasons" for the decisions in a manner pertinent to the issue before us and consistent with the Constitution and the statute, they do not contain a "concise statement of the facts" as required by Const 1963, art 6, § 6 and MCL 600.229.[4] While the orders are understandable with regard to *Waltz* and its retroactive nature, and can be applied to a broad spectrum of cases outside of *Wyatt*, *Evans*, and *Forsyth* without the need to know the particular facts involved in other actions, the constitutional and statutory

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granted. MCR 7.302(G)(1). That Court is to give the holding of *Waltz v Wyse*, 469 Mich 642 (2004), full retroactive application."

[4] I disagree with the majority that the orders in *Wyatt* and *Evans* each contain a sufficient statement of the facts, where the language relied on by the majority is simply part of the question framed by the Supreme Court to be addressed on remand. Additionally, the language has nothing to do with retroactivity.

requirements nonetheless remain applicable and must be satisfied. I am not prepared to rule that these orders constitute binding precedent when they do not comply with Const 1963, art 6, § 6, MCL 600.229, and the *Crall* decision.

Viewing the Supreme Court orders at issue as binding precedent that controls the outcome of this conflict dispute is also problematic for the reason that such a conclusion runs contrary to this Court's earlier determination, pursuant to a poll under MCR 7.215(J)(3), that an outcome-determinative issue existed between *Mullins* and *Ousley* and required resolution by a special panel. "Special panels may be convened to consider outcome-determinative questions only." MCR 7.215(J)(3)(a). The decision or outcome in *Mullins* regarding the retroactivity of *Waltz* would not hinge on whether the analysis in *Ousley* was legally correct if indeed the Supreme Court orders are controlling. But this Court has already ruled that an outcome-determinative issue exists, thereby requiring substantive analysis of whether the reasoning and holding in *Ousley* was sound and whether *Waltz* should be applied retroactively, and any reliance now solely on the Supreme Court orders would surely run afoul of the law of the case doctrine. See *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 98-100; 706 NW2d 843 (2005). Importantly, *Mullins* and this Court's vote to convene a special conflict panel all occurred after the relevant Supreme Court orders were issued, and thus these orders were subject to consideration.

After the *Mullins* panel declared that it was required to rule that *Waltz* was retroactive because *Ousley*, as binding precedent, mandated such a ruling, the decision by this Court, as a whole, to convene a special conflict panel on the issue reflected an agreement by this Court that the *Mullins* panel correctly determined that it was bound by *Ousley*, which controlled the ruling. The majority's analysis necessarily rejects this conclusion by determining that *Ousley* does not control and that the whole matter can be resolved simply by reference to the Supreme Court orders. There was no conflict that required resolution if the Supreme Court orders constituted binding precedent.[5] As such, the majority opinion is directly contrary to the majority vote of this Court.

MCR 7.215(J)(5) does not lend support for the majority's position. The majority relies on the following sentence found in MCR 7.215(J)(5): "The special panel shall limit its review to resolving the conflict that would have been created but for the provisions of subrule (1) and applying its decision to the case at bar." This language merely confines the special panel to

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[5] MCR 7.215(J)(3)(a) provides, in part, that

> the chief judge must poll the judges of the Court of Appeals to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict that would have been created but for the provisions of subrule (1).

Again, if the Supreme Court orders are deemed controlling, convening a special panel could not have been warranted, yet a majority of the full Court found that the convening of a special panel was indeed warranted.

analysis of the conflict issue and precludes the special panel from ruling on matters outside the issue for which it was formed; it does not abrogate the law of the case doctrine. Apparently, the majority believes that the language of MCR 7.215(J)(5) gives it, or any other special panel, unfettered and unrestricted discretion in resolving a conflict, without the need to abide by legal principles that govern the manner in which this Court analyzes and decides cases. For example, if a special panel were confronted with a conflict issue regarding a matter of statutory construction, under the majority's reasoning, the panel could ignore and even reject the well-accepted rules of statutory construction in resolving the conflict because, as asserted by the majority, MCR 7.215(J)(5) "simply imposes no restriction on the convened special panel's ability to consider and resolve the issue in conflict." *Ante* at ___. This position is untenable. There are legal rules, principles, and doctrines that we are required to follow in any ruling issued by this Court, and this includes rules of statutory construction as well as the doctrine of law of the case.[6]

The majority finds my position regarding law of the case to be troubling[7] because it requires a presumption that the judges voting to convene the special panel were aware of the Supreme Court orders when they voted, yet *Mullins* did not address the orders. I first note that both the majority and the dissent in *Mullins* cited and discussed *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), which was decided before the conflict polling took place. The majority in *Mullins* even directed readers to review *McLean*: "We reject *Ousley* for the reasons stated in Judge O'Connell's dissent in *McLean* . . . and reiterated in this opinion. For a complete review of the legal development of this issue, we direct the reader to the *McLean* opinions." *Mullins, supra* at 587 n 1.

McLean extensively addressed the three Supreme Court orders at issue. *McLean* itself was a published opinion of this Court and most certainly reviewed by many members of this Court. Additionally, I am aware of at least three unpublished opinions of this Court decided in December 2005, involving nine different judges of the Court, in which the panels specifically referred to the three Supreme Court orders relative to the issue of *Waltz* and retroactivity. See *Amon v Botsford Gen Hosp*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2005 (Docket No. 260252); *Washington v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2005 (Docket No. 263108); *Costa v Gago*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2005 (Docket No. 256673). Further, in *Mazumder v Univ of Michigan Bd of Regents*, 270 Mich App 42; 715 NW2d 96 (2006), a case decided around the time of the conflict polling and heard in December 2005, the Court referred to the three Supreme Court orders. Considering only *McLean*, *Mullins*,

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[6] "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

[7] What I find troubling is the majority's refusal to accept that the members of this Court already determined that it was necessary to substantively address the conflict between *Ousley* and *Mullins* on the issue of retroactivity relative to *Waltz* regardless of the Supreme Court orders.

Mazumder, and the three unpublished opinions, I count 17 members of this Court, including myself, who absolutely were aware of the Supreme Court orders at the time of the conflict polling. Furthermore, I am not aware of any authority that suggests that the law of the case doctrine is inapplicable because a judge or a panel in the controlling ruling was unaware of binding precedent. To the contrary, the law of the case applies even if the prior ruling is legally unsound. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997) (doctrine applies "without regard to the correctness of the prior determination"). Also, reliance on the argument that the members of this Court might not have been aware of "binding" Supreme Court precedent places all of us in a negative light.

The majority additionally suggests that *Health Call*, which I authored, incorrectly addressed the law of the case doctrine within the context of conflict resolution. For the reasons stated above as part of my analysis here, *Health Call* correctly addressed the issue regarding the law of the case, and, regardless, it represents binding precedent. The majority's attempt to distinguish *Health Call* reveals a fundamental misunderstanding of that decision. The three-member panel that issued the first opinion in *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 265 Mich App 79; 695 NW2d 337 (2005), vacated in part 265 Mich App 801 (2005) (vacated pursuant to MCR 7.215[J][5] for a special panel to be convened), factually distinguished its case from the earlier opinion in *Environair, Inc v Steelcase, Inc*, 190 Mich App 289; 475 NW2d 366 (1991), yet found that it was nevertheless bound to follow *Environair*. This indicated a position that the legal principle enunciated in *Environair* was a blanket rule not subject to factual exceptions or distinctions. When this Court voted to convene a special panel in *Health Call*, it necessarily reflected that the Court also found that *Environair* set forth a blanket legal rule not subject to factual exceptions or distinctions, otherwise there would not have existed an outcome-determinative conflict issue to resolve, as *Health Call* could have simply been found factually distinguishable and not controlled by *Environair*. Because a special panel was convened to resolve the conflict, the panel was bound by law of the case, noting, "We must construe *Environair* as standing for the proposition that damages arising out of or related to the termination of an at-will contract are speculative as a matter of law in all cases . . . ." *Health Call, supra*, 268 Mich App at 98. Just as the *Health Call* panel was required to construe *Environair* in a certain way because of the conflict vote to avoid offending the law of the case doctrine, we are likewise compelled to construe the Supreme Court orders as not being binding precedent in order to comply with the doctrine. This is not a matter of ignoring the orders, but merely an acceptance that the issue was necessarily and implicitly dealt with and rejected previously when the polling occurred.

The majority sums up its ruling by stating that if the Supreme Court orders in *Forsyth*, *Wyatt*, and *Evans* bind us and control the outcome of the conflict question, as it believes they do, the Court is obligated by law to follow the orders. This conclusion begs the question: Why, if the orders are binding, did this Court, as a whole, vote to convene a special panel? There can only be one answer: This Court's vote to convene a special panel despite the existence of the Supreme Court orders was essentially a determination that the orders were not binding precedent, yet the majority feels that it can revisit the issue, which I find improper.

If, hypothetically, the Supreme Court, after *Ousley* was decided, had issued a full opinion that analyzed the issue of retroactivity and held that *Waltz* was fully retroactive, and then *Mullins* was decided, in which the Court, as was done here, called for conflict resolution because of a

disagreement with *Ousley*, a vote by this Court to nonetheless convene a special panel would necessarily indicate a conclusion that the Supreme Court's decision was not controlling, because otherwise there would be no legal basis or need to convene a panel to resolve a conflict. The actual circumstances here are no different if one concludes that the three orders are binding precedent. Considering the procedural history faced by this conflict panel, I conclude that it is necessary for us to substantively address the issue whether *Waltz* should be applied retroactively.

I now turn to my view of the *Waltz* decision, both the merits of the decision and whether it should be applied retroactively. In this regard, I am reminded of the Michigan Supreme Court's directive in *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987), in which the Court, while stating that a decision by the Court was binding on the Court of Appeals under the tenet of stare decisis and must be followed, also noted that the Court of Appeals "may properly express its belief that [a Supreme Court decision] was wrongly decided . . . ."

While following *Waltz*, as I must, I respectfully accept the Court's "invitation" to express my belief that *Waltz* was wrongfully decided and that, at a minimum, I am of the opinion that it is unjust for the Michigan Supreme Court to require that *Waltz* be applied retroactively. The holding in *Waltz*, in my estimation, was clearly contrary to the Legislature's intent and represented a strained analysis, purportedly consistent with governing principles of statutory construction. In *Waltz*, the Supreme Court held that the tolling provision found in MCL 600.5856(c),[8] applicable in medical malpractice actions, does not apply to MCL 600.5852[9]

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[8] MCL 600.5856 provides, in relevant part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
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> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Waltz referred to § 5856(d), which, at that time, was the subsection that contained the tolling provision relative to notice periods in medical malpractice actions; the provision was moved to § 5856(c) with minor changes when the statute was amended in 2004. 2004 PA 87.

[9] 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

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because the tolling statute only tolls statutes of limitations or repose and § 5852 is a wrongful-death saving statute or provision, not a statute of limitations or repose. The term "saving statute" is a *judicially created* label, as there is no such reference in § 5852. The Supreme Court took it upon itself to define § 5852 as a "saving statute" where the Legislature itself failed to do so. From an "implied" perspective, while § 5852 has saving qualities, it can just as well be viewed as and labeled a statute that provides an alternative limitations period or a limitations period that is applicable under certain circumstances in wrongful-death cases, or simply a statute that has both saving and statute of limitations aspects; it ultimately sets timelines within which actions must be filed or they are lost. MCL 600.5852 is contained in chapter 58 of the Revised Judicature Act (RJA), MCL 600.5801 *et seq.*, and this entire chapter addresses the "LIMITATION OF ACTIONS," according to its title. It defies logic and principles of statutory construction to conclude that, because the Legislature used the words "statutes of limitations or repose" in § 5856, it did not intend to encompass § 5852 for tolling purposes because § 5852 is a "saving statute" and not a statute of limitations, despite the fact that § 5852 is contained in chapter 58 of the RJA, that § 5852 sets forth time periods within which a wrongful-death action must be filed by a personal representative, and that it was *the Court and not the Legislature* that labeled § 5852 a "saving statute."

Attributing to the Legislature knowledge and an understanding that § 5852 is a "saving statute" only and using this unexpressed thought, knowledge, or belief in construing other statutes is contrary to a constructionist approach in statutory interpretation. By enacting § 5856(c), the Legislature was plainly and unambiguously providing a tolling period for medical malpractice actions relative to notices of intent, MCL 600.2912b, which tolling comes into play any time a cause of action is susceptible to being lost because the claim would be untimely if there were full compliance with the requirements of § 2912b, and § 5852 indisputably plays a role in determining whether an action is time-barred, which is the essence of limitations periods.

Waltz relied in part on *Miller v Mercy Mem Hosp*, 466 Mich 196; 644 NW2d 730 (2002). In *Miller, supra* at 202-203, our Supreme Court stated that § 5852 is a saving statute and not a statute of limitations, while at the same time ruling that the six-month discovery period in MCL 600.5838a(2)[10] is a "distinct period of limitation." The Court found that the six-month discovery provision in § 5838a(2) is a period of limitations because "[i]t is a statutory provision that requires a person who has a cause of action to bring suit within a specified time." *Miller, supra* at 202. In the context of defining a statute of limitations, I see no true difference between a statute that gives a party six months to file suit after a claim was or should have been discovered and a statute that gives a party two years to file suit after letters of authority are issued. Both §§

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> 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.

[10] MCL 600.5838a(2) provides, in part, that a plaintiff in a medical malpractice action may commence suit "within 6 months after the plaintiff discovers or should have discovered the existence of the claim . . . ."

5838a(2) and 5852 are triggered under certain circumstances, i.e., discovery of a claim or the wrongful death of a decedent and appointment of a personal representative, and both require "a person who has a cause of action to bring suit within a specified time." *Miller, supra* at 202.

Section 5852 allows a personal representative in a medical malpractice action to file suit within two years after letters of authority are issued even though the standard two-year period of limitations on malpractice actions may have run. Just as § 5852 can "save" an action when a medical malpractice limitations period has expired, § 5838a(2) can "save" an action, on the basis of discovery, when the general limitations period has run. And both statutes *also* include deadlines within which to file an action. I also note that § 5838a(2) and (3) provide, in part, that medical malpractice claims are properly commenced when filed within the "applicable period" prescribed in "sections 5851 to 5856," which encompasses § 5852. This reference to "applicable period[s]" clearly indicates that the Legislature viewed § 5852 as a statute of limitations. Furthermore, *Miller* stated that the purpose of § 5852 was to give personal representatives a reasonable time to pursue actions, *Miller, supra* at 203. Yet how is this purpose served or even recognized in illogically concluding that the Legislature decided to deprive personal representatives in wrongful-death medical malpractice actions from having the benefit of the tolling statute?[11] Again, the Legislature did not call § 5852 a "saving statute." The Legislature directed that a notice be served before the filing of a medical malpractice complaint, § 2912b, and it intended to provide tolling to a plaintiff in such actions, § 5856(c), but that intent is contravened in *Waltz* by a ruling that relies entirely on the judicially created label attached to § 5852.

Waltz also relied on *Lindsey v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997). In *Lindsey*, the Supreme Court repeatedly referred to § 5852 as the "statute of limitations saving provision." The Court noted that § 5852 has the effect of extending the limitations period set forth in MCL 600.5805 and is "an exception to the statute of limitations . . . ." *Lindsey, supra* at 64-65. The Court's reference to § 5852 being an exception to the statute of limitations was made in the context of its discussion of § 5805, the general statute of limitations, and, in my opinion, was meant to indicate only that § 5852 could be utilized if an action was lost under § 5805, and not that § 5852 lacked its own distinctive features or characteristics common to other limitations statutes. In other words, *Lindsey* merely indicated that § 5852 had a saving feature relative to § 5805, but there was no suggestion whatsoever that other aspects of § 5852 could not be deemed as setting forth limitations periods in their own right that must be satisfied before a suit can be pursued. Indeed, the Court stated that § 5852 extended the limitations period, which language necessarily implies that § 5852 not only can save an action but additionally provides an outer time line within which a suit must be filed. *Lindsey, supra* at 64.

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[11] *Miller*'s statement that § 5852 is not a statute of limitations but is rather a saving statute does not appear to be relevant to the holding in the case, in which the Court found that the language of § 5852, limiting claims to those commenced "within 3 years after the period of limitations has run," allowed a claim to be filed within three years of the end of the six-month discovery period in § 5838a(2), which is a period of limitations.

In my opinion, § 5856(c) should apply to § 5852, and I would respectfully encourage the Supreme Court to reconsider its analysis of this issue.

Regarding the issue whether *Waltz*, if it remains unchanged, should be retroactive or prospective only, I conclude that the applicable principles in making this determination favor a finding that it should be applied prospectively only.

The three relevant cases on this issue are *Miller*, *Lindsey*, and *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled in part by *Waltz*, *supra* at 655. *Lindsey* involved the question whether the plaintiff 's wrongful-death action was barred despite § 5852. More specifically, the Court had to decide whether the period provided in § 5852 began to run when the probate court issued the plaintiff letters of authority as temporary personal representative or when the court issued the plaintiff letters of authority as personal representative on a permanent basis. As indicated above, the Court repeatedly referred to § 5852 as the "statute of limitations saving provision." This language does not clarify whether § 5852 should be considered as solely a saving statute or whether it has additional qualities comparable to statutes of limitations. It cannot be read to have given any meaningful guidance to the bench and bar on the issue whether tolling applied to § 5852. It is beyond any reasonable dispute that *Lindsey* did not address the issue whether tolling under § 5856(c) applies to § 5852.

Omelenchuk addressed MCL 600.2912b, the statute governing notices of intent. The Court concluded that a limitations period is tolled for the full 182 days, which is the applicable notice period in § 2912b. *Omelenchuk, supra* at 575. Section 5852 was discussed when the Court was making various calculations under the facts of the case. On February 13, 1994, the decedent died of a heart attack, and on February 14, 1994, two personal corepresentatives were appointed. The personal representatives eventually filed a medical malpractice action. The Court noted that if no tolling provision were applicable, the personal representatives had until February 14, 1996—two years after their appointment—to bring the action. *Omelenchuk, supra* at 569, 577. This determination was made pursuant to, as stated by the Court, the "two-year limitation period" in § 5852. *Id.* at 577. On December 11, 1995, the plaintiffs served the defendants with the notice of intent. *Id.* The Court concluded:

> As a result of the notice, the limitation period was tolled one hundred eighty-two days. Rather than expiring on February 14, 1996, the limitation period thus was tolled from December 11, 1995, until June 10, 1996; it then resumed for another sixty-five days until it expired on August 14, 1996. [*Id.*]

Although not directly addressing the issue whether § 5852 was subject to tolling under § 5856, the *Omelenchuk* Court's calculations clearly applied the notice of intent tolling period to § 5852 and the action brought by the personal representatives. Moreover, the Court referred to the two-year period set forth in § 5852 as a "limitation period." The *Waltz* Court pointed out that it was unnecessary to have even applied § 5852 in *Omelenchuk* because the action was timely filed applying tolling to the standard medical malpractice limitations period given the date of the death and the act of alleged malpractice. *Waltz, supra* at 653-655. But the *Waltz* Court acknowledged that its calculations in *Omelenchuk* and the references to § 5852 as providing a limitations period had caused confusion and were erroneous. *Id.* at 653-654.

As indicated above, *Miller* addressed the issue whether the six-month discovery provision in MCL 600.5838a(2), applicable to medical malpractice actions, is incorporated in § 5852 as a period of limitations. The Court held that § 5852 does indeed incorporate the six-month discovery rule. *Miller, supra* at 202. Again, the issue whether § 5856(c) applies to § 5852 was not addressed in *Miller.* The *Miller* Court stated, however, that § 5852 is a saving statute and not a statute of limitations. *Miller, supra* at 202. While this might provide some shaky basis for believing that § 5856(c) would not apply to § 5852, the area of the law was at best muddled considering *Omelenchuk* and considering that § 5852 does not contain any express language that it is a saving statute and not a statute of limitations. *Omelenchuk* was not cited in *Miller*, and remained good law at that point in time. Moreover, *Omelenchuk* was more on point in my opinion. *Waltz* was truly a case of first impression in a murky area of the law. One could not have reasonably expected an attorney to read *Miller* and then, although it had nothing to do with the focus and holding in *Miller*, pick out the reference to § 5852 as a saving statute and make the leap to analyze this reference in the context of the tolling statute. Even had an insightful attorney made this connection, he or she would most likely have brushed it aside because the Supreme Court itself had applied the tolling statute to § 5852 in *Omelenchuk.*

The general rule is that judicial decisions are given full retroactive effect, but "a more flexible approach is warranted where injustice might result from full retroactivity." *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002). A holding that overrules settled precedent may properly be limited to prospective application. *Id.* at 696. This Court should also consider whether a new principle of law was established through a ruling that addressed a matter of first impression that was unforeseeable. *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 190-191; 596 NW2d 142 (1999). As stated in *Ousley, supra* at 493, prospective application has been deemed appropriate for decisions that overrule clear and uncontradicted case law or that address issues of first impression whose resolution was not clearly foreshadowed. Before *Waltz,* there did not exist any binding precedent on the particular issue of whether § 5852 was subject to tolling under § 5856(c), but *Omelenchuk* came the closest to dealing with the issue and most certainly gave guidance to those in the legal community, and it would have been entirely reasonable to rely on *Omelenchuk. Waltz* found it necessary to partially overrule *Omelenchuk,* acknowledging the confusion, with the Court stating, "To the limited extent that the above-quoted portion of *Omelenchuk* might be viewed as sanctioning application of the notice tolling provision to the wrongful-death saving provision, it is hereby overruled." *Waltz, supra* at 655. Given that *Waltz* overruled a prior decision, coupled with the fact that a matter of first impression was being addressed, resulting in a resolution that was not clearly foreshadowed in light of the language in *Omelenchuk,* and the strained statutory analysis necessary to reach that resolution, it would not be appropriate, fair, and legally sound to apply the decision retroactively. Considering the purpose of the new rule announced in *Waltz,* the extent of reliance on *Omelenchuk,* and the lack of *statutory* language suggesting that § 5852 was not subject to tolling, and the effect of retroactivity on the administration of justice, *Pohutski, supra* at 696, I would conclude, if it were left to me, that *Waltz* should be applied prospectively only. In *Mazumder, supra* at 55 n 10, this Court noted that at least 17 members of this Court, as reflected in published and unpublished decisions, presumed that tolling applied to § 5852. Under such circumstances, how can we now, with any sense of justice, punish counsel, and thereby

punish their clients, for making that same presumption and pursuing actions in accordance with this belief.

While I recognize that the "handwriting may be on the wall" that our Supreme Court will apply *Waltz* retroactively across the board, on further careful consideration the Court may well take an eraser to the apparent "writing on the wall" in the interest of fundamental fairness and justice. Time will tell.

I respectfully dissent.

/s/ William B. Murphy