STATE OF MICHIGAN

COURT OF APPEALS

MELISSA BOODT, as Personal Representative of the Estate of DAVID WALTZ, Deceased,

Plaintiff-Appellant,

v

BORGESS MEDICAL CENTER, MICHAEL ANDREW LAUER, M.D., and HEART CENTER FOR EXCELLENCE, P.C.,

Defendants-Appellees,

and

MICHAEL ANDREW LAUER, M.D., P.C.,

Defendant.

FOR PUBLICATION
October 31, 2006
9:05 a.m.

No. 266217
Kalamazoo Circuit Court
LC No. 03-00318-NH

Official Reported Version

Before: White, P.J., Whitbeck, C.J., and Davis, J.

WHITE, P.J. (*concurring*).

I join in Judge Davis's opinion and write separately to make a few additional observations regarding the conflict between *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), and *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383; 715 NW2d 72 (2006).

Like Judge Davis, I conclude that *McLean*'s holding that the dismissal in that case was properly entered with prejudice is incorrect.[1] Further, I conclude that the factual distinctions

[1] I observe that the instant case differs from *McLean* and *Verbrugghe* in that, here, the first action was dismissed for failure to provide a sufficient notice of intent to sue (NOI), while *McLean* and *Verbrugghe* concerned the timeliness of the first actions in light of *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). While this distinction should not, in my view, lead to (continued…)

between the four types of cases identified in Chief Judge Whitbeck's opinion do not support differential application of *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003).

The first group is defined as cases "when a successor personal representative attempts to file an action because the predecessor personal representative never filed an action[.]" *Post* at ___. *Eggleston* is such a case. As observed in *Verbrugghe*, and by Judge Davis here, the *Eggleston* Court made no reference to the facts of that case as justifying a particular interpretation of MCL 600.5852. Rather, the Supreme Court, in a short and direct opinion, rejected the Court of Appeals conclusion that "'the two-year limitation period begins when the probate court issues the letters of authority to the personal representative, regardless of whether the court later appoints one or more successor personal representatives.'" *Eggleston*, 468 Mich at 32. The Supreme Court held that the statute "clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative." *Eggleston*, 468 Mich at 33. The Court made no mention of the fact that the original personal representative died or that he did not have a full two years in which to file suit. Nor did the Court observe that the two personal representatives together did not have a total of two years of authority to file suit. The Court nowhere intimated that the statute allowed for such distinctions.

Also classified as a group one case, in which the Court properly concluded that the second personal representative's action was timely under *Eggleston*, is *Rheinschmidt v Falkenberg*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2006 (Docket No. 261318).[2] In *Rheinschmidt*, the original personal representative mailed a notice of intent (NOI) on April 28, 2004, more than two years after the date of the decedent's death (July 18, 2001), but within two years of her appointment as personal representative on June 11, 2002. She never filed suit, however, and on September 16, 2004, the probate court issued letters of authority to the plaintiff, who commenced suit on October 28, 2004. Had the original personal

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different results in the cases, it does provide a basis for distinguishing *McLean*, to the extent that *McLean* relied on a conclusion that the *Waltz* dismissal was a decision on the merits. While I disagree with the *McLean* Court's conclusion that the *Waltz* dismissal was a decision on the merits, it is possible that the *McLean* panel would have recognized that a dismissal for an inadequate NOI is not a decision on the merits. Nevertheless, because both deficiencies lead to a dismissal on statute of limitations grounds under the facts presented, I agree that *McLean* is legally indistinguishable.

[2] Application for leave to appeal held in abeyance pending decision in *Washington v Sinai Hosp of Greater Detroit*, unpublished opinion per curiam of the Court of Appeals, issued December 1, 2005 (Docket No. 253777), lv gtd 475 Mich 909 (2006). See 721 NW2d 220 (Mich, 2006).

representative filed an action after the mandatory NOI waiting period, the claim would have been time-barred under *Waltz*. However, the *Rheinschmidt* panel[3] concluded that

> *Waltz* and the related cases cited by defendants have no effect on the situation here in which the successor personal representative's complaint was timely solely under § 5852. In *Eggleston*, *supra*, our Supreme Court addressed the issue whether a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute where the initial personal representative died before a complaint was filed. *Id.* at 30. The Court rejected this Court's "narrow reading" to the contrary, and held that a successor representative could make use of his own additional saving period. . . .
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> Here, the original personal representative, who was issued letters of authority on June 11, 2002, had two years from that date, until June 11, 2004, to commence a wrongful death medical malpractice action. But she never filed a complaint. Plaintiff was appointed successor personal representative, and issued letters of authority on September 16, 2004. Under § 5852 plaintiff, as the successor personal representative, had from the date of his appointment, September 16, 2004, until June 7, 2006, three years after the expiration of the medical malpractice limitation period, to bring a wrongful death medical malpractice claim on behalf of the decedent's estate. Plaintiff filed his complaint on October 28, 2004, less than two months after his letters of authority were issued. Because plaintiff, as the successor personal representative, filed a complaint within two years after letters of authority were issued to him, and less than three years after the medical malpractice period of limitations had run, the action was timely. MCL 600.5852; *Eggleston, supra.*[4]

> [4] We further reject defendants' contention that *Eggleston* is properly applicable only to situations where a successor representative is appointed by necessity rather than by choice. MCL 600.5852 contains no such limitation, and we decline to read it into the plain language of the statute. Further, we find the present case distinguishable from *McLean v McElhaney*, 269 Mich App 196 [], because in *McLean* the purported successor personal representative tried to revive an untimely, but otherwise valid, complaint.[4] Here, plaintiff is not trying to revive

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[3] Chief Judge Whitbeck was on this panel.

[4] Upon first reading, it appears that the *Rheinschmidt* panel may have mistaken *McLean* for a group three case (in which a successor personal representative does not attempt to file a new action, but attempts to revive a previously filed untimely action) because it distinguished *McLean* on the basis that it involved an attempt to revive a an untimely, but otherwise valid, complaint, while *Rheinschmidt* involved the filing of an original complaint. However, while the opinion uses the word "revive," the panel was more likely drawing a distinction between a case

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> an untimely complaint but rather filing an original complaint under the two-year saving provision afforded to him by the issuance of his letter of authority.
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> [*Rheinschmidt*, slip op at 4-5.]

As recognized by the *Rheinschmidt* footnote, there is no basis to limit MCL 600.5852 to cases in which the successor representative is appointed by necessity. Further, there is no basis on which to limit it to cases in which the original personal representative does not go through the motions of filing an untimely suit. The only distinction between this case and *Rheinschmidt*, other than the fact that this is an NOI case and *Rheinschmidt* is a *Waltz* case, is that here the first personal representative filed an action following the deficient NOI, and that action was thus dismissed as untimely, and, in *Rheinschmidt*, the first personal representative never filed the first suit, which was already time-barred and would have been dismissed had it been filed. The significance of this fact can only be that, in one case, principles of res judicata apply and, in the other, no such principles are involved because no suit was actually filed. However, a dismissal for failure to file a satisfactory NOI is a dismissal on procedural grounds, not on the merits, and is not ordinarily a dismissal with prejudice. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). Such a dismissal is only entered with prejudice when it would be impossible to bring another action. Because of the very reasons expounded in *Rheinschmidt*, no such impossibility is present here.

The second group of cases described by the dissent are those in which "a successor personal representative attempts to file an action when a predecessor tried to file an action but was not authorized to do so[.]" *Post* at ___. In *Myers v Marshall Med Assoc, PC*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 264667) (*Myers II*),[5] the same panel as in *Rheinschmidt* found that the second personal representative was not barred by the first representative's untimely action, the dismissal of which had been affirmed by the *Myers I*[6] panel on the basis that the first personal representative was removed before he filed the NOI and suit. The panel found *Eggleston* controlling. One can certainly see the distinction between *Myers II* and the instant case, in that the initial personal representative had the authority to file the instant action here and, in *Myers I*, the plaintiff lacked authority. Thus, in the *Myers* cases, it was as if the first action had never been filed. The question remained, however, whether the second personal representative could file suit given her date of appointment, and the panel held that under *Eggleston* she could, rejecting the very distinctions the *Rheinschmidt* defendants had sought to draw.

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in which a complaint had been filed and determined to be untimely and one in which no case had previously been filed.

[5] Application for leave to appeal held in abeyance pending decision in *Washington, supra.* See 720 NW2d 298 (Mich, 2006).

[6] *Myers v Marshall Med Assoc, PC*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2005 (Docket No. 262590) (*Myers I*).

In another group two case, *Jackson v Henry Ford Health Sys*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2006 (Docket No. 263766),[7] the panel[8] made observations pertinent to the res judicata issue:

> It is true that under some circumstances "a summary disposition ruling is the procedural equivalent of a trial on the merits that bars relitigation on principles of res judicata." Here, however, the Wayne Circuit Court's ruling in Pickett's [the first personal representative] earlier cases did not address the merits of the underlying substantive claim. Most significantly, the Wayne Circuit Court *could not* have addressed the wrongful death claim, despite the fact that Pickett attempted to raise it, because the proceedings only addressed the issue of whether Pickett properly brought suit on behalf of the estate. Whether Debra Jackson has additional time during which she could bring suit presents a separate question that requires the application of different law to additional facts that Pickett could not have raised in his suits. Self-evidently, Debra Jackson had not been appointed successor until *after* the Wayne Circuit Court dismissed Pickett's suits. Accordingly, Pickett's earlier suits did not—and could not—resolve the matters to be contested in Wrongful Death Suit No. 4. Barring Wrongful Death Suit No. 4 would not fulfill the purposes of the res judicata doctrine: it would not prevent the litigation of the same cause of action because the cause of action was never, in fact, litigated. [*Jackson*, slip op at 7-8 (emphasis in original.]

These observations apply equally here. The instant suit was dismissed for the sole reason that the NOI was insufficient. This is not an adjudication on the merits. Further, the question whether a successor personal representative, who has not even been appointed, will himself or herself have two years in which to file suit, limited by the overall three-year limitation, is not properly presented and should not litigated.

In *Mitchell-Crenshaw v Joe*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 2006 (Docket No. 263057),[9] another group two case, the initial personal representative was appointed a month after the decedent's death. She filed an NOI exactly two years after her appointment. Four months after filing the NOI, the personal representative's authority was terminated. Six months later, the estate was reopened and a successor personal representative was appointed. The successor personal representative sent another NOI within days of her appointment and filed suit six months later. The *Mitchell-Crenshaw* panel reversed

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[7] Application for leave to appeal held in abeyance pending decision in *Washington, supra.* See 717 Mich 339 (Mich, 2006).

[8] Chief Judge Whitbeck presided on this panel.

[9] Application for leave to appeal held in abeyance pending decision in *Washington, supra.* See 720 NW2d 321 (Mich, 2006); 720 NW2d 322 (Mich, 2006).

the dismissal of the successor personal representative's malpractice claims, concluding that the claim was timely under *Eggleston:*

> In *Eggleston, supra*, a unanimous Supreme Court decided the case based solely on the statutory language of the wrongful death saving provision. The short decision . . . does not examine the reasons behind the appointment of a successor personal representative, as defendants urge us to do here.
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> Defendant asserts that *Eggleston* is distinguishable because the temporary personal representative died within two years of appointment and the successor was appointed within two years after the first representative was appointed. However, we fail to see the significance of these facts. In *Eggleston*, the successor representative was appointed more than two years after the decedent's death, and the complaint was filed more than two years after the initial appointment. Defendants' attempt to distinguish the instant case on the basis that the statute had run by the time the successor representative was appointed ignores that the statute is intended to permit an action even where the representative is appointed after the statute has run. The only constraint is that the action cannot be commenced more than three years after the statute of limitations has run. [*Mitchell-Crenshaw,* slip op at 4-6.]

It appears that *Mitchell-Crenshaw* might more accurately be classified as a group one, rather than a group two, case because the initial personal representative had authority to act. Her authority was simply terminated during the six-month notice period, and she never filed suit. The case seems similar to *Rheinschmidt* in this regard. What is significant is that in *Mitchell-Crenshaw,* the original personal representative's suit would have been time-barred had she brought it. As with *Rheinschmidt,* I see no reasoned basis to distinguish the cases simply because the suit that would have been time-barred in the hands of the initial personal representative was not actually filed and was only filed in the first instance by the successor representative, whose appointment was necessary to save the otherwise time-barred action. The instant case differs only in that first personal representative here actually brought suit using the deficient NOI.

The third group of cases encompasses those in which "a successor personal representative did not attempt to file a new action but attempts instead to revive or reinstate a previously filed untimely action[.]" *Post* at ___. Indeed, these cases are distinguishable on the ground that while the successor personal representative has a right to begin anew, there is nothing to indicate that he or she can revive the prior representative's untimely action, which is what was attempted in those cases. Here no successor personal representative had been appointed, and the issue is simply whether the dismissal should be with prejudice.

The fourth group is described as those cases in which "a successor personal representative attempts to file a new action to overcome a predecessor's filing of an untimely action." *Post* at ___. The instant case is a group four case. As explained previously, I find no

grounds for distinguishing this group from group one. In *King v Briggs,* unpublished opinion per curiam of the Court of Appeals, issued July 12, 2005 (Docket Nos. 259136 and 259229), it is unclear whether the plaintiff was the initial personal representative or a successor personal representative seeking to save an untimely suit with his appointment. It appears that the successor representative had already been appointed and was required by the court to substitute in the initial action.

Another group four case, *Young v Spectrum Health-Reed City Campus,* unpublished opinion per curiam of the Court of Appeals, issued May 18, 2006 (Docket No. 259644), distinguished *Eggleston* solely on the basis that "[u]nlike the plaintiff in *Eggleston*, insufficient additional time remained after observance of the tolling provision. The *Eggleston* rule is inapplicable under these circumstances."[10] It appears from this terse statement that *Young* distinguished *Eggleston* on the basis that the statute had already run on the predecessor's complaint, a fact that is present, however, in the group one cases cited.

Finally, there is *McLean.* In *McLean*, the circuit court's refusal to permit a voluntary dismissal without prejudice so that a new personal representative could be appointed to file suit was affirmed under an abuse of discretion standard. The *McLean* panel rejected plaintiff's reliance on *Eggleston* on the basis that in *Eggleston* the estate was represented for a total of 10 1/2 months, rather than two years, and the predecessor personal representative had died. I conclude that the many cases, including *Verbrugghe*, *Rheinschmidt,* and *Mitchell-Crenshaw,* that declined to distinguish *Eggleston* on this basis were correctly decided. The *Eggleston* holding is based on the statutory language, which does not contemplate these distinctions.

The *McLean* Court additionally determined that a dismissal without prejudice would have been inappropriate because such a dismissal would legally prejudice defendant:

> An order granting summary disposition is an adjudication on the merits. *Capital Mortgage Corp v Coopers & Lybrand,* 142 Mich App 531, 536; 369 NW2d 922 (1985). Here, defendants were entitled to summary disposition because plaintiffs failed to file their claim within the period established by the Legislature. Thus, defendants were entitled to a judgment on the merits that would bar relitigation under the doctrine of res judicata. *Id.* If plaintiffs' request for dismissal without prejudice had been granted, defendants would conceivably have been subject to the relitigation of plaintiffs' claim if a new personal representative was appointed to act on behalf of Karen's estate. Being subject to a second suit that would otherwise be barred under the doctrine of res judicata would be legally prejudicial to defendants. Accordingly, we conclude that the trial court did not abuse its discretion by denying plaintiffs' request for dismissal without prejudice. [*McLean,* 269 Mich App at 202-203.]

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[10] *Young,* slip op at 3, citing *McLean,* 269 Mich App at 201-202.

I do not agree with the *McLean* Court's reliance on *Capital Mortgage* for the proposition that the dismissal of the McLeans' action as untimely under *Waltz* was an adjudication on the merits. In *Capital Mortgage*, the Court determined that the defendant waived its right to arbitrate when it filed its motion for summary judgment. The Court stated that "[t]he rationale for this rule is that summary judgment is the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on principles of res judicata." *Capital Mortgage*, 142 Mich App at 536. When summary disposition is granted on substantive grounds, it is, indeed, the procedural equivalent of a trial on the merits. However, a motion granted on procedural defects does not decide the merits of the case. No one questions that had plaintiff sent another, adequate NOI and filed a timely action thereafter, the earlier dismissal would not have been a bar to the subsequent action. *Dorris*, 460 Mich at 47.

The pertinent issue actually litigated and decided here is whether the NOI was sufficient. With respect to the corporate defendants, we affirm the determination that it was not. Under *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679; 684 NW2d 711 (2004), that determination amounts to a determination that the action was not timely with respect to those defendants. It is a separate question whether the dismissal should have been with prejudice. The failure to provide an adequate NOI is a procedural failure that does not in itself lead to a dismissal with prejudice. *Dorris*, 460 Mich at 47. It is only when another factor makes it impossible to save the action that the dismissal, which would normally be without prejudice, is entered with prejudice. *Roberts, supra* at 701-702. If there is still time within which a potential successor personal representative might file suit in compliance with the requirements of the NOI provisions, *Waltz* and MCL 600.5852, a dismissal for reasons other than the merits should be entered without prejudice, and the question whether a subsequent suit is timely should be addressed in that action.

In sum, I find no meaningful distinction between the cases in which it is agreed that the successor personal representatives are entitled to two years in which to file suit and the instant case. In those cases, the personal representatives had a full two years of authority in which to file suit and failed to do so. The successor personal representatives were permitted to revive the claims following their appointment. The fact that the first personal representatives did not file the untimely claims in those cases should not make a difference if the claims were barred. Clearly, those estates were given the very same "second bite at the apple" that *McLean* and the dissent here finds unwarranted. *Post* at ___. The second bite is granted by the Legislature without limitation, until three years have passed from the running of the period of limitations. At that point, all authority to file claims ceases. Up until that point, as long as there is no adjudication on the merits, successive personal representatives may cure procedural defects. Most likely, this legislative approach is in recognition of the representative capacity in which a personal representative serves and the fact that a representative who fails to diligently pursue the rights of an estate negatively affects the rights of others. In any event, I conclude that *Eggleston* holds that any successor representative would be entitled to a separate two-year period and that res judicata does not require that the action be dismissed with prejudice.

/s/ Helene N. White