

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. 03-000318-NH

Official Reported Version

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

WHITBECK, C.J. (*concurring in part and dissenting in part*).

I. Overview

I agree with the majority's conclusion that the notice of intent was sufficient with respect to the claims against Dr. Michael Andrew Lauer. I also agree with the majority's conclusion that the notice of intent was deficient with respect to the claims against Borgess Medical Center and Heart Center for Excellence, P.C., for failure to comply with MCL 600.2912b. Hence, I agree with the majority's decision to affirm the trial court's dismissal of the claims against Borgess Medical Center and Heart Center for Excellence, P.C., with prejudice.

I do not agree, however, with the majority's conclusion that dismissal with respect to the latter two defendants *should* be *without* prejudice. I write separately because I believe that *McLean v McElhaney*¹ was correctly decided and that dismissal in this case *should* be *with*

¹ *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005).

prejudice, thus barring a successor personal representative from filing a new action on behalf of the estate. I would declare a conflict with *Verbrughe v Select Specialty Hosp-Macomb Co, Inc.*²

II. Dismissal: With or Without Prejudice?

A. Overview

Boodt failed to set forth a statement of the factual basis for the claims against Borgess Medical Center and Heart Center for Excellence. With respect to them, the notice of intent was therefore defective. And, being defective, Boodt failed to give proper notice. Absent proper notice, Boodt's filing of her complaint was ineffective, the period of limitations was not thereby tolled,³ and the period of limitations subsequently expired without a proper notice of intent being filed. After the period of limitations runs, a plaintiff is no longer in a position to be able to correct the error by filing a new notice of intent and commencing a new action. Thus, the only practical remedy is dismissal with prejudice.⁴ Accordingly, the appropriate remedy here is to dismiss the action with prejudice. However, Boodt argues that the trial court erred in dismissing the case with prejudice. She asserts that her successor personal representative, Andrew Waltz,

² *Verbrughe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383; 715 NW2d 72 (2006).

³ MCL 600.2912b(1); MCL 600.5856(c); *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 681, 684, 686; 684 NW2d 711 (2004).

⁴ See *Roberts v Mecosta Co Gen Hosp*, 240 Mich App 175, 184; 610 NW2d 285 (2000), rev'd and remanded 466 Mich 57 (2002); *Roberts v Mecosta Co Gen Hosp (On Remand)*, 252 Mich App 664; 653 NW2d 441 (2002), rev'd *Roberts (After Remand)*, *supra* at 702 (reinstating the trial court's dismissal with prejudice).

This conclusion is in keeping with rulings addressing affidavits of merit. "When a plaintiff fails to comply with the affidavit of merit requirement but the limitation period has not yet expired, dismissal of the complaint without prejudice may constitute an appropriate remedy, leaving the plaintiff free to refile the complaint together with an affidavit of merit." *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). "If the claim is time-barred, however, the complaint should be dismissed with prejudice." *Id.* at 706-707. See also *Young v Spectrum Health-Reed City Campus*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2006 (Docket No. 259644), slip op, p 3:

Plaintiff finally argues that this case should not be dismissed with prejudice. We disagree. Plaintiff first argues that compliance with MCL 600.2912b is only necessary to toll the limitations period for 18[2] days under MCL 600.5856(c), which was unnecessary here because she timely filed her complaint even without applying the notice-tolling period. This is irrelevant: "a person *shall not commence* an action alleging medical malpractice" without complying with MCL 600.2912b. Plaintiff's noncompliance precluded her from commencing this action at all. [Citation omitted.]

who was appointed on May 24, 2005, had until October 6, 2006, the expiration of the wrongful death saving statute three-year ceiling,⁵ to file an action.

B. Factual Framework: The Four Categories

There are actually four different situations in which a successor personal representative's ability to pursue an action has been questioned: (1) when a successor personal representative attempts to file an action because the predecessor personal representative never filed an action;⁶ (2) when a successor personal representative attempts to file an action when a predecessor tried to file an action but was not authorized to do so;⁷ (3) when a successor personal representative did not attempt file a new action but attempts instead to revive or reinstate a previously filed untimely action;⁸ and (4) when a successor personal representative attempts to file a new action to overcome a predecessor's filing of an untimely action.⁹

⁵ MCL 600.5852 states:

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.

⁶ *Eggleston v Bio-Medical Applications of Detroit, Inc.*, 468 Mich 29; 658 NW2d 139 (2003); *Rheinschmidt v Falkenberg*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2006 (Docket No. 261318), application for leave held in abeyance 721 NW2d 220 (Mich, 2006).

⁷ *Myers v Marshall Med Assoc, PC*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 264667), application for leave held in abeyance 720 NW2d 298 (Mich, 2006); *Mitchell-Crenshaw v Joe*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 2006 (Docket No. 263057), application for leave held in abeyance 720 NW2d 321 (Mich, 2006), and 720 NW2d 322 (Mich, 2006); *Jackson v Henry Ford Health Sys*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2006 (Docket No. 263766), application for leave held in abeyance 717 NW2d 339 (Mich, 2006).

⁸ *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586; 711 NW2d 448, aff'd in part 271 Mich App 503 (2006); *McMiddleton v Bolling*, 267 Mich App 667; 705 NW2d 720 (2005); *Long v Goodson*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2006 (Docket Nos. 261049, 261050, 261051, and 261052); *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).

⁹ *Mili v Tendercare Michigan, Inc (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued September 26, 2006 (Docket No. 265824); *Verbrugghe, supra*; *McLean, supra*; *Young, supra*; *King v Briggs*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2005 (Docket Nos. 259136 and 259229).

(1) The First Category:
Original Personal Representative Files no Action;
Successor Personal Representative Attempts to File Action

With respect to the first category, the controlling case is clearly the Michigan Supreme Court's decision in *Eggleston*. In my opinion, the clear rule of that case is that if a successor personal representative attempts to file an action and the predecessor never filed an action, the successor personal representative may utilize his or her own saving period. And, under MCL 600.5852, that saving period commences with the issuance of his or her letters of authority. The rationale for this interpretation is that administration of the estate should not be forfeited simply because the original personal representative was unable to perform his or her duties, necessitating the appointment of a new personal representative.¹⁰

(2) The Second Category:
Original Personal Representative Attempted to File Action, but was not Authorized;
Successor Personal Representative Attempts to File Action

Turning to the second category, although the three relevant cases are unpublished, each consistently holds that when the predecessor personal representative attempted to file an action but was not authorized to do so, an authorized successor personal representative is entitled to his or her own saving period. This saving period commenced upon the issuance of his or her letters of authority. The rationale for these cases is that a filing by an unauthorized personal representative is equivalent to no filing at all, and an authorized successor personal representative should be entitled to an opportunity to file the action.

(3) The Third Category:
Original Personal Representative Files Untimely Action;
Successor Personal Representative Attempts to Revive or Reinstate the Untimely Action

While the first two categories allow a successor personal representative to file an action, the third category presents a clear limitation on the successor's ability to pursue an action on behalf of the estate. In this category, the lead published decision is *McMiddleton v Bolling*. That case held that a successor personal representative cannot rely on or revive an untimely action that was filed before his or her appointment because there would be no benefit to ratifying an untimely action under MCL 700.3701.¹¹ *Mullins v St Joseph Mercy Hospital*, also a published opinion, reached the same conclusion, explaining that the mere appointment of a successor personal representative did not transform the previously filed untimely action into a timely one.¹²

¹⁰ See MCL 700.3613 ("[T]he successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had if the appointment had not been terminated.").

¹¹ *McMiddleton*, *supra* at 671-674.

¹² *Mullins*, *supra*, 269 Mich App at 591.

(4) The Fourth Category:
Original Personal Representative Files Untimely Action;
Successor Personal Representative Attempts to File New Action to Overcome Untimely Action

Regarding the last category, which is the situation here, the case law is not as consistent. In this situation—in which a successor personal representative attempts to file a new action to overcome a predecessor's filing of an untimely action—there is an apparent conflict between two published opinions: *McLean* and *Verbrugghe*. The *McLean* panel held that a dismissal without prejudice was not warranted to allow a successor personal representative to file a new action. The *McLean* panel reasoned that the successor could not file an action of his or her own (although the three-year ceiling had not yet expired) given that the predecessor representative had negligently failed to file a timely action. Addressing the same factual circumstances, however, the *Verbrugghe* panel did not apply *McLean*. Rather, the *Verbrugghe* panel instead held that under *Eggleston* and the plain language of MCL 600.5852, a successor personal representative *could* file a new action with the specific purpose of overcoming a predecessor's filing of an untimely action.

C. Cases Relevant to the Present Action

(1) *Eggleston*

In *Eggleston*, the decedent's widower was appointed temporary personal representative, but he died several months later without having filed an action. The decedent's son was appointed successor personal representative. Interpreting the plain language of the wrongful death saving statute, the Michigan Supreme Court held that the successor personal representative had two years after issuance of *his* letters of authority, rather than the issuance of the deceased personal representative's letters of authority, to file an action on behalf of the estate.¹³ The fact that the successor personal representative met the MCL 600.5852 time requirements was the dispositive fact on which the *Eggleston* Court relied to hold that the action was timely filed. However, the *Eggleston* Court did not, as the lead opinion contends, hold that "*every* personal representative is entitled to two years after receipt of his or her letters of authority within which to file a complaint, *irrespective of any predecessors*."¹⁴ Indeed, the absence of such a ruling was the basis on which the *McLean* panel was able to recognize the dispositive factual distinction between the facts on which it ruled and the facts in *Eggleston*.

(2) *McLean*

The *McLean* panel concluded that the plaintiffs' action was untimely because it was filed outside both the period of limitations and the saving period.¹⁵ Apparently anticipating this

¹³ *Eggleston, supra* at 33.

¹⁴ *Ante* at ____ (emphasis added).

¹⁵ *McLean, supra* at 199-200.

disposition, the plaintiffs asserted alternatively "that the trial court should have permitted a voluntary dismissal of plaintiffs' claims without prejudice so that a new personal representative could have been appointed to file suit" ¹⁶ Distinguishing the facts at hand from those of *Eggleston*, the *McLean* panel noted that "neither the initial nor the successor representative [in *Eggleston*] represented the estate for the full two years available to him under the wrongful death saving statute." ¹⁷ "Contrarily, [the *McLean*] plaintiffs were afforded the full two years permitted under the wrongful death saving statute to file their complaint, but failed to do so." ¹⁸ The *McLean* panel further noted that the plaintiffs' failure to timely file was due to "their own negligence in calculating the proper time for filing the complaint" as opposed to "the untimely demise of a predecessor representative" ¹⁹ The *McLean* panel concluded that the plaintiffs were therefore "not entitled to relief under *Eggleston*." ²⁰

In a similar case, *King v Briggs*, a panel of this Court concluded that the personal representative's action was untimely, having been filed outside both the period of limitations and the saving period. ²¹ The *King* panel then went on to address "whether a successor personal representative of the estate would have an additional two years from the date of his letters of authority to file suit under MCL 600.5852" ²² In answering this question, the *King* panel distinguished the facts at hand from those of *Eggleston*, specifically noting that "in *Eggleston*, the temporary personal representative never filed suit, while the predecessor personal representative in the instant case did." ²³ Thus, the *King* panel stated that the issue was really "whether a personal representative who fails to diligently pursue a malpractice cause of action on behalf of an estate within the allotted time may nonetheless save the action from dismissal by substituting another personal representative." ²⁴ The *King* panel then found MCL 700.3613 dispositive. MCL 700.3613 "states that a successor personal representative 'must be substituted in all actions and proceedings in which the former personal representative was a party.'" ²⁵ The *King* panel held that the successor personal representative would be substituted in the action already filed and would not have the additional two years under the wrongful death saving

¹⁶ *Id.* at 201.

¹⁷ *Id.* at 202.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *King, supra*, slip op, p 2. Although not binding, MCR 7.215(C)(1), I view this case as decidedly persuasive.

²² *King, supra*, slip op, p 2.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

statute to pursue an action.²⁶ Thus, under the rationale of *King*, the successor personal representative inherits the same untimely status as the previous personal representative.

(3) *Verbrugghe*

In *Verbrugghe*, a panel of this Court again addressed a successor personal representative's ability to file a new action after a predecessor's untimely filing. The *Verbrugghe* panel found it significant that the *Eggleston* Court relied solely on the plain language of the statute.²⁷ The *Verbrugghe* panel concluded that, under the plain language of the wrongful death saving statute, there are only two limitations on a successor personal representative's ability to exercise the saving provision: the death of the decedent during the limitations period and the successor's receiving letters of authority.²⁸ Therefore, according to the *Verbrugghe* panel, once letters of authority are issued, the successor personal representative need only comply with the saving-statute time limits.²⁹

The *Verbrugghe* panel acknowledged that its holding gave the successor personal representative "a second bite of the apple. But . . . the predicament lies within the statute"³⁰ The *Verbrugghe* panel stated that, if necessary, the Legislature would be the proper body to correct this result.³¹

D. Successor Personal Representative Attempts to File New Action to Overcome Predecessor's Untimely Action: *McLean* Versus *Verbrugghe*

I first emphasize that *McLean* is a published opinion that was released in 2005. Thus, subsequent panels, like *Verbrugghe*, were bound to follow its ruling,³² absent some distinguishing factor. In presumed recognition of this rule, the *Verbrugghe* panel attempted to distinguish *McLean*. I believe, however, that the *Verbrugghe* panel's attempt to do so was without merit.

The *Verbrugghe* panel stated: "[U]nlike *McLean v McElhaney*, . . . we do not believe the facts in this case allow us to avoid applying the plain language of this statute as enforced in *Eggleston*. Thus, because *McLean* did not apply *Eggleston*, we find that *McLean* provides us no

²⁶ *Id.*

²⁷ *Verbrugghe, supra* at 389.

²⁸ *Id.* at 389-390.

²⁹ *Id.* at 391.

³⁰ *Id.*

³¹ *Id.* at 391-392.

³² MCR 7.215(J).

useful guidance."³³ The *Verbrugghe* panel, like the majority here, apparently concluded that *McLean* was not binding because it failed to follow the Supreme Court precedent of *Eggleston*.

However, the *McLean* panel was not bound to follow a rule that it considered inapplicable to the facts at hand. That is, the *McLean* panel recognized that the *Eggleston* rule did *not* cover the broad scope of cases to which the majority would have it apply—"every personal representative . . . , irrespective of any predecessors."³⁴ The *Eggleston* rule came in the context of a particular set of circumstances that did not, and could not, contemplate the relevant facts in cases like *McLean*, *King*, and the case here. *Eggleston* was distinguishable because in that case the initial personal representative had not filed an action and, because of his death, could not be described as having failed to diligently pursue the cause of action. Further, *Eggleston* did not address the ramifications of MCL 700.3613: given that the deceased personal representative never filed an action before he died, there was no prior action in which to substitute the successor personal representative.

The *Verbrugghe* panel may have concluded that there was some relevant factual distinction between the facts of that case and those of *McLean*. But I fail to comprehend what that distinction might be. In both *McLean* and *Verbrugghe*, the predecessors' actions were untimely because they were filed outside both the period of limitations and the saving period. In both cases, the estate sought to file a new action through use of a successor personal representative. In both cases, the plaintiffs relied on *Eggleston* to argue that the successor personal representative should be able to file a new action under his or her saving period. And in both cases, the panels recognized that the pertinent issue was whether *Eggleston* allowed the filing of a new action.

The only distinguishing factor that I can discern is the fact that the *Verbrugghe* appeal was brought by the successor personal representative who had filed a new action. In contrast, the *McLean* appeal was brought by the original personal representatives, who argued that a successor should be allowed to file a new action. Even if this is indeed a relevant distinguishing factor, I conclude that this panel is unquestionably bound to follow *McLean* because, here, the successor personal representative has yet to file a new action. In my opinion, however, there is no actual relevant factor distinguishing the facts of this case and *McLean* or *Verbrugghe*. Once again, I conclude that under the facts here, this panel is bound to follow *McLean*.

Simply put, the *Verbrugghe* panel was faced with the same relevant facts as the *McLean* panel. Yet the *Verbrugghe* panel disagreed with the *McLean* panel's reading of *Eggleston*. In my view, this was not the correct procedure; either the rules regarding precedent and the conflict rules mean something or they do not. In my view, the *Verbrugghe* panel should have declared a conflict with *McLean*, rather than ignoring *McLean's* binding precedence.

³³ *Verbrugghe*, *supra* at 389.

³⁴ *Ante* at _____. See the discussion in part II(B) of this opinion.

The majority here concedes that *McLean* is binding because, under our court rules, "[w]hen a panel is confronted with two conflicting opinions published after November 1, 1990, the panel is obligated to follow the first opinion issued."³⁵ Thus, because *McLean* and *Verbrugghe* are conflicting, and *McLean* was issued first, the panel here is obligated to follow *McLean*.

Further, not only is *McLean* binding under the court rule, I believe that *McLean* did in fact reach the correct holding. The *Verbrugghe* panel resolved the issue by interpreting the plain language of the wrongful death saving statute *alone*. By contrast, I believe reading that statute *together with* MCL 700.3613 compels the result reached in *McLean* and *King*. "The saving provision of the statute of limitations and the Probate Code are intended to work together to preserve legal actions that survive death and to define the running of the statute of limitations where a person dies before or within thirty days of the running of the period of limitation."³⁶

The *Verbrugghe* panel considered the application of MCL 700.3613, but dismissed that provision. The panel stated that while MCL 700.3613 "has procedural implications for the successor personal representative, it does not . . . preclude her from initiating a separate action."³⁷ Although this is technically true, under MCL 700.3613, the successor personal representative must inherit the predecessor's status. And substitution into an untimely action would be futile. Additionally, despite the majority's attempt here to discount MCL 700.3613, in my opinion, the *McLean* approach best harmonizes the statutory provisions.³⁸

E. Resolution of the Present Action

As mentioned, this action falls under the last of the four different categories in which a successor personal representative's ability to pursue an action is in question: when a successor personal representative attempts to file a new action to overcome a predecessor's filing of an untimely action. The period of limitations has expired, precluding Boodt from filing a new notice of intent. A dismissal with prejudice is therefore required. Accordingly the successor personal representative, Andrew Waltz, should be barred from filing a new action because his predecessor representative already failed to diligently pursue an action when she filed a defective notice of intent and allowed the period of limitations to expire.³⁹

³⁵ *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 473; 556 NW2d 517 (1996).

³⁶ *Lindsey v Harper Hosp*, 455 Mich 56, 65; 564 NW2d 861 (1997).

³⁷ *Verbrugghe*, *supra* at 392.

³⁸ See *Lindsey*, *supra* at 65 ("Under the rule of construction of statutes in *pari materia*, it is appropriate to harmonize statutory provisions that serve a common purpose when attempting to discern the intent of the Legislature.").

³⁹ MCL 700.3613; *McLean*, *supra* at 201-203; *King*, *supra*; *Young*, *supra*.

III. Statutory Revisions

I believe that this case provides yet another example of "the continuing difficulties presented by recent developments in medical malpractice law."⁴⁰ As Judge Neff aptly stated in *Braverman v Garden City Hosp*, "Given the intricacies of the statutory scheme and the nuances of cases interpreting those decisions, this area of medical malpractice law is fraught with peril for even the most careful practitioner."⁴¹ Thus, I echo her call for "the Legislature to consider revisions to the statutory scheme that would provide litigants and the courts with clear guidance to carry out the Legislature's intent in this area of law."⁴²

IV. Conclusion

In sum, in a wrongful death malpractice action, a personal representative is generally entitled to a saving period.⁴³ This saving period operates to suspend the running of the period of limitations until a personal representative is authorized to represent the estate.⁴⁴ In *Eggleston*, the Michigan Supreme Court made clear that the saving provision could be applied to successor personal representatives. However, I do not agree that the *Eggleston* ruling extends as far as the majority here and the *Verbrugghe* panel would have it extend. In short, I do not agree that the Legislature or the *Eggleston* Court intended to give every successor personal representative a second bite at the apple. As the Michigan Supreme Court has also made clear: "Statutes of limitation serve to protect defendants from stale claims. This purpose must be balanced with the purpose of exceptions to statutes of limitation, such as the saving provision. The saving provision preserves a plaintiff's claim, but, as an exception to a statute of limitation, must be narrowly construed."⁴⁵ Thus, in my opinion, recognition of the four categories outlined earlier serves best to both construe the saving provision narrowly and to harmonize that provision with the Probate Code. Accordingly, I would conclude that if a predecessor personal representative files an untimely action on behalf of the estate, a successor personal representative steps into the shoes of the former and is time-barred from bringing a stale claim.

/s/ William C. Whitbeck

⁴⁰ *Braverman v Garden City Hosp*, 272 Mich App 72, 88; ___ NW2d ___ (2006), vacated in part 272 Mich App 801 (2006).

⁴¹ *Id.*

⁴² *Id.*

⁴³ MCL 600.5852.

⁴⁴ *Lindsey, supra* at 61.

⁴⁵ *Id.* at 69.