STATE OF MICHIGAN
IN THE SUPREME COURT

ERIC A. BRAVERMAN, Successor Personal Representative of the Estate of Patricia Swann, Deceased,

Plaintiff-Appellee,

v

SC: 134445, 134446
COA: 264029, 264091
Wayne CC: 05-502345-NH

GARDEN CITY HOSPITAL, a/k/a GARDEN CITY HOSPITAL, OSTEOPATHIC,

Defendant,

and

JOHN R. SCHAIRER, D.O., GARY YASHINSKY, M.D., ABHINAV RAINA, M.D., and PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,

Defendants-Appellants.

BRIEF ON APPEAL- APPELLANTS

* * * ORAL ARGUMENT REQUESTED * * *

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I.

WHETHER MCL 600.5852 PROVIDES AN ADDITIONAL TWO YEAR SAVINGS PERIOD TO A SUCCESSOR PERSONAL REPRESENTATIVE WHEN:

(1) THE PERSONAL REPRESENTATIVES(S) OF THE ESTATE DID NOT FILE SUIT WITHIN TWO YEARS WHICH WERE EARLIER AFFORDED TO THE ESTATE BY THE SAVINGS STATUTE; OR

(2) THE TIMING OF THE APPOINTMENT OF THE SUCCESSOR PERSONAL REPRESENTATIVE SUGGESTS THE APPOINTMENT WAS INTENDED TO OBTAIN ANOTHER TWO-YEAR SAVINGS PERIOD?

Defendants-Appellants say "no."

Plaintiff-Appellee says "yes."

The trial court says "yes."

The Court of Appeals says "yes."

II.

WHETHER THE FILING OF THE NOTICE OF INTENT BY THE INITIAL PERSONAL REPRESENTATIVE SATISFIED THE REQUIREMENT OF MCL 600.2912b THAT A "PERSON" WHO "COMMENCE[S] AN ACTION" – HERE THE SUCCESSOR PERSONAL REPRESENTATIVE – BE "THE PERSON" WHO GIVES NOTICE OF INTENT?

Defendants-Appellants say "no."

Plaintiff-Appellee says "yes."

The trial court says "yes."

The Court of Appeals says "yes" in its conflict decision.

III.

WHETHER THE DISMISSAL WITH PREJUDICE IN THE SUBSEQUENTLY-FILED ACTION BY THE SUCCESSOR PERSONAL REPRESENTATIVE ACTS AS *RES JUDICATA* UNDER *WASHINGTON v SINAI HOSPITAL OF GREATER DETROIT*, AND BARS THIS ACTION?

Plaintiff-Appellee has not addressed this question, but presumably says no."

Defendants-Appellees say "yes."

The trial court did not address this question.

The Court of Appeals did not address this question.

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to consider and resolve this appeal pursuant to MCR 7.301(A)(2) and 7.302(G)(1). This Court's jurisdiction has been timely and properly invoked, as evidenced by the following:

- June 5, 2007 conflict decision of the Michigan Court of Appeals (Apx 53-60a);
- July 17, 2007 application for leave to appeal and accompanying documents, filed with this Court within the 42-day deadline set forth in MCR 7.302(C)(2); and
- September 26, 2007 order granting leave to appeal (Apx 62a).

STATEMENT OF FACTS

A. Introduction.

This is a wrongful death case grounded in allegations of medical malpractice in which defendants contend that the lawsuit filed by plaintiff, as the successor personal representative of the deceased, is untimely under the governing two-year medical malpractice statute of limitations, MCL 600.5805(6), and is not saved by the wrongful death savings statute, MCL 600.5852. The Honorable Daphne Means Curtis of the Wayne County Circuit Court ruled that the lawsuit filed by plaintiff is timely because the two-year savings period commences upon the issuance of letters to plaintiff, as the successor personal representative, under the authority of *Eggleston v Bio-Medical Applications of Detroit, Inc.*, 468 Mich 29; 658 NW2d 139 (2003). (Tr, 6/10/05; Apx 246-258a). The trial court also rejected defendants' argument that plaintiff's notice of intent was faulty (and thus the ensuing complaint is a nullity) because the notice of intent was not filed by the same person who ultimately filed the complaint. *Halton v Fawcett, M.D.*, 259 Mich App 699; 675 NW2d 880 (2003), *lv den*, 471 Mich 912; 688 NW2d 287 (2004). On July 5, 2005, the trial court entered a conforming order denying the defendants' motions for summary disposition. (Apx 32-33a).

On leave granted, the Michigan Court of Appeals issued its original opinion on August 15, 2006, in which it affirmed the trial court's decision on the *Eggleston* issue, and determined that the two-year savings period may be measured from the date letters of authority were issued to the plaintiff, as successor personal representative. (Apx 44a). The Court of Appeals then found that the notice of intent filed by the original personal representative was invalid as to the lawsuit filed by the successor personal representative. (Apx 39-42a). As to these defendants, the Court of Appeals remanded the matter to the trial court for further proceedings (the Court determined that this issue was not raised by co-defendant Garden City Hospital in its lower court documents). (Apx 46a).

A conflict panel was convened pursuant to MCR 7.215(J) to resolve the notice of intent issue conflict, identified by the Court as whether "the notice of intent to sue before a successor personal representative may commence a medical malpractice action." (Order of September 8, 2006; Apx 51a). On June 5, 2007, the conflict panel issued its decision in which it held that a notice of intent sent by a predecessor personal representative can support a complaint filed by a successor personal representative. (Conflict opinion, p 2; Apx 54a).

These defendants, John R. Schairer, D.O., Gary Yashinsky, M.D., Abhinav Raina, M.D., and Providence Hospital and Medical Centers, Inc., request this Court reverse and remand this matter to the Wayne County Circuit Court for entry of summary disposition in their favor.

B. Background facts.

Eric A. Braverman, successor personal representative of the estate of Patricia Swann, deceased, contends that the defendants were professionally negligent and that Ms. Swann's death arose from the failure to properly diagnose "fibromuscular dysplasia of the small coronary arteries." (2005 Complaint, ¶¶ 36, 41(A) – (Y); Apx 93a, 95-98a). The dates of the asserted malpractice per defendant are as follows:

> Dr. Schairer: April 19 – 21, 2000 (*Id* at ¶¶ 26-29; Apx 90-91a); and
>
> Dr. Yashinsky and Providence Hospital: October 19 – November 29, 2001 (*Id* at ¶¶ 31-35; Apx 92-93a).

C. Material facts.

The following facts are relevant for the statute of limitations/savings statute equation:

DATE EVENT	
April 21, 2000 – November 29, 2001[1]	Asserted malpractice (*Id*, ¶¶ 23 – 29, 31 – 35; Apx 91-93a).
February 18, 2002	Decedent's death (*Id* at ¶¶ 23, 26; Apx 90a).
October 29, 2002	Letters of authority are issued to the initial personal representative, Grace Fler (Apx 71a).
April 21, 2002 – November 29, 2003	Expiration of the two-year medical malpractice statute of limitations.
April 14, 2004	Issuance of *Waltz v Wyse, D.O.*
July 8, 2004	Date of notice of intent (Apx 148a).[2]
August 18, 2004	Letters of authority are issued to plaintiff Eric A. Braverman, successor personal representative (Apx 74a).
October 29, 2004	Expiration of the two-year savings period (absent tolling)[3] (measured from October

1 For purposes of the statute of limitations/savings provision equation, a range of dates of asserted malpractice may be used because the case is time-barred even assuming the latter date of asserted malpractice, November 29, 2001.

To the extent the Court deems material the different dates of the asserted malpractice, then the case is "more tardy" as to Dr. Schairer (treatment dates limited to April 19 – 21, 2000) and possibly as to Dr. Yashinsky (complaint asserts an October 19, 2001 date of asserted malpractice).

2 The statute of limitations expired before the filing of the notice of intent. Therefore, there is no tolling effect of the notice of intent. MCL 600.5856(d) (notice of intent tolling applies only if the statute of limitations would otherwise expire during the notice of intent period).

3 Notice of intent tolling is inapplicable to the savings statute. *Waltz v Wyse, D.O.*, 469 Mich 642; 677 NW2d 813 (2004).

	29, 2002).
October 29, 2004	Filing of initial complaint (voluntarily dismissed as premature, order dated January 5, 2005) (Apx 265-281a).[4]
January 25, 2005	Filing of complaint in this action (Apx 86-102a).

D. Probate court proceedings.

Grace Fler, the mother of Patricia Swan, was appointed personal representative on August 8, 2002 (Petition; Apx 64-65a) and issued letters of authority on October 29, 2002 (Letters of Authority; Apx 71a). Ms. Fler was active as the personal representative, as evidenced by the October 29, 2002 inventory and the October 27, 2003 notice of continued administration. (Apx 70a, 72a). On June 28, 2004, Ms. Fler filed a petition to remove herself as the personal representative for the reason that she "no longer feels she can perform her duties as personal representative." (Apx 73a). The petition was not acted upon and granted until August 18, 2004, after which time letters of authority were issued to the successor personal representative, Mr. Eric Braverman, a licensed attorney, dated August 18, 2004. (Apx 73-74a). Although Mr. Braverman was in place as the successor on that date, Ms. Fler apparently continued in her capacity of representing the estate, as evidenced by the September 9, 2004 partial sworn statement to close unsupervised administration – supplemental, dated September 9, 2004. (Apx 75a).

4 This complaint and the ensuing action, Wayne County Circuit Court No. 04-433837-NH, were voluntarily dismissed as to all defendants through an order dated January 5, 2005, entered in that action (see Exhibit F to Providence Hospital and Medical Centers, Inc.'s and Gary Yashinsky, M.D.'s reply to plaintiff's response to motion for summary disposition, dated June 9, 2005; Apx 237-239a).

As indicated in the previous subsections, the notice of intent, dated July 8, 2004, was filed while Grace Fler was still the personal representative (Apx 71a, 148a), although Eric Braverman, as the successor personal representative, filed the complaint. (Apx 86a).

E. **The trial court's ruling.**

The trial court heard oral argument on June 10, 2005, at which time Judge Curtis denied defendants' motions for summary disposition and found that the case was timely filed. The circuit court cited *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), and found that the two-year savings period runs from the date letters of authority were issued to the successor personal representative. (Tr, 6/10/05, p 12; Apx 257a). After allowing plaintiff to measure the two years from the date letters were issued to the successor personal representative, the trial court found that the complaint was timely filed within two years of this date. (Apx 257a).

The trial court did not address defendants' argument that the notice of intent filed by the initial personal representative was faulty with respect to this action filed by the successor personal representative.

F. **The Court of Appeals' opinions.**

On August 15, 2006, the Court issued its opinion in this case, in which a majority of the Court (Jansen, P.J., and Neff, J.) reversed under the authority of *Verbrugghe v Select Specialty Hospital – Macomb County Co, Inc*, 270 Mich App 383; 715 NW2d 72 (2006) which held that the successor personal representative herself must be the person who filed the notice of intent under MCL 600.2912b(1), with respect to the lawsuit filed by that person. The majority declared a conflict pursuant to MCR 7.215(J)(2), which was subsequently accepted by a majority of the Court, as evidenced by the September 8, 2006 order of the Court, in which section III of the opinion involving this issue was vacated, and the parties were instructed to file supplemental briefs. (Apx 51a).

The dissent opined that the trial court's decision denying summary disposition should be affirmed on the basis that MCL 700.3701 modifies the meaning of "person" under MCL 600.2912b(1), and thus a successor personal representative is the same as the initial personal representative in this context (Zahra, J., dissenting). (Apx 48-50a). The dissent found no need to declare a conflict because, in the estimation of the dissent, *Verbrugghe* did not address the issue of whether the notice of intent statute, viewed in conjunction with MCL 700.3701, was satisfied by a notice of intent filed by a different person (serving as an initial personal representative) with respect to a lawsuit filed by another person (serving as a successor personal representative). (Apx 49a).

Each of the three Judges agreed that plaintiff, as the successor personal representative, was afforded a full two year savings period under MCL 600.5852, regardless of the time expended by the initial personal representative in pursuing earlier actions. The Court of Appeals rejected arguments that the savings statute is improperly interpreted otherwise, and that the existing authority on point, *Eggleston, supra*, is distinguishable. (Apx 44-45a).

In its conflict decision of June 5, 2007, the conflict panel held that a notice of intent sent by a predecessor personal representative may support a complaint filed by a successor personal representative. (Conflict opinion, p 2; Apx 54a). The conflict panel distinguished the earlier, conflicting opinion of *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383; 715 NW2d 72 (2006), *lv pending*, and disagreed on the proper interpretation of *Halton v Fawcett*, 259 Mich App 699; 675 NW2d 880 (2003) *lv den* 471

Mich 912; 688 NW2d 2 (2004). The conflict panel determined that *Halton* is not properly interpreted to mean that the same natural person who files a notice of intent must file the complaint when duly appointed personal and successor personal representatives are involved. The conflict panel examined the terms of MCL 700.3701, which provide that a personal representative's powers relate back in time to acts given by the person appointed that are beneficial to the estate which occur before the appointment, giving the same effect as those occurring after the appointment. *Id* at pp 6-7. The conflict panel concluded:

> "We see no reason to conclude that a predecessor personal representative and a successor personal representative are different persons under MCL 600.2912b(1), when each is acting in his or her representative capacity, such that a successor personal representative cannot rely on the notice sent by a predecessor personal representative. Rather, we conclude that "person" in MCL 600.2912b(1), includes a person acting in a representative capacity, and includes the duly appointed personal representative of the estate, whoever that person may be at any given time."

(*Id* at p 7; Apx 59a). The conflict panel thus resolved the conflict in favor of plaintiff and so amended the Court's original opinion.

These defendants then filed their application for leave to appeal, which this Court granted:

> "On order of the Court, the application for leave to appeal the June 5, 2007 judgment of the Court of Appeals is considered, and it is GRANTED. The parties are directed to include among the issues to be briefed: (1) whether there are any circumstances, other than the expiration of the three-year ceiling in MCL 600.5852, under which the appointment of a successor personal representative would not trigger the start of a new two-year savings period, despite *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29 (2003), and (2) whether a successor personal representative may rely on a notice of intent filed by a predecessor personal representative."

SUMMARY OF ARGUMENT I

Defendants present three related arguments: (1) MCL 600.5852 is properly interpreted to provide that the two-year savings period runs from the date letters of authority are issued to the initial personal representative: it is the position or role of personal representative, not any one individual serving in that role, that is afforded two years to evaluate and file, if appropriate, a lawsuit; (2) *Eggleston* is factually and legally distinguished; and (3) despite of and in contradiction to *Eggleston*, section 5852 does not authorize multiple lawsuits by different personal representatives.

ARGUMENT I

MCL 600.5852 DOES NOT PROVIDE AN ADDITIONAL TWO YEAR SAVINGS PERIOD TO A SUCCESSOR PERSONAL REPRESENTATIVE WHEN:

(1) THE PERSONAL REPRESENTATIVE(S) OF THE ESTATE DID NOT FILE SUIT WITHIN TWO YEARS WHICH WERE EARLIER AFFORDED TO THE ESTATE BY THE SAVINGS STATUTE; OR

(2) THE TIMING OF THE APPOINTMENT OF THE SUCCESSOR PERSONAL REPRESENTATIVE SUGGESTS THE APPOINTMENT WAS INTENDED TO OBTAIN ANOTHER TWO-YEAR SAVINGS PERIOD.

A. Standard of review and supporting authority.

The question of whether a claim is within the period of limitations is one for the Court to decide and is therefore reviewed *de novo*. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997); *Cardinal Mooney High School v Michigan High School Athletic Assoc*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993). This Court reviews *de novo* decisions regarding summary disposition motions. *Maskery v Board of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). This Court reviews *de novo* the interpretation and application of a statute as questions of law. *Lincoln v General Motors Corp*, 461 Mich 483, 489; 607 NW2d 73 (2000).

B. Governing law.

1. MCL 600.5852.

MCL 600.5852 provides in its entirety:

> "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."

Under §5852, there are several prerequisites before the statute applies:

- The deceased must die before or within 30 days after expiration of the statute of limitations;
- "An" action may be commenced by "the" personal representative of the deceased, even if the period of limitations has run, if;
    - That action is filed within 2 years after letters of authority are issued, but;
    - No later than 3 years after the period of limitations has expired.

The issue presented involves an interplay between the function of the savings statute and the strategic replacement of a personal representative to resurrect a savings provision otherwise expired. The savings provision has the effect of extending the period of limitation where death occurs either before the period of limitation has run or within 30 days after that period. *Lindsey v Harper Hosp*, 455 Mich 56, 64; 464 NW2d 861 (1997). As an exception to the statute of limitations, the savings provision is strictly construed. *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984). The purpose of the savings statute is to "preserve actions that survive death in order that the representative of the estate may have a *reasonable time to pursue such actions.*" *Lindsey*, 455 Mich at 66-67 (emphasis supplied).[5]

2. Eggleston.

In *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), the Michigan Supreme Court had occasion to interpret whether the calculation of the two-year savings period must be measured from the issuance of letters of authorities to the initial personal representative.[6] The Court rejected the view that the letters run from this date, and instead held that the savings period may run from the date letters of authority are issued to a successor personal representative:

> "The language adopted by the Legislature 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 dates the letters of authority are issued to the initial personal representative."

Eggleston, 468 Mich at 33.

Under the facts of *Eggleston*, this Court then held that:

> "[p]laintiff was 'a personal representative' of the estate and filed the complaint 'within 2 years after letters of authority [were] issued,' and 'within 3 years after the period of limitations had run.' MCL 600.5852. The action was therefore timely."

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5 A personal representative is granted the power and authority to take possession, collect, preserve, manage and dispose of property of the estate according to the law. The personal representative is also granted authority to perform other acts permitted or required by statute, court rule, and orders and decrees of the court. This includes the decision of whether to investigate and ultimately file a medical malpractice action, after consultation with the legal and medical communities. See citations, *infra*.

6 In *Eggleston*, the successor personal representative was appointed by necessity (the original had died) and the two years for the original personal representative to decide whether to file and then effectuate a lawsuit had not yet expired.

Id. The particular circumstances of *Eggleston* include:

- The initial/temporary personal representative did not have available a full two-year period in which to file an action within the savings statute;
- The successor personal representative was appointed by way of necessity (death of the temporary personal representative), not by way of strategy;
- The successor personal representative was appointed within the two-year savings statute, measured from the date letters of authority were issued to the original/temporary personal representative;
- The successor personal representative had already been issued letters of authority when the action was filed;
- The initial personal representative had not earlier filed a lawsuit;
- An initial lawsuit was not pending when the plaintiff estate obtained a successor personal representative; and, most importantly
- The lawsuit was filed within a combined two year period during which the office of personal representative was empowered to act.

On this last point, it is important to note that there was a period of time between the death of the initial personal representative and the appointment and issuance of letters of authority to a successor personal representative during which the plaintiff estate was not empowered to prosecute a lawsuit. See then-effective Revised Probate Code (RPC), MCL 700.578; presently-effective Estates and Protected Individuals Code (EPIC), MCL 700.3609. As explained in the following pages, the Michigan Legislature did not intend the savings statute to apply to circumstances when the plaintiff estate had earlier been afforded a two-year period in which to timely file an action.

C. Argument.

1. **MCL 600.5852 is properly interpreted to provide that the two-year savings period runs from the date letters of authority are issued to the initial personal representative: it is the position or role of personal representative, not any one individual serving in that role, that is afforded two years to evaluate and file, if appropriate, a lawsuit.**

a. **Statutory interpretation of MCL 600.5852- plain language.**

A proper construction of MCL 600.5852 leads to the conclusion that the role or position of a personal representative, rather than any one individual personal representative, is afforded a maximum of two years available to the plaintiff estate in which to evaluate and, if appropriate, file a lawsuit. This conclusion arises from the rules of statutory interpretation, and to the extent necessary the need for judicial interpretation beyond the mere words of the statute, and an understanding of the purpose of the statute itself (discussed in the next subsection).

The paramount rule of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI*, 460 Mich 396, 411; 596 NW2d 164 (1999). Statutory language is read according to its ordinary and generally accepted meaning. If the statute's language is plain and unambiguous, the court assumes that the Legislature intended its plain meaning. Therefore, the court enforces the statute as written and follows the plain meaning of the statutory language. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996). If the Legislature's intent is clearly expressed by the language of the statute, no further construction is permitted. *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000).

The Legislature provided that an action which survives by law:

> "[M]ay 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."

(Emphasis added). The phrase "the personal representative," with particular note on the Legislature's use of the word "the" modifying "personal representative," rather than "a" personal representative is properly interpreted to mean "the" office of personal representative of the deceased person, rather than the individual persons serving in that position ("a" personal representative), which benefits from the savings statute. The law recognizes the difference between the use of the words "the" and "a." "The" is a definite article, which provides for a specifying or particularizing effect, as opposed to the indefinite or generalized force of the indefinite article "a" or "an." *Paige v City of Sterling Heights*, 476 Mich 495, 508-509; 720 NW2d 219 (2006), quoting with approval *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000) and *Random House Webster's College Dictionary*, p 1382:, *Hagerman v Gencorp Automotive*, 457 Mich 720, 753-754; 579 NW2d 347 (1998) (Taylor, J., dissenting, joined by Brickley and Weaver, JJ.)[7], quoting *Random House Webster's Collegiate Dictionary*, p 1382. This Court has long recognized the significance of the word "the" before a singular noun. *Robinson, supra* ("the" proximate cause refers to the "sole" proximate cause, and is distinguished from "a" proximate cause); *Woodard v Custer*, 476 Mich 545, 580-582; 719 NW2d 842 (2006) ("the" same specialty as a defendant physician contemplates "one" specialty, for purposes of the medical malpractice expert witness qualification statute, MCL 600.2169(1)(a)). Thus, the Court must follow the distinction between "the" and "a" personal representative. "*The* personal representative"

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7 Chief Justice Taylor's dissent in *Hagerman* is now the governing law of the jurisdiction because the majority position in *Hagerman* was overruled recently by this Court in *Paige v City of Sterling Heights*, 476 Mich 495, 508-509; 720 NW2d 219 (2006).

refers to the office, role or position of personal representative, as the fiduciary of the estate itself.

This construction is supported by reference to portions of EPIC, including MCL 700.3703, which provides in pertinent part:

> "A personal representative is a *fiduciary* who shall observe the standard of care applicable to a trustee as described in section 7302. A personal representative is under a duty to settle and distribute the decedent's estate in accordance with the terms of a probated and effective will and this act, and as expeditiously and efficiently as is consistent with *the best interests of the estate...*"

(Emphasis supplied). As indicated by the words "fiduciary" and "best interest of the estate," the personal representative serves in a representative capacity for the beneficiaries of the estate. This is a legal position or role acknowledged by Michigan law, served by individuals in a representative capacity for the beneficiaries. It is in this role or position that an individual, serving as the personal representative, may commence a lawsuit:

> "Except as restricted or otherwise provided by the will or by an order in a formal proceeding, and subject to the priority stated in section 3902, a personal representative, *acting reasonably for the benefit of interested persons,* may properly do any of the following:
>
> * * *
>
> > (x) Prosecute or defend a claim or proceeding in any jurisdiction for the *protection of the estate* and of the personal representative in the *performance of the personal representative's duties.*"

MCL 700.3715(x) (emphasis supplied).

The Legislature did not intend the phrase "*the* personal representative" to refer to any and all - - in other words, plural usage - - persons who may serve in the capacity of a personal representative. This construction is apparently sought by plaintiff through an argument that section 5852 evidences legislative intent to allow multiple persons, serving as personal representatives at different times, to have multiple two-year periods in which to file a lawsuit.

The definition of "personal representative" in EPIC supports the view that an individual only serves in a representative capacity in the role or office of personal representative, regardless of the particular designation of the individual (successor, special, or other personal representative):

> " 'Personal representative' includes, but is not limited to, an executor, administrator, successor personal representative, and special personal representative, and any other person who performs substantially the same function under the law governing that person's status."

MCL 700.1106(n).

b. Statutory interpretation of MCL 600.5852- judicial interpretation.

Defendants contend that their interpretation of the savings statute is correct on the express language used by the Legislature, with particular emphasis on the use of the phrase "the" personal representative. To the extent the Justices of this Court disagree that the savings statute is clear on its face, defendants contend that the Court should interpret the statute to prevent a successor personal representative from using the two-year savings statute when the estate already had a full two-year period in which to exercise the savings statute. Where a statute is susceptible to various meanings, the Court is instructed to examine its structure as a whole, and particularly the text surrounding the phrase or word that is subject to several meanings. *GC Timmis & Company v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). For purposes of this sub-argument, the phrase "the personal representative" carries several possible meanings, which opens the door for judicial interpretation to discern the intended meaning, which in turn allows the Court to consider the Legislature's apparent purpose in enacting a statute. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998).[8] This Court has already acknowledged the intent behind the savings statute, namely to "preserve actions that survive death in order that the representative of the estate may have a *reasonable time* to pursue such actions." *Miller v Mercy Memorial Hospital Corporation*, 466 Mich 196, 203; 644 NW2d 730 (2002) (emphasis supplied), quoting with approval *Lindsey v Harper Hospital*, 455 Mich at 66. As indicated in the following subsection, in the context of this case, the plaintiff estate was allowed the "reasonable time to pursue such actions" through the two years that were afforded but not taken advantage of by the estate, which was represented by the initial and successor personal representatives for two years before the lawsuit was filed. It makes little sense to interpret section 5852 to allow for the appointment of multiple personal representatives, regardless of reason, for as many occasions as necessary (subject only to the ceiling provision of section 5852) simply to allow the plaintiff estate a "reasonable time" to consider the propriety of and timely file a wrongful death case grounded in allegations of medical malpractice.[9]

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8 This Court may interpret section 5852 to avoid absurd consequences. See generally footnote 4 of Justice Markman's concurring opinion in *Woodard, supra*. "While it must be presumed that these [legislative] judgments are almost always those reflected in the words used by the lawmakers, in truly extraordinary cases, exercise of 'judicial power' allows recognition of the fact that no reasonable lawmaker could conceivably have intended a particular result." *Id.* at p 8. "[T]he 'absurd results' rule 'demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way." *Id.*, quoting *Public Citizen v United States Department of Justice*, 491 US 440, 470; 109 S Ct 2558; 105 L Ed 2d 377 (1989) (Kennedy, J., concurring).

9 The intent of the *Eggleston* court with respect to those circumstances in which the savings period runs from the letters issued to the successor personal representative should be also determined to advance the clear policy behind statutes of limitations,

The savings statute acts as an exception to, and is not considered a, statute of limitations. *Lindsey, supra*; *Miller, supra.* Generally savings provisions open the door and expose the responding party to otherwise stale claims by sacrificing the protection of the statute of limitations. *Barragan v Casco Design Corporation*, 837 NE2d 16, 24 (Ill 2005). Indeed, the savings statute has as its aim to *preserve* rather than *bar* claims. *Id* at 25. Given the tension between the policy considerations behind the statute of limitations on one hand (to prevent stale claims), and the competing policy considerations behind the savings statute (to preserve such claims when stale), the proper balance must be struck when interpreting and applying a savings statute which effectively resurrects an already-barred claim. "Just because [Illinois' savings statute] "saves" otherwise barred counterclaims does not mean it gives a party a right to bring the counterclaim for "all eternity" as [defendant] suggests." *Barragan*, 837 NE2d at 25, note 4.

As noted by the Connecticut courts, a court should be sensitive to the conflicting purposes of the statute of limitations and the savings provision by "recognizing the remedial nature of the savings statutes but refusing to construe them in a manner that 'would defeat the basic purpose of the public policy that is inherent in statutes of limitations.'" *Isidro v State*, 62 Conn App 545, 551; 771 A2d 257 (2001). Since a savings statute provides refuge from the statute of limitations:

> "It should not be construed so liberally as to render statutes of limitations virtually meaningless..."

Defendants suggest that, given these competing policy concerns, a plaintiff may use the savings period only once in the context of a single dispute. In a similar context,

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namely to prevent stale claims and relieve defendants of the protracted fear of litigation. *Witherspoon v Guilford*, 203 Mich App 240, 247; 511 NW2d 720 (1994).

the Ohio appellate courts have recognized this very point. *Thomas v Freeman*, 79 Ohio St3d 221, 227; 680 NE2d 997 (Ohio 1997). In *Thomas*, the Ohio Supreme Court held that a dismissal for failure to obtain service on a defendant was sufficient for the plaintiff to utilize the savings statute to re-file within one year. The court rejected the argument that classified the dismissal as without prejudice (thus triggering the savings period) because such classification "would risk continuous re-filings by a dilatory plaintiff," noting that "the savings statute can only be used once to re-file a case." 79 Ohio St3d at 227.

A similar result should issue here. The plaintiff estate had the opportunity to use a two year savings period to preserve an action otherwise barred. Once that time expired, however, the estate should not be allowed to assert a claim for which the ability to preserve the action was previously provided to the personal representatives. More to the point and in the vernacular, a plaintiff does not have the right to have the case "saved" twice. Yet that is what occurred in this case, and has occurred in many similar cases. Any other interpretation would risk continuous re-filings by dilatory plaintiffs because, as plaintiff openly argues, the only prohibition would be the expiration of the ceiling period in section 5852. Defendants' view is consistent with those cases that suggest that the individual circumstances of the case are not irrelevant to the interpretation and application of the savings statute, and that the legal question cannot always be decided in a factual vacuum. *Ruddock v Burrowes*, 243 Conn 569, 576; 706 A2d 967 (1998).

If the phrase "letters of authority" used in MCL 600.5852 contemplates issuance of letters to the successive personal representative on an ongoing basis, such an interpretation would create the absurdity that even the same personal representative could obtain "new" letters of authority, or a series of successor personal representatives could be appointed, and indefinitely extend the two-year savings period, subject only to the three-year ceiling. If this were the case, then the Michigan Legislature would have simply provided that a plaintiff may timely file an action within three years after expiration of the applicable limitations period - - the language employed by the Michigan Legislature to describe the ceiling provision, only. Under plaintiff's view of the savings statute, the grant of the two years would be academic and would not even appear in the body of the statute.

c. Defendants' statutory interpretation analysis is not foreclosed, but rather supported, by this Court's decision in *Eggleston*.

Putting aside the factual distinctions in this case, discussed *infra*, the *Eggleston* court found that the intermediate appellate court erred when interpreting the savings statute when the Court of Appeals inserted the word "the" before the phrase "letters of authority," which simply does not appear in the statute. Consistent with defendants' argument here, this Court found in *Eggleston* that the absence of the word "the" before the phrase "letters of authority" denoted plurality, i.e., different sets of letters of authority. The *Eggleston* Court never addressed the significance of the word "the" before the phrase "personal representative,"[10] which, to be consistent with the *Eggleston* rationale, denotes singularity, rather than plurality.

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[10] In its conclusion, the *Eggleston* court did refer to the plaintiff, who was the successor personal representative, as "the personal representative" under MCL 600.5852. 468 Mich at 32. There was no discussion nor analysis of this statement. In any event, the statement is mere *dicta* because it was not necessarily involved nor essential to the determination of the issue at hand, and otherwise lacks the force of an adjudication. *Hett v Duffy*, 346 Mich 456; 78 NW2d 284 (1956); *Black's Law Dictionary*, abridged Sixth Edition, p 313 ("statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication. *Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without

The *Eggleston* analysis actually supports defendants' position. If the absence of the word "the" denotes plurality, *Eggleston, supra*, then the affirmative use of the word "the" in the very same statute, must denote singularity. More precisely, "the" modifies "personal representative," with a specifying or particularizing effect. Defendants contend that "the personal representative" is a reference to the role or position of the personal representative, rather than the numerous persons who may fulfill that role in the course of administering an estate. In turn, it is that role or position as a personal representative, consistent with definitions found in EPIC, which is afforded two years from the time letters of authority are issued in which to file a timely lawsuit. In cases such as this, when the estate had a full two-year period but did not act timely, the savings statute is not resurrected by the mere appointment of another individual, to assume the role or position as the personal representative, which was already afforded the full two-year period.

2. *Eggleston* is factually and legally distinguished.

a. The facts of *Eggleston*.

In *Eggleston*, the complained-of treatment and death of the decedent took place on June 21, 1996 and June 22, 1996, respectively. A temporary personal representative was appointed and letters of authority were issued to him on April 4, 1997. Under the savings provision, section 5852, the personal representative had through April 4, 1999 in which to file a timely action. On August 20, 1997, the personal representative died a mere 4 ½ months into the two-year period. At that point, the estate was not empowered to move

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argument, or full consideration of the point. They are not the professed deliberate determinations of the judge himself.").

forward with a lawsuit, RPC, MCL 700.578;[11] now EPIC, 700.3609.[12] The estate was re-empowered to proceed once a successor personal representative was appointed by reason of the death of the original personal representative, and letters of authority were issued to the successor on December 8, 1998 – still within the two-year savings provision. Seven months later, on June 9, 1999, a complaint was filed alleging medical malpractice.[13] The complaint was filed within the two-year period measured from the letters issued to the second personal representative, but not within two years from the date letters issued to the original personal representative.

b. ***Eggleston* is distinguishable.**

The *Eggleston* interpretation of section 5852 is factually and legally distinguishable from this case for several reasons. First, the *Eggleston* successor personal representative

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[11] MCL 700.578 provided:

> "When the fiduciary of the estate dies without leaving a surviving fiduciary, his fiduciary shall not as such, have any authority to administer the estate of the first decedent but shall file a final accounting in the estate of the first decedent. If the deceased fiduciary does not have a fiduciary of his estate then the surety on the bond if any of the deceased fiduciary shall file the final accounting."

[12] MCL 700.3609 provides:

> "The personal representative's death or a conservator's appointment for the personal representative's estate terminates the appointment of that individual. Until appointment and qualification of a successor or special personal representative to replace the deceased or protected personal representative, the personal representative of the estate of the deceased or conservator of the protected personal representative has the duty to protect the estate possessed and being administered by the decedent or ward at the time the appointment terminates, has the power to perform acts necessary for that protection, and shall account for and deliver the estate property to a successor or special personal representative upon the successor's appointment and qualification."

13 It is unclear from the *Eggleston* opinion whether the seven-month period was subsumed in part by compliance with the notice of intent provisions of MCL 600.2912b.

filed the lawsuit within a combined two year period in which the plaintiff estate was empowered to file such a lawsuit, measured from the date letters of authority were issued to the initial personal representative, subtracting the gap in time during which the estate could not move forward because of the death (as opposed to a voluntary resignation) of the initial personal representative.[14] In this case, the initial personal representative voluntary resigned, as opposed to resignation by death (as in *Eggleston*), and therefore there is no interim period during which the plaintiff estate lack the power to file a lawsuit.[15] Rather, the two year savings period ran continuously from the date letters were issued to the initial personal representative, October 29, 2002, through the date the successor was appointed and letters were issued, August 18, 2004, and expired on October 29, 2004. The successor personal representative failed to file this lawsuit by this date, but rather waited until January 25, 2005.

Once Grace Fler, the initial personal representative, was appointed and letters were issued, she had the full authority and uninterrupted legal ability to prosecute this action. The subsequent appointment of Eric Braverman and issuance of letters continued that legal ability to proceed.[16] The letters of authority issued are simply a reflection of the power to initiate a lawsuit:

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[14] The initial letters were issued on April 4, 1997. Approximately 4 ½ months later, the personal representative died, and a successor was later appointed and letters issued on December 8, 1998. During the interim, the estate was not empowered to file suit, but only to protect estate assets. *See* then-effective MCL 700.579. Therefore, the interim time period does not count against the two year savings period. The successor personal representative thus had 19 ½ months in which to file a timely lawsuit, which occurred six months after his letters were issued, on June 9, 1999.

[15] *See* MCL 700.3610.

[16] "*A personal representative's duties and powers commence upon appointment.* A personal representative's powers relate back in time to give acts by the

> "Except as restricted or otherwise provided by the will or by an order in a formal proceeding, and subject to the priorities stated in section 3902, a personal representative, acting reasonably for the benefit of interested persons, may properly do any of the following:
>
> * * *
>
> (x) Prosecute or defend a claim or proceeding in any jurisdiction for the protection of the estate and of the personal representative in the performance of the personal representative's duties."

MCL 700.3715(x).

Second, in *Eggleston* the successor personal representative was appointed *by* necessity (the original/temporary personal representative had died). As previously discussed, there was a "gap" in time in which the estate could not move forward in the *Eggleston* case, in contrast to the continuity in this case occasioned by the voluntary resignation of the initial personal representative, and the immediate appointment and continuation of estate's affairs by the successor personal representative. In addition, there was no indication in *Eggleston* of any strategic replacement of a personal representative to extend the savings statute. In stark contrast, absent explanation of the after-the-fact appointment of the successor personal representative, the *Braverman* case appears to be a textbook example of an attempt to maneuver the Michigan probate provisions to resurrect a claim heretofore time-barred.

> person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment. Before or after appointment, a person named as personal representative in a will may carry out the decedent's written instructions relating to the decedent's body, funeral, and burial arrangements. A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative."

MCL 700.3701 (emphasis supplied);

These points are fully supported by the reasoning of the Court of Appeals in *McLean v McElhaney, MD*, 269 Mich App 196; 711 NW2d 775 (2005) *lv pending:*

> "Plaintiffs rely on *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 30; 658 NW2d 139 (2003), for their assertion that a successor personal representative would be able to timely file a complaint in this case. In *Eggleston*, our Supreme Court held that a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute. *Id.* However, the facts of the present case are distinguishable. In *Eggleston*, the decedent's widower 'was appointed temporary personal representative and issued letters of authority on April 4, 1997. He died on August 20, 1997.' *Eggleston, supra* at 31. The decedent's son was appointed her successor personal representative on December 8, 1998, and he filed a medical malpractice complaint on June 9, 1999. *Id.* Thus, the estate of the decedent was represented for a total of approximately ten-and-a-half months when the complaint was filed, and neither the initial nor the successor representatives represented the estate for the full two years available to them under the wrongful death saving statute. Certainly, *plaintiffs were afforded the full two years permitted under the wrongful death saving statute to file their complaint, but failed to do so. Moreover, plaintiffs' failure was not due to the untimely demise of a predecessor representative, but to their own negligence in calculating the proper time for filing the complaint.* Accordingly, we conclude that plaintiffs are not entitled to relief under *Eggleston*."

McLean, 269 Mich App at 201-202 (emphasis supplied).

Third, the *Eggleston* court never indicated that its construction of the statute is to apply to *all* situations. As noted by Chief Judge Whitbeck of the Michigan Court of Appeals, "The *Eggleston* Court did not . . . 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* . . . '" *Boodt v Borgess Medical Center*, 272 Mich App 621, 656; 728 NW2d 471 (2007) (Whitbeck, C.J., concurring in part and dissenting in part) (emphasis original), oral argument scheduled on application on different question, Supreme Court Docket No. 132688 (order dated October 12, 2007). As explained, *Eggleston* is different dramatically on the facts from this case.

In addition to *McLean*, several decisions from the Court of Appeals demonstrate that *Eggleston* is not applied to all circumstances. In *King v Briggs, DO*, Michigan Court of Appeals Docket Nos. 259136 and 259229, *rel'd* July 12, 2005 (unpublished) *lv den* 474 Mich 1113; 712 NW2d 164 (April 21, 2006) (Exhibit A), a panel of the Court of Appeals (Owens, P.J., and Cavanagh and Neff, JJ.) distinguished *Eggleston* on the facts and determined that the trial court erred by finding that a successor personal representative was entitled to an additional two years in which to file a wrongful death action. The *King* plaintiff had available but did not file a timely action within two years of the date that the predecessor personal representative had received letters of authority. As such, the *King* court found *Eggleston* distinguishable because:

> "[O]ur Supreme Court did not have the occasion to address the issue facing this Court, which essentially is 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."

King slip opinion, page 2.

The *King* court reasoned that the successor personal representative assumed the position of the predecessor personal representative under the terms of MCL 700.3613, which provides in pertinent part that:

> "After appointment and qualification, a successor personal representative *must* be substituted in all actions and proceedings in which the former personal representative was a party... The 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."

MCL 700.3613 (emphasis supplied).

In *Gainforth v Bay Health Care*, Michigan Court of Appeals Docket No. 260054, *rel'd* August 11, 2005 (unpublished) *lv den* 474 Mich 1086; 711 NW2d 339 (March 22, 2006) (No. 129530) (Exhibit B), a panel of the Court of Appeals (Cooper, P.J., and Bandstra and Kelly, JJ.) distinguished *Eggleston* on the facts and determined that the plaintiff estate failed to take advantage of the two-year period running from the date the original letters were issued, and therefore there was no reason to extend that period by recommencing upon issuance of the second set of letters:

> "This case is distinguishable from *Eggleston*. Plaintiff was *the* personal representative appointed to the decedent's estate. Although subsequent letters of authority were issued to plaintiff, these letters merely continued plaintiff's term as *the* personal representative. Granting the plaintiff in *Eggleston* two years from his appointment as successor personal representative allowed him two full years to file his complaint. In this case, allowing the saving period to run from the issuance of the second letters of authority grants plaintiff as additional year beyond the statutory saving period in which to file the complaint. Plaintiff had until the two-year anniversary of the issuance of the letters of authority to file the malpractice claims. This two-year savings period expired on June 6, 2002, more than four months before plaintiff filed the complaint. Accordingly, the complaint was not timely filed within either the statute of limitations or within the two-year period provided by the saving provision."

Gainforth slip opinion, p 6 (footnotes omitted), *lv denied* on March 22, 2006.

King and *Gainforth* are noteworthy for an additional reason: this Court denied leave to appeal in each case.

Indeed, even the panels of the Court of Appeals which applied *Eggleston* recognized the difficulty with applying rotely the rule of *Eggleston* in all factual circumstances, yet bound to do so by the rules of statutory construction (addressed earlier in this application). For example, in *Verbrugghe v Specialty Hospital*, 270 Mich App 383; 715 NW2d 72 (2006), *lv pending*, the court explained well that the Legislature did not envision a plaintiff estate obtaining any number of successor personal representatives to restart the savings period:

> "In ruling as we have, we have not ignored the rather unique situation created under these facts. It is patently obvious that under these facts plaintiff may proceed with a second lawsuit, despite the dismissal of the initial personal representative's lawsuit. In other words, the estate gets a chance for a second bite of the apple. But we believe the predicament lies with the statute, which must be our focal point, and under the statute there is no limitation as to the circumstances under which a personal representative can file a lawsuit once letters of authority are issued, other than the time limits with which plaintiff has complied. *Eggleston, supra; Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566; 703 NW2d 115 (May 26, 2005), *lv den* January 27, 2006 (Supreme Court Docket Nos. 129391-393), reconsideration denied April 28, 2006. *Thus, if this type of successive suit is an unintended consequence of the language contained in the statute, the Legislature is the proper body to correct that deficiency.*"

270 Mich App at 391-392 (emphasis added). The *Verbrugghe* court's reference to a successive suit as an "unintended consequence" of the savings statute is a telling statement, which stands unrebutted in the portfolio of *Eggleston* cases decided by the Michigan Court of Appeals. Different approaches have arisen to address this "unintended consequence," with the *Verbrugghe* court allowing the successive lawsuit to move forward, in contrast to the *McLean* court's disallowance of that lawsuit. *McLean*, 269 Mich App at 201-202. Consistent with the previous discussion regarding statutory interpretation, the better-reasoned *McLean* opinion leads to the result envisioned by defendant, namely the dismissal of a lawsuit filed by a successor when, in fact, the lawsuit was not filed within two years previously afforded the plaintiff estate.

Finally, the result sought by plaintiff is inconsistent with *Lindsey v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997), in which this Court held that the purpose of the savings provision was to preserve actions that survived death to allow the personal representative of the estate a " reasonable time to pursue such actions." *Id* at 66, citing *Morse v Hayes*, 150 Mich 597, 602; 114 NW 397 (1908).

In *Lindsey*, this Court held that the savings provision began to run when the probate court issued to plaintiff letters of authority as the initial personal representative, rather than when the probate court issued to plaintiff letters of authority as a successor personal representative approximately one month later.[17] The *Lindsey* court reasoned that the initial personal representative could have commenced and maintained a cause of action, and that the revised probate code regarding the authority and responsibility of a temporary personal representative and a personal representative contained no constructive difference. 455 Mich at 67-68.

Under plaintiff's interpretation of *Eggleston*, the *Lindsey* result would have been different because the plaintiff estate would have had the unfettered right to obtain a successor personal representative and to start/restart/extend commencement of the two-year savings period. Yet, the *Lindsey* court determined that the two years runs from the date the initial personal representative was appointed. Unlike *Eggleston*, where the appointment of a successor was by way of necessity, both *Lindsey* and this case present an appointment of a successor personal representative *by choice*, and are thus distinguishable from *Eggleston*.

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[17] In *Lindsey*, the decedent died on January 7, 1988. The plaintiff's daughter was appointed personal representative on September 14, 1990, at which time letters of authority were issued. On October 4, 1990, the probate court then appointed a successor personal representative, and issued letters of authority on that same date. On October 1, 1992, two years after the issuance of the September 14, 1990 letters of authority, but within two years of the October 9, 1990 letters of authority, plaintiff initiated the wrongful death medical malpractice action against the respective defendants.

3. **Section 5852 does not authorize multiple lawsuits by different personal representatives.**[18]

Section 5852 provides in pertinent part that, subject to conditions inapplicable here:

> "*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."

MCL 600.5852 (emphasis supplied). The Legislature provided a single opportunity for an estate to apply the savings statute, as evidenced by the italicized words above. For example, it is only "the" personal representative of the deceased person, rather than "a" personal representative, who may benefit from the savings statute. It is only "an" action which is available to the plaintiff estate. These singular terms do not suggest that a plaintiff estate may have multiple opportunities to comply with the savings statute, subject only to the limitation of the ceiling provision.[19]

The common usage of the words "an" and "the" do not allow for a construction whereby a plaintiff estate accesses multiple personal representatives and files multiple

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18 To the extent this argument is contrary to *Eggleston*, the defense asserts *Eggleston* is wrongly decided, and this Court should reconsider and reverse its *per curium* decision in that case.

19 "An" is an indefinite article which is defined as "one." *Webster's Ninth New Collegiate Dictionary* (1983). *Black's Law Dictionary* defines "an" as the equivalent to "one" or "any;" "*seldom used to denote plurality.*" (*Black's Law Dictionary*, Fifth Edition, p 77) (emphasis supplied). "The" is a definite article which has various meanings, the primary which is used as a "function word to indicate that a following noun or noun equivalent is *definite* or has been previously specified by context or by circumstance." (*Webster's*, *supra* at 1222) (emphasis supplied). *Black's Law Dictionary* indicates that "the" refers to a certain object. *Black's*, *supra* at 1324.

lawsuits, only to claim that the last lawsuit in line by the last personal representative is timely because it was filed before expiration of the ceiling period. Not only does plaintiff's position fly in the face of the use of the words "an" and "the," but it renders superfluous the first and foremost limitation in the savings statute, namely that the personal representative must act within two years of the date letters of authority are issued. The use of multiple lawsuits and multiple personal representatives effectively restarts the clock on the two-year period at the whim of the estate, without regard to previous activity by the estate, and reduces the two-year requirement as a mere footnote, if at all, to the three-year ceiling period. Restated, plaintiff's position is the statutory equivalent of the "tail wagging the dog" by elevating the three year ceiling period over the two year savings statute itself.

Further support for defendants' position is found in this Court's reasoning in *Eggleston*. The Court concluded the absence of the word "the" before the phrase "letters of authority" allow for the usage of multiple letters of authority, not just an initial set of letters of authority. In turn, the affirmative use of "the" before the phrase personal representative – used twice in the statute, and by analogy the affirmative use of the word "an" before the word "action," signifies a limited, singular context. Restated, if the absence of the word "the" denotes plurality, then surely the use of the word "the," and by analogy " an," in the very same statute, must denote singularity.

If further judicial interpretation is necessary, the Legislature's intent must be gathered from the language used. The language must be given its ordinary meaning, and the language is to be given the reasonable construction that best accomplishes the purpose of the statute. *Mino*, 209 Mich App at 204-205.[20] A fair reading of section 5852 opens the door for judicial interpretation in the context of this case, when there were multiple lawsuits filed by multiple personal representatives, the last of which is claimed timely by the plaintiff estate.

4. Circumstances other than the expiration of the three-year ceiling of MCL 600.5852 under which the appointment of a successor personal representative would not trigger the start of a new two-year savings period, despite *Eggleston*.[21]

When the office or role of personal representative has a combined two years in which to file a timely lawsuit, and that two year period has expired, it may not be restarted by the appointment of a successor personal representative under *Eggleston*. It matters not whether there are other factors which independently may affect the propriety of either the appointment of a successor personal representative, or the allowance of a new two year period afforded to that successor personal representative.

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20 For example, if this Court determines that the usage of the word "an" does not necessarily denote a singular term, then judicial interpretation is needed to determine whether, in the particular circumstances of this case, a singular or plural application should apply. As noted in *Black's Dictionary of Law*, Fifth Edition, p 1, meaning may depend on context:

> "For example, in Workman's Compensation Act, on, or in or about 'a' railway factory, etc., was held not to mean any railway, factory, etc., but *the* railway, factory, etc., of the employer."

(Emphasis supplied).

21 In its September 26, 2007 order granting leave to appeal (Apx 62-63a), this Court directed the parties to brief this question.

To the extent this Court interprets otherwise section 5852, there are independent factors under which the appointment of a successor personal representative would not trigger the start of a new two year savings period.

Subject to the prior analysis, defendants adopt Court of Appeals Chief Judge Whitbeck's four categories of different situations in which a successor personal representative's ability to pursue an action has been questioned, taken from *Boodt*, 272 Mich App at 652. Defendants agree with Judge Whitbeck's conclusion that a successor personal representative may not attempt to revive or reinstate an untimely action filed by the original personal representative (the third category), 272 Mich App at 654-655, because the successor personal representative inherits the same untimely status as the previous personal representative, *Id* at 658, citing MCL 700.3613. Defendants also agree with Judge Whitbeck's conclusion that a successor personal representative may not attempt to file a new action or overcome an untimely action when the original personal representative has filed such an untimely action (the fourth category), *Id* at 655, 661-662 (the successor personal representative must inherit the predecessor's status), once again citing MCL 700.3613.

Defendants disagree with Judge Whitbeck's conclusions in the first category (original personal representative files no action; successor personal representative attempts to file action) and in the second category (original personal representative attempted to file action, but was not authorized; successor personal representative attempts to file action). *Id* at 272 Mich App at 653-654. In these situations, the successor is not entitled to additional time if the plaintiff estate already was provided two years in which to file a timely action. See previous argument.

<u>ARGUMENT II</u>

THE FILING OF THE NOTICE OF INTENT BY THE INITIAL PERSONAL REPRESENTATIVE DOES NOT SATISFY THE REQUIREMENT OF MCL 600.2912b THAT A "PERSON" WHO "COMMENCE[S] AN ACTION" – HERE THE SUCCESSOR PERSONAL REPRESENTATIVE – BE "THE PERSON" WHO GIVES NOTICE OF INTENT.

A. **Standard of review and supporting authority.**

This Court reviews *de novo* questions of statutory interpretation of the notice of intent statute, MCL 600.2912b. *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

B. **Introduction – summary.**

Plaintiff, the successor personal representative, did not send the notice of intent required under MCL 600.2912b. Instead, the only notice of intent of record was sent by the initial personal representative.[22] This notice of intent is insufficient under Michigan law because it was not sent on behalf of the person who commenced the lawsuit. The failure to file a notice of intent renders the complaint a nullity under Michigan law. *Roberts v Atkins, M.D.*, 470 Mich 679; 684 NW2d 711 (2004). Therefore, this action is a nullity and the Court of Appeals' original determination should be reinstated. Defendants' position is supported by the clear and unequivocal terms of MCL 600.2912b. Plaintiff and the Court of Appeals erroneously relied on MCL 700.3701, which applies only when a person, not yet appointed the personal representative, is subsequently appointed. This statute does not provide that there is relation back to the acts of a person who is not the personal representative for whom the estate seeks to benefit.

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22 The notice of intent, dated July 8, 2004, was filed while Grace Fler was still the personal representative, although Eric Braverman, as the successor personal representative, filed both the initial and the instant complaints (Apx 85a, 265a).

C. Governing law.

MCL 600.2912b (1) provides:

> "Except as otherwise provided in this section, *a person* shall not commence an action alleging medical malpractice against a health professional or health facility unless *the person* has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."

(Emphasis supplied). The Courts have interpreted this statute to preclude a medical malpractice claimant from commencing suit against a health professional or health facility unless written notice is provided to that professional or facility before the time the action is commenced. *Roberts, supra.* After providing the written notice, the claimant is then required to wait for the applicable notice period to expire before filing suit. MCL 600.2912b (3).

The two-year period of limitations for medical malpractice actions is tolled by a qualifying notice of intent during the notice period "after the date notice is given *in compliance* with section 2912b." MCL 600.5856(d)[23] (emphasis supplied). Moreover, as indicated by the phrase, "a person *shall not commence* an action alleging medical malpractice" before the notice of intent is given, Michigan law nullifies a complaint filed in noncompliance with notice of intent. *Roberts, supra*; see also *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005) (court holds that a complaint filed before expiration of the notice period violates MCL 600.2912b and is ineffective to toll the limitations period; by analogy failure to comply with the notice of intent period altogether likewise is ineffective to satisfy the limitations period).

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23 MCL 600.5856(d), now replaced by MCL 600.5856(c), applies to this notice of intent under Public Acts 2004, No. 87, enacting Section 1.

The courts have consistently held that MCL 600.2912b places the burden of complying with the notice of intent requirements on the plaintiff and that the clear, unambiguous statute requires full compliance with its provisions as written. *Roberts, supra*; *Roberts v Mecosta County General Hosp*, 466 Mich 57; 642 NW2d 665 (2002) (*Roberts* I; *Burton, supra*).

D. Argument.

1. **MCL 600.2912b was not satisfied in this case.**

In its conflict panel decision, the Michigan Court of Appeals erred by determining that the person who files the complaint may rely upon a notice of intent filed by a different person. This determination is directly contrary to the terms of MCL 600.2912b(1), discussed next. A proper interpretation of this statute renders erroneous the conflict panel's conclusion, found at p 7 of its opinion:

> "[W]e conclude that the term 'person' in MCL 600.2912b(1) includes a person acting in a representative capacity, and includes the duly appointed personal representative of an estate, whoever that person may be at any given time."

(Slip opinion; Apx 59a).

The Michigan Legislature requires that a person filing the lawsuit be the same person that filed the notice of intent:

> "Except as otherwise provided in this section, *a person* shall not commence an action alleging medical malpractice against a health professional or health facility unless *the person* has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."

MCL 600.2912b(1) (emphasis supplied).

As demonstrated by the italicized language above, the person who files the complaint must also be the person who filed the notice of intent. That did not occur in this case. Ms. Fler, as the initial personal representative, filed the notice of intent. Mr. Braverman, as the successor personal representative, filed the complaint. The present plaintiff failed to file a notice of intent, which, under the express terms of section 2912b(1), renders the complaint a nullity. *Roberts II, supra.*

This conclusion is required by the clear language of section 2912b(1). The cardinal principle of statutory construction is that the court must give effect to the legislative intent. *Morales v Auto-Owners Ins Co* (After Remand), 469 Mich 487, 490; 672 NW2d 849 (2003). When reviewing a statute, courts necessarily must first examine the text of the statute. *Dressel v Ameribank*, 468 Mich 557, 562; 664 NW2d 151 (2003). If the Legislature's intent is clearly expressed by the language of the statute, no further construction is permitted. *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000).

The Legislature's intent is clear from the express terms of section 2912b. "[A] person" who commences the action must be 'the person' who has given notice. The Legislature did not provide that a person commencing the lawsuit may rely on a notice of intent given by another person. Indeed, to reach this conclusion is to ignore the articles before the operative word 'person,' namely 'a' person against whom the prohibition to file a lawsuit is directed, and 'the' person who can avoid this prohibition by giving notice of intent during the statutory period.

The law recognizes the difference between the use of the words "the" and "a." See previous discussion and legal authorities, *supra*. When the Michigan Legislature stated that a person shall not commence an action unless "*the* person" has given the notice of intent, the conscious use of the phrase "*the* person" mandates that the same person who files the action must have filed the notice of intent. Otherwise, the Michigan Legislature would have simply provided that "a person" who commences the action must do so only if "a person" has filed a notice of intent. Such a construction would allow for a reasonable interpretation that these two individuals – the filing person and the notice of intent person – can be separate "persons" or separate human beings, as so required under *Halton v Fawcett, MD, supra.* The Michigan Legislature did not use this construction of the statute and, in fact, made clear that reference to "person" in the statute requires that the filing person be the very same person who filed the notice of intent. The statute is clear on its face, and no further interpretation is necessary. In turn, it was improper for the conflict panel to expand the scope of section 2912b to include an initial and predecessor personal representative.

Case law provides that the sharing of the office of personal representative, once by the initial and once by the successor personal representative, does not render these occupants the same "person" for purposes of the notice of intent statute. In *Halton*, plaintiff argued and the Court of Appeals held that a person not yet appointed the personal representative could file a notice of intent which would be honored and valid with respect to a claim ultimately filed by that same individual, who by that time had been properly appointed the personal representative. The *Halton* Court premised its holding on two points: (1) the person who filed the notice of intent was the same person who filed the complaint, albeit in a personal representative capacity; and (2) a "personal representative" is not a separate legal entity under applicable Michigan law.

Our case is one in which the physical human beings are different. The *Halton* opinion makes clear that the notice of intent will not be honored under such circumstances:

> "With the use of the definite article 'the' with the second occurrence of the word 'person' in MCL 600.2912b(1), it is clear that the statute requires that *the person commencing a medical malpractice action be the person who previously served a notice of intent on the defendant...*
>
> *   *   *
>
> In sum, the word (person) refers to a human being, whether in their individual or representative capacity. Plaintiff is the same human being who is responsible for the notice of intent and the filing of the lawsuit. Therefore, the statutory requirement that the person who files the suit must have previously given notice of intent is satisfied."

Halton, 259 Mich App at 701-702, 704 (emphasis supplied). Ms. Fler is not the same human being as Mr. Braverman. Therefore the notice of intent filed by Ms. Fler is invalid as to the Complaint filed by Mr. Braverman, the successor personal representative.[24]

The defense interpretation of *Halton* is hammered home by Justice Markman's concurring opinion in the *Halton* order denying leave to appeal, 471 Mich 912; 688 NW2d 287 (October 29, 2004):

> "However, MCL 700.3701 states that 'a personal representative's powers relate back in time to give acts *by the person appointed* that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment.' Accordingly, *plaintiff's* appointment as personal representative relates back to *her* filing the notice of intent."

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24 The proper scope of MCL 700.3701, through its predecessor version, was previewed by the Court in *Waltz*, 469 Mich at 647, note 8, in which the Court reasoned but did not decide that the notice of intent filed by the *Waltz* plaintiff, who had not yet been appointed personal representative at the time she filed her notice of intent, may be honored by the relation back doctrine to "give acts by the person appointed" the "same effect as those occurring thereafter" by the same person. This Court did not extend this analysis to a different person than the person eventually appointed the personal representative and who then prosecuted the action.

(Emphasis supplied).

This analysis was recently bolstered by the Court in *Woodard v Custer, supra*, in which the Court explained that the use of the definite article "the" before a singular noun contemplates specificity with respect to that singular noun. Here the Legislature's use of the definite article "the" before the singular phrase "person" means the specific person who filed the lawsuit must be the person who has given notice of intent.

Plaintiff contends that EPIC, MCL 700.3701, allows plaintiff to reach back and use the notice of intent filed by the initial personal representative. MCL 700.3701 does have a relation back provision, but it relates only to pre-appointment activities beneficial to the state *by the same person who is eventually appointed the personal representative*:

> "A personal representative's duties and powers commence upon appointment. A personal representative's powers relate back in time to give acts *by the person appointed* that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment. Before or after appointment, a person named as personal representative in a will may carry out the decedent's written instructions relating to the decedent's body, funeral, and burial arrangements. A personal representative may ratify and accept an act on behalf of the estate done by another if that act would have been proper for a personal representative."

(Emphasis supplied). Plaintiff keys on the second sentence when arguing that relation back applies here, between different persons:

> "A personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same affect as those occurring after appointment."

As indicated in the block quote immediately before this sentence, relation back applies only to acts done by the person who is eventually appointed the personal representative. Any other interpretation reads out of the statute the phrase "by the person appointed."

Plaintiff also points to the last sentence of the statute when arguing that relation back applies to acts done by Ms. Fler, a different person:

> "A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative."

This sentence of the statute does not contain a "relation back" feature, in contrast to the second sentence previously discussed. The Legislature's inclusion of a relation back feature to acts beneficial to the estate and performed by the person subsequently appointed is noticeably and intentionally omitted from the ratification and acceptance sentence. It is also a specific reference to a category of acts that relate, in the first instance, to the overall power of the personal representative, discussed in the preceding sentence. Thus, the ratification and acceptance of an act must be within the scope of power granted the personal representative. In turn, that power relates only to acts done by that person who is eventually appointed.[25]

Plaintiff also argued, and the conflict panel of the Court of Appeals found, that the defense defined too broadly the scope and application of *Halton*. The *Halton* court considered whether a notice of intent filed by a person not yet appointed the personal representative is valid to a lawsuit filed by that very same person, once appointed a personal representative. The *Halton* court answered no, and reasoned that the word "person," undefined in the notice of intent statute, is commonly understood to be the same human being, and that EPIC defines "personal representative" separate and distinct from the Legislature's definition of "person," immediately preceding such definition:

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25 The same infirmity infects any citation to MCL 700.3613, which provides in pertinent part:

> "Except as the court orders otherwise, the 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."

There is no relation back feature to this provision.

"(m) 'Person' means an individual or an organization.

(n) 'Personal representative' includes, but is not limited, an executor, administrator, successor personal representative, and special personal representative, and any other person who performs substantially the same function under the law governing that person's status."

MCL 700.1106 (m) and (n).

Under these definitions, if plaintiff is correct and "person" means something separate, distinct, and in addition to the more narrow definition of "personal representative," then these different definitional sections would not exist, and more importantly, would not be referenced in 3701. The power of relation back in time applies only to acts by the person appointed, i.e., the eventual personal representative, before such status was obtained. The care with which the Legislature defined "personal representative" and "person" in EPIC evidences the difference between these two categories.

2. **Response to the *Braverman* majority opinion analysis.**

In its June 5, 2007 conflict opinion, the Court of Appeals adopted the majority opinion of August 15, 2006. The majority affirmed under the authority of *Halton* and *Verbrugghe*, but reasoned that the notice of intent filed by the initial personal representative satisfied the statutory requirement placed on the successor personal representative, who is the plaintiff in this lawsuit. The reasoning of the majority lacks merit because it conflicts with the very terms of MCL 600.2912b(1). The Michigan Legislature dictated that any person ("a person") may file a medical malpractice lawsuit so long as "the person" complies with the notice of intent requirements. Regardless of how the *Braverman* majority felt about the substitution of parties in a representative capacity, and the difficulties that may be encountered in those settings (slip opinion, p

8), the intent of the Legislature must be gleaned from the statute itself, without further interpretation. It seems apparent that the *Braverman* majority intertwined notions of equity with the legal question presented and thus misinterpreted clear and unequivocal statutory language contrary.

The *Braverman* majority compounds this analytical error by finding that the reasoning in *Halton* is *dicta* because it involves a different fact situation then presented in this case. Defendants respectfully disagree because *Halton* dealt with the meaning of "person" in a death context in which the underlying case is medical malpractice in nature. The majority sidesteps these obvious similarities by arguing that *Halton* did not deal with the exact confluence of overlapping issues in this case. Yet rarely does a rule of law enunciated in one case echo in all regards circumstances presented in another case, to the extent that it suddenly ceases to precedential, or can be placed in the analytical parking lot as "*dicta*."

The *Braverman* majority then finds that the holding of *Verbrugghe* in these circumstances is "particularly unjustified" because the notice of intent expressly stated it was filed on behalf of the estate's "duly appointed Representative." Slip opinion, p 8; Apx 43a. This is a distinction without legal significance because the only "duly appointed representative" at the time the notice of intent was filed was the initial personal representative. It places form over substance to rely upon this immaterial difference. The logical extension of the majority's reasoning is that a notice of intent can be filed on behalf of a plaintiff estate, not a personal representative, which clearly contradicts the express terms of section 2912b that relate to a "person."

The majority is correct that "it is undisputed that the person who served the notice of intent on defendants was not the same human being who filed suit." Slip opinion, p 8. It matters not that "both the notice of intent and the complaint were filed by the personal representative of the Swann's estate at the time of the act," slip opinion, p 8, because this is the not the test allowed under the express language used by the Michigan Legislature in MCL 600.2912b. Specifically, there is no mention in the statute of measuring statutory obligations "at the time of the act," which is the criteria apparently grafted on the statutory requirement by the *Braverman* majority. Rather the Legislature was clear: any person may file a medical malpractice action, but that person ("the person") must give notice of intent.

3. Response to the *Braverman* dissenting opinion.[26]

The *Braverman* dissent takes a different tact then the majority by first divining freedom to distinguish *Verbrugghe* on the basis that the *Verbrugghe* panel did not consider the interplay between MCL 600.2912b and 700.3701, thus leaving open the question whether the initial personal representative is the same "person" as the successor personal representative. Dissenting opinion, p 3. Review of the *Verbrugghe* briefs on appeal in this Court, and the application pending in the Michigan Supreme Court, reveals that this argument was presented to the Court in *Verbrugghe*, but was not accepted by the Court. It is true that the successor personal representative in *Verbrugghe*, who filed the second lawsuit, "specifically elected not to ratify the lawsuit by the initial personal representative." 270 Mich App at 392. It is speculative to assume, however, that the

26 The conflict panel did not adopt the dissent position. Defendants nonetheless address the dissent to belie any contention that the conflict panel reached the right result for the wrong reason.

Verbrugghe panel therefore disregarded altogether any analysis that the "person" limitation in the notice of intent statute can be satisfied by two, separate human beings, serving in successive personal representative capacities.

The *Braverman* dissent does not opine on whether the interplay between the notice of intent statute and EPIC, specifically MCL 700.3701, leads to the conclusion that a notice of intent filed by the initial personal representative satisfies the notice of intent requirement for the plaintiff successor personal representative. In fact, the dissent simply notes that the issue should be addressed and that there should be development of this "significant issue of law." *Braverman* slip opinion, pp 3-4 (dissent) (Apx 49-50a). As indicated earlier in this brief, EPIC recognizes the difference between a "personal representative" and a "person," as evidenced by different definitional sections. MCL 700.1106(m) and (n).

4. **Consistency of argument.**

If, as plaintiff argues, different human beings serving in a representative capacity constitute the same "person" for purposes of notice of intent, then the Court must honor the primacy of the role or office of personal representative, which then cuts against the plaintiff's argument that each person serving in the role of personal representative is afforded a two year starting point under the saving statute (which affects the other ruling of the Court in *Braverman* that plaintiff can proceed with a timely lawsuit under the saving statute, as a successor personal representative). In other words, plaintiff cannot have it both ways. If "person" means the office of personal representative, then plaintiff cannot change gears when interpreting the terms of the saving statute, MCL

600.5852, by arguing that each person serving in that representative capacity is granted a two-year period.

ARGUMENT III

THE DISMISSAL WITH PREJUDICE IN THE SUBSEQUENTLY-FILED ACTION BY THE SUCCESSOR PERSONAL REPRESENTATIVE ACTS AS *RES JUDICATA* UNDER *WASHINGTON V SINAI HOSPITAL OF GREATER DETROIT*, AND BARS THIS ACTION.

A. Standard of review and supporting authority.

This Court is respectfully referred to the standards of review set forth in the corresponding subsections of Arguments I and II. In addition, the application of a legal doctrine, such as *res judicata*, presents a question of law that this Court reviews *de novo*. *Pierson v Sand & Gravel, Inc v Keeler Brass Company*, 460 Mich 372, 379; 596 NW2d 153 (1999).

B. Argument.

This is an argument that was not presented to the trial court or to the Michigan Court of Appeals because the Court of Appeals' opinion, which mandated a dismissal with prejudice of a subsequent action, was issued after the trial court proceedings and after the briefing at the Michigan Court of Appeals level in this case. See *Braverman v Garden City Hospital et al*, Court of Appeals Docket No. 266505, released May 16, 2006 (unpublished) (Apx 338 – 341a).

In this Court of Appeals' opinion, the Michigan Court of Appeals determined that the trial court's dismissal of a later-filed action (Apx 338-341a)[27], which is identical on

[27] The trial court amended its earlier order to provide the dismissal was with prejudice (compare Apx 336 – 337a with Apx 342a).

the merits (Apx 301 – 317a), was properly dismissed "with prejudice." (Apx 339 – 341a).

The Court of Appeals concluded:

> "Here, it is undisputed that plaintiff filed a case involving the same parties and identical issues. Plaintiff, however, argues that, notwithstanding MCR 2.116(C)(6), the trial court erred by dismissing his action "with prejudice" instead of holding the matter in abeyance until the resolution of the first case was determined. . . .
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> * * *
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> Plaintiff has waived his right to claim error in this regard. . . . In responding to defendants' motions for summary disposition, plaintiff simply incorporated by reference the motion to consolidate that he had filed in the first case, in which plaintiff requested the trial court consolidate the first and second cases according to MCR 2.505, but did not request that the matter be held in abeyance. . . .
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> * * *
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> Indeed, in accordance with this rule, the *Sovran* court held that 'dismissal prior to an actual resolution of the jurisdictional question potentially could prevent plaintiff from ever being able to adjudicate the claim in this state.' *Sovran, supra* at 414. The exception to MCR 2.116(C)(6), therefore, is limited to cases in which the first forum either lacks jurisdiction over the case or where the first forum does not have the power to provide the claimants with appropriate relief. This conclusion is consistent with the purpose of the rule, which is to preclude parties from being harassed by new suits brought by the same plaintiff involving the same questions as those in pending litigation. *Fast Air, supra* at 546. Because plaintiff does not fall within either of these exceptions, the trial court properly granted summary disposition under MCR 2.116(C)(6) and properly dismissed plaintiff's action 'with prejudice.'"

Slip opinion, pp 3-4 (Apx 339a – 341a).

Plaintiff did not appeal the Court of Appeals' decision that this lawsuit, Wayne County Circuit Court No. 05-511888-NH, was properly dismissed "with prejudice." Nor did plaintiff appeal the notion that this dismissal was an adjudication on the merits, to which the doctrine of res judicata applies.

In *Washington v Sinai Hospital of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007), this Court held that the trial court's involuntary dismissal of an initial personal representative's wrongful death suit operates as an adjudication on the merits for *res judicata* purposes. The *Washington* court examined whether the elements for *res judicata* should exist in the context of two separate lawsuits filed by an initial personal representative and a successor personal representative. The Court found these individuals to be in privity for purposes of *res judicata*. The *Washington* court relied on the terms of MCR 2.504(B), to determine whether the action was dismissed "with prejudice."

Washington applies here and prevents plaintiff from pursuing the cause of action in Wayne County Circuit Court No. 05-502345-NH, the principal action. To the extent plaintiff argues that *res judicata* is inapplicable under any of the factors, that argument has been waived by the failure to take further appellate action in Case No. 05-511888-NH. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

RELIEF

WHEREFORE defendants-appellants request this Court reverse the Court of Appeals' April 15, 2006 and June 5, 2007 opinions, and remand the matter to the Wayne County Circuit Court for entry of summary disposition in favor of the defendants. Defendants-appellants also request the recovery of all attorney fees and costs so wrongfully sustained in prosecuting this matter on appeal.

Respectfully submitted,

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