

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

THE ESTATE OF NINA F. MULLINS,
Deceased, by Mary Mullins, Personal
Representative,

S. Ct. No.: 131879

Ct. Appeals No.: 263210

Plaintiff-Appellant,

Washtenaw County Circuit No. 03-812-NH
Hon. Donald E. Shelton

v

ST. JOSEPH MERCY HOSPITAL, an
assumed name for ST. JOSEPH MERCY
HEALTH SYSTEM, a Michigan
corporation, KIMBERLY STEWART, M.D.,
JASON WHITE, M.D., and RAFAEL J.
GROSSMAN, M.D., jointly and severally,

Defendant-Appellees,

v

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

Defendants.

BRIEF ON APPEAL BY DEFENDANT-APPELLEES

ORAL ARGUMENT REQUESTED

Submitted by:

JOHNSON & WYNGAARDEN, P.C.
David R. Johnson (P33822)
Michael L. Van Erp (P44218)
Attorneys for Defendants-Appellees
3445 Woods Edge Drive
Okemos, Michigan 48864
(517) 349-3200

TABLE OF CONTENTS

INDEX OF AUTHORITIES v

COUNTER STATEMENT OF QUESTIONS PRESENTED ix

COUNTER STATEMENT OF JURISDICTION x

STATEMENT OF MATERIAL PROCEEDINGS 1

 Factual Background 1

 Procedural History 1

 Argument and Decision on the Motion for Summary Disposition 3

 Argument and Decision in the Trial Court on Remand 3

 Subsequent Proceedings in the Court of Appeals 4

ARGUMENT 6

I. The Court of Appeals Correctly Applied *Waltz v Wyse* Retroactively in Determining Whether the Present Claim was Filed in Compliance with the Statute of Limitation 6

 A. Standard of Review 6

 B. Plaintiff’s Claim Was Not Timely Commenced If *Waltz v Wyse* Is Applied Retroactively 6

 C. *Waltz v Wyse* Should Be Applied Retroactively 9

 1. This Court has Applied *Waltz* Retroactively Eight Times 9

 2. An Opinion is Given Full Retroactive Application Unless the Extreme Measure of Prospective Application is Justified Because the Decision Resolves an Issue of First Impression or Overrules a Clear Precedent 10

 3. Cases Relied on by Those Who Argue for Retroactivity are Distinguishable and Not Controlling 13

 4. *Waltz* Did Not Overrule Existing Law or Decide an Issue of First Impression Which Was Not Foreshadowed by Prior Decisions 16

5.	<i>Waltz</i> Was Foreshadowed by Prior Decisions and the Plain Language of MCL 600.5852 and MCL 600.5856(c)	22
6.	<i>Omelenchuk</i> Was Not Universally Relied On as Transforming §5852 Into a Statute of Limitations	25
7.	Retroactive Application is Consistent with the Purposes Underlying Statutes of Limitation and the Saving Provision of the WDA	27
8.	Retroactive Application Does Not Deny a Plaintiff a Reasonable Opportunity to Pursue a Claim	29
D.	Judicial Tolling is Not the Issue Before this Court in this Action	29
II.	Appointment of a Successor Personal Representative Does Not Make this Action Timely	30
A.	MCL 600.5852 Is Ambiguous as to Whether Multiple Grace Periods Are Allowed, making Judicial Construction of the Statute Necessary	31
B.	The Language of MCL 600.5852 Is Consistent with a Single Two-Year Grace Period	33
C.	<i>Eggleston v Bio-Medical Applications</i> Did Not Address Successive Two-Year Periods	35
D.	Provisions of the Current Probate Code Support Allowance of a Single Grace Period	37
E.	<i>McLean v McElhaney</i> Held That a Personal Representative Who Serves for Two Years Exhausts an Estate’s Grace Period	38
F.	<i>Verbrugghe v Select Specialty Hosp</i> was Wrongly Decided, and Improperly Distinguished and Ignored <i>McLean</i>	39
G.	Allowance of Multiple Grace Periods would Contradict the Holding in <i>Lindsey v Harper Hospital</i>	43
H.	Successive Two-Year Periods Would Nullify the Two-Year Provision in §5852	45
I.	Successive Two-Year Periods Would Violate the Purpose of the Saving Provision	46
J.	Successive Two-Year Periods Would Invite Gamesmanship	46

CONCLUSION AND REQUEST FOR RELIEF 48

INDEX OF AUTHORITIES

CASE LAW

<i>Bradley v School Board of Richmond</i> , 416 US 696, 717; 94 S Ct 2006 (1974)	16
<i>Bryant v Oakpointe Villa Nursing Centre</i> , 471 Mich 411; 684 NW2d 864 (2004)	30
<i>Burton v Reed City Hosp Corp</i> , 471 Mich 745; 691 NW2d 424 (2005)	41
<i>Carr v City of Lansing</i> , 259 Mich App 376, 384; 674 NW2d 168 (2003)	21, 22
<i>Chernoff v Sinai Hosp of Greater Detroit</i> , unpublished (COA No. 228014; March 22, 2002)	26
<i>City of Detroit v Public Utilities Comm'n</i> , 288 Mich 267, 299-300; 286 NW 368 (1939)	19, 20, 21
<i>Colbert v Conybeare Law Office</i> , 239 Mich App 608; 609 NW2d 208 (2000)	6
<i>County of Wayne v Hathcock</i> , 471 Mich 445; 684 NW2d 765 (2004)	11
<i>Cox v Board of Hospital Managers</i> , 467 Mich 1; 651 NW2d 356 (2002)	45
<i>Dorsey v Kosyonan</i> , 193 Mich App 711; 484 NW2d 415 (1992)	28, 46
<i>Downs v Northern Michigan Hospitals</i> , COA No. 256462 (consolidated with COA Nos 253611, 255045, and 256422)	26
<i>Eggleston v Bio-Medical Applications</i> , 248 Mich App 640; 645 NW2d 279 (2001) ...	36, 37, 38
<i>Eggleston v Bio-Medical Applications</i> , 468 Mich 29; 658 NW2d 139 (2003)	<i>passim</i>
<i>Estate of Allison v Graham</i> , COA NO 247426	26
<i>Estate of Harris v Bolling</i> , 267 Mich App 667 at 672; 705 NW2d 720 (2005)	4
<i>Ettor v City of Tacoma</i> , 228 US 148; 33 S Ct 428 (1913)	16
<i>Evans v Hallal</i> , 472 Mich 929; 697 NW2d 526 (2005)	10
<i>Farley v Advanced Cardiovascular Health Specialists, P.C.</i> , 266 Mich App 566; 703 NW2d 115 (2005)	9, 34, 42, 43
<i>Forsyth v Hopper</i> , 472 Mich 929; 697 NW2d 526 (2005)	10

Hardy v Maxheimer, 429 Mich 422; 416 NW2d 299 (1987) 24

Hawkins v Regional Medical Laboratories, P.C., 415 Mich 420; 329 NW2d 729 (1982) 24

Hoseney v Zantop, 17 Mich App 141; 169 NW2d 124 (1969) 28, 46

Hyde v U. of M. Board of Regents, 426 Mich 223; 393 NW2d 847 (1988) 15

In Re MCI, 460, Mich 396, 414; 596 NW2d 164 (1999) 45

Lambert v Calhoun, 394 Mich 179; 229 NW2d 332 (1975) 27, 46

Lentini v Urbancic, 472 Mich 885; 695 NW2d 66 (2005) 10

Lesner v Liquid Disposal, Inc., 466 Mich 95; 643 NW2d 553 (2002) 14

Lincoln v General Motor’s Corp, 461 Mich 483, 491; 607 NW2d 73 (2000) 12, 15

Lindsey v Harper Hospital, 455 Mich 56; 564 NW2d 861 (1997) *passim*

Lothian v Detroit, 414 Mich 160, 165-167; 324 NW2d 9 (1982) 27

McLean v McElhaney, 269 Mich App 196; 711 NW2d 775 (2005) 38, 39, 40, 41, 42

Mair v Consumers Power Company, 419 Mich 74; 348 NW2d 256 (1984) 28, 33, 46

Massey v Mandell, 462 Mich 375; 614 NW2d 70 (2000) 35

Mazumder v U of M Regents, 270 Mich App 42; 715 NW2d 96 (2006) 25, 29

MEEMIC v Morris, 460 Mich 180; 596 NW2d 142 (1999) 11, 14

Miller v Mercy Memorial Hospital, 466 Mich 196; 644 NW2d 730 (2002) 24

Monat v State Farm Insurance Co., 469 Mich 679; 677 NW2d 843 (2004) 11

Morrison v Dickinson, 217 Mich App 308; 551 NW2d 449 (1996) 15, 16

Mullins v St. Joseph Mercy Hosp (Mullins I), 269 Mich App 586; 711 NW2d 448 (2006) 4

Mullins v St. Joseph Mercy Hosp (Mullins II), 271 Mich App 503; 722 NW2d 666 (2006) 4

Omelenchuk v City of Warren, 461 Mich 567;
 609 NW2d 177 (2000) *passim*

Ousley v McLaren, 264 Mich App 486; 691 NW2d 817 (2004) *passim*

People v Webb, 458 Mich 265, 274; 580 NW2d 884 (1998) 45

Pittsfield Charter Twp v Washtenaw County, 468 Mich 702, 714; 664 NW2d 193 (2003) 45

Pohutski v Allen Park, 465 Mich 675; 641 NW2d 219 (2002) 13

Poletown Neighborhood Council v Detroit, 410 Mich 616; 304 NW2d 455 (1981) 11, 12

Rheaume v Vandenberg, 232 Mich App 417; 591 NW2d 331 (1998) 6

Roberts v Mecosta County General Hospital, 466 Mich 57, 62; 642 NW2d 663 (2002) 6

Shinholster v Annapolis Hospital, 471 Mich 540, 549; 685 NW2d 275 (2004) 45

Showers v Robinson, 43 Mich 502; 5 NW 988 (1880) 27, 46

Solowy v Oakwood Hospital, 454 Mich 214; 561 NW2d 843 (1997) 28, 46

Terry v Anderson, 95 US 628; 24 L Ed 365 (1877) 16

Tucker v Eaton, 426 Mich 179; 393 NW2d 827 (1986) 28, 33, 46

Turner v Mercy Hospitals, 210 Mich App 345; 533 NW2d 365 (1995) 23

Verbrugge v Select Specialty Hosp, 270 Mich App 383; 715 NW2d 72 (2006) *passim*

Waltz v Wyse, 469 Mich 642; 677 NW2d 813 (2004) *passim*

Wyatt v Oakwood Hosp and Medical Ctr, 472 Mich 929; 697 NW2d 528 (2005) 10

COURT RULES

MCR 2.116(C)(7) 2, 6

MCR 7.215(J) 2

MCR 7.215(J)(1) 4

MCR 7.302(C)(3) 10

STATUTES

MCL 600.2912b 2, 6, 7, 22

MCL 600.2912b(7) 17

MCL 600.2912b(8) 17

MCL 600.5805(5) 6

MCL 600.5838a(2) 6

MCL 600.5852 *passim*

MCL 600.5856 2, 8, 22

MCL 600.5856(c) 16, 21, 22, 23, 38

MCL 600.5856(d) *passim*

MCL 700.3613 37, 43

MCL 700.3701 43

MCL 700.3704 37

MCL 700.9(3)(repealed) 44

COUNTER STATEMENT OF QUESTIONS PRESENTED

Defendant-Appellees submit that Plaintiff-Appellant's submission of four proposed issues fails to address the heart of the two primary questions presented by this appeal, and offers the following counter-statement of proposed questions for review:

ISSUE I: DID THE COURT OF APPEALS CORRECTLY APPLY *WALTZ v WYSE* RETROACTIVELY IN DETERMINING WHETHER THE PRESENT CLAIM WAS FILED IN COMPLIANCE WITH THE STATUTE OF LIMITATION?

Plaintiff-Appellant says:	No.
Defendant-Appellees say:	Yes.
Defendants say:	Unknown.
The trial court said:	No.
The Court of Appeals said:	Yes.

ISSUE II: DID THE COURT OF APPEALS CORRECTLY HOLD THAT APPOINTMENT OF A SUCCESSOR PERSONAL REPRESENTATIVE DID NOT MAKE THE PRESENT ACTION TIMELY?

Plaintiff-Appellant says:	No.
Defendant-Appellees say:	Yes..
Defendants say:	Unknown.
The trial court did not address.	
The Court of Appeals said:	Yes.

COUNTER-STATEMENT OF JURISDICTION

Defendant-Appellees acknowledge that this Court has jurisdiction to hear Plaintiff-Appellant's request for review of the July 11, 2006, decision by the Court of Appeals. However, Defendant-Appellants submit that Plaintiff-Appellee, at Issue III, seeks to challenge the first decision by the Court of Appeals in this matter, issued on January 31, 2006, and that any such attempt is untimely and outside of the jurisdiction of this Court, as MCR 7.302(C)(3) specifically prohibits untimely appeals in this Court.

JOHNSON & WYNGAARDEN, P.C.
ATTORNEYS AT LAW

3445 WOODS EDGE DRIVE • OKEMOS, MI 48864 • (517) 349-3200

STATEMENT OF MATERIAL PROCEEDINGS

Plaintiff-Appellant (hereinafter Plaintiff) challenges the retroactive application of a recent decision by this Court, and also asks this Court to consider whether substitution of a successor personal representative as plaintiff renders this otherwise untimely action timely. Defendant-Appellees (hereinafter Appellees) submit that this Court's decision was properly applied retroactively, and that Plaintiff's reliance upon appointment as a successor (an issue which has not been properly preserved) does not save the action. Proper consideration of these issues requires a thorough review of the history of this matter.

Factual Background.

According to Plaintiff's pre-suit notice (App D, P 54a) and complaint, Plaintiff's Decedent, Nina Mullins, was admitted to St. Joseph Mercy Hospital on March 22, 1999, for a heart catheterization. This led to angioplasty, with complications. During the late afternoon of March 25, the patient arrested. Resuscitation efforts were unsuccessful, and Ms. Mullins passed away at the age of 57. Plaintiff claims that a retroperitoneal bleed during the catheterization led to hemodynamic instability, and ultimately death. Plaintiff claims that proper intervention would have prevented this outcome.

Procedural History.

The medical events in question occurred during March 23 - 25, 1999. The 2-year malpractice statute of limitation was thus set to expire no later than March 25, 2001. On December 5, 2000, the original Plaintiff was appointed Personal Representative (App D-1, P 52a). This commenced the running of the 2-year saving provision under the Wrongful Death Act, giving Plaintiff until December 5, 2002, to file a complaint. Eighteen months and 8 days after appointment, and thus with less than 182 days left under the 2-year saving provision, Plaintiff served a pre-suit notice of her

intent to sue on June 13, 2002.¹ Plaintiff assumed that this tolled the saving provision during the 182 day notice period,² giving her until June 5, 2003, to proceed. The complaint was filed on March 25, 2003.

On May 27, 2004, Appellees filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that both the applicable statute of limitation and the WDA saving provision had expired prior to the filing of the complaint, under *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). A hearing was held on August 11, 2004. With little discussion, the motion was denied on the basis that it was up to this Court to specifically hold that *Waltz* should apply retrospectively. The trial judge signed an order denying the motion on September 7, 2004 (App B-2, P 8a).

Appellees filed a timely Application for Leave. In lieu of granting the application, the Court of Appeals, on January 29, 2005, remanded for reconsideration in light of *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), which held that *Waltz* did apply retroactively. The trial judge heard oral argument on May 4, 2005. Finding that *Ousley* did not affect his analysis or decision, he again denied Appellants motion. An order entered on May 24, 2005 (App B-3, P 10a). The Court granted leave, and subsequently issued a published decision in which it rejected Plaintiff's reliance upon her appointment as successor personal representative, and applied *Waltz* retroactively but only because of a prior published decision compelling that outcome. In the process, a majority voted to convene a special panel, pursuant to MCR 7.215(J), to address the retroactivity question. A full panel was subsequently convened, with the result being a four-vote majority opinion in favor of

¹ A pre-suit notice of intent is mandated by MCL 600.2912b, and a complaint may not be filed until 182 days after the notice is served.

² MCL 600.5856(subsequently renamed as c) tolls the statute of limitation for 182 days if the statute would otherwise expire during the 182 day notice period.

retroactivity. Plaintiff filed a timely application for leave, which was granted. Plaintiff filed a timely brief on appeal, and appellees submit the present brief in response thereto.

Argument and Decision on the Motion for Summary Disposition.

The defense argued that there was no dispute that the basic statute of limitation had expired, that Plaintiff's claim had to be timely under the Wrongful Death Act, and that Plaintiff thus had to proceed within two years from issuance of letters of authority. Plaintiff did not do so, and could not rely upon tolling of the saving provision, as the tolling statute (MCL 600.5856(d)), by its clear terms, tolls only a statute of limitation or repose. Prior decisions have held that the saving provision is not a statute of limitation. This Court, in *Waltz*, clearly stated this to be the case.

Plaintiff argued that *Waltz* should not be applied retroactively, in light of the prior holding in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000). Plaintiff argued that *Omelenchuk* had, by implication, applied tolling to the saving provision. Therefore, *Waltz* either announced a new rule of law, or overruled an existing precedent. Further, as applied in the present case, *Waltz* would be unconstitutional. According to Plaintiff, *Waltz* should be given prospective application only and the present claim should be considered timely. The trial judge agreed with Plaintiff.

Argument and Decision in the Trial Court on Remand.

On remand, the trial judge indicated, by both his comments and his questions, that he did not see how either *Waltz* or *Ousley* applied to the present matter. He pointed to the fact patterns in both *Waltz* and *Ousley*, which involved a challenge to the three year outside limit in MCL 600.5852, and thus concluded that the provision requiring an action to be commenced within two years after appointment was not affected by either of these two decisions. Appellants pointed to the specific holding in *Waltz* which stated that §5852 was not a statute of limitation, and reminded that the

Supreme Court had not made any distinction between the three year and two year provisions, but rather held that §5852 was not affected by §5856(d). In spite of this analysis, the judge saw no reason to believe that either *Waltz* or *Ousley* applied to that two year provision, and denied the motion on that basis.

Plaintiff also argued, in a written supplemental brief, that a successor personal representative had been appointed on January 13, 2004. Plaintiff argued that, under the Supreme Court holding in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), appointment of a successor resulted in a new two year grace period.

Subsequent Proceedings in the Court of Appeals.

The Court of Appeals issued a full opinion at *Mullins v St. Joseph Mercy Hosp (Mullins I)*, 269 Mich App 586; 711 NW2d 448 (2006). The Court first considered Plaintiff's assertion that appointment of a new personal representative renewed the two-year period allowed an estate under the Wrongful Death Act. The Court noted that, in *Estate of Harris v Bolling*, 267 Mich App 667 at 672; 705 NW2d 720 (2005), a similar argument had been rejected and the Court had held that a successor who did not file a separate complaint could not take advantage of the two-year opportunity. The Court held that "Plaintiff's appointment as successor personal representative and substitution as successor plaintiff did not transform the previous personal representative's untimely complaint into a timely one." *Mullins I, supra* at 590-591.

The Court next addressed whether the claim was timely under the analysis which this Court had applied in *Waltz*. After noting the decision in *Ousley, supra*, a two-vote majority concluded that it had been wrongly decided. A conflict was declared pursuant to MCR 7.215(J)(1). *Id* at 591.

After a vote by the full Court of Appeals, a conflict resolution panel was convened. On July 11, 2006, it released *Mullins v St. Joseph Mercy Hosp (Mullins II)*, 271 Mich App 503; 722 NW2d

666 (2006). The four-vote majority focused its analysis upon three peremptory orders which this Court issued on June 17, 2005, each of which directed the Court of Appeals to give *Waltz* full retroactive effect. The majority found these orders to be understandable, and to thus constitute binding precedent for the proposition that *Waltz* must be applied retroactively. *Id.* at slip op p 1. Three separate dissenting opinions each maintained that the Court should directly address the merits of the retroactivity question, and each also advocated for prospective application only. Judge Murphy, at page 12 of his dissent, was critical of the “strained statutory analysis necessary to reach” the resolution in *Waltz* and felt that it was unlikely that the average attorney would come to the same conclusion. Judge White, at page 4 of her opinion, appeared to be persuaded by the “balance of justice” approach to retroactivity. Judge Cooper, at page 2, focused upon “fairness” and “just results for individual litigants.”

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED *WALTZ v WYSE* RETROACTIVELY IN DETERMINING WHETHER THE PRESENT CLAIM WAS FILED IN COMPLIANCE WITH THE STATUTE OF LIMITATION.

A. Standard of Review.

This Court reviews a motion for summary disposition pursuant to MCR 2.116, as well as questions of statutory construction, *de novo* on appeal. See *Roberts v Mecosta County General Hospital (Roberts I)*, 466 Mich 57, 62; 642 NW2d 663 (2002). A motion under MCR 2.116(C)(7) requires consideration of all affidavits, pleadings and other documentary evidence submitted by the parties, construed in favor of the non-moving party, to determine if there remains a disputed issue of fact as to whether the cause of action is barred by the statute of limitation. *Rheaume v Vandenberg*, 232 Mich App 417; 591 NW2d 331 (1998); *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000).

B. Plaintiff's Claim Was Not Timely Commenced If *Waltz v Wyse* Is Applied Retroactively.

As a preliminary matter, it is necessary to establish that the present claim is, in fact, untimely under the analysis which was applied in *Waltz*. The basic limitation period in a malpractice action is found by reading two statutes in conjunction, MCL 600.5838a(2) and MCL 600.5805(5). The two, when read in conjunction, provide a two-year statute of limitations generally applicable to medical malpractice actions.

Under some circumstances, the malpractice limitation period can be extended or tolled. This frequently arises in the context of the pre-suit notice of intent required by MCL 600.2912b. That provision mandates a 182 day waiting period following service of the notice, and a claim may only be filed after this notice period has passed. If the 182 day period falls near the end of the limitation period, such that the statute would expire while the “no-suit” period was in effect, then the statute

of limitation is tolled for the entire 182 day period. Specifically, the statute provides that “the statutes of limitation or repose are tolled . . . [i]f, during the applicable notice period under §2912b, a claim would be barred by the statute of limitation or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with §2912b.”

When the above rules are applied to the present action, it is clear that the basic limitation period had expired before the complaint was filed. Plaintiff alleges negligence on or before March 25, 1999. The 2-year statute was thus set to expire on March 25, 2001. A notice of intent was served more than a year later, on June 13, 2002. As this notice could not extend an already expired limit, tolling under §5856(d) does not apply. The complaint was not timely under the statute of limitation, and Plaintiff must turn to the Wrongful Death Act to “save” her claim.

An exception to the general statute of limitation is found in MCL 600.5852. This “saving” provision allows a claim to be brought outside of the limitation period if the injured party dies before or shortly after that period expires. The statute reads:

If a person dies before the period of limitation has run or within 30 days after the period of limitation 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 limitation 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 limitation has run.

A review of the record demonstrates that letters of authority were issued on December 5, 2000 (App P 52a). The 2-year “saving” period thus expired on December 5, 2002. The complaint was filed on March 25, 2003. It is indisputable, and Plaintiff did not contest below, that her complaint was untimely unless the grace period was somehow extended. She argues, however, that service of a pre-suit notice (App D-3, P 54a) on June 13, 2002, occurred within 182 days of the scheduled expiration of the saving period. Plaintiff claimed that, just as a statute of limitation would

be tolled, so too should the wrongful death saving statute be tolled. If such an extension were allowed, the complaint filed in March 2003 would have been timely under the extended saving period.

In April 2004, this Court issued a decision which clearly explained the status of tolling under the Wrongful Death Act. In *Waltz*, the Court clearly stated that MCL 600.5856 tolls the “statute of limitation” only and does not toll the “saving provision” of MCL 600.5852. The Court held:

However, plaintiff claims that the notices of intent given to defendants tolled the extended five year limit set forth in the saving statute, MCL §600.5852. We disagree. We need look no further than the language of the tolling statute to resolve this issue. MCL §600.5856(d) expressly tolls the “statute of limitation.” The Supreme Court has said recently that MCL §600.5852 is not a statute of limitation, but rather a saving statute. Therefore, by its express language, MCL §600.5856(d) tolls the statute of limitation, not the extended limit in MCL §600.5852. Consequently, the trial court did not err because the statute of limitation barred plaintiff’s claim. *Id* at 649-650 (citation omitted).

The Court noted that §5852 “is a *saving statute*, not a statute of limitation.” *Id* at 650 (italics in original). The Court added that the “plain language of §5852 wholly supports our conclusion that it is not itself a ‘statute of limitation.’” *Id*. The opinion pointed to language in §5852 which indicates that it applies only in situations where the “period of limitation” has run and that a claim may be commenced “although the period of limitation has run.” *Id*. The Court also addressed a conceptual issue, at footnote 12.

The dissent further questions “how a claim may be considered time-barred under the saving provision if the saving provision is not a limitation period.” The dissent misunderstands our analysis. Plaintiff’s claim is not time-barred under the *saving* provision. Rather, it is barred by the two year statute of limitation for medical malpractice actions. The saving provision simply does not *save* plaintiff’s claim because she did not file her complaint until after the *grace period* provided for in the saving provision had expired. *Id*, n 12 (italics in original).

The analysis in *Waltz* is clear. Additionally, it is directly applicable to the facts in this case. Applying *Waltz*, Plaintiff's complaint is untimely and must be dismissed. This leads to the central issue in this appeal - - whether *Waltz* applies retroactively.

C. Waltz v Wyse Should Be Applied Retroactively.

Plaintiff asks this Court to bypass the general rule of retroactivity and to provide her (and other similarly situated plaintiffs) with an escape from the impact of the plain language of the statutes at issue, as interpreted by this Court in *Waltz*. However, *Waltz* did not represent either a change in established law or a resolution which should not have been anticipated. Appellees respectfully submit that prospective application would improperly create an exception which the statutory language makes no allowance for, and that *Waltz* should apply retroactively.

1. This Court has Applied Waltz Retroactively Eight Times.

This Court has applied *Waltz* retroactively on at least eight occasions. The first was *Waltz* itself, wherein the Court applied the rule to the case before it, thus effectively (if not precedentially) giving it retroactive impact. More significantly, a subsequent motion for reconsideration was filed, solely on the basis of retroactivity. The Court denied this motion, clearly demonstrating its intent that its analysis be applied retroactively.

In addition, the Court also declined to consider two applications in which the Court of Appeals had applied *Waltz* retroactively. In *Ousley, supra*, that Court specifically addressed retroactivity of *Waltz* for the first time, and held that it must be so applied. Subsequently, in *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566; 703 NW2d 115 (2005), it followed *Ousley* in applying *Waltz* retroactively. Both cases were the subject of applications to this Court, which denied leave in *Ousley* at 472 Mich 927; 697 NW2d 525 (2005) and in *Farley* at 474 Mich 1020; 708 NW2d 385 (2006).

Four more decisions also serve to highlight this Court’s expressed view on the retroactivity of the *Waltz* opinion. In *Lentini v Urbancic*, 472 Mich 885; 695 NW2d 66 (2005), the Court vacated an earlier decision by this Court, and remanded “for reconsideration in light of [*Waltz*].” Additionally, on June 17, 2005, the Supreme Court issued orders in three separate cases, directing this Court to consider them as on leave granted. In each order, this Court was directed to give *Waltz* “full retroactive application.” See *Forsyth v Hopper*, 472 Mich 929; 697 NW2d 526 (2005); *Wyatt v Oakwood Hosp and Medical Ctr*, 472 Mich 929; 697 NW2d 528 (2005); and *Evans v Hallal*, 472 Mich 929; 697 NW2d 526 (2005).

2. **An Opinion Is Given Full Retroactive Application Unless The Extreme Measure of Prospective Application is Justified Because the Decision Resolves an Issue of First Impression or Overrules a Clear Precedent.**

A succinct summary of the law regarding retroactive application is found in *Lindsey v Harper Hospital*, 455 Mich 56; 564 NW2d 861 (1997). This Court wrote:

The general rule is that judicial decisions are to be given full retroactive effect. However, where injustice might result from full retroactivity, this Court has adopted a more flexible approach, giving holdings limited retroactive or prospective effect. This flexibility is intended to accomplish the “maximum of justice” under varied circumstances.

Prospective application of a holding is appropriate when the holding overrules settled precedent or decides an “issue of first impression whose resolution was not clearly foreshadowed.” Although this is the first time this Court has considered whether the 1988 revised statute of limitation saving provision begins to run at the issuance of letters of authority for the temporary personal representative or the personal representative, this is not the type of first-impression question that supports prospective application. As the Court of Appeals persuasively reasoned:

The fact that a decision may involve an issue of first impression does not in and of itself justify giving it prospective application where the decision does not announce a new rule of law or change existing law, but merely gives an interpretation that has not previously been the subject of an appellate court decision.

We do not find that the balance of justice demands prospective application in this case. Although plaintiff’s claim may seem unfairly barred by our holding, it cannot

be denied that all statutes of limitation set arbitrary time limits for legal claims. Statutes of limitation serve to protect defendants from stale claims. This purpose must be balanced with the purpose of exceptions to statutes of limitation, such as the saving provision. The saving provision preserves a plaintiff's claim, but, as an exception to a statute of limitation, must be narrowly construed. *Id* at 564 NW2d 866-867 (citations omitted).

In *Monat v State Farm Insurance Co.*, 469 Mich 679; 677 NW2d 843 (2004), the Court provided useful guidance when it wrote:

We believe that the instant decision should be given full retroactive effect because, contrary to the dissent's assertion, this decision does not "represent a sweeping change in the law." Rather, there is no previous decision of this Court that has decided whether mutuality should apply in the defensive context. *Id* at 695.

In *MEEMIC v Morris*, 460 Mich 180; 596 NW2d 142 (1999), the Court noted the general rule that the decisions are given "complete retroactive effect." *Id* at 189. The opinion recited the three factors to be applied in approaching the issue of retroactivity, including whether the decision establishes a new principle of law by overruling clear past precedent or deciding an issue of first impression which had not been clearly foreshadowed, the purpose and effect of the rule, and the equity of retroactive application. "Before any question of retroactive application of an appellate decision arises, it must be clear that the decision announces a new principle of law." *Id* at 191. "Only if the this Court's decision can be said to be 'unexpected' or 'indefensible' in light of the law in place at the time of the accident in question would there be a question about whether to afford the decision complete retroactivity." *Id* at 195.

In *County of Wayne v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), the court overruled *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW 2d 455 (1981), which had marked a significant change in the practice of eminent domain. In reversing *Poletown*, the Court recognized that it could not "lightly overrule precedent." *County of Wayne, supra* at 483. However,

Poletown had been “such a radical departure” from established norms that reversal was necessary.

Retroactive application was then discussed;

In the twenty-three years since our decision in *Poletown*, it is a certainty that state and local government actors have acted in reliance on its broad, but erroneous, interpretation of Art. 10, § 2. Indeed, Wayne County’s course of conduct in the present case was no doubt shaped by *Poletown*’s disregard for constitutional limits on the exercise of the power of eminent domain and the license that opinion appeared to grant to state and local authorities.

Nevertheless, there is no reason to depart from the usual practice of applying our conclusions of law to the case at hand. Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our constitution since it took effect in 1963. Our decision simply applies fundamental constitutional principles and enforces the “public use” requirement as that phrase was used at the time our 1963 constitution was ratified. *Id* at 484 (footnotes omitted).

The Court noted that the case presented “none of the exigent circumstances that warranted the ‘extreme’ measure of prospective application. . .” *Id*. “Furthermore, this Court has recognized that ‘complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law.’” *Id*.

Another decision to consider is *Lincoln v General Motor’s Corp*, 461 Mich 483, 491; 607 NW2d 73 (2000). The opinion quoted the general rule that “complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law.” *Id*. However, it then applied that rule as if it was a mandatory condition, writing:

Accordingly, the first question is whether *Wozniak I* overruled clear and uncontradicted prior case law. In turn, that leads to the question whether *Lopez* constituted a clear and uncontradicted ruling on the subject of these proceedings - the relationship among the three statutory provisions discussed in *Wozniak I*. *Id*.

In *Lincoln*, the Court thus applied the threshold question of whether its decision was overruling clear and uncontradicted prior case law. More significantly, it then explained that this question must be

answered by determining whether the prior decision which had been overruled “constituted a clear and uncontradicted ruling on the subject . . .” *Id.*

The above quotations demonstrate that this Court has treated the principle that a decision must establish a new rule of law to be more than simply a general suggestion, but rather a threshold issue which must be satisfied before prospective application should be considered. It is readily clear from a review of *Waltz* that the Court did not consider *Omelenchuk* to represent a clear and uncontradicted statement of the law in reference to tolling of the saving provision, and thus did not limit its holding to prospective application.

3. Cases Relied On by Those Who Argue for Retroactivity are Distinguishable and Not Controlling.

Plaintiff quotes from *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002) as an example of a decision which was properly applied prospectively. While Plaintiff is correct in citing to the discussion of retroactivity from this opinion, two additional observations are in order. First, the Court also provided an extensive discussion of the rule of *stare decisis* in the process of explaining its decision to overrule a clearly established precedent. The Court noted:

It is well to recall in discussing reliance, when dealing with an area of the law that is statutory, . . . that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. *Id* at 694.

Second, the Court, in evaluating the “threshold question whether the decision clearly established a new principle of law”, found that, “practically speaking our holding is akin to the announcement of a new rule of law . . .” *Id* at 696-697. *Waltz* stands in marked contrast to this analysis, as the Court went to great lengths to explain that it was merely correcting an oversight, contained in dicta, which should not be seen as having established a rule of law.

Plaintiff has argued that *MEEMIC, supra* should be understood to establish the rule that “[r]esolution of the retrospective-prospective issue ‘ultimately turns on considerations of fairness and public policy.’” (Plaintiff’s Court of Appeals brief at p 4, quoting *MEEMIC, supra* at 190.)

While the opinion did quote that phrase from an earlier decision, it went on to add:

Therefore, the first criterion that must be determined in deciding whether a judicial decision should receive full retroactive application is whether that decision is establishing a new principle of law, either by overruling clear past precedent on which the parties have relied or by deciding an issue of first impression where the result would have been unforeseeable to the parties. If the decision does not announce a new principle of law, then full retroactivity is favored.

Before any question of the retroactive application of an appellate decision arises, it must be clear that the decision announces a new principle of law. A rule of law is new for purposes of resolving the question of its retroactive application . . . either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision. *Id.* at 190-191.

* * * *

Only if this Court’s decision can be said to be “unexpected” or “indefensible” in light of the law in place at the time of the acts in question would there be a question about whether to afford the decision complete retroactivity. It can hardly be considered “unexpected” or “indefensible” that this Court would reverse a Court of Appeals decision that was contrary to the clear and unambiguous language of the statute, the legislative intent behind the statute, and two prior opinions of this Court. *Id.* at 195.

Plaintiff relies upon *Lesner v Liquid Disposal*, 466 Mich 95, 108-109; 643 NW2d 553 (2002), claiming that it stands for the proposition that a flexible approach to retroactivity is required.

Other than to acknowledge this general principle as set forth in prior decisions, the opinion otherwise does little to support Plaintiff’s position. The Court repeated the general rule “that judicial decisions are given complete retroactive effect.” *Id.* at 108. It also held that “limited retroactivity” could be allowed when “settled law” was changed. *Id.* at 108-109. In the case before it, the Court overruled what it considered to have “been controlling authority for over six and one-half years.” *Id.* at 109. In contrast, this Court went to great lengths in *Waltz* to explain that it did not consider *Omelenchuk* to be controlling authority on the tolling issue.

Plaintiff also criticized the analysis which *Ousley* relied upon and particularly its reference to *Hyde v U. of M. Board of Regents*, 426 Mich 223; 393 NW2d 847 (1988). Plaintiff's criticism is that *Ousley* stated that prospective application is limited to decisions which overrule clear and uncontradicted case law, without adding the qualifier that this is "generally" the case. This rather narrow criticism misrepresents the actual analysis applied in *Ousley*. The opinion first stated: "The general rule is that judicial decisions are to be given complete retroactive effect. . ." *Id* at 493. It then stated the rule that prospective application is limited to cases which overrule settled law or decide an unanticipated issue. Additionally, it should be noted that *Ousley* was not directly quoting from *Hyde*, but rather from a more recent opinion which had quoted *Hyde*, that being *Lincoln, supra* at 491. As discussed above, while *Lincoln* did quote from *Hyde*, it also applied what Plaintiff claims to be a general rule as a mandatory prerequisite, identifying "the first question" as being whether a new decision has "overruled clear and uncontradicted prior case law." *Id*.

Some have argued against retroactive application of *Waltz* based upon other decisions which have addressed legislative modification of statutes of limitations. Examples include the analysis in *Morrison v Dickinson*, 217 Mich App 308; 551 NW2d 449 (1996). Because of the way tort reform had been enacted, a plaintiff filing suit after October 1, 1993, for a claim which arose before then, had to serve a notice and then wait 182 days but was not entitled to tolling during that 182 days under §5856(d). The Court noted that the statute required a plaintiff to wait and, "1993 PA 78 also plainly states that the period of limitation is tolled" if the 182 day waiting period would otherwise bar an action. *Id* at 317-318. The Court found the statute to be mandatory, but crafted a limited exception. The provision which indicated that tolling would not apply to claims arising before the effective date of the amendments was held inapplicable where it would abrogate a vested cause of

action arising out of a claim which had already accrued. The decision was specifically applicable to statutes of limitation, holding that such statutes cannot be retroactively changed by legislation.

Some have also cited decisions from the U.S. Supreme Court in this regard, including *Terry v Anderson*, 95 US 628; 24 L Ed 365 (1877), *Bradley v School Board of Richmond*, 416 US 696, 717; 94 S Ct 2006 (1974), and *Ettor v City of Tacoma*, 228 US 148; 33 S Ct 428 (1913). All three opinions, as well as other federal decisions providing similar analysis, addressed modification of a statute which would have affected a vested right if applied retroactively. It was only in the context of statutory amendments that the Court forbade retroactive application which would deprive a plaintiff of the right to pursue a cause of action which had previously existed. Just as with *Morrison, supra*, these decisions specifically addressed legislative modification of a statute of limitations. They are inapplicable to judicial construction of an existing statute.

4. Waltz Did Not Overrule Existing Law or Decide an Issue of First Impression Which Was Not Foreshadowed by Prior Decisions.

The premise upon which the challenge to retroactivity is based is language from the opinion in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000). Those who argue for prospective application assert that the calculation of time limits in *Omelenchuk* established a clear rule, upon which both the bench and bar have relied, that MCL 600.5852 is subject to the tolling provisions of MCL 600.5856(c), and is thus extended for 182 days if a notice of intent is served within the last 182 days of the two-year grace period allowed under §5852.

In deciding *Waltz*, this Court, although not directly addressing retroactivity, clearly indicated that it did not believe that *Omelenchuk* had established the rule that the saving provision was tolled.

The following pertinent excerpts from *Waltz* demonstrate this:

The issue in *Omelenchuk* was whether the malpractice notice tolling provision tolled the statutory limitation period for a full 182 days or, instead, for only 154 days, when a medical malpractice claimant does not receive the written response to the notice of

intent contemplated under MCL 600.2912b(7). We held that the limitation period was tolled for the entire 182 day-period, notwithstanding the fact that the plaintiffs, who were appointed personal representatives of the decedent's estate the day after his death and who filed their notice of intent before the expiration of the two-year limitation period, *could* have commenced their lawsuit after only 154 days.

It was unnecessary in *Omelenchuk* to determine whether the 182-day notice tolling provision applied to the wrongful death saving provision. The plaintiffs' decedent died on February 13, 1994. Leaving aside application of the wrongful death saving provision, the two-year medical malpractice limitation period would thus have expired on February 13, 1996. The plaintiff's filed their notice of intent on December 11, 1995, and they did not receive a written response from the defendants. We held that the plaintiffs were entitled to a tolling period of a full 182 days, rather than only 154 days, even though under MCL 600.2912b(8) they *could* have filed suit after 154 days. Applying the 182-day tolling period, the two-year limitation period would have expired on August 13, 1996, *irrespective of the wrongful death saving statute*. The plaintiffs filed their complaint on July 19, 1996, well before expiration of the limitation period as extended by the tolling provision.

The source of the confusion surrounding our holding in *Omelenchuk* stems in part from our passing reference to §5852 as creating a "limitation period." *Id* at 652-653 (italics in original).

* * * *

To the extent that our imprecise choice of words in *Omelenchuk* implied that §5852 created a separate "limitation period," we again clarify that §5852 is not a statute of limitations, but a *saving* statute.

We additionally note that we mistakenly, and unnecessarily, based our time calculations on a starting date of February 14, 1994 (the date the personal representatives were appointed), when we should have based those calculations on the accrual date of the cause of action, February 13, 1994 (the date of the decedent's death). *Id* at 654 (italics in original).

* * * *

We should have stated that rather than expiring on February 13, 1996, the limitation period was tolled from December 11, 1995, until June 10, 1996, and then resumed for another sixty-five days until it expired on August 13, 1996. In any event, it was unnecessary to apply the wrongful death saving provision because the action was commenced within the two-year limitation period. To the limited extent that the above-quoted portion of *Omelenchuk* might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision, it is hereby overruled. *Id* at 654-655 (italics in original).

The Court of Appeals subsequently had the opportunity to apply *Waltz*. In *Ousley, supra*, the Court first addressed the retroactivity of the decision. The panel unanimously held:

“The general rule is that judicial decisions are to be given complete retroactive effect . . .” Complete prospective application has been deemed appropriate only for decisions that either “overrule clear and uncontradicted case law” or “decide an issue of first impression whose resolution was not clearly foreshadowed.”

We conclude that *Waltz* meets neither of these criteria. The only case law that *Waltz* arguably overruled is *Omelenchuk v City of Warren*. In *Omelenchuk*, the Court addressed whether §5856(d) tolled the statutory limitations period for a full 182 days or only 154 days when a medical malpractice claimant does not receive a written response to the notice of intent pursuant to MCL 600.2912b(7). However, as the Court explained in *Waltz*, the question whether the 182-day notice tolling provision applied to the wrongful death saving provision, §5852, was not before it in *Omelenchuk*, because the plaintiffs in *Omelenchuk* had filed their complaint before the expiration of the limitations period as extended by the tolling provision, and, thus, did not need to rely on the wrongful death saving provision to make their action timely.

The Court acknowledged that its “imprecise” passing references to §5852 as creating a “limitation period” in *Omelenchuk* had occasioned some confusion, but it clarified that other case law clearly established that §5852 was “a *saving* statute, not a statute of limitations,” and that, therefore, §5856(d), which applies only to “statutes of limitation or repose,” did not apply to §5852. The Court also acknowledged that it “mistakenly, and unnecessarily,” based its calculations in *Omelenchuk* on the date the personal representatives were appointed rather than the date the decedent died, which was when the cause of action accrued. The Court then overruled *Omelenchuk* “to the limited extent” that that portion of the *Omelenchuk* opinion “might be viewed as sanctioning application of the notice tolling provision to the wrongful death saving provision. . .”

It is evident, then, that *Waltz* did not overrule “clear and uncontradicted case law,” as the test for prospective application requires. Rather, as the Court explained, what *Waltz* actually overruled was confusing and imprecise dicta. Further, to the extent that *Waltz* decided an issue of first impression in deciding that §5856(d) does not toll §5852, that resolution was “clearly foreshadowed,” if not actually determined, by its previous decision holding that §5852 is a saving provision, not a statute of limitations or repose. The conclusion that *Waltz* did not represent a change in the law is supported by the fact that, despite being decided after *Omelenchuk*, this Court reached the same conclusion in *Waltz*, using the plain language in the statutes, as did the trial court in this case. Therefore, *Waltz* meets neither of the threshold criteria for applying its holding only prospectively. *Id* at 493-495 (italics in original; citations omitted).

It is clear from a review of *Waltz* and *Ousley* that both opinions considered the pertinent language in *Omelenchuk* to both represent a mistake in the date calculations and to be peripheral to

the issues in *Omelenchuk*. Therefore, both opinions concluded that *Omelenchuk* had not analyzed the question of whether the saving provision was tolled by service of a notice of intent, and that any commentary in this regard was thus dicta. This interpretation is consistent with the general rule that a judicial opinion does not represent controlling authority as to a particular question unless that question was actually before the Court and was thus actually considered and decided by that Court, and that comments which reflect only a marginal or passing analysis of a topic are mere dictum.

Plaintiff has referenced a number of cases for the proposition that the date calculations used in *Omelenchuk* should, even if dicta, be treated as controlling authority. A review of those cases demonstrates that they are distinguishable and, in fact, contain multiple references which support this Court's determination that the pertinent language in *Omelenchuk* should be seen as dicta. For example, while Plaintiff cited to *City of Detroit v Public Utilities Comm'n*, 288 Mich 267, 299-300; 286 NW 368 (1939), she failed to acknowledge that the legal analysis in that case was central to resolution of the issue on appeal, and not merely a peripheral analysis of dates which had no impact upon the outcome. Seven paragraphs from the opinion follow, the second through fourth being those relied upon by Plaintiff:

“A judgment or decree which expressly excepts or reserves from its operation specified rights or claims of parties in suit, or the decisions of questions in issue, or the right to take further proceedings in respect to certain matters, is not a bar to subsequent action on the matters so reserved; *but on the contrary the reservation itself becomes res judicata, and prevents the raising of any questions to the right to bring or maintain such subsequent suit.*”

With regard to the question of whether the decision in the *Walker Case* as expressed in the opinion of Mr. Justice FELLOWS is decisive in the instant case, it has been said that all that is necessary for a decision to be authoritative is to show application of the judicial mind to the subject.

“When a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a

binding decision.” *Chase v American Cartage Co., Inc.*, 176 Wis 235, 238 (196 N.W. 589).

In *Alexander v Worthington*, 5 Md. 771, 488, it is said:

“But where a question of general interest is supposed to be involved and is fully discussed and submitted by counsel, the court frequently decides the question with a view to settle the law, and it has never been supposed that a decision made under such circumstances could be deprived of its authority by showing that it was not called for by the record. * * * * All that is necessary in Maryland to render the decision of the court of appeals authoritative on any point decided is to show that there was an application of the judicial mind to the precise question adjudged; and this we apprehend is the rule elsewhere.”

It is true that the views of Justice FELLOWS were expressed in a separate concurring opinion. Views, however, expressed in separate concurring opinions are the views of the court when it appears that the majority of the court concurred in such separately expressed views. *Anderson v Sutton*, 316 MO. 1058, 1065 (293 S.W. 770). It was stated by Mr. Justice FELLOWS that the court should declare the law on the point involved, obviously, as a guide in future proceedings. His opinion was devoted to this one question, and that of the dissenting opinion of Mr. Justice WIEST was confined to a dissent from this point. The majority of the court agreed that the law on this question should be declared and held that a consumer had the right to petition the commission to fix rates; and in the decree of the court, the right was expressly reserved to such consumer, or any consumer, to file a petition before the commission.

It is difficult to understand the contention of appellants that this question was not decided in the *Walker Case*. In three different opinions the only single point upon which there was any disagreement was whether the commission secured jurisdiction to fix rates on petition of a consumer. This issue was narrowly drawn, and the court disagreed on the point in question. The bill was merely dismissed without prejudice, but in the majority opinion *there was explicitly set forth the reservation of the consumer’s right to bring the matter before the commission by petition.*

There is no question that the point was before the court; that the court intended to declare the rule of law for a guide in the future; that there was an application of the judicial mind to the proposition and a thorough consideration of the subject; and that the majority of the court concurred with the views of Mr. Justice FELLOWS with the clear intent and expressed purpose of determining this issue. *City of Detroit, supra* at 299-301 (italics in original; footnotes omitted)

Given the emphasis in the above excerpts, a digression is in order, to consider the definition of germane. According to Black’s Law Dictionary (5th Edition), germane is defined as: “In close

relationship, appropriate, relative, pertinent.” The American Heritage Dictionary, New College Edition (1976) defines germane as: “Having a significant bearing upon a point at hand; related; pertinent.” It lists an appropriate synonym as “relevant”. The New Lexicon Webster’s Dictionary (1991) simply defines germane as “relevant”. Under either of these three definitions, it is clear that, before judicial analysis can be germane, it has to be pertinent or relevant to the question actually before the deciding court. Given that the issue in *Omelenchuk* was whether tolling under §5856(c) would run for a full 182 days or only 154 days under certain circumstances, in a case where the notice was served within the statute of limitations and the tolling provision was thus irrelevant, there is no sound basis to claim that the applicability of tolling to the saving provision was germane to the analysis.

Plaintiff turned to *Carr v City of Lansing*, 259 Mich App 376, 384; 674 NW2d 168 (2003), as another example of a case which had followed the rule from *City of Detroit, supra*. At issue was whether state and county road commissions were responsible for traffic signs and other traffic control devices, or whether local municipalities had that responsibility. This Court noted that “the purpose of our holding today is merely to return to a principled application of the plain language of the highway exception,” and then addressed a prior decision which a dissenting opinion considered to be dicta. The Court wrote:

Although the trial court in the instant case dismissed footnote 37 in *Evens-Nawrocki* as dictum, this Court has noted that dictum is a “judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).” *Id* at 383-384.

After offering this comment, the Court then quoted the pertinent language from *Detroit, supra* and concluded that the holding in *Evens* was not dictum as it “was germane to the Court’s holding regarding immunity of the state and county road commissions and displayed the ‘application of the

judicial mind’ to the question.” *Id.* Although the analysis is somewhat detailed, it is clear from a review of *Carr* that the central issue, responsibility for traffic control devices in light of the doctrine of governmental immunity, was also central to the analysis in *Evans*, and was not “unnecessary to the decision in the case. . .”

5. Waltz Was Foreshadowed by Prior Decisions and the Plain Language of MCL 600.5852 and MCL 600.5856(c).

The holding in *Waltz*, that the saving provision of the WDA is not a statute of limitation and is thus is not subject to tolling under MCL 600.5856(c), was not fashioned out of whole cloth. Rather, the opinion followed the statutory language and a series of decisions going back to 1995.

The discussion under this section necessarily begins with the language of MCL 600.5856(c), which provides:

The statutes of limitations or repose are tolled in any of the following circumstances:

* * * *

(d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

The key phrase in this statute is the introductory language which precedes subsections (a) through (c). Application of MCL 600.5856 is specifically limited to “statutes of limitations or repose . . .”

This language is directly at odds with any assumption that the saving provision of MCL 600.5852 would be tolled by service of a notice of intent. This is because that statute, on its face, states that the saving provision is something other than a statute of limitations or repose. Section 5852 provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives the 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. However, 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.

What is important to note about this statute is that, in three separate places, it provides that the opportunity of a personal representative to commence an action applies if “the period of limitations has run . . .” It is thus evident from the plain language of this statute that it provides an exception to the statutes of limitation or repose, rather than an independent statute of limitations or repose. Thus, under §5856(c), the exception in §5852 is not tolled by service of a notice of intent. This analysis of the statutory language is consistent with various appellate decisions considered in the following paragraphs.

Pertinent analysis begins with *Turner v Mercy Hospital’s*, 210 Mich App 345; 533 NW2d 365 (1995), which questioned whether the saving provision would be tolled while a personal representative’s letters of authority had been suspended due to negligence by the representative. In finding that it would not, the Court noted that limitation statutes “are grounded in important public policies” and a “tolling provision, as an exception to the statute of limitation, is to be strictly construed.” *Id* at 349-350. Further, “as a general rule, a limitation period is tolled only by a substantive restriction on the plaintiff’s ability to bring an action in a timely manner, not by merely procedural or technical irregularities whose correction is within the control of the plaintiff.” *Id* at 350-351.

In *Lindsey, supra*, this Court considered whether the two-year saving provision began to run from issuance of temporary letters of authority, or did not commence until general letters of authority were issued. The Court held that the temporary letters allowed the plaintiff the opportunity to proceed with an action, and thus commenced the running of the two-year period. The Court found this to be “consistent with the purposes of the statute of limitation saving provision, MCL 600.5852, which is intended to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.” *Id* at 66. Further, “it cannot be denied that all

statutes of limitation set arbitrary time limits for legal claims The saving provision preserves a plaintiff’s claim, but as an exception to a statute of limitation, must be narrowly construed.” *Id* at 69. As the plaintiff had immediately assumed control over the estate and otherwise acted on its behalf, “it does not seem unfair to accord her the responsibility to pursue claims on behalf of the estate within two years of her appointment as temporary personal representative.” *Id*.

The Court later issued *Miller v Mercy Memorial Hospital*, 466 Mich 196; 644 NW2d 730 (2002), this time determining whether the saving provision allowed a two-year grace period after expiration of the six month discovery period, or only after the basic two-year period of limitation had run. The Court observed that “the six month discovery rule is a distinct period of limitation.” *Id* at 202. In the process, it clearly explained that §5852 must be distinguished. “Section 5852 is a saving statute, not a statute of limitation.” *Id*. Its purpose is to give the personal representative “a reasonable time to pursue” actions which survive death. *Id* at 202-203.

The above opinions are not the only relevant commentaries. Plaintiff herself has emphasized that *Waltz* was not the first decision to hold that MCL 600.5852 was a saving provision as opposed to a statute of limitations. Plaintiff referenced *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987) and *Hawkins v Regional Medical Laboratories, P.C.*, 415 Mich 420; 329 NW2d 729 (1982). She asserted that they are “notable” because “each of these prior decisions describing §5852 as a savings provision predated the Court’s decision in *Omelenchuk*.” This is certainly true. However, it does not support Plaintiff’s position that *Omelenchuk* correctly referred to §5852 as a statute of limitations. Rather, it simply enhances the belief that this Court considered §5852 to be something other than a statute of limitations, and any reference that the saving provision as a statute of limitation was an essentially irrelevant aspect of the *Omelenchuk* decision.

6. **Omelenchuk Was Not Universally Relied On as Transforming §5852 Into a Statute of Limitations.**

Although some have taken the position that *Omelenchuk* established a clear rule regarding notice tolling which both the bench and the bar relied upon, examples to the contrary are available. The history of *Waltz* itself is an obvious starting point. There is no disputing the fact that, well before the Court issued its opinion, defense counsel in *Waltz* had argued that the saving provision was not tolled by a notice of intent. *Omelenchuk* was released on March 28, 2000, and oral argument on the *Waltz* defendant's summary disposition motion took place on June 2, 2000. *Omelenchuk* was not a factor in the debate. The trial judge agreed with the defense argument and dismissed the action, leading to a claim of appeal by the *Waltz* plaintiff on December 4, 2000. The Court of Appeals concurred, and released an unpublished opinion on October 1, 2002, holding that the saving provision was not tolled. It is thus undeniable that at least some in the bench and bar did not treat *Omelenchuk* as having established a rule regarding tolling.

Contrary to the analysis in the recently published decision in *Mazumder v U of M Regents*, ___ Mich App ___; ___ NW2d ___ (2006), the unpublished opinion in *Waltz* (COA No. 231324; October 1, 2002) does not appear to have "presumed that tolling applied to the wrongful death saving statute." In *Waltz*, this Court wrote:

However, Plaintiff claims that the notices of intent given to defendants tolled the extended five-year limit set forth in the saving statute, MCL 600.5852. We disagree. We look no further than the language of the tolling statute to resolve this issue. MCL 600.5856(d) expressly tolls the "statute of limitations." The Supreme Court has recently said that MCL 600.5852 is not a statute of limitations, but rather a savings statute. Therefore, by its express language, MCL 600.5856(d) tolls the statute of limitations, not the extended limit in MCL 600.5852. *Id* at slip op 2-3 (citation omitted).

Admittedly, the Court distinguished *Omelenchuk* on the basis that it had involved the two-year provision of the saving statute, and not the three-year maximum period which could be added to the

underlying statute of limitations. However, the fact that the Court drew this distinction cannot eliminate the language used in the body of the opinion, in which the Court specifically held that the saving provision is not tolled. Additionally, in the same footnote, the Court acknowledged a previous decision in *Chernoff v Sinai Hosp of Greater Detroit*, unpublished (COA No. 228014; March 22, 2002), “in which the Court applied notice tolling to the two-year period after appointment of a personal representative.” The *Waltz* Court then wrote: “However, we are not bound by an unpublished opinion, MCR 7.215(C)(1), and, further, that decision also did not address the five-year maximum.” The *Waltz* Court stood by its opinion that §5852 was not subject to tolling.

This author is aware of at least two other cases in which the tolling issue addressed by *Waltz* was argued before the Supreme Court issued its decision. In *Downs v Northern Michigan Hospitals*, COA No. 256462 (consolidated with COA Nos 253611, 255045, and 256422), three separate defense firms challenged a claim based upon failure to commence it prior to expiration of either the statute of limitations or the saving provision. All three groups of defendants specifically argued that the saving provision was not tolled by service of a notice of intent. All briefs were filed well before publication of the Supreme Court opinion in *Waltz* and, in fact, oral argument in the trial court took place on March 29, 2004, 16 days before *Waltz* was released. Similarly, in *Estate of Allison v Graham*, COA NO 247426, the defendant moved for summary disposition based upon failure to timely commence an action. The case also involved whether the saving provision was tolled by service of a notice of intent. Hearings in this case were held in the trial court on November 19, 2002, and March 4, 2003, at which time the trial judge dismissed it. A claim of appeal was filed on March 18, 2003, and remained pending when *Waltz* was released in April 2004. Based upon the issuance of that decision, a motion to affirm was filed on May 3, 2004, and granted on June 2, 2004. Thus, *Estate of Allison* must be included along with *Downs* and *Waltz* in the list of cases which argued,

before *Waltz* was released, that the saving provision was not tolled by service of a notice of intent. This author is unable to determine how many other situations involved the same issue before trial courts, but which did not make it to the appellate level. However, it is undeniable that at least some among both the bench and the bar were aware of, and in agreement with, the analysis applied in *Waltz* well before that decision was issued.

7. **Retroactive Application is Consistent with the Purposes Underlying Statutes of Limitation and the Saving Provision of the WDA.**

The purpose of a statute of limitation is to determine the time between accrual of a claim and the last possible date to commence an action, in the process limiting the right to redress, rather than destroying a cause of action. *Lambert v Calhoun*, 394 Mich 179; 229 NW2d 332 (1975). Such a statute is, by its very nature, an arbitrary determination as to when a claim may no longer be pursued, and although its application is sometimes harsh, this is essential to the very nature of, and purpose for, the statute. *Showers v Robinson*, 43 Mich 502; 5 NW 988 (1880). A fairly comprehensive discussion is found in *Lothian v Detroit*, 414 Mich 160, 165-167; 324 NW2d 9 (1982), wherein the Court wrote (citations omitted):

A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. A statute of limitations is a statute of presumption. The fact of “delay extending to the limit prescribed”, without further proof, “is itself a conclusive bar” to suit. Although at one time limitations provisions were looked upon with disfavor because of the harsh results worked by their application, the modern view treats them as statutes of repose, and as “wise and beneficial” laws common to “all systems of enlightened jurisprudence”. In general, statutes of limitations are regarded as procedural, not substantive, in nature. The statute of limitations is assertable as a “perfectly righteous . . . meritorious” affirmative defense.

Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they “afford security against stale demands when the circumstances would be unfavorable to a just examination and decision”; they prevent fraudulent claims from being asserted; and

they “remedy the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert”.

More recently, a claim which was filed 8 days after expiration of the limitation period was found to be untimely. In *Solowy v Oakwood Hospital*, 454 Mich 214, 225-226; 561 NW2d 843 (1997) the Court wrote:

We recognize that [plaintiff’s] situation is sympathetic because she proceeded with some diligence in filing her claim. Although she did not sit on her rights for long, she unfortunately sat on them long enough to miss the statute of limitation cut off by approximately eight days. This type of case illustrates the apparent arbitrariness of statutes of limitation. This arbitrariness, however, is unavoidable and is the essential nature of any statute of limitation. While we are sympathetic to those who miss the deadline by a few days, their claims are nevertheless barred.

It is well settled that exceptions to the statute of limitation are to be strictly construed.

Tucker v Eaton, 426 Mich 179; 393 NW2d 827 (1986); *Mair v Consumers Power Company*, 419 Mich 74; 348 NW2d 256 (1984). In *Mair, supra* at 80 (citations omitted), the Court observed that:

[T]he statute of limitation is not a disfavored plea but a perfectly righteous defense, a meritorious defense”. For these reasons, it is the general rule that exceptions to statutes of limitation are to be strictly construed.

A plaintiff seeking an exception by way of a tolling provision has the burden of showing facts sufficient to justify tolling. *Dorsey v Kosyonan*, 193 Mich App 711; 484 NW2d 415 (1992); *Hoseney v Zantop*, 17 Mich App 141; 169 NW2d 124 (1969).

In *Lindsey, supra*, the Court noted that the purpose of the saving provision contained in §5852 is “to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.” In the case before it, the Court considered whether appointment of a temporary personal representative commenced the running of the two-year saving provision. The opinion held that it did and that the statutory purpose was met because the personal representative had full authority to act on behalf of the estate and thus had a full two year opportunity in which to perfect a claim. *Lindsey, supra* at 455 Mich 66.

8. Retroactive Application Does Not Deny a Plaintiff a Reasonable Opportunity to Pursue a Claim.

The purpose of the saving provision of the WDA is to provide a plaintiff with a reasonable opportunity to pursue a claim, although the statute of limitation has expired. *Lindsey, supra*. The original Plaintiff herein was appointed personal representative 21 months after the alleged malpractice. The appointment could have been sought, and steps taken to obtain appointment and commence an action, at any point during the original two-year statute of limitation, and Plaintiff would have had the full benefit of that statute. There was time, even though that Plaintiff waited 21 month, to have served a notice and thus triggered tolling within that basic limitations period. That Plaintiff also had two years from the date that letters of authority were issued to commence a claim. The fact that more than 18 months passed before a pre-suit notice was served does not change the fact that the Plaintiff had the full two years of the saving provision. MCL 600.5852 must be narrowly construed as it operates to allow a claim after the statute of limitation has run. Whatever the reasons, it was Plaintiff's choice to wait 18 plus months after appointment, and 39 months after the alleged malpractice, to serve a notice.

D. Judicial Tolling is Not the Issue Before this Court in this Action.

The issue before this Court is limited to consideration of retroactive application of *Waltz*. Although Plaintiff herein has previously argued for judicial or equitable tolling, that is a remedy which is not available for consideration. The recent opinion in *Mazumder, supra* clearly noted that *Waltz* had retroactively foreclosed the possibility of tolling of the saving provision (although it then proceeded to apply equitable tolling). While a final resolution of the equitable tolling issue addressed in *Mazumder* has yet to be determined, it is clear that the Court recognized the distinction between retroactive application of a decision in the general sense, and tolling of a limitations period when the equities dictate. While questions of equity may play a role in the determination of whether

a decision should be applied retroactively or prospectively, this is true only to the extent that equity might be used, under appropriate circumstances, to avoid the general rule of retroactive application. Once it is determined that a decision should apply retroactively, that determination would be completely obviated by a subsequent determination that the retroactivity of the opinion at issue could be negated through the use of tolling. More importantly, for the present discussion, even if the one doctrine could be used to bypass the other, it nevertheless remains that the two are distinct questions, and the only issue before this Court is a determination of retroactivity. Whether there is a proper role for judicial tolling in relation to *Waltz* is a determination which must be left for another day.

Plaintiff has made repeated references to *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411; 684 NW2d 864 (2004), offering the opinion as a clear directive that *Waltz* should not be applied to existing cases, but rather should have future effect only. At page 14, she went a step further, and specifically attributed to *Bryant* the rule “that retroactivity is governed by equitable principles”. This is a misstatement of the decision, as *Bryant* never specifically addressed the retroactive/prospective distinction, as it was not creating a new rule of law but rather clarifying a previously unaddressed definitional issue stemming from the judicially created distinction between malpractice and ordinary negligence. *Bryant* is best understood as having applied a variation of equitable tolling, rather than having announced a change in the law which would apply prospectively only. While principles of equity may have a role in discussions of retroactivity, *Bryant* is not the proper source for an understanding of that role. Nor does *Bryant* provide guidance for this Court’s analysis of retroactive or prospective application of *Waltz*.

II. APPOINTMENT OF A SUCCESSOR PERSONAL REPRESENTATIVE DOES NOT MAKE THIS ACTION TIMELY.

Plaintiff argued that, under the recent decision in *Eggleston v Bio-Medical Applications*, 468 Mich 29; 658 NW2d 139 (2003), the appointment of a successor made the present action timely.

The trial judge did allow her motion to amend the caption of the case, to reflect the replacement personal representative. However, there was no specific holding that the claim was timely based upon this decision, as Judge Shelton did not address the issue. Appellees submit that appointment of a successor does not save Plaintiff's claim.

In its first published opinion in this matter, the Court of Appeals agreed. Additionally, Appellees submit that, as the issue was decided by the first opinion, the opportunity to timely appeal that aspect of the case in this Court has passed, and that the issue is not properly before this Court. However, in the event the Court does choose to consider the issue, Appellees respectfully submit that Plaintiff is not entitled to relief, for the reasons set forth hereinafter.

A. MCL 600.5852 Is Ambiguous as to Whether Multiple Grace Periods Are Allowed, making Judicial Construction of the Statute Necessary.

The provision in MCL 600.5852 allowing for commencement of an action within two years of issuance of letters of authority is ambiguous and subject to conflicting interpretations. Judicial construction of the statute is thus both appropriate and necessary. While Plaintiff asserts that a grace period commences every time letters of authority are issued, Dr. Bashir reads the statute as providing for, at most, a single, uninterrupted grace period (although that two years may commence upon issuance of initial letters or subsequent letters). MCL 600.5852 provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued, although the period of 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.

Five observations serve to highlight the ambiguity in the statute, and thus the necessity for this Court to construe the language contained therein. Three focus upon the literal words of the legislation. Two others are more general.

The first textual observation is that, while the two-year grace period is calculated from when letters of authority are issued, the statute does not say “the letters.” The absence of “the” is argued by Plaintiff to support his claim that a two-year period commences with every issuance of letters. However, the statute does not specifically say this either. The Legislature could have said “any letters” if that was intended, but did not do so. The words used in the statute are neither inclusive nor exclusive in this regard.

A second textual observation is the absence of any words following “letters of authority are issued” defining who those letters must be issued to. There is no statement that the two years begins to run when letters are “issued to the personal representative” or “issued to the initial personal representative.” Conversely, the statute does not provide that the two years commences anew every time letters are “issued to any personal representative.” Nor does it say that an action may be commenced by a personal representative within two years after letters “are issued to that personal representative.” Once again, the language of the statute is neither expansive nor limiting, and allows for substantial gray area as to when issuance of letters will commence a grace period.

A final semantic observation relates to use of the word “the” before “personal representative.” As noted above, the Legislature did not specifically reference “the letters of authority” when defining the issuance date which would commence the saving provision. This was of some significance to the Court when deciding *Eggleston*, as discussed at pages 12-13 of this brief. In short, this Court found that the absence of “the” demonstrated the absence of any limitation or restriction on “letters.” However, the statute uses “the” in another location. Section 5852 allows “the personal representative” to commence an action within two years after letters are issued. The statute does not allow “a personal representative” or “any personal representative” to file suit. The

reference to “the personal representative” is, in some fashion, a limiting reference (as discussed more fully in the following section).

Two observations regarding the general application of the statute are pertinent. First, analysis of the language of the statute reveals that it does not include any specific provision for anything other than a very routine probate estate, in which a single personal representative is appointed and serves until the estate is closed. Section 5852 does not say what to do when an initial two-year period is interrupted, either by a temporary suspension of a single representative’s authority or the replacement of one representative by another prior to expiration of the two-year grace period. Nor does it say what to do when an uninterrupted grace period expires, and subsequent letters of authority are issued. There simply are no words in the statute to provide a clear and unambiguous answer.

Additionally, the lack of specifics demonstrates that the legislators never thought to address the precise question raised by this application. There is no clear directive as to whether the statute envisioned a single two-year period, or multiple grace periods. However, a two-year limit was imposed. The saving provision of §5852 was obviously capped, in some sense, at two years. The statute does not spell out exactly how this limit applies in the present case. Such a result is not uncommon, given the complexities involved in drafting legislation, and the inability to predict all scenarios and craft a perfect bill. For that reason, it is axiomatic that ambiguities (such as the one presented by this issue) must be resolved by the appellate courts, with the primary goal of discerning and effectuating legislative intent.

B. The Language of MCL 600.5852 Is Consistent with a Single Two-Year Grace Period.

The saving provision is an exception to the applicable statute of limitation and, as such, must be narrowly construed. *Tucker v Eaton*, 426 Mich 179; 393 NW2d 827 (1986); *Mair v Consumers Power Company*, 419 Mich 74; 348 NW2d 256 (1984). The two-year reference in §5852 does exist

and must be given some meaning. When narrowly construed, it can only logically be read as narrowing or limiting the saving provision's exception to the limitation period. The Legislature imposed, in addition to the two-year reference, a three-year ceiling. The statute requires filing within three years of expiration of the underlying limitation period, as well as within two years of issuance of letters. Given the fixed outside limit, the two-year reference is most logically seen as an additional limitation within that period. In other words, two years must be seen as shortening or capping the opportunity to proceed with an action within that outer limit. This Court said as much in *Farley v Advanced Cardiovascular Health Specialists*, 266 Mich App 566, 573, n 16; 703 NW2d 115 (2005), when it wrote that, "while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it." (Italics in original.)

A fair reading of the statute as a whole suggests that it was intended to provide an uninterrupted two-year grace period during which an estate would have the opportunity to commence an action. The language of the statute bears repeating, and reads:

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.

When edited down to the terms pertinent to the present issue, the words of the statute are properly construed as allowing an estate a single, uninterrupted two year grace period. The statute essentially reads: "*an action . . . may be commenced by the personal representative. . . within two years after letters of authority are issued . . .*" The statute appears to be drafted to allow the personal representative who serves for two years to have that two years as a reasonable opportunity to commence an action.

As noted earlier, MCL 600.5852 refers to “the personal representative”. The use of the word “the” in §5852 demands consideration. In *Massey v Mandell*, 462 Mich 375; 614 NW2d 70 (2000), this Court recently noted:

The use of the word “the” has a meaning that is different than the word “a” and [MCL 600.1629(1)(a)(i)] does not say “a” defendant resides, has a place of business, or conducts business in the county. Nor does it say “one of the defendants.” Rather, it says “the defendants.” . . . “The” and “a” have different meanings. “The” is defined as a “definite article. 1. (used especially before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or and) . . .” *Random House Websters College Dictionary*, p 1382. Moreover, when, as in subd (1)(a), the Legislature has qualified the same word with the definite article “the” in one instance (subd [1][a][i]) and the indefinite article “a” in another instance (subd [1][a][ii]), and both are within the same subsection of a statute, even more clearly, there can be no legitimate claim that this Court should read “the” as if it were “a.” *Id* at 382, n 5.

Some effect must be given to the insertion of “the” (as opposed to “a”) before “personal representative” in §5852. In light of the analysis in *Massey*, it is logical to conclude that *the* personal representative who serves for two years may bring an action within two years after appointment, even though the period of limitations has run.

C. ***Eggleston v Bio-Medical Applications Is Factually Distinguishable and Did Not Address Successive Two-Year Periods.***

Eggleston, supra, involved a wrongful death claim arising out of kidney dialysis provided on June 21, 1996, resulting in death the following day. The surviving husband was issued letters of authority on April 4, 1997, but died 4 ½ months later, on August 20, 1997. Plaintiff was appointed as a successor personal representative and letters of authority were issued on December 8, 1998. He filed a complaint alleging medical malpractice on June 9, 1999. The defendants sought summary disposition, arguing that the claim was barred by the two-year malpractice statute of limitation and had been filed after expiration of the two-year saving provision, assuming it began to run from the appointment of the initial personal representative. Plaintiff argued that the two year grace period was

properly calculated from the date of his appointment as successor, thus making the claim timely. *Id* at 30-31.

Central to the analysis was an error in the underlying appellate decision, *Eggleston v Bio-Medical Applications*, 248 Mich App 640; 645 NW2d 279 (2001), in which the Court had read MCL 600.5852 to allow for a two-year period after “the letters of authority” are issued. *Id* at 248, Mich App 648-649. However, the statute does not include “the” before “letters of authority.” The Supreme Court wrote that this Court had incorrectly “relied on this misquotation in holding that a personal representative must bring an action within two years after the initial letters of authority are issued to the first personal representative.” *Eggleston, supra*, at 468 Mich 33.

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 date letters of authority are issued to the initial personal representative. *Id*.

As the plaintiff had filed the complaint “within two years after letters of authority [were] issued,” as well as within three years after the statute of limitation had run, the case was timely. *Id*.

The opinion is relatively short. The facts that are provided make clear that the case involved an initial personal representative who had served for only 4 ½ months, and therefore had not had two years in which to pursue a potential action. The successor was appointed 16 months after, and filed a complaint six months later. The total time during which the estate had an active personal representative before commencing an action was less than 11 months. It is clear from the discussion in both the Supreme Court and Court of Appeals opinions that the possibility of allowing two separate representatives to have two separate, complete two-year periods was not contemplated. The Supreme Court wrote its opinion in terms of a single two-year period, and the central issue was whether “*the* two-year period is measured from the date letters of authority are issued to the initial

personal representative.” *Id* at 33 (emphasis added). *Eggleston* did not explicitly set forth a rule that two personal representatives might each have a separate two-year period to file suit.

D. Provisions of the Current Probate Code Support Allowance of a Single Grace Period.

The saving provision of the WDA must be read in light of, and construed in harmony with, applicable provisions of the probate code. As noted in *Lindsey, supra* at 455 Mich 65:

The saving provision of the statute of limitations and the probate code are intended to work together to preserve legal actions that survive death and to define the running of the statute of limitations where a person dies before or within 30 days of the running of the period of limitation. Under the rule of construction of statutes in *pari materia*, it is appropriate to harmonize statutory provisions that serve a common purpose when attempting to discern the intent of the Legislature. The present case requires construction of these provisions in light of those rules and principles applicable to statutes of limitation in general.

One of the provisions of the EPIC is MCL 700.3613, which specifically defines and limits the powers of a successor, stating in part:

Except as the court otherwise orders, the successor personal representative has the powers and duties in respect to the continuing administration that the former personal representative would have had if the appointment had not been terminated.

Under the clear language of the statute, a successor stands in the shoes of the predecessor, and has the same powers and duties, as if the substitution had never occurred. Plaintiff herein should be found to have “the powers and duties” of his predecessor as if “the appointment had not been terminated.”

Another provision in the current probate code, MCL 700.3704, is pertinent to the present discussion, and reads:

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent’s estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order or direction of the court. However, the personal representative may invoke the court’s jurisdiction in a proceeding authorized by this act to resolve a question concerning the estate or its administration.

It cannot be considered an accident that the Legislature began this section with the specific directive to “proceed expeditiously” with resolution of the estate. It is certainly consistent with the intent behind the saving provision, that being to provide a reasonable opportunity to proceed with an action. *Lindsey, supra* at 66. It is also inconsistent with the rule proposed by Plaintiff herein, which would essentially allow a personal representative, at his or her own election, to bypass the two-year limit in §5852. The saving provision is intended to provide for a reasonable opportunity, and not an opportunity which is lengthened by Plaintiff only after being confronted with the fact that, although the estate has had its two year opportunity, it has missed the statute of limitation.

E. *McLean v McElhaney* Held That a Personal Representative Who Serves For Two Years Exhausts an Estate’s Grace Period.

McLean v McElhaney, 269 Mich App 196; 711 NW2d 775 (2005) represents the first published decision regarding the right to a successive grace period when a successor personal representative is appointed. Its analysis is on point in this appeal. *McLean* involved co-personal representatives who served a pre-suit notice within the two-year grace period, assuming that they were entitled to 182 days tolling pursuant to MCL 600.5856(c). The *McLean* plaintiffs argued that they should be entitled to appoint a successor who, under *Eggleston, supra*, could timely commence a new action, and thus dismissal with prejudice had been inappropriate. In *McLean*, the Court was thus confronted with, and necessarily considered, the question of whether a successor representative was entitled to an additional grace period, in determining whether dismissal had properly been with prejudice. Pertinent analysis is found at *McLean, supra* at 201-202, as follows:

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 personal representatives represented the estate for the full two years available to them under the wrongful death saving statute. Contrarily, plaintiffs were afforded the full two years available to them under the wrongful death saving statute to file their complaint, but failed to do so. Moreover, plaintiffs’ failure was not due to an 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*.

The reasoning employed by the *McLean* Court is directly applicable to the present case. Plaintiff herein was “afforded the full two years permitted under the wrongful death saving statute to file [her] complaint, but failed to do so.” Additionally, the estate’s predicament is due to its initial personal representative’s “negligence in calculating the proper time for filing the amended complaint.” Accordingly, Plaintiff is not entitled to a successive grace period, notwithstanding his mistaken reliance upon *Eggleston*.

It is acknowledged that a dissent was filed in *McLean*. However, review of that dissent demonstrates that it is clearly limited to a criticism of the retroactive application of *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Nowhere in the dissent is there any criticism of the majority’s analysis of *Eggleston* or the majority’s holding regarding successive grace periods when a personal representative has already been afforded a full two years to proceed but failed to do so.

F. *Verbrugghe v Select Specialty Hosp* was Wrongly Decided, Improperly Distinguished and Ignored *McLean*.

Verbrugghe v Select Specialty Hosp, 270 Mich App 383; 715 NW2d 72 (2006) was released on March 23, 2006. At issue was a medical malpractice claim which had been the subject of two separate circuit court actions. The first was dismissed because the initial personal representative filed the complaint more than two years after appointment. A successor had been appointed and was

in place by the time the trial court dismissed the first action, and she promptly filed a second complaint. The trial court dismissed it on statute of limitations grounds. The Court of Appeals subsequently held that MCL 600.5852 and its interpretation in *Eggleston* authorized the successor to commence a new action, and reversed the trial judge. Some argue that *Verbrugghe* is thus published authority which has resolved the dispute over whether a successor personal representative is entitled to an additional two-year grace period. Appellants respectfully submit that it has not, as *Verbrugghe* failed to recognize the import of a previously published decision and, further, its analysis of §5852 is flawed.

The published decision in *McLean, supra* was released prior to *Verbrugghe*. Thus, to the extent that *McLean* addressed the question of successive grace periods, it represents controlling authority pursuant to MCR 7.215(C)(2). When deciding *Verbrugghe*, the Court disregarded the precedential impact of *McLean*. This writer respectfully submits that it did so by ignoring the *McLean* analysis regarding successive grace periods, and simply referenced an unspecified factual distinction. In *Verbrugghe*, the Court apparently (although without specifically saying so) distinguished *McLean* because a successor personal representative had not actually been appointed in the latter case (*Verbrugghe, supra* at 389). The Court concluded that “*McLean* did not apply *Eggleston*” and thus that it provided “no useful guidance.” *Id.* However, as the preceding analysis of *McLean* makes clear, the Court was faced with the argument that dismissal without prejudice should have been ordered, and thus necessarily considered whether, under *Eggleston*, a successor was entitled to an additional grace period. The *McLean* Court based its decision upon the fact that “plaintiffs were afforded the full two years available to them under the wrongful death saving statute to file their complaint, but failed to do so.” *McLean, supra* at 202. Whether or not one agrees with this decision, it is broadly applicable to the entitlement of an estate to a successive grace period. In

Verbrugghe, the Court completely discounted this analysis. While it was within the rights of the Court to have expressed its disagreement with the *McLean* analysis, it was inappropriate under MCR 7.215(C)(2) to simply ignore that analysis.

The *McLean* Court did properly consider the question of successive grace periods and the impact of *Eggleston*. Some have suggested that *McLean* need not have addressed successive grace periods, as a successor personal representative had never been appointed. However, the plaintiff had clearly requested the Court to consider whether dismissal should be without prejudice, thus making it necessary to determine the rights of a successor. Therefore, the analysis in *McLean* was not dicta, as the issue was before that panel at least as much as it was before the Court in *Verbrugghe*.

Conversely, in *Verbrugghe* it was not necessary to address this issue. The Court recognized as much just before the conclusion of the opinion in *Verbrugghe*, when it determined that the trial court had correctly dismissed the complaint because the successor had not served her own notice of intent. *Id* at 397. This Supreme Court has held that “the failure to comply with the statutory requirement renders the complaint insufficient to commence the action.” *Burton v Reed City Hosp*, 471 Mich 745, 754; 691 NW2d 424 (2005). In *Verbrugghe*, the Court thus did not have a valid action before it, and should have dismissed on that basis alone. It was therefore premature to determine if the successor would, after service of a notice of intent followed by the proper waiting period, have the right to file a new complaint. The analysis of successive grace periods in *Verbrugghe* is thus dicta at least as much as is the similar analysis in *McLean*, and if one is to be honored, so should the other. Given that *McLean* was first in time, the Court of Appeals should have followed it when deciding *Verbrugghe*.

More important than the failure to defer to *McLean* is the fact that the rationale applied in *Verbrugghe* is unpersuasive, due to its failure to recognize the ambiguity in §5852. The Court stated that it was simply limiting its analysis to the plain language of the statute, and held:

We also reject defendants' argument, adopted by the trial court, that applying *Eggleston* would circumvent a purpose of the statute of limitations, which is to protect defendants from stale claims. In order to accept this position, we would have to ignore the statutory timelines within MCL 600.5852. *Verbrugghe, supra* at 11.

It is respectfully submitted that the Court, in *Verbrugghe*, actually did ignore the statutory timelines within MCL 600.5852. As discussed earlier herein, the language is subject to competing interpretations. While the statute has been interpreted by some to state that a grace period commences upon any issuance of letters of authority, it also does clearly contain two timelines, imposing a two-year limit from the date letters are issued and a three-year limit from the date the statute of limitations expires. Allowing an estate a successive grace period even when an initial personal representative served for two years without commencing an action ignores the two-year statutory timeline by allowing an estate to bypass it any time it would actually come into play.

In *Verbrugghe*, the Court supported its analysis, in part, by reference to *Farley, supra*. However, it appears that the Court rather selectively quoted from *Farley*, by referencing only its statement that a claim may be brought within two years after letters of authority are issued, as long as the suit is commenced within three years of expiration of the statute of limitations. *Verbrugghe, supra*, at 390. The Court made no mention of additional analysis in *Farley, supra* at 266 Mich App 573, n 16 (italics in original), which reads:

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

two-year window during which a personal representative may file suit, it cannot *lengthen* it.

While the *Verbrugghe* Court turned to *Farley* to support its position that any issuance of letters triggers a grace period, it simultaneously ignored this analysis, which seems to recognize that there is a two-year limit, which must be given some meaning and effect.

One more flaw in *Verbrugghe* should be noted. The Court mentioned MCL 700.3613 in the general sense, and admitted that it “has procedural implications for the successor personal representative,” but then turned to MCL 700.3701 without any further discussion of the contents of §3613. *Id* at 392. The Court focused upon the reference in §3701 that a personal representative may ratify an act done by another and concluded that, because the successor in the case before it elected not to ratify the lawsuit brought by the initial personal representative,” the provisions of §3613 were somehow rendered irrelevant. The fact that a personal representative has the right to ratify an act done by another does not change the directive in §3613 that the successor “has the powers and duties” that the predecessor “would have had if the appointment had not been terminated.” There is simply no basis to conclude that, because a successor chose not to ratify a prior act, he or she somehow has additional powers beyond those allotted to the initial personal representative. There is thus no basis to conclude, as the Court did in *Verbrugghe*, that §3701 allows one to disregard §3613.

G. Allowance of Multiple Grace Periods would Contradict the Holding in *Lindsey v Harper Hospital*.

In *Lindsey, supra*, the Supreme Court addressed whether, under the statutory provisions in effect at the time, “the statute of limitations saving provision began to run when the probate court issued plaintiff letters of authority as temporary personal representative on September 14, 1990, or when the probate court issued plaintiff letters of authority as personal representative on October 9,

1990.” *Id* at 455 Mich 58-59. As the complaint was filed on October 1, 1992, the Court had to determine which issuance of letters of authority had triggered the saving provision.

The Court looked to the Revised Probate Code for an answer. It found significant the fact that the statute, at former MCL 700.9(3), “specifically defined a personal representative as including, among others, a temporary or successor personal representative, or a person who performs substantially the same functions.” *Id* at 66. The Court found that the statutory amendments were intended to allow “temporary personal representatives to perform essentially the same functions and to bear the same responsibilities as personal representatives.” *Id* at 66. The plaintiff had “full authority to commence and maintain actions on behalf of the estate.” *Id* at 69. Further, plaintiff had exercised her authority to benefit the estate, by issuing notice to creditors and thus limiting their time to present claims.

Given plaintiff’s assumption of such control over the estate, it does not seem unfair to accord her the responsibility to pursue claims on behalf of the estate within two years of her appointment as temporary personal representative. *Id*.

The issue in *Lindsey* is similar to that raised herein, and distinguishable from that considered in *Eggleston*. In *Lindsey*, the Court addressed the claim that a personal representative could have two years from issuance of general letters of authority, although the probate court had previously signed temporary letters. The representative, who had continuously exercised authority as legal representative of the estate, argued that the two-year saving provision should begin anew when her authority was renewed, even though this would result in her having more than two years to commence an action. She claimed that there was no dispute that the date when general letters were provided was a date when “letters of authority are issued” as provided in MCL 600.5852. The Court rejected this argument, noting that, even as temporary representative, the plaintiff had full authority to proceed on behalf of the estate. The Court therefore determined that there was no reason not to

hold her responsible for commencing a claim within that two years. In contrast to *Eggleston*, which dealt with initial appointment of a personal representative whose authority was interrupted, *Lindsey* addressed whether an estate which did have valid representation for a full two years was still entitled to extend the two-year grace period by obtaining reissuance of letters of authority (the issue herein).

H. Successive Two-Year Periods Would Nullify the Two-Year Provision in §5852.

It is a “fundamental rule of construction that every word of a statute should be given meaning and no words should be treated as surplusage or rendered nugatory if at all possible.” *Pittsfield Charter Twp v Washtenaw County*, 468 Mich 702, 714; 664 NW2d 193 (2003). It is “a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning.” *In Re MCI*, 460, Mich 396, 414; 596 NW2d 164 (1999). “The rules governing statutory construction require that every word or phrase of a statute be given its commonly accepted meaning.” *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). It is well settled that, in deciding questions of statutory interpretation, courts are to “discern and give effect to the Legislature’s intent as expressed in the statutory language.” *Cox v Board of Hospital Managers*, 467 Mich 1, 18; 651 NW2d 356 (2002). “Undefined statutory terms must be given their plain and ordinary meanings.” *Id.* Construction of statutory language requires consideration of “both the plain meaning of the critical word or phrase” and “its placement and purpose in the statutory scheme.” *Shinholster v Annapolis Hospital*, 471 Mich 540, 549; 685 NW2d 275 (2004). The “doctrine of *noscitur a sociis*, i.e., that ‘a word or phrase is given meaning by its context or setting,’” is a useful tool, and words or phrases in a statute “must be assigned such meanings as are in harmony with the whole of the statute. . . .” *Id.* at 570.

In light of these principles, the two-year provision in §5852 must be given some meaning. Given that it is contained in an exception to statutes of limitation, it can only be given meaning if

it is seen as defining and limiting that exception. Since it is found in conjunction with the three year limit on the grace period, it can only be given meaning if treated as an additional, shorter limitation within that fixed outside period.

I. Successive Two-Year Periods Would Violate the Purpose of the Saving Provision.

The purpose of a statute of limitation is to determine the time between accrual of a claim and the last possible date to commence an action, in the process limiting the right to redress, rather than destroying a cause of action. *Lambert v Calhoun*, 394 Mich 179; 229 NW2d 332 (1975). Such a statute is, by its very nature, an arbitrary determination as to when a claim may no longer be pursued, and though its application is sometimes harsh, this is essential to the nature of, and purpose for, the statute. *Showers v Robinson*, 43 Mich 502; 5 NW 988 (1880); *Solowy v Oakwood Hospital*, 454 Mich 214; 561 NW2d 843 (1997). Exceptions to a statute of limitation are to be strictly construed. *Tucker, supra; Mair, supra*. A plaintiff seeking an exception by way of a tolling provision has the burden of showing facts sufficient to qualify for tolling. *Dorsey v Kosyonan*, 193 Mich App 711; 484 NW2d 415 (1992); *Hoseney v Zantop*, 17 Mich App 141; 169 NW2d 124 (1969).

The purpose of the saving provision is to provide a reasonable opportunity to pursue an action which survives death. *Lindsey, supra* at 66. That purpose is served by allowing an estate a full two-years in which to commence an action. The Legislature has, by imposing a two year limit, implicitly defined that time frame as an appropriate and thus reasonable opportunity. Allowance of successive grace periods would provide an estate an opportunity beyond that envisioned by the saving provision as written.

J. Successive Two-Year Periods Would Invite Gamesmanship.

Some, including Plaintiff herein, have proposed an interpretation that allows for commencement of a new two-year grace period every time the personal representative is replaced.

They do not limit this rule to cases where circumstances warrant, such as when a personal representative is unable to serve for two years and must be replaced. Rather, an estate would have the option of triggering a new two years any time its representative chooses, simply by appointment of a replacement. Under this approach, the two-year provision could be effectively repealed by a personal representative every time it would have an impact. To be given any real meaning, the two-year grace period must be seen as actually limiting the time during which to bring suit, and actually closing out that opportunity after a personal representative has had two years. The alternative is a limit which can be removed by the limited party at will, which is essentially no limit at all.

The potential for gamesmanship is particularly apparent in the present case. Plaintiff's claimed reason for the decision to become appointed as successor representative is the assertion that the initial representative was too emotionally affected by the process to continue. However, this did not become an issue until after she had served for more than two years and more than a year after she filed the present lawsuit. A successor was appointed, new counsel was retained and, six months after these developments, the attempt to amend and add previously un-named Defendants was made. At no time has Plaintiff ever argued that this was because those claims were newly discovered, or that there was any barrier whatsoever to pursuing the newly named Defendants from the outset. Rather, Plaintiff's sole argument has been that his appointment as a successor, who substituted into the existing action, gives him the right to amend in a manner that would be forbidden if the original representative tried it. It is readily apparent that the substitution of personal representatives (whether for legitimate reasons or not) was subsequently used as a vehicle to pursue claims against new parties although the statute of limitation, and all legitimate exceptions thereto including the saving provision, had run. This manipulation of the system cannot be consistent with the Legislature's authorization of a reasonable opportunity during which an estate might pursue a claim.

CONCLUSION AND REQUEST FOR RELIEF

In *Waltz*, the Supreme Court explained that service of a Notice of Intent does not toll the saving provision contained in MCL 600.5852. Plaintiff failed to timely commence an action. Additionally, Plaintiff cannot rely upon the limited holding in *Eggleston* to allow appointment of a successor or personal representative to save her claim. For the reasons discussed herein, that opinion is distinguishable and does not support a general rule that an estate is entitled to enjoy a two-year period with a valid personal representative without commencing an action, and then trigger a new saving period by appointment of a successor. The Court of Appeals should be affirmed.

Respectfully submitted,

JOHNSON & WYNGAARDEN, P.C.

By _____
Michael L. Van Erp (P44218)
Attorney for Defendant-Appellees

Date: June 8, 2007

I:\DRJ\Mullins\S Ct Appeal\Brief on Appeal