STATE OF MICHIGAN

COURT OF APPEALS

DIONNE WEATHERS-TAYLOR, Personal Representative of the Estate of MELVIN GOODMAN, Deceased, CAROLE GOODMAN, and SHEILA WINFREY,

Plaintiffs-Appellees,

v

RANDY STAPISH, P.A., and BOTSFORD GENERAL HOSPITAL,

Defendants,

and

H. REX RUETTINGER, D.O., and H. REX RUETTINGER, D.O., P.C.,

Defendants-Appellants.

UNPUBLISHED
December 2, 2008

No. 258682
Wayne Circuit Court
LC No. 03-336676-NH

DIONNE WEATHERS-TAYLOR, Personal Representative of the Estate of MELVIN GOODMAN, Deceased,

Plaintiff-Appellee,

v

H. REX RUETTINGER, D.O., and H. REX RUETTINGER, D.O., P.C.,

Defendants-Appellants,

and

BOTSFORD GENERAL HOSPITAL,

Defendant.

No. 265511
Wayne Circuit Court
LC No. 04-438726-NH

DIONNE WEATHERS-TAYLOR, Personal Representative of the Estate of MELVIN GOODMAN, Deceased,

Plaintiff-Appellee,

v

No. 267097
Wayne Circuit Court
LC No. 04-438726-NH

H. REX RUETTINGER, D.O., and H. REX RUETTINGER, D.O., P.C.,

Defendants,

and

BOTSFORD GENERAL HOSPITAL,

Defendant-Appellant.

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

In Docket No. 258682, defendants H. Rex Ruettinger, D.O., and H. Rex Ruettinger, D.O., P.C. (collectively "the Ruettinger defendants"), appeal by right, challenging the trial court's order denying their motion for summary disposition and dismissing the complaint in LC No. 03-336676-NH without prejudice.[1] In Docket Nos. 265511 and 267097, Botsford General Hospital ("Botsford") and the Ruettinger defendants appeal by leave granted from the trial court's orders denying their motions for summary disposition in LC No. 04-438726-NH. We affirm.

The Ruettinger defendants argue in Docket No. 258682 that the trial court erred by dismissing the complaint in LC No. 03-336676-NH without prejudice because it was untimely filed. We disagree. We review for an abuse of discretion a trial court's decision to dismiss a case under MCR 2.504. *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Further, we review de novo a trial court's decision denying summary disposition under MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). In reviewing a motion for summary disposition under subrule (C)(7), we accept the plaintiff's

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[1] Because defendant Randy Stapish is not a party to these appeals, references to "defendants" refer collectively to Botsford General Hospital and the Ruettinger defendants only.

well-pleaded allegations as true and construe them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). In doing so, we consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Id.*

A medical malpractice plaintiff has two years from the date a cause of action accrues in which to file suit. MCL 600.5805(6). A medical malpractice claim generally "accrues at the time of the act or omission that is the basis for the claim of medical malpractice." MCL 600.5838a(1).[2] But in wrongful death actions, the Legislature has afforded plaintiff personal representatives additional time to pursue legal action on behalf of a decedent's estate. The wrongful death saving provision, MCL 600.5852, provides as follows:

> 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.

In *Waltz v Wyse*, 469 Mich 642, 650-651; 677 NW2d 813 (2004), our Supreme Court held that under the clear and unambiguous language of MCL 600.5856, giving notice of intent to sue during the two-year malpractice period of limitation in MCL 600.5805(6) operates to toll this period, but that giving notice does not toll the period in MCL 600.5852, which constitutes a "*saving provision*" that is "an *exception* to the limitation period" and not a period of limitation itself. (Emphasis in original).

The Ruettinger defendants argue that *Waltz* applies to the complaint filed in LC No. 03-336676-NH, so, as such, the action is time barred. Our Supreme Court's recent decision in *Mullins v St Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007) ("*Mullins II*"), controls this issue. In that case, our Supreme Court reversed this Court's special panel decision holding that *Waltz* applies retroactively. See *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006) ("*Mullins I*"), rev'd 480 Mich 948 (2007). In *Mullins II*, our Supreme Court stated:

> [W]e . . . reverse the July 11, 2006, judgment of the Court of Appeals. MCR 7.302(G)(1). We conclude that this Court's decision in *Waltz v Wyse*, 469 Mich 642 (2004), does not apply to any causes of action filed after *Omelenchuk v City of Warren*, 461 Mich 567[; 609 NW2d 177] (2000)[, overruled by *Waltz, supra*], was decided in which the saving period expired, i.e., two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided.

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[2] Although MCL 600.5838a(2) also gives a medical malpractice plaintiff "6 months after the plaintiff discovers or should have discovered the existence of the claim" to file suit, the discovery rule is not at issue in this case.

> All other causes of action are controlled by *Waltz*. In the instant case, because the plaintiff filed this action after *Omelenchuk* was decided and the saving period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided, *Waltz* is not applicable. Accordingly, we remand this case to the Washtenaw Circuit Court for entry of an order denying the defendants' motion for summary disposition and for further proceedings not inconsistent with this order. [*Mullins II*, *supra* at 948.]

Therefore, our Supreme Court provided a timeframe within which *Waltz* does not apply into which the instant case squarely fits.

Omelenchuk was decided on March 28, 2000. Sheila Winfrey and Carol Goodman were appointed co-personal representatives of the decedent's estate on July 31, 2002. Thus, the two-year saving period expired on July 31, 2004, two years after their appointment. MCL 600.5852. In addition, *Waltz* was decided on April 14, 2004. Pursuant to *Mullins II*, because the co-personal representatives "filed this action after *Omelenchuk* was decided and the saving period expired between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided, *Waltz* is not applicable." Thus, the November 4, 2003, complaint was timely filed.

The Ruettinger defendants argue that the trial court erred by measuring the two-year saving period from the date that letters of authority were issued to Winfrey and Goodman as co-personal representatives rather than from the date that Winfrey was appointed the sole initial personal representative. Pursuant to *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), the trial court correctly determined that Winfrey and Goodman had two years from the date of their appointment to file their complaint.

In *Eggleston*, *supra* at 30, our Supreme Court addressed "whether a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute, MCL 600.5852, or whether the two-year period is measured from the appointment of the initial personal representative." This Court held that the latter interpretation prevailed. Our Supreme Court, however, opined that this Court erroneously added the word "the" immediately before "letters of authority" in MCL 600.5852, which provides in part that "an action which survives by law may be commenced . . . within 2 years after letters of authority are issued although the period of limitations has run." Our Supreme Court reasoned:

> The Court [of Appeals] 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. This is not, however, what the statute says. The statute simply provides that an action may be commenced by the personal representative "at any time within 2 years after letters of authority are issued although the period of limitations has run." *Id. 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.*
>
> Plaintiff was "the personal representative" of the estate and filed the complaint "within 2 years after letters of authority [were] issued," and "within 3

> years after the period of limitations ha[d] run." MCL 600.5852. The action was therefore timely. [*Eggleston, supra* at 33 (emphasis added).]

Similarly, in the instant case, Goodman and Winfrey, collectively, were "the personal representative" of the estate and filed their complaint "'within 2 years after letters of authority [were] issued' and 'within 3 years after the period of limitations ha[d] run.'" MCL 600.5852. Accordingly, under MCL 600.5852 as clarified by *Eggleston*, Goodman and Winfrey had two years from their appointment as co-personal representatives to file suit.

This result is consistent with our Supreme Court's decision in *Braverman v Garden City Hosp*, 480 Mich 1159; 746 NW2d 612 (2008) ("*Braverman II*"). In that case, the original personal representative was appointed on October 29, 2002, and the plaintiff, the successor personal representative, was appointed on August 18, 2004. The plaintiff filed a complaint on October 29, 2004, but the action was dismissed because the requisite 182-day waiting period following the notice of intent had not expired. See MCL 600.2912b(1). The plaintiff then filed a second action on January 25, 2005. See *Braverman v Garden City Hosp*, 275 Mich App 705, 708-709; 740 NW2d 744 (2007) ("*Braverman I*"), aff'd 480 Mich 1159 (2008). In holding that the second complaint was timely, our Supreme Court stated, "plaintiff's complaint, filed by the successor personal representative within two years of his appointment, was timely under *Eggleston v BioMedical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003)." *Braverman II, supra* at 1159.

Notwithstanding that *Braverman* involved a second complaint filed after the dismissal of the first complaint, pertinent to LC No. 03-336676-NH, *Braverman* involved a successor personal representative filing a complaint that would have been untimely had the original personal representative filed it. The two-year saving period applicable to the original personal representative would have expired before the representative could have filed a complaint following the expiration of the 182-day waiting period. Thus, as in this case, the appointment of the successor personal representative was the only way in which the estate could have timely filed an action. Nevertheless, our Supreme Court held that the plaintiff's complaint was timely under *Eggleston*. By the same token, the November 4, 2003, complaint that Goodman and Winfrey filed in this case was timely under *Eggleston*. See also, *Estate of Dale v Robinson*, 279 Mich App 676; ___ NW2d ___ (2008).

The Ruettinger defendants argue that this approach is inconsistent with *Lindsey v Harper Hosp*, 455 Mich 56; 564 NW2d 861 (1997). Our Supreme Court addressed this argument in *Braverman II, supra* at 1159 n 1, and stated as follows:

> Defendants argue that *Lindsey v Harper Hosp*, 455 Mich 56 (1997), should apply. However, *Lindsey* relied on the Revised Probate Code, and in particular on then-current MCL 700.179, which indicated that a temporary personal representative who was reappointed personal representative "shall be accountable as though he were the personal representative from the date of appointment as temporary personal representative." *Lindsey, supra* at 66. After *Lindsey* was decided, the Revised Probate Code was repealed and replaced by the Estates and Protected Individuals Code. MCL 700.8102(c). The Estates and Protected Individuals Code does not contain a provision similar to MCL 700.179.

> Therefore, the holding of *Lindsey*, which relied on this statutory provision, no longer controls.

Accordingly, this argument lacks merit. Because the November 4, 2003, complaint was timely filed, the trial court did not err by dismissing the action without prejudice.

The Ruettinger defendants further argue that the complaint in LC No. 03-336676-NH should have been dismissed with prejudice because the co-personal representatives never filed a proper affidavit of merit. We disagree. Although the trial court never addressed the Ruettinger defendants' arguments regarding the validity of the out-of-state affidavit of merit and the absence of an affidavit of merit pertaining to Randy Stapish, this Court may properly consider issues raised but not addressed in the trial court where the lower court record provides the necessary facts. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

In *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007), our Supreme Court followed its holding in *Saffian v Simmons*, 477 Mich 8, 13; 727 NW2d 132 (2007) that an affidavit of merit is presumed valid when filed with a malpractice complaint. The Court held:

> Therefore, a complaint and affidavit of merit toll the period of limitations until the validity of the affidavit is successfully challenged in "subsequent judicial proceedings." Only a successful challenge will cause the affidavit to lose its presumption of validity and cause the period of limitations to resume running.
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> Thus, if the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If that challenge is successful, the proper remedy is dismissal without prejudice. *Scarsella* [*v Pollak*, 461 Mich 547,] 551-552[; 607 NW2d 711 (2000)]. The plaintiff would then have whatever time remains in the period of limitations within which to file a complaint accompanied by a conforming affidavit of merit. [*Kirkaldy*, *supra* at 586.]

If, by analogy, *Kirkaldy* applies to a wrongful death saving period, and assuming that the Ruettinger defendants are correct that no valid affidavit of merit was filed, then dismissal without prejudice would have been the proper remedy. Given that dismissal *without prejudice* would have been proper, the Ruettinger defendants' substantive arguments are moot if *Kirkaldy* applies because the trial court in fact dismissed the action without prejudice. In light of *Waltz*, however, it appears that the filing of a complaint and defective affidavit of merit do not toll the saving period. In *Kirkaldy*, the Court specifically relied on MCL 600.5856(a), which pertains only to statutes of limitation or repose, as recognized in *Waltz*, *supra* at 650. Also as recognized in *Waltz, supra* at 655, MCL 600.5852 is a saving provision and "not a 'statute of limitations' or a 'statute of repose.'" Accordingly, reading *Kirkaldy* and *Waltz* together, the filing of a complaint and affidavit of merit tolls the limitations period until there is a successful challenge to the validity of the affidavit. But their filing does not toll the saving period because the saving provision is not a statute of limitations or repose. Thus, it is reasonable to conclude that dismissal without prejudice would be improper if the Ruettinger defendants' substantive arguments are correct. Consequently, we must examine these arguments.

The Ruettinger defendants contend that the co-personal representatives failed to file a proper affidavit of merit pertaining to Stapish and Dr. H. Rex Ruettinger. "[U]nder MCL 600.2912d(1), a plaintiff is required to file with the complaint an affidavit of merit signed by an expert who the plaintiff's attorney *reasonably believes* meets the requirements of MCL 600.2169." *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004) (emphasis in original). MCL 600.2912d(1) provides, in pertinent part:

> [T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney *reasonably believes meets the requirements for an expert witness under section 2169*. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
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> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [Emphasis added.]

Further, MCL 600.2169 provides in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
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> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, *if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty*. [Emphasis added.]

The Ruettinger defendants argue that because Dr. Ruettinger is board certified in internal medicine, the co-personal representatives were required to file an affidavit of merit signed by a physician similarly board certified in internal medicine.

The trial court properly determined that the co-personal representatives' attorney reasonably believed that Dr. Ruettinger was not board certified in any specialty, but rather, was a general practitioner. Before filing the complaint, counsel consulted the American Medical Association website which identified Dr. Ruettinger as a general practitioner. So, when he prepared the affidavit of merit, counsel consulted reliable, available resources and reasonably concluded that Dr. Ruettinger was a general practice physician. See *Grossman, supra* at 600. Accordingly, the trial court did not err by determining that counsel reasonably believed that the affidavit of merit of Dr. Ronald Surowitz, a general practitioner, complied with MCL 600.2912d and MCL 600.2169, and, the trial court properly denied summary disposition on this basis.

The Ruettinger defendants also argue that the trial court erred by denying summary disposition because the co-personal representatives failed to file an affidavit of merit signed by a physician's assistant, and the claims against these defendants were based on the vicarious liability of Stapish, Dr. Ruettinger's assistant. Under MCL 333.17078(2), "[a] physician's assistant shall conform to minimal standards of acceptable and prevailing practice for the supervising physician." Therefore, the affidavit of merit pertaining to Dr. Ruettinger also set forth the proper standard of care applicable to Stapish.

In addition, the Ruettinger defendants contend that Dr. Surowitz's affidavit of merit was a nullity because it was signed by an out-of-state notary and did not contain a certification of the notary's signature and authority as required under MCL 600.2102(4).[3] Our Supreme Court recently rejected this argument in *Apsey v Mem Hosp*, 477 Mich 120, 123-124, 134; 730 NW2d 695 (2007), and held that the Uniform Recognition of Acknowledgements Act (URAA), MCL 565.261 *et seq.*, "provides an alternative method of authenticating out-of-state affidavits."[4]

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[3] MCL 600.2102(4) provides:

> In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:
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> * * *
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> (4) If such affidavit be taken in any other of the United States or in any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits therein, or before any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. The signature of such notary public or justice of the peace, and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public or justice of the peace, shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court.

[4] MCL 565.262(a) of the URAA provides, in pertinent part:

> (a) "Notarial acts" means acts that the laws of this state authorize notaries
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> (continued…)

Therefore, Dr. Surowitz's affidavit was not required to conform to MCL 600.2102(4), and the contrary argument fails. The trial court did not err by failing to grant summary disposition for the Ruettinger defendants on this basis.

In Docket No. 265511, the Ruettinger defendants argue that the trial court erred by denying their motion for summary disposition under MCR 2.116(C)(6). We disagree. We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(6). *Fast Air, Inc v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999).

Under MCR 2.116(C)(6), a party may move for dismissal of a claim if "[a]nother action has been initiated between the same parties involving the same claim." Subrule (C)(6) "is a codification of the former plea of abatement by prior action." *Fast Air, Inc, supra* at 545. The purpose of the rule is to prevent the endless litigation of matters involving the same questions as those presented in pending litigation and to avoid useless expenditures associated with repeated suits. *Id.* at 545-546. MCR 2.116(C)(6) does not operate, however, "where another suit between the same parties involving the same claims is no longer pending at the time the motion is decided." *Id.* at 545.

In *Fast Air, Inc,* defendant Richard Knight filed an action against the plaintiffs and another party in the Genesee Circuit Court, but the plaintiffs were never served with process. That action was ultimately dismissed, but before the dismissal, the plaintiffs filed suit against the defendants in the Oakland Circuit Court alleging claims related to the same failed business deal that was the subject of the first action. *Id.* at 542-543. The defendants moved to dismiss the second action under MCR 2.116(C)(6). The trial court granted the motion seven months after the Genesee case had been dismissed. *Id.* at 543. This Court held that subrule (C)(6) did not apply because another action between the same parties involving the same claims was not pending at the time that the Oakland Circuit Court decided the subrule (C)(6) motion. *Id.* at 545.

Here, the Ruettinger defendants argue that another action was pending at the time that Weathers-Taylor filed her complaint in LC No. 04-438726-NH because the first action was being appealed to this Court. They rely on *Darin v Haven*, 175 Mich App 144; 437 NW2d 349 (1989), for the proposition that an action being appealed is considered "pending" for purposes of MCR 2.116(C)(6). In that case, the plaintiffs filed an action in federal court that involved both state and federal claims. The court granted summary judgment for the defendants on the federal claims and dismissed the state claims without prejudice. *Id.* at 146-147. The plaintiffs appealed the federal court order and filed their state claims in the Oakland Circuit Court, which dismissed

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(…continued)

> public of this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgments of instruments, and attesting documents. *Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by the following persons* authorized pursuant to the laws and regulations of other governments in addition to any other person authorized by the laws of this state:
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> (i) A notary public authorized to perform notarial acts in the place in which the act is performed. [Emphasis added.]

the claims pursuant to MCR 2.116(C)(6). *Id.* at 147. This Court upheld the dismissal, holding that pendency of an action in an appellate court "abates a second action between the same parties on the same subject matter in the trial court." *Id.* at 151. This Court further held that the state claims were tolled during the appeal. *Id.* at 152.

We note that pursuant to MCR 7.215(J)(1), we are not required to follow the holding in *Darin* because that case was decided before November 1, 1990. In any event, this case is distinguishable from *Darin*. In that case, the plaintiffs appealed the federal court order, and this Court specifically stated that the appeal encompassed both the state and federal claims. *Darin, supra* at 150. Thus, the appellate court could have reversed the dismissal of both the federal and state claims and reinstated the claims. Here, Weathers-Taylor was the party seeking dismissal of her claims in LC No. 03-336676-NH, and she did not appeal the trial court's dismissal of her action. In fact, the issues on appeal in Docket No. 258682 involve whether the trial court properly dismissed the action without prejudice or whether the action should have been dismissed with prejudice because it was filed without a proper affidavit of merit and after the expiration of the saving period and statute of limitations. The Ruettinger defendants do not argue in this Court that the trial court should not have dismissed the action and do not seek to reinstate the estate's claims in LC No. 03-336676-NH. While the trial court could have stayed the second action pending appeal of the first action, we hold that under the limited circumstances of this case, the trial court did not err by denying the Ruettinger defendants' motion for summary disposition under MCR 2.116(C)(6).

Finally, in Docket Nos. 265511 and 267097, Botsford and the Ruettinger defendants argue that Weathers-Taylor's complaint in LC No. 04-438726-NH was untimely. Again, we disagree.

As discussed previously, *Eggleston* specifically holds that MCL 600.5852 permits "the personal representative" of an estate to file an action and does not require that the person filing the action be the *initial* personal representative of the estate. Here, Weathers-Taylor was "the personal representative" of the estate and filed her complaint "'within 2 years after letters of authority [were] issued,' and 'within 3 years after the period of limitations ha[d] run.'" See MCL 600.5852; *Eggleston, supra* at 33. Therefore, the complaint was timely under MCL 600.5852 and *Eggleston*.

This result is consistent with *Braverman, supra*, also discussed previously. In that case, the plaintiff filed a second action after the estate's first action was dismissed. *Braverman I, supra* at 708-709. In holding that the second complaint was timely, our Supreme Court stated, "plaintiff's complaint, filed by the successor personal representative within two years of his appointment, was timely under *Eggleston v BioMedical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003)." *Braverman II, supra* at 1159. A similar result is compelled in the instant case. In addition, we note that res judicata did not bar the second action because "no lawsuit filed prior to [that] case was dismissed with prejudice." See *id.*

Defendants argue that Weathers-Taylor's complaint was untimely under *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), rev'd 480 Mich 978 (2007), but our Supreme Court reversed this Court's decision in *McLean* based on its order in *Mullins II, supra*, providing a window of time within which *Waltz* does not apply. See *McLean v McElhaney*, 480 Mich 978; 741 NW2d 840 (2007). Moreover, this Court in *McLean* did not apply *Eggleston* or

the language of MCL 600.5852 in reaching its decision. This Court acknowledged as much in *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc*, 270 Mich App 383; 715 NW2d 72 (2006), vacated 481 Mich 874 (2008). In that case, this Court rejected the analysis in *McLean* stating that "because *McLean* did not apply *Eggleston*, we find that *McLean* provides us no useful guidance." *Id.* at 389. Accordingly, pursuant to MCL 600.5852 and case law interpreting that provision, Weathers-Taylor's complaint in LC No. 04-438726-NH was timely filed.

In *Verbrugghe*, the personal representative of the deceased's estate filed an action in circuit court that was ultimately dismissed because the statute of limitations had expired. *Verbrugghe, supra* at 384-385. The plaintiff, the successor personal representative, then filed a second action in the circuit court, which was also dismissed based on the statute of limitations. *Id.* at 385. The plaintiff then appealed the dismissal of the second action to this Court which held that the "plaintiff's complaint was filed in strict compliance with MCL 600.5852" and was thus timely. *Id.* at 390. Our Supreme Court vacated this Court's decision, stating:

> By order of October 17, 2007, the application for leave to appeal the March 23, 2006 judgment of the Court of Appeals was held in abeyance pending the decision in *Braverman v Garden City Hospital* (Docket Nos. 134445-134446). On order of the Court, the case having been decided on April 9, 2008, 480 Mich 1159, 746 NW2d 612 (2008), the application is again considered, and in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Washington v Sinai Hospital of Greater Detroit*, 478 Mich 412, 733 NW2d 755 (2007), and *Braverman, supra.* [*Verbrugghe, supra*, 481 Mich 874.]

We conclude that regardless of this Court's decision in *Verbrugghe* on remand, the instant case was timely filed. *Washington* addressed whether a "successor personal representative of a decedent's estate is barred from filing a subsequent complaint by the doctrine of res judicata when the initial personal representative filed a complaint that was involuntarily dismissed." *Washington, supra* at 414. Unlike *Washington*, the first action in this case was *voluntarily* dismissed without prejudice as was the first complaint in *Braverman*. See *Braverman II, supra* at 1159. Therefore, our conclusion that this case was timely filed is consistent with *Braverman*.

We affirm.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot