STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

ESTATE OF JERRITH WALTZ, Deceased, by Collene E. Waltz as Personal Representative,

Plaintiff-Appellant,

v

CAROL WYSE, D.O. and HILLS & DALES COMMUNITY GENERAL HOSPITAL, individually and severally,

Defendants-Appellees

Supreme Court No. 122580

COA No. 231324

Tuscola Cir Ct Case No.: 99-17990-NH

DEFENDANT-APPELLEES' RESPONSE TO PLAINTIFF-APPELLANT'S BRIEF ON APPEAL TO THE MICHIGAN SUPREME COURT

** ORAL ARGUMENT REQUESTED**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

COUNTER-JURISDICTIONAL STATEMENT 1

COUNTER - STATEMENT OF QUESTIONS PRESENTED 3

COUNTER - STATEMENT OF FACTS 4

STANDARD OF REVIEW 7

COUNTER CHRONOLOGY OF SIGNIFICANT EVENTS 8

COUNTER-LEGAL ARGUMENTS 9

I. THE PROVISIONS OF MCL 600.5856; MSA 27A.5856 TOLL THE STATUTE OF LIMITATIONS DURING THE PRE-SUIT NOTICE PERIOD IF THE STATUTE OF LIMITATIONS WOULD OTHERWISE EXPIRE DURING THE NOTICE PERIOD. 9

A. THE WRONGFUL DEATH SAVINGS PROVISION IS NOT TOLLED BY MCL 600.5856(d); MSA 27A.5856(d). 11

II. A PERSONAL REPRESENTATIVE OF AN ESTATE HAS THE AUTHORITY TO COMMENCE A MEDICAL MALPRACTICE ACTION ON BEHALF OF A DECEDENT AND GIVE THE REQUISITE PRE-SUIT NOTICE PURSUANT TO MCL 600.2912B; MSA 27A.2912B 18

A. An Individual Other than a Personal Representative Cannot Serve a Valid Notice of Intent 18

B. The Later Appointment of a Personal Representative Does Not Act to Toll the Statute of Limitations 22

C. A Deficient Notice of Intent Does Not Toll the Statute of Limitations 24

D. A Defective Affidavit of Merit Does Not Toll the Statute 25

III. PLAINTIFF'S COMPLAINT FAILED TO STATE A CAUSE OF ACTION AND AMENDMENT WOULD BE FUTILE 26

A. Plaintiff's Complaint Failed to State a Cause of Action. 26

B. Amendment Would be Futile Where the Statute of Limitations Expired 28

CONCLUSION AND RELIEF REQUESTED 30

INDEX OF AUTHORITIES

Cases

Chase v Sabin, 445 Mich 190, 199; 516 NW2d 60 (1994) 13
Chernoff v Sinai, unpublished opinion per curiam of the Court of Appeals, decided March 22, 2002 (Docket No. 228014) 16, 17, 21
Dacon v Transue, 441 Mich 315, 328; 490 NW2d 369 (1992) 27, 28
Doyle v Hutzel Hospital, 241 Mich App 206, 212; 615 NW2d 759 (2000) 28
Gardner v Van Buren Public Schools, 445 Mich 23, 44; 517 NW2d 1 (1994) 20
Hakari v Ski Brule Inc, 230 Mich App 352, 355; 584 NW2d 343 (1998) 28
Jenks v Brown, 219 Mich App 415, 420; 557 NW2d 114 (1996) 29
Kalakay v Farmers Insurance Group, 120 Mich App 623, 628; 327 NW2d 537 (1983) 23
Lindsey v Harper Hospital, 455 Mich 56, 66; 564 NW2d 861 (1997) 12
Lipman v Wm. Beaumont Hospital, 256 Mich. App. 483, -- N.W. 2d --, released for publication July 1, 2002 ..... 2, 9, 12
Mair v Consumers Power, 419 Mich 74, 80; 348 NW2d 256 (1984) 13
McNeil v Quines, 195 Mich App 199, 203, fn4; 489 NW2d 180 (1992) 12
Miller v Mercy Memorial Hospital, 466 Mich 196, 202; 644 NW2d 730 (2002) 2, 7, 12
Neal v Oakwood Hospital, 226 Mich App 701; 575 NW2d 68 (1997) 21, 24
Olemenchuk v City of Warren, 461 Mich. 567, 609 N.W. 2d 177 (2000) 11, 15
O'Toole v Fortino, 97 Mich App 797, 803; 295 NW2d 867 (1980), *lv app den*, 410 Mich 863 (1980) 28
Poffenbarger v Kaplan, 224 Mich App 1, 9; 568 NW2d 131 (1997) 13, 14
Powers Estate v City of Troy, 4 Mich App 572, 577; 145 NW2d 418; *aff'd* 380 Mich 160; 156 NW2d 530 (1967) 18
Rheaume v Vandenberg, 232 Mich App 417; 591 NW2d 331 (1999) 10, 24
Saltmarsh v Burnard, 151 Mich App 476; 391 NW2d 382 (1986) 22
Scarsella v Pollack, 461 Mich 547; 607 NW2d 711 (2000) 26
Simonelli v Cassidy, 336 Mich 635 59 NW 2d 28 (1953) 27
Smith v Henry Ford Hospital, 219 Mich App 555, 557; 557 NW2d 154 (1997) 20
Toth v Goree, 65 Mich App 296, 299; 237 NW2d 297 (1975) 19
Waltz v Wyse, No. 2131324 Slip op. at 1, Court of Appeals, October 1, 2002 ..... 1, 6
Warren v Howlett, 148 Mich App 417, 423; 383 NW2d 636 (1980) 19, 22
Welniak v Alcantara, 100 Mich App 714, 716; 300 NW2d 323 (1980) 28
Wischmeyer v Schanz, 449 Mich 469, 484; 536 NW2d 760 (1995) 11
Witherspoon v Guilford, 203 Mich App 240, 246-47; 511 NW2d 720 (1994) 13

Statutes

MCL 600.2912b; MSA 27A.2912b 3, 5, 18, 24
MCL 600.2912d; MSA 27A.2912d 5, 25
MCL 600.2912f; MSA 27A.2912f 20
MCL 600.2921; MSA 27A.2921 28

MCL 600.2921(b); MSA 27A2921(b) 20
MCL 600.2922; MSA 27A.2922 ..... 18, 19
MCL 600.5805; MSA 27A.5805 ..... 8, 11, 14, 17
MCL 600.5838a(1); MSA 27A.5838a(1) 8, 11
MCL 600.5852; MSA 27A.5852 ..... 1, 8, 9, 11, 12, 14, 15, 16, 17
MCL 600.5856 2
MCL 600.5856 (d); MSA 27A.5856(4) 17
MCL 600.5856; MSA 27A.5856 ..... 1, 3, 6, 7, 9
MCL 600.5856d; MSA 27A.5856d 8, 9, 11, 13, 17, 24
MCL 600.5882; MSA 27A.5852 7
MCL 700.3103 19
MCR 2.111(B) 3, 27
MCR 2.116(C)(7) 6, 8, 30
MCR 2.116(C)(8) 3, 6, 28, 30
MCR 7.302 1

COUNTER-JURISDICTIONAL STATEMENT

Defendant-Appellees Carol Wyse, D.O. and Hills & Dales General Hospital acknowledge that Plaintiff-Appellant Collene Waltz filed an Application for Leave to Appeal the October 1, 2002, unpublished decision of the Michigan Court of Appeals and that the Application for Leave to Appeal was granted April 22, 2003, *(Plaintiff-Appellant's Appendix at p.76a),* thereby granting this Court jurisdiction over the Appeal pursuant to MCR 7.302. This Brief is being filed on behalf of both Dr. Wyse and Hills & Dales Community General Hospital, as the issues are the same, although the Defendants were represented separately below.

This case involves the intersection of the wrongful death savings provision, MCL 600.5852; MSA 27A.5852[1], and the medical malpractice Notice of Intent tolling provision, MCL 600.5856; MSA 27A.5856[2]. The crux of Plaintiff-Appellant's argument is that the tolling provision should act to extend the Wrongful Death statute's *savings* provision as opposed to the *statute of limitations* period. As the Court of Appeals correctly noted in upholding this dismissal, "we need look no further than the language of the tolling statute to resolve this issue." (Waltz v Wyse, No. 231324, slip op. at 1, Michigan Court of Appeals,

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[1] This statute provides as follows:

> If a person dies before or within 30 days after the period of limitation has run, the personal representative may file an action that survives by law within 2 years after letters of authority are issued, even though the period of limitation has run. However, **an action under this provision must be brought within 3 years after the period of limitation has run**.

[2] This statute provides as follows:

> The statutes of limitations or repose are tolled:
>
> (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 the 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.

October 1, 2002, *See Plaintiff-Appellant's Appendix at p.73a*). MCL 600.5856 clearly indicates that tolling applies only if "a claim would be barred by the statute of limitations…". The wrongful death statute is a savings provision, not a statute of limitations period. Therefore, this Appeal primarily involves questions of statutory interpretation and case law interpretation that have been correctly decided by both the trial court and the Court of Appeals.

This Court has recently and unequivocally ruled that:

Section 5852 is a saving statute, not a statute of limitations.

Miller v Mercy Memorial Hospital, 466 Mich 196, 202; 644 NW2d 730 (2002). This principle was very recently confirmed by the Court of Appeals in Lipman v Wm. Beaumont Hospital, 256 Mich. App. 483, -- N.W. 2d --, released for publication July 1, 2002. *(Defendant-Appellees' Appendix, p.1b)*. Because the Court of Appeals correctly decided the issues involved in this appeal, Defendant-Appellees request that this Court DENY Plaintiff-Appellant's request to reverse the Order of the Court of Appeals and instead enter an order affirming the Court of Appeals' ruling upholding dismissal.

COUNTER - STATEMENT OF QUESTIONS PRESENTED

I. THE PROVISIONS OF MCL 600.5856; MSA 27A.5856 TOLL THE STATUTE OF LIMITATIONS DURING THE PRE-SUIT NOTICE PERIOD IF THE STATUTE OF LIMITATIONS WOULD OTHERWISE EXPIRE DURING THE NOTICE PERIOD.

SHOULD THE TOLLING PROVISION BE EXPANDED BY JUDICIAL INTERPRETATION TO TOLL NOT ONLY THE STATUTE OF LIMITATIONS BUT THE WRONGFUL DEATH SAVINGS PROVISION AS WELL?

The trial court answered: "No."
The Court of Appeals answered: "No."
Defendant-Appellees answer: "No."
Plaintiff-Appellant answers: "Yes."

II. A PERSONAL REPRESENTATIVE OF AN ESTATE HAS THE AUTHORITY TO COMMENCE A MEDICAL MALPRACTICE ACTION ON BEHALF OF A DECEDENT AND GIVE THE REQUISITE PRE-SUIT NOTICE PURSUANT TO MCL 600.2912b; MSA 27A.2912b.

DOES AN INDIVIDUAL OTHER THAN THE PERSONAL REPRESENTATIVE HAVE THE AUTHORITY TO GIVE PRE-SUIT NOTICE?

The trial court answered: "No."
The Court of Appeals did not reach or answer this question.
Defendant-Appellees answer: "No."
Plaintiff-Appellant answers: "Yes."

III. MCR 2.111(B) REQUIRES A PLAINTIFF TO PLEAD ALL ELEMENTS OF HER CLAIM WITH SUFFICIENT SPECIFICITY TO REASONABLY INFORM DEFENDANTS OF THE NATURE OF THE CLAIMS THE ADVERSE PARTY IS CALLED UPON TO DEFEND.

IS A COMPLAINT THAT DOES NOT SET FORTH THE ELEMENTS OF PLAINTIFF'S CLAIM WITH REASONABLE SPECIFICITY VALID UNDER MCR 2.116(C)(8)?

The trial court answered: "No."
The Court of Appeals did reach or not answer this question.
Defendant-Appellees answer: "No."
Plaintiff-Appellant answers: "Yes."

COUNTER - STATEMENT OF FACTS

This case arises out of the death of four- month-old Jerrith Waltz on April 18, 1994. Plaintiff-Appellant Collene Waltz, his mother and now Personal Representative of his Estate, took him to the emergency room at Defendant-Appellee Hills & Dales Community General Hospital ("the Hospital") the night before his death. Although he had been seriously ill for about half of his short life, Plaintiff-Appellant's Complaint is essentially silent as to the cause of death. It is equally silent as to what Defendant –Appellees allegedly did wrong in treating him or how it contributed to his death.

According to the Complaint, Dr. Wyse had evaluated Jerrith on a weekly basis between February 1994, and April 1994, for "vomiting, diarrhea, pneumonia, and problems leading to dehydration and inability to eat." *(Complaint ¶10, Plaintiff-Appellant's Appendix, p. 23a).* He was also taken to the University of Michigan for testing on March 13 and to the emergency room of the Hospital on March 30 and April 13. *(Complaint ¶11, 14-15, Plaintiff-Appellant's Appendix, p. 23a).* On April 14, 1994, Plaintiff called Dr. Wyse's office and was instructed not to bring Jerrith to her office, but to take him to the University of Michigan. *(Complaint ¶16, Plaintiff-Appellant's Appendix, p. 23a.).*

On April 17, 1994, Plaintiff-Appellant, who allegedly was unable to get an earlier appointment with the University of Michigan, brought Jerrith back to the emergency room at the Hospital. *(Complaint ¶17-18, Plaintiff-Appellant's Appendix, p. 23a).* Jerrith Waltz died the next morning, April 18, 1994. *(Complaint ¶18, Plaintiff-Appellant's Appendix, p. 23a).* The Complaint does not state a cause of death. The autopsy report, performed at Huron Memorial Hospital in Bad Axe, MI, lists the cause of death as "sudden infant death, cause unknown."

Four-and-a-half-years later, on January 16, 1999, Hills & Dales Community General Hospital received a Notice of Intent pertaining to Jerrith's death. *(Plaintiff-Appellant's Appendix, p. 9a).* Dr. Wyse received essentially the same Notice on January 19, 1999. *(Plaintiff-Appellant's Appendix, p. 17a).* ***Significantly, no one had been appointed personal representative of the Estate, and no one had the authority to serve such notices on behalf of Jerrith Waltz.*** Furthermore, the Notices, as more fully discussed in Section II(C), below, did not comply with the statutory requirements of MCL 600.2912b; MSA 27A.2912b. They were simply sent under the name of an attorney who had no authority whatsoever to send a Notice of Intent on behalf of a deceased infant, when no personal representative for his Estate had been named. (The wrongful death statute makes clear that the personal representative is the person with the authority to commence an action, not an attorney acting unilaterally on their own, despite whatever "understanding' they may have had with the deceased child's relatives.)

On May 27, 1999, Collene Waltz was finally appointed Personal Representative of the Estate of Jerrith Waltz, after the Notices of Intent had been invalidly filed. *(Defendant-Appellees' Appendix, p.5b).* A Complaint followed on June 23, 1999. *(Plaintiff-Appellant's Appendix, p.22a).* The Complaint, like the Notices of Intent, lacked sufficient specificity to comply with MCR 2.111(B), and failed to set forth the requisite elements of a medical negligence action. *(Plaintiff-Appellant's Appendix, p. 22a and Section III, below).* Accompanying the Complaint were two documents purporting to be Affidavits of Merit. *(Plaintiff-Appellant's Appendix, p. 33a).* The Affidavits, however, failed to set forth the sufficient factual information as required by MCL 600.2912d; MSA 27A.2912d.

Therefore, because (1) the statute of limitations and wrongful death savings period expired on April 18, 1999, prior to the date the Complaint was filed, and (2) the Complaint failed to state a valid cause of action, Defendant-Appellees filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8). The trial court agreed with the Defendant-Appellee's arguments and dismissed the case on November 29, 1999. *(Plaintiff-Appellant's Appendix, p. 71a).* Plaintiff-Appellant appealed to the Michigan Court of Appeals.

On October 1, 2002, in an unpublished decision, (Waltz v Wyse, No. 231324, slip op. at 1, Michigan Court of Appeals, October 1, 2002, *See Plaintiff-Appellant's Appendix at p.73a),* the Court of Appeals correctly concluded that Plaintiff-Appellant had failed to file this Complaint within the applicable statute of limitations, and failed to file the Complaint within the grace period allowed by the wrongful death savings provision. **Because the tolling provision found in MCL 600.5856; MSA 27A.5856 does not, by its clear-cut terms, apply to extend a "savings" provision, this Complaint was not timely filed and the dismissal was upheld.** *(Plaintiff-Appellant's Appendix, p. 73a).*

STANDARD OF REVIEW

The Court of Appeals affirmed the trial court's decision based on its interpretation of MCL 600.5882; MSA 27A.5852 and MCL 600.5856; MSA 27A.5856 as well as the applicable caselaw. This Court reviews questions of statutory interpretation *de novo*. Miller v Mercy Memorial Hospital, 466 Mich 196, 201; 644 NW2d 730 (2002). Defendant-Appellees accept the standard of review as set forth in Plaintiff- Appellant's Brief on Appeal to the Michigan Supreme Court.

COUNTER CHRONOLOGY OF SIGNIFICANT EVENTS

- **April 18, 1994** – Jerrith Waltz dies. Last possible date for claim to accrue. MCL 600.5838a(1); MSA 27A.5838a(1).

- **April 18, 1996** – Medical malpractice statute of limitations expires. MCL 600.5805; MSA 27A.5805. Plaintiff has taken no action on the claim. Three- year savings provision for wrongful death actions begins running, during which the **personal representative** can commence an action. MCL 600.5852; MSA 27A.5852.

- **January 16, 1999** – Notice of Intent (not authored by a person with authority to do so) is served on Hills & Dales Community General Hospital. No tolling is granted as the Notice of Intent was not sent by the personal representative of the Estate, as none had been named and the tolling provisions of MCL 600.5856(d); MSA 27A 58569(d) do not apply to this "savings" grace period.

- **January 19, 1999** – Notice of Intent (not authored by a person with authority to do so) is served on Carol Wyse, D.O. No tolling is granted as the Notice of Intent was not sent by the personal representative of the Estate, as none as been named and the tolling provisions of MCL 600.5856(d); MSA 27A 58569(d) do not apply to this "savings" grace period.

- **April 18, 1999** – Three-year savings provision for wrongful death actions expires. MCL 600.5852; MSA 27A.5852. No personal representative has ever been appointed during the five-year period since the death of Jerrith Waltz.

- **May 27, 1999** – Personal Representative is finally appointed, after the expiration of both the statute of limitations and the wrongful death savings provision, without a valid Complaint being filed.

- **June 23, 1999** – The Complaint is filed after the expiration of both the statute of limitations and the wrongful death savings provision mandating dismissal pursuant to MCR 2.116(C)(7).

COUNTER-LEGAL ARGUMENTS

I. THE PROVISIONS OF MCL 600.5856; MSA 27A.5856 TOLL THE STATUTE OF LIMITATIONS DURING THE PRE-SUIT NOTICE PERIOD IF THE STATUTE OF LIMITATIONS WOULD OTHERWISE EXPIRE DURING THE NOTICE PERIOD.

The central issue in this case is whether the tolling provision of MCL 600.5856 (d); MSA 27A.5856(4) acts to extend the three year wrongful death savings provision found in MCL 600.5852; MSA 27A.5852. If it does not, Plaintiff-Appellant's action was not timely filed, and the trial court appropriately dismissed her Complaint. The additional reasons for dismissal set forth by the Defendant-Appellees were not reached by the Court of Appeals but will be addressed here for completeness and for additional support for the dismissal by both the trial court and the Court of Appeals.

In support of the trial court and Court of Appeals' decisions, Defendant-Appellees argue first that the wrongful death savings provision is a statutorily created grace period, distinct from the statute of limitations. Nothing in the clear language of the Notice of Intent tolling provision or the wrongful death statute gives any authority to the proposition that the 182- day Notice of Intent tolling period applies to the wrongful death savings provision.

In enacting MCL 600.5856(d); MSA 27A.5856(d), the Legislature provided a mechanism to toll the medical malpractice statute of limitations under limited circumstances. It did *not* provide a mechanism to extend the wrongful death savings provision, and such an extension should not be created judicially. The fact that the wrongful death provision is a savings provision, not a tolling provision, was recently addressed by the Court of Appeals in the case of Lipman v Wm. Beaumont Hospital, 256 Mich. App. 483, -- N.W. 2d --, released for publication July 1, 2002. *(Defendant-Appellees' Appendix, p1b).*

This case addressed that the savings provision allows actions to be commenced by the Personal Representative of an Estate, within the statutory savings period:

> First, Sec. 5852 states that actions may be brought by the Personal Representative of the Estate within the time frames specified "although the period of limitations has run." Thus, the plain language of the statute states its purpose is to "save" or "preserve" a cause of action that survives the decedent when the cause of action would otherwise be lost because the period of limitations expired before the personal representative filed the action on behalf of the estate. Lipman, supra.

Nowhere in the language of the statutes or any case law is there any indication that the 182-day Notice of Intent tolling period should be extended to the "savings" provision of the wrongful death statute. In fact, the clear language is quite to the contrary.

In the alternative, Defendant-Appellees advanced three theories under which the statute of limitations expired prior to the time Plaintiff-Appellant filed her Complaint. First, at the time the Notices of Intent were served, Plaintiff-Appellant had not been appointed Personal Representative. She therefore lacked the authority to serve the Notices, rendering them ineffective to toll the statute of limitations. Nowhere in the law is an attorney granted authority to unilaterally act in any legal manner on behalf of a deceased child, when no Estate has been opened or a personal representative named.

Second, the Notices themselves were deficient. Under the authority of Rheaume v Vandenberg, 232 Mich App 417; 591 NW2d 331 (1999), a deficient Notice of Intent does not toll the statute of limitations. Finally, the Affidavits of Merit filed with the Complaint did not comply with the applicable statute and did not toll the statute of limitations. For these additional reasons, the wrongful death savings provision expired on April 18, 1999, ***more than two months*** before the Complaint was filed in this case.

Plaintiff-Appellant's Complaint was also correctly dismissed pursuant to MCR 2.116(C)(8) for failure to state a valid cause of action. Plaintiff-Appellant's Complaint fails to set forth with specificity the standard of care, the actions required by the standard of care, and the manner in which the standard of care proximately caused Jerrith Waltz' death. Each is a required element in a claim premised on alleged medical negligence. Wischmeyer v Schanz, 449 Mich 469, 484; 536 NW2d 760 (1995). Given that the statute of limitations has expired, it would be futile for Plaintiff-Appellant to file a First Amended Complaint to correct her pleading deficiencies, and the trial court appropriately dismissed the Complaint.

A. THE WRONGFUL DEATH SAVINGS PROVISION IS NOT TOLLED BY MCL 600.5856(d); MSA 27A.5856(d).

The instant action is premised on alleged medical malpractice. Generally, a plaintiff has two years after the date of the "act or omission that is the basis for the claim" in which to file suit. MCL 600.5805; MSA 27A.5805; MCL 600.5838a(1); MSA 27A.5838a(1). In this case, the last possible date for Plaintiff-Appellant's claim to have accrued is April 18, 1994, which also happened to be the date of Jerrith Waltz' death. Under the general two-year medical malpractice statute of limitations, this claim would then be time barred as of April 18, 1996, unless a valid Notice of Intent sent by the Personal Representative of the Estate was sent timely. This was not the case in this instance and therefore, Olemenchuk v City of Warren, 461 Mich. 567, 609 N.W. 2d 177 (2000), has no application. That case, heavily relied on by Plaintiff-Appellant, has no application to the wrongful death savings provision in the context of this case.

Because this is a death case, the savings provision found in MCL 600.5852; MSA 27A.5852 can be applicable under certain circumstances. This statute provides as follows:

> If a person dies before or within 30 days after the period of limitation has run, the **personal representative** may file an action that survives by law within 2 years after letters of authority are issued, even though the period of limitation has run. However, **an action under this provision must be brought within 3 years after the period of limitation has run**. *(Emphasis added.)*

This statute, known as the "wrongful death savings provision" operates as a grace period for wrongful death plaintiffs *after* the statute of limitations has expired. As the Court explained in Lindsey v Harper Hospital, 455 Mich 56, 66; 564 NW2d 861 (1997),

> ...the statute of limitations savings provision, MCL 600.5852; MSA 27A.5852, 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. (*Emphasis added.*)

This grace period is distinct from the underlying statute of limitations. Lipman v Wm. Beaumont Hospital, 256 Mich. App. 483, -- N.W. 2d --, released for publication July 1, 2002. As well, the Court of Appeals cogently described the distinction in McNeil v Quines, 195 Mich App 199, 203, fn4; 489 NW2d 180 (1992):

> **We understand the three-year period referred to in MCL 600.5852; MSA 27A.5852 to be a limitation of the two-year extension allowed by the statute in cases where an executor or administrator is not appointed until more than three years after a statutory period of limitation has run.**

Furthermore, in Miller v Mercy Memorial Hospital, 446 Mich 196, 202; 644 NW2d 730 (2002), this Court unequivocally stated that:

> Section 5852 is a saving statute, **not a statute of limitations**.

In this case, letters of authority establishing a Personal Representative of the Estate were not issued until May 27, 1999 – more than three years after the statutory period of limitations expired and after the maximum period of five- and- one half years allowed by the medical malpractice statute of limitations, including the 182-day tolling applicable to the statute of limitations only, under certain circumstances described above and below.

When this Complaint was filed, June 23, 1999, the entire period in which Plaintiff-Appellant could possibly timely file suit had expired, and Plaintiff-Appellant's Complaint – invalidly started by an unqualified person was simply time barred.

There is yet another statute, which comes into play in deciphering the applicable time, frame in this case. Plaintiff-Appellant argues that she is entitled to the benefit of the tolling provision found in MCL 600.5856(d); MSA 27A.5856(d), which reads as follows:

> The statutes of limitations or repose are tolled:
>
> (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 the 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.

Plaintiff-Appellant suggests that the Notices of Intent that were served on January 16 and January 19, 1999, after the expiration of the statute of limitations, entitled her to the benefit of this tolling provision. Such is not the case.

"The primary purpose of courts in interpreting statutes is to discover and give effect to the intent of the legislature." Witherspoon v Guilford, 203 Mich App 240, 246-47; 511 NW2d 720 (1994). "Statutes of limitation will be construed to advance the policy that they are designed to promote." Poffenbarger v Kaplan, 224 Mich App 1, 9; 568 NW2d 131 (1997), *overruled in part on other grounds,* 446 Mich 196 (2002).

> Statutes of limitation are grounded in important public policies such as providing plaintiffs with a reasonable opportunity to bring lawsuits, providing defendants with a fair opportunity to defend against them, preventing the court system from being overburdened with stale claims, and protecting potential defendants from prolonged fear of litigation. Chase v Sabin, 445 Mich 190, 199; 516 NW2d 60 (1994).

A tolling period, as an exception to a statute of limitations, is to be strictly construed. Mair v Consumers Power, 419 Mich 74, 80; 348 NW2d 256 (1984). Likewise,

> [t]he wrongful death savings provision is an exception to the general statute of limitations for medical malpractice and, as such, should be construed strictly. Poffenbarger, 224 Mich App at 10.

To determine the resolution of this question, one need look no further than the language of the tolling provision. It provides that tolling is available "if, during the applicable notice period under section 2912b, a claim would be barred by the ***statute of limitations***..." The statute does not allow for tolling the *grace period* granted by MCL 600.5852; MSA 27A.5852, because this three year extension is not a part of the statute of limitations. In fact, it is not even mentioned in the section of the Michigan Compiled Laws which provides the period of limitations, namely MCL 600.5805; MSA 27A.5805.

Statutes and precedential opinions that refer to the three-year extension are unequivocal on this point, and they clearly distinguish between the two-year statute of limitations and the three-year grace period provided by the wrongful death savings provision. *See, e.g.,* MCL 600.5852; MSA 27A.5852; Poffenbarger, *supra.*

For instance, in Poffenbarger, the court was careful not to confuse the three year extension period with the statute of limitations as it explained the theory under which the plaintiff in that case might have argued for the longest period of limitations, writing:

> [plaintiff] might have utilized the wrongful death savings provision, MCL 600.5852; MSA 27A.5852, and commenced her lawsuit within two years after being appointed personal representative **as long as the suit was commenced within three years after the expiration of the two-year malpractice period of limitations**. 224 Mich App at 11 (Emphasis added).

Furthermore, the wrongful death savings provision itself states "...an action shall not be brought under this provision unless the personal representative commences it within three years **after the statute of limitations has run**." (Emphasis added). Both the statute and the Court's opinion maintain the distinction between the two year period of limitations and the

three year extension – but for that distinction, there would simply be a five-year plus statute of limitations in malpractice/death cases, which is simply not the case.

Plaintiff-Appellant argues that the Court's analysis in Omelenchuk v City of Warren, 461 Mich 567; 607 NW2d 177 (2000) supports her position that the grace period is tolled during the applicable notice period. This is simply a misunderstanding of Defendants' argument and that case in particular, in conjunction with the clear language of the applicable statutes and the facts of this case.

In Omelenchuk, the plaintiffs acted diligently, comported with applicable law and were appointed Personal Representatives of the Estate before serving notice of intent to file a lawsuit. The valid notice was served *within* the period of limitations set forth in MCL 600.5852; MSA 27A.5852, which generally allows suit to be filed within two years of the appointment of the personal representative. (Recall that in this case a personal representative had never been named until after the expiration of the statute of limitations and the savings period.) In Omelenchuk, because the notice was filed prior to the expiration of the statute of limitations, and because the tolling provision otherwise applied, plaintiffs received the benefit of tolling. The Omelenchuk court did not address the instant situation where a Plaintiff waits until after the expiration of the statute of limitations before filing a Notice of Intent, and an invalid Notice of Intent at that, and then also seeks an extension of the three-year savings/grace period. Clearly, this Plaintiff-Appellant cannot rely on the statute of limitations and the 182-day Notice of Intent tolling period that allows suit to be filed within two years after the Personal Representative is appointed, for one, ***because Plaintiff-Appellant had not been appointed Personal Representative at the time the Notices were served.***

Plaintiff-Appellant also relies on Chernoff v Sinai, unpublished opinion per curiam of the Court of Appeals, decided March 22, 2002 (Docket No. 228014) in support of her position in this matter. *(Plaintiff-Appellant's Appendix, p.83a).* Chernoff, however does not further Plaintiff-Appellant's case. Plaintiff-Appellant first argues that the Court's analysis in Chernoff supports her position that the three-year grace period provided for in MCL 600.5852 is tolled during the applicable notice period. It does not.

To understand this issue, it must first be understood that MCL 600.5852 contains two separate provisions regarding the permissible timeframe in which to file a Wrongful Death action. First, the statute allows an action to be filed within 2 years after the letters of authority are issued, even though the statute of limitations has run. This is the provision which this Court relied upon in Chernoff and has no application to this case as letters of authority were not granted until after the expiration of any possible analysis of timeliness. In Chernoff, the Notice of Intent was served *within* two years after the letters of authority were issued. The difficulty in Chernoff was that the Estate had been closed prior to the time the Notice of Intent was served, and the Court was called upon to determine whether, through application of the relation back doctrine, the Notice was valid.

In the instant case, there can be no credible dispute that Plaintiff-Appellant is not relying on the provision of MCL 600.5852 which permits a Complaint to be filed within 2 years after the letters of authority are issued, ***because Plaintiff-Appellant had not been appointed Personal Representative at the time the Notice was served.*** Rather, this Plaintiff-Appellant is seeking an extension of the second provision of MCL 600.5852, which is a substantive limitation requiring any action to be filed not more than three years following the expiration of the underlying statute of limitations. The Chernoff court did not address this

issue, because in Chernoff, the Notice period expired *before* the three- year grace period. In other words, the Chernoff Plaintiffs were not seeking to apply the tolling provision of MCL 600.5852 to the three- year grace period. Because it was not an issue, the Chernoff panel did not address the situation that confronts the Court in this case. Indeed, the Court emphasized this when it stated:

> The underlying reason behind the motion for summary disposition was plaintiff's untimely reappointment as personal representative, not her failure to file her claim within the statutory period. (Slip Op at 4).

In the instant case, Defendant-Appellees *do* contend that the statute of limitations had expired at the time Plaintiff-Appellant was appointed personal representative, and at the time the Complaint was filed.

The two year statute of limitations in issue here is created by MCL 600.5805; MSA 27A.5805. This period may be tolled by MCL 600.5856d; MSA 27A.5856d, and is specifically mentioned in the statute. However, the three-year period referred to in MCL 600.5852; MSA 27A.5852 is a grace period not an additional statute of limitations. The three-year extension is a savings of the statute of limitations, and may not be tolled by a Notice of Intent, as there is absolutely nothing in the language of the statutes that would allow this. In fact, the statutes read quite to the contrary. MCL 600.5856d; MSA 27A.5856d makes no mention of the three year grace period, and a strict reading of the exception indicates that a tolling of the grace period may not be liberally inferred.

Therefore, based on the above analysis, it is clear that the holding of the trial court and the Court of Appeals should be upheld as Plaintiff-Appellant's Complaint is clearly untimely.

II. A PERSONAL REPRESENTATIVE OF AN ESTATE HAS THE AUTHORITY TO COMMENCE A MEDICAL MALPRACTICE ACTION ON BEHALF OF A DECEDENT AND GIVE THE REQUISITE PRE-SUIT NOTICE PURSUANT TO MCL 600.2912b; MSA 27A.2912b

A. An Individual Other than a Personal Representative Cannot Serve a Valid Notice of Intent

Pursuant to MCL 600.2912b; MSA 27A.2912b, prior to filing an action alleging medical negligence,

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

In this appeal, Plaintiff-Appellant contends that the statute allows *any* person to file a Notice of Intent to file suit, regardless of whether s/he has any connection to the issues involved in the suit. In support of this contention, Plaintiff-Appellant argues that the statute requires nothing more than that "a person" give notice. Such a position misapprehends the nature of a wrongful death action.

In Michigan,

> All actions and claims survive death. Actions on claims for injuries that result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. MCL 600.2921; MSA 27A.2921.

The "next section," MCL 600.2922; MSA 27A.2922, is commonly referred to as the Wrongful Death Act.

> The object of the Wrongful Death Act is to enable an action to be brought where the deceased would have had a cause of action had he survived, and it is a derivative action since **the direct action belonged to the deceased**. Powers Estate v City of Troy, 4 Mich App 572, 577; 145 NW2d 418; *aff'd* 380 Mich 160; 156 NW2d 530 (1967).

Stated otherwise,

> Even though the Wrongful Death Act is for the benefit of certain persons, the cause of action is a derivative one whereby the personal representative of the deceased stands in the latter's shoes. ... The suit is brought on behalf of the deceased. The cause of action belongs to the deceased. Toth v Goree, 65 Mich App 296, 299; 237 NW2d 297 (1975).

For this reason, a person

> [h]as no interest in the suit before he [becomes] the decedent's personal representative. Warren v Howlett, 148 Mich App 417, 423; 383 NW2d 636 (1980)

In this case, if Jerrith Waltz had survived, he would have been required to serve a Notice of Intent in order to bring a claim premised on medical negligence. His death required that a personal representative "stand in his shoes" and take the actions necessary to perfect a medical negligence claim, including serving a Notice of Intent. The cause of action, however, remains his. ***No one other than a duly appointed personal representative has the authority to act on his claim.***[3] When serving a Notice of Intent on a death case, the Notice is not given in a person's individual capacity. Rather, notice is given on behalf of the Estate – an action that can only be taken by a personal representative. Imagine the confusion and chaos that would reign in the Michigan Courts if attorneys were allowed to unilaterally initiate wrongful death actions on behalf of an individual to whom they have no legally binding connection!

This conclusion is further buttressed when placed in the context of other related statutes. MCL 600.2922; MSA 27A.2922 provides that:

> Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased person.

[3] MCL 700.3103 provides that, "to acquire the powers and undertake the duties and liabilities of a decedent's personal representative, a person must be appointed by the register or by court order, must qualify, and must be issued letters..."

The requirement of this section that a wrongful death action be brought by the personal representative of the deceased in mandatory. Smith v Henry Ford Hospital, 219 Mich App 555, 557; 557 NW2d 154 (1997). By the language of MCL 600.2912b; MSA 27A.2912b, the person who initiates the lawsuit must be the person who gives notice. In the wrongful death arena, it is the personal representative who does both.

Further, MCL 600.2912f; MSA 27A.2912f provides that:

> ***A person*** who has given notice under section 2912b...waives for purposes of that claim or action the privilege created by section 2157 and any other similar privilege created by law with respect to a person or entity who was involved in the acts, transactions, events, or occurrences that are the basis for the claim or action or who provided care or treatment to the claimant...in the claim or action for that condition or a condition related to the claim or action either before or after those acts, transactions, events, or occurrences, whether or not the person is a party to the claim or action.

Thus, "a person" who files a Notice of Intent is deemed to have statutorily waived the physician-patient privilege with respect to the issues raised in the Notice. If this Court adopts the rationale advanced by Plaintiff-Appellant, *anyone* can file a Notice of Intent and thereby waive another individual's physician-patient privilege relating to "the acts, transactions, events or occurrences that are the basis for the claim." This Court has consistently attempted to construe statutes so as to avoid absurd results. Gardner v Van Buren Public Schools, 445 Mich 23, 44; 517 NW2d 1 (1994). It should act to construe the Notice of Intent provision to require that the Notice be served by someone with authority to do so – in this case, a duly appointed personal representative.

In support of her argument that any individual can serve a Notice of Intent, Plaintiff-Appellant argues that the "legislative purpose" mandates such a finding. This argument must fail.

In Neal v Oakwood Hospital, 226 Mich App 701; 575 NW2d 68 (1997), the Michigan Court of Appeals indicated that the Notice provision was enacted "for the purpose of promoting settlement without the need for formal litigation." From this, Plaintiff-Appellant concludes that it would be inappropriate to require the appointment of a personal representative before a Notice of Intent is served. Again, this argument fails to consider the procedural requirements of a wrongful death claim.

During the pre-suit phase, a case is either settled or not. If it is not settled, Plaintiff-Appellant states that the next step is a lawsuit. In *either* event, a personal representative will be necessary. As Plaintiff-Appellant recognizes, "after a settlement is reached, an estate must be opened, so that the probate court can approve the settlement." *(See Plaintiff-Appellant's Brief on Appeal to the Court of Appeals at p.31).* "If the claim is rejected, then a personal representative must be appointed in order to bring suit." *(See Plaintiff-Appellant's Brief on Appeal to the Court of Appeals at p. 31).* In other words, regardless of whether or not a claim is settled during the pre-suit period, a personal representative must be appointed. The fact that a personal representative must be appointed in order for the Notice of Intent to be served neither neither adds expense to the parties nor runs contrary to the legislative purpose behind the notice period. It simply follows the statutory guidelines set forth above and keeps order in the Courts which would disappear should attorneys, or anyone for that matter, be allowed to unilaterally file Notice of Intents on behalf of another individual.

Plaintiff-Appellant also suggests that the Chernoff court held that a Personal Representative need not be appointed prior to the time a Notice of Intent is served. This is simply inaccurate. In Chernoff, a personal representative had been appointed prior to the time the Notice of Intent was served, but the Estate had been closed. The Chernoff court confined

its opinion to the issue of the relation back doctrine. There is neither an analysis of, nor a holding regarding the issue of whether a Notice of Intent can be served in a wrongful death action by someone other than one with authority – namely, a personal representative.

B. The Later Appointment of a Personal Representative Does Not Act to Toll the Statute of Limitations

Plaintiff further argues that, even if she lacked the authority to serve a Notice of Intent prior to the time she was appointed Personal Representative, her subsequent appointment should relate back to the time the notices were filed. It does not.

In Michigan,

> ...an appointment as administrator after the period limitations has expired relates back to the filing of suit if, at the time the suit was filed the plaintiff holds a good faith reasonable belief that he has authority to bring suit ***as administrator***, provided that the defendant is not prejudiced by the application of the relation back doctrine in such situations. ... We believe that justice is best served by precluding the avoidance of valid claim, such as the one at bar, by a legal technicality which does not prejudice the defendant, ***provided that the plaintiff*** has acted in good faith and ***had reasonable grounds for believing that plaintiff had been duly appointed personal representative of the estate.*** Saltmarsh v Burnard, 151 Mich App 476; 391 NW2d 382 (1986). (Emphasis added).

In this instant case, there can be no good faith belief on behalf of the attorney that she had authority to file the Notice of Intent as the mother had never been appointed personal representative of any estate. In Warren v Howlett, 148 Mich App 417; 383 NW2d 636 (1980), suit was filed on October 11, 1983. That Plaintiff was not appointed personal representative until October 20, 1983. The trial court dismissed Plaintiff's action on the basis that the wrongful death action was not brought in the name of the personal representative, and that the statute of limitations had since expired. In upholding the trial court's ruling, the Court of Appeals noted:

> **Plaintiff did not act in good faith because he could not reasonably have believed that he had been appointed the decedent's personal representative at the time he brought the action**. 148 Mich App 417, 422; 383 NW2d 636 (1986).

Likewise, in this case, Plaintiff-Appellant "did not act in good faith" because she "could not reasonably have believed that she had been appointed the decedent's personal representative" at the time she served the Notice of Intent. The instant case is not one that involves a mistaken belief that Plaintiff-Appellant was the personal representative at the time the Notice was served. Indeed, Plaintiff-Appellant, actually Plaintiff's attorney, concedes that *she knew* she was not the Personal Representative at the time the Notices were filed. *(See Plaintiff-Appellant's Brief on Appeal to the Court of Appeals at p. 38).* Rather, Plaintiff urges this Court to invoke the doctrine because she was ignorant of the law. However, "ignorance of the law usually does not toll a statute of limitations." Kalakay v Farmers Insurance Group, 120 Mich App 623, 628; 327 NW2d 537 (1983). It definitely should not toll the statute in this instance as an experienced attorney was involved.

Because Plaintiff-Appellant lacked the authority to serve the Notices of Intent, the notices were invalid and did not toll the statute of limitations. As noted above, minor Jerrith Waltz expired on April 18, 1994. The two-year statute of limitations expired on April 18, 1996. The three-year savings period under the wrongful death act expired April 18, 1999. The Complaint, filed on June 23, 1999, was time barred and properly dismissed by the trial court.

C. A Deficient Notice of Intent Does Not Toll the Statute of Limitations.

Even if Collene Waltz somehow had the authority to serve a Notice of Intent before she was appointed Personal Representative, the statute of limitations expired on this claim prior to the time the Complaint was filed due to the deficiencies in the Notice. In Rheaume v Vandenberg, 232 Mich App 417, 423; 591 NW2d 331 (1998), the Court of Appeals held that:

> The language of MCL 600.5856(d); MSA 27A.5856(d) clearly provides that the statute of limitations is tolled if the notice of intent to sue if given "*in compliance with* section 2912b." The negative implication of this section is that the statute of limitations is not tolled if the notice of intent to sue does not comply with 2912b. (Emphasis in original).

Thus, the statute of limitations in the instant case was tolled only if the Notices complied with the applicable statute. As the trial court ruled, the Notices submitted in this case are deficient.

MCL 600.2912b(4); MSA 27A.2912b(4) provides, in relevant part, that:

> The notice given to a health professional or health facility under this section ***shall contain*** a statement of at least all of the following:
>
> * * *
>
> (b) The applicable standard of practice or care alleged by the claimant;
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility;
>
> (d) The alleged action which should have been taken to achieve compliance with the alleged standard of practice or care;
>
> (e) The manner in which it is alleged that the breach of the standard of practice or care was the proximate cause of injury claimed in the notice.

See, Neal v Oakwood, 226 Mich App 701; 575 NW2d 68 (1997) ("*Notice of Intent must specify the factual and legal basis for the plaintiff's claim.*") Under "Applicable Standard of Care or Practice Alleged," the Notice of Intent recites:

> To properly care for and treat the infant patient, Jerrith Waltz, so as to address [his] dehydration, pneumonia, and other related medical conditions that subsequently resulted in [his] death.

Under "The Manner the Applicable Standard of Care or Practice was Breached/etc." the Notice of Intent lists a total of sixteen general theories, which are on their face a list of all the possible ways malpractice can occur, some of them obviously inapplicable to the case at hand. Under "The Manner in Which the Breach of the Standard of Practice or [Care] Was the Proximate Cause of the Injury Claimed in the Notice," the Notice of Intent states:

> The failure to properly treat the infant patient, Jerrith Waltz, resulted in her [sic] death on April 17, 1994. [sic]

In sum, there are essentially no *facts* stated in the Notice. The Plaintiff here never stated a standard of care, breach of that standard, or proximate cause in any but conclusory terms. Where, as here, the Notice fails to reasonably inform the Defendants as to Plaintiff's theory of liability, the Notice must be considered defective. As noted above, a defective Notice does not toll the statute of limitations. As such, the statute of limitations expired on April 18, 1999, and the trial court properly dismissed this case.

D. A Defective Affidavit of Merit Does Not Toll the Statute

The same analysis can be applied to the Plaintiff-Appellant's Affidavits of Merit. MCL 600.2912d; MSA 27A.2912d requires an Affidavit of Merit to contain a statement of : (1) the applicable standard of care; (2) 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; (3) the actions which should have been taken or omitted by the health professional or health facility to have complied with the applicable standard of practice or care; and (4) the manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

In these Affidavits, proximate cause is stated in purely conclusory terms. Although Dr. Nelson (Plaintiff-Appellant's expert) purported to state a standard of care and breach, he could only specify that Dr. Wyse "ought to have known" that Jerrith needed continued care. Dr. Nelson could not, and did not say why she ought to have known, what that continued care would have consisted of, nor how its denial caused Jerrith's death. In short, the Affidavits fail to comply with the applicable statute.

A complaint filed without a proper Affidavit of Merit fails to toll the statute of limitations. Scarsella v Pollack, 461 Mich 547; 607 NW2d 711 (2000). The purpose of the Affidavit is similar to the Notice of Intent. It requires the Affiant to provide reasonable notice to the Defendant-Appellees as to the allegations they must defend. This Affidavit does not notify the Defendant-Appellees what actions should have been taken to comply with the standard of care, nor how their actions allegedly resulted in the death of Jerrith Waltz. In other words, it fails in its primary purpose. Under these circumstances, this Court should act to extend the holding in Scarsella and find that the insufficient Affidavits of Merit does not toll the statute of limitations in this case.

III. PLAINTIFF'S COMPLAINT FAILED TO STATE A CAUSE OF ACTION AND AMENDMENT WOULD BE FUTILE.

A. Plaintiff's Complaint Failed to State a Cause of Action.

The Complaint in this case provides no more guidance than the Notices of Intent. In paragraph 25, it alleges that Dr. Wyse committed eleven separate breaches of the standard of care. As in the Notice of Intent, they are highly generalized and not related to the facts of this specific case. For instance, paragraph 25(H) accuses Dr. Wyse of:

> Failing to pursue accepted forms of conservative treatment that should have been performed before Defendant undertook a course of treatment that, at the time, was not medically justified.

This clearly does not speak to any known fact in this case and is reflective of the level of generality that permeates the Complaint. Likewise, the issue of proximate cause is stated only in conclusory terms.

Under MCR 2.111(B)(1), a complaint must provide reasonable notice to opposing parties. The rule is designed, in part, to avoid ambiguous and uninformative pleading. Dacon v Transue, 441 Mich 315, 328; 490 NW2d 369 (1992). Plaintiff's Complaint speaks only in vague and indefinite terms. As the Supreme Court held in Dacon:

> By literally alleging everything, this [complaint] alleges nothing. Id. at 330.

To assert a theory of liability, MCR 2.111(B)(1) specifies that an allegation must state "the specific allegations necessary reasonably to inform the adverse party" of the pleader's claims. Plaintiff-Appellant's Complaint falls short on this count.

Despite very specific factual allegations, Plaintiff-Appellant's Complaint states the alleged theory of recovery only in its most general terms. In Simonelli v Cassidy, 336 Mich 635 59 NW 2d 28 (1953), the Supreme Court stated that:

> [W]here the breach of duty relied on is negligence in the treatment of a patient, it is not sufficient merely to state that certain acts not negligent in themselves were done or omitted by the physician or surgeon without alleging that they were negligently done or omitted[4]. 336 Mich 635, 644; 59 NW2d 28 (1953).

Plaintiff-Appellant's Complaint makes only the most general mention of the acts of the physician and hospital alleged to be negligent. Furthermore, "where the breach of duty relied on is

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[4] The 1953 Simonelli decision continues today as the seminal case in the area of sufficiency of pleadings in the context of medical malpractice. In the 1992 Dacon decision, the Michigan Supreme Court was asked to abandon Simonelli. The court refused, stating:

> [B]ecause Simonelli hinged on the importance of fair notice to the defendant and not some procedural quirk of 1950 civil practice, its lesson is neither obsolete nor anachronistic and is one we will continue to follow. Id. at 332, 333.

negligence in the diagnosis and treatment of the patient, it is insufficient for a plaintiff to simply describe what a physician did or failed to do and then allege that the action or omission was negligent. Plaintiffs must allege the proper or accepted method of diagnosis and treatment." O'Toole v Fortino, 97 Mich App 797, 803; 295 NW2d 867 (1980), *lv app den*, 410 Mich 863 (1980). In addition to alleging the correct diagnosis and treatment, the allegations "must inform a defendant of the negligent acts or omissions complained of and indicate what the prevailing medical standards would have required. Welniak v Alcantara, 100 Mich App 714, 716; 300 NW2d 323 (1980).

Plaintiff-Appellant's Complaint in this case neither indicates what prevailing medical standards would have required nor alleges the proper or accepted method of diagnosis and treatment. Plaintiff-Appellant's Complaint delineates nothing specific about how the physician or hospital erred. Defendant-Appellees are unable to adequately prepare a defense to the charges based on the vague and imprecise allegations contained in the Complaint. Leaving Defendant-Appellees to guess upon what grounds Plaintiff-Appellant believes recovery is justified violates basic notions of fair play and substantial justice. Dacon, 441 Mich at 329, 330. Such a Complaint is deficient on its face, and fails to state a cause of action pursuant to MCR 2.116(C)(8).

B. Amendment Would be Futile Where the Statute of Limitations Expired.

In her appeal, Plaintiff-Appellant alleges that the trial court erred in denying her the right to file an Amended Complaint. Decisions granting or denying motions to amend pleadings are within the sound discretion of the trial court. Doyle v Hutzel Hospital, 241 Mich App 206, 212; 615 NW2d 759 (2000). It is well-settled that "a trial court should freely grant leave to amend pleadings if justice so requires." Hakari v Ski Brule Inc, 230 Mich App 352, 355; 584 NW2d 343 (1998). However,

> **[l]eave to amend a complaint may be denied for particularized reasons, such as** undue delay, bad faith, or dilatory motive on the movant's part,

> repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or **where amendment would be futile.** Jenks v Brown, 219 Mich App 415, 420; 557 NW2d 114 (1996) (Emphasis added).

In the instant case, Plaintiff-Appellant's proposal to file an amended complaint to cure the pleading defects would be futile, as the statute of limitations has expired on her claims against Defendants. As such, the trial court properly denied Plaintiff-Appellant's request to file a First Amended Complaint.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Defendant-Appellees Carol Wyse, D.O. and Hills & Dales Community General Hospital respectfully request this Court to DENY Plaintiff-Appellant's Brief on Appeal and issue an order affirming the Court of Appeals' ruling, dismissing Plaintiff-Appellant's Complaint pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8).

Respectfully submitted,

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