

STATE OF MICHIGAN
IN THE SUPREME COURT

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

PATRICIA A. PAPPAS, Personal Representative
of the Estate of Florinda C. Pappas, Deceased,

Docket No.

Plaintiff-Appellee,

vs

Court of Appeals No. 251144

*Cpu 3/3/05
Rec 5/2/05*

BORTZ HEALTH CARE FACILITIES, INC. and
WARREN GERIATRIC VILLAGE, INC. d/b/a
BORTZ HEALTH CARE OF WARREN,

Macomb County Circuit Court
No. 03-2446-NH

Defendants-Appellants. ok

D. Servitto

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**DEFENDANTS-APPELLANTS BORTZ HEALTH CARE
FACILITIES, INC. and WARREN GERIATRIC VILLAGE,
INC. d/b/a BORTZ HEALTH CARE OF WARREN'S
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF ORDER APPEALED AND RELIEF SOUGHT

Defendants-Appellants Bortz Health Care Facilities, Inc., and Warren Geriatric Village, Inc., d/b/a Bortz Health Care of Warren, seek leave to appeal the March 3, 2005 opinion of the Michigan Court of Appeals, reversing the trial court's grant of summary disposition in defendants' favor and remanding for further proceedings. *Exhibit A, Pappas v Bortz Health Care Facilities, Inc*, unpublished opinion per curiam of the Court of Appeals, decided 3/3/05 (Docket No. 251144). This application for leave to appeal is timely, having been filed on June 9, 2005, within 42 days after the Court of Appeals May 2, 2005 denial of defendants' motion for reconsideration. *Exhibit B, Pappas v Bortz Health Care Facilities, Inc*, unpublished order of the Court of Appeals, issued 5/2/05 (Docket No. 251144).

Defendants-Appellants ask this Court to grant their application for leave to appeal, reverse the decision of the Court of Appeals, and reinstate the trial court's order granting summary disposition in defendants' favor. Alternatively, defendants ask this Court to peremptorily reverse the Court of Appeals decision and reinstate the trial court's order granting summary disposition in defendants' favor.

STATEMENT OF QUESTION PRESENTED

Miller v Mercy Memorial Hosp Corp, 466 Mich 196 (2002) held that the six-month discovery period is a separate period of limitation incorporated under the wrongful death savings provision of MCL 600.5852, and applied the savings provision based on the *decedent's* discovery of his cause of action before death. The Court of Appeals determined that a question of fact existed whether Florinda Pappas discovered or should have discovered her cause of action before she died, and held that the savings provision applies to the *personal representative's* discovery of her cause of action. Does the Court of Appeals decision represent an inappropriately broad interpretation of the savings statute and an improper extension of *Miller*?

The trial court did not answer this question.

The Court of Appeals answered, "No."

Plaintiff-Appellee Patricia Pappas, personal representative of the Estate of Florinda C. Pappas, will argue that the answer is "No."

Defendants-Appellants Bortz Health Care Facilities, Inc., and Warren Geriatric Village, Inc., d/b/a Bortz Health Care of Warren submit that the correct answer is "Yes."

STATEMENT OF STANDARD OF REVIEW

Appellate courts review a trial court's ruling on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a cause of action is barred by a statute of limitations is a question of law that appellate courts review de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

**STATEMENT OF REASONS WHY THIS COURT
SHOULD GRANT LEAVE TO APPEAL**

The Court of Appeals decided an issue that this Court expressly declined to address in *Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196; 644 NW2d 730 (2002). In *Miller*, this Court held that the six-month discovery period under §5838a(2) is a “period of limitation” within the meaning of the wrongful death saving statute, MCL 600.5852. The *Miller* holding allowed the personal representative of the decedent’s estate to pursue a medical malpractice action under the savings provision of MCL 600.5852 using the six-month discovery rule as the relevant period of limitation, *where the decedent discovered the cause of action before his death*. The *Miller* Court expressly declined to consider whether the six-month discovery rule under the savings provision may be invoked by a personal representative.

The Court of Appeals held that the six-month discovery period, MCL 600.5838a(2), applies to a personal representative’s discovery of a cause of action operating in conjunction with the death savings provision of MCL 600.5852. This decision represents an extension of *Miller*, and presents a question of major significance that cries out for this Court’s consideration.

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STATEMENT OF PERTINENT FACTS

On April 1, 1996, Florida Pappas became a resident at Defendant Bortz Health Care.¹ On March 27, 1997, Ms. Pappas was found on the floor by Bortz Health Care staff.² She had apparently fallen after getting out of her bed.³ Florinda Pappas was taken to Bi-County Hospital on the same day where she underwent surgery for a subdural hematoma.⁴ She remained a resident at Bortz until she died on July 13, 2001.⁵

Procedural History

Trial court proceedings

Letters of authority were issued on July 16, 2002. On October 10, 2002, plaintiff Patricia Pappas, as personal representative of the Estate of Florinda Pappas, filed a notice of intent to file a medical malpractice case under MCL 600.2912b.⁶ Plaintiff filed her complaint in this case on June 2, 2003.⁷

Defendants moved for summary disposition under MCR 2.116(C)(7) on the basis that plaintiff's claim is barred by the applicable two-year statute of limitations set forth in MCL 600.5805.⁸ Defendants argued that Ms. Pappas' claim accrued on March 27, 1997, and plaintiff did not file her notice of intent to file a medical malpractice action until October 10, 2002.⁹ Therefore, defendants maintained, plaintiff's claim is time-barred.¹⁰

¹ *Exhibit C*, Complaint, ¶ 8.

² *Exh C*, ¶ 12.

³ *Id.*

⁴ *Id.*

⁵ *Id.*, ¶ 13.

⁶ *Exhibit D*, notice of intent, 10/10/02.

⁷ *Exh C*.

⁸ *Exhibit E*, defendants' motion for summary disposition and brief in support.

⁹ *Id.*

¹⁰ *Id.*

Plaintiff filed a response to defendants' motion in which she relied on MCL 600.5851 and MCL 600.5852 to save her claim.¹¹ Plaintiff did not dispute that the medical malpractice claim accrued on March 27, 1997. Plaintiff argued that Florinda Pappas was under the legal disability of insanity at the time her medical malpractice claim accrued, and therefore the statute of limitations had not run because MCL 500.5851 provides for one year in which to file a claim after the disability is removed by death.¹² Plaintiff urged the court to apply MCL 600.5851 in conjunction with MCL 600.5852, which provides that if the statute of limitations has not run on a cause of action at the time of the injured party's death, the personal representative has two years in which to commence an action.¹³ Plaintiff maintained that because of Florinda Pappas' insanity disability that was removed at her death on July 13, 2001, plaintiff had one year, until July 13, 2002, in which to file her claim in accordance with MCL 600.5851. Plaintiff then argued that because MCL 600.5852 allows the personal representative two years in which to file an action on behalf of the decedent, her June 2, 2003 complaint was timely.¹⁴ Essentially, plaintiff appeared to argue that these statutes should "tack" together to preserved her cause of action.

Defendants replied by clarifying that MCL 600.5851 is a savings provision, not a tolling provision, as the Court of Appeals explained in *Honig v Liddy*, 199 Mich App 1; 500 NW2d 745 (1993).¹⁵ For purposes of its motion only, defendants did not dispute plaintiff's claim that Florinda Pappas was insane when her claim accrued on March 27, 1997. Accordingly, defendants maintained, although the savings provision allows a claim to be brought within one year after the alleged disability has been removed even though the statute of limitations had

¹¹ *Exhibit F*, plaintiff's response to defendants' motion for summary disposition.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Exhibit G*, defendants' reply.

run, still the statute of limitations had run in this case.¹⁶ Plaintiff did not bring her action within one year of Florinda Pappas' death. Defendants further argued that because the statute of limitations had run at the time of her death, MCL 600.5852 is inapplicable.¹⁷

Plaintiff then filed a response to defendants' reply. Plaintiff argued that the discovery rule of MCL 600.5838a saved her claim.¹⁸ She contended that Florinda Pappas' insanity prevented her from discovering her claim, and that therefore upon her death when she was no longer insane, her cause of action was first discovered.¹⁹ Plaintiff argued that because the discovery rule applies, the statute of limitations had not run at the time of plaintiff's death because she had not even discovered the claim at that time. Plaintiff then concluded that MCL 600.5852 applies to provide her two years in which to file this claim.²⁰

On July 14, 2003, Judge Deborah Servitto heard argument on defendants' motion for summary disposition.²¹ The court took the matter under advisement, and on August 14, 2003 issued its opinion and order granting defendants' motion.²²

The Court of Appeals decision

The Court of Appeals reversed and remanded. This case was placed on the Court's summary panel case call docket, and therefore the parties were not afforded the opportunity to appear for oral argument.²³

The Court rejected plaintiff's insanity disability argument, noting that the insanity statute is not a tolling statute, nor is it a separate statute of limitations. Rather, MCL 600.5851 "allows disabled plaintiffs additional, separate protections from the bar of the statute of

¹⁶ *Id.*
¹⁷ *Id.*
¹⁸ *Exhibit H*, plaintiff's second response.
¹⁹ *Id.*
²⁰ *Id.*
²¹ *Exhibit I*, hearing transcript, 7/14/03.
²² *Exhibit J*, opinion and order, 8/14/03.
²³ *Exh A.*

limitations, protection that is independent of the running of the statute.”²⁴ The Court of Appeals recognized that

Even if Florinda Pappas was insane within the meaning of MCL 600.5851, her death on July 13, 2001, removed that disability. Under MCL 600.5851, Patricia Pappas had one year after the disability was removed to file this malpractice action in a representative capacity. Because the complaint was not filed within this time period, the protection afforded by MCL 600.5851 is unavailable to Patricia Pappas.²⁵

The Court agreed with defendants that the two-year statute of limitations had run, and therefore the only issue was whether the discovery rule applied to trigger the savings provision. The panel concluded that a question of fact existed regarding whether Florinda Pappas discovered, or should have discovered, her cause of action before her death. Because the six-month discovery period is a distinct limitations period, the Court concluded, if Florinda was unable, due to her insanity, to discover her cause of action, then the six-month limitations would not have run (and would not have begun) before her death, and the savings provision would apply. The Court reasoned:

Consequently, we find merit to Patricia Pappas's claim that the trial court erred by failing to apply the discovery rule to Florinda Pappas. Although this Court indicated that the discovery rule can be applied to a personal representative's discovery of a potential claim, this Court did not preclude application of the discovery rule to a decedent. Indeed, the Michigan Supreme Court specifically applied the discovery rule to a decedent in *Miller v Mercy Memorial Hosp.* Although this case is distinguishable from *Miller* in that the decedent in *Miller* discovered a possible malpractice claim before his death, a decedent's discovery of a possible cause of action is not a prerequisite to applying MCL 600.5838a(2). As a matter of law, a wrongful death action brought by a personal representative belongs to the decedent. Hence, Patricia Pappas stood in the shoes of Florinda Pappas for purposes of determining whether Florinda Pappas discovered or should have discovered her malpractice claim before her death.²⁶

²⁴ *Id.*, p 3.

²⁵ *Id.*

²⁶ *Id.*, p 2 (footnotes omitted).

The Court concluded that “[a]ccepting as true the allegation in Patricia Pappas’s complaint about Florinda Pappas’s cognitive limitations, including her alleged acute dementia, neither party was entitled to summary disposition because a disputed factual question existed with regard to whether a reasonable person with Florinda Pappas’s condition would have become aware of her injury and its possible cause.”²⁷

Defendants moved the Court of Appeals for reconsideration. The Court denied the motion, and defendants now seek leave to appeal to this Court.²⁸

²⁷ *Id.*, p 4.

²⁸ *Exh B.*

ARGUMENT

The savings provision in MCL 600.5852 for actions that survive death is inapplicable because at the time of Ms. Pappas' death, two-year the statute of limitations had run, and the six-month discovery rule is not applicable under the savings provision where the decedent allegedly did not discover her cause of action before death.

A. *Statutes of limitation in medical malpractice actions.*

“[S]tatutes of limitation are procedural devices intended to promote judicial economy and the rights of defendants.” *Goodridge v Ypsilanti Twp Bd*, 451 Mich 446, 454; 547 NW2d 668 (1996), citing *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). The statute of limitations furthers the goals of encouraging plaintiffs to diligently pursue their claims and protecting defendants from having to defend against stale claims. *Larson v Johns Manville*, 427 Mich 301, 311; 399 NW2d 1 (1986). As this Court explained in *Gebhardt v O'Rourke*, 444 Mich 535, 546; 510 NW2d 900 (1994), “[t]he statute of limitations affords the opposing party a fair opportunity to defend, relieves the court system from dealing with ‘stale’ claims, and protects potential defendants from protracted fear of litigation.” Statutes of limitation also encourage the prompt recovery of damages and penalize plaintiffs who have not been industrious in pursuing their claims. *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982).

Courts must literally interpret and apply statutes of limitation. See *Gebhardt, supra*, 444 Mich at 546 (“The literal interpretation we apply today conforms with the policies underlying the statute of limitations[.]”) Exceptions to statutes of limitation are to be strictly construed. *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984).

The statute of limitations “is a valid defense that should be available to defendants and construed by courts as specifically provided by the Legislature.” *Id.* “[T]he statute of limitations is not a disfavored plea but a perfectly righteous defense, a meritorious defense.”

Bigelow v Walraven, 392 Mich 566, 570; 221 NW2d 328 (1974). The burden of proving facts in avoidance of a period of limitation is on the party relying on the claim of avoidance. *Zenith Industrial Corp v Department of Treasury* 130 Mich App 464; 343 NW2d 495 (1983), appeal after remand 152 Mich App 476, 394 NW2d 451 (1986),

B. The savings provision in MCL 600.5852 for actions that survive death.

1. Statute of limitations in medical malpractice actions and the death savings provision

The accrual provision applicable to medical malpractice actions specifies that the claim accrues "at the time of the act or omission that is the basis for the claim regardless of the time the plaintiff discovers or otherwise has knowledge of the claim" MCL 600.5838a(1). Thus, the claim accrues on the date of the alleged act or omission giving rise to the claim. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997).

A plaintiff in a medical malpractice case must commence the action within two years after the claim first accrues. MCL 600.5805(4); *Solowy, supra*, 454 Mich at 219. MCL 600.5805 provides in relevant part:

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

* * *

(4) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

A six-month discovery rule applies to medical malpractice claims. Under MCL 600.5838a(2), "an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 . . . or within 6 months after

the plaintiff discovers or should have discovered the existence of the claim, whichever is later.”

MCL 600.5838a(2) provides in relevant part:

Except as otherwise provided in section 5838a an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.

It was not disputed that Florinda Pappas’ claim accrued on March 27, 1997. *See plaintiff’s appeal brief, p 5.* Therefore, because her claim accrued on March 27, 1997, the statute of limitations expired two years later, on March 27, 1999. At the time of her death on July 13, 2001, the statute of limitations had already run. Plaintiff filed the notice of intent to file this claim on Florinda Pappas’ behalf on October 10, 2002, well after the expiration of the statute of limitations. Thus, plaintiff’s claim is time-barred.

Plaintiff seeks to pursue this medical malpractice claim by relying on the savings provisions for cases involving death under MCL 600.5852. This statute concerns the effect of death *before* the period of limitations has run or within thirty days thereafter. Under the savings provision, the personal representative then has two years to file a claim after letters of authority are issued, but may not file a claim more than three years after the statute of limitations expires. *Lindsey v Harper Hosp*, 213 Mich App 422, 540 NW2d 477 (1995), *aff’d* 455 Mich 56, 564 NW2d 861 (1997). MCL 600.5852 provides in pertinent part:

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 two 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 *Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196, 202-203; 644 NW2d 730 (2002), this Court emphasized that §5852 is a saving statute, *not* a statute of limitations, and cautioned that §5852 “is to be *narrowly* construed as an exception to the statute of limitations.” *Miller, supra*, 466 Mich at 202-203, citing *Lindsey v Harper Hosp*, 455 Mich 56, 66; 564 NW2d 861 (1997). The purpose of §5852 was “to preserve actions that survive death in order that the representative of the estate may have a reasonable time to pursue such actions.” *Lindsey, supra*, 455 Mich at 66.

2. Plaintiff's claim is time-barred under the two-year limitations period.

The savings provision does not apply to save plaintiff's cause of action. As discussed previously, the two-year limitations period expired on March 27, 1999, more than two years before Ms. Pappas' death. Thus, Florinda Pappas would have had to die before April 27, 1999 for this section to be applicable. Ms. Pappas died on July 13, 2001, long after the period of limitations had run. Thus, this section does not apply to preserve plaintiff's cause of action.

Even assuming *arguendo* that §5852 has some application, still plaintiff's action is too late. MCL 600.5852 requires the action be commenced “within 3 years after the period of limitations has run.” The period of limitations ran on March 27, 1999, two years after the March 27, 1997 fall that forms the basis for plaintiff's action. Thus, plaintiff would have had to file her claim by March 27, 2002. She filed the notice of intent on October 10, 2002, some seven months too late. See *Vandenberg v Vandenberg*, 253 Mich App 658; 660 NW2d 341 (2002).

3. The statutory six-month discovery rule, MCL 600.5838a(2), is inapplicable.

In *Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196; 644 NW2d 730 (2002), this Court held that the six-month discovery period under §5838a(2) is a “period of limitation” within the meaning of the saving statute, MCL 600.5852. The plaintiff filed a medical malpractice wrongful death action based on the defendants’ failure to timely diagnose the decedent’s cancer. The decedent received a cancer diagnosis on January 10, 1996; she died on January 24, 1996. The plaintiff became personal representative of the decedent’s estate on February 22, 1996, and filed the wrongful death action on October 23, 1997. The trial court granted summary disposition in the defendants’ favor based on the statute of limitations.

The Court of Appeals in *Miller* affirmed, relying on *Poffenbarger v Kaplan*, 224 Mich App 1; 568 NW2d 131 (1997), which had held that the six-month discovery period was not incorporated by the wrongful death saving statute, thus the general two-year statute of limitations for medical malpractice action was the only relevant period of limitation for purposes of the MCL 600.5852 savings provision. Because the two-year statute of limitations had run when the decedent died, the savings provision was not triggered, the Court of Appeals concluded.

This Court reversed, holding that the six-month discovery rule is a separate period of limitation, and that if it had not run at the time of the decedent’s death, the savings provisions of MCL 600.5852 were triggered. In so doing, this Court overruled *Poffenbarger*. The Court addressed the interaction between the six-month discovery rule provision and the savings provision:

[W]e conclude that the six-month discovery rule is a “period of limitation” within the meaning of the saving statute. The plain language of § 5838a(2) provides two distinct periods of limitation: two years after the accrual of the cause of action, and six months after the existence of the claim was or should have been discovered by the medical malpractice claimant. MCL

600.5852, simply refers to “the” period of limitation. The provision does not limit or qualify which period of limitation applies, the two-year period of limitation rooted in § 5805(5), or the six-month discovery period found in § 5838a(2). As a saving statute, § 5852 applies to whatever period of limitation is or may be applicable in a given case, be it a professional malpractice claim or a breach of contract action. [*Miller, supra*, 466 Mich at 202.]

The *Miller* decision allowed the personal representative of the decedent’s estate to pursue a medical malpractice action under the savings provision of MCL 600.5852 using the six-month discovery rule as the relevant period of limitation, where the decedent discovered the cause of action before his death. The *Miller* Court expressly declined to consider whether the six-month discovery rule under the savings provision may be invoked by a personal representative, the issue in the present case:

We do not purport to address whether a personal representative may use the six-month discovery provision in § 5838a(2), because the facts in this case are clearly distinguishable from Poffenbarger. In this case, the six-month discovery provision applied to the decedent’s discovery of the alleged acts of malpractice, and the issue is whether the personal representative may avail the estate of a cause of action under this provision within the time prescribed by §5852. [Miller, supra, 466 Mich at 201 n 3.]

In *Miller*, once this Court determined that the six-month discovery period is a separate statute of limitation incorporated into the savings provision of §5852, the application of the statutes was straightforward because the plaintiff died fourteen days after she was diagnosed, and thus before her death she had discovered the cause of action for failure to timely diagnose her cancer. Under the savings provision, the personal representative had two years from the issuance of the letters of authority to bring suit, as long as the action was commenced within three years of July 1996, *the end of the six-month discovery period that was triggered before the decedent’s death. Miller, supra*, 466 Mich at 203.

The facts here stand in stark contrast to *Miller*. Unlike the instant case, *Miller* involved allegations that the decedent discovered the medical malpractice action before he died. *Miller, supra*, 466 Mich at 201 n 3. The *Miller* Court expressly declined to consider whether the discovery rule applied to the personal representative's discovery of the cause of action. *Id* at 201 n 4. Although the Court of Appeals recognized this express qualification in *Miller*, the Court of Appeals invoked *Poffenbarger*, which *Miller* overruled, and held that the six-month discovery period, MCL 600.5838a(2), applies to a personal representative's discovery of a cause of action operating in conjunction with the death savings provision of MCL 600.5852. The Court of Appeals opinion reflects not only a questionable extension of *Miller*, but also an inappropriately broad interpretation of MCL 600.5852.

The Court of Appeals correctly states that "a decedent's discovery of a possible cause of action is not a prerequisite to applying MCL 600.5835a(2). However, in applying both the discovery period and the savings provision of MCL 600.5852, the Court refers to both Florinda Pappas' alleged discovery of the action and plaintiff's discovery of the action:

By its terms, MCL 600.5852 only operates within the context of the separate limitation periods that would otherwise bar an action. Thus, if Florinda Pappas did not discover or should not have discovered a possible malpractice claim before her death, then the six-month discovery period would not have run before her death. As such, Patricia Pappas, as personal representative of Florinda Pappas's estate, was entitled to bring an action within two years after her appointment as personal representative, ***but not later than three years after the period of limitations has run.***²⁹

The Court of Appeals makes a tremendous leap from *Miller* by concluding that if the decedent did not discover and should not have discovered a cause of action before death, then the savings provision is implicated because the statute of limitations has not run at that time. MCL 600.5852. The Court then allows for the discovery of the cause of action by the personal representative, giving the personal representative two years from her appointment to file the

²⁹ *Exh A*, p 3.

cause of action. This was an issue that the *Miller* Court expressly declined to consider. The Court of Appeals held that the six-month discovery period, MCL 600.5838a(2), applies to a personal representative's discovery of a cause of action operating in conjunction with the death savings provision of MCL 600.5852. This decision represents an extension of *Miller*, and presents a question of major significance that cries out for this Court's consideration.

RELIEF REQUESTED

Defendants ask this Court to grant their application for leave to appeal. Alternatively, defendants ask this Court to peremptorily reverse the decision of the Court of Appeals and reinstate the trial court's grant of summary disposition in defendants' favor.

**COLLINS, EINHORN, FARRELL
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