

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS AND  
CIRCUIT COURT FOR THE COUNTY OF MACOMB

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

S.C. No.: 128864

C.A. No.: 251144

Plaintiff-Appellee,

Lower Court No.: 03-2446-NH  
Hon. Deborah A. Servitto

v

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

Defendants-Appellants.

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*128864*  
*Sur*  
PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO THIS COURT'S  
OCTOBER 12, 2007, ORDER

SUBMITTED BY:

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ISSUE

**Plaintiff's decedent died insane. At the time of her death, she had not discovered a medical malpractice claim against defendants. Accordingly, the period of limitations she had to discover and file a wrongful death action based on medical malpractice had not run. When at the time of death the period of limitations has not run, and the decedent's estate brings a wrongful death claim based upon medical malpractice, is the timeliness of any complaint governed by the terms of MCL 600.5852, not MCL 600.5851(1), because the former specifically applies to wrongful death actions?**

## STATEMENT OF FACTS

This case is pending before this Court on defendants' application for leave to appeal from the Court of Appeals' decision reversing the trial court's order granting defendants' motion for summary disposition pursuant to the statute of limitations. Plaintiff filed an answer to defendants' application for leave to appeal on about July 15, 2005, and incorporates that Statement of Facts by reference. Since defendants' application for leave to appeal was filed, this Court has entered several orders.

On May 12, 2006, this Court entered an order denying defendants' application for leave to appeal. Justices Kelly, Cavanagh, and Markman would have granted the application. In response to defendants' motion for reconsideration, this Court vacated its May 12, 2006, order and held the matter in abeyance pending its decision in *Vega v Lakeland Hospitals* (SC Docket No. 129436).

This Court decided *Vega* on July 18, 2007. *Vega v Lakeland Hospitals*, 479 Mich 243; 736 NW2d 561 (2007). Thereafter, on October 12, 2007, this Court entered an order directing the Court's Clerk to schedule oral argument on whether to grant defendants' application or take other peremptory action. The parties were directed to file supplemental briefs addressing two questions:

(1) whether, assuming that the six-month discovery provision in MCL 600.5838a(2) applies in this case because the plaintiff's decedent was insane from the time the claim accrued until her death, the claim is barred where the plaintiff did not bring this action within one year after the insanity disability was removed through death pursuant to MCL 600.5851(1); and (2) whether the wrongful death saving statute, MCL 600.5852, is controlling under the circumstances of this case.

The following argument ensues in support of plaintiff's position that resolution of this case is controlled by MCL 600.5852 and that plaintiff's complaint was timely.

## ARGUMENT

**Where at the time of the death of an insane person the person had not discovered a cause of action for medical malpractice, the applicable statute of limitations has not yet run. When at the time of death the period of limitations has not run, and the decedent's estate brings a wrongful death claim based upon medical malpractice, the timeliness of any complaint is governed by the terms of MCL 600.5852, not MCL 600.5851(1).**

**Standard of Review:** Defendants moved for summary disposition under MCR 2.116(C)(7). When this Court reviews such a motion, it accepts the allegations in a well-pled complaint as true and construes them in the plaintiff's favor. *Witherspoon v Guilford*, 203 Mich App 240, 243; 511 NW2d 720 (1994); *Kassab v Michigan Basic Property Insurance Association*, 185 Mich App 206, 201; 460 NW2d 300 (1990). Additionally, this Court reviews questions of law under the *de novo* standard. *Cruz v State Farm Mutual Automobile Insurance Company*, 466 Mich 588, 594; 648 NW2d 591 (2002).

A few facts are necessary to understand the applicable legal arguments in this case. According to plaintiff's complaint, plaintiff's decedent moved into defendants' residential facility on about April 1, 1996, after suffering a series of strokes. In February and March 1997, decedent became increasingly agitated. Early on March 27, 1997, decedent was discovered on the floor in a confused state. A few hours later she was incoherent, lethargic, and could neither sit nor stand without assistance. She was transported to Bi-County Hospital and underwent surgery for a subdural hematoma. She returned to defendants' facility and remained in a state of increasingly diminished capacity until her death on July 13, 2001. Letters of authority were issued to Patricia Pappas on July 16, 2002. The instant complaint was filed on June 3, 2003. The complaint seeks damages for wrongful death based upon medical malpractice.

This Court has asked the parties to answer two questions: one, whether given MCL 600.5851(1) the instant claim is barred because plaintiff did not bring the action within one year after decedent's disability, due to insanity, was removed by her death; and two, whether the

wrongful death saving statute, MCL 600.5852, is controlling under the circumstances of this case. The answers are that § 5852, the wrongful death savings statute, controls because this is a wrongful death action and because the statute of limitations had not run at the time of decedent's death. Section 5851(1), the general savings statute, does not apply because this is a wrongful death action, because the period of limitations had not run at the time of death, and because it provides that it cannot be used to shorten the time provided in § 5852 to file a claim.

Section 5852 states 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. MCL 600.5852.

Note the language that makes this section specifically applicable to wrongful death actions – it applies where a person has died with an action which survives by law. This is why this section is called the wrongful death saving statute. See generally *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 30; 658 NW2d 139 (2003); *Miller v Mercy Memorial Hospital Corp*, 466 Mich 196, 197; 644 NW2d 730 (2002). It applies in wrongful death cases, and this is a wrongful death case.

The idea that § 5852 applies to wrongful death claims, and that § 5851(1) does not, finds support in both *Miller, supra* and *Vega, supra*. In *Miller* this Court looked to § 5852 to set the filing limitations and the claim there was one for wrongful death. *Miller*, 466 Mich at 197-198. In contrast, *Vega* was not a wrongful death action, though it was a medical malpractice action. *Vega*, 479 Mich at 245. In *Vega* this Court looked to § 5851(1) to set the filing

limitations. Likewise, in *Vance v Henry Ford Health System*, 272 Mich App 426, 427-428; 726 NW2d 78 (2007), the Court of Appeals looked at a wrongful death action grounded in medical malpractice. The decedent was seven at the time of death. Plaintiff argued that the claim was timely under MCL 600.5851(7). On the other hand, the defendants

argue that the two-year wrongful death saving provision under MCL 600.5852 provides the appropriate measure to determine the latest filing date of this case. *Defendants contend that the trial court erred in accepting plaintiff's argument that the infancy disability saving provision trumps the wrongful death saving provision where this case does not involve a living minor, but instead involves a wrongful death. We agree. Vance, 272 Mich App at 430 (emphasis added).*

See also *Turner v Mercy Hospitals*, 210 Mich App 345, 349; 533 NW2d 365 (1995) (“Because this is a wrongful death claim, the following [§ 5852] savings clause applies.”). These cases support the notion that § 5852 applies to wrongful death actions, by its plain terms, and § 5851(1) applies to other actions.

Under the terms of § 5852, plaintiff’s action was timely. Plaintiff’s claim was based on medical malpractice. The discovery rule, MCL 600.5838a(2), therefore applied to her claim. Decedent died while still insane, and thus this period of limitations had not run. The action was brought within two years of the letters of authority being issued to Patricia Pappas; death occurred on July 13, 2001, letters of authority were issued on July 16, 2002, and the complaint was filed on June 2, 2003. Admittedly, the claim must still be timely within § 5852’s last sentence. Defendants argue that it was not.

Specifically, defendants reason as follows. Because she was insane, Florinda Pappas did not discover her cause of action before her death. Because she died insane, Florinda Pappas could never have discovered her claim. Moreover, Florinda Pappas can now never

discover her claim, and therefore the period of limitations will never run. In other words, defendants believe that the last sentence of § 5852 is a nugatory – “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.” Defendants are wrong for the following reason.

First of all, defendants argue as if it is a matter of discretion whether the discovery rule should apply in wrongful death/medical malpractice actions, that this case demonstrates why the rule should not apply. The Legislature has declared that the discovery rule applies, without discretion, in medical malpractice actions. “Except as otherwise provided in this subsection, *an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, which is later.*” MCL 600.5838a(2) (emphasis added). This Court has already unanimously held that the discovery provision applies to medical malpractice claims *and* that its provisions are incorporated into the wrongful death savings provision, MCL 600.5852, under which plaintiff brings this action. *Miller, supra*.

Second, a period of limitation can be calculated in a case where a person with a medical malpractice action dies without having discovered that action. It is obvious: the discovery period ends on the date of death. This follows logically from the fact that, obviously, death ends the possibility of any potential claimant discovering any cause of action he or she may have had. So, the discovery period expires on the date of death. The estate then has six months to commence an action. If it does not, the period of limitations expires. But, once the six month discovery period of limitations expires, the estate has three years to bring an action.

This is when the last sentence of § 5852 applies. This interpretation gives effect to the last sentence of § 5852.

The language of § 5852 supports this interpretation. The section starts by noting that it applies if “a person dies before the period of limitations has run”.<sup>1</sup> It goes on to acknowledge that after death the limitations period could have run; it state that an action could be filed within two years of the issuance of letters of authority “although the period of limitations has run.” So, the statute begins by acknowledging that the period of limitations had *not* run at the time of death but ends by acknowledging that the period of limitations had run. This scenario makes sense only if the period of limitations continues to run, or begins to run, at the time of death.

So, contrary to defendants’ argument § 5852 does *not* provide a period of limitations without limitation. The period of limitation provided in § 5852’s last sentence begins to run no later than the date of death. At that point the decedent had either discovered the claim, or the opportunity for the claim to be discovered ends. The discovery period ends, and the six month period of limitations to file a claim begins. Once that six month period has run, the estate has a maximum of three years to bring an action that survives death. In the case at bar, six months after the date of death is January 13, 2002, and three years after that is January 13, 2005. The complaint was filed on June 2, 2003.

To conclude, § 5852 applies specifically to wrongful death claims, and this is a wrongful death claim. It applies when the period of limitations has not run at the time a person a dies, and here the period of limitations had not run at the time of death. Further, the claim was based upon medical malpractice, so the discovery rule applies. The complaint was filed both

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<sup>1</sup> It also applies if a person dies “within 30 days after the period of limitations has run”. MCL 600.5852.

within two years of the issuance of letters of authority, and within three years of the running of the period of limitations, that being six months plus three years after the date of death.

That answers this Court's second question. Now to answer this Court's first question: § 5851(1) does not apply in this case. Moreover, even if it does, it refers us back to § 5852 and its longer periods of limitation.

Section 5851(1) states as follows:

Except as otherwise provided in subsections (7) and (8) [neither of which is applicable here], if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852. MCL 600.5851(1).

Several differences between § 5851(1) and § 5852 are apparent. Those differences demonstrate that the latter, not the former, applies to the instant claim.

To begin, in contrast with the wrongful death savings provision, § 5851(1) is known as the general savings provision. See generally *Liptow v State Farm*, 272 Mich App 544, 556; 726 NW2d 442 (2006); *Professional Rehabilitation Associates v State Farm*, 228 Mich App 167; 577 NW2d 909 (1998); *Amwake v Mercy-Memorial Hospitals*, 92 Mich App 546; 285 NW2d 369 (1979). Where there is a specific statute that may apply to a given scenario and a general statute that may apply, the specific controls. *Fluor Enterprises, Inc v Department of Treasury*, 477 Mich 170, 181; 730 NW2d 722 (2007); *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006). Thus, the wrongful death savings provision should apply to this wrongful death action.

There are other differences between § 5851(1) and § 5852. Unlike § 5852, § 5851(1) makes no reference to a wrongful death action, to actions that by law survive death. The case at bar is a wrongful death action. Unlike § 5852, § 5851(1) applies only when the period of limitations has run, it allows a claim to be filed “although the period of limitations has run”. In the case at bar, the period of limitations had not run, nor did it run within 30 days of the date of death.<sup>2</sup> Unlike § 5852, § 5851(1) makes no reference to letters of authority being issued. In the case at bar, letters of authority had been issued. Section 5852 contemplates a wrongful death action as it assumes letters of authority will be issued; § 5851(1) makes no such assumption. All of these facts point toward the application of § 5852 to the case at bar.

Finally, there is the last sentence of § 5851(1): “This section does not lessen the time provided for in section 5852.” Defendants seek to lessen the time period § 5852 allows to bring a wrongful death action by application of § 5851(1). This last sentence of § 5851(1) expressly precludes that.

At first blush this cross-reference to § 5852 in § 5851(1) would seem unnecessary if § 5852 only applies to wrongful death claims and § 5851(1) applies to non-wrongful death claims. The sentence seems necessary only if arguably both of the provisions might apply in a given case. There is an explanation.

Section 5852 applies *only* when someone has died, either before the period of limitations has run or within 30 days thereafter. It specifically applies to claims “which survive[] by law”. In contrast, § 5851(1) can apply in the absence of a person’s death. It can apply when a

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<sup>2</sup> Regarding this point, to be precise, *if* § 5851(1) applies to wrongful death actions, to harmonize it with § 5852, the former would only apply to cases where the period of limitations did not run within 30 days of the date of death. In other words, § 5852 would apply if a person died before the period of limitations had run or “within 30 days after the period of limitations ha[d] run,” and § 5851(1) would therefore only apply to cases where the period of limitations had run more than 30 days after the period of limitations had run. However, if § 5852 applies to wrongful death actions and § 5851(1) does not, there is no need to harmonize the two provisions.

minor turns 18 or when an insane person becomes sane. But, § 5851(1) can also apply when “the disability [either being under 18 years of age or being insane] is removed through death or otherwise”. So, where death ends the disability, there could be some confusion as to whether § 5851(1) or whether § 5852 applies. The last sentence of § 5851(1) clarifies any confusion. If there is a death, and a wrongful death action, § 5852 applies, or said another way the one year period in § 5851(1) “does not lessen the time provided for in section 5852.”

To summarize, § 5851(1)’s last sentence is added to clarify that if death is involved and a wrongful death action is filed, the filing periods are stated in § 5852 and not lessened by § 5851(1). Section 5851(1) applies when there is a death but no wrongful death action; § 5852 applies when there is a death and a wrongful death action.

To conclude, § 5851(1) does not apply in this case. It does not apply to wrongful death actions, and it does not apply where at the time of death the period of limitations has not run. And, if § 5851(1) applies, it cannot be used to lessen the time periods stated in § 5852.

**RELIEF**

WHEREFORE, plaintiff-appellee, Patricia A. Pappas, Personal Representative of the Estate of Florinda C. Pappas, Deceased, requests that this Court deny defendants' application for leave to appeal and remand this matter to the circuit court for further proceedings.

Respectfully submitted,

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