

# MICHIGAN SUPREME COURT



## *Office of Public Information*

contact: Marcia McBrien | (313) 972-3219 or (517) 373-0129

FOR IMMEDIATE RELEASE

### **POLICE OFFICERS' WHISTLEBLOWER SUIT AGAINST DETROIT MAYOR, CITY OF DETROIT TO COME BEFORE MICHIGAN SUPREME COURT THIS WEEK**

LANSING, MI, May 8, 2007 – Two former Detroit police officers who claim they lost their jobs because of their investigation into alleged misconduct have asked the Michigan Supreme Court to hear their appeal, as have defendants Mayor Kwame Kilpatrick and the city of Detroit.

In *Brown v Mayor of Detroit*, the former deputy chief of the Detroit Police Department's Executive Protection Unit and a former EPU detective claim in that they were forced out of their jobs because the detective reported, and the deputy chief began to investigate, alleged misconduct by the mayor's security staff and a rumored party at the Manoogian Mansion, the mayor's residence. At issue is whether the officers' actions were "protected activity" under the state's Whistleblower Protection Act. The Court will hear oral argument and later decide whether to grant leave to appeal in this case.

Also before the Court is *In re Certified Question (Miller v Ford Motor Company)*, in which the Court is asked to decide a question of Michigan law in an asbestos case filed in Texas. At issue is whether Ford owes a duty to the deceased plaintiff, who was allegedly exposed to asbestos through her stepfather, an independent contractor's employee who worked at Ford's River Rouge plant.

The remaining cases involve tax, insurance, medical malpractice, and procedural issues.

Court will be held on **May 10** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m.**

*(Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at [http://www.courts.michigan.gov/supremecourt/Clerk/msc\\_orals.htm](http://www.courts.michigan.gov/supremecourt/Clerk/msc_orals.htm). For further details about the cases, please contact the attorneys.)*

**Thursday, May 10**  
***Morning Session***

**HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC v TOWNSHIP OF MARION (case no. 130698)**

**Attorney for petitioner Highland-Howell Development Company, LLC:** Kathleen McCree Lewis/(313) 568-6577

**Attorney for respondent Township of Marion:** Neil H. Goodman/(248) 988-5880

**Attorney for amicus curiae Michigan Association of Home Builders:** Gregory L. McClelland/(517) 482-4890

**Attorney for amicus curiae Michigan Townships Association:** Craig A. Rolfe/(269) 382-4500

**Tribunal:** Michigan Tax Tribunal

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/05-07/130698/130698-Index.htm>

**At issue:** The petitioner developer did not appeal a \$3 million special assessment for a sewer project that included a trunk line through its 200-acre parcel. It later appealed to the Tax Tribunal when the respondent township informally eliminated the trunk line, but the Tax Tribunal rejected the appeal as untimely. After the township formally ratified changes in the original project, including elimination of the trunk line, the petitioner timely appealed, but the Tax Tribunal ruled that its earlier decision barred the appeal under res judicata, a legal doctrine that provides that a matter already decided by a court or tribunal cannot be relitigated. The Court of Appeals affirmed based on the legal doctrine of collateral estoppel, which prevents a party to a lawsuit from raising a fact or issue which was already decided against that party in another lawsuit. How may a property owner seek relief from a special assessment for a planned improvement when there is a later change to the plan that materially affects the benefit to the owner's property? Did the Tax Tribunal have jurisdiction to consider the last appeal?

**Background:** Under the Public Improvement Act, a township may make a public improvement and levy a special assessment by following a process that includes notice, hearing, opportunity to object by property owners, approval of the plan and determination of a special assessment district by resolution, and confirmation of the "special assessment roll." There is then another hearing, preceded by notice, at which objections can be made to the assessment roll. After that hearing, the township board confirms the special assessment roll, amends it, or rejects it. MCL 41.726(3) provides the only appeal process: "After the confirmation of the special assessment roll, all assessments on that assessment roll shall be final and conclusive unless an action contesting an assessment is filed in a court of competent jurisdiction within 30 days after the date of confirmation." Highland-Howell Development Company, LLC owns 200 vacant acres in Marion Township. Highland-Howell did not object or appeal in December 1996 when Marion Township levied a special assessment of \$3.25 million for a sanitary sewer project that included a trunk line through the middle of the Highland-Howell's property. But in 1998, after learning that Marion Township had unofficially eliminated the trunk line from the project, Highland-Howell petitioned the Tax Tribunal. The Tax Tribunal dismissed the appeal for lack of jurisdiction because Highland-Howell had not timely appealed from the 1996 special assessment decision. After Marion Township passed a resolution on May 13, 2004 that ratified changes in the sewer plan, including elimination of the trunk line across Highland-Howell's property, the Highland-Howell filed a petition with the Tax Tribunal within 30 days. The Tax Tribunal dismissed that appeal, reasoning that, under the legal doctrine of res judicata, the tribunal's dismissal of the 1998 petition barred Highland-Howell's 2004 petition. In an unpublished opinion, the Court of Appeals affirmed, but on the basis that the 2004 petition was barred by collateral estoppel, a legal doctrine which prevents a party to litigation from raising an issue or

fact that was decided against that party in another lawsuit. Highland-Howell appeals.

**IN RE CERTIFIED QUESTION FROM THE FOURTEENTH COURT OF APPEALS  
DISTRICT OF TEXAS (MILLER, et al. v FORD MOTOR COMPANY) (case no. 131517)**

**Attorney for plaintiffs Glenn Miller, Estate of Carolyn Miller, Shawn Dean, John Roland, and Alma Roland:** Neil A. Kay/(248) 613-5297

**Attorney for defendant Ford Motor Company:** Phillip J. DeRosier/(313) 223-3500

**Attorney for amicus curiae Pacific Legal Foundation:** C. Thomas Ludden/(248) 593-5000

**Attorney for amicus curiae Michigan Defense Trial Counsel:** Mary Massaron Ross/(313) 983-4801

**Attorney for amicus curiae International Union of Bricklayers and Allied Craftworkers, Trowel Trades, Local No. 1 of Michigan:** C. Taylor Campbell/(248) 647-6966

**Attorney for amicus curiae Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Association of Manufacturers, National Federation of Independent Business Legal Foundation, American Chemistry Council, Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies, and American Tort Reform Association:** Dana M. Mehrer/(816) 474-6550

**Attorney for amicus curiae Michigan Trial Lawyers Association:** David R. Parker/(313) 875-8080

**Attorney for amicus curiae Michigan Manufacturers Association:** Paul C. Smith/(313) 965-8300

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/05-07/131517/131517-Index.htm>

**At issue:** A Texas jury awarded \$9.5 million for the mesothelioma death of a woman who was allegedly exposed to asbestos by washing her stepfather's work clothes; her stepfather worked for an independent contractor hired by Ford Motor Company to work at Ford's River Rouge plant. The woman herself was never at the plant. The Texas Court of Appeals has asked the Michigan Supreme Court to determine whether, under Michigan law, Ford owed a duty to the woman to protect her from exposure to asbestos fibers.

**Background:** The plaintiffs, relative of Carolyn Miller, claim that she died from mesothelioma, a form of cancer linked to asbestos exposure. From the mid-1950s to 1965, Miller's stepfather, John Roland, worked for independent contractors who were hired by Ford Motor Company to maintain and refurbish blast furnaces, including the blast furnaces at Ford's River Rouge plant. The plaintiffs allege that Roland was exposed to asbestos while working there and that Miller in turn was exposed to asbestos when she washed Roland's work clothes. A Texas jury awarded the plaintiffs \$9.5 million as compensation for Miller's death; the jury also awarded \$500,000 to Roland for his asbestos-related injuries. Ford appealed the jury's verdict to the Texas Court of Appeals. Under Michigan law, which applies to this case because the alleged injuries happened in Michigan, Ford did not have a duty to Miller because she was never on or near Ford's property, Ford contended. Moreover, Ford argued, it did not owe a legal duty to a household member of an independent contractor's employee. The plaintiffs responded, in part, that Ford should have foreseen not only that workers at the plant would be harmed by asbestos exposure, but also that their family members would be harmed.

Michigan Court Rule 7.305(B) permits federal, tribal, and appellate courts of other states to submit, or certify, questions to the Michigan Supreme Court where the question is one "that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent...."

The Texas Court of Appeals, at Ford's request and over the plaintiffs' objection, certified the following question to the Michigan Supreme Court: "Whether, under Michigan law, Ford, as owner of the property on which asbestos-containing produces were located, owed to Carolyn Miller, who was never on or near that property, a legal duty specified in the jury charge submitted by the trial court, to protect her from exposure to any asbestos fibers carried home on the clothing of a member of Carolyn Miller's household who was working on that property as the employee of an independent contractor." On December 29, 2006, the Michigan Supreme Court granted the Texas Court of Appeals' request to answer the certified question.

**MATTHEWS v REPUBLIC WESTERN INSURANCE COMPANY, et al. (case no. 130912)**

**Attorney for plaintiffs Lewis Matthews III and Deborah Matthews:** Jeffrey B. Morganroth/(248) 355-3084

**Attorney for defendant Republic Western Insurance Company:** Raymond M. Kethledge/(248) 822-7800

**Trial court:** Wayne County Circuit Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/05-07/130912/130912-Index.htm>

**At issue:** The plaintiff was injured while driving a rented truck in Georgia on a suspended license. The truck rental company's insurer denied the plaintiff's claim for no-fault benefits. The insurance company argued that the truck was not subject to the requirements of Michigan's no-fault act, because it was owned by a nonresident and titled in Kentucky, and was not operated in Michigan for more than 30 days in the calendar year preceding the accident. The insurance company also argued that it did not owe the plaintiff no-fault benefits because he was engaged in wrongful conduct – driving on a suspended license – at the time of the accident. Both the trial court and the Court of Appeals rejected the insurance company's arguments. Does the common law wrongful conduct rule bar the plaintiff from recovering no-fault benefits? What is the meaning of the phrase "operated in this state for an aggregate of more than 30 days in any calendar year" in the no-fault statute?

**Background:** While driving in Georgia, Lewis Matthews was seriously injured in a collision with an 18-wheel tractor-trailer. The police determined that Matthews, who rented the truck in Michigan, was not at fault for the accident. Matthews sought to obtain first-party no-fault benefits from Republic Western Insurance Company, the truck rental company's insurer, but Republic refused. First, because Matthews was driving with a suspended operator's license, the insurance company argued that he was engaged in "wrongful conduct" when the accident occurred and was therefore ineligible for benefits. Under Michigan's common-law "wrongful conduct" rule, a plaintiff may not bring a lawsuit "if, in order to establish his action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party." *Orzel v Scott Drug Co*, 449 Mich 550, 558 (1995). Second, Republic argued that the truck was not subject to the requirements of the Michigan no-fault act, because it was owned by a nonresident and titled in Kentucky, and was not operated in Michigan for more than 30 days in the calendar year preceding the accident. Matthews sued the insurer and, after an interlocutory ruling from the Court of Appeals, the trial judge rejected both of Republic's arguments. A jury awarded Matthews \$400,000. The insurance company appealed to the Court of Appeals, which held in an unpublished opinion that the causal relationship between Matthews' driving with a suspended license and his injuries was too attenuated to bar recovery under the wrongful conduct rule. The

Court of Appeals also agreed with the trial court that the insurance company's evidence concerning the truck's presence in Michigan during the preceding calendar year was insufficient to establish that it was not subject to the provisions of the no-fault act. The appellate court affirmed the trial court's rulings. The insurance company appeals.

*Afternoon session*

**BETTEN AUTO CENTER, INC. v DEPARTMENT OF TREASURY (case nos. 132343-5, 132347-9)**

**Attorneys for plaintiffs Betten Auto Center, Inc., Betten Motor Sales, Inc., d/b/a Toyota of Grand Rapids, and Betten-Friendly Motors Company, d/b/a/ Family Auto Center:** Michael H. Perry/(517) 482-5800, June Summers Haas/(517) 377-0734

**Attorney for defendant Department of Treasury:** Heidi L. Johnson-Mehney/(517) 373-3203

**Attorney for amicus curiae Detroit Auto Dealers Association and Michigan Automobile Dealers Association:** Jay A. Kennedy/(313) 566-2500

**Trial court:** Court of Claims

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/05-07/132343/132343-Index.htm>

**At issue:** Automobile dealerships sought a refund of use taxes that they paid on cars that were purchased for resale but received limited use as demonstrators before resale. Defendant Department of Treasury denied the plaintiffs' request, and the plaintiffs appealed in the Court of Claims, which ordered the refund. The Court of Appeals affirmed. It also held, however, that pursuant to MCL 205.93(2), the plaintiffs were liable for a 2.5 percent use tax and a \$30 monthly charge for certain vehicles. Did the Court of Appeals properly interpret the resale exemption?

**Background:** The plaintiffs are licensed automobile dealerships that purchase and resell new and used cars. Each new and used automobile is entered into inventory and remains in inventory until it is resold. None of the vehicles are ever titled in any of the plaintiffs' names. Some vehicles are driven by the plaintiffs' employees as "demonstrators." Such vehicles carry dealer plates, and have stickers on their windows listing their features and price. During the period at issue — October 1999 through September 2003 — the Michigan Department of Treasury had a policy that required payment of use tax on vehicles purchased for resale that accumulated above a certain mileage limitation during the selling process, regardless of whether the vehicles were purchased for resale and sold, and without inquiry into whether the mileage was due to test drives by customers or by dealership employees. Each of the plaintiffs paid use tax on the new and used vehicles at issue in this case in accordance with that policy. In late 2003, the Court of Appeals issued its unpublished decision in *Crown Motors of Charlevoix, Ltd v Dept of Treasury*, (Docket No. 240555). *Crown Motors* held that a dealership that purchased vehicles for resale and that ultimately sold the vehicles, but meanwhile used the vehicles for "various other purposes" before reselling them, was not liable for use tax pursuant to MCL 205.94(1)(c). After learning of the Court of Appeals ruling in *Crown Motors*, the plaintiffs requested a refund of use tax they had previously paid on new and used vehicles. The refund requests totaled \$48,449.74. The Department of Treasury denied each of the plaintiffs' requests, refusing to alter its long-standing position on the basis of an unpublished Court of Appeals opinion, which is not binding precedent. The plaintiffs appealed to the Court of Claims, which determined that the plaintiffs were entitled to a refund; the Court of Claims directed the department to refund the full amount requested of \$48,449.74. In a published opinion, the Court of Appeals affirmed in part, reversed

in part, and remanded the case to the trial court for further proceedings. The appeals court affirmed the trial court's determination that, because plaintiffs purchased the subject automobiles for resale, they were exempt from use tax pursuant to the "purchased for resale" exemption of MCL 205.94(1)(c). But the Court of Appeals also concluded that, pursuant to the 2002 amendment of MCL 205.93(2), a 2.5 percent use tax and a \$30 monthly charge applies to vehicles the plaintiffs used as "demonstrators" beyond the 25-vehicle allowable exemptions under the demonstration exemption, notwithstanding the resale exemption. Both the department and the plaintiffs appeal.

**BROWN, et al. v MAYOR OF DETROIT, et al. (case nos. 132016-7)**

**Attorney for plaintiffs Gary A. Brown and Harold C. Nelthrope:** Michael L. Stefani/(248) 544-3400

**Attorney for defendants Mayor of Detroit and City of Detroit:** Morley Witus/(313) 596-9308

**Trial court:** Wayne County Circuit Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/05-07/132016/132016-Index.htm>

**At issue:** Two former Detroit police officers have sued the Mayor of Detroit and the city of Detroit. The plaintiffs claim that they lost their jobs in violation of the Whistleblower Protection Act, MCL 15.361 et seq. The mayor and city argue that the plaintiffs did not engage in protected activity within the WPA's meaning. In order to fall within the WPA's scope, must an employee of a public body report illegal activity to an outside or higher authority than his employer?

**Background:** Harold Nelthrope was a detective in the Detroit Police Department's Executive Protection Unit, which provides security for the Mayor of Detroit; Gary Brown was the EPU's deputy chief. In March 2003, Nelthrope contacted the Detroit Police's Professional Accountability Bureau with allegations about EPU officers Loranzo "Greg" Jones and Michael Martin, and about a rumored party in the Manoogian mansion attended by Mayor Kwame Kilpatrick that featured nude dancers. Nelthrope asserted that Mrs. Kilpatrick had unexpectedly arrived at the party and fought with one of the dancers, injuring her, and that police officials had destroyed activity logs documenting the party. Nelthrope also claimed that Jones and Martin falsified timesheets, drank while on duty, covered up accidents involving departmental vehicles, and left a departmental handgun unattended in a car. He asserted that Jones and Martin were old friends of Kilpatrick and that they facilitated the mayor's alleged practice of cheating on his wife with other women, including Christine Beatty, Kilpatrick's chief of staff. Brown, who directed some preliminary investigation into Nelthrope's allegations, prepared a memo about the allegations; the memo was ultimately given to Beatty, who then gave it to Kilpatrick. Kilpatrick fired Brown; Nelthrope, who had been transferred out of EPU, went on sick leave and then disability leave.

Brown and Nelthrope sued the city of Detroit and Kilpatrick. Brown claimed he was fired because he was investigating Kilpatrick, his family, and his friends. Nelthrope contended that he was transferred out of EPU because of his allegations regarding the Mayor and his friends. Nelthrope also asserted that the related media coverage put him in fear for his and his family's safety, and that he was so stressed that he ultimately could not return to work. Their complaints included claims for slander, intentional infliction of emotional distress, and violation of the Whistleblower Protection Act, MCL 15.361 et seq. The WPA provides in part that "An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the

employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body....” An employee is engaged in WPA-protected activity if the employee has reported, or is about to report, a suspected violation of law to a public body.

The trial judge dismissed both plaintiffs’ slander claims against the city based on governmental immunity, but allowed the plaintiffs’ slander claims against Kilpatrick to go forward. The judge also denied the defendants’ motions to dismiss the plaintiffs’ WPA claims. The judge ruled in favor of Nelthrope on his whistleblower claim, finding that the defendants violated the WPA and that the only issue remaining for the jury was how much to award Nelthrope in damages. The defendants sought leave to appeal to the Court of Appeals, arguing that the plaintiffs did not engage in WPA-protected activity. In a published opinion, the Court of Appeals rejected this argument as to Brown, but found a question of fact as to whether Nelthrope had engaged in protected activity because he had reported his allegations to his employer, rather than to an outside agency or higher authority. Accordingly, the Court of Appeals reversed the trial court’s grant of partial summary disposition to Nelthrope on his WPA claim. The Court of Appeals also dismissed the plaintiffs’ slander claims against the mayor, holding that Kilpatrick was acting within the scope of his governmental authority when he made statements to the media about Brown and Nelthrope. The appellate court affirmed the trial judge’s other rulings. Both the defendants and the plaintiffs appeal on the WPA issues.

**KIRKALDY v RIM, et al. (case no. 129128)**

**Attorney for plaintiffs Mary Kirkaldy and William Kirkaldy:** Mark Granzotto/(248) 546-4649

**Attorney for defendants Choon Soo Rim, M.D., and Rim & Sol, M.D., P.C.:** Raymond W. Morganti/(248) 357-1400

**Attorney for defendants Raina M. Ernstoff, M.D., and Raina M. Ernstoff, M.D., P.C.:** Debbie K. Taylor/(586) 447-3736

**Attorney for amicus curiae Michigan Trial Lawyers Association:** Janet M. Brandon/(248) 855-5580

**Attorney for amicus curiae Citizens for Better Care:** Jules B. Olsman/(248) 591-2300

**Trial court:** Wayne County Circuit Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/05-07/129128/129128-Index.htm>

**At issue:** In this medical malpractice case, the affidavit of merit filed with the plaintiffs’ complaint was signed by an expert who does not have the same board certification as the defendant physician, as required by MCL 600.2912d and 600.2169. The trial court dismissed the plaintiffs’ lawsuit without prejudice. The Court of Appeals ruled in a published opinion that the statute of limitations was not tolled by the defective affidavit of merit and that the complaint should be dismissed with prejudice. Did the defective affidavit of merit toll the statute of limitations? Can a defect in an affidavit of merit filed with a medical malpractice complaint be cured without refileing the complaint?

**Background:** Mary and William Kirkaldy, sued Dr. Ernstoff and Dr. Rim, two board-certified neurologists. With their complaint, the Kirkaldys filed an affidavit of merit that was signed by a neurosurgeon. But the medical malpractice statute requires that an affidavit of merit must be signed by an expert who is board-certified in the same specialty as the doctor who is being sued.

The trial judge determined that the plaintiffs' affidavit of merit was defective and dismissed the case, but without prejudice. The defendants appealed, arguing that the dismissal should have been with prejudice because the statute of limitations had expired after the plaintiffs filed their complaint. The plaintiffs cross-appealed, arguing that their case should not have been dismissed at all, because their attorney "reasonably believed" that the affidavit of merit was satisfactory. The Court of Appeals affirmed the trial court's ruling in a published opinion. Both the plaintiffs and the defendants appealed, and the Supreme Court remanded the case to the Court of Appeals to consider whether the statute of limitations was tolled by the filing of the plaintiffs' defective affidavit of merit. On remand, in a published opinion, the Court of Appeals agreed with the defendants that the statute of limitations was not tolled and that the plaintiffs' complaint should have been dismissed with prejudice. Two members of the Court of Appeals panel asked the Supreme Court to reconsider its decision in *Scarsella v Pollak*, 461 Mich 547 (2000), which held that, because filing a medical malpractice complaint without an affidavit was insufficient to commence a plaintiff's malpractice action, the statute of limitations was not tolled. The Court of Appeals also asked the Supreme Court to examine Court of Appeals opinions that have expanded the reach of *Scarsella*, such as *Geralds v Munson Healthcare*, 259 Mich App 225 (2003) and *Mouradian v Goldberg*, 256 Mich App 566 (2003). The plaintiffs appeal.

**MATHER INVESTORS, LLC v LARSON, et al. (case no. 131654)**

**Attorney for plaintiff Mather Investors, LLC, d/b/a Mather Nursing Center:** Randolph B. Osstyn/(906) 228-3650

**Attorney for defendant William Larson:** Bruce L. Houghton/(906) 475-4408

**Trial court:** Marquette County Circuit Court

**Link to briefs:**

<http://www.courts.michigan.gov/supremecourt/Clerk/05-07/131654/131654-Index.htm>

**At issue:** A nursing home resident transferred a savings account and real estate to her nephew; she died owing the nursing home for her care. Although the nursing home sued both the resident and her nephew for fraudulent transfer, the resident died a week after the lawsuit was filed, and was never served with the complaint. The nursing home did not add her estate as a party, and the trial judge ultimately dismissed the case against the nephew, finding that the aunt's estate was a necessary party. The court also denied the nursing home's motion to then add the estate as a defendant, reasoning that the nephew would be prejudiced by the delay. In a fraudulent transfer case, if the debtor is dead, must the plaintiff sue the debtor's estate to get relief from the debtor's alleged fraud? Did the lower courts in this case correctly rule that the nephew would have been prejudiced by the nursing home's delay in adding the estate to the lawsuit?

**Background:** Alice Maddock resided at Mather Nursing Center; Medicare paid for her care from her admission in June 2002 until August 2002, at which time she became a private pay patient. On July 22, 2002, Maddock transferred her savings account to her nephew, William Larson. In October 2002, when she owed the nursing home about \$11,000, Maddock also transferred two real estate parcels to Larson by quit claim deed. A week before Maddock died at the nursing home in August 2003, the nursing home sued her and Larson to recover an outstanding debt for Maddock's care; the nursing home claimed in part that Maddock fraudulently transferred her assets to Larson. Maddock was not served before her death; Larson answered the nursing home's complaint, attaching a copy of Maddock's death certificate; Maddock was dismissed from the lawsuit for lack of service. The nursing home did not petition the circuit court to open an estate for Maddock or seek to add her estate as a party by a June 14,

2004 deadline set by the court. Both parties moved for summary disposition, with Larson arguing that the case against him must be dismissed. His aunt's estate was a necessary party to the lawsuit, Larson argued, contending that the nursing home would be unable to obtain a judgment against him without including Maddock's estate. The nursing home argued that the court should enter a judgment in its favor, asserting that Larson had admitted during his deposition that he had no evidence to dispute the nursing home's fraudulent transfer claim. But the circuit judge denied the nursing home's motion, reasoning that Maddock's estate was a necessary party. The judge also later denied the nursing home's motion to substitute the estate as a party; the trial judge found that Larson has been prejudiced by the nursing home's delay in making the substitution. In a published authored opinion, the Court of Appeals affirmed. The nursing home appeals.

-- MSC --