No. 29004 -- Patricia Lou Bradshaw, Administratrix of the Estate of James J. Bradshaw and Patricia Lou Bradshaw, individually v. David L. Soulsby, M.D., A.C. Velasquez, M.D., Alberto C. Lee, M.D., and Kenneth McNeil, M.D.

Maynard, Justice, dissenting:

**FILED**
**December 12, 2001**
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The majority decision in this case violates both the settled law of this Court and the principles of sound reasoning.

The doctrine of *stare decisis* mandates that we follow this Court's unanimous opinion in *Miller v. Romero,* 186 W.Va. 523, 413 S.E.2d 178 (1991), in deciding this case. *Stare decisis* rests upon the important principle that the law by which people are governed should be "fixed, definite, and known," *Booth v. Sims*, 193 W.Va. 323, 350 n. 14, 456 S.E.2d 167, 194 n. 14 (1995) (citation omitted), and not subject to frequent modification in the absence of compelling reasons. Of course, this Court does not blindly adhere to precedent in every case. "[A]s a practical matter, a precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled[.]" *State v. Guthrie*, 194 W.Va. 657, 679 n. 28, 461 S.E.2d 163, 185 n. 28 (1995). However, the in-depth analysis in *Miller* remains as valid today as it was when that opinion was handed down. In *Miller,* we explained:

> The plaintiff's argument for extending the time limitations for wrongful death cases ignores a crucial line of West Virginia

> case law interpreting our wrongful death act. This Court has held that, unlike a malpractice or negligence action, a wrongful death action is not a right which was recognized at common law. . . .
>
> Without an underlying common-law basis, wrongful death is a legislatively created right.

*Miller*, 186 W.Va. at 525-26, 413 S.E.2d at 180-81. The wrongful death act's legislative origins are significant because,

> the two year limitation upon the bringing of an action for wrongful death is *an integral part of the statute itself and creates a condition precedent to the bringing of an action.* The condition is made absolute and, strictly speaking, is not a statute of limitations. The time fixed by the statute creating the right is one of the components entering into the plaintiff's right of recovery. Once the statutory period expires, there remains no foundation for judicial action.

*Huggins v. Hospital Bd. of Monongalia County*, 165 W.Va. 557, 560, 270 S.E.2d 160, 162-63 (1980) (citations omitted) (emphasis added), *superseded on other grounds by rule as stated in Winston v. Wood*, 190 W.Va. 194, 437 S.E.2d 767 (1993).

There has been no change in the wrongful death act since *Miller* that warrants a reconsideration of the issue before us. *Miller* is well reasoned, in accord with a long line of case law, and consistent with a significant number of cases in other jurisdictions. *See, Morano v. St. Francis Hospital*, 100 Misc.2d 621, 420 N.Y.S.2d 92 (1979); *Eldridge v. Eastmoreland General Hospital*, 307 Or. 500, 769 P.2d 775 (1989), *superseded by statute as stated in Kambury v. Daimler Chrysler Corp.*, 173 Or.App. 372, 21 P.3d 1089 (2001); *Fowles v. Lingos*, 30 Mass.App.Ct. 435, 569 N.E.2d 416 (1991); *Moyer v. Rubright*, 438 Pa.Super. 154, 651 A.2d 1139

(1994); *Corkill v. Knowles,* 955 P.2d 438 (Wyo. 1998); *Gray v. Com., Transp. Cabinet Dept. of Highways,* 973 S.W.2d 61 (Ky.Ct.App. 1997); *Schultze v. Landmark Hotel Corporation,* 463 N.W.2d 47 (Iowa 1990); *Moreno v. Sterling Drug, Inc.,* 787 S.W.2d 348 (Tex. 1990); *Leo v. Hillman,* 164 Vt. 94, 665 A.2d 572 (1995); *Trimper v. Porter-Hayden,* 305 Md. 31, 501 A.2d 446 (1985); and *Miles v. Ashland Chemical Co.,* 261 Ga. 726, 410 S.E.2d 290 (1991). Accordingly, there is no sound reason for this Court to overrule *Miller*.

In addition, the majority opinion ignores clear statutory language. It is fundamental that "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus Point 2, *State v. Elder,* 152 W.Va. 571, 165 S.E.2d 108 (1968). Also, "[c]ourts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed." Syllabus Point 1, *id.*

W.Va. Code § 55-7-6(d) unequivocally provides that "[e]very such action shall be commenced within two years after the death of such deceased person[.]" This code section unambiguously provides that death is the event that triggers the running of the two-year limitation period. There is no blank in this code section for this Court to fill in. Accordingly, the Court should apply the code section as it is written and resist the temptation to expand its meaning.[1]

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[1]Notably, the Legislature has provided an exception to the two-year limitation period. According to W.Va. Code § 55-7-6(d), the limitation period is subject to the provisions of W.Va. Code § 55-2-18 which provide for a one-year extension of the applicable statute of limitations for instituting an action which was timely commenced in the circuit court and terminated during its pendency upon a ground not going to

Moreover, the majority's application of the discovery rule to a wrongful death action is superfluous. Unlike situations where the injured party is not aware of the injury when it occurs, such as *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992), or is aware of the injury but is blamelessly ignorant of its true cause, as *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), an allegedly wrongful death puts any person possessing common knowledge and experience on notice that a possible cause of action exists at the time of death. In other words, the time of death indicates an obvious starting point for inquiry regarding the cause of the decedent's death so that there is no reason for a discovery rule.

Further, even if I were to believe that the discovery rule should be applied to wrongful death actions, and that this Court had the power to do so, this is the wrong case in which to change the law. There was absolutely no reason for the appellant in this case to file her wrongful death action outside of the two-year limitation period. The facts show that the appellant's decedent died on October 17, 1997. Just three days later, on October 20, 1997, after an autopsy was performed, the appellant learned that her husband died as the result of an overdose of a drug that was prescribed by the appellees. Nevertheless, she waited until October 20, 1999, two years and three days after the decedent's death, to bring a wrongful death action.

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the merits. *Taylor v. State Workmen's Compensation Com'r*, 152 W.Va. 609, 615, 165 S.E.2d 613, 615 (1969). This Court has said that W.Va. Code § 55-2-18 "is designed to remedy the harsh effect of the statute of limitations and to save a cause of action which is otherwise barred." *McClung v. Tieche*, 126 W.Va. 575, 577-78, 29 S.E.2d 250, 251 (1944).

Finally, I am disturbed by this Court's continued expansion of the discovery rule and the concomitant erosion of statutes of limitations. This Court has recognized that "[t]he basic purpose of statutes of limitations is to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and to avoid inconvenience which may result from delay in asserting rights or claims when it is practicable to assert them." *Morgan v. Grace Hospital, Inc.*, 149 W.Va. 783, 791, 144 S.E.2d 156, 161 (1965) (citations omitted). The majority opinion further impedes these laudable purposes.

In conclusion, the majority opinion needlessly overrules recent precedent of this Court; ignores the clear language of W.Va. Code § 55-7-6(d); disregards the plain intent of the Legislature; and further eviscerates statutes of limitations. The opinion crafted by the majority will do nothing to advance the interests of diligent plaintiffs, while providing aid to dilatory and apathetic ones. Accordingly, I dissent to the majority opinion. I am authorized to state that Justice Davis joins me in this dissent.