No. 120745

In the

Supreme Court of Illinois

SHERI LAWLER, Executor of the Estate of JILL PRUSAK, Deceased,

Plaintiff-Appellee,

v.

THE UNIVERSITY OF CHICAGO MEDICAL CENTER, a corporation, THE UNIVERSITY OF CHICAGO HOSPITALS and HEALTH SYSTEM, THE UNIVERSITY OF CHICAGO PHYSICIANS GROUP, THE UNIVERSITY OF CHICAGO HOSPITALS, ADVOCATE CHRIST MEDICAL CENTER, a corporation, UNIVERSITY RETINA & MACULA ASSOCIATES, P.C., and RAMA D. JAGER, M.D.,

Defendants-Appellants.

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-14-3189.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 11 L 8152.
The Honorable **Daniel T. Gillespie**, Judge Presiding.

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I.

The Appellate Court Erred in Holding that the Relation-Back Statute Applied to this Case as an Exception to the Medical-Malpractice Statute of Repose.

Nature of the Case

This appeal arises from the dismissal of the plaintiff's wrongful-death claims, which the circuit court held to be time-barred by the medical-malpractice statute of repose, 735 ILCS 5/13-212(a). The original complaint was filed by the decedent in August 2011, alleging negligence in her medical care, which had ended in July 2009. The timeliness of that complaint, which alleged that the decedent did not discover her alleged injury until August 2009, is not in dispute. After the decedent died in November 2013, the plaintiff filed an amended complaint that maintained the decedent's original negligence claims under the Survival Act, 755 ILCS 5/27-6, and added new claims under the Wrongful Death Act, 740 ILCS 180/1 *et seq.* The defendants moved to dismiss the new wrongful-death claims, observing that they had first been brought more than four years after the patient care from which they arose; the plaintiff insisted that they related back to the filing of the original complaint, and should therefore be treated as timely. *See* 735 ILCS 5/2-616(b). The circuit court concluded that the relation-back doctrine did not apply, and dismissed the wrongful-death claims as untimely, leaving the survival claims still pending. The appellate court reversed, holding that the relation-back statute applied, and that the wrongful-death claims should be treated as having been filed on the date the decedent filed the initial complaint. The pleadings are at issue in that

the defendants maintain that the plaintiff's claims under the Wrongful Death Act were time-barred by the medical-malpractice statute of repose.

Questions Presented for Review

The statute of repose for medical-malpractice claims bars any such claim brought more than four years after the last act, or omission, or occurrence giving rise to the claim. The plaintiff first brought her wrongful-death claims more than four years after the allegedly negligent patient care that she alleges to have caused the decedent's death. Does the statute of repose bar those claims?

The relation-back statute is meant to preserve existing causes of action by treating allegations in an amended complaint as having been filed at the time of the original complaint. If a wrongful-death claim was extinguished by the statute of repose before it accrued, can the relation-back statute give validity to such a claim?

In determining the legislative intent of conflicting statutes that cannot be reconciled on their face, courts are generally to presume that the legislature intends more-specific statutes to control over more-general ones, and does not create exceptions not contained in the statutory language. The medical-malpractice statute of repose is a recognized substantive statute that concerns a specific subject, while the relation-back statute concerns a procedural issue of general application. If they are in conflict, does the statute of repose control over the relation-back statute?

Jurisdiction

Appellate jurisdiction is proper under Supreme Court Rule 304(a), the circuit court having made a written finding pursuant to that rule on October 2, 2014 (Vol. III, C673, C729), and the plaintiff having filed a notice of appeal on October 17, 2014 (Vol. III, C723–30). In addition, this Court has jurisdiction under Supreme Court Rule 315, the defendants having filed a timely petition for leave to appeal the appellate court's decision reversing the circuit court's dismissal of the wrongful-death claims and this Court having granted leave to appeal. The dismissal of the plaintiff's wrongful-death claims did not affect the survival claims, which remain pending in the circuit court.

Statutes Involved

Code of Civil Procedure, 735 ILCS 5/13-212(a):

> Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.

Code of Civil Procedure, 735 ILCS 5/2-616(b):

> The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended.

Statement of Facts

On August 4, 2011, Jill Prusak filed a medical-malpractice action against several defendants, claiming that the defendants failed to diagnose her macular pathology between November 5, 2007 and July of 2009 (Vol. I, C3–12). Prusak sued a number of University of Chicago Hospital defendants, several Advocate Health defendants, University Retina and Macula Associates, PC, and Dr. Rama Jager (Vol. I, C3–4). Prusak alleged that as the result of negligent treatment, she sustained injuries of a personal and pecuniary nature (Vol. I, C6). (All Advocate defendants except Advocate Christ Medical Center were later dismissed from the case by agreement (Vol. I, C217–18).)

In early 2014, the circuit court granted the plaintiff leave to file an amended complaint (Vol. II, C368) and to name Sheri Lawler as party plaintiff (Vol. II, C370). Sheri Lawler, as Executor of the Estate of Jill Prusak, filed a First Amended Complaint on April 11, 2014 (Vol. II, C373–91). The amended complaint alleged that Jill Prusak had died on November 24, 2013, and that the plaintiff had been appointed executor of Prusak's estate (Vol. II, C376 at ¶¶ 15, 17). The amended complaint restated the negligence claims from the original complaint, recast as claims under the Survival Act. Unlike the original complaint, however, the amended complaint also included wrongful-death claims against all the defendants (Vol. II, C374, C381–86).

The defendants moved to dismiss the wrongful-death claims, observing that those claims had not been filed until more than four years after the last care in question and were therefore barred by the medical-malpractice statute of repose, 735 ILCS 5/13-212(a) (Vol. II, C406–12, C466–75; *see also* Vol. III, C628–30). They also argued that Jill Prusak's brother and father were not proper beneficiaries under the Wrongful Death Act, and moved to strike the allegations concerning the pecuniary loss to those individuals (Vol. II, C410–11, C466–75; *see also* Vol. III, C629–30).

In a combined response, the plaintiff argued that her amended complaint related back to Prusak's original complaint pursuant to the relation-back statute, 735 ILCS 5/2-616(b) (Vol. III, C541–52). The defendants countered that the relation-back statute did not apply because the plaintiff's wrongful-death action was a new cause of action, brought outside the repose period (Vol. III, C657–62, C663–67).

The circuit court granted the defendants' motions to dismiss the wrongful-death claims, holding that "the relation back doctrine ... is not applicable to the medical malpractice statute of repose" (Vol. III, C672). The court ruled that the plaintiff's wrongful-death claim was a new action barred by the statute of repose (*id.*). Subsequent orders clarified that the wrongful-death claims against all defendants were dismissed, and that all the dismissals were appealable under Supreme Court Rule 304(a) (Vol. III, C673, C729).

The appellate court reversed, holding that the relation-back statute applied as an exception to the statute of repose, and that the plaintiff's wrongful-death claims should be treated as having been filed on the date the decedent filed the initial complaint. *Lawler v. University of Chicago Med. Ctr.*, 2016 IL App (1st) 143189.

Argument

The appellate court erred in holding that the relation-back statute can be applied to avoid the medical-malpractice statute of repose for claims that were extinguished before they even existed. In construing the relation-back statute in that way, the appellate court gave the relation-back statute a power that exceeded the stated legislative purpose of that statute, while also subverting the purpose of the statute of repose.

The relation-back statute has the expressly limited purpose of "preserving" causes of action. 735 ILCS 5/2-616(b). But by applying that statute in the circumstances of this case, the appellate court's decision lets that statute do something much different, and much greater. Because the wrongful-death claims did not exist until the decedent died, more than four years after the last act of patient care and outside the statutory period of repose, the statutory cause of action for wrongful death never existed. By giving the relation-back statute the power to supersede the statute of repose on these facts, the appellate court's decision prevents the statute of repose from achieving the vital legislative purpose for which it was enacted. The appellate court overlooked that

purpose because the court confused that statute's purpose with the very different purpose of the statute of limitations.

Despite its stated attempt "to assess each relevant statute to ensure they operate together consistently with their legislative purposes," the appellate court's decision relies on a mistaken understanding of those purposes. *See Lawler*, 2016 IL 2016 IL App (1st) 143189, ¶ 17. The distinct legislative purposes of these statutes, and the language the General Assembly used to accomplish each purpose, shows that the relation-back statute does not apply on these facts—and thus does not conflict with the statute of repose, which must take precedence here. But even if they could not be reconciled, their language and purposes call for the statute of repose to control—a result that is equally consistent with the canons that guide the courts in more-general matters of statutory construction.

Issues of statutory construction are reviewed *de novo*. *Orlak v. Loyola Univ. Health System*, 228 Ill. 2d 1, 8 (2007). The appellate court erred in this case because it failed "to ascertain and give effect to the legislature's intent." *See Uldrych v. VHS of Illinois, Inc.*, 239 Ill. 2d 532, 540 (2011) (quoting *Moore v. Green*, 219 Ill. 2d 470, 488 (2006)). The most reliable indicator of the legislature's intent is the statutory language, which must be given its plain and ordinary meaning. *Moon v. Rhode*, 2016 IL 119572, ¶ 22 (citing *Hayashi v. Ill. Dep't of Fin. & Prof'l Regulation*, 2014 IL 116023, ¶ 16); *Evanston Ins. Co. v. Riseborough*,

2014 IL 114271, ¶ 15 (citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006)). The appellate court's interpretation gives the relation-back statute the power to do something it was never meant to do, at the expense of an unchallenged legislative purpose this Court has long recognized and consistently respected. Because the appellate court's application of the relation-back statute is based on a mistaken construction of the legislature's intentions as to both the relation-back statute and the statute of repose, its decision was an error of law, and must be reversed.

I.
The Appellate Court Erred in Holding that the Relation-Back Statute Applied to this Case as an Exception to the Medical-Malpractice Statute of Repose.

The appellate court erred in construing the relation-back statute to have a greater effect than what the General Assembly identified in the statute itself. The plaintiff's wrongful-death action for care rendered in or before July 2009 had already been extinguished by the statute of repose before the decedent's death in November 2013. Because the plaintiff's wrongful-death claims did not exist within four years after the last act of patient care at issue, the appellate court's decision does more than just let the relation-back statute "preserve" those claims. It empowers the relation-back statute to confer legal validity on claims that were extinguished before they could come into existence. By giving that statute the power to give life to claims that were extinguished before they

accrued, the appellate court's decision vests the relation-back statute with powers the General Assembly did not mean for it to have. Under the appellate court's construction, the two statutes do not operate in a manner that is consistent with the legislative purpose of either. Because that construction is at odds with legislative intent, the appellate court's decision is in error, and must be reversed.

A. The appellate court's interpretation of the relation-back statute exceeds the narrow purpose set forth in the statutory language by empowering it to validate claims that were extinguished before they accrued.

The language the General Assembly used in the two statutes demonstrates that it did not intend the relation-back statute to permit a claim that never existed within the repose period. It was the legislature's intention to bar medical-malpractice claims first brought more than four years after the patient care at issue—even if the reason they were not brought sooner was that they did not accrue within the repose period.

1. The statute of repose renders medical-malpractice claims nonexistent if not filed within four years of the patient care at issue.

A strict and unrelenting bar to an action brought more than four years from the date of the alleged negligent act or omission, the statute of repose "creates an absolute bar to liability for damages based upon allegations of medical negligence, even if the four years have elapsed prior to the death of the decedent." *O'Brien v. O'Donoghue*, 292 Ill. App. 3d 699, 704 (1st Dist. 1997).

This Court has recognized this as an intended and legitimate consequence of any statute of repose. Because a statute of repose terminates the existence of possible liability after a fixed time, as measured from an identified event—not from a plaintiff's discovery of the claim, like a statute of limitations—a statute of repose can extinguish the claim even before it can accrue. *Folta v. Ferro Engineering*, 2015 IL 118070, ¶ 33 (citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 61 (2006) (citing *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001))); *Mega v. Holy Cross Hosp.*, 111 Ill. 2d 416, 422 (1986). Still, this Court has enforced that very understanding of repose: "That is the effect of the four-year period of repose." *Mega*, 111 Ill. 2d at 422. "A plaintiff's right to bring an action is terminated when the event giving rise to the cause of action does not transpire within the period of time specified in the statute of repose." *Evanston Ins.*, 2014 IL 114271, ¶ 16.

This understanding is consistent with the recognition that a statute of repose does not merely limit the time within which a lawsuit may be commenced after a cause of action has accrued. *Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 726 (2d Dist. 1977) (citing *Skinner v. Anderson*, 38 Ill. 2d 455, 458 (1967)). Because a statute of repose is not directed at the remedy, it may extinguish the right of action itself before it arises. *Id.* Its effect is not to bar a cause of action, but "to prevent what might otherwise be a cause of action, from ever arising." *Id.* (quoting *Rosenberg v. Town of North Bergen*, 293 A.2d 662, 667 (N.J. 1972)).

Thus, an injury that occurs outside the repose period "forms no basis for recovery." *Id.* (quoting *Rosenberg*, 293 A.2d at 667).

2. The relation-back statute has the limited purpose of preserving existing causes of action.

The relation-back statute is not equipped to breathe life into such a nonexistent action. The legislature gave that statute a limited mandate, empowering it only to *preserve* a claim that would otherwise be time-barred. In the words of the statute itself, "for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, *and for that purpose only*, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." 735 ILCS 5/2-616(b).

So long as a timely complaint was filed arising from the same event or transaction, the statute is adequate to the task of preserving an existing but unfiled claim that otherwise might be time-barred. But the existence of the claim, even if unfiled, is a crucial element of relation back, and it is not present here. Whatever else the relation-back statute has the power to do, it is powerless to rescue a claim that did not exist before the repose period expired.

The putative wrongful-death claims here fit that description. Because the decedent's death did not occur within the four years that followed her last medical care by the defendants, there was no claim for wrongful death in that time. Just as a claim does not exist and cannot be

brought after the repose period expires, it does not exist and cannot be brought before the claim itself accrues. *Cf. Brucker v. Mercola*, 227 Ill. 2d 502, 535 (2007) (cause of action for injury to fetus does not accrue until birth). With many negligence claims, their accrual more or less coincides with the acts of alleged negligence on which they are based. *Id.* But a wrongful-death claim is significantly different in that it does not exist until the death of the decedent. The decedent's death is more than just an additional injury; it is the defining feature of a distinct claim. Unlike a mere amendment of an existing complaint, which might relate back to the filing of that complaint, the plaintiff's wrongful-death claims made for a separate and distinct cause of action. *See Wyness v. Armstrong World Indus., Inc.*, 131 Ill. 2d 403, 410 (1989).

Indeed, because the injuries underlying them are different, claims under the Wrongful Death Act and the Survival Act may accrue at different times—"*even where the underlying facts are the same[.]*" *Fetzer v. Wood*, 211 Ill. App. 3d 70, 77–78 (2d Dist. 1991) (emphasis added). An action under the Wrongful Death Act arises upon the death of an individual and does not exist until the death occurs. *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 431 (1974); *Kessinger v. Grefco, Inc.*, 251 Ill. App. 3d 980, 987–88 (4th Dist. 1993). "The precipitating 'injury' for the plaintiffs in a wrongful death action, unlike the injury in a personal injury action, is the death[.]" *Wyness*, 131 Ill. 2d at 414–15; *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶32. The wrongful-death claim

might not come into existence until several months, or even years, after the alleged negligence.

Indeed, in some cases that claim might not come into existence at all—as in this case, where the decedent's death occurred so long after the alleged negligence that the statute of repose had already extinguished the possibility of any wrongful-death claim before such a claim could accrue. *See Real v. Kim*, 112 Ill. App. 3d 427, 429–30 (1st Dist. 1983). In *Real*, a defendant doctor misread a brain scan, allegedly leading to an untimely diagnosis of brain cancer and the eventual death of the patient more than four years after the misreading. *Real*, 112 Ill. App. 3d at 429–30. In holding that the action was barred, even though it had not accrued until after the period of repose expired, the court acknowledged the unfortunate result for the decedent's survivors. Still, it recognized the "necessity and convenience" of such provisions:

> They are practical and pragmatic devices ... They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. [*Id.* at 431 (citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).]

The *Real* court understood the difficult choices sometimes facing legislatures trying to achieve a goal that is important to the state as a whole—in this case, the societal value of terminating potential liability at a point that is certain, even at the possible expense of an injured party's claim. State lawmakers emphasized the importance of such certainty in

the medical-negligence setting despite sometimes barring an action before it exists or is known.

This is an especially distinct possibility in medical-malpractice cases, in which a plaintiff might blame a decedent's death on alleged negligence that took place long before. But it is not limited to medical-malpractice cases—as illustrated by *Evanston Insurance*, where this Court rejected the notion that a prematurely filed claim could preserve a claim not yet in existence and protect it from being barred by the subsequent expiration of a statute of repose. 2014 IL 114271, ¶¶ 30–33..

Evanston Insurance concerned a legal-malpractice claim arising out of an insurance company's participation in the settlement of a prior personal-injury suit. The plaintiff, an insurance company, alleged that the defendant attorneys had agreed to a settlement on their clients' behalf without having the clients' authority to do so. *Id.*, ¶ 6. When the clients denied being bound by the settlement, the insurance company anticipated that it could eventually become liable for the settlement, and filed a claim for legal malpractice against the attorneys, claiming that their actions could prevent it from recovering settlement payments from its insured. *Id.*, ¶ 8. That claim was dismissed for failure to state a claim because the insurer had not yet established a right to reimbursement from its insured. *Id.* After it was determined in other litigation that the insured was not bound by the settlement agreement, the company filed an amended complaint reasserting its claim against the attorneys—but

by that time, more than nine years had elapsed since the alleged malpractice had occurred, and the claim was dismissed as barred by the six-year statute of repose for legal-malpractice claims. *Id.*, ¶¶ 8–9.

This Court held that the legal-malpractice statute of repose applied, rejecting the plaintiff's argument that its action had been filed within the repose period. *Id.*, ¶¶ 26, 31. According to the plaintiff, its original and first amended complaints were timely because they were filed within the repose period. *Id.*, ¶ 30. Not so, this Court held; at the time those complaints were filed, the plaintiff's cause of action for legal malpractice had not yet accrued. Indeed, the Court found that because the cause of action could not have accrued at that time, a complaint could not properly have been filed then. *Id.*, ¶ 31. It squarely rejected the plaintiff's argument "that a plaintiff may avoid an applicable statute of repose by filing a premature complaint alleging claims which have not fully accrued," finding such an argument to have "no support in the law." *Id.*, ¶ 30. Likewise, the Court further rejected the notion that the plaintiff might have "preserved its claims, safe from the statute of repose, until such time as [it] was able to state a legally sufficient cause of action." *Id.*, ¶ 31.

Yet that is just what the appellate court enabled the plaintiff to do in this case: it treated the plaintiff's wrongful-death claims as "preserved" by the relation-back statute, under the legal fiction that they were filed at a time when neither the decedent nor the plaintiff could state a legally

sufficient cause of action for wrongful death. This Court's rationale for rejecting the plaintiff's argument in *Evanston Insurance* cannot be reconciled with allowing relation back in this case, because the Court held that the plaintiff could not "preserve" its cause of action by filing it prematurely. *See Evanston Ins.*, 2014 IL 114271, ¶ 30.

The appellate court's application of the relation-back statute in the instant case works the same procedural alchemy this Court prohibited in *Evanston*: to treat the plaintiff's amended complaint as if it had been filed at the time the original complaint was filed, within four years of the patient care at issue and thus within the repose period. But that pretense does not make the wrongful-death claims timely; to the contrary, it makes them premature. *Evanston* stands for the proposition that a premature claim does not preserve a claim against a statute of repose. *Id.* If the wrongful-death claims in this case related back to the filing of the original complaint, when they would have been premature, they would be no more capable of preserving the plaintiff's claims than the premature claims were in *Evanston*.

Indeed, if the wrongful-death claims related back to the date the original complaint was filed, they would be treated as if they had been filed before the decedent died. But if the wrongful-death claims could not have been filed before the decedent died, they cannot be *treated* as if they were filed before then, either. Yet that is the consequence of the appellate court's treatment of the wrongful-death claims as if they were filed on the

date the decedent filed the original complaint. That result is at odds with *Evanston* and inconsistent with the purpose of both the statute of repose and the relation-back statute.

The Court expressly declined to address the relation-back argument in *Evanston*, finding that the plaintiff had forfeited that argument by failing to timely raise it in the circuit court. *Id.*, ¶ 36. In recognizing that prematurely filed claims have no preservative effect against a statute of repose, however, the Court effectively foreclosed the relation-back statute from playing the role the appellate court gave it in this case.

That result is consistent with the language of the relation-back statute, which describes its own limited purpose: It is intended "for the purpose of *preserving* the cause of action, cross claim or defense set up in the amended pleading, and *for that purpose only[.]*" 735 ILCS 5/2-616(b) (emphasis added). But "preserving" a cause of action requires the prior existence of the claim, something that cannot be said of a medical-malpractice claim for an alleged wrongful death that did not occur within four years after the patient care at issue.

Indeed, the relation-back statute's expressly limited power to *preserve* a claim cannot validate a claim that did not exist within the repose period. The relation-back statute has long been understood as a procedural mechanism "to prevent a party to a suit *by inadvertence in the language of a pleading* from losing his right of action by limitations

between the time the complaint was filed and the time of the amendment." *Williams v. Fredenhagen*, 350 Ill. App. 26, 36 (2d Dist. 1953) (emphasis added). It is not meant to preserve causes of action from extinguishment before they exist, but rather "to preserve causes of action against loss *by reason of technical rules of pleading.*" *Metropolitan Trust Co. v. Bowman Dairy Co.*, 369 Ill. 222, 229–30 (1938) (emphasis added).

In a case such as this one, "relation back" would mean something much different than preserving a claim from the consequences of inadvertence or technical pleading rules. It would mean treating a claim as if it had been filed even before it accrued; indeed, in this case it would mean pretending that the plaintiff filed the wrongful-death claims even before the decedent died. Even if this were not at odds with the principle that undergirds *Evanston Insurance*, it cannot have been what the General Assembly intended. The decedent's death is the defining feature of a wrongful-death claim; the General Assembly made it a necessary element of a claim under the Wrongful Death Act. Treating a wrongful-death claim as if it existed and was filed while the decedent still lived goes well beyond mere preservation, and as such it is outside the reach of the relation-back statute. The appellate court erred in construing the relation-back statute in a manner that exceeds the legislative intent. Its decision should be reversed and the order dismissing the wrongful-death claims should be reinstated.

B. The appellate court resolved the effect of the relation-back statute on the statute of repose by improperly utilizing the legislative purpose of a statute of limitations.

The appellate court's error largely results from its blurring of the important distinctions between statutes of repose and statutes of limitation. Its decision draws from cases that construed statutes of limitation, articulating the concerns that the courts properly tried to protect in those cases. But by interpreting the statute of repose according to the concerns protected by statutes of limitation—and allowing relation back in this case because it was consistent with *those* concerns, while overlooking the legislature's purpose in enacting the statute of repose—the appellate court allowed the relation-back statute to frustrate the legislative scheme that the statute of repose was meant to promote.

Indeed, the appellate court expressly focused on notice and prejudice as the reasons for its decision, refusing to apply the statute of repose without a demonstration of prejudice caused by lack of notice:

> Defendants have not shown how they will be prejudiced by the allowance of Lawler's amended complaint, especially considering their attention was directed, within the statutory time prescribed, to the facts that form the basis of the claims asserted against them. [*Lawler*, 2016 IL App (1st) 143189, ¶ 52.]

But contrary to the appellate court's view, this is no shortcoming in the argument for enforcing the statute of repose. The statute of repose does not require the defendants to show prejudice, because protecting

defendants from being prejudiced by stale claims is not the purpose of that statute; it is the purpose of the statute of limitations. This Court has never suggested that the statute of repose was intended to duplicate that purpose. Indeed, while that concern can be crucial to determining if a statute of *limitations* should apply, it is so unimportant to the construction of the statute of *repose* that this Court's decisions construing the latter provision have never even mentioned notice.

To the contrary, this Court has repeatedly recognized that that the two provisions play different roles in the legislative scheme, and it draws a sharp distinction between them: "The period of repose gives effect to a policy different from that advanced by a period of limitations; it is intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge of his cause of action." *Mega v. Holy Cross Hosp.*, 111 Ill. 2d 416, 422 (1986). Similarly, a statute of repose may terminate the possibility of liability regardless of whether the plaintiff's cause of action has accrued. *Folta*, 2015 IL 118070, ¶ 33.

The history of the statute of repose, especially the reason for its enactment, justifies such outcomes. The statute of repose was a legislative response to the malpractice-insurance crisis of the 1970s, which had resulted from the judicial construction of the discovery rule and the "long tail" of potential but unpredictable liability that resulted from that rule. *Orlak v. Loyola Univ. Health System*, 228 Ill. 2d 1, 17

(2007) (citing *Anderson*, 79 Ill. 2d at 307). The statute of repose was meant to restore that predictability. This Court has often recounted the events that led the General Assembly to enact the definitive four-year repose period for medical-malpractice claims. *Hayes v. Mercy Hosp. & Med. Ctr.*, 136 Ill. 2d 450, 457–59 (1990) (citing *Anderson v. Wagner*, 79 Ill. 2d 295 (1979)). In the 1970s, the implementation of the discovery rule effectively extended the potential liability of health-care providers for negligence or injuries that went undetected for long periods of time. This expansion of liability made providers of medical-liability insurance increasingly reluctant to write insurance policies in Illinois, and led to a dramatic increase in the premiums for liability policies, both of which caused physicians to leave the state. *Id.* at 457. The statute of repose was designed to reduce the cost of medical-liability coverage and preserve the availability of health-care providers in the state, by establishing a "definite period in which an action could be filed ... as necessary to prevent extended exposure of physicians and other hospital personnel to potential liability." *Id.* at 458. That provision "was viewed as necessary to prevent extended exposure of physicians and other hospital personnel to potential liability for their care and treatment of patients, thereby increasing an insurance company's ability to predict future liabilities." *Uldrych*, 239 Ill. 2d 542 (citing *Hayes*, 136 Ill. 2d at 458).

Given the crisis the General Assembly faced in the 1970s when it enacted the statute of repose, the policy considerations related to medical

malpractice were "so important" that the legislature chose to deal with them in a provision specifically devoted to that context. *Uldrych*, 239 Ill. 2d at 541. The language it chose to serve those policy considerations reflected the legislature's "desire at the time it originally enacted the statute to limit a physician's exposure to liability for damages for injury or death arising out of patient care *under all theories of liability, whether then existing or not.*" *Hayes*, 136 Ill. 2d at 459 (emphasis added).

This distinction is critical to appreciating how relation back affects the interests meant to be served, respectively, by the two provisions—and to determining whether the General Assembly intended for the relation-back statute to validate a wrongful-death claim that was extinguished before it accrued. The appellate court blurred that distinction, holding that the relation-back statute could apply here because, in the court's view, it would not do violence to the interests served by the statute of repose. But it was not considering those interests; the interests it was considering, rather, were those served by the statute of limitations.

Indeed, the linchpin of the appellate court's decision was the mistaken notion that the statute of repose protects defendants against stale claims that are unknown to them. That notion runs afoul of this Court's decisions on the statute of repose—cases in which the Court enforced the statute of repose despite incontrovertible proof that the defendants knew the grounds for the claims within the repose period.

The statue of repose applied in *Hayes*, for instance, even though it was beyond dispute that the defendant was aware of events giving rise to the contribution claim at issue. The defendant had already been timely sued for malpractice on the basis of those events. Not only did the defendant have sufficient notice to defend itself; it already *had been* defending itself, until the initial action was dismissed. Still, this Court affirmed the dismissal of the claim as barred by the statute of repose, giving effect to the General Assembly's concerns about prolonged exposure to potential liability: "[A] suit for contribution against an insured for damages arising out of patient care exposes insurance companies to the same liability as if the patient were to have brought a direct action against the insured[.]" *Hayes*, 136 Ill. 2d at 458. The Court expressed no concern for the defendant's ability to defend itself against a claim filed so long after the patient care.

The Court applied the same principle in *Uldrych*, where one defendant filed a counterclaim for indemnification against another defendant after several years of litigation and more than four years after the medical care. Echoing what it said in *Hayes* about the General Assembly's attempt to fix the malpractice-insurance crisis, the Court described the purpose of the repose period as "increasing an insurance company's ability to predict future liabilities." *Uldrych*, 239 Ill. 2d at 542 (citing *Hayes*, 136 Ill. 2d at 458). The Court held that the statute of repose barred the indemnification claim—even though the counter-

defendant had been defending the original claim for years, and presumably had notice of it well before the repose period expired. *See id.* at 548.

As in *Hayes*, this Court said nothing in *Uldrych* to suggest that it had considered whether there was any prejudice to the defendant. But the outcome of each case demonstrates that such concerns are irrelevant to the statute of repose; they certainly do not play the outsize role that the appellate court gave them in this case. *Hayes* and *Uldrych* both concerned claims that were derivative of the original malpractice actions—contribution in *Hayes*, indemnification in *Uldrych*—claims that grew out of the same transactions and occurrences alleged in the original actions, in which the parties had already been defending themselves since before the repose periods expired.

Hayes and *Uldrych* prove that the concern for a defendant's ability to defend itself, without being prejudiced by the staleness of a claim, is relevant only to the statute of limitations. But the appellate court's decision in this case is riddled with assurances to the effect that a defendant is not "prejudiced" by a claim brought outside the repose period, so long as the defendant had "notice or knowledge" of the "essential information necessary to prepare a defense." Tellingly, most of those assurances rely on authorities that construed statutes of limitation:

- " '[A] defendant has not been ***prejudiced*** so long as his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him.'" *Lawler*, 2016 IL App (1st) 143189, ¶ 33 (emphasis added) (quoting *Zeh v. Wheeler*, 111 Ill. 2d 266, 272–73 (1986) (quoting *Simmons v. Hendricks*, 32 Ill. 2d 489, 495 (1965)).
- "[A] defendant should not be required to defend against stale claims of which he had no ***notice or knowledge.***" *Id.* (emphasis added) (citing *Zeh*, 111 Ill. 2d at 274).
- The General Assembly believed "that defendants would not be ***prejudiced*** by the addition of claims so long as they ***were given the facts*** that form the basis of the claim asserted against them prior to the end of the limitations period." *Id.*, ¶ 34 (emphasis added) (quoting *Avakian v. Chulengarian*, 328 Ill. App. 3d 147 (2d Dist. 2002) (citing *Zeh*, 111 Ill. 2d at 273)).
- "[A]s long as [defendants] are ***aware*** of the occurrence or transaction that is the basis of the claim, they can be ***prepared to defend*** against that claim, whatever theory is advanced." *Id.* (emphasis added) (quoting *Avakian*, 328 Ill. App. 3d at 154 (citing *Zeh*, 111 Ill. 2d at 279)).
- "[T]here is no reason to apply a statute of limitations when, as here, the respondent has had ***notice*** from the beginning that petitioner was trying to enforce a claim against it because of

the events leading up to the death of the deceased[.]" *Id.*, ¶ 36 (emphasis added) (quoting *Zeh*, 111 Ill. 2d at 280).

- "As long as the defendant has been ***apprised of the essential information necessary to prepare a defense,*** an amended complaint will be deemed to relate back to the original pleading ..., and a defendant is ***not prejudiced*** by allowance of an amendment 'so long as ***his attention was directed,*** within the time prescribed or limited, to ***the facts that form the basis of the claim*** asserted against him.'" *Id.*, ¶ 49 (emphasis added) (quoting *Sompolski v. Miller*, 239 Ill. App. 3d 1087 (1st Dist. 1992) (quoting *Simmons*, 32 Ill. 2d at 495)).
- "The relation back doctrine has been frequently applied to permit an amended complaint against the defendant medical providers when they had received ***adequate notice*** of the same ***operative facts leading to the alleged medical negligence*** stated in an earlier, timely filed complaint." *Id.*, ¶ 54 (emphasis added).

In the same vein, the appellate court parenthetically described other cases in which complaints related back "because the defendant hospital was ***informed*** in [a timely-filed complaint] of the plaintiff's claim that symptoms of a predictive stroke were misdiagnosed," or because "the defendants received ***adequate notice*** from the timely filed earlier complaints that the plaintiff was alleging damages as a result of adverse

effects from a prescription," or because the amended complaint "***directed attention*** to facts concerning the reading of sonograms and X-rays[.]" *Id.*, ¶ 54 (emphasis added) (citing *Castro v. Bellucci*, 338 Ill. App. 3d 386, 394–95 (1st Dist. 2003); *Avakian*, 328 Ill. App. 3d at 157–58; and *McArthur v. St. Mary's Hosp.*, 307 Ill. App. 3d 329, 335 (4th Dist. 1999)).

None of this is relevant to the repose concerns at the crux of this case. Indeed, the court's citation of *Simmons* as precedent for so many of the cases the appellate court cited here, is even more telling: *Simmons* was decided in 1965, long before the insurance crisis prompted the General Assembly to enact the medical-malpractice statute of repose.

While the appellate court paid lip service to the proposition that it should not use the analysis of limitations cases to construe the statute of repose, it did just that—and offered only a perfunctory bootstrap as justification for doing so. It defended its reliance on *Sompolski v. Miller*, 239 Ill. App. 3d 1087 (1st Dist. 1992), by observing that *Sompolski* focused "on whether the wrongful death claim was based on the same occurrence as that alleged in the original complaint filed by the decedent," and "specifically found the amended claims and original claims sounded in negligence and made the same allegations respecting the defendant's alleged liability for the decedent's injuries." *Lawler*, 2016 IL App (1st) 143189, ¶ 51. This overlooks the shortcomings of *Sompolski* as precedent for this case: It concerned a statute of limitations, not

repose, and did not even involve medical malpractice. It contains nothing to suggest that the principles of limitations and repose are interchangeable.

Indeed, the appellate court's reliance on *Sompolski* further illustrates that its interpretation of the statute of repose was informed by the reasons for statutes of limitation. While the court declared the posture of this case to be "just as in *Sompolski*," in that the plaintiff here "filed her amended complaint after the *statutorily mandated* time allotted to file a wrongful death action," that comparison overlooks the very different statutory mandates involved—here a statute of repose, there a statute of limitations—and the distinctly different legislative goals of those statutes. *See Lawler*, 2016 IL App (1st) 143189, ¶ 52 (emphasis added). Treating *Sompolski* as precedent for interpreting a statute of repose ignores the distinct purposes of repose and limitations, revealing a crucial defect in the court's reasoning.

The legislative scheme requires diligent enforcement of the statute of repose, not because it protects defendants against stale claims—the statute of limitations does that—but because it protects *everyone* who relies on the continued availability of affordable malpractice insurance, potential plaintiffs and defendants alike. The notion that the defendants here had notice of the facts underlying the wrongful-death claims, and were therefore not prejudiced when such claims were filed outside of the repose period, might have justified relation back as an exception to a

statute of limitations, which is meant to address those concerns. But the statute of repose is meant "to curtail the long tail exposure to medical malpractice claims brought about by the advent of the discovery rule"—a concern that is frustrated by relation back, even if notice is provided and prejudice is eliminated. *See Turner v. Nama*, 294 Ill. App. 3d 19, 25 (1st Dist. 1997).

It is for these reasons that the statute of repose does not concern itself with whether a defendant has notice of a claim, or whether a new claim arises out of the same underlying facts, or whether a defendant has been prejudiced by the passage of time. Instead, it sets a date certain, without regard to any other fact, outside of which no action may be brought. The purpose served by the statute of repose is to enable liability insurers to predict their exposure by giving them the assurance that new claims cannot be brought more than four years after patient care ends. It cannot serve that purpose if the relation-back statute is given the ability to animate claims that never accrued within the period of repose. That ability is far greater than the power to *preserve* a claim, the only power the General Assembly intended the relation-back statute to have. The purposes of both statutes demonstrate that the appellate court's construction was in error, and should be reversed.

II.
If the Relation-Back Statute Applies to the Plaintiff's Wrongful-Death Claims, the Resulting Conflict With the Statute of Repose Must be Resolved in Favor of the Statute of Repose.

Even if the relation-back statute could be applied to this case, it would conflict with the statute of repose—a conflict that would require resort to the canons of statutory construction, which would call for the statute of repose to control. The appellate court alluded to such a conflict, recognizing "a classic clash of apparently conflicting statutes," but declined to employ the canons of construction when it determined that the statutes were "clear and unambiguous." *Lawler*, 2016 IL App (1st) 143189, ¶¶ 17, 56. But clarity does not preclude a conflict. If the statutory construction allows the relation-back statute to validate wrongful-death claims that were extinguished before they accrued, then the relation-back statute conflicts with the statute of repose—which provides that "in no event" shall such an action be brought more than four years after the patient care at issue. 735 ILCS 5/13-212(a).

Whether the appellate court recognized it or not, that procedurally awkward result reveals a conflict between the statutes as the court interpreted them. When the appellate court ignored the limiting language in the relation-back statute ("for the purpose of preserving the cause of action ... and for that purpose only"), and concluded that the relation-back statute saved the plaintiff's wrongful-death claims, then the prohibition in the repose statute ("in no event" shall any action be filed more than four years after the last date of treatment) ran headlong into

the forgiving language of the relation-back statute. Faced with that conflict, the court should have employed principles of statutory construction to reconcile the two statutes. *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 346 (2008). If the statutes are in conflict, as the appellate court's interpretation of them would suggest, the canons of statutory construction would call for the statute of repose to control.

A. The statute of repose is more specific than the relation-back statute.

Chief among these principles is the canon that when two conflicting statutes cover the same subject, "the specific governs the general," which applies when "a general permission or prohibition is contradicted by a specific prohibition or permission." *People v. Burge*, 2014 IL 115635, ¶ 31. Applying this principle of statutory construction, the medical-negligence statute prevails over other general statutes. *See, e.g. Walsh v. Barry-Harlem Corp.*, 272 Ill. App. 3d 418, 426 (1st Dist. 1995) (section 13-212, rather than Consumer Fraud Act's statute of limitations, governed claim because section 13-212 "prevails as the more specific statute"); *Heneghan v. Sekula*, 181 Ill. App. 3d 238, 241–42 (1st Dist. 1989) (medical negligence statute of repose prevails over contribution statute because section 13-212 is "more specific"); *Desai v Chasnoff*, 146 Ill. App. 3d 163, 167 (1st Dist. 1983) ("Since section 13-212 is specific in its language, it is controlling regarding the applicable time period in which to bring a malpractice action based on breach of

warranty against a physician" over the more-general Uniform Commercial Code.). This principle favors the statute of repose, a provision the legislature enacted to address a crisis unique to the specific context of medical-malpractice cases. *See Uldrych*, 239 Ill. 2d at 541. The relation-back statute, by contrast, is a general rule of civil procedure with no specific area of application.

Nor did the appellate court consider the fact that the statute of repose is a substantive statute and the relation-back statute a procedural one. "A statute of repose differs from a statute of limitations in that it is substantive rather than procedural." *Freeman v. Williamson*, 383 Ill. App. 3d 933, 939 (1st Dist. 2008). By contrast, "rules regarding amendments to pleadings are procedural in nature, as is the statute of limitations itself." *Vaughn v. Speaker*, 126 Ill. 2d 160, 161 (1989). If a statute of repose eliminates a substantive right, then there is no right to which procedural rules apply—a significant distinction that the appellate court overlooked.

The "foremost consideration" in resolving statutory conflict is determining legislative intent. *Abruzzo*, 231 Ill. 2d at 332; *In Re D.D.*, 196 Ill. 2d 405, 419 (2001). In determining the General Assembly's intent, the Court "may properly consider not only the language of the statute, but also the purpose and necessity for the law, the evils sought to be remedied, and the goals to be achieved." *Brucker v. Mercola*, 227 Ill. 2d 502, 514 (2007). Section 13-212's statute of repose "was viewed as

necessary to prevent extended exposure of physicians and other hospital personnel to potential liability," to address the medical malpractice insurance crisis. *Id.* at 515. In contrast, the relation-back statute was intended "to *preserve* causes of action against loss due to *technical pleading rules.*" *Santiago v. E.W. Bliss Co.*, 2012 IL 111792, ¶25, (emphasis added.) But the statute of repose is no technical pleading rule; it is a substantive law. *Freeman*, 383 Il. App. 3d at 939. And one cannot *preserve* a cause of action that never existed.

In view of the apparent conflict the appellate court recognized between the relation-back statute and the statute of repose, the court was obligated to apply the specific statute over the general one, in an effort to give foremost consideration to the specific legislative intent behind the statute of repose. But the appellate court inverted that principle, applying the general relation-back statute as an exception to the specific medical-malpractice statute of repose. That decision did not give "foremost consideration" to the legislative intent, as understood through the canons of statutory construction—and the appellate court's failure to do so is further evidence of its error in statutory interpretation.

B. The statute of repose is subject to only one express exception, for fraudulent concealment.

Nor does the statute of repose contain anything to suggest that the legislature intended it to yield to the relation-back statute—an omission that speaks volumes, since the legislature *expressly* intended it to yield

to the fraudulent-concealment statute, 735 ILCS 5/13-215. In light of that express exception, the legislative silence about relation back establishes that relation back was not meant to be an exception to the statute of repose.

The appellate court's decision makes the statute of repose subject to an exception it does not contain. Critically, section 13-212(a) contains only one exception: for fraudulent concealment, which is inapplicable here. *See Orlak*, 228 Ill. 2d at 7 ("The only exception to the four-year statute of repose is the fraudulent-concealment exception contained in section 13-215 of the Code."). Because the legislature did not include other exceptions in section 13-212(a), it would be wrong for this Court to read any additional exception into the statute. The Court has no authority to create an exception that the legislature did not include. *Jackson-Hicks v. East St. Louis Bd. of Election Comm'rs*, 2015 IL 118929, ¶ 21.

More importantly, the General Assembly's decision to expressly identify one or more exceptions must be construed as an exclusion of all other exceptions that are not enumerated. *State v. Mikusch*, 138 Ill. 2d 242, 250 (1990) ("[T]he expression of certain exceptions in a statute will be construed as an exclusion of all others."). While the legislature certainly could have carved out section 2-616 as an exception to section 13-212(a) had it wished to, it did not. This intent to exclude other exceptions is manifested by the General Assembly's express statement

that fraudulent concealment is the sole exception to the medical-malpractice statute of repose. In the absence of action by the legislature, this Court cannot manufacture such an exception and cannot subject section 13-212(a) to a general exception contained in another statute. *See Heneghan*, 181 Ill. App. 3d at 243 ("[T]he legislature's decision to expressly include certain exceptions indicates an intention that the medical malpractice statute of repose was subject only to those included exceptions and not to general exceptions contained in other statutes."). This is an application of the maxim *expressio unius est exclusio alterius*: "the enumeration of an exception in a statute is considered to be an exclusion of all other exceptions." *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 17 (citing *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 286 (2003)). This rule "'is based on logic and common sense,' as '[i]t expresses the learning of common experience that when people say one thing they do not mean something else.'" *Id.* (quoting *Sherman*, 203 Ill. 2d at 286 (quoting *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 152 (1997))).

The inference that the legislature intended only the single stated exception for fraudulent concealment is further bolstered by the fact that the statute of repose is the more recently enacted statute. When choosing between two statutes in direct conflict, the more recent enactment generally will prevail as the later expression of legislative intent. *Jahn v. Troy Fire Prot. Dist.*, 163 Ill. 2d 275, 282 (1994). This inference is

similarly rooted in logic; the General Assembly was presumably aware of the relation-back at the time it enacted the statute of repose, yet did not identify relation back as an exception to the repose period. And that is even more significant because the General Assembly was also presumably aware of fraudulent concealment as an exception to section 13-212(a), and did consider it necessary to identify section 13-215 as an express exception.

If the legislature had intended more than the one express exception to section 13-212(a), it would have expressly included additional exceptions. An example of the legislature specifically carving out an exception to a statute of repose can be found in section 13-214.3 of the Code of Civil Procedure which contains a six-year statute of repose period in which to bring actions for attorney malpractice. There, the legislature specifically carved out an exception to that statute of repose in circumstances where the injury caused by the alleged attorney malpractice did not occur until the death of the person for whom the professional services were rendered. 735 ILCS 5/13-214.3(c), (d).

The legislature's treatment of the legal-malpractice statute of repose is instructive in understanding the medical-malpractice statute of repose; it illustrates that when the legislature intends to make an exception to such a statute, it does so explicitly. If the General Assembly had intended to make the medical-malpractice statute of repose subject to an exception for relation back under section 2-616, then it would have

identified such an exception—just as it did for fraudulent concealment, expressly citing section 13-215 as the source of that exception. Its decision not to identify section 2-616 as another exception must be regarded as a decision to make no such exception.

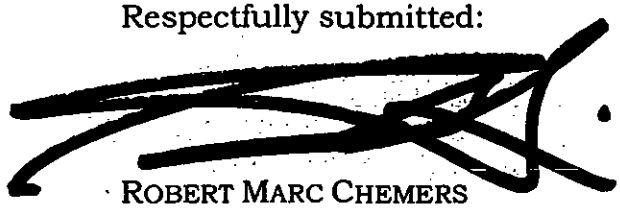
Because the "in no event" language of section 13-212(a) is subject to but a single exception that is inapplicable here, there is no basis for creating any additional exception for relation back.

Conclusion

The appellate court's decision runs counter to this Court's precedents in myriad ways: by misstating the legislative intent of the statute of repose; by overlooking the differences between that statute and the statute of limitations; and by giving the relation-back statute a far greater effect than its limited mandate allows, especially as compared to the broadly prohibitory language and purpose of the statute of repose. The appellate court's error is vividly illustrated by its absurd result: allowing the relation-back statute to "preserve" a wrongful-death claim that never existed during the repose period. That result distorts the legislative intent behind the statute of repose, the relation-back statute, and the Wrongful Death Act itself. The appellate court's concern for notice and prejudice might be relevant to a relation-back case involving a statute of limitations—but it has no place in the interpretation of the medical-malpractice statute of repose.

Whether viewed through the prism of the General Assembly's intentions or interpreted under the canons of statutory construction, the relation-back statute does not make the plaintiff's wrongful-death claims timely. Because those claims are barred by the statute of repose, the circuit court was correct to dismiss them. The appellate court's decision, reversing that dismissal, should be reversed.

Respectfully submitted:



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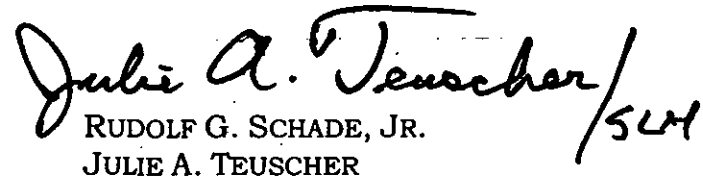

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Supreme Court Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 39 pages.

Respectfully submitted:

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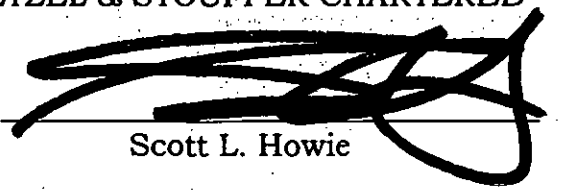
By: 
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APPENDIX

Appendix

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
MOTION SECTION

SHERI LAWLER, Executor of the Estate of JILL PRUSAK, Deceased	)	
	)	Case No. 11 L 008152
Plaintiff	)	
v.	)	
UNIVERSITY OF CHICAGO MEDICAL CENTER, et. Al.,	)	
	)	Judge Daniel T. Gillespie
	)	
Defendants	)	

Memorandum Ruling and Order

Nature of the Proceeding: Defendants University of Chicago Medical Center ("Center"), University of Chicago Hospitals and Health System ("Health System"), University of Chicago Physicians Group ("Group"), University of Chicago Hospitals ("Hospitals"), University Retina and Macula Associates ("Retina"), and Dr. Rama D. Jager ("Jager") request the Court to dismiss the amended complaint, or alternatively, to strike a portion of Count I Paragraph 18 of the Complaint.

Facts: On November 5, 2007, Jill Prusak started receiving medical treatment for the flashes, spots and floaters in her eyes from Dr. Jager who held himself out as a physician faculty at Center, Health System, Hospitals, and Group. The treatment continued till July 13, 2009, when she had the last exam on her eyes at Retina. (Plaintiff's Response, paragraph 2; Physician Report.) On August 7, 2009, Prusak underwent a brain biopsy at Barnes Medical Center and got diagnosed with B-cell lymphoma with ocular involvement.

On August 4, 2011, Prusak filed a Complaint against the Defendants for failing to order appropriate diagnostic testing on November 5, 2007, diagnose macular pathology, and perform appropriate medical evaluation of the state of her eyes. On November 24, 2013, more than four years after last treatment in July 13, 2009, Prusak died. She is survived by Sheri Lawler, her daughter, Charles Allen Boswell, Jr., her brother, and Charles Allen Boswell, her father. On August 11, 2014, Plaintiff's estate filed the First Amended Complaint which contained identical allegations but brought them under the Wrongful Death Act, pursuant to 740 ILCS 180/1.

ISSUES PRESENTED:

1. Whether the Statute of Repose, *i.e.*, 735 ILCS 5/13-212(a), bars Plaintiff from bringing a wrongful death claim by amending the original complaint
2. Whether Prusak's father and brother should be barred from receiving any part of remedies from the wrongful death claim at issue because they do not belong to the class of beneficiaries defined in the Wrongful Death Act

DEFENDANTS' MOTIONS:

Defendants Center, Health System, Group, and Hospitals (herein called "UCMC") and defendants Jager and Retina assert that the Court should dismiss Plaintiff's amended Complaint because the wrongful death claim is barred by the statute of repose. Alternatively,

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they claim that the Court should strike a portion of Count I, paragraph 18 where it lists Prusak's father and brother as beneficiaries, because they are not in the class entitled to a benefit under the Wrongful Death Act.

First, Defendants claim that Plaintiff's wrongful death claim, even as an added claim in the amended complaint, is a new cause of action, and thus, it is barred by the medical malpractice statute of repose. The statute of repose clause provides: any "action for damages for injury or death against physician, dentist, registered nurse or hospital duty . . . , whether based on tort or breach of contract" shall not be brought more than four years after the date of the act or omission of act that allegedly caused such injury or death. 735 ILCS 5/23-212(a) (West 2014). The Illinois courts have previously held that Section 13-212 "absolutely bars claims filed more than four years from the date of the act giving rise to the case of action." *Malinowski v. Mullangi*, 223 Ill. App. 3d 1037, 1040 (1991). Defendants rely on *Limer* to describe two situations where the statute of repose bars a wrongful death claim: (a) when Plaintiff dies after the four-year period expires, and (b) when Plaintiff or Plaintiff's estate files the claim after the four-year period expires. See *Limer v. Lyman*, 220 Ill.App. 3d 1036, 1043 (4th Dist. 1991). *Limer* illustrated the second situation where Plaintiff died before the four-year statute of repose expired but Plaintiff's estate brought a wrongful death claim after the four-year period was over. *Id.* at 1039. The plaintiff in *Limer* argued that the wrongful death claim is a 'derivative' of the action that the decedent filed (and later voluntarily dismissed) during her lifetime, and therefore, should not be considered a new action. *Id.* at 1043. The court, however, ruled that the wrongful death claim was a new action, because the Section 13 – 209(a) only grants a one-year extension to claims which the decedent could have brought at the time of his or her death and which the cause of action "*survive and . . . not otherwise barred.*" 735 ILCS 5.13-209(b)(emphasis added). The medical malpractice wrongful death claims are "otherwise barred," because they are "subject to an additional rule of the filing within the four-year period from the tortious acts." *Limer*, 220 Ill. App. 3d at 1043 (citing *Wolfe v. Westlake Community Hospital*, 173 Ill. App. 3d 608, 612 (1988)).

Strict enforcement of the statute of repose in a medical malpractice case is necessary because the statute was purposely created to "prevent extended exposure of physicians and other hospital personnel to potential liability for their care and treatment, thereby increasing an insurance company's ability to predict future liabilities." *Hayes v. Mercy Hospital & Medical Center*, 136 Ill.2d 450, 458. The General Assembly legislated the statute of repose in order to respond to the medical malpractice insurance crisis where insurance companies were becoming more reluctant to write medical malpractice insurance policies and dramatically raising premiums. *Id.* at 457. Accordingly, the statute of repose bars any claims brought more than four years after the date when the malpractice that became the basis of their claims occurred.

Second, Defendants also assert that the Court should strike a portion of Count I, Paragraph 18 where Plaintiff listed Prusak's father and brother as beneficiaries of the remedies from the wrongful death claim. The Wrongful Death Act provides a remedy to a defined class of individuals, *i.e.*, "the surviving spouse and next of kin" of the deceased. *Baez v. Rosenberg*, 409 Ill. App. 3d 525, 529 (1st Dist. 2011). The *Baez* court, based on the law of intestacy, defined the meaning of "next of kin" to be "decedent's child" since the Probate Act provides that a decedent's estate is distributed to the decedent's descendants "per stripes" when the decedent leaves no surviving spouse but only a descendent. *Id.* at 530. Thus, Defendants argue that Sheri Lawler, Prusak's daughter, is the only "next of kin" entitled to damages from the wrongful death claim, and therefore, the Court should strike the portion listing Prusack's father and brother as beneficiaries.

PLAINTIFF'S RESPONSE:

Plaintiff, however, asserts that the wrongful death claim relates back to the original claim because it is based on the identical allegations as those alleged in the original complaint, and therefore, it is not subject to the statute of repose. The relation back doctrine provides that a claim "in any amended pleading shall not be barred by lapse of time under any statute . . ., if the time prescribed or limited had not expired when the original pleading was filed" and if the amended claim "grew out of the same transaction" in the original pleading. 735 ILCS 5/2-616(a). Plaintiff claims that the Court should liberally apply the relation back doctrine, *i.e.*, in favor of Plaintiff, considering its remedial nature, and that medical malpractice cases should be allowed to "enable the action to be heard on the merits" rather than coming to an end based on "procedural technicalities." *Peterson v. Hinsdale Hospital*, 233 Ill. App.3d 327, 332 (2d. Dist. 1992); *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 154 (2d. Dist. 2002). Plaintiff relies on *Sompolski* and *Cain* to show where the courts allowed the plaintiffs to add a wrongful death or a survival claim after the statute of limitations were expired based on the relation back doctrine. In *Sompolski*, the court allowed the plaintiff to bring a wrongful death claim after the statute of limitations expired because the wrongful death claim and the original claim were based on the same occurrence. *Sompolski v. Miller*, 239 Ill. App. 3d 1087, 1088 (1st Dist. 1992). Similarly, in *Cain*, the plaintiff could file an additional survival action even after the statute of limitation expired because the claim was "based on the same occurrence [as the original claim] and the negligence charged in both counts is identical." *Cain v. New York Central R.R. Co.*, 35 Ill. App.2d 333, 338-39 (1982). Plaintiff argues that the wrongful death claim in this case relates back to the original claim since it is based on exactly the same occurrence that allegedly caused the original medical negligence claim. Plaintiff also asserts that Defendants are not prejudiced since they were notified of the facts of the occurrence which formed a basis of the claim before the limitation period expired, as it is noted in *Zeh*. See *Zeh v. Wheeler*, 111 Ill. 2d 266, 273 (1986).

Plaintiff also asserts *Limer* to be inapposite because it involved a situation where Plaintiff voluntarily dismissed the original claim and then re-filed the wrongful death claim after the four-year statute of repose expired. In *Limer*, the plaintiff voluntarily dismissed the original claim and then re-filed a wrongful death claim more than five years after the occurrence that caused medical negligence. *Limer*, 220 Ill. App. 3d 1036, 1039. Plaintiff asserts that the *Limer* court considered the plaintiff's voluntary dismissal of the original claim and re-filing of a wrongful death claim made the situation equivalent to filing the wrongful death claim for the first time, and therefore, the court ruled that the plaintiff cannot bring a new claim after the expiration of the four-year statute of repose period.

DEFENDANTS' REPLY:

Defendants argue that Plaintiff failed to show that the relation back doctrine applies to the medical malpractice cases because the precedents that Plaintiff cited did not involve the medical malpractice statute of repose. For examples, *Sompolski* involved a negligence claim arose out of a car accident which was subject to the ordinary statute of limitations, not the medical malpractice statute of repose. *Sompolski*, 239 Ill. App. 3d at 1090.Thus, the *Sompolski* court's allowing the plaintiff to file a wrongful death claim after the limitation period based on the relations back doctrine is not applicable to this case. Similarly, in *Cain* and *Zeh*, the occurrences at issue were injuries suffered while the plaintiff cleaned a train (in *Cain*) and when the plaintiff fell on a staircase (in *Zeh*). *See Cain*, 35 Ill. App. 2d at 335-37; *Zeh*, 111 Ill.2d at 268-70. Both cases were only subject to the statute of limitations, not the statute of repose. Defendants then emphasize the need for treating the statute of repose differently from the statute of limitations—to reduce physician's potential liability and in turn, increase insurance companies' ability to predict future liabilities. *See Hayes*, 136 Ill.2d at 458.

Finally, Defendants assert that the Court should consider Plaintiff's failure to respond

to Defendants' assertion, *i.e.*, that Prusak's father and brother should be eliminated from the beneficiaries in this claim, as a concession and request the Court to strike the portion at issue, if it is not going to dismiss the claim entirely.

ANALYSIS:

The wrongful death claims are only valid if the deceased was not time-barred to bring the action at the time of his or her death. *Wolfe*, 173 Ill. App. 3d at 612. Since the wrongful death claim in this case was added (in the amended complaint) in August, 2014— more than four years after the date of last medical treatment in July, 2009— the claim is barred by the statute of repose, unless the Court finds that Plaintiff's wrongful death claim relates back to her original medical negligence claim.

The Court agrees with Defendants. The relations back doctrine does not apply to this case because there is no precedent, as shown from the absence of medical malpractice cases where courts allowed plaintiffs to file a claim after the four-year period expired. As Defendants have noted, the cases that Plaintiff cited involved non-medical malpractice claims which were only subject to the statute of limitations. In fact, Illinois courts have been clear in that the statute of repose is "an absolute bar" to medical malpractice claims "arising out of patient care under all theories of liability, whether then existing or not." *O'Brien v. O'Donoghue*, 292 Ill. App. 3d 699, 704 (1st Dist. 1997); *Hayes*, 136 Ill. 2d at 459. Such conclusion is an accurate interpretation of the law considering the purpose of the statute. As noted in *Hayes*, this statute of repose was the result of General Assembly's special efforts to curb the medical insurance premium from increasing by artificially limiting the potential liability that physicians and medical personnel might face for the care they provided to patients. *See Hayes*, 136 Ill.2d at 458. For the reasons above, the relation back doctrine— though it ordinarily allows plaintiffs to bring new claims even after the statute of limitations expires—is not applicable to the medical malpractice statute of repose. Thus, Plaintiff's wrongful death claim is a new action and it is barred by the statute of repose.

Defendants are also correct in their reading of the Wrongful Death Act and its definition of beneficiaries entitled to the remedy. The Act provides that "[t]he amount recovered in any such action shall be distributed . . . to each of the surviving spouse and next of kin of such deceased person." 740 ILCS 180/2 (West 1994). Pursuant to 755 ILCS 5/2-1(b) of the Probate Act, a decedent's estate is given to the decedent's descendants *per stirpes* when the decedent is survived by only a descendant. Thus, the Prusak's father and brother do not fall under the class of beneficiaries. However, this Court need not grant Defendants' motion to strike the portion of Count I, Paragraph 18 since the claim will be dismissed based on their motion to dismiss.

Order: For the reasons stated above, The Court grants Defendants' motions to dismiss Plaintiff's wrongful death claim (Count I) with prejudice. The case is continued for status on discovery on Oct. 21, 2014 at 9:30 a.m. This is final and appealable

Rev 304(a)

Associate Judge
Daniel T. Gillespie

Date: September 17, 2014

Enter: SEP 17 2014

Judge Daniel T. Gillespie #1507
Circuit Court – 1507

C00727

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

SHERI LAWLER, Executor of the Estate of JILL PRUSAK, Deceased, Plaintiff, v. THE UNIVERSITY OF CHICAGO MEDICAL CENTER, et al., Defendants.	NO. 11 L 8152

NUNC PRO TUNC ORDER

THIS MATTER COMING ON TO BE HEARD on the motion of the defendant, ADVOCATE CHRIST MEDICAL CENTER, to revise the Order of September 17, 2014 by entering a *nunc pro tunc* order adding ADVOCATE CHRIST MEDICAL CENTER as a moving party on the Motion to Dismiss portions of the Amended Complaint, specifically those portions referenced as Count I in the Court's Memorandum ruling and Order of said date by adding Count III to said Memorandum ruling and Order and to identify ADVOCATE CHRIST MEDICAL CENTER as a moving party to dismiss the wrongful death claim contained in the Plaintiff's Amended Complaint and to incorporate by reference ADVOCATE CHRIST MEDICAL CENTER as a moving party defendant at any place in the Court's Memorandum ruling and Order where defendants are referenced; and add ADVOCATE CHRIST MEDICAL CENTER as a moving party whose Motion to Dismiss is granted by the Court in the Order of September 17, 2014. The Court further finds that pursuant to S. Ct. Rule 304(a), there is no just reason to delay enforcement or appeal of this order or that of September 17, 2014.

, 2014

ENTERED Associate Judge Daniel T. Gillespie

OCT - 2 2014

Judge Circuit Court – 1507 Judge's No.

Firm ID No. 44613
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Attorney for ADVOCATE CHRIST MEDICAL CENTER
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E-Mail rschade@cassiday.com

DOROTHY A. BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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#35414/RGS/1352
ORDER CCG-2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

SHERI LAWLER, Executor of the Estate of JILL PRUSAK, Deceased,

Plaintiff,

v.

THE UNIVERSITY OF CHICAGO MEDICAL CENTER; ET AL.,

Defendants.

NO. 2011 L 8152 - B

ORDER

IT HAVING BEEN THE INTENTION OF THE COURT to dismiss all wrongful death claims for the reasons set forth in its September 17, 2014 Order, and it appearing that ADVOCATE CHRIST MEDICAL CENTER, UNIVERSITY RETINA AND MACULA ASSOCIATES, P.C., and RAMA D. JAGER, M.D. were each named in Count III of the First Amended Complaint, but not mentioned in this Court's prior dismissal orders of September 17, 2014 and October 2, 2014, now therefore:

IT IS HEREBY ORDERED that said ADVOCATE CHRIST MEDICAL CENTER, UNIVERSITY RETINA AND MACULA ASSOCIATES, P.C., and RAMA D. JAGER, M.D., be and hereby are dismissed from Count III of the First Amended Complaint;

And, in clarification of those prior orders, IT IS FURTHER ORDERED that Counts I and III of Plaintiff's Amended Complaint be and hereby are dismissed with prejudice as to all Defendants.

It is further ordered that, pursuant to Supreme Court Rule 304(a), the Court finds that there is no just reason to delay the enforcement or appeal of this Order, and the Orders of September 17, 2014 and October 2, 2014.

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ENTER: Associate Judge Daniel T. Gillespie, 2014.
OCT 17 2014

Judge Circuit Court – 1589 Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

7977840 RSCHADE:cklauba

APPEAL TO THE APPELLATE COURT OF ILLINOIS
First Judicial District
from the
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department — Law Division

SHERI LAWLER, Executor of the Estate of JILL PRUSAK, Deceased, Plaintiff—Appellant, v. THE UNIVERSITY OF CHICAGO MEDICAL CENTER, a corporation, et al. Defendant—Appellees.	))))))	No. 11 L 008152

NOTICE OF APPEAL

SHERI LAWLER, Executor of the Estate of JILL PRUSAK, Deceased, (hereinafter sometimes referred to as Plaintiff—Appellant), by her attorneys, Clifford Law Offices, P.C., hereby appeals to the Appellate Court of Illinois, First Judicial District, from orders entered on September 17, 2014, October 2, 2014 and October 17, 2014 (copies of which are attached hereto), by Honorable Daniel T. Gillespie, one of the Judges of the Circuit Court of Cook County, against her and in favor of the Defendant—Appellees, THE UNIVERSITY OF CHICAGO MEDICAL CENTER, THE UNIVERSITY OF CHICAGO HOSPITALS and HEALTH SYSTEM, THE UNIVERSITY OF CHICAGO PHYSICIANS GROUP, THE UNIVERSITY OF CHICAGO HOSPITALS, UNIVERSITY RETINA AND MACULA ASSOCIATES, P.C., RAMA D. JAGER, M.D., ADVOCATE CHRIST HOSPITAL AND MEDICAL CENTER, and ADVOCATE CHRIST MEDICAL CENTER, dismissing Counts I and III of her First Amended Complaint with prejudice—thereby entirely disposing of her wrongful death claim as to all Defendants—and from all orders and rulings leading and/or contributing thereto.

On appeal, Plaintiff-Appellant will ask that said Orders be reversed and that the case be remanded for further proceedings consistent with this Court's Opinion or Order, and for such further, additional or alternative relief as Plaintiff—Appellant may be entitled to on appeal.

Clifford Law Offices
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Chicago Illinois 60602
(312) 899-9090
Att'y No. 32640

One of the Attorneys for the Plaintiff—Appellant

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
MOTION SECTION

SHERI LAWLER, Executor of the Estate of JILL PRUSAK, Deceased	)	
	)	Case No. 11 L 008152
Plaintiff	)	
v.	)	
UNIVERSITY OF CHICAGO MEDICAL CENTER, et. Al.,	)	
	)	Judge Daniel T. Gillespie
	)	
	)	
Defendants	)	

Memorandum Ruling and Order

Nature of the Proceeding: Defendants University of Chicago Medical Center ("Center"), University of Chicago Hospitals and Health System ("Health System"), University of Chicago Physicians Group ("Group"), University of Chicago Hospitals ("Hospitals"), University Retina and Macula Associates ("Retina"), and Dr. Rama D. Jager ("Jager") request the Court to dismiss the amended complaint, or alternatively, to strike a portion of Count I Paragraph 18 of the Complaint.

Facts: On November 5, 2007, Jill Prusak started receiving medical treatment for the flashes, spots and floaters in her eyes from Dr. Jager who held himself out as a physician faculty at Center, Health System, Hospitals, and Group. The treatment continued till July 13, 2009, when she had the last exam on her eyes at Retina. (Plaintiff's Response, paragraph 2; Physician Report.) On August 7, 2009, Prusak underwent a brain biopsy at Barnes Medical Center and got diagnosed with B-cell lymphoma with ocular involvement.

On August 4, 2011, Prusak filed a Complaint against the Defendants for failing to order appropriate diagnostic testing on November 5, 2007, diagnose macular pathology, and perform appropriate medical evaluation of the state of her eyes. On November 24, 2013, more than four years after last treatment in July 13, 2009, Prusak died. She is survived by Sheri Lawler, her daughter, Charles Allen Boswell, Jr., her brother, and Charles Allen Boswell, her father. On August 11, 2014, Plaintiff's estate filed the First Amended Complaint which contained identical allegations but brought them under the Wrongful Death Act, pursuant to 740 ILCS 180/1.

ISSUES PRESENTED:

1. Whether the Statute of Repose, *i.e.*, 735 ILCS 5/13-212(a), bars Plaintiff from bringing a wrongful death claim by amending the original complaint
2. Whether Prusak's father and brother should be barred from receiving any part of remedies from the wrongful death claim at issue because they do not belong to the class of beneficiaries defined in the Wrongful Death Act

DEFENDANTS' MOTIONS:

Defendants Center, Health System, Group, and Hospitals (herein called "UCMC") and defendants Jager and Retina assert that the Court should dismiss Plaintiff's amended Complaint because the wrongful death claim is barred by the statute of repose. Alternatively,

C00724

they claim that the Court should strike a portion of Count I, paragraph 18 where it lists Prusak's father and brother as beneficiaries, because they are not in the class entitled to a benefit under the Wrongful Death Act.

First, Defendants claim that Plaintiff's wrongful death claim, even as an added claim in the amended complaint, is a new cause of action, and thus, it is barred by the medical malpractice statute of repose. The statute of repose clause provides: any "action for damages for injury or death against physician, dentist, registered nurse or hospital duty . . . , whether based on tort or breach of contract" shall not be brought more than four years after the date of the act or omission of act that allegedly caused such injury or death. 735 ILCS 5/23-212(a) (West 2014). The Illinois courts have previously held that Section 13-212 "absolutely bars claims filed more than four years from the date of the act giving rise to the case of action." *Malinowski v. Mullangi*, 223 Ill. App. 3d 1037, 1040 (1991). Defendants rely on *Limer* to describe two situations where the statute of repose bars a wrongful death claim: (a) when Plaintiff dies after the four-year period expires, and (b) when Plaintiff or Plaintiff's estate files the claim after the four-year period expires. See *Limer v. Lyman*, 220 Ill.App. 3d 1036, 1043 (4th Dist. 1991). *Limer* illustrated the second situation where Plaintiff died before the four-year statute of repose expired but Plaintiff's estate brought a wrongful death claim after the four-year period was over. *Id.* at 1039. The plaintiff in *Limer* argued that the wrongful death claim is a 'derivative' of the action that the decedent filed (and later voluntarily dismissed) during her lifetime, and therefore, should not be considered a new action. *Id.* at 1043. The court, however, ruled that the wrongful death claim was a new action, because the Section 13 – 209(a) only grants a one-year extension to claims which the decedent could have brought at the time of his or her death and which the cause of action "*survive and . . . not otherwise barred.*" 735 ILCS 5.13-209(b)(emphasis added). The medical malpractice wrongful death claims are "otherwise barred," because they are "subject to an additional rule of the filing within the four-year period from the tortious acts." *Limer*, 220 Ill. App. 3d at 1043 (citing *Wolfe v. Westlake Community Hospital*, 173 Ill. App. 3d 608, 612 (1988)).

Strict enforcement of the statute of repose in a medical malpractice case is necessary because the statute was purposely created to "prevent extended exposure of physicians and other hospital personnel to potential liability for their care and treatment, thereby increasing an insurance company's ability to predict future liabilities." *Hayes v. Mercy Hospital & Medical Center*, 136 Ill.2d 450, 458. The General Assembly legislated the statute of repose in order to respond to the medical malpractice insurance crisis where insurance companies were becoming more reluctant to write medical malpractice insurance policies and dramatically raising premiums. *Id.* at 457. Accordingly, the statute of repose bars any claims brought more than four years after the date when the malpractice that became the basis of their claims occurred.

Second, Defendants also assert that the Court should strike a portion of Count I, Paragraph 18 where Plaintiff listed Prusak's father and brother as beneficiaries of the remedies from the wrongful death claim. The Wrongful Death Act provides a remedy to a defined class of individuals, *i.e.*, "the surviving spouse and next of kin" of the deceased. *Baez v. Rosenberg*, 409 Ill. App. 3d 525, 529 (1st Dist. 2011). The *Baez* court, based on the law of intestacy, defined the meaning of "next of kin" to be "decedent's child" since the Probate Act provides that a decedent's estate is distributed to the decedent's descendants "per stripes" when the decedent leaves no surviving spouse but only a descendent. *Id.* at 530. Thus, Defendants argue that Sheri Lawler, Prusak's daughter, is the only "next of kin" entitled to damages from the wrongful death claim, and therefore, the Court should strike the portion listing Prusack's father and brother as beneficiaries.

PLAINTIFF'S RESPONSE:

Plaintiff, however, asserts that the wrongful death claim relates back to the original claim because it is based on the identical allegations as those alleged in the original complaint, and therefore, it is not subject to the statute of repose. The relation back doctrine provides that a claim "in any amended pleading shall not be barred by lapse of time under any statute . . ., if the time prescribed or limited had not expired when the original pleading was filed" and if the amended claim "grew out of the same transaction" in the original pleading. 735 ILCS 5/2-616(a). Plaintiff claims that the Court should liberally apply the relation back doctrine, *i.e.*, in favor of Plaintiff, considering its remedial nature, and that medical malpractice cases should be allowed to "enable the action to be heard on the merits" rather than coming to an end based on "procedural technicalities." *Peterson v. Hinsdale Hospital*, 233 Ill. App.3d 327, 332 (2d. Dist. 1992); *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 154 (2d. Dist. 2002). Plaintiff relies on *Sompolski* and *Cain* to show where the courts allowed the plaintiffs to add a wrongful death or a survival claim after the statute of limitations were expired based on the relation back doctrine. In *Sompolski*, the court allowed the plaintiff to bring a wrongful death claim after the statute of limitations expired because the wrongful death claim and the original claim were based on the same occurrence. *Sompolski v. Miller*, 239 Ill. App. 3d 1087, 1088 (1st Dist. 1992). Similarly, in *Cain*, the plaintiff could file an additional survival action even after the statute of limitation expired because the claim was "based on the same occurrence [as the original claim] and the negligence charged in both counts is identical." *Cain v. New York Central R.R. Co.*, 35 Ill. App.2d 333, 338-39 (1982). Plaintiff argues that the wrongful death claim in this case relates back to the original claim since it is based on exactly the same occurrence that allegedly caused the original medical negligence claim. Plaintiff also asserts that Defendants are not prejudiced since they were notified of the facts of the occurrence which formed a basis of the claim before the limitation period expired, as it is noted in *Zeh*. See *Zeh v. Wheeler*, 111 Ill. 2d 266, 273 (1986).

Plaintiff also asserts *Limer* to be inapposite because it involved a situation where Plaintiff voluntarily dismissed the original claim and then re-filed the wrongful death claim after the four-year statute of repose expired. In *Limer*, the plaintiff voluntarily dismissed the original claim and then re-filed a wrongful death claim more than five years after the occurrence that caused medical negligence. *Limer*, 220 Ill. App. 3d 1036, 1039. Plaintiff asserts that the *Limer* court considered the plaintiff's voluntary dismissal of the original claim and re-filing of a wrongful death claim made the situation equivalent to filing the wrongful death claim for the first time, and therefore, the court ruled that the plaintiff cannot bring a new claim after the expiration of the four-year statute of repose period.

DEFENDANTS' REPLY:

Defendants argue that Plaintiff failed to show that the relation back doctrine applies to the medical malpractice cases because the precedents that Plaintiff cited did not involve the medical malpractice statute of repose. For examples, *Sompolski* involved a negligence claim arose out of a car accident which was subject to the ordinary statute of limitations, not the medical malpractice statute of repose. *Sompolski*, 239 Ill. App. 3d at 1090.Thus, the *Sompolski* court's allowing the plaintiff to file a wrongful death claim after the limitation period based on the relations back doctrine is not applicable to this case. Similarly, in *Cain* and *Zeh*, the occurrences at issue were injuries suffered while the plaintiff cleaned a train (in *Cain*) and when the plaintiff fell on a staircase (in *Zeh*). *See Cain*, 35 Ill. App. 2d at 335-37; *Zeh*, 111 Ill.2d at 268-70. Both cases were only subject to the statute of limitations, not the statute of repose. Defendants then emphasize the need for treating the statute of repose differently from the statute of limitations—to reduce physician's potential liability and in turn, increase insurance companies' ability to predict future liabilities. *See Hayes*, 136 Ill.2d at 458.

Finally, Defendants assert that the Court should consider Plaintiff's failure to respond

to Defendants' assertion, *i.e.*, that Prusak's father and brother should be eliminated from the beneficiaries in this claim, as a concession and request the Court to strike the portion at issue, if it is not going to dismiss the claim entirely.

ANALYSIS:

The wrongful death claims are only valid if the deceased was not time-barred to bring the action at the time of his or her death. *Wolfe*, 173 Ill. App. 3d at 612. Since the wrongful death claim in this case was added (in the amended complaint) in August, 2014— more than four years after the date of last medical treatment in July, 2009— the claim is barred by the statute of repose, unless the Court finds that Plaintiff's wrongful death claim relates back to her original medical negligence claim.

The Court agrees with Defendants. The relations back doctrine does not apply to this case because there is no precedent, as shown from the absence of medical malpractice cases where courts allowed plaintiffs to file a claim after the four-year period expired. As Defendants have noted, the cases that Plaintiff cited involved non-medical malpractice claims which were only subject to the statute of limitations. In fact, Illinois courts have been clear in that the statute of repose is "an absolute bar" to medical malpractice claims "arising out of patient care under all theories of liability, whether then existing or not." *O'Brien v. O'Donoghue*, 292 Ill. App. 3d 699, 704 (1st Dist. 1997); *Hayes*, 136 Ill. 2d at 459. Such conclusion is an accurate interpretation of the law considering the purpose of the statute. As noted in *Hayes*, this statute of repose was the result of General Assembly's special efforts to curb the medical insurance premium from increasing by artificially limiting the potential liability that physicians and medical personnel might face for the care they provided to patients. *See Hayes*, 136 Ill.2d at 458. For the reasons above, the relation back doctrine— though it ordinarily allows plaintiffs to bring new claims even after the statute of limitations expires—is not applicable to the medical malpractice statute of repose. Thus, Plaintiff's wrongful death claim is a new action and it is barred by the statute of repose.

Defendants are also correct in their reading of the Wrongful Death Act and its definition of beneficiaries entitled to the remedy. The Act provides that "[t]he amount recovered in any such action shall be distributed . . . to each of the surviving spouse and next of kin of such deceased person:" 740 ILCS 180/2 (West 1994). Pursuant to 755 ILCS 5/2-1(b) of the Probate Act, a decedent's estate is given to the decedent's descendants *per stirpes* when the decedent is survived by only a descendant. Thus, the Prusak's father and brother do not fall under the class of beneficiaries. However, this Court need not grant Defendants' motion to strike the portion of Count I, Paragraph 18 since the claim will be dismissed based on their motion to dismiss.

Order: For the reasons stated above, The Court grants Defendants' motions to dismiss Plaintiff's wrongful death claim (Count I) with prejudice. The case is continued for status on discovery on Oct. 21, 2014 at: 10:30 a.m. This is final and appealable under Rule 304(a)

Associate Judge
Daniel T. Gillespie

Date: September 17, 2014

Enter: SEP 17 2014

Judge Daniel T. Gillespie #1507
Circuit Court – 1507

C00727

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

SHERI LAWLER, Executor of the Estate of JILL PRUSAK, Deceased, Plaintiff, v. THE UNIVERSITY OF CHICAGO MEDICAL CENTER, et al., Defendants.	NO. 11 L 8152

NUNC PRO TUNC ORDER

THIS MATTER COMING ON TO BE HEARD on the motion of the defendant, ADVOCATE CHRIST MEDICAL CENTER, to revise the Order of September 17, 2014 by entering a *nunc pro tunc* order adding ADVOCATE CHRIST MEDICAL CENTER as a moving party on the Motion to Dismiss portions of the Amended Complaint, specifically those portions referenced as Count I in the Court's Memorandum ruling and Order of said date by adding Count III to said Memorandum ruling and Order and to identify ADVOCATE CHRIST MEDICAL CENTER as a moving party to dismiss the wrongful death claim contained in the Plaintiff's Amended Complaint and to incorporate by reference ADVOCATE CHRIST MEDICAL CENTER as a moving party defendant at any place in the Court's Memorandum ruling and Order where defendants are referenced; and add ADVOCATE CHRIST MEDICAL CENTER as a moving party whose Motion to Dismiss is granted by the Court in the Order of September 17, 2014. The Court further finds that pursuant to S. Ct. Rule 304(a), there is no just reason to delay enforcement or appeal of this order or that of September 17, 2014.

, 2014

ENTERED Associate Judge Daniel T. Gillespie
OCT - 2 2014
Judge Circuit Court – 1507 Judge's No.

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C00728

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

SHERI LAWLER, Executor of the Estate of JILL PRUSAK, Deceased,

Plaintiff,

v.

THE UNIVERSITY OF CHICAGO MEDICAL CENTER; ET AL.,

Defendants.

NO. 2011 L 8152 - B

ORDER

IT HAVING BEEN THE INTENTION OF THE COURT to dismiss all wrongful death claims for the reasons set forth in its September 17, 2014 Order, and it appearing that ADVOCATE CHRIST MEDICAL CENTER, UNIVERSITY RETINA AND MACULA ASSOCIATES, P.C., and RAMA D. JAGER, M.D. were each named in Count III of the First Amended Complaint, but not mentioned in this Court's prior dismissal orders of September 17, 2014 and October 2, 2014, now therefore:

IT IS HEREBY ORDERED that said ADVOCATE CHRIST MEDICAL CENTER, UNIVERSITY RETINA AND MACULA ASSOCIATES, P.C., and RAMA D. JAGER, M.D., be and hereby are dismissed from Count III of the First Amended Complaint;

And, in clarification of those prior orders, IT IS FURTHER ORDERED that Counts I and III of Plaintiff's Amended Complaint be and hereby are dismissed with prejudice as to all Defendants.

It is further ordered that, pursuant to Supreme Court Rule 304(a), the Court finds that there is no just reason to delay the enforcement or appeal of this Order, and the Orders of September 17, 2014 and October 2, 2014.

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Associate Judge ..... 2014.
Daniel T. Gillespie

ENTER: OCT 17 2014

Judge Circuit Court – 1580dge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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SIXTH DIVISION
March 25, 2016

No. 1-14-3189

SHERI LAWLER, Executor of the Estate of Jill Prusak, Deceased, Plaintiff-Appellant, v. THE UNIVERSITY OF CHICAGO MEDICAL CENTER, a corporation, THE UNIVERSITY OF CHICAGO HOSPITALS AND HEALTH SYSTEM, THE UNIVERSITY OF CHICAGO PHYSICIANS GROUP, THE UNIVERSITY OF CHICAGO HOSPITALS, UNIVERSITY RETINA AND MACULA ASSOCIATES, P.C., RAMA D. JAGER, M.D., ADVOCATE CHRIST HOSPITAL AND MEDICAL CENTER, a corporation, and ADVOCATE CHRIST MEDICAL CENTER, a corporation, Defendants-Appellees (Advocate Health and Hospitals Corporation, a corporation, Advocate Health Care Network, a corporation, Advocate Health Centers, Inc., a corporation, Advocate Professional Group, S.C., a corporation, Advocate Christ Hospital Health Partners, a corporation, Advocate South Suburban Hospital, a corporation, Advocate Health Partners, a corporation, Advocate Medical Group, a corporation, Advocate Christ Medical Group, a corporation, Advocate Christ Hospital Physician Partners, and Advocate Health Care, Defendants).	) Appeal from the) Circuit Court) of Cook County.)))) No. 11 L 8152))))))))))))))))) Honorable) Daniel T. Gillespie,) Judge Presiding.

JUSTICE DELORT delivered the judgment of the court, with opinion.
Justices Hoffman and Hall concurred in the judgment and opinion.

OPINION

¶ 1 This appeal concerns an issue of first impression in Illinois regarding the interplay of three statutes. We must determine whether the medical malpractice statute of repose (735 ILCS

5/13-212(a) (West 2010)) bars the application of the relation back doctrine (735 ILCS 5/2-616(b) (West 2010)) for purposes of adding a claim to an existing case under the Illinois Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2010)). We hold that the relation back doctrine applies so the wrongful death action is not barred.

¶ 2 BACKGROUND

¶ 3 On August 4, 2011, Jill Prusak, the decedent in this case, filed a medical malpractice cause of action within both the two-year statute of limitations and four-year statute of repose under section 13-212(a). Prusak filed a two-count complaint against defendants, The University of Chicago Medical Center, The University of Chicago Hospitals and Health System, The University of Chicago Physicians Group, The University of Chicago Hospitals (collectively, the University of Chicago defendants), University Retina and Macula Associates, P.C., Dr. Rama Jager, Advocate Christ Hospital and Medical Center, and Advocate Christ Medical Center (collectively, the Christ Hospital defendants), and other medical providers who have since been dismissed from the case.[1] Prusak alleged that Dr. Jager misdiagnosed her macular pathology and that this misdiagnosis led to defendants' failure to recognize central nervous system lymphoma. Count I alleged negligence against the University of Chicago defendants and asserted that Dr. Jager was an agent or apparent agent of the University of Chicago defendants. Count II made the same allegations with respect to the Advocate defendants and the Christ Hospital defendants. In both counts, Prusak specifically alleged:

[1] By agreed order, the parties stipulated to the voluntary dismissal of certain defendants under section 2-1009 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2010)), including Advocate Health and Hospitals Corporation, Advocate Health Care Network, Advocate Health Centers, Inc., Advocate Professional Group, S.C., Advocate Christ Hospital Health Partners, Advocate South Suburban Hospital, Advocate Health Partners, Advocate Medical Group, Advocate Christ Medical Group, Advocate Christ Hospital Physician Partners, and Advocate Health Care (collectively, the Advocate defendants).

"From November 5, 2007 through July of 2009, and at all times mentioned herein, Defendant, JAGER, was negligent in the following ways:

a) Failed to order appropriate diagnostic testing on November 5th, 2007 for a patient with bilateral metamorphopsia and visual acuity that could not be corrected to normal levels in either eyes;

b) Failed to diagnose macular pathology[;] and

c) Failed to perform appropriate medical evaluation of a 47 year old patient with macular pathology and no known systemic illness."

Prusak also alleged that she "neither knew or should have known her injury and that it may have been wrongfully caused before August 7, 2009, when a brain biopsy was performed and this case is brought within two (2) years of the date of said discovery."

¶ 4 Defendants each filed answers to Prusak's complaint by April 20, 2012. A period of discovery followed during which Prusak answered defendants' interrogatories on August 16, 2012. In response to the question asking Prusak to describe each and every personal injury, condition, and symptom of ill-being sustained as a result of the occurrence alleged in her complaint, she described reoccurrences of both lymphoma (second brain tumor) and ocular lymphoma.

¶ 5 Prusak died on November 24, 2013, after the expiration of the four-year statute of repose. On March 11, 2014, the trial court granted Prusak's daughter, Sheri Lawler, leave to file an amended complaint, substituting herself as party plaintiff and as the executor of Prusak's estate.

¶ 6 Lawler filed a four-count first amended complaint on April 11, 2014. Two of the counts alleged claims under the Illinois survival statute (755 ILCS 5/27-6 (West 2010)) for injuries suffered by Prusak prior to her death. The other two counts sounded in wrongful death. The

amended complaint identified Prusak's survivors as Lawler; Charles Allen Boswell, Jr., Prusak's brother; and Charles Allen Boswell, Sr., her father. All four counts alleged the same acts of negligence and operative facts as the original complaint.

¶ 7 On May 9, 2014, the University of Chicago defendants filed an answer to count II, the survival claim, and moved to dismiss count I, the wrongful death claim, pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2010)). The University of Chicago defendants argued that the medical malpractice statute of repose (section 13-212(a)) barred Lawler's wrongful death claim. Defendants Dr. Jager and University Retina and Macula Associates filed a similar motion to dismiss on May 29, 2014. The remaining defendants also argued that Prusak's brother and father were not proper beneficiaries under the Wrongful Death Act and moved to strike the allegations concerning the pecuniary loss to those individuals.[2]

¶ 8 On September 17, 2014, after briefing and argument, the trial court entered a written order granting defendants' motions to dismiss count I (wrongful death) of the amended complaint with prejudice. The court found that the wrongful death claims were only valid "if the deceased was not time-barred to bring the action at the time of his or her death." The court stated that because the wrongful death claims were added in the amended complaint in April 2014, more than four years after the date of the last medical treatment in July 2009, the claims were barred by the statute of repose, "unless the Court finds that Plaintiff's wrongful death claim relates back to her original medical negligence claim." The court held that the relation back

[2] Whether Prusak's brother and father are proper beneficiaries under the Wrongful Death Act is not at issue in this appeal. Lawler agrees in her opening brief that the issue is not before this court because the trial court, in dismissing the wrongful death counts in their entirety, declined to grant the alternative relief defendants sought; however, the trial court indicated that defendants' position on this issue was correct. Lawler states that she "is persuaded that the Defendants' position with respect to the father and brother is probably meritorious, and in the event of reversal and remand will undertake to cure the situation voluntarily."

doctrine did not apply to this case "because there is no precedent, as shown from the absence of medical malpractice cases where courts allowed plaintiffs to file a claim after the four-year period expired." The trial court noted our supreme court's decision in *Hayes v. Mercy Hospital & Medical Center*, 136 Ill. 2d 450 (1990), which discussed the General Assembly's efforts to curb medical insurance premiums from increasing by artificially limiting the potential liability that physicians and medical personnel might face for the care they provided to patients. The court therefore concluded that Lawler's wrongful death claim was a new action barred by the four-year statute of repose. The order was made final and appealable under Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)).

¶ 9 The trial court entered subsequent *nunc pro tunc* orders on October 2, 2014 and October 17, 2014 to add count III of the amended complaint to the original dismissal order and clarify that the dismissal order also applied to the Christ Hospital defendants, University Retina and Macula Associates, and Dr. Jager. The *nunc pro tunc* orders also included Rule 304(a) language. This appeal followed.

¶ 10 ANALYSIS

¶ 11 Lawler argues that under a correct interpretation of the relevant statues, a wrongful death action can relate back to the original complaint even after more than four years have elapsed since the last date of the alleged negligent medical treatment. She notes that Prusak's original complaint was timely filed and that the alleged negligent transactions in the original and amended complaint are completely identical. Lawler argues that the relation back doctrine should apply because the original claims supplied defendants with the information necessary to prepare their defense to the amended claims.

¶ 12 Defendants respond that the trial court correctly dismissed the wrongful death counts in the amended complaint because they were separate and distinct causes of action than those in the existing action and, therefore, did not relate back to the original complaint. Defendants contend that the relation back doctrine is not an exception to the medical malpractice statute of repose. They rely on the language and purpose of the statute of repose, and the doctrine that the more specific statute should govern over the more general relation back statute. They also argue that the statute of repose controls because it is substantive and not procedural and, therefore, takes precedence over the relation back statute.

¶ 13 Standard of Review and Statutory Interpretation

¶ 14 We review whether the trial court erred in dismissing Lawler's wrongful death claims pursuant to section 2-619(a)(5) of the Code, which provides that a defendant may file a motion for dismissal if "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2010). We review this dismissal *de novo*. See *O'Toole v. Chicago Zoological Society*, 2015 IL 118254, ¶ 16.

¶ 15 The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent, and the plain language of the statute is the best indication of that intent. *Acme Markets, Inc. v. Callanan*, 236 Ill. 2d 29, 37-38 (2009). "The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning." *Roselle Police Pension Board v. Village of Roselle*, 232 Ill. 2d 546, 552 (2009). "The statute should be evaluated as a whole, with each provision construed in connection with every other section." *Id.* When statutory language is clear and unambiguous, we enforce it as written without reading into it exceptions, conditions, or limitations not expressed by the legislature. *Martin v. Office of the State's Attorney*, 2011 IL App (1st) 102718, ¶ 10.

¶ 16 "However, when the plain language of one statute apparently conflicts with the plain language of another statute, we must resort to other means in determining the legislature's intent. Where two statutes conflict, we will attempt to construe them together, *in pari materia*, where such an interpretation is reasonable." *Moore v. Green*, 219 Ill. 2d 470, 479 (2006) (citing *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311-12 (2001)). We must presume that the legislature did not intend to create absurd, inconvenient, or unjust results. *Price v. Phillip Morris, Inc.*, 2015 IL 117687, ¶ 30; *State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill. 2d 533, 541 (1992). "Further, in determining legislative intent, we may consider the purpose and necessity for the law as well as the consequences that would result from interpreting the statute in one way or another." *Price*, 2015 IL 117687, ¶ 30 (citing *People v. Gaytan*, 2015 IL 116223, ¶ 23). The interpretation of a statute is reviewed *de novo*. *Id.*

¶ 17 This case presents a classic clash of apparently conflicting statues which requires us to assess each relevant statute to ensure they operate together consistently with their legislative purposes. We now review each of the pertinent statutes and the legislature's intent as interpreted by Illinois courts.

¶ 18 Wrongful Death Act

¶ 19 No cause of action for wrongful death existed at common law. *Moon v. Rhode*, 2015 IL App (3d) 130613, ¶ 16. First enacted in 1853, the Wrongful Death Act created a new cause of action to compensate a decedent's survivors. *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 413 (1989). In contrast, "[p]ersonal injury actions were born of the common (judge-made) law and are susceptible to changes by the judiciary." *Moon*, 2015 IL App (3d) 130613, ¶ 16. At common law, the personal injury action died with the decedent. *Id.* The survival statute (755 ILCS 5/27-6 (West 2010)), also a creature of the legislature enacted in 1872, allows for

recovery of damages the injured party could have recovered, had she survived. *Moon*, 2015 IL App (3d) 130613, ¶ 16; see also *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 426 (1974). The Wrongful Death Act and survival statute are conceptually distinct in that one relates to an action arising upon wrongful death while the other relates to a right of action for personal injury arising during the life of the injured person. *Murphy*, 56 Ill. 2d at 431. However, our supreme court has noted that "[n]ot every death is recompensable." *Wyness*, 131 Ill. 2d at 413. Illinois courts have long held that, in a wrongful death action, "the cause of action is the wrongful act, neglect or default causing death, and not merely the death itself." (Internal quotation marks omitted.) *Id.* at 411.

¶ 20 The pertinent provisions of the Wrongful Death Act state:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would, *if death had not ensued*, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." (Emphasis added.) 740 ILCS 180/1 (West 2010).

In addition, section 2 of the Wrongful Death Act states:

> "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every

> such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person.
>
> * * *
>
> Every such action shall be commenced within 2 years after the death of such person ***." 740 ILCS 180/2 (West 2010).

¶ 21 In short, the Wrongful Death Act provides the exclusive remedy available when death occurs as a result of tortious conduct. *Murphy*, 56 Ill. 2d at 426. In *Wyness*, a wrongful death action, the defendants argued that the two-year statute of limitations for personal injury actions should have started running *before* the decedent's death because the plaintiff knew of the decedent's injuries and the cause of those injuries before death. Our supreme court disagreed, explaining:

> "The 'injury' which opens the door to initiation of a personal injury suit *** is not the same 'injury' which opens the door to a wrongful death suit. Though both actions require an individual to have been harmed in some way through the actions of another, this injury at the hands of another is not the sole thread which weaves the fabric undergirding both causes of action. A wrongful death action can only be instituted for the benefit of the next of kin who have suffered an 'injury' because a family member has died when that family member's death resulted from an injury wrongfully caused by another. [Citation.] The precipitating 'injury' for the plaintiffs in a wrongful death action, unlike the injury in a personal injury action, is the death; that the death must also be the result of a

> wrongfully caused injury suffered by the deceased at the hands of another does not alter the analysis. *The wrongful injury suffered by the deceased is the distinguishing characteristic of the particular death.*" (Emphasis added.) *Wyness*, 131 Ill. 2d at 414-15.

¶ 22 The supreme court in *Wyness* explained that the decedent's beneficiaries suffered a pecuniary injury by reason of the decedent's death. The decedent, however, was the person who suffered the actual physical injury which led to the death. With respect to that physical injury, the beneficiaries are said to step into the shoes of the decedent. In *Kessinger v. Grefco, Inc.*, 251 Ill. App. 3d 980, 987-88 (1993), the court described the relationship this way:

> "Although courts recognize the wrongful death action as an independent cause of action which does not arise until after death, the action is derivative of the injury to the decedent and is grounded on the same wrongful act of defendant whether it was prosecuted by the injured party during his lifetime or by a representative of the estate. The remedy depends upon the existence, in the decedent, at the time of his death, of a right of action to recovery for such injury." *Id.*

¶ 23 A wrongful death action will lie where the deceased had a claim that was not time-barred on or before his death. See *O'Brien v. O'Donoghue*, 292 Ill. App. 3d 699, 703 (1997); *Kessinger*, 251 Ill. App. 3d at 986; *Wolfe v. Westlake Community Hospital*, 173 Ill. App. 3d 608, 612 (1988); *Fountas v. Breed*, 118 Ill. App. 3d 669, 674 (1983). The Wrongful Death Act requires a plaintiff sue within two years from the time of death (740 ILCS 180/2 (West 2010)). However, because the plaintiff's rights are derivative of those which the decedent himself possessed, that time may be impacted by other limitations provisions, which may supersede the

wrongful death statute and recast the time in which the action may be brought. An example includes the limitations provisions for medical malpractice claims (735 ILCS 5/13-212(a) (West 2010)), which we review next.

¶ 24 The Limitations for Filing a Medical Negligence Claim

¶ 25 Section 13-212(a) of the Code establishes limitation and repose periods for filing medical malpractice actions against medical providers. First enacted on September 12, 1975, and adopted as part of "An Act to revise the law in relation to medical malpractice" (Pub. Act 79-960 (eff. Nov. 11, 1975)), the section states:

> "Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death." 735 ILCS 5/13-212(a) (West 2010).

See also *Anderson v. Wagner*, 79 Ill. 2d 295 (1979) (providing a comprehensive history and explanation of the enactment of the medical malpractice statute of repose).

¶ 26 In *Hayes*, a case in which defendants here strongly rely, our supreme court explained the legislature enacted of the medical malpractice repose period as part of its response to a "medical

malpractice insurance crisis," created by " 'the increasing reluctance of insurance companies to write medical malpractice insurance policies and the dramatic rise in premiums demanded by those companies which continued to issue policies.' " *Hayes*, 136 Ill. 2d at 457 (quoting *Anderson*, 79 Ill. 2d at 301).

¶ 27 In *Hayes*, the supreme court determined whether the four-year statute of repose in section 13-212(a) applied to third-party contribution actions brought against a doctor by the defendants in an underlying negligence action. The *Hayes* court held that the application of the repose period in section 13-212(a) was not limited to a direct action by the injured party. *Id.*, at 456-57. The court agreed that an action of contribution need not be predicated on the same theory of recovery as that asserted by the plaintiff in the underlying action. *Id.* at 457. Indeed, " 'the basis for a contributor's obligation rests on his liability in tort to the injured party [citation]' even if the plaintiff in the direct action did not assert the theory of liability on which the third-party action relies." *Id.*, at 457 (quoting *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 118 Ill. 2d 447, 462 (1987)).

¶ 28 The supreme court's plain reading of the statute led it to conclude that "the medical malpractice statute of repose bars any action after the period of repose seeking damages against a physician or other enumerated health-care provider for injury or death arising out of patient care, whether at law or in equity." *Id.* at 456. "Because a suit for contribution against the insured for damages arising out of patient care exposes insurance companies to the same liability as if the patient were to have brought a direct action against the insured, we believe that the term 'or otherwise' in the medical malpractice statute of repose includes actions for contribution against a physician for injuries arising out of patient care." *Id.* at 458. The supreme court believed inclusion of the term 'or otherwise,' following more restrictive language, indicated the

legislature intended the term to be all-inclusive and that its inclusion "demonstrates the General Assembly's desire at the time it originally enacted the statute to limit a physician's exposure to liability for damages for injury or death arising out of patient care under all theories of liability, whether then existing or not." *Id.* at 458-59.

¶ 29 *Hayes* is distinguishable from this case for one simple, but crucial, basis. The supreme court did not consider the relation back doctrine and, therefore, did not have the opportunity to consider the issue presented here.

¶ 30 Relation Back Doctrine

¶ 31 The relation back statute provides:

> "The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time *under any statute* or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held

> to relate back to the date of filing of the original pleading so amended." (Emphasis added.) 735 ILCS 5/2-616(b) (West 2010).

¶ 32 In *Zeh v. Wheeler*, 111 Ill. 2d 266, 269 (1986), the plaintiff amended her complaint to change the address of the location where she allegedly was injured. The trial court granted the defendants' motion to dismiss because the amendment stated a new and different cause of action which did not arise out of the same transaction or occurrence set forth in the original complaint. *Id.* at 269-70. The parties agreed that the plaintiff's amended complaint was barred by the applicable personal injury statute of limitations unless the amendment related back to the date of the filing of the original complaint.

¶ 33 The *Zeh* court affirmed the dismissal of the plaintiff's amended complaint and, significantly for the purposes of this case, noted that section 2-616(b) no longer required that the original and amended pleadings state the same cause of action. *Id.* at 272-73. The court explained:

> "In 1933, the legislature replaced amended section 39 of the former practice act with section 46 of the Civil Practice Act. The 1933 amendment omitted the words 'and is substantially the same as' so that amendments could be made if the matter introduced by the amended pleading 'grew out of the same transaction or occurrence set up in the original pleading.' (Ill. Rev. Stat. 1939, ch. 110, par. 46(2).) The 1933 Civil Practice Act thus shifted from the common law requirements as set out in *Carlin v. City of Chicago* (1914), 262 Ill. 564, 104 N.E. 905, that the original pleading technically state a cause of action and that the amended pleading set up the same cause of action as the original pleading to a test of identity of transaction or occurrence. [Citation.] The legislative change was

> based on the rationale that 'a defendant has not been prejudiced so long as his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him.' " *Id.*, at 272-73 (quoting *Simmons v. Hendricks*, 32 Ill. 2d 489, 495 (1965)).

The supreme court specifically noted that "a defendant should not be required to defend against stale claims of which he had no notice or knowledge." *Id.* at 274.

¶ 34 The *Zeh* court further explained that "the legislature's reason for this change was its belief that defendants would not be prejudiced by the addition of claims so long as they were given the facts that form the basis of the claim asserted against them prior to the end of the limitations period." *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 154 (2002) (citing *Zeh*, 111 Ill. 2d at 273). "This emphasis on the identity of the occurrence rather than the identity of the cause of action still provides protection to defendants because, as long as they are aware of the occurrence or transaction that is the basis of the claim, they can be prepared to defend against that claim, whatever theory is advanced." *Id.*, at 154 (citing *Zeh*, 111 Ill. 2d at 279). Thus, the critical inquiry becomes " 'whether there is enough in the original description to indicate that plaintiff is not attempting to slip in an entirely distinct claim in violation of the spirit of the limitations act.' " *Simmons*, 32 Ill. 2d at 497 (quoting Oliver L. McCaskill, Illinois Civil Practice Act Annotated, 126-127 (Supp. 1936)).

¶ 35 The *Zeh* court concluded that, because maintaining a stairway at one location involved different conduct by different persons at a different time and a different place from maintaining a stairway at another location, changing the address would involve two different locations and, therefore, two different occurrences, which did not relate back to the original pleading. *Zeh*, 111 Ill. 2d at 275. In contrast, simply changing a word in an address from "Street" to "place" would

relate back because it constituted two different descriptions of the same occurrence or locality. (Internal quotation marks omitted.) *Id.* at 276-77.

¶ 36 Relevant to this case, the *Zeh* court, quoting a United States Supreme Court decision, stated that " '[t]here is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.' " *Id.*, at 280 (quoting *Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574, 581 (1945)). With these statutes and legislative history in mind, we now turn to the merits of this case.

¶ 37 Application of the Relation Back Doctrine to the Statute of Repose

¶ 38 Defendants argue that a host of substantive and procedural differences exist between Lawler's wrongful death claims and the survival claims she is pursuing in Prusak's name. Defendants assert that, because Lawler's wrongful death claims constitute distinct causes of action than the survival claims, even though the underlying facts are the same, the addition of the wrongful death claims to the amended complaint should be regarded as a new suit commenced on the date the amended complaint was filed more than four years after the last act of alleged medical malpractice and, therefore, outside the repose period.

¶ 39 One case defendants cite, *Durham v. Michael Reese Hospital Foundation*, 254 Ill. App. 3d 492 (1993), determined whether the four-year medical malpractice statute of repose or the two-year Wrongful Death Act statute of limitations applied to a medical malpractice case where the alleged malpractice caused the decedent's death. Relying on *Hayes*, the *Durham* court found that section 13-212(a) of the Code controlled and, therefore, barred the plaintiff's action because more than four years elapsed from the date of the alleged negligent treatment of the decedent until the complaint's filing. *Id.*, at 495.

¶ 40 *Durham* is inapposite as the decedent did not file his own medical malpractice claim prior to his death, and the original cause of action in that case was filed after the expiration of the four-year repose period. And like in *Hayes*, the parties in *Durham* did not raise the application of the relation back doctrine.

¶ 41 Defendants also rely upon *Real v. Kim*, 112 Ill. App. 3d 427 (1983), in which the plaintiff, as special administrator of decedent's estate, filed an action under the then Wrongful Death Act and survival statute (Ill. Rev. Stat. 1979, ch. 70, ¶ 1, *et seq.*, and ch. 110$^{1/2}$, ¶ 27-6), alleging medical malpractice. *Real*, 112 Ill. App. 3d at 428. The trial court dismissed the case as time-barred by section 21.1 of the Limitations Act (Ill. Rev. Stat. 1979, ch. 83, ¶ 22.1 (now codified as section 13-212(a))). *Real*, 112 Ill. App. 3d at 428-29. The decedent received a medical evaluation on April 13, 1976, which produced normal test results. The plaintiff alleged that this diagnosis was incorrect because proper interpretation would have disclosed the presence of an abnormality. *Id.* at 429. In June 1979, the decedent was diagnosed as having brain cancer. The decedent died on August 9, 1980. The plaintiff filed the complaint on June 19, 1981. *Id.* at 430.

¶ 42 The *Real* court held that section 21.1 barred the survival action because the four-year limitations period began to run from the date of the alleged acts of negligence–April 13, 1976. *Id.* at 430. As to the wrongful death claim, the court noted that the plaintiff misapprehended the distinction between the two-year limitations period under section 2 of the Wrongful Death Act and "the fact that there is no liability under the Act unless the condition precedent specified by section 1 has been fulfilled." *Id.* at 432. "The plain language of section 1 provides that there will be no liability under the Wrongful Death Act unless the decedent *could have maintained an action for damages 'if death had not ensued* [citation],' and the supreme court has consistently

acknowledged and given effect to this unambiguous provision." (Emphasis added.) *Id.* (quoting Ill. Rev. Stat. 1979, ch. 70, ¶ 1 (now codified as 740 ILCS 180/1 (West 2010)). " 'One condition upon which the statutory liability depends is that the deceased had a right of recovery for the injuries at the time of his death, and there is no right in the administrator to maintain an action unless the deceased had the right to sue at the time of his death.' " *Id.* at 433 (quoting *Mooney v. City of Chicago*, 239 Ill. 414, 423 (1909)).

¶ 43 At the time death occurred in *Real*, the four-year repose period of section 21.1 of the Limitations Act (Ill. Rev. Stat. 1979, ch. 83, ¶ 21.1) barred the decedent from maintaining an action for the conduct which allegedly caused his death. *Real*, 112 Ill. App. 3d at 434. "It necessarily follows that section 1 of the Wrongful Death Act precludes plaintiff from bringing a wrongful death action for the same alleged malpractice." *Id.*

¶ 44 In this case, at the time of Prusak's death, section 13-212(a) would not have precluded her from maintaining an action for the conduct which allegedly caused her death because here, unlike the decedent in *Real*, Prusak had *already* filed a cause of action for medical negligence. If Prusak had not filed a medical malpractice action prior to her death, the four-year repose period would have already expired, preventing Lawler from seeking a wrongful death claim under the *Real* decision. Accordingly, based on the holding in *Real*, section 1 of the Wrongful Death Act should not preclude Lawler from bringing a wrongful death claim for the same alleged malpractice because Prusak could have maintained a cause of action for damages " 'if death had not ensued.' " *Id.* at 432 (quoting Ill. Rev. Stat. 1979, ch. 70, ¶ 1 (now codified as 740 ILCS 180/1 (West 2010)).

¶ 45 Similarly, defendant's reliance on cases such as *Wolfe, O'Brien*, and *Limer v. Lyman*, 220 Ill. App. 3d 1036 (1991), is not well placed because those cases did not involve the relation back doctrine.

¶ 46 In contrast to *Durham*, *Real*, *O'Brien*, and *Limer*, this case does not involve an original action newly filed after the expiration of the statute of repose, but a case that was active at the time of the decedent's death and filed within the four-year repose period. This case involves the filing of an amendment to an action that was timely filed and pending when the decedent died. This distinguishing characteristic triggers the relation back doctrine, which provides that a pleading may be amended before final judgment under certain circumstances. This section "is remedial in nature and should be applied liberally to favor hearing a plaintiff's claim." *Avakian*, 328 Ill. App. 3d at 154 (citing *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 106 (1996)). "Thus, plaintiffs are not to be barred from having the merits heard because of technical rules of pleading, and courts are to elevate issues of substance over form." *Id.* at 154. "Medical malpractice plaintiffs, in particular, are afforded every reasonable opportunity to establish a case, and to this end, amendments to pleadings are liberally allowed to enable the action to be heard on the merits rather than brought to an end because of procedural technicalities." *Id.*

¶ 47 The plaintiff in *Sompolski v. Miller*, 239 Ill. App. 3d 1087 (1992), appealed from the trial court's dismissal of her wrongful death claim stemming from a car accident that occurred on December 10, 1985. The decedent sued the defendant for personal injuries on April 9, 1986. *Id.* at 1088. The decedent died on November 14, 1988. Seven months later, the plaintiff moved to substitute herself for the decedent and to appear in a representative capacity for him in the personal injury suit filed against the defendant. On September 27, 1991, more than two years

after the decedent's death, the plaintiff filed an amended complaint that included an additional count for damages relating to the decedent's wrongful death. *Id.*

¶ 48 The *Sompolski* court reversed the trial court and ruled that the wrongful death claim related back to the original personal injury claim filed by the decedent. *Id.* at 1094. The court found the wrongful death claim was not barred by the two-year statute of limitations for personal injury claims. *Id.* According to the court, "the additional wrongful death claim filed by plaintiff arose from the same transaction or occurrence as that at issue in [the decedent's] original complaint, *i.e.*, the December 1985 automobile accident." *Id.* at 1091.

¶ 49 Citing *Zeh*, the *Sompolski* court stated that "[t]he right to amend does not depend on whether the cause of action set out in the amendment is substantially the same as that stated in the original pleading, but depends on whether the amendment relates back to the occurrence set out in the original pleading." *Id.* at 1090 (citing *Zeh*, 111 Ill. 2d at 272-73). "As long as the defendant has been apprised of the essential information necessary to prepare a defense, an amended complaint will be deemed to relate back to the original pleading [citation], and a defendant is not prejudiced by allowance of an amendment 'so long as his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him.' " *Id.* at 1090-91 (quoting *Simmons*, 32 Ill. 2d at 495). Furthermore, "the liberal provisions of section 2-616(b) apply regardless of whether the claims at issue are governed by a statute of limitations or a prescription that limits the right to bring suit." *Id.* at 1091 (citing *Simmons*, 32 Ill. 2d at 494). The court concluded that the plaintiff's wrongful death suit was not an attempt to " 'slip in an entirely distinct claim,' but was instead an effort to recover full damages for the injuries [the decedent] sustained as a result of the defendant's alleged negligence in the December 1985 automobile accident." *Id.* at 1091-92.

¶ 50 Defendants argue *Sompolski* is inapplicable to this case because it did not involve a medical malpractice claim or the application of the four-year statute of repose. Defendants assert the legislature treated medical malpractice cases differently from the other kinds of cases because it recognized that medical malpractice cases are uniquely susceptible to long-tail liability and pose special hazards to the public.

¶ 51 Although *Sompolski* did not involve a medical malpractice action, the court's focus was on whether the wrongful death claim was based on the same occurrence as that alleged in the original complaint filed by the decedent. The *Sompolski* court specifically found the amended claims and original claims sounded in negligence and made the same allegations respecting the defendant's alleged liability for the decedent's injuries. *Id.* at 1092.

¶ 52 This is directly analogous to the case before us. Prusak timely filed her original complaint within both the two-year statute of limitations and four-year statute of repose in medical malpractice actions. She alleged in her complaint that defendants failed, among other things, to diagnose her macular pathology. Prusak answered defendants' interrogatories to apprise them of her medical condition, a reoccurrence of both lymphoma and ocular lymphoma. After Prusak died, Lawler filed her amended complaint after the statutorily mandated time allotted to file a wrongful death action, just as in *Sompolski*. Like *Sompolski*, the wrongful death claims in this case arose from the same transaction or occurrence described in Prusak's original complaint and defendants were advised of the essential facts necessary to prepare their defense. Defendants have not shown how they will be prejudiced by the allowance of Lawler's amended complaint, especially considering their attention was directed, within the statutory time prescribed, to the facts that form the basis of the claims asserted against them. *Id.* at 1091; *Simmons*, 32 Ill. 2d at 495. Lawler's amended complaint is not based on a new set of facts. This

conclusion is bolstered by the liberal provisions of section 2-616(b), which apply "regardless of whether the claims at issue are governed by a statute of limitations or a prescription that limits the right to bring suit." *Sompolski*, 239 Ill. App. 3d at 1091 (citing *Simmons*, 32 Ill. 2d at 494).

¶ 53 The above-described principles regarding the relation back doctrine also apply in medical malpractice cases. See, *e.g.*, *Cammon v. West Suburban Hospital Medical Center*, 301 Ill. App. 3d 939, 947 (1998) (newly-added allegations against the defendant hospital concerning the failure to achieve adequate hemostasis related back because the original complaint had charged a doctor with failing to achieve adequate hemostasis following the procedure).

¶ 54 The relation back doctrine has been frequently applied to permit an amended complaint against the defendant medical providers when they had received adequate notice of the same operative facts leading to the alleged medical negligence stated in an earlier, timely filed complaint. See *Castro v. Bellucci*, 338 Ill. App. 3d 386, 394-95 (2003) (finding amended complaint related back because the defendant hospital was informed in the second-amended complaint, filed before the expiration of the medical malpractice statutes of limitation and repose, of the plaintiff's claim that symptoms of a predictive stroke were misdiagnosed); *Avakian*, 328 Ill. App. 3d at 157-58 (holding that the defendants received adequate notice from the timely filed earlier complaints that the plaintiff was alleging damages as a result of adverse effects from a prescription); *McArthur v. St. Mary's Hospital of Decatur*, 307 Ill. App. 3d 329, 335 (1999) (finding that the amended complaint related back to the timely filed original complaint because it directed attention to facts concerning the reading of sonograms and X-rays).

¶ 55 We briefly address defendants' additional arguments that certain principles of statutory construction call for the statute of repose to control over the relation back doctrine and Wrongful Death Act. Defendants argue that the statute of repose controls because it is more specific than

the wrongful death and relation back statutes. Defendants also assert the statute of repose controls because it is substantive, unlike the procedural amendments statute containing the relation back provision.

¶ 56 We need not employ these principles of statutory construction because the statutory language is clear and unambiguous. Accordingly, the statutes must be applied as written, without resort to extrinsic aids of statutory construction. *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009). We are enforcing the pertinent language of the Wrongful Death Act, the medical malpractice statute of repose, and the relation back doctrine as written without imposing limitations not expressed by the legislature upon them. Section 2-616(b) of the Code specifically states, "The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time *under any statute* or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed ***." (Emphasis added.) 735 ILCS 5/2-616(b) (West 2010). Applying this specific language to the medical malpractice statute of repose allows Lawler to maintain the amended complaint alleging wrongful death. This interpretation does not create absurd, inconvenient, or unjust results, because the proposed amended complaint, as compared with the earlier, timely filed complaint, "show[s] that the events alleged were close in time and subject matter and led to the same injury." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 360 (2008).

¶ 57 CONCLUSION

¶ 58 For these reasons, we reverse the judgment of the trial court and remand for further proceedings.

¶ 59 Reversed and remanded.

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

September 28, 2016

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No. 120745 - Sheri Lawler, Ex'r, etc., respondent, v. The University of Chicago Medical Center, etc., et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

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