No. 119572

IN THE
SUPREME COURT OF ILLINOIS

RANDALL W. MOON, Executor of the Estate of
KATHRYN MOON, Deceased,

Plaintiff-Appellant,

v.

DR. CLARISSA F. RHODE and CENTRAL ILLINOIS
RADIOLOGICAL ASSOCIATES, LTD.,

Defendants-Appellee.

On Appeal from the Appellate Court of Illinois,
Third Judicial District, No. 3-13-0613
There Appealed from the Tenth Judicial Circuit, Peoria County, Illinois, No. 13-L-69
The Honorable Richard D. McCoy, Judge Presiding

BRIEF AND ARGUMENT OF APPELLANT

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

These are medical negligence actions for wrongful death and under the Survival Act brought by Randall W. Moon, Executor of the Estate of Kathryn Moon, Deceased, against Dr. Clarissa F. Rhode, a radiologist at Central Illinois Radiological Associates, Ltd. Generally stated, the alleged negligence is a failure to diagnose a breakdown at a surgical site and/or a perforation of decedent's colon and to identify or report other significant findings on a CT scan.

Defendants filed a Motion to Dismiss pursuant to 735 ILCS 5/2-619(a)(5) asserting that both the wrongful death and survival actions were time-barred by virtue of 735 ILCS 5/13-212(a) and 740 ILCS 180/2 (C-26) The circuit court granted the defendants' motion to dismiss with prejudice for reasons stated by the court on the record. (C-161, R-17, A-4)

The question raised by the pleadings is whether the circuit court erred in granting that motion to dismiss.

ISSUES PRESENTED FOR REVIEW

Whether the appellate court erred in holding that 735 ILCS 5/13-212(a) does not permit application of the discovery rule in any case brought under the Wrongful Death Act or pursuant to the Survival Act.

Whether the circuit court, and the majority in the appellate court, in one paragraph, erred in deciding that even if the discovery rule were to be applied,

as a matter of law the plaintiff had reason to know that the death could have been wrongfully caused at some unspecified time more than two years before the filing of the complaint, thereby wrongly depriving plaintiff of a trial on that question of fact.

Whether the appellate court abused its discretion in deciding an issue never raised by the defendants in the circuit court, and whether defendants have forfeited that issue.

JURISDICTION

The Appellate Court, Third District, issued its Opinion on April 10, 2015, which affirmed the dismissal of plaintiff's complaint by the Circuit Court of Peoria County. On April 22, 2015, the Appellate Court issued a corrected opinion. Plaintiff, with new additional counsel, timely filed his Petition for Rehearing on May 1, 2015.

The Appellate Court denied that Petition for Rehearing and entered a modified opinion upon denial of rehearing on June 15, 2015.

Jurisdiction for the appeal to this Court is pursuant to SCR 315, upon the grant by this Court of plaintiff's Petition for Leave to Appeal.

STATUTE INVOLVED

735 ILCS 5/13-212(a) provides as follows:

§ 13-212. Physician or hospital.

(a) Except as provided in § 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.

The entirety of 735 ILCS 5/13-212 is in the Appendix to this brief.

STATEMENT OF FACTS

Kathryn Moon was admitted through the emergency room to Proctor Hospital in Peoria on May 18, 2009, under the care of Dr. Jeffrey Williamson for a prolapsed rectum. (C-1) Williamson performed a peritoneal proctectomy on Kathryn on May 20, 2009. He and his associate, Dr. Salimath, attended Kathryn through May 28, 2009. (C-2) During the postoperative period Kathryn developed pain, labored breathing, fluid overload, pulmonary infiltrates, ileus, and pneumoperitoneum. She died in the hospital on May 29, 2009. (C-2) The defendant, Dr. Rhode, interpreted two CT scans performed on the decedent on May 23 and May 24, 2009. (C-2)

Randall Moon, one of Kathryn's four children, was appointed as Executor of the Estate of Kathryn Moon in 2009. (C-44) Randall Moon is a licensed attorney in Illinois but for more than 15 years has resided in Pennsylvania. He retired from the Social Security Administration at the end of 2009, having worked as an administrative law judge. (C-61-63)

In his capacity as executor of the estate he requested Kathryn's medical records from Proctor Hospital on February 26, 2010. He received the records on or about March 10, 2010. (C-42) Randall Moon contacted a medical consultant firm during the week of April 11, 2011, and then sent a copy of the hospital records for review. (C-142) He received a verbal report from the consultant firm by April 21, 2011, that there was negligent conduct in the case and they would obtain a written report from a qualified doctor. (C-142) He received the physician's report and certificate of medical malpractice, which was attached to the complaint in a separate lawsuit filed against the surgeons, Dr. Williamson and Dr. Salimath, Peoria County Docket Number 11-L-147, on May 2, 2011. (C-131, 136, 142)

Plaintiff's discovery deposition was taken in that lawsuit against the two surgeons, 11 L 147, on March 8, 2012. The following question and answer took place:

> Q. "As you know, if this case ever goes to trial, one of the things that you are going to have the opportunity to do is get up on the stand in front of the jury and explain to a jury how your mother's death has affected you. Can you just briefly describe that to me?"
>
> A. "Well, yeah. Even though she was fairly old, my impression was that she was doing okay and that, you know, she should have gotten better treatment than she did." (C-98, ¶43)

There was no follow up question.

Plaintiff's complaint against Dr. Rhode and Central Illinois Radiological Associates, Ltd. is in two counts: Count I is brought under the Wrongful Death

Act and Count II is brought pursuant to the Survival Act. The complaint was filed on March 18, 2013, in the Circuit Court of Peoria County. (C-1) Paragraph 14 of each count alleges that plaintiff did not discover that Dr. Rhodes had failed to diagnose the breakdown of the anastomosis until February 28, 2013, when Dr. Dachman reviewed a CT scan taken during the decedent's lifetime. Kathryn Moon died on May 29, 2009. (C-2)

Defendants filed a motion to dismiss pursuant to 735 ILCS 5/2-619(a)(5). (C-26) Plaintiff responded to that motion (C-138), and defendants filed a reply (C-148).

Defendants asserted that plaintiff's executor, her son, is an attorney, that he testified in a deposition that his impression of the decedent was that prior to her death "she was doing okay and ... she should have gotten better treatment than she did" (C-98), and that the plaintiff's executor executed an authorization to obtain decedent's medical records.

Defendants made two arguments:

> a. "Randall Moon had sufficient knowledge that Kathryn Moon's death may have been wrongfully caused from the time of her death ... (His)testimony alone shows that the 'discovery rule' is not applicable, or is very limited in its effect as the requisite knowledge was present at, or before, the death of Kathryn Moon;" and,
>
> b. If the discovery rule were to be applied to extend the statute of limitations, "the latest one could say that the two-year limitations period began to run ... was in the spring of 2010 when Attorney

> Randall Moon began to compile a complete copy of Kathryn Moon's medical records ... ."
>
> (C-26, pp. 11, 12; C-37)

The trial court granted that motion to dismiss. (C-161, R-17) In ruling on the motion to dismiss, the circuit judge stated that he thought that the "date of death is the date from which the two-year statute should be measured as argued by (defendants)." The court also agreed with defendants' argument that if the court were to try to fix a date on which a person was placed on inquiry as to whether there was malpractice, that that unspecified time would have had expired. (R-17, A -4)

On plaintiff's appeal to the appellate court, defendants responded with those same arguments, and no others. Defendants set out in detail an accurate description of the discovery rule, and frankly stated that the limitations period of the Wrongful Death Act "is inapplicable in cases where the wrongful death claim is predicated upon a claim of medical malpractice that was not apparent to the plaintiff at the time of death." (App. Br., p. 5) Defendants' argument was that because of their contention that the plaintiff executor suspected that something had gone wrong with the medical care, that the discovery rule, for that reason, had no application. (App. Br., p. 15) Defendants made the same alternative argument, that even if the discovery rule were employed to extend the statute of limitations, the statute should have been deemed to have begun

running when plaintiff "took the first step in litigating a medical malpractice claim – obtaining his mother's medical file." (App. Br., p.15)

The majority of the appellate court decided the case on another ground entirely. The majority, Justice Schmidt as author, held that plaintiff was required to file his complaint within two years of the date on which the plaintiff knew of the death. The majority held that the discovery rule has no application to claims under the Wrongful Death Act or the Survival Act because both actions are maintainable only by action of the legislature, rather than by operation of the common law.

That argument was never made by defendants, either in the circuit court or before the appellate court.

As an alternative ground for its ruling, the appellate court stated that the circuit court's dismissal would be affirmed even if the discovery rule were to be applied. The majority's disposition of that issue was treated in a single paragraph. (¶27)

Justice Lytton dissented at length, stating that "Since 1987, Illinois courts have repeatedly and consistently applied the discovery rule to wrongful death claims." (Dissent, ¶40) Further, he stated that "Eighteen years ago, our Supreme Court ruled that the discovery rule applies to Survival Act claims." (Dissent, ¶45)

With respect to the majority's short additional ground of decision that even if the discovery rule were to be applied, it would have run from some unstated date, Justice Lytton noted that the relevant inquiry is not when plaintiff became aware that Dr. Rhode may have committed medical negligence but rather when plaintiff became aware that any defendant may have committed such negligence. Unlike the majority, which did not specify a date on which they thought the statute would have begun to run, Justice Lytton identified that date to be May 1, 2011, when attorney Moon received an expert's report finding that two other doctors were negligent. (Dissent, ¶60)

On April 22, 2015, the appellate court issued a corrected opinion, responding to a small request made by a defendant. Plaintiff, with new additional counsel, timely filed his Petition for Rehearing on May 1, 2015.

The appellate court denied that Petition for Rehearing and also entered a modified opinion on June 15, 2015. In that modified opinion upon denial of rehearing, Justice Schmidt, for the majority, stated:

> *We are well aware that this decision creates a split in the districts and, therefore, we anticipate at some point hearing from the supreme court on the issue.* (¶30)

Plaintiff brings this appeal upon the grant of his Petition for Leave to Appeal.

ARGUMENT

After this Court interpreted statutes of limitation to include the discovery rule, which tolls the initiation of the running of a limitations period until a plaintiff should reasonably be aware of both an injury and the reasonable possibility of wrongful conduct, the legislature crafted a separate statute of limitation applicable to all cases "for injury or death" involving medical negligence which expressly included the discovery rule. 735 ILCS 5/13-212(a).

The majority erred in interpreting that separate statute of limitation in a manner completely colored by outmoded and discredited reasoning which had previously been applied to the Wrongful Death Act itself. In contrast, every appellate panel which has considered the question has applied the discovery rule in both Wrongful Death Act and Survival Act cases, with the sole exception of *Greenock v. Rush-Presbyterian St. Luke's Medical Center*, 65 Ill.App.3d 266 (1st Dist. 1978). *Greenock,* as best as can be determined by plaintiff's counsel, has never been followed in the thirty-seven years since it was decided, until the opinion below. (The majority below cited *Greenock*, but never discussed it. ¶19)

The majority further erred in depriving the plaintiff of the right to a trial on the factual issue of when the discovery rule should have started to run. This Court has stated on many occasions that the time at which an injured party

knows or reasonably should have known of his injury and that it was wrongfully caused, will be a disputed question of fact "in many, if not most," cases. *Witherell v. Weimer*, 85 Ill.2d 136, 156 (1981).

Plaintiff acknowledges that an appellate court has the discretion to affirm a circuit court on a ground not argued by the appellee. However, it is respectfully suggested that the majority erred in doing so here where the issue had never been argued by defendants in either the circuit or appellate courts and should not reasonably have been anticipated by plaintiff to be an issue on appeal in view of the vast weight of authority to the contrary. This deprived plaintiff of a fundamentally fair appeal and offended the requirement of a reasonable presentation of issues on appeal.

I. THE APPELLATE COURT ERRED IN HOLDING THAT 735 ILCS 5/13-212(a) DOES NOT PERMIT APPLICATION OF THE DISCOVERY RULE IN ANY CASE BROUGHT UNDER THE WRONGFUL DEATH ACT OR PURSUANT TO THE SURVIVAL ACT.

A. The Standard of Review.

A §2-619 motion to dismiss, as here, admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts. In ruling on a motion to dismiss, a court must interpret the pleadings and supporting documents in the light most favorable to the non-moving party. The review of an order granting a § 2-619 motion to dismiss is *de novo.*

Henderson Square Condominium Association v. LAB Townhomes, LLC, 2015 IL 118139 ¶34.

B. The Nature and History of The Discovery Rule With A Focus on Its Particular Application in Medical Malpractice Cases.

1. Operation and Nature of the Discovery Rule

This Court has very recently summarized the nature and operation of the discovery rule:

> *(The purpose of the discovery rule is) to ameliorate the potentially harsh effect of a mechanical application of the statute of limitations that would result in it expiring before a plaintiff even knows of his cause of action. The discovery rule postpones the start of the limitations until a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused. At the point that the party knows or reasonably should know that the injury was wrongfully caused, the party is under obligation to inquire further to determine whether an actionable wrong has been committed. The question of when a party knew or reasonably should have known both of an injury and its wrongful cause is one of fact, unless the facts are undisputed and only one conclusion may be drawn from them.*

Henderson Square Condominium Association v. LAB Townhomes, LLC, 2015 IL 118139 ¶52.

That paragraph encapsulates the primary purpose, operation, and procedures concerning the discovery rule.

The discovery rule was first announced in Illinois in *Rozny v. Marnul*, 43 Ill.2d 54 (1969). *Witherell v. Weimer*, 85 Ill.2d 146, 154 (1981).

The essence of the rule is that for the statute of limitations to begin running, the plaintiff must have, or reasonably should have, knowledge of not only an injury but also of potential wrongful conduct. In *Nolan v. Johns-Manville Asbestos*, 85 Ill.2d 161 (1981) this Court described the nature of the wrongful conduct which is necessary to satisfy the second part of the rule. Choosing along a wide spectrum of possibilities, this Court held:

> *We are of the opinion that the preferred rule is that the cause of action accrues when the plaintiff knows or reasonably should know of an injury or also knows or reasonably should know that the injury was caused by the wrongful acts of another.*
>
> *Nolan,* 85 Ill.2d 161, 169 (1981).

From its inception in Illinois, the discovery rule has been a matter of statutory interpretation, as opposed to being purely a matter of common law. In *Rozny*, the first Illinois discovery rule case, the court was asked to determine "when an action 'accrues' as that word is used in various statutes of limitation in this State." *Rozny v. Marnul*, 43 Ill.2d 54, 70 (1969). The court grounded its holding on the meaning of "accrued" and on legislative policy:

> *We accordingly hold, in keeping with the more recent authorities and the legislative policy manifested by our General Assembly, that the statute of limitations does not bar plaintiffs' recovery, because their cause of action "accrued"*

when they knew or should have known of the defendant's error ... ."

Rozny, at 72.

2. The History and Development of the Discovery Rule in Medical Malpractice Cases.

Rozny v. Marnul, 43 Ill.2d 54 (1969) was an action against a surveyor for his alleged professional mistakes. The following year, in *Lipsey v. Michael Reese Hospital*, 46 Ill.2d 32 (1970) this Court extended the operation of the discovery rule to medical malpractice cases, stating, in part, that "it is impossible to justify the applicability of the discovery rule to one kind of malpractice and not to another." *Lipsey*, at 41.

The discovery rule has been expressly embodied in the Limitations Act for medical malpractice cases. That first took place in limited fashion when, in 1965, Ch. 83 Ill.Rev.Stat. §21.1 was adopted, which established the discovery rule to the narrow class of medical malpractice cases involving foreign bodies wrongfully introduced into a patient. After this Court's decision in *Lipsey*, §21.1 was amended in 1975 to extend the discovery rule to all cases of medical malpractice for "injury or death." "Thus, the legislature codified the rule in *Lipsey* but restricted its operation by imposing a five year period of repose." *Mega v. Holy Cross Hospital*, 111 Ill.2d 416, 426, 427 (1986). §21.1 has been recodified as 735 ILCS 5/13-212(a), its current incarnation, with the

two provisions being identical in all relevant respects. *Mega*, 111 Ill.2d 416, 420.

Thus, in the area of medical malpractice, the development of the discovery rule has been marked by an ongoing interchange between the courts and the legislature.

As is more fully developed in Argument I. D. of this brief, §13-212, contained in the Limitations section of the Code of Civil Procedure, controls, and not the period of limitation contained in the Wrongful Death Act. *Durham v. Michael Reese Hospital Foundation*, 254 Ill.App.3d 492, 495 (1st Dist. 1993). "The limitations period set forth in Section 2 (of the Wrongful Death Act) is inapplicable in cases where the wrongful death claim is predicated upon a claim of medical malpractice that was not apparent to the plaintiff at the time of death." *Young v. McKiegue*, 303 Ill.App.3d 380, 386 (1st Dist. 1999).

C. Contrary To The Holding of the Majority Below, the Applicability of the Discovery Rule in Wrongful Death Act and Survival Act Cases Has Met With Widespread Approval in the Appellate Court and Also in This Court, to the Extent That the Issue Has Been Either Decided, in the Case of the Survival Act, or Discussed in dicta, in the Case of the Wrongful Death Act.

1. Every Appellate Panel That Has Considered the Question Has Applied the Discovery Rule in Wrongful Death Act and Survival Act Cases, With the Sole Exception of a 1978 Case Which Has Never Been Followed.

Arndt v. Resurrection Hospital, 163 Ill.App.3d 209 (1st Dist. 1987) with Justice Bilandic writing for the court, provides an historical summary of the beginnings of the issue now before this Court:

> *Almost simultaneously, two opinions were released on this subject in two separate districts of this court. On September 25, 1978, the Second District released its opinion in Fure v. Sherman Hospital (2nd Dist. 1978), 64 Ill.App.3d 259, which supports the position taken by plaintiff. Two days later, on September 27, 1978, the First District released its opinion in Greenock v. Rush Presbyterian St. Luke's Medical Center, (1st Dist. 1978), 65 Ill.App.3d 266 ... which benefits the defendant.*
>
> *Arndt*, at 212.

In *Fure v. Sherman Hospital*, a medical malpractice action for wrongful death, the appellate court, rejecting the considerations espoused by the majority in the opinion here on appeal, construed §21.1 of the Limitations Act to apply the discovery rule. In rejecting the types of comments made by the majority below about the unique and strict nature of the Wrongful Death Act, the court said "It becomes rather difficult to maintain the severe legal distinction which allows the court to give more protection to the wounding of a man than to the ultimate disaster of his death." *Fure*, 64 Ill.App.3d 259, 270 (2nd Dist. 1978).

The defendants in *Fure* argued that a wrongful death action must be treated more strictly, and so as to exclude the discovery rule. This was argued on the basis of the statutory nature of the Wrongful Death Act, extending back

to the English origins of the supposed lack of a common law basis for wrongful death actions. The *Fure* court, after substantial analysis, rejected that claim. "When we consider the origin of Lord Campbell's Act as Prosser says ... it becomes rather difficult to maintain the severe legal distinction which allows the law to give more protection to the wounding of a man than to the ultimate disaster of his death." *Fure*, at 270.

Greenock v. Rush Presbyterian St. Luke's Medical Center, 65 Ill.App.3d 266 (1st Dist. 1978) went the other way. As did the majority below, *Greenock* held that the statute began running unalterably upon the knowledge of the death, without permitting any consideration of the discovery rule. Counsel for plaintiff has been unable to find any Illinois case which has followed *Greenock* or cited it with approval in the thirty-seven years since it was decided. Although the majority below cited *Greenock*, it was not discussed in the slightest. (Dissent, ¶19)

To the contrary of *Greenock* being stranded alone, the outcome of *Fure v. Sherman Hospital* has met with universal acceptance. Approximately four years after *Fure* and *Greenock* were decided, "the conflicting opinions of *Fure* and *Greenock* became the central issue in *Coleman v. Hinsdale Emergency Medical Corp.*, (2nd Dist. 1982), 108 Ill.App.3d 525, 530." *Arndt v. Resurrection Hospital*, 163 Ill.App.3d 209, 212 (1st Dist. 1987). *Coleman*, after examining

both opinions, and after consideration of a number of this Court's opinions, chose the *Fure* path:

> *Because of the broad interpretation of the statutory language of §21.1 with regard to the discovery of injury and wrongful causation, we continue to follow the Fure interpretation of §21.1 which requires discovery of not only the death but also of its wrongful causation.*
>
> *Coleman*, 108 Ill.App.3d 525, 531 (2nd Dist. 1982).

With the sole exception of *Greenock*, the appellate court has applied the discovery rule to medical malpractice wrongful death cases without exception, until the divided opinion below. The following listing of the cases is illustrative, but not exhaustive. *Praznik v. Sport Aero, Inc.*, 42 Ill.App.3d 330 (1st Dist. 1976); *Fure v. Sherman Hospital*, 64 Ill.App.3d 259, 270 (2nd Dist. 1978); *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill.App.3d 525, 533 (2nd Dist. 1982); *Arndt v. Resurrection Hospital*, 163 Ill.App.3d 209, 213 (1st Dist. 1987); *Hale v. Murphy*, 157 Ill.App.3d 531, 535 (5th Dist. 1987); *Cramsey v. Knoblock*, 191 Ill.App.3d 756, 764 (1989) (when medical negligence is not known at the time of death, "the discovery rule will apply so that the limitation period begins to run when plaintiff discovered the fact of defendant's negligence, not the fact of death."); *Neade v. Engel*, 277 Ill.App.3d 1004, 1008 (2nd Dist. 1996); and *Wells v. Travis*, 284 Ill.App.3d 282, (2nd Dist. 1996) (the defendant in *Wells*, in company with defendant in the case here for decision,

appropriately did not even question whether the discovery rule was to be applied, if factually appropriate).

2. This Court Has Applied the Discovery Rule in Survival Act Cases, Contrary to the Holding of the Majority Below.

The majority, in one paragraph, held that the discovery rule cannot be applied to actions under the Survival Act, just as the majority believed that the rule could not be applied to actions under the Wrongful Death Act. (Opinion, ¶26) The pivot point of the majority's brief reasoning appears to be its statement that "[A]t common law, your cause of action died with you." (¶26) The majority recognized that this Court has held "that the Survival Act did not create a new cause of action," referencing *National Bank of Bloomington v. Norfolk & Western Railway Company*, 73 Ill.2d 160, 172 (1978). The majority appears to have made only grudging recognition of that holding. ("We suppose that is true to the extent that ... ")

This Court has indeed spoken plainly both to the nature of a Survival Act claim and to the fact that the discovery rule is to be applied to such claims. A Survival Act claim is not "created" by the legislature, but is merely enabled to be maintained:

> *The Survival Act does not create a statutory cause of action. It merely allows a representative of the decedent to maintain those statutory or common law actions which it already accrued to the decedent before he died.*

Advincula v. United Blood Services, 176 Ill.2d 1, 42 (1996).

In *Advincula*, the court applied the discovery rule. at 42. This Court also applied the discovery rule in a Survival Act case in *Nolan v. Johns-Manville Asbestos*, 85 Ill.2d 161 (1981). There, the complaint was filed by a worker with an asbestos-related disease. His personal injury cause of action was dismissed on the basis of a two year statute, and he appealed. He died while the appeal was pending and his wife was substituted as administratrix to prosecute the appeal, which could only have been maintained under the Survival Act. This Court went on to decide that the discovery rule should have been applied. In *Wyness v. Armstrong World Industries, Inc.*, 131 Ill.2d 403 (1989), this Court described *Nolan* as a case where the plaintiff's administratrix "continued the case pursuant to the provisions of the survival statute," and related that the discovery rule had been applied there. at 412.

3. **This Court Has Discussed With Apparent Strong Approval the Application of the Discovery Rule in Wrongful Death Act Cases. Courts Have Offered Their Prediction That This Court Would Apply the Discovery Rule in Such Cases.**

In *Wyness v. Armstrong World Industries, Inc.,* 131 Ill.2d 403 (1989), this Court commented favorably on some of the appellate opinions cited in this brief, noting that they had applied the discovery rule in wrongful death actions. What was for decision before this Court in *Wyness* was entirely different than

what is now for decision here. *Wyness* involved an attempt by that defendant to have the discovery rule be used in such a manner that the wrongful death action would be regarded as accruing prior to death. The court rejected that effort, but discussed the relationship between the discovery rule and a wrongful death action in the course of the analysis. In *dicta*, but strongly rejecting the sometimes narrow reading given to the Wrongful Death Act as the majority did below, this Court stated:

> *In all probability, it has been with (the universality of death) in mind that courts have applied the discovery rule to cases where a death had occurred sometime prior to the discovery of its wrongfully caused nature. Although never addressed by this court, and indeed not now before us, the delay of the running of the limitation period accepted by the appellate courts in some districts assures that a wrongful death action may be filed after death when plaintiffs finally know or reasonably should know of the wrongfully caused injury which led to death. Many wrongful death cases have emphasized this 'discovery' time. See (Arndt, Coleman, Fure,* and *Praznik)*
>
> *Wyness*, 131 Ill.2d 403, 413 (1989).

The majority below makes frequent citation to *Wyness*, but it is respectfully suggested that the majority's use of *Wyness* is inappropriate and unconvincing. This Court, in rejecting the argument of the defendant there that the discovery rule be used to have the period of limitation accrue prior to the death, said in part that "this contention misapplies the law to the instant action in a manner approaching the absurd." *Wyness*, at 412. The majority's

references to *Wyness* frequently allude to this Court's rejection of that argument, but without noting the distinction or what was really at issue in *Wyness*.

The dissent makes far more appropriate use of the *dicta* in *Wyness* in support of the dissent's contention that this Court has intimated its approval of the application of the discovery rule. (Dissent, ¶42) It appears that this Court's discussion of the discovery rule rises to the level of judicial *dicta*.

This Court denied petitions for leave to appeal in at least two of the relevant cases. *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill.App.3d 525 (2nd Dist. 1982), app.den. 92 Ill.2d 567; *Neade v. Engel*, 277 Ill.App.3d 1004 (2nd Dist. 1996), app. den. 168 Ill.2d 599; *Arndt v. Resurrection Hospital*, 163 Ill.App.3d 209, 213 (1st Dist. 1987) regarded a denial of the petition for leave to appeal in *Coleman* as constituting tacit approval of *Coleman*. See *Corbett v. Devon Bank*, 12 Ill.App.3d 559, 567 (1st Dist. 1973).

At least two federal trial judges, in making their *Erie* prediction as to what this Court would do on the issue, have strongly predicted that this Court would apply the discovery rule. *In the Matter of Johns-Mansville Asbestosis Cases*, 511 F.Supp. 1235 (N.D. Ill. 1981), Judge Shadur decided:

> *This court concludes it to be highly likely that both the Illinois Supreme Court and the Illinois Appellate Court for the First District would apply the discovery rule to plaintiffs' claims under the Wrongful Death Act.*

At 1239.

In *Eisenmann v. Cantor Bros., Inc.,* 567 F.Supp. 1347, 1352 (N.D. Ill. 1983), Judge Kocoras decided that the discovery rule was applicable to actions under both the Wrongful Death Act and the Survival Act.

D. The Use of the Discovery Rule in Wrongful Death Act Cases is a Matter of Statutory Interpretation of the Medical Malpractice Statute of Limitations, 735 ILCS 5/13-212(a).

As noted at the outset of this brief, the history of the discovery rule in Illinois shows that the rule has its roots in statutory interpretation. In the first such case, this Court interpreted " 'accrues' as that word is used in various statutes of limitation in this state." *Rozny v. Marnul,* 43 Ill.2d 54, 70 (1969). This Court's own view that it engaged in statutory interpretation is to be contrasted with the statement of the majority below that the use of the discovery rule was merely "applying common law rules." (¶23)

The only statute at issue here is § 13-212(a), found in the Limitations Act. It applies to any "action for damages for injury or death against any physician, etc. ... arising out of patient care ... ." The prescribed period of limitation is that no such action "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 (sic) occurs first ... ."

It is clear beyond argument that what controls plaintiff's claim here is §13-212(a) and not the general limitation set out in the Wrongful Death Act, 740 ILCS 180/2:

> *[W]e believe the relevant case law inextricably leads to the conclusion that all actions for injury or death predicated upon the alleged negligence of a physician are governed by §13-212(a).*
>
> *Durham v. Michael Reese Hospital Foundation*, 254 Ill.App.3d 492, 495 (1st Dist., 1993).

Consideration of the general limitations set out in the Wrongful Death Act is foreclosed:

> *[T]he limitations period set forth in §2 (of the Wrongful Death Act) is inapplicable in cases where the wrongful death claim is predicated upon a claim of medical malpractice that was not apparent to the plaintiff at the time of death.*
>
> *Young v. McKiegue*, 303 Ill.App.3d 380, 386 (1st Dist. 1999).

The majority below did state "that § 212(a) applies," but also made frequent reference to the limitations period found in the Wrongful Death Act without offering any clear support for the appropriateness of such a reference. (¶¶13, 16, 22, 24, 25)

To the extent that the Court might find a conflict between the Wrongful Death Act and §13-212(a), then § 13-212(a), as the more specific statute, relating only to medical malpractice, is to control. "[W]hen a general statutory provision and a more specific one relate to the same subject, we will presume

that the legislature intended the more specific statute to govern." *Harris v. Thompson*, 2012 IL 11252 ¶57.

The issue in this case is, as a matter of statutory interpretation, to determine the meaning of the discovery rule language incorporated within §13-212(a) which provides for a period of limitation of two years after the date "on which the claimant knew, or through the use of reasonable diligence, should have known, ... of the existence of the injury or death for which damages are sought ... ." This Court decided the meaning of "injury" in that clause in *Witherell v. Weimer*, 85 Ill.2d 146 (1981), noting that cases had differed in their interpretations. *Witherell* held:

> *Where substantial intervals exist between the time at which a plaintiff should have known of the physical injury and the time at which he should have known that it was negligently caused, the definition of 'injury' as including or excluding its wrongful causation becomes significant. ... It is suggested that our opinions have left unresolved the question of whether the statute is triggered by plaintiff's discovery of the injury or not until discovery of the negligence where, as alleged here, knowledge of the injury substantially preceded knowledge of its cause.*
>
> *The statute starts to run when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused.* (emphasis added)
>
> *Witherell*, at 155, 156.

What remains for decision here is to determine whether "death" in the phrase "injury or death" should be interpreted in a manner radically different than was "injury" in *Witherell*. The interpretation should be the same, such that the statute begins to run only when there is not only knowledge of the death but that the claimant "also knows or reasonably should know that it was wrongfully caused." There is no cogent reason to interpret "death" in different fashion than "injury," as the majority did below. The majority below categorically rejected any precedential or logical relevance of *Witherell* because *Witherell* involved a common law action for injury, in the words of the appellate court. (¶16) The majority was of the opinion that a Wrongful Death Act case must be treated differently. However, returning to the root of the interpretive issue here before this Court, it is the Limitations Act which is to be interpreted, and not the limitation period contained in the Wrongful Death Act.

Young v. McKiegue, 303 Ill.App.3d 380, 387 (1st Dist. 1999) expressly relied upon *Witherell* as authority for the application of the discovery rule to a Wrongful Death Act case. Pointing at *Witherell*, the court concluded:

> *Thus, knowledge of the death does not commence the statute of malpractice limitations. Rather, the malpractice limitations period begins to run when the plaintiff knows or should have known not only of the death, but also that the death was wrongfully caused.*
>
> *Young*, at 387.

Wells v. Travis, 284 Ill.App.3d 282, 286 (2nd Dist. 1996) also expressly relied upon *Witherell* in arriving at the same understanding of § 13-212(a) in a Wrongful Death Act case.

In summary, there is no reason why the period of limitation in the Wrongful Death Act should either control or drive this decision, nor is there any reason why "death" should be interpreted differently than "injury" in the controlling statute, §13-212(a).

E. That the Legislature Has Acquiesced in the Holdings of the Numerous Courts Described in This Brief Indicates Legislative Approval of Those Opinions.

The principle of legislative acquiescence to judicial action applies in this situation. After *Fure v. Sherman Hospital,* 64 Ill.App.3d 259 (2nd Dist. 1978), except for *Greenock v. Rush-Presbyterian St. Luke's Medical Center,* 65 Ill.App.3d 266 (1st Dist. 1978), every case to take up the question presented in this case has ruled consistently with *Fure* and as plaintiff advocates here. As clearly established, these cases involve statutory interpretation. Where the legislature has acquiesced in the court's construction of a statute, that construction becomes part of the fabric of the statute. *Charles v. Seigfried,* 165 Ill.2d 482, 492 (1995). Despite that long history of judicial decisions applying the discovery rule in Wrongful Death Act cases and in interpreting "injury" to include knowledge of wrongful causation, the legislature has not chosen to alter the outcome of those cases.

"The discovery rule may be applied by the court in the absence of the expression of a contrary intent by the legislature." *Mega v. Holy Cross Hospital*, 111 Ill.2d 416, 428 (1986).

Taking note of this legislative acquiescence has additional relevance with respect to the analysis of the majority below. The two broad points made by the opinion are a) wrongful death actions are creatures of the legislature and must be strictly interpreted, and b) the contrary opinions which the majority disagrees with were in error in "applying common law rules to statutory causes of action." (¶23) Neither reason bears scrutiny. The first will be disposed of the in next section (and has been rejected in numerous appellate opinions), and the second is readily disposed of by an additional quote from this Court's opinion in *Mega v. Holy Cross Hospital*:

> *In Illinois, then, the history of the discovery rule in the area of medical malpractice has been directed and shaped largely by the legislature.*
>
> *Mega*, at 427.

The majority's contention that the discovery rule is a common law creation is unsustainable. The legislature has acquiesced in the numerous interpretations of this statute.

F. The View of the Wrongful Death Act Adhered to by the Majority Below Does Not Withstand Modern Scrutiny.

The first broad underpinning of the majority's reasoning is that "plaintiff's cause of action was for wrongful death, a cause of action that did not exist at common law." (¶16) In the same vein, the court stated that personal injury actions "were born of the common (judge-made) law and are susceptible to changes by the judiciary. Not so with respect to wrongful death actions, which are creatures of the legislature." (¶16) The court further stated:

> *[T]he Wrongful Death Act created a new cause of action for death in 1853. (Wyness) It is well established that we will strictly construe a statute that is in derogation of the common law.*
>
> *(¶17)*

That strict, and old, view of the Wrongful Death Act, and the reasoning engaged in by the appellate majority, is on suspect terrain indeed these days. This Court would have to revivify ancient and questioned views of the Wrongful Death Act in order to even give serious audience to the majority's position. In *Wilbon v. D.F. Bast Company, Inc.*, 73 Ill.2d 58 (1978), this Court confronted head on those antiquated views of the Wrongful Death Act in concluding that the limitations period for minor beneficiaries under the Wrongful Death Act was to be tolled by their minority, despite the absence of express language in the Wrongful Death Act, and despite the defendant arguing the same views of the Wrongful Death Act which were stated by the majority below here.

The *Wilbon* court noted the doubt which now exists about the history relied upon by the majority below. *Wilbon* traced the origin of the English concept that the common law did not provide a remedy for the death of a human being to *Baker v. Bolton (1808)*, 170 Eng.Rep. 1033. This Court noted English commentary that "the rule as laid down by Lord Ellenborough in *Baker v. Bolton* was 'obviously unjust, ... technically unsound ... and based upon a misreading of legal history.'" *Bolton* noted prior instances where this Court criticized the English rule. *id* at 62. The court quoted *Gaudette v. Webb*, 362 Mass. 60 (1972) at length, with approval. *Gaudette* held not only that the limitation for a wrongful death action would be tolled for minors but that the Massachusetts Wrongful Death Statute would "no longer be regarded as 'creating the right' to recovery for wrongful death." *id* at 62.

Wilbon also quoted at great length the foundational opinion by Justice Harlan in *Moragne v. States Marine Lines, Inc. (1970)*, 398 U.S. 375. This Court noted, *inter alia*, the following points from *Moragne*:

- *That rule has been criticized ever since its inception, and described in such terms as 'barbarous';*
- *Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter;*
- *The sole substantial basis for the rule at common law is a feature of the early English law that did not survive into this century;*

- *(Baker v. Bolton) did not cite authority or give supporting reasoning;*
- *The historical justification marshaled for the rule in England never existed in this country;*
- *The courts failed to produce any satisfactory justification for applying the rule in this country.*

Wilbon, at 63 – 66.

The *Wilbon* court did not regard itself to be bound by the old views of wrongful death remedies which had been found by courts across the land to have been without substance from their conception:

> *We are confronted here with the choice whether, because of a much criticized concept stemming from questionable antecedents, to hold that the two-year limitation is a condition of the existence of the claims of these infant plaintiffs or whether we are to follow the teaching of McDonald v. City of Spring Valley (1918), 285 Ill. 52 ... We conclude that logic, justice, and precedent require that we follow the latter course (permitting the minors to proceed.)*
> *Wilbon*, at 73.

The Supreme Court of Alaska reached the same result that *Wilbon* did in *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Al. 1979). The court rejected the twin underpinnings of the appellate majority below here in concluding that it was not required to follow the discredited views of wrongful death statutes and that its decision on the question of limitations was not based on the common law, but was rather statutory. *Haakanson* concluded:

> *Although we do not deem it necessary to base our holding on the common law, we are in agreement with the spirit of these decisions ('moving away from*

> *the traditional construction of wrongful death statutes'). ... Although an action for wrongful death is statutory, we have found no legislative intent to treat it differently than the common law tort actions. To find that only the wrongful death limitations period is meant to condition the right, rather than the remedy, would sacrifice policy for the sake of formalistic legal abstractions.*
>
> *Haakanson*, at 1092.

As a concluding point, it is useful to once again consider that what is here for interpretation by the court is the "Limitations Act," as it pertains to medical malpractice "for injury or death," and not the Wrongful Death Act itself. Rather, this Court must now determine what the legislative intent is based upon the entire legislative record. *Gaudette v. Webb*, 284 N.E.2d 222 (Mass. 1972) (noted with approval in *Wilbon*) took notice of *Moragne*, just as *Wilbon* did. There, noting the widespread adaption of wrongful death statutes across the country, the court said:

> *The statutes evidence a wide rejection by the legislatures of whatever justifications might once have existed for a general refusal to allow such a recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.*
>
> *Gaudette*, at 70.

Van Beeck v. Sabine Towing Company, Inc., 300 U.S. 342 (1937) is a prominent landmark in the geography of the realistic reappraisal of wrongful death statutes. Justice Cardozo, in his opinion for the court, employed a pertinent quotation from J. Holmes. (This Court has already drawn upon *Van Beeck* in *Zostautas v. St. Anthony DePadua Hospital*, 23 Ill.2d 326, 333 (1961)). Justice Cardozo wrote:

> *Death statutes have their roots in dissatisfaction with the archaisms of the law ... . It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with the legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. 'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.' Its intimation is clear enough in the statutes now before us that their effects shall not be stifled ... by the perpetuation of a policy which now has had its day.*
>
> *Van Beeck*, at 350, 351.

Not only was the passage of the Wrongful Death Act an indication of new legislative policy that there be recovery for death, but the adoption of §13-212(a) of the Limitations Act in its current form, expressly applicable to "death" is "a new generative impulse transmitted to the legal system," within the meaning of *Van Beeck*. It is <u>now</u> the intent of the legislature, and legislatively expressed public policy, that the discovery rule, and this Court's

prior interpretations of it, be fully applicable to claims for wrongful death, especially when, as here, there is an expressly applicable statute.

This Court has already exercised its authority to find that the legislative intent in the Wrongful Death Act was to incorporate existing doctrines. *Pasquale v. Speed Products Engineering,* 166 Ill.2d 337, 363 (1995). Here, the path is far more certain and clear in view of the statutory language expressly applying the discovery rule to "death."

II. THE CIRCUIT COURT, AND THE MAJORITY IN THE APPELLATE COURT, IN ONE PARAGRAPH, ERRED IN DECIDING THAT EVEN IF THE DISCOVERY RULE WERE TO BE APPLIED, AS A MATTER OF LAW THE PLAINTIFF HAD REASON TO KNOW THAT THE DEATH COULD HAVE BEEN WRONGFULLY CAUSED AT SOME UNSPECIFIED TIME MORE THAN TWO YEARS BEFORE THE FILING OF THE COMPLAINT, THEREBY WRONGLY DEPRIVING PLAINTIFF OF A TRIAL ON THAT QUESTION OF FACT. THE DISSENT CORRECTLY DISAGREED.

A. The Standard of Review.

A § 2-619 motion to dismiss, as here, admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts. In ruling on a motion to dismiss, a court must interpret the pleadings and supporting documents in the light most favorable to the non-moving party. The review of an order granting a § 2-619 motion to dismiss is *de novo. Henderson Square Condominium Association v. LAB Townhomes, LLC,* 2015 IL 118139 ¶34.

B. Argument.

The majority's primary holding is that the discovery rule is not available to the plaintiff as a matter of law. Thus, the majority affirmed dismissal on that ground. The opinion stated, however, "even if we were to apply the discovery rule," the complaint was untimely. The majority did not identify any specific date on which it believed the statute should have begun to run, as a matter of law. The court disposed of that issue in one paragraph. ¶27.

The dissent disagreed with the majority on this issue as well. (¶¶52-57)

The dissent wrote about facts and law which did not find expression in the majority's discussion of the application of the discovery rule. The dissent noted that the statute can begin to run under the discovery rule when plaintiff became aware that any defendant committed medical negligence, as opposed to deferring that moment until there is specific knowledge relating to the defendant in question. The dissent noted that a reasonable trier of fact could conclude that the plaintiff did not possess sufficient information to know that Kathryn Moon's death was wrongfully caused until May 1, 2011, when he received the expert's report finding that doctors other than the defendants in this case were negligent. (Dissent, ¶57)

As noted, the circuit court decided the factual question of when plaintiff reasonably should have had knowledge of wrongful causation on a § 2-619 motion. Attorney Randall Moon, counsel for plaintiff, filed his affidavit in

opposition to that motion to dismiss. (C-142) There, he attested that a) on May 2, 2011, he received correspondence from a medical consultant firm that a report had been approved and the consulting expert's surgeon would sign it on Wednesday, May 4, 2011, and b) that he received that physician's report and a certificate of the existence of malpractice, which was attached as an exhibit to the complaint, against the surgeons, and the related but separate case, on May 10, 2011. (C-142, ¶¶3,4)

The application of the discovery rule is almost always a question of fact:

> *In many, if not most, cases the time at which an injured party knows or reasonably should have known both of his injury and that it was wrongfully caused will be a disputed question to be resolved by the finder of fact.*

Witherell v. Weimer, 85 Ill.2d 136, 156 (1981).

See also *Henderson Square Condominium Association v. LAB Townhomes, LLC,* 2015 IL 181139 ¶52 and *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 416 (1981).

Defendants' §2-619 motion asserted that the statute of limitations barred this action and offered as factual support the plaintiff's execution of an authorization for disclosure of decedent's medical records and an excerpt from the discovery deposition of the plaintiff. (C-26) That motion does not contain the slightest hint of the reason relied upon for the majority's affirmance of the order of dismissal. Instead, defendants made the following two arguments:

A. The discovery rule is "not applicable" because Randall Moon had sufficient knowledge as of the date of Kathryn Moon's death from which to

potentially believe that her death may have been wrongfully caused. Although defendants contended throughout their motion that the discovery rule was "not applicable," by that they meant only that there was no factual reason to apply the rule because, in their view, the plaintiff had already "discovered," or had reason to believe, that wrongful conduct may have caused the death and that for that reason the rule had no application. Defendants stated:

> *Randall Moon had sufficient knowledge that Kathryn Moon's death may have been wrongfully caused from the time of her death. ... His impression was that she was healthy for her age and should have received better treatment prior to her death. This testimony alone shows that the "discovery rule" is not applicable, or is very limited in its effect, as the requisite knowledge was present at, or before, the death of Kathryn Moon.*
>
> (Motion, C-26, pp. 11, 12)

B. Alternatively, if the court were to decide that there was reason to apply the discovery rule, then:

> *Straining to give the plaintiff every chance to extend the limitations period by a very generous reading of the "discovery rule," the latest one could say that the two-year limitations period began to run for the plaintiff's wrongful death claims ... was in the spring of 2010 when Attorney Randall Moon began to compile a complete copy of Kathryn Moon's medical records ... .*
>
> (Brief, p. 12, C-37)

Defendants' Reply in the circuit court in support of its motion to dismiss left no doubt as to what defendants meant when they said that the discovery rule does not "apply" in this case:

> ... *At the time of her death, the plaintiff's impression was that Mrs. Moon had received sub-standard care that contributed to her death. As such, the plaintiff was put on inquiry of potential causes of action for medical malpractice at the time of death.*
>
> (Reply, C-148, pp. 1, 2)

The deposition testimony which defendants largely ground their argument on can only fairly be described as the merest wisp of evidence, likely falling short of the proverbial mere scintilla. The entirety of that evidence is a single question and answer, in a discovery deposition taken in the other case, in which the sole question was a request to decedent's son, also her attorney, to "explain to a jury how your mother's death has affected you. Can you just briefly describe that to me?" The entirety of her son's answer:

> A. "Well, yeah. Even though she was fairly old, my impression was that she was doing okay and that, you know, she should have gotten better treatment than she did." (C-98, ¶43)

There was no follow up question of any sort, let alone a question which sought to explore her son's understanding of or opinions regarding the medical care she had received. To decide that that exchange constituted even part of a reason to conclude that plaintiff reasonably should have had knowledge of wrongful, causative conduct defies reason.

It is also contrary to the law:

> *[W]hen a party knows or reasonably should know that her injury was wrongfully caused does not mean when a party is suspicious that her injury is wrongfully caused. ... Thus, the statute of limitations is not triggered during that period in which the party is attempting to discover whether her injury is wrongfully caused ... Instead, the limitations period commences when the party possesses enough information concerning her injury to apprise a reasonable person to the need for further inquiry ...*
>
> *More fundamentally, suspecting wrongdoing clearly is not the same as knowing that a wrong was probably committed. ... The fact that a party suspects wrongful conduct, without examining the reasons underlying those suspicions, is not enough to constitute constructive knowledge that an injury was wrongfully caused.*
>
> *Young v. McKiegue*, 303 Ill.App.3d 380, 390 (1st Dist. 1999).

When the standard of review, and the rules of decision incorporated within it, are taken into account, it is respectfully but strongly asserted that the circuit court erred in deciding the "date of reasonable knowledge for discovery" as a matter of law. All that the circuit judge said, in a single sentence within his ruling, was that "even if we were to give everybody the benefit of the doubt and try to fix a date at which a reasonable person was placed on inquiry as to whether there was malpractice, even that was long gone by the time the complaint was filed." (R-17)

Neither the circuit judge nor the appellate court offered their views as to a date on which they believed there was sufficient knowledge to trigger the running of the statute.

The dissent below correctly stated the applicable rule that the statute begins to run when the plaintiff receives a report from an expert finding negligence against any medical professional who treated the decedent, citing *Clark v. Galen Hospital, Inc.,* 322 Ill.App.3d 64, 74 (2001), *Young v. McKiegue*, 303 Ill.App.3d 380, 389 (1st Dist. 1999), and *Wells v. Travis*, 284 Ill.App.3d 282, 287 (2nd Dist. 1996).

Plaintiff had a reasonable basis of knowledge that there might have been some wrongful medical conduct when he received the expert's report on May 2, 2011. He filed the other complaint shortly thereafter. Upon further medical investigation and gaining an additional report, he filed the complaint in this case on March 18, 2013, (C-1) within two years of that initial report.

It is further suggested that the majority below gave little attention to this issue, in light of the majority's focus on the question of law raised for the first time by the court.

III. THE MAJORITY OF THE APPELLATE COURT ERRED IN REACHING THE ISSUE OF WHETHER, AS A MATTER OF LAW, THE DISCOVERY RULE IS APPLICABLE TO WRONGFUL DEATH ACT AND SURVIVAL ACT CLAIMS. THE APPELLATE COURT ABUSED ITS DISCRETION IN DECIDING AN ISSUE NEVER RAISED BY THE DEFENDANTS IN THE CIRCUIT COURT. FURTHER, DEFENDANTS HAVE FORFEITED THE ISSUE.

Defendants never argued in either the circuit or appellate court that the discovery rule, as a matter of law, could never be applied in a Wrongful Death Act or Survival Act case. Rather, their argument was that on a factual basis, the discovery rule should not be applied. Defendants argue that the period of limitation should have started running on either a) the date of death (because of the deposition testimony), b) at some later time (while decedent's attorney son was gathering records.) This point is not contested; defendants do not contend that they made the legal argument on which the appellate court decided the case anywhere below. The nature of the circuit court arguments are easily gleaned at C-26, C-37, C-148, R-4, and R-16. As for the appellate court arguments, plaintiff will arrange for filing of the appellate court briefs in this court pursuant to SCR 318(c).

Likewise, the majority below does not dispute that its chosen issue was never raised by a party. In responding to a petition for rehearing filed at the time that additional appellate counsel entered the case on behalf of plaintiffs, the appellate court said that its decision was "not a new issue, it is simply some of our reasoning for affirming the trial court." In its modified opinion on denial of rehearing, Justice Schmidt, the author of the opinion for the majority, stated that plaintiff "not only had the opportunity, but the duty, to address this issue of whether the common law discovery rule is applicable to a wrongful death action." (¶30)

The majority reached out on its own to decide the completely separate legal issue of whether the discovery rule was available in any Wrongful Death Act or Survival Act case, as a matter of law.

Plaintiff acknowledges that a reviewing court has the power to decide a case on an issue not raised by a party, and that that principle has particular application where the new issue is invoked in service of affirmance. However, the exercise of that power is within the court's discretion. *Busch v. Graphic Color Corp.*, 169 Ill.2d 325, 347 (1996).

There is a loose linkage between that principle and the general principle that an appellee may raise a previously un-argued point in support of affirmance. But there are limitations upon that rule:

> "[W]hile an appellee is not as limited in the scope of review as is an appellant, nevertheless, the review cannot go beyond the issues appearing in the record. ... The issues are determined from the pleadings and the evidence. [Citation] To permit a change of theory on review 'would not only greatly prejudice the opposing party but would also weaken our system of appellate jurisdiction.' *Kravis v. Smith Marine, Inc.*, 60 Ill.2d 141, 148 (1975) (quoting *In re Estate of Leichtenberg*, 7 Ill.2d 545, 548 (1956)). Thus, an issue raised by an appellee for the first time on appeal 'must at least be commensurate with the issues' presented in the trial court. *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 509 (1988)."

Hiatt v. Western Plastics, Inc., 2014 IL App (2d) 140178, ¶ 107.

Here, the appellees have not raised the new issue, but those limitations on an appellee help to inform the allowable range of discretion for an appellate court which undertakes to affirm a case on a non-argued issue *sua sponte*.

This Court, in recent years, has given express guidance to the appellate court for situations where consideration is being given to reversing a circuit court on the basis of an issue raised *sua sponte*. *People v. Givens*, 237 Ill.2d 311 (2010). After setting out the principle of "party representation" outlined in *Greenlaw v. United States*, 554 U.S. 237 (2008), and noting the need to avoid transforming a court's role from that of jurist to advocate as explained in *People v. Rodriguez*, 336 Ill.App.3d 1 (2002), *Givens* states, "a reviewing court does not lack authority to address unbriefed issues and may do so in the appropriate case, i.e. when a clear and obvious error exists in the trial court proceedings." At 325. In *Givens*, the court agreed with the appellants' contention that "the appellate court deprived (appellant) of a fair proceeding when it reversed ... (on) a theory never raised by defendant or addressed by the parties in their appellate briefs." At 323.

Here, plaintiff had no reason to brief the legal status of the discovery rule in a death case. And it could never be said that the issue the majority decided was to correct a clear and obvious error. After the appellate court decided that issue *sua sponte*, plaintiff's petition for rehearing requesting that the opinion be vacated and that briefing on the issue be allowed was denied.

This case does not present the type of situation which this Court confronted in *Stevens v. McGuirewoods LLP*, 2015 IL 118652, in which this Court ruled upon a forfeited issue because "we would not want anyone to

construe our silence on this point as a tacit recognition that plaintiffs have standing ... ." (¶22) Nor is this a case where there was a clear, glaring error which either in the interest of justice or for the preservation of a uniform body of precedent the court should have reached. To the contrary, the substantial authority on plaintiff's side of this issue, combined with the understandable silence of defendants on the point, all militated in favor of the appellate court not reaching an issue which had never been raised. If, despite the existence of the strong authority outlined in this brief, the appellate court wished to make note of the issue so that a reader would not think the court was unaware of the issue, then that purpose could have been served by the court's merely stating the issue but saying it would not be decided because it had never been raised.

In *People v. Givens*, 237 Ill.2d 311 (2010), this Court agreed that "the appellate court deprived (the party) of a fair proceeding when it reversed on ... a theory never raised by defendant or addressed by the parties in their appellate briefs." At 323. In reversing the appellate court, the Supreme Court expanded upon its thinking with an extensive quotation from *Greenlaw v. United States*, 554 U.S. 237 (2008):

> *In the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the rule of neutral arbiter of matters the parties present ... [A]s a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are*

responsible for advancing the facts and arguments entitling them to relief. As cogently explained:

> *Courts do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties ...*

Givens, at 323, 324.

This Court expressed its approval of *People v. Rodriguez*, 336 Ill.App.3d 1 (1st Dist. 2002), which stated:

> *While a reviewing court has the power to raise unbriefed issues ..., we must refrain from doing so when it would have the effect of transforming this court's role from that of jurist to advocate. Were we to address these unbriefed issues, we would be forced to speculate as to the arguments might have presented had these issues been properly raised before this court. To engage in such speculation would only cause further injustice; thus we refrain from addressing these issues sua sponte.*

Rodriguez, at 14.

This Court has agreed, albeit not always in the same factual setting, that SCR 366(a)(5) does not "nullify standard waiver and forfeiture principles," and that "the principle of that rule 'should not be a catchall that confers upon reviewing courts unfettered authority to consider forfeited issues at will.'" *Jackson v. Board of Election Commissioners*, 2012 IL 111928 ¶33.

This case was largely decided on an important issue without any notice to plaintiff, even in oral argument that he should respond. While plaintiff

again states that it recognizes the plenary power of a reviewing court, nonetheless the principle of "party representation" is an important one in this Court's jurisprudence, and "some logical order for the presentment of the issues to be reviewed must be observed ... ." *People v. Jung*, 196 Ill.2d 1, 7 (2000) J. Freeman, specially concurring. This case bears no indicia which would appear to support the appellate court's deviation from the normal rules of order of presentation and forfeiture.

Defendants are not to be faulted for not having raised the issue on which the majority decided this case in view of the mass of authority to the contrary and the dearth of authority in support of such a position. But the fact remains that they have not advocated that issue in either court below. It is requested that this Court rule that the majority abused its discretion in deciding the issue. But if that is not done, then defendants would be placed in the position of advocating, and given the benefits of, the merits of an issue they never raised. SCR 341(h)(7) provides that "points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." The avoidance of deciding forfeited issues is an important task of any reviewing court. *People v. Smith*, 228 Ill.2d 95, 106 (2008).

The issue of the legal applicability of the discovery rule should be regarded as forfeited. In that event, further impetus is added to this Court's

concluding that the appellate court abused its discretion in deciding the issue *sua sponte*.

CONCLUSION

It is respectfully requested that the appellate court be reversed, that the circuit court's granting of defendants' §2-619 motion be vacated, and that this matter be remanded to the Circuit Court of Peoria County for trial or other proceedings.

Respectfully submitted,

RANDALL W. MOON, Executor of
the Estate of KATHRYN MOON,
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CERTIFICATE OF COMPLIANCE WITH RULE 341

The undersigned hereby certifies that this Brief complies with the form and length requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the appendix, is 4 pages.

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APPENDIX

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13-12-0613

Dr. Clarissa F. Rhode & Central Illinois Radiological Associates, LTD
Appellee,

Vs.

Randall W. Moon, Executor of the Estate of Kathryn Moon, Deceased.,
Appellant

2015 IL App (3d) 130613

Opinion filed April 10, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

RANDALL W. MOON, Executor of the Estate of Kathryn Moon, Deceased, Plaintiff-Appellant, v. CLARISSA F. RHODE, M.D., and CENTRAL ILLINOIS RADIOLOGICAL ASSOCIATES, LTD., Defendants-Appellees.	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois. Appeal No. 3-13-0613 Circuit No. 13-L-69 Honorable Richard D. McCoy Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court, with opinion.
Presiding Justice McDade concurred in the judgment and opinion.
Justice Lytton dissented, with opinion.

OPINION

¶ 1 Over three years after his mother Kathryn Moon's death, plaintiff, Randall Moon, as executor, filed a wrongful death and survival action against defendants, Dr. Clarissa Rhode and Central Illinois Radiological Associates, Ltd. Defendants filed a motion to dismiss plaintiff's complaint, alleging that the complaint was untimely. The trial court granted defendants' motion.

¶ 2 Plaintiff appeals, arguing that the trial court erred in granting defendants' motion. Specifically, plaintiff contends that the discovery rule applied and that the statute of limitations

did not begin to run until the date on which he knew or reasonably should have known of defendants' negligent conduct.

¶ 3 BACKGROUND

¶ 4 Ninety-year-old Kathryn Moon was admitted to Proctor Hospital on May 18, 2009. Two days later, Dr. Jeffery Williamson performed surgery on Kathryn. Williamson attended to Kathryn from May 20 through May 23, 2009. Kathryn was under Dr. Jayaraji Salimath's care from May 23 through May 28, 2009. She died on May 29, 2009.

¶ 5 During Kathryn's hospitalization, she experienced numerous complications, including labored breathing, pain, fluid overload, pulmonary infiltrates, and pneumo-peritoneum. Pursuant to Dr. Salimath's order, Kathryn underwent CT scans on May 23 and May 24, 2009. Dr. Clarissa Rhode, a radiologist, read and interpreted the two CT scans.

¶ 6 The court appointed plaintiff, an attorney, as executor of Kathryn's estate in June of 2009. Eight months later, in February 2010, plaintiff executed a Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. § 201 (2006)) authorization to obtain Kathryn's medical records from Proctor Hospital. Plaintiff received the records in March of 2010. In April of 2011, 14 months after receiving the records, plaintiff contacted a medical consulting firm to review Kathryn's medical records. At the end of April 2011, plaintiff received a verbal report from Dr. Roderick Boyd, stating that Williamson and Salimath were negligent in treating Kathryn. On May 1, 2011, plaintiff received a written report from Boyd setting forth his specific findings of negligence against Williamson and Salimath.

¶ 7 On May 10, 2011, plaintiff filed a separate medical negligence action against Drs. Williamson and Salimath. On March 8, 2012, plaintiff testified at his deposition that "even

though [my mother] was fairly old, my impression was that she was doing okay and that, you know, she should have gotten better treatment than she did."

¶ 8 In February of 2013, almost four years after decedent's death and almost three years after receipt of her medical records, plaintiff sent radiographs to Dr. Abraham Dachman for review. On February 28, 2013, Dachman reviewed the May 24, 2009, CT scan. Dachman provided plaintiff with a report stating that the radiologist who read and interpreted the CT scan failed to identify the breakdown of the anastomsis, which a "reasonably, well-qualified radiologist and physician would have identified." Dachman further stated that the radiologist's failure to properly identify the findings caused or contributed to the injury and death of the patient. On March 18, 2013, plaintiff filed both wrongful death and survival claims against Dr. Rhode and her employer, Central Illinois Radiological Associates, Ltd. Plaintiff alleged that he did not discover that Rhode was negligent until Dachman reviewed the CT scan.

¶ 9 Defendants filed a motion to dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619(a)(5) (West 2010)), arguing that the two-year statutes of limitations for both wrongful death and survival actions had expired. Alternatively, defendants argued that even if the discovery rule applied, the record affirmatively showed that the complaint was nevertheless untimely filed. The trial court granted defendants' motion to dismiss and found that the date of Kathryn's death was the "date from which the two-year statute should be measured." The court furthered stated that "even if we give everybody the benefit of the doubt and try to fix a date at which a reasonable person was placed on inquiry as to whether there was malpractice, even that was long gone by the time the complaint was filed."

¶ 10 Plaintiff appeals. We affirm.

¶ 11 ANALYSIS

¶ 12 Plaintiff argues that the trial court erred in granting defendants' motion to dismiss. The discovery rule, says plaintiff, allowed him to file his complaint within two years from the time he knew or should have known of the negligent conduct. Defendants argue that the discovery rule does not apply and plaintiff had to file his complaint within two years from Kathryn's death. Alternatively, defendants argue that even if the discovery rule applied, the record affirmatively showed that plaintiff filed the complaint more than two years after a reasonable person knew or should have known of the alleged negligent conduct.

¶ 13 We review *de novo* the trial court's order granting a motion to dismiss. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). Under the *de novo* standard, our review is independent of the trial court's determination; we need not defer to the trial court's judgment or reasoning. *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 20 (citing *People v. Vincent*, 226 Ill. 2d 1, 14 (2007)). A defendant may file a motion to dismiss an action where the plaintiff failed to commence the action within the time allowed by law. 735 ILCS 5/2-619(a)(5) (West 2010). Plaintiff's wrongful death claim was brought pursuant to the Wrongful Death Act (the Act) (740 ILCS 180/0.01 *et seq.* (West 2010)). Section 2 of the Act states that "[e]very such action shall be commenced within 2 years after the death of such person." 740 ILCS 180/2 (West 2010). Section 13-212(a), relating to suits against physicians, provides that suit shall be filed within two years of knowledge of the death (735 ILCS 5/13-212(a) (West 2010)).

¶ 14 Plaintiff relies on *Young v. McKiegue*, 303 Ill. App. 3d 380 (1999), and *Wells v. Travis*, 284 Ill. App. 3d 282 (1996), to support his position that the discovery rule applied in this case. The *Young* and *Wells* courts held that where a wrongful death claim is predicated upon a claim of medical malpractice that was not apparent to the plaintiff at the time of death, the statute of

limitations applicable to medical malpractice actions governs the time for filing. *Young*, 303 Ill. App. 3d at 389; *Wells*, 284 Ill. App. 3d at 286-87. These two cases also held that the discovery rule applied to wrongful death suits against physicians. We believe that *Young* and *Wells* were incorrectly decided and refuse to follow them for the following reasons.

¶ 15 Section 13-212(a) of the Code governs the time constraints for medical malpractice claims (735 ILCS 5/13-212(a) (West 2010)). Section 13-212(a), in pertinent part, states:

> "[N]o 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 ***."
> (Emphasis added.) 735 ILCS 5/13-212(a) (West 2010).

¶ 16 However, section 13-212 does not create a cause of action. Instead, it merely places a limitation on the filing of medical malpractice actions. Here, plaintiff's cause of action was for wrongful death, a cause of action that did not exist at common law. *Young* and *Wells* relied on *Witherell v. Weimer*, 85 Ill. 2d 146 (1981), a *common law personal injury action*, to attach a discovery rule to a wrongful death action against a physician. A reading of *Witherell* simply does not support such a holding. The *Witherell* court read section 13-212(a) within the context of the discovery rule to mean that the two-year malpractice limitations period begins to run when one knew or should have known of the injury and also knew or should have known that the

injury was wrongfully caused. *Witherell*, 85 Ill. 2d at 156. However, the discovery rule cannot be found in the plain language of either the Act or section 13-212(a). Personal injury actions were born of the common (judge-made) law and are susceptible to changes by the judiciary. Not so with respect to wrongful death actions, which are creatures of the legislature. Likewise, at common law your personal injury action died with you. The Survival Act, too, is a creature of the legislature (755 ILCS 5/27-6 (West 2010)). It allows for recovery of damages the injured party could have recovered, had she survived.

¶ 17 Our supreme court stated that the discovery rule does not alter the fact that the Wrongful Death Act created a new cause of action for death in 1853. *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 413 (1989). It is well established that we will strictly construe a statute that is in derogation of the common law. *In re W.W.*, 97 Ill. 2d 53, 57 (1983). The court will not read language into a statute that is not there. *Wyness*, 131 Ill. 2d at 416; see also *People v. Perry*, 224 Ill. 2d 312, 323-24 (2007) (citing *People v. Martinez*, 184 Ill. 2d 547, 550 (1998) (the court will not read into the statute exceptions, limitations, or conditions that conflict with the expressed intent)). The General Assembly is capable of providing a limitation period based on knowledge as evident by section 13-212(a). *Wyness*, 131 Ill. 2d at 416.

¶ 18 So what did the General Assembly provide with respect to the filing of wrongful death and survival actions against physicians? It clearly provided that a claimant must file a wrongful death action within two years from 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 [*sic*] occurs first." 735 ILCS 5/13-212(a) (West 2010). The required knowledge is of the death or injury, not of the negligent conduct. If the General Assembly wanted to provide a limitations period in the

Act commencing when one had knowledge of the negligent conduct, it would have done so. *Wyness*, 131 Ill. 2d at 416.

¶ 19 The plain language of the Act required the plaintiff to file a wrongful death claim within two years of the date on which plaintiff knew of the death. *Greenock v. Rush Presbyterian St. Luke's Medical Center*, 65 Ill. App. 3d 266 (1978). We conclude that *Young* and *Wells* were wrongly decided. Likewise, we decline to follow similar cases such as *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill. App. 3d 525 (1982) (The court held that the discovery rule applied to wrongful death cases; plaintiff had two years to file his claim after he discovered or should have discovered the death and its wrongful causation.). *Arndt v. Resurrection Hospital*, 163 Ill. App. 3d 209 (1987) (relying on *Coleman*, the court found that the statute of limitations for wrongful death actions began to run when plaintiff discovered that defendant's negligence contributed to the death of the decedent); and *Hale v. Murphy*, 157 Ill. App. 3d 531 (1987) (following *Coleman*, the court held that the discovery rule in the medical malpractice statute was applicable to wrongful death cases and the limitation period began when plaintiff knew or should have known of the injury and knew or should have know that the injury was wrongfully caused).

¶ 20 Applying the limitation period set forth in section 13-212(a) to the present case, plaintiff had two years from the date on which he knew or should have known of Kathryn's death to file a complaint (735 ILCS 5/13-212(a) (West 2010)). It is undisputed that plaintiff filed this action more than two years after he knew or should have known of Kathryn's death. Therefore, we need not discuss a situation where plaintiff filed a medical malpractice suit within two years of learning of a death, but more than two years after the death. Plaintiff filed a wrongful death claim against defendants beyond the time allowed in either the Act (740 ILCS 180/2 (West

2010)) or the medical malpractice statute of limitations (735 ILCS 5/13-212(a) (West 2010)). The trial court did not err in granting defendants' motion to dismiss.

¶ 21 We acknowledge that some appellate courts have applied the discovery rule to wrongful death actions where circumstances surrounding the death permitted an extension of time. *Fure v. Sherman Hospital*, 64 Ill. App. 3d 259 (1978); *Praznik v. Sport Aero, Inc.*, 42 Ill. App. 3d 330 (1976). In *Praznik*, the court held that the cause of action for wrongful death did not accrue until the aircraft wreckage was discovered, despite the fact that the accident happened more than two years and eight months prior to the discovery. *Praznik*, 42 Ill. App. 3d at 337. In *Fure*, the court stated that the discovery rule is only applicable when the circumstances surrounding the death permit such an extension of time. *Fure*, 64 Ill. App. 3d at 270. The court further held that the discovery rule is an exception to the rule and should be invoked sparingly and with caution. *Id.* Here, the circumstances surrounding Kathryn's death do not support an extension of time; it is undisputed that plaintiff knew the date on which Kathryn died. See *Beetle v. Wal-Mart Associates, Inc.*, 326 Ill. App. 3d 528 (2001) (court distinguished cases applying discovery rule to wrongful death where plaintiff was aware of husband's death on the date it occurred and failed to file a wrongful death action within two years). We believe that the medical malpractice statute of limitations codifies the extension set forth in *Praznik*, at least in suits against healthcare providers. 735 ILCS 5/13-212(a) (West 2010). The clock starts ticking when the plaintiff "knew, or through the use of reasonable diligence should have known *** of the injury or death." *Id.*

¶ 22 The dissent argues that we concluded "that the discovery rule set forth in section 13-212(a) of the Code does not apply to wrongful death or survival actions." *Infra* ¶ 32. This, of course, is wrong. We do hold that section 13-212(a) applies and that the plain language of

section 13-212(a) provides that the clock starts ticking upon knowledge or notice of the injury or death, not upon notice of a potential defendant's negligent conduct. The statute gives a claimant two years from the date of that knowledge or notice to figure out whether there is actionable conduct.

¶ 23 Curiously, the dissent cites in detail language from a federal district court judge to the effect that the Illinois Supreme Court desires full recovery for a decedent's family against wrongdoers and that such policies can only be effectuated if the discovery rule is applied to wrongful death cases. *Infra* ¶ 38. Both the dissent and federal district court judge fail to recognize that which the supreme court has recognized and acknowledged: that statutes in derogation of the common law have always been strictly construed. See *Wyness*, 131 Ill. 2d at 416; *In re W.W.*, 97 Ill. 2d at 57. The supreme court has specifically acknowledged that the court "will not read into a statute language which is clearly not there." *Wyness*, 131 Ill. 2d at 416. We have looked everywhere possible in section 13-212(a) and nowhere can we find the language that the dissent would have us read into the statute to the effect that the statute begins running "when plaintiff discovered *the fact of the defendant's negligence* which contributed to the death." (Emphasis in original and internal quotation marks omitted.) *Infra* ¶ 37. With all due respect to the dissent and the federal district court that the dissent cites with approval, both are applying common law rules to statutory causes of action contrary to age-old rules of statutory construction.

¶ 24 Further, the dissent states that "[f]inally, the supreme court, in *dicta*, has approved the use of the discovery rule in wrongful death cases." *Infra* ¶ 39. The dissent cites *Wyness*, 131 Ill. 2d at 413, for this proposition. In *Wyness*, a wrongful death action, the defendants were arguing that the statute of limitations should have started running before the death because the plaintiff knew

of decedent's injuries and the cause of those injuries before the death. We fail to understand how anyone could read *Wyness* to support the proposition that the common law discovery rule applies to wrongful death actions. The actual issue before the court in *Wyness* was whether the two-year limitations period of the Wrongful Death Act could be triggered by the discovery rule such that a cause of action could accrue prior to the death of plaintiff's decedent. *Wyness*, 131 Ill. 2d at 406. In fact, the *Wyness* court observed that "this court has not to date applied the discovery rule to wrongful death actions." *Id.* at 409. It still has not. The Wrongful Death Act was first enacted in 1853. The supreme court had over 160 years to apply the discovery rule to a wrongful death action and has, to date, resisted the urge.

¶ 25 The dissent acknowledges that statutory language that is clear and unambiguous must be be given effect. *Infra* ¶ 48. Nowhere does the dissent point to any clear and unambiguous language in section 13-212(a) that the statute of limitations begins to run when the plaintiff knows or should have known of defendant's wrongful conduct which contributed to the death. That language is not in the wrongful death act and it is not in section 13-212(a). If that language is to be added, it is to be added by the General Assembly, not the courts. *Wyness*, 131 Ill. 2d at 416.

¶ 26 The same is true with respect to the survival action. See 755 ILCS 5/27-6 (West 2010). Our supreme court held that the Survival Act did not create a new cause of action. *National Bank of Bloomington v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 160, 172 (1978). We suppose that is true to the extent that a cause of action to recover damages for personal injury always existed. However, at common law, your cause of action died with you. *Bryant v. Kroger Co.*, 212 Ill. App. 3d 335, 336 (1991). The Survival Act, in derogation of common law, provided the decedent's representative with the ability to maintain claims that the decedent would have been

able to bring. We will strictly construe a statute that is in derogation of common law. *In re W.W.*, 97 Ill. 2d at 57. At the very latest, the limitations period for a survival action begins to run when the injured party dies. *Wolfe v. Westlake Community Hospital*, 173 Ill. App. 3d 608 (1988). A cause of action, for personal injury arising out of negligence, accrues at the time of the injury. *Fetzer v. Wood*, 211 Ill. App. 3d 70, 78 (1991). As stated above, section 13-212(a) governs the statute of limitations for personal injury actions against physicians; no action seeking damages for injury against a physician shall be brought more than two years after the date on which the claimant knew or should have known of the injury or death. Plaintiff cites to no authority other than *Young* and *Wells*, where the court applied the discovery rule to extend the statute of limitations of a survival action. Here, it does not matter whether the injury occurred when Dr. Rhode interpreted the CT scans or at the time of death; plaintiff failed to file his survival action within two years of Kathryn's death.

¶ 27 Even if we were to apply the discovery rule, we would find, as the trial court did, that plaintiff's complaint was untimely. Our supreme court stated that " 'if knowledge of negligent conduct were the standard, a party could wait to bring an action far beyond a reasonable time when sufficient notice has been received of a possible invasion of one's legally protected interests.' " *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981) (quoting *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 170-71 (1981)). Furthermore, the court held that "plaintiff need not have knowledge that an actionable wrong was committed." *Knox College*, 88 Ill. 2d at 415. "At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. At that point, under the discovery rule, the running of the limitations period commences." *Id.* at 416. Here, plaintiff did not obtain Kathryn's medical records until eight

months after her death. Plaintiff did not argue that he became possessed with new information within those eight months, which caused him to obtain the records. Furthermore, he waited 14 months after receiving the records before submitting them to a medical consultant firm. Plaintiff points to nothing to explain the delay in either obtaining the records or submitting them for review. Moreover, he did not send the reports to Dr. Dachman for review until almost four years after Kathryn's death. Plaintiff filed his complaint long after he became possessed with sufficient information, which put him on inquiry to determine whether actionable conduct was involved. The trial court did not err in granting defendants' motion to dismiss.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 30 Affirmed.

¶ 31 JUSTICE LYTTON, dissenting.

¶ 32 I dissent. The majority's conclusion that the discovery rule set forth in section 13-212(a) of the Code does not apply to wrongful death or survival actions conflicts with over 30 years of precedent (see *Advincula v. United Blood Services*, 176 Ill. 2d 1, 42-43 (1996); *Young v. McKiegue*, 303 Ill. App. 3d 380, 386 (1999); *Wells v. Travis*, 284 Ill. App. 3d 282, 287 (1996); *Neade v. Engel*, 277 Ill. App. 3d 1004, 1009 (1996); *Durham v. Michael Reese Hospital Foundation*, 254 Ill. App. 3d 492, 495 (1993); *Janetis v. Christensen*, 200 Ill. App. 3d 581, 585-86 (1990); *Cramsey v. Knoblock*, 191 Ill. App. 3d 756, 764 (1989); *Arndt v. Resurrection Hospital*, 163 Ill. App. 3d 209, 213 (1987); *Hale v. Murphy*, 157 Ill. App. 3d 531, 533 (1987); *Eisenmann v. Cantor Bros., Inc.*, 567 F. Supp. 1347, 1352-53 (N.D. Ill. 1983); *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill. App. 3d 525, 533 (1982); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1239 (N.D. Ill. 1981); *Fure v. Sherman Hospital*, 64 Ill.

App. 3d 259, 268 (1978); *Praznik v. Sport Aero, Inc.*, 42 Ill. App. 3d 330, 337 (1976)), as well as the plain language of the statute (735 ILCS 5/13-212(a) (West 2010)).

¶ 33 The discovery rule applies to plaintiff's causes of action. I would reverse the trial court's dismissal of plaintiff's complaint.

¶ 34 I. CASE LAW

¶ 35 A. Wrongful Death Actions

¶ 36 Thirty-eight years ago, the First District applied the discovery rule to a wrongful death cause of action. See *Praznik*, 42 Ill. App. 3d at 337. Two years later, the Second District followed suit, "reject[ing] the idea that no wrongful death action can ever be brought more than 2 years after the plaintiff knows of the death in question." *Fure*, 64 Ill. App. 3d at 272. The court discussed the inequity of applying the discovery rule to personal injury actions but not wrongful death actions, concluding: "In our opinion there should be no barrier to the application of the 'discovery' rule based on the ultimate tragedy of death where the circumstances of the death would have permitted an extension of the time limitation for the mere wounding or injury of the person and we hold that the fact of death does not *per se* foreclose the use of the discovery doctrine." *Id.* at 270. The Second District reaffirmed its holding four years later, stating, "the discovery rule *** is applicable in a wrongful death case." *Coleman*, 108 Ill. App. 3d at 533. Five years after that, the Fifth District also ruled that "[s]ection 13-212 is applicable to an action brought under the Wrongful Death Act." *Hale*, 157 Ill. App. 3d at 533. The court refused to find that a decedent's date of death triggered the start of the two-year statute of limitations for a plaintiff's wrongful death claim because the "[p]laintiff could have reasonably believed [the decedent's] death was the result of a nonnegligent factor." *Id.* at 535.

¶ 37 Since 1987, Illinois courts have repeatedly and consistently applied the discovery rule to wrongful death claims. See *Young*, 303 Ill. App. 3d at 386 (when a wrongful death claim is predicated on a claim of medical malpractice that was not apparent to the plaintiff at the time of death, "the time for filing a wrongful death claim will be governed by the statute of limitations applicable to medical malpractice actions under section 13-212(a) of the Code"); *Wells*, 284 Ill. App. 3d at 287 (statute of limitations for wrongful death action began to run when plaintiff learned of defendant's negligence); *Neade*, 277 Ill. App. 3d at 1009 (same); *Durham*, 254 Ill. App. 3d at 495 ("all actions for injury or death predicated upon the alleged negligence of a physician are governed by section 13-212(a)"); *Cramsey*, 191 Ill. App. 3d at 764 (when medical negligence is not known at the time of death, "the discovery rule will apply so that the limitation period begins to run when plaintiff discovered the fact of defendant's negligence, not the fact of death"); *Arndt*, 163 Ill. App. 3d at 213 (statute of limitations began running "when plaintiff discovered *the fact of the defendant's negligence* which contributed to the death of her husband, and not on the date she discovered *the fact of the death* of her husband" (emphases in original)).

¶ 38 While our supreme court has not directly decided this issue, several courts have determined that the supreme court would likely apply the discovery rule to wrongful death cases. See *Arndt*, 163 Ill. App. 3d at 213; *Eisenmann*, 567 F. Supp. at 1352-53; *Johns-Manville*, 511 F. Supp. at 1239. The Second District concluded that because a petition for leave to appeal was filed by the defendants in *Coleman* but was denied by the supreme court, "the supreme court has granted its tacit approval" of applying the discovery rule to wrongful death actions. *Arndt*, 163 Ill. App. 3d at 213. Additionally, the United States District Court for the Northern District of Illinois has twice ruled that our supreme court would likely apply the discovery rule to wrongful

death cases. See *Eisenmann*, 567 F. Supp. at 1352-53; *Johns-Manville*, 511 F. Supp. at 1235. The federal court in *Eisenmann* stated:

> "The Supreme Court of Illinois has expressed its desire to insure full recovery for a decedent's family against wrongdoers. [Citation.] It has also held that the 'discovery rule' is the only fair means by which a statute of limitations can be applied in a case where an injury is both slowly and invidiously progressive, and where recognition of the illness – that an 'injury' has occurred – does not necessarily enlighten the victim that 'the injury was probably caused by the wrongful acts of another.' [Citation.] Without question, the policies underlying these recent Illinois Supreme Court decisions can only be effectuated if the 'discovery rule' is said to apply to Wrongful Death cases." *Eisenmann*, 567 F. Supp. at 1352-53.

¶ 39 Finally, the supreme court, in *dicta*, has approved the use of the discovery rule in wrongful death cases, stating: "[T]he delay of the running of the limitation period accepted by the appellate court in some districts assures that a wrongful death action may be filed after death when plaintiffs finally know or reasonably should know of the wrongfully caused injury which led to death." *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 413 (1989).

¶ 40 Based on the foregoing well-settled case law, I dissent from the majority's refusal to apply the discovery rule to plaintiff's wrongful death claim.

¶ 41 B. Survival Actions

¶ 42 Eighteen years ago, our supreme court ruled that the discovery rule applies to Survival Act claims. *Advincula*, 176 Ill. 2d at 42-43. The court reasoned that because a survival claim "is a derivative action based on injury to the decedent, but brought by the representative of a decedent's estate in that capacity," the discovery rule should apply, just as it would in any other personal injury action. *Id.* at 42.

¶ 43 Thirteen years earlier, the United States District Court for the Northern District of Illinois held that "the 'discovery rule' applies in actions brought under the Illinois Survival Act." *Eisenmann*, 567 F. Supp. at 1354. The district court found that application of the discovery rule to survival actions was consistent with the supreme court's position that "no statute of limitations will be imposed under this state's law so as to rob the victims of invidious diseases, who are unable to quickly link their injury to the perpetrator, from recourse in Illinois courts." *Id.* at 1353 (citing *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161 (1981)). The court stated:

> "A survivor takes the rights of the decedent – no more *and no less*. Therefore if the decedent would have had a cause of action during his lifetime, but for the invidious nature of his disease and his inability to link the injury to the wrongdoer, then that cause of action, when discovered, should survive his death. Adoption of any other rule will represent a relapse to the incongruous injustice which the Supreme Court expressly wanted to avoid when 'the injury caused is so severe that death results, [and] the wrongdoer's liability [is thereby] extinguished.' [Citation.] I do not believe the Illinois Supreme Court would impose on survivors the statute of limitations *constraints* which decedent's would have faced had

> they lived without also allowing them the *benefits* of the 'discovery rule' which would have inured to them had their injuries not been so severe as to cost them their lives." (Emphases in original.) *Id.* at 1354.

¶ 44 Illinois appellate courts have applied the discovery rule to survival actions. See *Wells*, 284 Ill. App. 3d at 286; *Janetis*, 200 Ill. App. 3d at 585-86. This analysis is consistent with the reasoning of Professors Dobbs, Hayden and Bublick in their treatise. "The discovery rule is now familiar in personal injury statute of limitations cases. It logically applies as well in survival actions, which are merely continuations of the personal injury claim ***." 2 Dan Dobbs, *et al.*, The Law of Torts § 379, at 528-29 (2d ed. 2011) (citing *White v. Johns-Manville Corp.*, 693 P.2d 687 (Wash. 1985)).

¶ 45 I agree with the above reasoning and would hold that because the discovery rule would apply to a personal injury action brought by an injured party who survives, it should likewise apply to a survival action brought on behalf of an injured party who did not survive. I see no rational reason to distinguish between the two.

¶ 46 II. STATUTE

¶ 47 I also dissent from the majority's decision because it conflicts with the plain language of section 13-212 of the Code.

¶ 48 The primary rule of statutory construction requires that a court give effect to the intent of the legislature. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 253 (2008). In ascertaining the legislature's intent, courts begin by examining the language of the statute, reading the statute as a whole, and construing it so that no word or phrase is

rendered meaningless. *Id.* Statutory language that is clear and unambiguous, must be given effect. *Id.*

¶ 49 Section 13-212 of the Code states that it applies to an "action for damages for injury or *death* against any physician *** or hospital duly licensed under the laws of this State." (Emphasis added.) 735 ILCS 5/13-212(a) (West 2010). Section 13-212 expressly refers to "damages resulting in death." *Beetle v. Wal-Mart Associates, Inc.*, 326 Ill. App. 3d 528, 536 (2001). In order to give those words meaning, section 13-212 must be applied to wrongful death and survival actions, where the damages caused by the medical professional resulted in the death of the decedent. The majority's ruling that section 13-212 does not apply to wrongful death and survival actions requires us to disregard the plain language of section 13-212 and violate the fundamental rule of statutory construction that no word or phrase should be rendered superfluous or meaningless. See *id.*

¶ 50 The majority's conclusion that the discovery rule does not apply to wrongful death and survival actions conflicts with the plain language of section 13-212 of the Code. I dissent on that basis as well.

¶ 51 III. APPLICATION OF DISCOVERY RULE

¶ 52 Since I have found that the discovery rule can be applied to wrongful death and survival actions, I must next determine whether application of the discovery rule prevents dismissal of plaintiff's case.

¶ 53 When a complaint alleges wrongful death caused by medical malpractice, the statute of limitations begins to run when the plaintiff knows or should have known that the death was "wrongfully caused." *Young*, 303 Ill. App. 3d at 388. " '[W]rongfully caused' does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause

of action." *Id.* Rather, it refers to "that point in time when 'the injured party becomes possessed of sufficient information concerning his [or her] injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.' " *Id.* (quoting *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981)).

¶ 54 Whether a party possesses the requisite constructive knowledge that an injury or death occurred as the result of medical negligence contemplates an objective analysis of the factual circumstances involved in the case. *Id.* at 390. The relevant determination rests on what a reasonable person should have known under the circumstances, and not on what the particular party specifically suspected. *Id.* The trier of fact must examine the factual circumstances upon which the suspicions are predicated and determine if they would lead a reasonable person to believe that wrongful conduct was involved. *Id.* What the plaintiff knew or reasonably should have known after viewing the medical records available and the factual circumstances presented, and whether based on that information plaintiff knew or reasonably should have known that the decedent's death may have resulted from negligent medical care, are questions best reserved for the trier of fact. *Id.*

¶ 55 When it is not obvious that death was caused by medical negligence, the statute of limitations begins to run when the plaintiff receives a report from a medical expert finding negligence against any medical professional who treated the decedent. See *Clark v. Galen Hospital Illinois, Inc.*, 322 Ill. App. 3d 64, 74-75 (2001); *Young*, 303 Ill. App. 3d at 389; *Wells*, 284 Ill. App. 3d at 287. A plaintiff need not know of a specific defendant's negligence before the limitations clock begins to run against that defendant. See *Castello v. Kalis*, 352 Ill. App. 3d 736, 748-49 (2004); *Wells*, 284 Ill. App. 3d at 289.

¶ 56 Here, Kathryn died on May 29, 2009. On May 1, 2011, plaintiff received a report from Dr. Boyd stating that Dr. Williamson and Dr. Salimath were negligent in treating Kathryn. Nine days later, plaintiff filed a medical negligence complaint against Dr. Williamson and Dr. Salimath. In February 2013, a radiologist reviewed Kathryn's May 24 CT scan and determined that Dr. Rhode was negligent. In March 2013, plaintiff filed his medical negligence complaint against Dr. Rhode and Central Illinois Radiological Associates, Ltd.

¶ 57 The relevant inquiry is not when plaintiff became aware that Dr. Rhode may have committed medical negligence but when plaintiff became aware that any defendant may have committed medical negligence against Kathryn. See *Wells*, 284 Ill. App. 3d at 287-89. Based on the circumstances in this case, a reasonable trier of fact could conclude that plaintiff did not possess sufficient information to know that Kathryn's death was wrongfully caused until May 1, 2011, when he received Dr. Boyd's report finding that Dr. Williamson and Dr. Salimath were negligent. See *Clark*, 322 Ill. App. 3d at 74; *Young*, 303 Ill. App. 3d at 389; *Wells*, 284 Ill. App. 3d at 287. "What plaintiff knew or reasonably should have known after viewing the medical records available and the factual circumstances presented, and whether based on that information plaintiff knew or reasonably should have known that [his mother's] death may have resulted from negligent medical care are questions best reserved for the trier of fact." *Young*, 303 Ill. App. 3d at 390. Because a disputed question of fact remains about when the statute of limitations began to run against defendants, I would reverse the trial court's dismissal of plaintiff's complaint. See *id.*; *Clark*, 322 Ill. App. 3d at 75.

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 735. Civil Procedure
Act 5. Code of Civil Procedure (Refs & Annos)
Article XIII. Limitations
Part 2. Personal Actions

735 ILCS 5/13-212
Formerly cited as IL ST CH 110 ¶13-212

5/13-212. Physician or hospital

Effective: January 1, 2015
Currentness

§ 13-212. Physician or hospital.

(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.

(b) 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 8 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 where the person entitled to bring the action was, at the time the cause of action accrued, under the age of 18 years; provided, however, that in no event may the cause of action be brought after the person's 22nd birthday. If the person was under the age of 18 years when the cause of action accrued and, as a result of this amendatory Act of 1987, the action is either barred or there remains less than 3 years to bring such action, then he or she may bring the action within 3 years of July 20, 1987.

(c) If the person entitled to bring an action described in this Section is, at the time the cause of action accrued, under a legal disability other than being under the age of 18 years, then the period of limitations does not begin to run until the disability is removed.

(d) If the person entitled to bring an action described in this Section is not under a legal disability at the time the cause of action accrues, but becomes under a legal disability before the period of limitations otherwise runs, the period of limitations is stayed until the disability is removed. This subsection (d) does not invalidate any statute of repose provisions contained in this Section. This subsection (d) applies to actions commenced or pending on or after the effective date of this amendatory Act of the 98th General Assembly.

Credits

P.A. 82-280, § 13-212, eff. July 1, 1982. Amended by P.A. 82-783, Art. III, § 43, eff. July 13, 1982; P.A. 83-235, § 1, eff. Sept. 8, 1983; P.A. 85-18, § 1, eff. July 20, 1987; P.A. 85-907, Art. II, § 1, eff. Nov. 23, 1987; P.A. 86-1329, § 4, eff. Jan. 1, 1991; P.A. 98-1077, § 5, eff. Jan. 1, 2015.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 13-212.

735 I.L.C.S. 5/13-212, IL ST CH 735 § 5/13-212
Current through P.A. 99-487 of the 2015 Reg. Sess.

End of Document

MR. MOON: I said, all right, your Honor.

THE COURT: It's, you know, it's a good question. I have to go one way or the other. No court ever wants to dismiss a case on anything less than the merits of the case, but sometimes we have to. And under the case law and the situation as presented, I believe the statute has expired. The motion's granted. The case is dismissed with prejudice.

I actually think that the date of death is the date from which the two-year statute should be measured as argued by Mr. Thompson. But I also agree with Mr. Thompson that, even if we were to give everybody the benefit of the doubt and try to fix a date at which a reasonable person was placed on inquiry as to whether there was malpractice, even that was long gone by the time the complaint was filed. So there you go. Please write it up, gentlemen.

MR. THOMPSON: Thank you, your Honor.

THE COURT: Good luck to everybody.

MR. MOON: Thank you, your Honor.

(End of electronically recorded proceedings.)