№ 120745

In the

Supreme Court of Illinois

SHERI LAWLER, Executor of the Estate of Jill Prusak, Deceased,

Plaintiff—Appellee,

v.

THE UNIVERSITY OF CHICAGO MEDICAL CENTER, et al.,

Defendants—Appellants.

On Appeal to the Supreme Court of Illinois, from the Appellate Court of Illinois, First Judicial District, there pending as matter No. 1-14-3189, and heard there on appeal from the Circuit Court of Cook County, Illinois, there pending as matter № 11 L 008152. Honorable **Daniel T. Gillespi**, Judge Presiding

BRIEF and ARGUMENT of PLAINTIFF-APPELLEE

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ORAL ARGUMENT REQUESTED

POINTS and AUTHORITIES

I.
THE APPELLATE COURT CORRECTLY UNDERSTOOD AND APPLIED ILLINOIS LAW IN REACHING ITS DECISION IN THIS CASE

A. There is no substantial conflict between the statutes.

B. This Court has historically understood the relation-back doctrine to apply to every kind of time-bar

C. The appellate court was correct in holding that a wrongful death case could relate back under Illinois law

D. The decision that the death claim relates back is supported by the decisions of this Court

E. The opinions of other jurisdictions also support the decision in this case

II
THE DEFENDANTS' ARGUMENTS ARE INCORRECT AND UNPERSUASIVE

A. A statutory exception is not required for Plaintiff's claim to relate back

B. There is no merit to the Defendants' contention that the legislative concern about long-tail exposure precludes application of the relation-back doctrine

C. A wrongful death claim qualifies for the relation-back doctrine

D. The Defendants' case citations are inapposite and distinguishable

III
THE AMICUS BRIEF OFFERS NOTHING PERSUASIVE

BRIEF AND ARGUMENT OF PLAINTIFF-APPELLEE

PLAINTIFF'S STATEMENT OF ISSUES PRESENTED

Plaintiff believes that the "Issues Presented" section of the Defendants' Brief does not conform to the spirit or the letter of this Court's Rule 341(h)(3) in that it is argumentative and fundamentally incorrect. Plaintiff believes that the proper issue for review in this case is the one that the appellate court decided:

Whether a wrongful death claim added by amendment to a timely filed and pending lawsuit, is barred by 735 ILCS 13-212(a) if the decedent dies more than four years after her last treatment by the Defendants, even if all the allegations of negligence are identical to those first made by the decedent in her original timely complaint.

ARGUMENT

I.
THE APPELLATE COURT CORRECTLY UNDERSTOOD AND APPLIED ILLINOIS LAW IN REACHING ITS DECISION IN THIS CASE

The appellate court was correct. The wrongful death of Jill Prusak properly related back to the time of filing of her complaint for the medical negligence that ultimately caused her death. The appellate court correctly understood that Defendants' arguments did not appreciate the real nature and function of section 735 ILCS 5/2–616(b), the relation-back statute, or the scope of section 735 ILCS 5/13-212(a), which contains the four-year repose language. The appellate court was further correct in determining that there was no substantial conflict between these two statutes, for reasons that must be immediately clear as soon as their language is properly understood.

A. There is no substantial conflict between the statutes.

Section 735 ILCS 5/13-212(a), the statute of limitations as to health care providers has, in that single section, two different time limitations. The first is that a claim must be brought within 2 years from when the claimant knew, ought to have known, or had been given notice in writing of the existence of the injury or death for which damages are sought—this is commonly referred to as the medical malpractice statute of limitations. The second part is a qualification of the first part, and states that "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." This language is 5/13-212(a) is commonly referred to as the statute of repose. Its operation is not dependent on when or whether the claimant knew about the wrongful injury. In order to avoid the operation of this or any statute of repose it is necessary for the claimant's action to be brought within the time allowed. If an action has been brought within this time, the statute has been satisfied.

Bringing an action within the prescribed time also fulfills one of the requirements of the other statute which is involved in the case at bar, section 735 ILCS 5/2–616, Illinois' amendment law. Section 2-616(b) provides in pertinent part that "[t]he cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, *if the time prescribed or limited had not expired when the original pleading was filed...*" Emphasis added. Hence, these two statutes are not inconsistent; they both require that the original action be brought within the time allowed.

Defendants have filled their Appellants' Brief with cases in which the claimants did not bring their actions within the time allowed, and where the issues involved were whether the claim did or did not fall within the statute of repose. Their cases did not concern and had nothing to do with relation-back, because none of the actions were timely filed to begin with. But once an action has been timely filed, the statute of repose has been satisfied and has no further part to play. As this Court said in *Metropolitan Trust Co. v. Bowman Dairy Co.*, 369 Ill. 222, 230 (1938), a time barring statute "applies to the commencement of a suit and has no application to matters of pleading or procedure thereafter." The Defendants' undue focus on the statute of repose is misdirected.

B. This Court has historically understood the relation-back doctrine to apply to every kind of time-bar.

The *Bowman Dairy* case was the first to extensively analyze what became our modern relation-back doctrine. It was discussed at length by this Court in *Simmons v. Hendricks*, 32 Ill.2d 489, 494-97 (1965), and was the basis for *Simmons* court's holding that the claim before it related back. The Defendants mention *Bowman Dairy* at page 19 of their Brief as standing for the proposition that the relation-back statute was not meant to include causes of action before they exist. Defendants' comment does not accurately portray this Court's opinion or its importance for the case at bar, since *Bowman Dairy* not only gave a full analysis of the scope of the relation-back doctrine, but approved the relation back of a wrongful death claim against many of the same sorts of objections that the Defendants have advanced in this case. It is also the source of this Court's later reasoning in *Simmons v. Hendricks*, 32 Ill.2d 489 (1965), and *Zeh v. Wheeler*, 111 Ill.2d 266 (1986), which follow *Simmons'* reasoning closely.

The Defendants criticize the appellate court's reliance on *Simmons v. Hendricks*

saying that because it was decided before the four-year language was added to section 5/13-212(a) it therefore is irrelevant to the case at bar. Def. Br. at 21. The Defendants are, however, mistaken. *Simmons* is a leading case that this Court specifically relied upon in *Zeh v. Wheeler*, 111 Ill.2d 266, 273 (1986). In *Zeh*, this Court had occasion to examine the history of the relation-back doctrine in Illinois from its inception up until that time. It noted in particular that the 1933 amendment to the Civil Practice Act replaced section 39 with section 46 which materially enlarged the doctrine.

> The 1933 amendment omitted the words 'and is substantially the same as' so that amendments could be made if the matter introduced by the amended pleading 'grew out of the same transaction or occurrence set up in the original pleading.' The 1933 Civil Practice Act thus shifted from the common law requirements...that the original pleading technically state a cause of action and that the amended pleading set up the same cause of action as the original pleading to a test of identity of transaction or occurrence."

Zeh 111 Ill.2d at 272-73, *internal citations omitted.* Relying on *Simmons*, 32 Ill.2d 489, the Court continued: "The legislative change was based on the rationale that 'a defendant has not been prejudiced so long as his attention was directed, within the time *prescribed* or limited, to the facts that form the basis of the claim asserted against him.' " *Id.* at 273, emphasis added. This is the essence of the modern view. Hence, it was clear that the *Zeh* court, and the *Simmons* court before it, recognized that the relation-back doctrine was intended to apply to every kind of time prescription, whether limitation or repose or even the kind involved in the Wrongful Death Act, where the right to sue is not, strictly speaking, limited but exists for only a period of time authorized by the creating statute. We see this clearly from the following language in *Simmons*, 32 Ill.2d at 494-95 [internal citations omitted, emphasis added]:

> By its express terms [then] section 46 applies to '*any statute* or contract *prescribing* or limiting *the time* within which an action may be *brought* or right asserted.' The section is thus applicable whether a particular time limitation is regarded as a *prescription governing the right to sue* or as a statute of limitations. The leading case upon the construction of section 46 is *Metropolitan Trust Co. v. Bowman Dairy Co.*, 369 Ill. 222, 15 N.E.2d 838, in which this court held squarely that the section *is applicable to a wrongful death action.*
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> After a full analysis of section 46, the court in the *Bowman Dairy* case stated the only test to be applied in determining whether an amendment relates back to the date of filing the original complaint: 'The sole requirement of that paragraph (paragraph (2) of section 46) is that the cause of action set up in the amendment grew out of the same transaction or occurrence set up in the original pleading.

Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222 (1938) arose from plaintiff's effort to amend at trial to include a new cause of action for wrongful death under the [then] Injuries Act after the expiration of the time for filing such claims. Bowman objected that a new cause of action was beyond the [then] one-year statutory time for death actions. The amendment was allowed, and judgment ultimately entered against the defendant. In that case, this Court held that the relation-back statute could apply to wrongful death cases, and in so doing gave full consideration to the fact that a wrongful death case is not only subject to underlying time statutes, but the right to sue expires by the creating statute's own terms. There, this Court wrote [369 Ill. at 225-26, 230 (internal citations omitted, emphasis added)]:

> The [then] Injuries Act first became a law in this State in 1853....Under that act we have uniformly held that the time fixed by it for commencing an action for wrongful death *is not a statute of limitations, but is a condition of the liability itself.* It is a condition precedent attached to the right to sue at all, and being so, the plaintiff must bring himself within the prescribed requirements necessary to confer the right of action.
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> The amendment in this case qualifies under all the requirements of section 46. Therefore, it relates back to the filing of the declaration and is not barred by the limitation in the Injuries Act....The Injuries Act applies to

> the *commencement of a suit and has no application to matters of pleading or procedure thereafter.* The trial court correctly allowed the amendment to be filed.

From the foregoing language, as well as this Court's language in *Simmons* and *Zeh*, it is manifest that section 5/2-616(b) was intended to and does apply to wrongful death actions, and also that the appellate court was correct when it considered the relation-back statute itself, noting its provision that a "cause of action...set up in any amended pleading shall not be barred by lapse of time *under any statute* or contract prescribing or limiting the time within which an action may be brought or right asserted..." *Lawler v. University of Chicago Medical Center*, 2016 IL App (1st) 143189, ¶31, emphasis the court's. Accordingly, the appellate court's reliance on *Simmons* was appropriate, and its decision should be affirmed.

C. The appellate court was correct in holding that a wrongful death case could relate back under Illinois law.

Although they dress it up in many different ways, and approach it from many different angles, the Defendants have only a few arguments to make in support of their contention that the wrongful death claim should not relate back to the time of filing in this case. Essentially, what the Defendants are telling this Court is: First, that wrongful death cases should not relate back because of their nature—they did not exist at the time of the injurious conduct or even when the complaint was originally filed; in short the statute did not intend to rescue nonexistent claims. Next, that the statute of repose is, by kind, not subject to relation-back because its purpose is to avoid increased liability for medical malpractice insurers, which purpose is defeated if additional claims can be added to the case after the four years have elapsed. There is no Illinois case to support either of

these contentions. On the contrary, Illinois law clearly points in the other direction, as the appellate court recognized.

The appellate court was correct in determining that the medical statute of repose did not prevent an otherwise proper claim from relating back despite the legislative history of that statute, which included a desire to limit liability for physicians because of the then perceived "insurance crisis." *Lawler*, at ¶26. But Plaintiff must note that the legislature's concern is reflected in the relatively short period of time allowed for filing the original complaint, not in an *animus* to curtain amendments. There is no language in 5/13-212(a) dealing with amendments after the case has been filed. This language of the statute of limitation, "whether based upon tort, or breach of contract, or otherwise, arising out of patient care," has been understood to refer to those theories of recovery to which the statute extends, and to represent a legislative intent to embrace all theories of recovery against medical providers, not just the theories of damages or breach of contract that were commonly used at the time of the statute's enactment. This is clear from the decision and discussion in *Hayes v. Mercy Hospital & Medical Center*, 136 Ill. 2d 450 (1990), where this Court interpreted the "or otherwise" language as embracing an action for contribution (unknown in Illinois at the time section 5/13-212(a) was enacted) within the four year time for filing. *Hayes*, 136 Ill.2d at 458-59. Clearly, the term "or otherwise" is not meant to be a limitation on the amendment of existing cases. In fact, section 5/13-212(a) specifically states that its terms apply to "injury or death," making no distinction between the two. Statutes are to be given their ordinary meaning [*Roselle Police Pension Board v. Village of Roselle*, 232 Ill.2d 546, 552 (2009)], and it is clear that section 5/13-212(a) places actions for injuries and for wrongful death on an equal footing. It makes no

distinction between them with respect to its terms. And therefore the appellate court was acting reasonably when it considered those numerous cases that have allowed amendments to relate back against the repose section of 5/13-212(a) even though those cases did not involve wrongful death.

The appellate court correctly found that the principles regarding the relation-back doctrine applied to medical malpractice cases, noting particularly *Cammon v. West Suburban Hospital Medical Center*, 301 Ill.App.3d 939, 947 (1998); *Castro v. Bellucci*, 338 Ill.App.3d 386, 394–95 (2003); *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 153, 161 (2002); and *McArthur v. St. Mary's Hospital of Decatur*, 307 Ill.App.3d 329, 335-36 (1999). *Lawler*, at ¶53-54. The appellate court could have mentioned others as well: *Marek v. O.B. Gyne Specialists II, S.C.*, 319 Ill.App.3d 690, 700 (2001); *Compton v. Ubilluz*, 351 Ill. App. 3d 223, 231-32 (2004); and *Frigo v. Silver Cross Hospital and Medical Center*, 377 Ill. App. 3d 43, 58-59 (2007). In all these cases, amendments were allowed later than four years after the occurrence; many of them clearly involved not only a change of theory, but potentially an enlargement of the defendants' liability. See below at pages 20-22, and 30-31. Accordingly, there is a whole body of Illinois law that supports the appellate court's determination that Illinois' relation-back doctrine applies to the medical malpractice statute of repose just as it does to other time bars. And since section 5/13-212(a) treats injury and death claims alike, there is no reason to suppose that the same rule would not apply to wrongful death cases as well. Accordingly, the appellate court was not wrong in considering the case of *Sompolski v. Miller*, 239 Ill.App.3d 1087 (1992) in reaching the conclusion it did. *Lawler*, at ¶¶46-49.

In *Sompolski*, where the plaintiff died of the injuries sustained in an automobile accident after three years, the court rejected the defendants' argument that the recovery for plaintiff's death was a "new claim." *Sompolski* at 1092. Defendants fault the appellate court for relying on *Sompolski,* but in that well-reasoned opinion, repeatedly cited with approval and never criticized, the court answered the question of whether wrongful death claims fell within the scope of section 2-616(b). The panel correctly appreciated the rationale of that case, and that it applied with equal force to the case at bar—that a death that proximately arose from the occurrence which was already the subject of a timely pending injury suit was not a new action in the terms of section 5/2–616, and that if the elements of section 5/2-616(b) were otherwise met, relation back was proper. *Lawler,* at ¶¶46-49.

D. The decision that the death claim relates back is supported by the decisions of this Court.

The appellate court's application of the requirements for relating back an amendment were absolutely correct, and closely followed the rules set forth by this Court. In order for an amendment to relate back to the filing of the original complaint, it is no longer necessary to establish that the amendment involves the same cause of action, but rather that it arose from the same occurrence or transaction that gave rise to the timely filed action. The panel correctly noted this Court's language in *Zeh v. Wheeler*: "that section 2–616(b) no longer required that the original and amended pleadings state the same cause of action." *Lawler,* at ¶33. The appellate court then continued [at ¶34, some citations omitted]:

> The Zeh court further explained that "the legislature's reason for this change was its belief that defendants would not be prejudiced by the addition of claims so long as they were given the facts that form the basis

> of the claim asserted against them prior to the end of the limitations period." "This emphasis on the identity of the occurrence rather than the identity of the cause of action still provides protection to defendants because, as long as they are aware of the occurrence or transaction that is the basis of the claim, they can be prepared to defend against that claim, whatever theory is advanced." Thus, the critical inquiry becomes "'whether there is enough in the original description to indicate that plaintiff is not attempting to slip in an entirely distinct claim in violation of the spirit of the limitations act.'" Simmons, 32 Ill.2d at 497, 207 N.E.2d 440 (quoting Oliver L. McCaskill, Illinois Civil Practice Act Annotated, 126–127 (Supp. 1936)).

The appellate court's reasoning also comports well with this Court's later decision in *Porter v. Decatur Memorial Hospital*, 227 Ill.2d 343, 358 (2008), in which this Court said: "Illinois courts are liberal in allowing amendments to the pleadings after the running of the limitations period and that the Code reflects the modern approach to pleading of resolving litigation on the merits and the avoidance of elevating questions of form over questions of substance." The Court further wrote [*Id.* at 355, internal citations omitted]:

> The purpose of the relation-back doctrine of section 2–616(b) is to preserve causes of action against loss by reason of technical default unrelated to the merits. Courts should therefore liberally construe the requirements of section 2–616(b) to allow resolution of litigation on the merits and to avoid elevating questions of form over substance. Additionally, both the statute of limitations and section 2–616(b) are designed to afford a defendant a fair opportunity to investigate the circumstances upon which liability is based while the facts are accessible. Thus, it has been stated that the rationale behind the "same transaction or occurrence" rule is that a defendant is not prejudiced if " 'his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him.' "

Hence, the reasoning of this Court supports the decision at bar, and the many appellate decisions that the medical malpractice statute of repose did not create any special hindrance to relation back. As the appellate court noted in *Avakian v. Chulengarian*, 328

Ill. App. 3d 147 at 154 (2002): "Medical malpractice plaintiffs, in particular, are afforded every reasonable opportunity to establish a case, and to this end, amendments to pleadings are liberally allowed to enable the action to be heard on the merits rather than brought to an end because of procedural technicalities."

The Court will recall that the Defendants have criticized the appellate court for deciding that they would not be prejudiced by allowing the amendment, saying that notice and the absence of prejudice are not part of the statute of repose. Def. Br. at 20-21. But as can be seen from the foregoing, these considerations *are* part of the determination of whether relation back will be allowed. Since the case before the appellate court was not whether the complaint had been timely filed, but whether the amendment would relate back to that timely filing, the appellate court's consideration of notice and prejudice was appropriate and its decision was proper. *Lawler*, at ¶54. The Defendants' contention that consideration of adequate notice supports its claim that the appellate court's analysis was flawed is altogether without merit.

E. The opinions of other jurisdictions also support the decision in this case.

Plaintiff believes that the correctness of the appellate court's decision is manifest from the foregoing. Amendments are to be liberally allowed so that matters can be heard on the merits. Even new and different causes of action can be alleged, so long as they are firmly rooted in the same transaction or occurrence as gave rise to the original case—or as this Court has even more liberally held in *Porter v. Decatur Memorial Hospital*: "Section 2–616(b) itself was largely designed to notify a party that claims will be asserted that grow out of the general fact situation set forth in the original pleading." 227 Ill.2d at 362. In *Porter*, this Court reversed the refusal to allow an amendment because the circuit

and appellate court had taken too narrow a view of what was required for section 2–616(b) to apply. In ruling, the Court noted of its earlier decision in *Huntoon v. Pritchard*, 371 Ill. 36 (1939), which had been decided the year after, and had relied upon *Bowman Dairy*. *Id.* at 56. In adopting the more liberal standard for relation back ("the general fact situation set forth in the original pleading," rather than the "same transaction or occurrence"), this Court hoped to give guidance to lower courts of Illinois with respect to how broadly Section 2–616(b) should be interpreted. *Id.* at 362. In short, since the modern relation-back statute was first enacted in Illinois, this Court has consistently stood for liberal allowance of amendment, so long as "a defendant should not be required to defend against stale claims of which he had no notice or knowledge." *Zeh*, 111 Ill.2d at 274. This Court held in *Simmons* that the relation-back statute, by its express terms "applies to 'any statute or contract prescribing or limiting the time within which an action may be brought or right asserted.' The section is thus applicable whether a particular time limitation is regarded as a prescription governing the right to sue or as a statute of limitations." citing *Metropolitan Trust Co. v. Bowman Dairy Co.*, 369 Ill. 230, "in which this court held squarely that the section is applicable to a wrongful death action." *Simmons*, 32 Ill.2d at 494. Accordingly, it seems clear to Plaintiff that the appellate court's decision in the case at bar was manifestly correct and consistent with opinions of this Court, and should now be affirmed, thereby joining Illinois with the other jurisdictions that have already held that a death case properly relates back, even after the expiration of a statute of repose, where the death arises from the same conduct that is the subject of a pending suit for injury.

This Court may give consideration to the opinions and reasoning of sister jurisdictions, especially when deciding a question of first impression in Illinois. *Prince v. Indus. Commission*, 15 Ill. 2d 607, 611–12 (1959); *People v. Mills*, 40 Ill. 2d 4, 11–12 (1968); *In re Marriage of Baumgartner*, 237 Ill. 2d 468, 475–76 (2010). Two other jurisdictions have squarely faced the question of whether a wrongful death case can relate back when the death has occurred after the expiration of a repose period, but while a case has been pending for the medical negligence that allegedly gave rise to the death. Plaintiff believes that these decisions are worthy of this Court's consideration.

Sisson v. Lhowe, 460 Mass. 705, 954 N.E.2d 1115 (2011), is a contemporary decision of the Supreme Judicial Court of Massachusetts, and involves legal concepts similar or identical to those of Illinois, and facts highly reminiscent of those in the case at bar. There, the court was faced with a situation in which the plaintiff's wife had from osteosarcoma and the complaint for medical malpractice in a pending action against the defendants was amended to include a claim for wrongful death. The wrongful death claim in the amended complaint was dismissed as time barred pursuant to Massachusetts' statute of repose, G.L. c. 260, § 4. *Sisson*, like the case at bar, was a case of first impression for the Massachusetts' court, which wrote [*Id.* at 706]:

> Although we have had several opportunities to discuss the statute of repose in the context of claims for medical malpractice, we have not previously addressed the question whether a plaintiff may, after the period of time set forth in the statute of repose has expired, amend a complaint alleging medical malpractice to add a claim for wrongful death where the underlying complaint alleged medical malpractice resulting in injury including expected premature death. We answer in the affirmative and conclude that the wrongful death claim should not have been dismissed.

Reviewing the language of *Sisson* as a whole, the similarities to the case at bar are seen to be numerous. First, the Massachusetts statute itself is, like Illinois': a combination of

statute of limitation based on discovery (three years) and a statute of repose (seven years) which provides that "in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based." *Id.* at 708. Just as in Illinois, under Massachusetts law the limitations time runs when the injury became known, while the statute of repose runs "regardless of whether a cause of action has accrued or whether any injury has resulted." *Id.* at 709. And like this Court's definition in *Porter*, the focus is on "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person," noting that various remedial claims which may be made as a result of the negligent act are not the concern of the statute of repose, so long as the original malpractice complaint (or action) was filed within the seven-year period that begins to run from the date of the negligent acts or omissions. 709-10.

The *Sisson* court then discussed the general purpose of a statute of repose, writing that "[t]he object of a statute of repose, as stated by Justice Story, 'is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, or their representatives, when all the proper vouchers and evidences are lost, or the facts have become obscure, from the lapse of time, or the defective memory, or death, or removal of witnesses.' " *Id.* at 712. Interestingly, virtually the same language was used by our appellate court in *Desiron v. Peloza*, 308 Ill. App. 582, 587-88 (1941), cited with approval by the Court in *Demchuk v. Duplancich*, 92 Ill. 2d 1, 6 (1982). However, the *Sisson* court was also aware that a troubling circumstance had arisen from Massachusetts having enacted a modern statute of limitations that appreciated that the

fact of medical negligence might not be immediately known, making it appropriate to tie the statute of limitations to the time as the right of action became reasonably knowable. Accordingly the *Sisson* court wrote [*Id.* at 712-13, internal citations omitted]:

> We have previously had occasion to discuss both the history and legislative purpose behind the enactment of G.L. c. 260, § 4, and G.L. c. 231, § 60D (pertaining to minors). We have noted that the Legislature's primary concern in enacting the statute of repose was to prevent claims of malpractice in circumstances where claims made stale through the passage of time would increase costs to defendants, and thereby to insurers.
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> In 1986, the special commission created to investigate the issue reported that "extraordinary premium increases" resulting from a surge in medical malpractice claims was contributing to a "crisis."
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> * * *
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> We have noted also that "[t]he statute of repose was not passed in isolation, but as 'part of a larger, long-term effort to curb the cost of medical malpractice insurance and keep such insurance available and affordable.'"

Hence, it is quite clear that the *Sisson* court was faced with the same circumstances that confront this Court—a statute of repose the historical reasons for which are augmented by a present concern about the impact of remote claims upon insurers as well as the defendants themselves.

This is the context in which the Massachusetts high court undertook to decide the issue before it. It noted that "the defendants contend that, considered in the context of the entire statutory scheme, claims for personal injury and wrongful death are distinct "causes of action," and, because the statute of repose is not subject to tolling, the filing of a complaint within the statute of limitations that alleges personal injury does not toll the period of repose for an action premised on wrongful death." *Id.* at 707. This is the identical position taken by the Defendants in the case at bar. And as noted above, the *Sisson* court determined (one justice dissenting) that the wrongful death case did relate

back. In view of the legal and factual similarities with the case at bar, Plaintiff is confident that this Court will be interested in the reasons for that decision. The *Sisson* court wrote [*Id.* at 714-15]:

> In the circumstances presented here, none of the purposes of the statute repose discussed, supra, would be served by dismissing the plaintiffs' wrongful death claim. The additional costs associated with defending stale claims do not manifest where a plaintiff dies during the pendency of a malpractice suit and the parties proceed to trial based on a claim of wrongful death, rather than personal injury. Regardless of whether a claim is for personal injury or wrongful death, where both claims are based on the facts supporting the malpractice action, the liability issue to be resolved remains the same, as will any problems of proof encountered by defendants during a pending action.... [T]here is no concern that the defendants' insurers in this case will be called on to defend medical providers in unexpected lawsuits; the insurers are already on notice of the timely filed claim, the defendants have not yet been adjudged liable, and the relevant insurers have not disbursed any funds. The defendants had already conducted nearly two years of discovery before the plaintiffs amended their complaint, and there is no concern that evidence favorable to the defendants' case will now be difficult to discover. Nor are legitimate concerns of finality disturbed, since the lawsuit was pending when Dawn died.

The logic of that decision is clear and its applicability to the case at bar is beyond dispute, and Plaintiff believes that the logic and rationale exhibited in this opinion is worthy of this Court's consideration and approval.

Georgia is the other jurisdiction approving relation back of a wrongful death claim occurring after the expiration of the medical malpractice statute of repose, which in a 2007 opinion affirmed the denial of a summary judgment brought on statute of repose grounds. *Wesley Chapel Foot and Ankle Center v. Johnson*, 286 Ga.App. 881, 650 S.E.2d 387 (2007)(three justices dissenting). Like *Sisson*, the similarity of the operative law to Illinois' was considerable, Georgia having both a statute of limitations capped by a five-year statute of repose that provided that "Notwithstanding subsection (a) of this Code

section (which creates a two-year statute of limitation for medical malpractice claims), in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." *Id.* at 883. In that case, the plaintiff's husband, a diabetic, died of complications of a leg amputation that was the subject of a pending negligence suit. The defendant had argued that because Mrs. Johnson brought her wrongful death claim by filing her amended complaint more than five years after the alleged negligence, the wrongful death claim was barred by the medical malpractice statute of repose, even though she filed the wrongful death claim as an amendment to a pending action that had timely asserted against the same defendants other claims arising out of the same alleged medical malpractice. *Id.* at 882. The court continued, "But Mrs. Johnson's wrongful death claim did not initiate legal proceedings against Dr. Byrd for his diagnosis and care of Mr. Johnson; rather, Mrs. Johnson filed her wrongful death claim as an amendment to...a pending action that timely asserted other claims arising out of the same alleged medical malpractice." *Id.* at 884. Based upon this reasoning, the court concluded [*Id.* at 884]:

> In summary, Mrs. Johnson brought her wrongful death claim within two years after the date on which Mr. Johnson died, by filing an amendment to a medical malpractice action that timely asserted other claims arising out of the same alleged medical malpractice, where such action had been pending since before the expiration of five years after the date on which the negligent or wrongful act or omission occurred and when Mrs. Johnson was entitled to amend her pleading as a matter of course and without leave of court. Under these circumstances, Mrs. Johnson's wrongful death claim is timely both in terms of the statute of repose and the statute of limitation. As a result, the trial court correctly denied [defendant's] motion for summary judgment on this basis.
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> We conclude that this result is consistent with the stated purpose of the medical malpractice statute of repose. As set forth in OCGA § 9-3-73(f), the General Assembly intended the medical malpractice statutes of repose

> and limitation to serve "the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole."

Again, as in *Sisson*, the facts and the law are similar to what confronts the Court at this time; the conclusion is reasonable and the rule is just. Where the negligence of defendants causes the plaintiff's injury and ultimately her death, they should not be entitled to a windfall by walking away from the damages arising from that death while likewise being excused from the injured party's damages that have now ended by that selfsame wrong. In all these cases, the touchstone is that an action for the negligence has been timely brought, which is all that is necessary to satisfy the terms, policy, and concerns of the statute of repose. The opinions from these sister states and of our own appellate court are in agreement, and Plaintiff asks that this Court join the other jurisdictions that have subscribed to the rational and just rule that permits the wrongful death claim to relate back under such circumstances as those in the case at bar.

II
THE DEFENDANTS' ARGUMENTS ARE INCORRECT AND UNPERSUASIVE

A. A statutory exception is not required for Plaintiff's claim to relate back.

Contrary to Defendants' argument, there does not need to be an express exception to the statute of repose for relation back. It is not an exception; the statute of repose curtails when a case can be filed, not whether it can relate back. The simple fact is that section 5/13-212 governs the time in which an action can be originally brought. After that its work is done. Section 5/2-616(b) deals with whether an action, already timely brought,

can have an amendment relate back to the date of its original filing. On page 29 of their Brief, the Defendants present a "straw man" argument that Plaintiff says that the principles of limitations and repose are interchangeable. That has never been the Plaintiff's position. The Plaintiff's position is that their differences do not impact the operation of the relation-back statute. The relation-back statute, by its express terms, is clearly meant to include every type of time prescription. *Simmons v. Hendricks*, 32 Ill.2d 489, 496-97 (1965); *Boatmen's National Bank v. Direct Lines, Inc.*, 167 Ill.2d 88, 102 (1995). It is not an exception to the time limitations of the medical malpractice or any other time limiting statute, since these control *when* a case must be filed, not what happens *after* a case is filed. Accordingly, the Defendants' arguments [Def. Br. at 34-38] that the relation-back statute is an exception to the statute of repose that the legislature did not contemplate, and therefore does not apply to the repose section of 5/13-212(a), and that if the legislature had intended such an exception it would have provided for it, are without merit. To reiterate, section 5/13-212(a), like all time-barring statutes, concerns when an action can be brought. Here, an action *was* brought within the time allowed. No exception is needed because the time for filing has been satisfied.

The Defendants spend considerable time discussing which statute controls when a conflict exists. In their brief they discuss numerous cases in which these rules have been relevant. Def. Br. at 32-33. The difficulty is, however, that all these cases concern competing time periods for when an action can be brought. For example, they cite *Walsh v. Berry –Harlem Corp.*, 272 Ill.App.3d 418, 426 (1995), in which the court had to decide between section 5/13-212 and statute of limitations for cases under the Consumer Fraud Act in a case involving when a case must be filed. That, however, is not the issue in this

case. The Defendants repeatedly observe in their brief that section 5/13-212(a) requires that an action be *brought* within the four-year period. Cases that discuss section 5/13-212(a)'s interaction with other statutes prescribing a different time period have no relevance to the case at bar—the action in this case was brought within the time allowed.

The Defendants act as if this were the first case that sought to introduce a different claim into the case after the statute of repose had expired and was something not previously met with in Illinois law. That is simply not true.

In *Avakian v. Chulengarian*, reversing dismissal of new counts filed after the expiration of the medical statute of repose, the court said [328 Ill. App. 3d at153]:

> Section 2–616(b) provides that an amended claim will not be barred by the statute of repose, even if filed outside the four-year period, as long as it relates back to an original timely filed complaint.

In *Marek v. O.B. Gyne Specialists II, S.C.*, 319 Ill.App.3d 690 (2001), the decision that an amendment was barred by the four-year repose provision of section 13-212(a) was reversed. Finding that the new allegations related to the same transaction that was alleged in the original complaint, and that the plaintiff was not trying to slip in a different factual claim, the court held that the amendment related back, saying [*Id.* at 700, internal citations omitted]:

> We also note that *McArthur*, *Cammon* and the language of section 2–616(b) do not require that the allegations in a particular count of an original complaint correspond to the same defendant in an amended complaint for the relation-back doctrine to apply. Rather, the focus is on the identity of the transaction or occurrence on which the causes of action are based. Thus, we conclude that the allegations against O.B. Gyne relating to the December 17, 1994, mammography report are not time-barred because they relate back to the original complaint.

Likewise, in *Cammon v. W. Suburban Hosp. Med. Ctr.*, 301 Ill. App. 3d 939 (1998), despite the fact that more than four years had elapsed, the court permitted plaintiff to

amend in order to allege new claims that related to the exploratory laparotomy that had been performed, but not to the negligent administration of drugs, since there had been no allegations even remotely suggesting a problem with drug administration in the original complaint. *Id.* at 947. But with respect to new allegations touching upon those treatments that *were* part of the original filing, the court concluded that they did "relate back to the filing of her original complaint and are not barred by the four-year statute of repose set forth in section 13-212(a) of the Code." *Id.* at 948.

Similarly, in *McArthur v. St. Mary's Hospital of Decatur*, 307 Ill.App.3d 329 (1999), the plaintiff sued a hospital and several doctors for the death of a baby due to complications during the delivery. In the original complaint, the only allegation made against the hospital was that it " '[f]ailed to implement and/or enforce a policy requiring a permanent radiographic image of all ultrasound sonogram examinations be maintained.' " *Id.* at 331. The allegations against other defendants included the failure to correctly read the sonograms and X-rays taken and the failure to diagnose the deceased infant's hydrocephalus. After discovery, and outside the limitations period, the plaintiff moved for leave to file a third amended complaint in which seven new allegations were added against the hospital, relating to the negligent interpretation of the sonogram and X-rays by one of the hospital's agents on a date different from the date specified in earlier complaints. Ultimately, the hospital was granted summary judgment, arguing that the new allegations complained of different conduct by different people than those in the original pleadings and were therefore time-barred. *Id.* at 333. On review, the court reversed because the hospital had known that the reading of the sonograms were at the heart of the plaintiff's case, and found neither prejudice nor unfair surprise to the hospital

in allowing the amended claims to relate back since the hospital already knew of the involvement of its own personnel who were reading the films. *Id.* at 336.

The concept that section 5/2-616(b) applies to the medical malpractice statute of repose is well-established in Illinois law. Defendants' argument that relation-back should not be applied is meritless. Section 5/2-616(b) is not an exception to this or any statute of repose or limitations, and Defendants' contention that, in order to be applied to section 5/13-212(a), that statute had to specifically provide for it as an exception, is without merit. Similarly meritless is Defendants' related argument that the legislative history of section 5/13-212 compels the conclusion that Illinois' relation-back doctrine does not apply this statute of repose, which Plaintiff will now address.

B. There is no merit to the Defendants' contention that the legislative concern about long-tail exposure precludes application of the relation-back doctrine.

From the foregoing authorities, it is manifest that the law in Illinois is that, while the four-year statute of repose may be an absolute bar to newly filed cases because of the Legislature's concern about long tail liability, it is no different than other statutes as respects relation back in cases where section 2-616(b) is properly applied. In the case at bar, the fact of notice was judicially admitted by the Defendants below, when counsel told the trial court: "Judge, I'm not going to sit here and tell you we weren't on notice or that there are different allegations in the amended complaint, because there is not." RP.17-18. Defendants do not claim that they were in any way surprised that Prusak died of her cancer. In all four counts, the allegations of negligence were the same [C.376, 379, 384, 390] and exactly the same as the negligence allegations in the original complaint. C.004, C.010. It is clear that Defendants have suffered no prejudice by an

amendment that does no more than allege that the original negligence is the proximate cause of the foreseeable result.

One of the grounds for Defendants' arguments is that the legislative history, as judicially commented on by this and other courts, shows the statute was intended to avoid "long tail" liability for insurance carriers. Plaintiff will address that in a moment, but first wishes to address a very specific position that the Defendants make—that the avoidance of long-tail exposure for insurance carriers was the sole and only purpose for this statute of repose, the enactment of which had nothing to do with protecting defendants from stale claims. Def. Br. at 21, 23-24. The Defendants' position is incorrect. The legislative purpose was also to protect defendants from remotely brought claims. In fact, a review of the legislative history from 1987, the time the Medical Malpractice Statute of Limitations was amended to deal with the long tail exposure from minors' claims, shows the contrary.

> "The current Statute results in the potentiality of cases being filed as many as twenty-two years after the incident was allegedly malpractice. This delay is a significant problem both because it creates an extended period of potential liability *and because it makes it difficult to get appropriate evidence.* The passage of time often results in records being lost, witnesses having died or being impossible to locate and other serious problems."

85th Ill.Gen.Assem., Senate Proceedings, May 13, 1987, at 196 (statement of Senator Marovitz), emphasis added. In fact, this Court made mention of the same comments in *Antunes v. Sookhakitch*, 146 Ill.2d 477, 492 (1992), where it summarized Senator Marovitz' statement:

> Senator Marovitz stated that the new subsection (b), with its more restrictive eight-year repose period for minors, was intended "to aid both in determining insurance rates and in the length of time for which a

> potential defendant is exposed while based on past practice not unreasonably limiting a plaintiff's ability to bring a lawsuit."

Manifestly there is no merit to the Defendants' contention that the repose statutes were intended solely to address the problems faced by insurers and not the prejudice to the defendants themselves. If Defendants' position were correct, what would be the justification for the numerous other statutes of repose that exist in this state, such as those for attorneys, accountants, architects, or asbestos claims? There's no suggestion that their existence is solely the product of an insurance crisis. No—the purpose of this and all repose statutes is to prevent the unfairness and uncertainty arising from remote claims. Unlike, say, an automobile accident, where the fact of a wrongful injury is immediately known, injuries arising from other kinds of situations may remain hidden for an extremely long time. The medical malpractice limitations, absent the statute of repose, would allow timely claims decades after the transactions giving rise to them. The repose section of 5/13-212(a) is meant to address all the kinds of prejudice that could arise from claims that are too remote. Plaintiff is confident that this Court will not hold that the sole purpose of this statute of repose is solely to benefit insurance carriers and not the defendants themselves. Hence, the medical malpractice repose section is no different than other repose statutes in curtailing to a reasonable time when an action can be brought. What is special about it, and what constituted the response to the "insurance crisis" and the problems of "long-tail" exposure, was not the enactment of a statute of repose itself, but how very short the repose period is. In all events, cases have considered the "long tail" argument in connection with relation back, and rejected the idea that the legislature's concern for long-tail potential liability should curtail the amendment of pending cases. Rather, the purpose was to limit the time in which they must be initiated

"*by placing an outer time limit within which a malpractice action must be commenced*". *Turner v. Nama*, 294 Ill. App. 3d 19, 25 (1997)(emphasis added). In the case at bar, the action *was* commenced within two years. The statute was satisfied. The "long tail" concerns, which involve not only the loss of evidence by an extravagant delay, but the actuarial burdens of reserving for coverage in the distant future, are not present once a case has been filed.

The Defendants contend throughout their brief that notice and prejudice have nothing to do with the four year requirement of the statute of repose, but they certainly have much to do with the operation of the relation-back statute. The touchstone of fairness that animates section 2-616(b) is that the defendants be provided reasonable notice of the later claim from the allegations of the original, timely filed complaint. In *Frigo v. Silver Cross Hospital and Medical Center*, 377 Ill. App. 3d 43 (2007), the court summarized the factors that govern relation back[*Id.* at 60, internal citations omitted]:

> "In determining whether the subsequent pleading relates back to the filing of the initial pleading, the focus is not on the nature of the causes of action, but on the identity of the transaction or occurrence." "However, the cause of action asserted in the later complaint need not be identical to or substantially the same as the claim raised in the original pleading." Relation back will be allowed where the defendant received adequate notice of the occurrence or transaction that is the basis of the plaintiff's claim. The rationale for this rule is that a defendant will not be prejudiced so long as his attention has been directed, within the limitations period, to the facts that form the basis of the claim asserted against him.

The concern that arose from long-tail liability is that a cause could be first discovered, and therefore accrue, after a number of years or even decades. From the standpoint of defendants (and therefore their insurers), evidence and witnesses could be lost. From the standpoint of coverage, the need to provide for actions that might be brought in the distant future lessens the percentage of premiums that are available for

administrative expense and profit, and because the administrative expense is more or less fixed and businesses exist to show a profit, the premiums necessarily go up. But once a suit has been filed, the insurer can and does reserve for the potential liability. Medical malpractice insurers, and their insureds, perhaps know better than anyone the real prognosis of their former patients, whether their condition will drag on for years or decades, or whether they will soon succumb. Hence, in terms of benefiting insurance companies, since that's what the Defendants believe this case is all about, they have nothing to complain about by the substitution of the wrongful death damages (such as loss of society) for the costs associated with a plaintiff staying alive. Those are the economic realities. From the standpoint of the four year statute and the legislature's concern, as soon as the case is brought the statute of repose is satisfied, and the insurer knows what manner of case is involved, and if because of the injury alleged proximately resulting death is foreseeable, the insurer will be aware of that as well. In short, a timely filed medical malpractice case tells the insurer, as well as the defendants, everything they need to know. Just as the defendants have no prejudice from any amendment that relates to the same transaction or occurrence (or now "the general fact situation set forth in the original pleading." *Porter*, 227 Ill.2d at 362), the insurer has no long-tail liability once the case is filed. Its liability is fixed within the terms of that general fact situation. Causes of action or claims arising from the fact situation are all embraced in the filed suit. If it was timely brought, they are deemed to have been timely brought. Claims that arise from *different* transactions, occurrences or factual situations do not secure this benefit. *Zeh v. Wheeler*, 111 Ill.2d at 282-83 (1986). In the case at bar it is manifest that the allegations of the amended pleadings arose from the same transaction, occurrence, or factual

situation as had been timely brought. There is no long-tail exposure, there is no prejudice to the Defendants, and there is no reason to reverse the appellate court's opinion in this case.

Before leaving this subject, Plaintiff would ask the Court to note its decision in *Antunes v. Sookhakitch*, 146 Ill. 2d 477, 484 (1992), which relates to Defendants' overall theme that the policy that created the four-year requirement is so inviolate that nothing, including the section 5/2-616(b), could ever prevail against it. Yet, in *Antunes*, this Court gave a corporation the benefit of the eight-year statute of repose for the filing of a contribution claim because the plaintiff in the underlying case was subject to that statute under 13-212(b). There the court made no statements about the statute of repose being absolute, but reasoned that to hold otherwise would produce the absurd and unjust result of a party's right to contribution being extinguished before the underlying case even had been filed, stating [*Antunes*, at 486, internal citation omitted]: "Statutes should be construed as to give them a reasonable meaning and in the most beneficial way to prevent absurdity or hardship. A statute will be interpreted to avoid a construction which would raise doubts as to the statute's validity." Further, the appellate court later expanded the holding in *Antunes* to include counterclaims, focusing on language in that case that "[A]llowing the filing of [defendant's] third-party actions within the same period of repose as the minor's underlying complaint does not have the effect of lengthening the period of potential liability of [third-party defendants] or their insurers." *Alvis v. Henderson Obstetrics, S.C.*, 227 Ill. App. 3d 1012, 1020 (1992), quoting *Antunes*, 146 Ill.2d at 491. A liberal interpretation of section 5/13-212(a) was also given by this Court in *Cunningham v. Huffman*, 154 Ill.2d 398, 405 (1993), when it extended the time for

bringing a new action to four years from the last negligent act, holding that the repose section should not be so narrowly construed so as to produce "absurd" or "unjust results." When many statutes are potentially implicated, a proper interpretation must avoid inconsistencies and give effect to all. *McNamee v. Federated Equipment & Supply Co.*, 181 Ill.2d 415, 427 (1998). There are no inconsistencies between the language of these two statutes. The Defendants' argument that not the language of section 5/13-212(a) but rather its legislative history creates a basis overthrowing the clear language of section 5/2-616(b) that it applies to any time limiting statute, is among the "absurd" or "unjust results" that this Court has declared itself bound to avoid. Plaintiff submits that it is manifest that the statutes and decisions of this state permit relation back of amendments in medical malpractice cases, even after four years.

C. A wrongful death claim qualifies for the relation-back doctrine.

As discussed in the previous point, the Plaintiff maintains that it is manifest that the medical malpractice statute of repose does not in itself hinder the operation of the relation-back statute in a case that is otherwise proper. *Ergo*, the Defendants' argument with respect to that point is clearly without merit. Defendants have another argument, however, and that is that this is not a proper case for relation back because there was effectively no right of action to relate back to the date the suit was brought because it did not then exist. Defendants' position can be summarized as having two separate arguments that they weave together in what they hope will be a plausible pattern, but in reality is only a confusing scheme of circular arguments that beg the question. The first argument is semantic: no right of action for wrongful death ever existed because judicial decisions have described the expiration of a statute of repose as "terminating" or

"extinguishing" rights of action. The second argument is ontological: the wrongful death did not actually exist at the time the suit was initiated, so how can it relate back? Neither of these arguments have any merit.

Section 5/13-212(a) states that a claim must be brought within four years of "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 statute does not speak of terminating or extinguishing claims; rather, that is judicially created language used to describe the effect of the expiration of the repose period on unfiled claims—even those that did not sooner accrue. As an answer to arguments of litigants who have *not* filed any claim within the allowed time, the language may aptly describe the condition in which those unfiled claims find themselves. But howsoever apt such language may be in that context, it does not warrant the Defendants' suggestion that it has the substantive import of the statute itself, and can be extended to a different realm—relation back. The fact of the matter is that the statute of repose is simply a time-barring statute and is no different than the others contemplated by section 5/2-616(b) within the broad terms of "any statute or contract prescribing or limiting the time within which an action may be brought or right asserted..." This Court has never used the foregoing descriptive language in the manner that the Defendants suggest, and there is accordingly no merit to the Defendants' suggestion that the statutes of repose are something substantively more than time barring statutes. Further, if the "terminating" or "extinguishing" language sometimes used by this Court were meant to be, not a description of the effect of the statute on *un-filed cases*, but an independent and substantive feature of statutes of repose generally, then

such would have applied with equal force to many cases in which courts have approved the addition of new and different claims to pending actions.

Plaintiff has already discussed the approval of the amendment of new theories in *Cammon,* 301 Ill. App. 3d at 947 and *McArthur*, 307 Ill.App.3d 333-36. In addition to these, new matter was also involved in *Castro v. Bellucci*, 338 Ill. App. 3d 386 (2003), where a new defendant was added by a Fourth Amended Complaint filed five years after the injury. A motion to dismiss the new defendant based upon the four-year statute of repose was granted. The appellate court recognized that "Castro's fourth amended complaint, filed over five years after the events giving rise to the claims of medical negligence, is accordingly time-barred unless the amendments "relate back" to the second amended complaint..." *Id.* at 390. Following *McArthur v. St. Mary's Hospital of Decatur*, 307 Ill.App.3d 329 (1999), the *Bellucci* court reversed because these allegations were made against the prior defendant who was aware of the allegations made against the new defendant, was therefore adequately apprised, before the expiration of the statutory time period, of the facts upon which the claims set out in the new counts were based and therefore suffered no prejudice. *Id.* at 396-97. In short, the new claims were not extinguished by the expiration of the statute of repose.

A further example of this can be seen in *Frigo v. Silver Cross Hospital and Medical Center*, 377 Ill. App. 3d 43 (2007), where the court was confronted with the question of whether an amendment containing a newly added theory *and* defendant, was barred by both the statute of limitations and the "statute of repose" because plaintiff's last visit to that doctor had been more than four years prior to the amendment. The *Frigo* court conducted its entire analysis as a question of "limitations," and did not differentiate

between that portion of the section 13-212(a) of the Code of Civil Procedure concerned with limitations and that concerned with "repose" since it was dealing with a timely filed complaint and a unified nexus of operative facts. *Frigo*, 377 Ill. App. 3d at 58-59.

Consistently, it has been held that there is no reason to differentiate between the two-year and four-year provisions in the statute of repose with respect to statutory interpretation. *O'Brien v. O'Donoghue*, 292 Ill. App. 3d 699, 702 (1997)(holding that the goal of curtailing "the 'long tail' exposure to medical malpractice claims brought about by the advent of the discovery rule" was not "impaired by the terms of section 13-209, which merely extend the time for filing survival claims for one year from the death of the decedent."). The Defendants cite *O'Brien* [Def. Br. at 10] for the language that failure to bring an action within four years "creates an absolute bar." But actually it did not create an absolute bar in that case. Further, a time bar, no matter how strictly enforced, is still a time bar, and does not equate to the non-existence of the action that is at the heart of the Defendants' argument. Indeed, this and other Illinois courts have used the "terminated" or "extinguished" language more less interchangeably with the traditional language: "time barred." For example, *M.E.H. v. L.H.*, 177 Ill. 2d 207, 217 (1997), citing *Mega v. Holy Cross Hosp.*, 111 Ill. 2d 416, 420-22 (1986), this Court wrote [emphasis added]: "Plaintiffs must proceed within a reasonable time following the effective date of the statute of repose. If they fail to do so, their actions will be *barred* even if they have not yet discovered that they have a claim." Likewise, in *Hayes v. Mercy Hospital & Med. Ctr.*, 136 Ill. 2d 450, 458 (1990), the court elected to describe the statute's effect with the more usual term, saying [emphasis added]: "We believe that the medical malpractice statute of repose *bars* any action after the period of repose seeking damages against a

physician or other enumerated health-care provider for injury or death arising out of patient care, whether at law or in equity;" and thereafter concluded that the actions for contribution were merely "time-barred." Id. at 461. Similarly, the action of repose statutes is described merely as "barred" in *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 20, and in *Evanston Ins. Co. v. Riseborough*, 2014 IL 114271, ¶ 26, the case upon which the Defendants have placed singular reliance (and which the Plaintiff will discuss more fully in Point IID hereinafter), this Court characterized its ruling saying the second amended complaint "was properly dismissed as *time-barred* pursuant to the statute." Emphasis added. Hence, what is important to realize is that the repose portion of section 5/13-212(a) is simply a time-barring statute. It is not anything fundamentally different than other Illinois statutes of repose, and its language or legislative history does not place it outside the ambit of "any statute or contract prescribing or limiting the time within which an action may be brought or right asserted" referred to in section 5/2-616(b). There is no merit to the Defendants' argument that the language used to characterize the statute's effect on claims that have not been brought controls the application of section 5/2-616(b).

The Defendants' other contention is based on a different argument—the wrongful death action did not exist when Prusak filed her initial complaint, and hence should not permitted to relate back to a time that it did not actually exist. Specifically, the Defendants point to the language of section 5/2-616(b) that it is "for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only," and that therefore the appellate court's opinion took section 5/2-616(b) far beyond what the legislature had intended or authorized. Def. Br. at 18-19. Defendants stress the language that the statute is limited to preserving causes of actions

and that preserving an action requires the prior existence of a claim which they assert cannot be a death claim, since the person was not dead. Def. Br. at 18. There are a number of reasons why the Defendants' position is without merit.

First, the language upon which the Defendants rely has been quoted in almost every case in which the relation-back statute has been applied. In *Norman A. Koglin Assocs. v. Valenz Oro, Inc.*, 176 Ill. 2d 385, 398 (1997), the Court wrote, citing *Boatmen's National Bank v. Direct Lines, Inc.*, 167 Ill.2d at 102 (1995):

> "The purpose of the relation back provision has been construed as the preservation of causes of action * * * against loss by reason of technical rules of pleading. [Citation.] To further this purpose, courts should liberally construe the requirements of section 2–616(b) in order to allow the resolution of litigation on the merits and to avoid elevating questions of form over substance. [Citation.] The rationale behind the same transaction or occurrence rule is that a defendant will not be prejudiced by an amendment so long as 'his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him.' [Citation.]"

Numerous other decisions of this Court set forth the same concept. These include *Simmons*, 32 Ill. 2d at 493–94; *Zeh*, 111 Ill. 2d at 270–71; *Wolf v. Meister–Neiberg, Inc.*, 143 Ill.2d 44, 47–48 (1991); *Porter*, 227 Ill. 2d at 355–56; and many others. The only conclusion that can be drawn from these cases is that, reading the statute as a whole, the import of the cited language is to require that the claim sought to be included by amendment grew out of the same transaction, occurrence, or general fact situation set forth in the original pleading. Notably, if this qualification has been met, along with the requirement that the original pleading itself be timely filed, the relation-back statute embraces different causes of actions and new theories—the plaintiff is not restricted to the same theory that was originally pled. Accordingly, the Court wrote in *Zeh v. Wheeler*, 111 Ill.2d 266, 279 (1986):

> "The shift in focus from the identity of the cause of action in the original and amended complaints under our pre-Civil Practice Act pleading to the identity of the occurrence or transaction under our practice act is bottomed on the belief that if the defendant has been made aware of the occurrence or transaction which is the basis for the claim, he can prepare to meet the plaintiff's claim, whatever theory it may be based on."

Hence it is clear that the prohibition against relating back a "new cause of action" refers to a claim that does not qualify for the same transaction or occurrence rule—such as the attempt in *Zeh* to newly allege that the injury had occurred at a different location. But it is beyond cavil that Prusak's death arose from the same transaction, occurrence, or general fact situation set forth in the original pleading.

McArthur v. St. Mary's Hospital of Decatur, 307 Ill.App.3d 329, 331-33 (1999) (relating back new theories involving new defendant employees) and numerous other appellate cases have followed this Court's understanding of the statute expressed in *Zeh*, that the requirements of the statute should be liberally construed in favor of hearing the plaintiff's claim. In *Avakian v. Chulengarian*, 328 Ill. App. 3d 147 at 154 (2002). the court was very clear about this policy, stating:

> We first note the liberality with which courts are to construe a plaintiff's pleadings. Section 2–603(c) of the Code of Civil Procedure explicitly provides that pleadings are to be liberally construed in order to do substantial justice between the parties. 735 ILCS 5/2–603(c) (West 2000). Further, the "relation back" doctrine, located in section 2–616, is remedial in nature and should be applied liberally to favor hearing a plaintiff's claim.

The court stated that this is particularly true in medical malpractice cases.

> Medical malpractice plaintiffs, in particular, are afforded every reasonable opportunity to establish a case, and to this end, amendments to pleadings liberally allowed to enable the action to be heard on the merits rather than brought to an end because of procedural technicalities.

Id. at 154. This liberal construction informed the analysis of what must be established in order for the relation-back doctrine to apply. In considering this section, and whether or not an amendment will be regarded as relating back, it has been held that "the amended pleadings may change the cause of action and will not be time-barred so long as (1) the original pleading was timely filed and (2) the cause of action added in the amended pleading grew out of the same transaction or occurrence as was set up in the original pleading." *Id,* at 153. It has been held that there is no reason to expand the 2-616(b) analysis beyond those two elements. *Marek v. O.B. Gyne Specialists II, S.C.*, 319 Ill. App. 3d 690, 699 (2001). Accordingly, there is no merit to the Defendants' contention that the statutory language they have relied upon requires reversal of the case at bar. Their highlighted language is part of the statutory analysis of essentially every case that has allowed relation back under the current understanding on section 5/2-616(b). To agree with the Defendants' position would involve an abrogation of a whole body of precedent of this Court and the appellate court. There is no merit in the Defendants' position to justify this Court in doing so.

In reference to this issue, the Defendants ask this Court to disregard *Sompolski v. Miller*, 239 Ill.App.3d 1087 (1992) saying that the appellate court's opinion "overlooks the shortcomings of *Sompolski* as precedent for this case" because "it concerned a statute of limitations, not repose, and did not even involve medical malpractice." Def. Br. at 6. As discussed above, section 5/2-616(b) is indifferent to what kind of time-barring statute is involved and hence the Defendants' objection to *Sompolski*'s relevance has no traction. Further, the issue we are now discussing is whether section 5/2-616(b) applies to a claim that Defendants say was "non-existent" at the time the original complaint was filed. With

respect to that issue, it is clear that there is no distinction between *Sompolski* and the case at bar. In both cases, the original plaintiff died as a proximate cause of the injuries that were already the subject of the timely filed pending litigation. These central facts are essentially the same, and the reasoning of the *Sompolski* court makes as much sense in the case at bar as it did when first written. In *Sompolski v. Miller*, 239 Ill. App. 3d 1087 (1992), the court rejected defendants' argument that the recovery for plaintiff's death was a "new claim", stating [*Id.* at 1091-92, internal citations omitted]:

> In light of these considerations, plaintiff's wrongful death suit was not an attempt to "slip in an entirely distinct claim," but was instead an effort to recover full damages for the injuries Mele sustained as accident. Consequently, plaintiff's wrongful death claim related back to Mele's original personal injury suit.
>
> Defendant's attorney argues that plaintiff's wrongful death suit was a new cause of action alleging a new fact, *i.e.*, Mele's death, not stated in the original personal injury claim. Defendant's counsel contends that because of the additional fact of Mele's death, the original personal injury suit and the subsequent wrongful death claim do not arise "from the same transaction or occurrence." We disagree.
>
> * * *
>
> Both plaintiff's wrongful death suit and her survival action are based on the same occurrence, *i.e.*, the December 1985 accident. In addition, both claims sound in negligence and make the same allegations respecting defendant's alleged liability for Mele's injuries. Based upon this precedent, plaintiff's amended complaint, seeking damages for wrongful death, related back to the original pleading that sought damages for personal injuries.

The *Somploski* court's reference to the effort to recover full damages for the injury rather than being the filing of a "new claim" will be reminiscent of rationale of the other jurisdictions that have considered and approved the relation back of death claims in causes where the conduct that was alleged to be the cause of the death was already being litigated. The reasoning of all these cases is sound, and should help persuade this Court that the decision of the appellate court in the case at bar was correct and should be affirmed.

But there is another reason that supports the appellate court's resolution even beyond *Sompolski's* reasoning—it is the fact that, in Illinois, a wrongful death case is never entirely a new case. Illinois law is clear that a wrongful death action is a derivative action, where the rights of the wrongful death plaintiff are derived from and defined by the rights of decedent herself. Hence, the decedent's representative is said to stand in the shoes of the decedent (*Moon v. Rhode*, 2016 IL 119572, ¶39), and that representative rights are derivative on those possessed by the decedent herself at the time of her death. *Varelis v. Northwestern Memorial Hosp.*, 167 Ill. 2d 449, 454–55 (1995)("[A]n action under the Wrongful Death Act may be said to be derivative of the decedent's rights, for the ability to bring the wrongful death action "depends upon the condition that the deceased, at the time of his death, had he continued to live, would have had a right of action against the same person or persons for the injuries sustained.") This entire feature of Illinois law was correctly analyzed by the *Lawler* court at ¶¶22-23 of its opinion, and gives further reason for concluding that a wrongful death can relate back in a case where the same injurious conduct is already being complained of. In the case at bar, of course, there would be no question about Prusak's right to bring an action for the complained of conduct, for she had ready done so and her action was pending.

Further, in a case like this, and like *Sompolski*, there is more than a technical reason for this rule. The Defendants want to argue that the death claim was non-existent at the time the initial suit was filed, but there is a sense in which their argument is painfully false. For people in Prusak's circumstances, death is not something that slips in at the final moment, it is something that starts with the injury itself and, along with the pain and suffering, accompanies the injured person day by day until she finally succumbs to that

which was present from the very first, as well as being present when she filed her initial complaint. Plaintiff believes that it is clearly correct that her wrongful death claim related back under the facts of this case.

D. The Defendants' case citations are inapposite and distinguishable.

The contention that Prusak's death is a new claim is not only legally incorrect, but in the deepest and most meaningful sense extremely callous. The negligence of the Defendants ultimately resulted in her death. Their position is that she took too long to die. The numerous cases they cite to support their position are distinguishable, and in some instances blatantly inapposite; largely, these cases refer to circumstances where an action seeking redress because of an occurrence has not been brought within the limited time. Defendants dwell on why those cases did not avoid the effect of repose. But none of them deal with the circumstance of an amendment to a case already filed—which is obviously a crucial distinction in the consideration of section 5/2-616(b), since that statute requires for its application the timely filing of an initial complaint. But before discussing any of Defendants' particular citations, Plaintiff has a general comment to make. The real issue in this case, as Plaintiff mentioned at the outset, is whether a wrongful death that it the proximate result of conduct that is already the subject of pending litigation for pre-death injuries, can relate back after the expiration of the four-year repose section of 5/13-212(a). With respect to this issue, there is Illinois law that acknowledges that section 5/2-616(b) permits an amendment containing a wrongful death action. The Defendants have no authority that wrongful death actions, by their nature, cannot relate back, even though they did not exist when the case was originally brought. Further, Illinois has a long history of permitting amendments against the operation of the

statute of repose to relate back, so long as the amendment arose from the same transaction or occurrence. Defendants have no similar authority for such an amendment not being permitted to relate back simply because the statute of repose was the time barring provision. In short, the Defendants have absolutely no real authority for their position whatsoever. Instead, they cherry-pick language from cases that are not directly related to the issue *sub judice*, and seek to weave a web of misunderstanding around the appellate court's clear application of existing law. With that in mind, Plaintiff will undertake to address the most notable of the cases which the Defendants have urged upon this Court.

Defendants' reliance on *Real v. Kim*, 112 Ill.App.3d 427 (1983) and *Evanston Ins. Co. v. Riseborough*, 2014 IL 114271 is ironic. These cases are offered in aid of what might be called the "tough luck" factor that Defendants want to control the outcome of this case. Their point is that where the cause of action did not arise until after the statute of repose had run, the fact the case could not be filed sooner (because the cause of action had not accrued) did not keep the claims from being reposed—it was just the plaintiffs' tough luck, something that sometimes happens in the scheme of things. But Defendants ignore the appellate court's observation about the non-utility of *Real* in the case at bar because of the critical factual distinction: that at the time of death, there was no case pending based upon the death-causing transaction or occurrence. *Lawler*, at ¶44. This distinction is at the heart of the whole matter—the statute of repose applied because the *Real* plaintiff had not *brought* an action in ample time—that was the deciding factor. That an action couldn't be sooner brought was just the plaintiff's tough luck. It is the same with *Evanston Insurance*. When the plaintiff's case was reposed, they did not have

a case pending arising out of the transaction that gave rise to action. Again, it was tough luck. But in the case at bar, the facts are crucially different. Prusak did have an action pending at the time repose time elapsed—an action for the same misconduct that was the proximate cause of her death. This is a crucial distinction, as the appellate court reasoned. Neither the Defendants' arguments or case citations explain why this tough luck reasoning should automatically be extended to markedly different facts. Here, there was a pending case, unlike *Real*, *Evanston Insurance*, and virtually every case on which Defendants rely. The discussion and rationale employed in cases where there was no case pending do not give guidance for the determination of the case at bar.

The centerpiece of the Defendants' Brief [at p.16-17] is their discussion of *Evanston Insurance* where the plaintiff could not preserve its claim by filing a premature action. Given the amount of attention the Defendants devote to *Evanston*, it must be supposed that they wish the Court to place great weight on this argument. But in reality, the factual distinctions between that case and the case at bar are too significant as to allow its application here. A closer look at the opinion in that case is warranted before it is possible to agree with the Defendants that it is one that is important for the decision here.

The Defendants' presentation of *Evanston* is flawed because it fails to present all the facts of the case and the issues that were before this Court. The central feature of *Evanston* was whether the claim it presented was one to which the legal malpractice statute of repose (section 13-214.3(c)) would apply at all, overruling a prior appellate decision in *Ganci v. Blauvelt*, 294 Ill.App.3d 508 (1998).

The facts in that case, briefly stated, were these. The plaintiff, Evanston Insurance, had brought an action against certain attorneys for entering into a "fund and fight"

agreement without authority to do so. Because the action was premature, it was dismissed, but without prejudice to re-file. *Id.* at ¶8. Years later, Evanston filed what it styled a second amended complaint, defending the argument that it was now barred by the statute of repose on the ground that fraud, not legal malpractice, were complained of. The Court rejected that argument. As an alternative, Evanston argued that the dismissal was not a final order, and tolled the time limitation so that it could filed its case later. This Court also rejected the argument that a dismissed case, even if dismissed without prejudice, could have the effect of tolling the operation of a statute of repose. *Id.* at ¶30. Significantly, this Court recognized a way in which the plaintiff's claim *could have been preserved*, by staying the premature proceedings "until the underlying litigation was resolved." *Id.* at ¶32. Evanston, however, never requested such a stay of proceedings.

The Defendants focus on this part of the opinion to make their argument that the rationale of *Evanston Insurance* points to a need to reverse this case. Ironically, however, very little of rationale was devoted to this particular point, the Court rejecting it out of hand and merely saying: "Evanston's argument that a plaintiff may avoid an applicable statute of repose by filing a premature complaint alleging claims which have not fully accrued has no support in the law." *Id.* at ¶30. Clearly, the factual distinction between *Evanston* and the case at bar is pronounced. The case at bar was a pending and active case, not one that had been dismissed years before. There is no reason to suppose that failure of Evanston's re-filed complaint (whether they chose to call it an amendment or not), controls the facts of this case. The Defendants seemingly want to suggest that *Evanston* gives guidance to the case at bar, where the issue—as the trial court [R.P.012] and the appellate court both recognized—was whether the amended complaint related

back to the time of the original filing. In *Evanston Insurance* that was specifically not the issue. Evanston had never raised the relation-back doctrine until a motion for reconsideration after it had lost in the trial court, and it was not considered by this Court. *Id.* at ¶36. Even if it had done so, it is unlikely that such a determination would have had any application to the case at bar, since the amendment here was made in an active and pending case. Further, the alleged import of *Evanston Insurance* was never discussed by the appellate court because that case was never urged before it. Plaintiff respectfully suggests that its belated appearance in this case testifies to its lack of utility with respect to the issues now before the Court. In short, Defendants' claim for the importance of *Evanston Insurance* only reveals the paucity of actual authority to support its position.

Further, that *Evanston* does not really support the Defendants' position can be clearly seen from a closer examination of the language of that opinion itself. With respect to the character legal malpractice statute of repose, this Court wrote [*Id.* at ¶31]:

> Evanston's initial complaint was dismissed by the circuit court pursuant to section 2–615 of the Code (735 ILCS 5/2–615 (West 2008)) because it failed to set forth a cause of action upon which relief may be granted. See Wakulich v. Mraz, 203 Ill.2d 223, 228, 271 Ill.Dec. 649, 785 N.E.2d 843 (2003). Because the circuit court concluded that the complaint did not state a legally sufficient claim, the complaint was dismissed without prejudice to later refile. The dismissal without prejudice did not mean, however that Evanston preserved its claims, safe from the statute of repose, until such time as Evanston was able to state a legally sufficient cause of action.

The Court in *Evanston Insurance* explained the distinction between repose and limitations by saying that "the purpose of a period of repose is to terminate the possibility of liability after a defined period of time." *Id.* After reviewing the facts before it, the Court stated: "Because the circuit court concluded that Evanston *failed to file a complaint*

stating a legally cognizable cause of action prior to the end of the six-year repose period, Evanston's claims were extinguished by the statute of repose." *Id.* at ¶31, emphasis added. Note the crucial difference between these facts and those in the case at bar. Here, the Plaintiff did file a legally cognizable cause of action prior to the end of repose period. Moreover and significantly, once the discussion of the difference between limitations and repose was done, the *Evanston* court abandoned its "terminated" and "extinguished" language, and ruled simply: "We hold that the statute of repose in section 13–214.3(c) applies to Evanston's second amended complaint, which was properly dismissed *as time-barred* pursuant to the statute." *Id.* at ¶26, emphasis added.

That foregoing actually represents the correct analysis of the matter can be seen from other language in *Evanston Insurance*, namely the discussion of *Hayes v. Mercy Hospital & Medical Center*, 136 Ill.2d 450 (1990), where the Court had held that statute of repose for actions against physicians and hospitals arising out of patient care applied to third-party complaints for contribution as well as original actions for malpractice. In than connection, the Court wrote [*Id.* at ¶25, emphasis added]:

> Key to the *Hayes* decision was the legislative purpose underlying the statute of repose, which was to provide a definite period in which *an action arising out of patient care could be filed*, thus preventing extended exposure of physicians and their insurers to potential liability for the care and treatment of patients.

Note that the court writes about the time in which "...an action arising out of patient care *could be filed*," not "could be amended." In short, the language upon which the Defendants so heavily rely was meant to describe the difference between statutes of limitations that were dependent on the knowledge of an injury in order to accrue, and statutes of repose, that are indifferent to such considerations and bar the bringing of cases

based on the passage of time alone. Accordingly, contrary to the arguments the Defendants now make, the question at issue in the case at bar, and which the appellate court was invited to and did in fact decide, is whether the wrongful death amendment was time barred by the statute of repose, not whether section 5/2-616(b) is guilty of calling into existence causes of actions that never were.

Folta v. Ferro Engineering [Def. Br. at 11, 21] is another case devoted to the distinction between statutes of limitation and statutes of repose with respect to when a case can be initially brought, not when it can be amended.

Mega v. Holy Cross Hospital, 111 Ill.2d 416 (1986) is another case relied upon by the Defendants that deals with the difference between the statutes of limitations and repose with respect to the bringing of an action, not its amendment. Defendants imply that the policy considerations in this distinction between limitations and repose should somehow obliterate the distinction between filed and unfiled cases. *Mega* has no such import, however, and has no application to the case at bar. That case held that the plaintiff was not entitled to an extended time period to bring the action on account of a statutory change. *Id.* at 422.

The Defendants mention also [Def. Br. 10] *O'Brien v. O'Donoghue*, 292 Ill. App. 3d 699, 704 (1997), which acknowledged the draconian character of the four-year requirement, but that refers solely to the fact that the right of action may, in certain instances, expire before it is even known to exist. But those considerations have nothing to do with the case at bar where the action was already brought before the expiration of two years from the acts complained of. Further, *O'Brien* actually enlarged the time for filing beyond the statute of repose, as noted at page 31 above.

Defendants call on *Fetzer v. Wood*, 211 Ill. App. 3d 70, 77-78 (1991), to support the idea that the wrongful death claims are treated as separate and distinct causes of action even when the underlying facts are the same [Def. Br. at 13], but what that case stands for is that there is a distinction between the survival statute and wrongful death statute, which is a distinction unrelated to the issues of this case. On the same page they cite this Court's decision in *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403 (1989) for the proposition that the wrongful death action is a separate and distinct cause of action, but again that is distinct from survival action. *Id.* at 410-11. What the Defendants fail to appreciate is that under section 5/2-616(b) new and different causes of action can relate back so long as they arose from the same occurrence or transaction. Hence, whether wrongful death is a distinct cause of action from survival is immaterial for the issues in this case.

Similarly, in *Orlak v. Loyola University Health Systems*, 228 Ill. 2d 1, 17 (2007), the plaintiff brought her action some 13 years after her claim arose. Acknowledging that its decision was consistent with the purposes of the statute of repose, the Court decided that her claim was not timely brought.

Defendants also urge *Hayes v. Mercy Hospital & Medical Center*, 136 Ill. 2d 450 (1990) and *Uldrych v. VHS of Illinois, Inc.*, 239 Ill. 2d 532 (2011) [Def. Br. at 24-25], saying that notice is not an element in the application of a statute of repose because, in these cases, the fact of notice did not excuse these cases being after the expiration of the statute. The purpose of the statute was to limit liability to a fixed period of time, so the defendants' knowledge did not serve to extend that period. Both of these cases, however, were efforts to file new claims (third-party and indemnification) against

defendants with respect to whom the plaintiffs had no prior claim pending. The Defendants argue that *Hayes* and *Uldrych* should give guidance to this Court because in both instances the claims arose out of the same transaction or occurrence that gave rise to underlying claim which the parties had already been defending themselves since the repose period expired [Def. Br. at 25], but while the general facts may have been the same, these parties had not previously brought a claim which they were seeking to amend. Neither of these cases dealt with relation back at all; the parties did assert they were entitled to bring these claims as amendments to existing cases—these were clearly claims that did not qualify for amendment and therefore the argument was that they fell outside the statute of repose. This Court held that because they involved potential liability for defendants they could not be brought after the time had expired – but this case has not been brought after the time has expired. The Plaintiff sought to amend. The question is whether that amendment is proper. It is not relevant that the repose time has expired, that is not a hindrance to the relation back, it is a condition for the application of relation back. Unless the time has expired there is no need for the relation-back statute.

On page 30 of their Brief, Defendants rely on *Turner v. Nama*, 294 Ill. App. 3d 19 (1997) for the concept that the legislature's concern about long tail liability is frustrated by the relation-back statute not being given the narrow construction they contend for. *Turner*, however, does not really help them at all. What *Turner* actually said was [*Id.* at 25, emphasis added]:

> Although the statute of repose causes harsh consequences in some cases, the legislature intended "to curtail the 'long tail' exposure to medical malpractice claims brought about by the advent of the discovery rule" (Cunningham, 154 Ill.2d at 406, 182 Ill.Dec. 18, 609 N.E.2d 321) "by placing an outer time limit within which a malpractice action *must be*

> *commenced*" (Anderson v. Wagner, 79 Ill.2d 295, 312, 37 Ill.Dec. 558, 402 N.E.2d 560 (1979)).

Again, this is another case discussing the time limitations of when a case may be brought, and does not suggest any limitation upon the amendment of a case pursuant to section 5/2-616(b).

Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 724–25 (1981), which the Defendants urge on page 11 of their brief, could hardly be more inapposite. That case, like the other cases the Defendants urge, involved a case that was not brought within the statutory time—there, the ten-year period for products liability. The injury occurred more than 10 years after the product had been purchased, therefore its filing was untimely. These are the same essential facts that attend the most of Defendants' citations, and do not involve the relation-back statute. But they are not facts of this case, where a case has been timely brought and a later amendment is sought.

Defendants' reliance on *Santiago v. E.W. Bliss Co.*, 2012 IL 111792 (2012) is badly misplaced. They use that case for a quotation ¶25: "The purpose of the relation-back provision of section 2–616(b) is to preserve causes of action against loss due to technical pleading rules." That quotation is taken completely out of context. The *Santiago* case dealt with very unusual facts involving an action originally brought under a fictitious name, and was before this Court on a certified question as to "whether the circuit court should dismiss the injured plaintiff's cause of action with prejudice because the plaintiff's amended complaint, with the plaintiff's correct name, does not relate back to the initial filing." *Id.*, ¶23. The majority held that it did relate back, and it was in that context that the quoted language was written. A fuller quotation makes the meaning of the opinion clear [Emphasis in the original]:

> ¶ 24 Section 2–616(b), in turn, provides for relation back of the amended pleading to the original pleading, as follows:
>
> > "The cause of action * * * set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that *the cause of action asserted * * * in the amended pleading grew out of the same transaction or occurrence set up in the original pleading,* even though the original pleading was defective in that it failed to allege * * * the existence of some fact * * * an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." (Emphasis added.) 735 ILCS 5/2–616(b) (West 2010).
>
> ¶ 25 The purpose of the relation-back provision of section 2–616(b) is to preserve causes of action against loss due to technical pleading rules. *Boatmen's National Bank of Belleville v. Direct Lines, Inc.,* 167 Ill.2d 88, 102, 212 Ill.Dec. 267, 656 N.E.2d 1101 (1995). In construing the relation-back provision of section 2–616(b), this court has stated that the requirements of section should be liberally construed "to allow the resolution of litigation on the merits and to avoid elevating questions of form over substance. [Citation.]" *Boatmen's National Bank,* 167 Ill.2d at 102, 212 Ill.Dec. 267, 656 N.E.2d 1101.
>
> ¶ 26 The only requirements imposed by section 2–616(b) for the relation-back provision to be applicable are (1) that the original complaint was timely filed, and (2) that the cause of action asserted in the amended complaint grew out of the same transaction or occurrence. 735 ILCS 5/2–616(b) (West 2010).

From the foregoing it is clear that *Santiago* is another example of what the Plaintiff has been saying all along—this Court understands the language that the Defendants have quoted to be satisfied by the requirements of the amendment arising from the same transaction or occurrence that was originally pled, so long as the original claim was timely brought. *Santiago v. Bliss* supports the Plaintiff, not the Defendants.

The Defendants have cited other cases as well. Many of these have been addressed in earlier sections of this Brief—none of them support the Defendants' position that the

appellate court's opinion is thoughtless and wrong, or that this Court should reach a different conclusion.

III
THE AMICUS BRIEF OFFERS NOTHING PERSUASIVE

Before concluding, Plaintiff would wish to say a few words in response to the amicus brief filed by the Illinois Health and Hospital Association and the Illinois Medical Society. The essential feature of this amicus brief is the argument that the appellate court's decision will enlarge medical insurance costs. As Plaintiff has already argued, there is no basis for such a claim, that damages from the death of the injured party are balanced (possibly more than balanced) by the injured person's own damages having been cut short by the same wrong that created them. To this Plaintiff would only add that the statutes involved in this case have now been operating for decades, yet the case at bar is one of first impression in Illinois. Moreover, Plaintiff's research has disclosed only two other jurisdictions in which this factual situation has been squarely presented. In short, the likelihood of cases of this kind making a statistical difference to the insurance industry is extremely remote.

The essential mistake of the amicus brief is that is shares the Defendants' focus on cases that are "brought" after the expiration of four years. See, Amicus Br. at 9. Section 5/2-616(b) has nothing to do with cases that are brought after the expiration of the relevant time-barring statutes. Those concerns and those cases are all without merit here where the case *was* timely brought. In Plaintiff's estimation, the Amicus Brief of the Illinois Health and Hospital Association and the Illinois Medical Society offers no persuasive argument for reversing the appellate court's decision.

CONCLUSION

For the reasons above stated, Plaintiff asks that the judgment of the appellate court be affirmed.

Dated: April 25, 2017

Respectfully Submitted,

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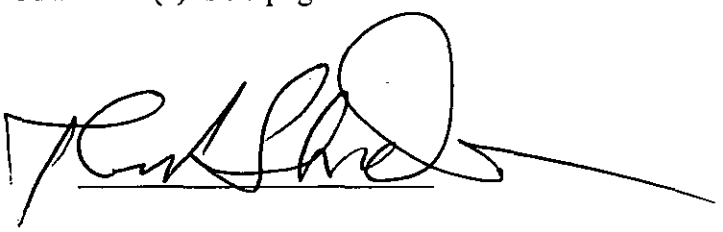
RULE 341 CERTIFICATE OF COMPLIANCE

Robert P. Sheridan, the undersigned attorney hereby certifies that this Appellee's Brief conforms to the requirements of Rules 341 (a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 341(a) is 50 pages.

Dated: April 25, 2017



Certificate of Service

Robert P. Sheridan, the undersigned, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure certifies that the statements set forth in this Instrument are true and correct, and that he served three true copies of the foregoing Appellee's Brief and Argument on Michael T. Trucco, Stamos & Trucco LLP, One East Wacker Drive, Chicago, Illinois 60601; Robert Marc Chemers, Pretzel & Stouffer, Chartered, One South Wacker Drive, Chicago, IL 60606; Julie A. Teuscher, Rudolf G. Schade, Jr., Cassiday Schade, LLP, 20 N. Wacker Drive, Suite 1040, Chicago, Illinois 60606; Hugh C. Griffin, Hall, Prangle & Schoonveld, 200 S. Wacker Dr., Suite 3300, Chicago IL 60606; on John K. Kennedy, James D. Montgomery & Associates, Ltd., One North LaSalle Street, Suite 2450, Chicago IL 60602, by causing said to be mailed said proper postage prepaid, this 25th day of April 2017.