NO. 119572

Appeal to the Supreme Court of Illinois

RANDALL W. MOON, Executer of the Estate of
KATHRYN MOON, Deceased,
Petitioner-Appellant

v.

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

Appeal from the Third District Appellate Court, No. 3-13-0613

Appeal From the Tenth Judicial Circuit, Peoria County, Illinois
Case No. 13 L 69
The Honorable Judge Richard D. McCoy

Answer to Petition for Leave to Appeal

HEYL, ROYSTER, VOELKER & ALLEN
Attorneys for Defendants-Respondents
DR. CLARISSA F. RHODE and
CENTRAL ILLINOIS RADIOLOGICAL ASSOCIATE, LTD.

Craig L. Unrath
Nicholas J. Bertschy
J. Matthew Thompson
300 Hamilton Boulevard
P.O. Box 6199
Peoria, Illinois 61601-6199
Telephone 309.676.0400
cunrath@heylroyster.com
nbertschy@heylroyster.com
mthompson@heylroyster.com

STATEMENT OF FACTS

Plaintiff's decedent, Kathryn Moon, arrived at the emergency room at Proctor Hospital on May 18, 2009 and was later admitted to the hospital under the care of Dr. Jeffrey Williamson for treatment of a rectal prolapse (C. 1). Two days later, on May 20th, Dr. Williamson performed a perineal proctectomy operation and followed her postoperatively (C. 1).

Dr. Jayaraj Salimath became involved with her post-operative care on May 23rd by which time, Kathryn Moon had developed a number of complications, including labored breathing, pulmonary infiltrates, and an elevated white blood cell count (C. 2).

Dr. Salimath discussed options with Kathryn Moon's family, explaining that a decision had to be made as to whether they should perform a surgical re-exploration or continued observation (C. 101). Given her age and condition, there was a high risk of mortality if they returned to surgery, so it was decided to wait 24 hours and see what developed (C 102-03).

A radiologist, Respondent-Defendant, Dr. Clarissa Rhode, interpreted a number of imaging studies taken of Kathryn Moon's chest and abdominal area on May 23rd and 24th (C. 2, 5-6). On May 29, 2009, Kathryn Moon passed away (C. 2).

On June 9, 2009, Kathryn Moon's son, Randall W. Moon, was appointed executor of the estate (C. 44). About 8 months later, on February 26, 2010, Moon sought his late mother's complete medical file from Proctor Hospital going back

to 2007 (C. 42). According to the Disclosure Form, he sought the records in order to "Administer the decedent's Estate" (C. 42).

From there, Moon waited a little over a year, until April 11, 2011, before contacting a medical consulting firm (C. 142). He sent the consulting firm copies of the medical records and ten days later, on April 21, 2011, he received a verbal report from the consultant stating that there had been negligent conduct on the part of Drs. Williamson and Salimath (C. 142). A few weeks later, on May 2, 2011, the consulting firm advised Moon that it had approved a written report from a qualified surgeon (C. 142).

Acting as his own legal counsel, on May 10, 2011, Moon filed a Complaint against Drs. Williamson and Salimath alleging, among other things, that they failed to diagnose and/or timely treat pneumonia and respiratory distress (C. 131-32, 142). The physician's report appended to the Complaint stated that the decedent was 90 years of age and suffered post-operatively from labored breathing, pneumonia, and abdominal compartment syndrome (C. 136). The report stated that, in spite of her condition, "in an elderly lady who had COPD, the defendants waited almost a week to attempt to treat the infection and supply sufficient oxygen" (C. 136).

Almost four years after his mother's death, on March 4, 2013, Moon filed the Complaint in the case at bar, alleging that he did not discover that he had a claim against Dr. Rhode until February 28, 2013, when Dr. Abraham H. Dachman reviewed the CT scans (C. 2).

Dr. Rhode moved to dismiss the case, asserting that there is no legitimate basis for application of the discovery rule, but if applied, the Complaint was nevertheless untimely filed (C. 30). Dr. Rhode argued that the limitation period begins to run when an injured party possesses sufficient information concerning his injury to put a reasonable person on inquiry to determine whether actionable conduct is involved (C. 31). At that point, Rhode argued, the burden fell upon the injured party to inquire further (C. 31).

Dr. Rhode pointed to Moon's deposition testimony where he stated that, even "though she was very old, my impression was that she was doing okay and…she should have gotten better treatment that she did" (C. 98). Dr. Rhode argued that this testimony demonstrated that Moon considered his mother's medical care to have been substandard and that it may have contributed to her death (C. 36). As such, Dr. Rhode argued, from the time of his mother's death, Moon was put on notice to determine whether actionable conduct was involved (C. 36-37).

Moon responded, arguing that he had no way of knowing of the negligence of the radiologist in this case until Dr. Dachman reviewed the imaging studies in February, 2013 (C. 140).

The trial court concluded that the limitation period should be measured from the date of death (R. 17). However, he also agreed with defense counsel that, "even if we were to give everybody the benefit of the doubt and try to fix a date at which a reasonable person was placed on inquiry as to whether there was

malpractice, even that was long gone by the time the complaint was filed" (R. 17). The trial court dismissed the case with prejudice (R. 17).

The Appellate Court affirmed, finding that the discovery rule does not apply to statutory actions under the Wrongful Death and Survival Act. ***Moon v. Rhode***, 2015 IL App (3d) 130613. In the alternative, the court found that, even if it applied the discovery rule, the suit was not timely filed. ***Id***. at ¶ 27. Relying on Illinois Supreme Court precedent, the court explained that "if knowledge of negligent conduct were the standard, a party could wait to bring an action far beyond a reasonable time when sufficient notice has been received of a possible invasion of one's legally protected interests." ***Id***. at ¶ 27, quoting ***Knox College v. Celotex Corp.***, 88 Ill. 2d 407, 415 (1981).

ARGUMENT

Introduction

Supreme Court Rule 315 provides that the determination of whether to grant a petition for leave to appeal is a matter of sound discretion and lists a number of criteria which, if satisfied, may persuade the Court to accept the case for review. Chief among these criteria is the general importance of the question presented and the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court or another division of the Appellate Court.

Notably absent from the Rule 315 is whether the lower court's decision was wrongly decided. The Illinois Supreme Court's function is not to correct perceived errors of the Appellate Court, but to resolve cases of great importance

affecting significant issues of public policy, and to resolve conflicts among the courts in order to maintain a consistent and predictable body of law.

The present case satisfies two of the Rule 315 criteria. No one can reasonably suggest that the case fails to satisfy the criteria of general importance. And Justice Schmidt openly acknowledged that the majority's opinion lies in direct conflict with a number decisions holding that the discovery rule applies in actions brought under the Wrongful Death Act. Indeed, the majority anticipated that the Supreme Court will, ***at some point***, resolve the conflict. ***Moon v. Rhode***, 2015 IL App (3d) 130613, ¶ 30. The question is whether the issue should be decided ***now***, and under the circumstances presented in this case.

Petitioner suggests that this Court should intervene in this case because the parties never had an opportunity to address the majority's perspective in the case. The argument suffers from two pronounced flaws. First, Petitioner had every opportunity to address the majority's reasoning in his Petition for Rehearing. It seems odd that Petitioner would urge this Court to grant his Petition in order to hear Dr. Rhode's response to those arguments.

Nevertheless, even if we accept Petitioner's suggestion that the process is somehow flawed due to Dr. Rhode's absence from the discussion, the question naturally arises as to whether this Court should grant a petition for leave to appeal in a case where the parties have not fully addressed the Appellate Court's perspective on the case. Would it not be better to accept a case for review where

both parties had an opportunity to address the Appellate Court's ruling in the Appellate Court?

Another, equally important reason for denying leave to appeal in this case is found in the underlying circumstances of the case. The administrator of Kathryn Moon's estate is her son, who also serves as counsel for the estate. Deposition testimony showed that the representative of the estate (who acts as its legal counsel) believed at the time of Kathryn Moon's death that she received sub-standard care that may have caused her demise. Under the plain language of the statute, nothing more is required to trigger the two-year limitations period. 735 ILCS 5/13-212(a). Although the majority's ruling presents a significant issue of law, it does so in a case involving a routine application of the statutory limitation period.

As noted above, the question is not whether to review this issue, but whether to review it ***now*** and in this case. It is reasonable to assume that other divisions of the Appellate Court are presently addressing this issue. Respondent respectfully submits that it may be prudent to allow the various divisions of the Appellate Court an opportunity to further explore the issues raised in the majority's opinion before accepting the case for review.

Finally, and perhaps most important, the determination of whether the common law interpretation of the discovery rule should be superimposed on a statutory cause of action is a matter best left to the legislature. The fundamental basis underlying the majority's reasoning is a refusal to read into a statute

language which is clearly not there. "If that language is to be added, it is to be added by the General Assembly, not the courts." ***Moon***, 2015 IL App (3d) 130613, ¶ 30.

I. Any Alteration to the Statute, Regardless of Any Perceived Danger, Must Necessarily be Sought From the Legislature.

Petitioner contends that the discovery rule stems from the interpretation of statute and "is not an overlay of a common law principle unconnected to a statute" (Petition, p. 9). And yet, even a cursory examination of Petitioner's argument reveals that her entire position depends on language not found anywhere in the statute. The Code Provision provides, in relevant part, that an action for injury or death against a physician arising out of patient care shall be brought no later than two years after the date that the claimant knew, or through the use of reasonable diligence should have known, of ***the injury or death***. 735 ILCS 5/13-212.

The common law rule differs in one very significant respect. Under common law, the action must be filed within two years of the date the party knows or reasonably should know of an injury ***and*** "also knows or reasonably should know that it was wrongfully caused." (Petition, p. 9, citing ***Young v. McKiegue***, 303 Ill. App. 3d 380 (1st Dist. 1999)). The notion that the limitation period is triggered when claimant had knowledge that an injury was wrongfully caused is not found anywhere in the statute. The statute says nothing about knowledge of potential negligence. Nor does the Wrongful Death Act address a claimant's

knowledge that an injury may be wrongfully caused. 740 ILCS 180/2 ("Every such action shall be commenced within 2 years after the death…"). Accordingly, application of the common law discovery rule is indeed an "overlay" on the plain language of the statute.

Petitioner relies on this Court's ruling in ***Mega v. Holy Cross Hosp.***, 111 Ill. 2d 416, 428 (1986) for the proposition that the discovery rule may be applied in the absence of a contrary intent by the legislature. And yet, the position Petitioner endorses lies in direct conflict with the established principle that:

> It is axiomatic that where the language of a statute is plain and unambiguous, the only role of the court is in its application. We have no authority either to amend or to annex a statute. Any alteration to the statute, regardless of any perceived benefit or danger, must necessarily be sought from the legislature.

In re M.M., 156 Ill. 2d 53, 69 (1993). The thrust of the majority's ruling in this case is that our courts are free to apply common law interpretation of the limitations statute to common law actions. But courts have no authority to overlay these common law interpretations in ***statutory*** actions. One may disagree with the majority's view expressed in this case, but its reasoning is sound and well-founded on established principles of law.

The case is unworthy of this Court's review for the simple reason that legal counsel for the estate had knowledge of both the injury, and that it appeared to be wrongfully caused, as of the date of his mother's death. And, as Petitioner noted, the case comes before this Court having never been addressed by the Defendants-Appellees and only marginally explored in a Petition for Rehearing

filed in the Appellate Court. As such, the case is premature for review by this Court.

II. Petitioner's Unexplained Delay in Prosecuting his Claim Strongly Suggests that this Case is Not an Appropriate Case for Review.

Petitioner suggests that both the Circuit Court and Appellate Court erred in finding the claim time barred. Assuming that the common law discovery rule applies in this case, to adopt Petitioner's view under the circumstances underlying this case would effectively nullify the limitations period leaving only the 4-year statute of repose.

It is a longstanding, common law rule that the limitations period begins to run when the injured party has reason to believe a strong likelihood exists that treatment has been improper. ***Beasley v. Abusief***, 146 Ill. App. 3d 54, 58 (4th Dist. 1986). At that point, the injured person is under a duty to further investigate before initiating a suit. The purpose of the two-year period is to give the injured person that period of time to make the investigation. ***Id.***

Moon, acting as the administrator of the estate ***and*** its attorney, testified that as of the date of his mother's death, he suspected his mother had received sub-standard medical treatment that may have caused her death (C. 98). At that point, the two-year clock began to run and he had a duty to investigate further.

But he chose to wait. Eight months after her death, on February 26, 2010, Moon did what any attorney would do to initiate an investigation—he ordered

her medical files. Moon's conduct in taking the initial steps to prepare a case for litigation erased any remaining doubt that the limitations period was running.

After receiving the medical records, Moon delayed once again. He waited over a year, until April, 2011, before contacting a medical consulting firm to review the records. A few weeks later, he had a physician's report sufficient to satisfy the requisites under Healing Art Malpractice statute and filed suit against two of his mother's treating physicians. 735 ILCS 5/2-622. During discovery in that suit, he engaged a different expert to review the medical records and, on March 18, 2013, filed a separate action against Dr. Rhode. Accordingly, he filed suit in the case at bar almost four years after his mother died and over three years after he initiated the first steps in litigating this action.

Petitioner has never offered any explanation for waiting eight months to request the medical records even though he admitted that he suspected negligence from the very date of his mother's death (C. 98). Nor has he ever explained why he waited over a year to have those records reviewed by medical professionals. Even if we assume that the majority erred in refusing to superimpose the common law discovery rule on a statutory claim, the outcome in this case will remain the same. This is not a good case to test the viability of the Appellate Court's ruling.

III. Courts of Review Have a Duty To Correct Errors and Inconsistencies in the Law Regardless of the Arguments Advanced By Counsel.

Petitioner takes issue with the fact that the Dr. Rhode never raised the precise analysis utilized in the majority's ruling. The argument appears to miss the point. This was not Dr. Rhode's appeal. Dr. Rhode was under no obligation to make ***any*** particular argument on appeal. Indeed, Dr. Rhode was under no obligation to file an appellate brief at all. Had she failed to enter an appearance in the Appellate Court, Moon would still have the burden of persuading the court that the trial court erred in dismissing the case. There is no default judgment in a court of review.

The very notion that a decision of the Appellate Court is deserving of this Court's attention because its reasoning differed from the analysis contained in an appellee's brief is profoundly disturbing. Under that theory, justices serving on our courts of review will be admonished to set aside their own view of a case and adopt the reasoning of either the appellant or the appellee. And what happens when neither party to the appeal offers a cognizable argument? Will our courts of review be compelled to adopt the least irrational choice placed before it?

Judge Posner reflected on this issue, noting that:

> Judges are not umpires, calling balls and strikes; or judges of a moot court, awarding victory to the side that argues better… Appellate courts do rely on counsel to present the grounds for reversal, but in this country, unlike the practice in England, where the judges have no law clerks, they do not depend on counsel to find all the cases and all the reasons in support of the appeal.

Smith v. Farley, 59 F.3d 659, 665 (7th Cir. 1995). Supreme Court Rule 366 empowers our reviewing courts to "enter any judgment and make any order that ought to have been given or made, and make any other and further orders grant any relief…that the case may require." Petitioner essentially invites the Court to eliminate Rule 366 and encourage the justices serving our courts of review to satisfy themselves with calling balls and strikes. Respondent respectfully urges the Court to decline that invitation.

It is also essential to keep in mind the interests of the Defendants. Dr. Rhode vehemently denies that she breached the standard of care in her review of Kathryn Moon's radiological exams. She considers this suit to be entirely without merit. Accordingly, she has but one interest in this case—to see it disappear as quickly and quietly as possible.

Dr. Rhode has no interest in the evolution of Illinois jurisprudence. She has no interest in creating a conflict among the various divisions of the Appellate Court, nor does she have any interest in seeing her case litigated in the Illinois Supreme Court and having her name appear in legal journals. To the contrary, she seeks repose, nothing more.

The circumstances underlying this case point to a straightforward, easily ascertainable conclusion. Petitioner knew of his injury and that it may have been wrongfully caused as of the date of his mother's death. The discovery rule has no application under these facts. The very notion that her counsel would needlessly

urge the Appellate Court to create a conflict in the law—and potentially add years to the course of litigation that she considers frivolous—is astonishing.

To the extent that Petitioner is suggesting that counsel should ignore the needs of their client in order to advance novel theories of law that, by their very nature, may lead to protracted litigation and a substantial increase in legal should be rejected out of hand. Certainly, on a common sense level, this issue is undeserving of this Court's attention.

Petitioner closes his argument with the contention that Supreme Court Rule 341(h)(7) provides that "points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing" (Petition, p. 20). Surely, Petitioner understands that waiver is a limitation on the parties, not the court. ***Dillon v. Evanston Hosp.***, 199 Ill. 2d 483, 504-505 (2002). The notion that our courts of review are handcuffed to the arguments raised by counsel finds no support in the law.

Petitioner's suggestion that the process is somehow flawed because the parties never briefed the issue raised in the majority's ruling is undermined by the fact that he had an opportunity to directly address the issue in his Petition for Rehearing. Remarkably, Petitioner did not raise a single argument addressing the majority's primary holding. Instead, as the Appellate Court noted, Petitioner accused the court "of deciding an issue never raised in either the circuit court or before this court." Moon, 2015 IL App (3d) 130613, ¶ 28.

Petitioner had every opportunity to address the majority's reasoning in his Petition for Rehearing, but he chose not to do so. Accordingly, to come before this Court now and claim that Dr. Rhode somehow forfeited the issue appears somewhat disingenuous. The fact that the majority's analysis went unchallenged in the Appellate Court is an error of Petitioner's own making.

CONCLUSION

WHEREFORE, the Defendants-Respondents, DR. CLARISSA F. RHODE AND CENTRAL ILLINOIS RADIOLOGICAL ASSOCIATES, LTD., respectfully pray that the Petition for Leave to Appeal be denied.

Respectfully submitted,

BY: s/Craig L. Unrath
HEYL, ROYSTER, VOELKER & ALLEN
Attorneys for Defendants-Respondents
DR. CLARISSA F. RHODE and
CENTRAL ILLINOIS RADIOLOGICAL
ASSOCIATES, LTD

CRAIG L. UNRATH
NICHOLAS J. BERTSCHY
J. MATTHEW THOMPSON
300 Hamilton Boulevard
P.O. Box 6199
Peoria, Illinois 61601
Telephone 309.676.0400
cunrath@heylroyster.com
nbertschy@heylroyster.com
mthompson@heylroyster.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages 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 342(a), is 14 pages.

BY: s/Craig L. Unrath
Craig L. Unrath

PROOF OF SERVICE

Craig L. Unrath, one of the attorneys for the Defendants-Respondents, DR. CLARISSA F. RHODE and CENTRAL ILLINOIS RADIOLOGICAL ASSOCIATES, LTD, certifies that on August 10, 2015, the foregoing Answer to Petition for Leave to Appeal was electronically filed with the Clerk of the Illinois Supreme Court using the I2file system. The undersigned certifies that a copy of the foregoing instrument will be served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Box in Peoria, Illinois on August 10, 2015.

Michael T. Reagan
Law Offices of Michael T. Reagan
633 LaSalle Street
Suite 409
Ottawa, Illinois 61350

Randall W. Moon
Attorney at Law
715 Sara Drive
Washington, Pennsylvania 15301

s/Craig L. Unrath
Craig L. Unrath
#6207905

CLU/lmg
28367288_1