No. 119572

IN THE
SUPREME COURT OF ILLINOIS

RANDALL MOON, Executor of the estate of
KATHRYN MOON, Deceased,
Plaintiff-Respondent

v.

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

BRIEF OF *AMICUS CURIAE* ILLINOIS STATE MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION

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POINTS AND AUTHORITIES

AMICUS CURIAE BRIEF AND ARGUMENT OF THE ILLINOIS STATE MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION

IN SUPPORT OF DEFENDANTS-APPELLEES DR. CLARISSA F. RHODE AND CENTRAL ILLINOIS RADIOLOGICAL ASSOCIATES, LTD.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Illinois State Medical Society (ISMS) and the American Medical Association (AMA) by their attorneys, submit this brief in support of Defendants-Appellees Dr. Clarissa F. Rhode and Central Illinois Radiological Associates, Ltd.[1]

The ISMS is a non-profit, I.R.C. § 501(c)(6) professional society comprised of over 9,000 practicing physicians, medical residents, and medical students. ISMS membership encompasses practicing physicians from a broad range of specialties, geographic locations, and types of practice.

The AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. AMA members practice and reside in all states, including Illinois. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The main issue in the instant appeal is whether, in a case brought under the Wrongful Death Act and Survival Act, the Appellate Court correctly held that the two-

[1] The Illinois State Medical Society and the American Medical Association join this brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

year statute of limitations contained in 735 ILCS 5/13-212(a) commences upon discovery of the alleged injury or death and does not depend on discovery of wrongful conduct. *Amici* believe the court correctly harmonized the Wrongful Death Act and the Code of Civil Procedure. Overturning the decision would create substantial injustice to the health care professionals of this State by removing statutory protections against the filing of actions that are time-barred by the limitations period set out by statute. Additionally, such a ruling would unjustly frustrate the plain language of the statutes.

ISMS, by virtue of being the most broadly based professional association representing Illinois physicians, has a vital interest in the resolution of issues concerning the practice of medicine and the interpretation of the Code of Civil Procedure, Wrongful Death Act, and Survival Act, and specifically the ability of similarly-situated physicians to receive appropriate protection from lawsuits filed outside of the applicable statute of limitations.

As the representative of hundreds of thousands of physicians throughout the United States, the AMA has a profound interest in this case. The AMA joins in this brief *amicus curiae* in the hope that it will provide helpful information that will allow the court to understand the impact of this case on physicians in Illinois and across the nation. The plaintiffs' position, which would essentially create a four-year statute of limitations, would be out of step with the prevailing limitation period nationally for wrongful death actions.

ARGUMENT

I. OVERTURNING THE RULING OF THE THIRD DISTRICT OF THE APPELLATE COURT WOULD MISINTERPRET THE PLAIN LANGUAGE OF THE APPLICABLE LIMITATIONS PERIODS THE LEGISLATURE HAS ESTABLISHED.

The Illinois State Medical Society (ISMS) and the American Medical Association (AMA) believe that overturning the ruling of the Third District Appellate Court would misinterpret the plain language of 735 ILL. COMP. STAT. ANN. 5/13-212(a) and 740 ILL. COMP. STAT. ANN. 180/2 (West 2015) and frustrate the intent of the General Assembly. The ISMS and AMA fully support those arguments offered by Defendants-Appellees.

The facts are as follows: the plaintiff's ninety-year-old decedent, Kathryn Moon, was admitted to Proctor Hospital on May 18, 2009 for treatment of a rectal prolapse. (C. 1). Dr. Jeffery Williamson performed surgery on Kathryn two days later, and she remained under his care until May 23, 2009, at which time Dr. Jayaraji Salimath became involved with her post-operative care. (C. 1). Kathryn developed numerous complications, including labored breathing, pulmonary infiltrates, and an elevated white blood cell count. (C. 2). Dr. Salimath ordered two CT scans on May 23 and May 24, 2009, both of which were interpreted by Dr. Clarissa Rhode, a radiologist. (C. 2, 5-6). Kathryn passed away on May 29, 2009. (C. 2). Kathryn's son, Randall Moon, was appointed as executor of the estate on June 9, 2009. (C. 44). Although Randall Moon currently lives in Pennsylvania, he maintains an active license to practice law in Illinois and is experienced in Illinois personal injury matters. (C. 62). Prior to relocating to Pennsylvania, Moon practiced law in Peoria, Illinois for 22 years. (C. 61).

The following year, on February 26, 2010, Randall Moon requested Kathryn's records from Proctor Hospital for the purpose of administering the decedent's estate. (C. 42). Over one year later, on April 11, 2011, Randall Moon contacted a medical consulting firm and sent copies of the medical records. (C. 142). Within weeks, at the end of April 2011, Moon received a verbal report that there was negligent conduct on behalf of Drs. Salimath and Williamson. (C. 142). A written report followed on May 2, 2011. (C. 142).

Moon, acting as his own legal counsel, filed a medical negligence action against Drs. Salimath and Williamson on May 10, 2011, alleging failure to diagnose and/or treat pneumonia and respiratory distress. (C. 131-32, 142). On March 18, 2013, Moon filed the complaint in the instant case, claiming he did not discover his action against Dr. Rhode until February 28, 2013, when Dr. Abraham Dachman reviewed the CT scans. (C. 2).

Dr. Rhode filed a motion to dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure, arguing the two-year statute of limitations periods for wrongful death and survival actions had expired. (C. 26, 28). The trial court granted the motion to dismiss. (R. 17). On appeal, the Third District of the Appellate Court affirmed. *Moon v. Rhode*, 2015 IL App (3d) 130613 ¶ 10, 32-33.

Illinois has a specific statute that governs the timeliness for filing a medical malpractice action under the Code of Civil Procedure. 735 ILL. COMP. STAT. ANN. 5/13-212 (West 2015).

Section 13-212(a) of the Code of Civil Procedure states:

> (a) Except as provided in Section 13-215 of this Act, *no action for damages for injury or death* against any physician, dentist,

> registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care *shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death* for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death. (Emphasis added.)
>
> (Source: P.A. 98-1077, eff. 1-1-15.)

Additionally, the timeline for commencing an action pursuant to the Wrongful Death Act is explicitly delineated by statute.

Section 2 of the Wrongful Death Act, 740 ILL. COMP. STAT. ANN. 180, states in part:

> Every such action shall be commenced *within 2 years after the death* of such person but an action against a defendant arising from a crime committed by the defendant in whose name an escrow account was established under the "Criminal Victims' Escrow Account Act" shall be commenced within 2 years after the establishment of such account. For the purposes of this Section 2, next of kin includes an adopting parent and an adopted child, and they shall be treated as a natural parent and a natural child, respectively. However, if a person entitled to recover benefits under this Act, is, at the time the cause of action accrued, within the age of 18 years, he or she may cause such action to be brought within 2 years after attainment of the age of 18. (Emphasis added.)
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> (Source: P.A. 95-3, eff. 5-31-07.)

The Survival Act is conceptually separate and distinct from the Wrongful Death Act. *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 431 (1974). Whereas the Wrongful Death Act provides a remedy for injuries to the spouse and next of kin, a survival action is for injuries to the deceased that he or she sustained prior to death. *Wyness v. Armstrong World Indus., Inc.*, 131 Ill. 2d 403, 410 (1989). Enacted

originally in 1872, the Survival Act does not create a statutory cause of action, but rather allows a representative of the decedent to maintain those statutory or common law actions which accrued to the decedent before her death. *Nat'l Bank of Bloomington v. Norfolk & W. Ry. Co.*, 73 Ill. 2d 160, 172 (1978). The Survival Act, codified at 755 ILL. COMP. STAT. ANN. 5/27-6 (West 2015) states:

> In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 6-21 of "An Act relating to alcoholic liquors".
>
> (Source: P.A. 82-783.)

A. The Wrongful Death Act is a creation of statute and must be strictly construed.

To compensate the surviving spouse and next of kin of the decedent for the injury resulting to them from the death of the decedent, the Illinois General Assembly enacted the Wrongful Death Act in 1853. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 612 (1956). For a wrongful death action to exist, the tortious act upon which it is based must be one upon which the decedent could have sued if he or she was alive. *Limer v. Lyman*, 220 Ill. App. 3d 1036, 1043 (4th Dist. 1991). The limitations period for a wrongful death claim thus begins to run at the time of the death, as long as the decedent's claim was not time-barred at the time of death. *Skridla v. Gen. Motors Co.*, 2015 IL App (2d) 141168 ¶17; see also *Wolfe v. Westlake Cmty. Hosp.*, 173 Ill. App. 3d 608, 612 (1st Dist. 1988).

As the Wrongful Death Act is a creature of statute, it is to be strictly construed, and is not subject to amendment by implication—any amendment must be by express legislative enactment. *Williams v. Manchester*, 228 Ill. 2d 404, 419 (2008). This Court has previously observed that:

> "Since the right of action for death by wrongful act is wholly statutory and must be taken with all the conditions imposed upon it, the burden being upon plaintiff to bring himself within the requirements of the statute, it is almost universally held that a provision in the statute creating the right, requiring an action thereon to be brought within a specified time, is more than an ordinary statute of limitations and goes to the existence of the right itself. It is a condition attached to the right to sue at all." *Hartray v. Chicago Ry. Co.*, 290 Ill. 85, 86 (1919).

Similarly, courts cannot engraft conditions to the Wrongful Death Act, nor can they depart from the plain language of the statute when interpreting it. *Light v. Proctor Cmty. Hosp.*, 182 Ill. App. 3d 563, 565 (3rd Dist. 1989).

B. Courts should not interpret a statute to contain language the legislature omitted.

Under a strict interpretation of the Illinois statute of limitations, it was possible for the statutory period to run before the person became aware of the specific harm suffered. To alleviate such harsh consequences, the judiciary created the discovery rule, which postpones the commencement of the statute of limitations until the plaintiff knows, or reasonably should know, that he or she has been injured and that injury was wrongfully caused. *Golla v. Gen. Motors Corp.*, 167 Ill. 2d. 353, 360-61 (1995). This rule was later expanded to apply to medical malpractice cases. *Lipsey v. Michael Reese Hosp.*, 46 Ill. 2d 32, 40 (1970). The application of the discovery rule to medical malpractice actions created a long tail of liability, which necessitated the

adoption of the statutory repose period during the 1970s. *Anderson v. Wagner*, 79 Ill. 2d. 295, 312 (1979).

The discovery rule, established through the common law, does not apply to all cases. *Advincula v. United Blood Servs.*, 176 Ill. 2d 1, 43 (1996). In the instructive case *Greenock v. Rush Presbyterian St. Luke's Medical Center*, 65 Ill. App. 3d 266 (1st Dist. 1978), the plaintiff filed a medical malpractice action against a hospital to recover for the wrongful death of the plaintiff's decedent. *Greenock*, 65 Ill. App. 3d at 268. The suit was filed on November 1, 1976, alleging the death of the plaintiff's decedent on April 11, 1973 was caused by the hospital's negligence during a renal transplant. *Id.* at 268. On appeal to the First District, the court reviewed the language in the Limitations Act, which has since been recodified as 735 ILCS 5/13-212(a), and noted that, regarding medical malpractice actions for death where the fact of the death is known, the statute states "No action for ...death...shall be brought more than 2 years after the date on which the claimant knew...of the...death for which damages are sought in the action..." *Id.* at 269-70. Based upon that language, the court stated that the plain language of the statute indicates that the two-year period began on April 11, 1973—the date of the decedent's death—and the suit was time-barred when it was filed on November 1, 1976. *Id.* at 270. Importantly, the court noted that "[w]e cannot read into section 21.1 an extra extension of time for plaintiff to bring suit following death when it is not clearly provided for by the statute." *Id.* at 270.

The facts and circumstances of *Greenock* are substantially similar to the instant case and the holding is instructive. Here, we have a medical malpractice action against a physician to recover for the alleged wrongful death of the plaintiff's

decedent. Similar to the plaintiff in *Greenock*, the plaintiff's decedent died more than two years prior to the filing of the lawsuit despite the fact that the date of the plaintiff's decedent's death was known by the plaintiff. (C. 1, 2). Analogous to the court in *Greenock*, this Court is asked to interpret the language of the statute of limitations. Although the Limitations Act has been recodified since *Greenock* was decided, the language remains substantially the same. Thus, the reasoning of the appellate court in *Greenock* should be applied in this case; the filing deadline should not be extended where the fact of the death is known, as plainly stated in the statute. The statute of limitations does not state that the clock starts running only when the plaintiff reasonably should know of the death and of wrongful causation – the legislature omitted such limiting language. Therefore, the holding of the Appellate Court should be upheld.

C. The Appellate Court properly held that the discovery rule did not extend the filing deadline for the Wrongful Death Act claim in the instant case.

The case before this Court concerns the applicability of multiple statutes. This Court has held that statutes that relate to one subject are governed by one spirit, that the legislature intended enactments to be consistent and harmonious, and statutes are to be read together. *Williams v. Ill. State Scholarship Comm'n*, 139 Ill. 2d 24, 52 (1990).

In the instant case, there are two statutes addressing the time period for bringing an action related to death. The language in the Wrongful Death Act is unequivocal that claimants have two years from the date of death to bring a suit, and the Code of Civil Procedure is clear that a claimant must file a wrongful death action

within two years from the date on which "the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first." 735 ILL. COMP. STAT. ANN. 5/13-212(a) and 740 ILL. COMP. STAT. ANN. 180/2 (West 2015).

In applying the plain language of the statutes here, the plaintiff clearly knew of the death. Where the injury is obvious—such as the death of a patient who was "doing okay," per the plaintiff's own assessment—the more easily a plaintiff should be able to determine its cause. (C. 98). *Clark v. Galen Hosp. Ill., Inc.*, 322 Ill. App. 3d 64, 72 (1st Dist. 2001). The plaintiff does not allege that the decedent received an aggravated injury—one caused by allowing an undiagnosed condition to worsen over time—that might warrant application of the discovery rule. Instead, the plaintiff describes an acute, sudden course of events, and this Court has held that where a sudden event occurs, the cause of action accrues. *Golla v. Gen. Motors Corp.*, 167 Ill. 2d 353, 361 (1995). Specifically, death may be considered such a sudden event. *Cramsey v. Knoblock*, 191 Ill. App. 3d 756, 764 (4th Dist. 1989).

The date on which the plaintiff "knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death" was May 29, 2009, the date of death of the decedent. Despite this knowledge, the plaintiff chose to wait to file a lawsuit against defendant Rhode alleging a wrongful death until almost four years after the decedent passed away. Further, the executor for the decedent in this case is, and was at the time of the filing of this suit, an experienced personal injury lawyer, authorized to practice law in the

State of Illinois, and did in fact act as a licensed attorney in this matter. Attorney Moon, who had practiced law for 22 years in Illinois, unlike the ordinary layman, was aware of the various limitations periods and had extensive professional experience in reviewing medical records. (C. 61, 63, 96). This case is an example of a claimant who has slept on his rights, and this Court should not reward him for doing so. Indeed, this case amply illustrates the correct application of the statute of limitations as constructed by the General Assembly. There is no need to reach beyond the plain language of the statute and read a wrongful conduct component into the discovery rule. Thus, the Appellate Court correctly interpreted the governing statutes and upheld the trial court's dismissal of the case.

II. THIS COURT SHOULD UPHOLD THE RULING OF THE APPELLATE COURT IN KEEPING WITH THIS COURT'S RECOGNITION OF THE IMPORTANT PUBLIC POLICY SUPPORTING THE STATUTE OF LIMITATIONS.

The Code of Civil Procedure provides a two-year statute of limitations for medical malpractice actions. The purpose behind the General Assembly's enactment of the statute of limitations is illuminating in the instant case. During the early 1970s, a medical malpractice crisis arose in most jurisdictions in the United States, including Illinois. *Anderson v. Wagner*, 79 Ill. 2d 295, 301 (1979). An increased reluctance by insurance companies to write medical professional liability, combined with a significant increase in premiums for those policies, adversely affected the medical profession. *Id.* at 301. Numerous physicians curtailed their practices or ceased practicing medicine altogether. *Id.*

In response to this crisis, which affected both physicians and citizens of this State, the General Assembly sought to decrease the cost of medical professional

liability insurance and ensure the continued availability of such insurance. *Anderson*, 29 Ill. 2d at 301. As a solution, the legislature enacted an outside time limit of five years from the time of patient care, later reduced to four years, in which a plaintiff could bring an action. *Hayes v. Mercy Hosp. & Med. Ctr.*, 136 Ill. 2d 450, 458 (1990). The General Assembly imposed this time limit to curtail the extended exposure of physician and other health care professionals to potential liability, increase the medical malpractice insurance companies' ability to predict future liability, and decrease the amount of medical professional liability premiums. *Hayes*, 136 Ill. 2d at 458.

Statutes of limitation, in general, seek to "promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Such statutes promote stability for defendants, as they codify society's belief that individuals should not be forced to live indefinitely with the threat of a lawsuit.[2] The legislative intent is to encourage diligence in the initiation of lawsuits and discourage the presentation of stale claims. *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill. 2d 129, 132 (1975). Requiring the timely filing of lawsuits also helps conserve judicial resources by preventing overcrowding of court dockets.[3]

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[2] Kathleen L. Cerveny, *Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686, 687 (1985).
[3] *Id.* at 687.

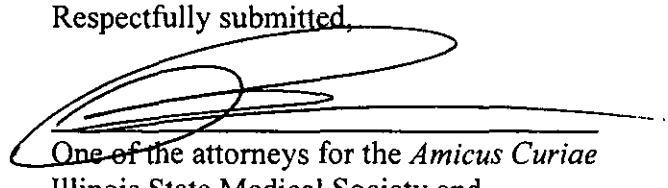
The General Assembly contemplated that the statute of limitations would bar some actions, an inevitable result of balancing the interests involved. Limitations statutes encourage a claimant to bring a cause of action when evidence is fresh and her need for recompense may be acute and prevent defendants from indefinite exposure. In enacting the limitations periods in the Code of Civil Procedure and Wrongful Death Act, the General Assembly codified this important public policy, and any changes to that public policy should be achieved legislatively. This Court has repeatedly held that regulatory solutions to public policy issues are the rightful domain of the legislature. See *Anderson*, 79 Ill. 2d at 312 (legislature's action in establishing time limit for filing a complaint for medical malpractice was reasonable); see also *Orlak v. Loyola Univ. Health Sys.*, 228 Ill. 2d 1, 17 (2007) (statute of repose "was part of the legislative response to a medical malpractice crisis; the purpose was to reduce the cost of medical malpractice insurance and to assure its continued availability to medical practitioners."); *Grand Trunk W. Ry. Co. v. Indus. Comm'n*, 291 Ill. 167, 173-74 (1919) ("liability for death caused by wrongful act...is a modern statutory innovation. The legislature may modify this right of action, extend it or limit it, or even abolish it altogether."); *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 41 (2001) ("the General Assembly has wide regulatory power with respect to the health-care professions...and it is in the broad discretion of the legislature to determine not only what the public interest and welfare require, but to determine the measures needed to secure such interest." (quoting *Chicago Nat'l League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 364 (1985)).

Overturning the ruling of the Appellate Court would remove an important and fair manner for plaintiffs to bring suits and for defendants to respond, and would undoubtedly subject health care professionals to unwarranted liability. This ruling affects not only Dr. Rhode and her associates, but all physicians and licensed health care providers in the State of Illinois. This Court should give effect to the intent of the General Assembly, which created a fair and just process for tort claims.

III. CONCLUSION

As this Court has recognized, the General Assembly intended to provide the citizens of this State with a limitations period fair to both plaintiffs and defendants—it balances the need for plaintiffs to bring lawsuits with the defendants' need to know when their potential liability is extinguished. This Court repeatedly has recognized that the need for this certainty is particularly acute in the medical malpractice arena. Plaintiffs have fair access, and medical professionals are protected by reasonable limits. To expand the discovery rule as drafted by the General Assembly would contradict the laudable purpose of the legislation. The limitations period language is clear and unambiguous. For all of these reasons, the Illinois State Medical Society and the American Medical Association respectfully request the Illinois Supreme Court uphold the decision of the Third District Appellate Court in this matter.

Respectfully submitted,



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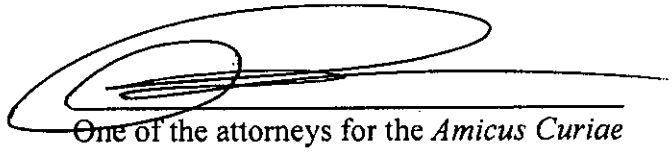
SUPREME COURT RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 15 pages.



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