No. 120745

In the

Supreme Court of Illinois

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

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

AMICI CURIAE BRIEF OF THE ILLINOIS HEALTH AND HOSPITAL ASSOCIATION AND THE ILLINOIS STATE MEDICAL SOCIETY IN SUPPORT OF DEFENDANTS-APPELLANTS

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae, the Illinois Health and Hospital Association ("IHA"), is a state-wide, not-for-profit association with a membership of over 200 hospitals and nearly 50 health systems in the State of Illinois. For over 80 years, IHA has served as a representative and advocate for its members, addressing the social, economic, political and legal issues affecting the delivery of high-quality health care in Illinois. IHA strives to promote the cost-effective delivery of high quality health care through advocacy in the general assembly, federal and state agencies, and the courts. Furthermore, IHA was deeply involved in the medical malpractice insurance-health care crisis that resulted in the Illinois legislature's 1976 enactment of the 4-year statute of repose involved in this case and now embodied in 735 ILCS 5/13-212(a). Given its long-standing involvement in this legislation, IHA believes that it can bring to the Court a historical perspective that will assist the Court in applying the medical malpractice statute of repose consistent with the legislature's intent that all Illinois citizens have access to affordable health care. Furthermore, as a representative of almost every hospital in this state, IHA has a profound interest in this case in which a wrongful death action was allowed to proceed against various hospitals, even though it was filed more than four years after the alleged malpractice occurred.

Amicus curiae, the Illinois State Medical Society (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 in the State of Illinois.

Founded in 1840, ISMS is the only statewide professional organization that represents physicians practicing in the State of Illinois in all specialties and practice types. ISMS represents and unifies its physician members as they practice the science and art of medicine in the State of Illinois. ISMS represents the interests of its member physicians, advocates for patients, and promotes the doctor/patient relationship, the ethical practice of medicine, and the betterment of public health. Like IHA, ISMS and its members have had a historical and direct involvement in the medical malpractice insurance crisis, the legislative debates, and the ultimate enactment of the 4-year statute of repose in 1976. Like the IHA, ISMS and its members have a vital interest in any case where, as here, IHA and ISMS believe the 4-year statute of repose for a wrongful death medical malpractice action was not applied by the Appellate Court in the manner in which it was written and intended by the Illinois legislature.

Virtually every member hospital of IHA and every physician member of ISMS will be potentially affected by the Court's decision in this case. ISMS and IHA will seek to demonstrate that the Appellate Court's decision, applying the doctrine of relation back to avoid the 4-year statute of repose, is inconsistent with the legislature's intent and contradicts the fundamental purpose of the statute of repose as it has been historically recognized and applied by this Court and our appellate courts, even in cases where, unlike the case at bar, the plaintiff was left without a remedy.

ARGUMENT

I. The Medical Malpractice 4-Year Statute of Repose is Founded on the Legislature's Determination that the Statute Serves the Public Interest in Having Available and Affordable Healthcare for All Illinois Citizens.

The 4-year statute of repose, now embodied in 735 ILCS 5/13-212(a), was enacted by the Illinois legislature in 1976. P.A. 79-1434 (1976). Thereafter, in *Anderson v. Wagner*, 79 Ill. 2d 295, 303-04 (1979), this Court, noting "the unique nature of medical malpractice problems," upheld the statute of repose against all constitutional challenges. Over the ensuing decades, this Court has consistently and repeatedly upheld and enforced the statute as a valid exercise of the legislature's right to limit the discovery rule's "long tail" of liability that generated a medical malpractice insurance crisis and threatened the availability and affordability of medical care to all Illinois citizens.

> The difficulty in obtaining insurance at reasonable rates forced many health-care providers to curtail or cease to render their services. The legislative response to this crisis sought to reduce the cost of medical malpractice insurance and to insure its continued availability to the providers of health care.

Hayes v. Mercy Hosp. and Medical Center, 136 Ill. 2d 450, 457-58 (1990), citing and quoting *Anderson*, 79 Ill. 2d at 301 (1980).

> [R]epose periods reflect the legislature's balancing of an individual's interest in recovery against the problems and costs perceived in medical malpractice actions and the public's interest in having available to it affordable health care.

Mega v. Holy Cross Hosp., 111 Ill. 2d at 428 (1986).

The Illinois General Assembly has amended Section 13-212 on numerous occasions since this Court's decision in *Anderson*, but has never attempted to

reject that decision or its progeny. *See, e.g.,* P.A. 82-783, adding dentists to the statutory provision; P.A. 83-235, adding nurses to the provision; P.A. 85-18, adding specific text concerning minors; and just recently P.A. 98-1077, effective January 1, 2015, adding text concerning causes of action for those with a legal disability. "[W]here the legislature chooses not to amend a statute after a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent." *Ready v. United/Goedecke Services, Inc.,* 232 Ill. 2d 369, 380 (2008) (citations omitted); *Hubble v. Bi-State Development Agency of Illinois-Missouri Metro. Dist.,* 238 Ill. 2d 262, 273-74 (2010) (same).

Furthermore, the same interest and goal of providing available and affordable health care for all Illinois citizens is as strong today as it was when the statute of repose was first enacted. *See, e.g., Orlak v. Loyola University Health System,* 228 Ill. 2d 1, 7-8 (2007); *Uldrych v. VHS of Illinois, Inc.,* 239 Ill. 2d 532, 542 (2011). The Appellate Court's decision in the instant case, carving a relation back exception to the repose statute that the legislature did not provide or intend, undermines that goal and is contrary to that public interest.

This Court most recently made clear that the discovery rule governs medical malpractice wrongful death actions, *Moon v. Rhode*, 2016 IL 119572. Thus, the same need for a statute of repose to extinguish the long tail of liability exists just as much in a wrongful death medical malpractice action as it does in any other medical malpractice action. Indeed, the *Moon* Court expressly noted that "pursuant to the plain language of section13-212(a) of the Code," application

of the discovery rule in a wrongful death medical malpractice case presumes that the action was filed "within a four-year statute of repose." *Moon*, ¶ 24. However, under the Appellate Court's decision, that 4-year repose period can be extended for an unlimited number of additional years by the relation-back statute.

II. The Appellate Court's Decision has the Potential to Affect Access to Health Care in Illinois, Especially in Rural Communities.

Obviously, a decision that so significantly lengthens the time that medical malpractice claims may be brought has the potential to increase the cost of medical malpractice insurance for physicians and hospitals. As set further below, there is a clear link between the cost of medical malpractice insurance for physicians and the supply of physicians and, therefore, access to health care by the residents of Illinois.

A 2010 study by the Northwestern University Feinberg School of Medicine reported that half of all graduating medical residents or fellows trained in Illinois leave the state to practice medicine elsewhere, in large part due to the medical liability environment in Illinois. The study warned Illinois will face a critical doctor shortage – especially in rural areas – if new strategies are not adopted to stem the exodus.[1] A more recent study, issued in 2015 by the Association of

[1] www.northwestern.edu/newscenter/stories/2010/11/doctors-flee-illinois.html (last visited January 9, 2017)

American Medical Colleges (AAMC)[2] shows that the situation has not improved. According to the AAMC, Illinois ranks 33rd in the nation for retenion of physicians trained at Illinois colleges and universities.[3] Indiana, by contrast, ranks 9th.[4]

These results are not surprising. Illinois physicians continue to pay among the highest medical liability insurance premiums in the country[5], and Illinois far surpasses 11 other Midwestern states in terms of medical malpractice payouts.[6]

Illinois hospitals typically report that the inability to attract and retain physicians is one of their top challenges – especially in rural communities. A recent report indicated that 25-29% of Illinois rural residents live in communities with a primary care shortage.[7]

The potential impact of the Appellate Court's decision on the cost of medical malpractice coverage – and therefore on access to care – is of course not limited to physicians. Any significant increase in the cost of a hospital's malpractice insurance has the potential to result in the need to cut costs by

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[2] 2015 State Physician Workforce Data Book (AAMC) www.aamc.org/data/workforce/reports/442830/statedataandreports.html (last visited January 9, 2017)

[3] www.aamc.org/download/447172/data/illinoisprofile.pdf (last visited January 9, 2017)

[4] www.aamc.org/download/447174/data/indianaprofile.pdf (last visited January 9, 2017)

[5] Medical Liability Monitor, Vol. 41, No. 10 (Oct. 2016) pp.16-19

[6] www.diederichhealthcare.com/the-standard/2015-medical-malpractice-payout-analysis/ (last visited January 9, 2017)

[7] www.beckershospitalreview.com/hospital-physician-relationships/15-things-to-know-about-the-physician-shortage.html (last visited January 9, 2017)

curtailing services or reducing staff – with a corresponding reduction in access to care.

III. There is Nothing in the Statute of Repose's Statutory Language, Prior Judicial Interpretation, or Public Policy to Support a Relation-Back Exception.

In enacting the 4-year statute of repose for medical malpractice cases (not involving minors), the Illinois legislature recognized only one exception – "Fraudulent concealment" as provided in 735 ILCS 5/13-215.[8] As stated by this Court in *Orlak*, 228 Ill. 2d at 7: "The only exception to the four-year statute of repose is the fraudulent-concealment exception contained in section 13-215 of the Code." Absent this fraudulent concealment exception, the statute of repose's application to medical malpractice actions, including wrongful death actions, is all inclusive:

> *[I]n 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 the injury *or death*. 735 ILCS 5/13-212(a) (Emphasis added).

Thus, this Court and the appellate courts have repeatedly rejected attempts to carve further exceptions to this 4-year statute of repose under various other statutes of limitations. *Uldrych*, 239 Ill. 2d at 542 (statute of limitations for implied indemnity actions); *Hayes,* 136 Ill. 2d at 458-60 (statute of limitation for

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[8] 5/13-215. Fraudulent Concealment:

> If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards.

contribution actions); *Heneghan v. Sekula,* 181 Ill. App. 3d 238, 241-42 (1st Dist. 1989) (same); *O'Brien v. O'Donoghue,* 292 Ill. App. 3d 699, 703-04 (1st Dist. 1997) (statute of limitations for survival action); *Limer v. Lyman,* 220 Ill. App. 3d 1036, 1041-42 (4th Dist. 1991) (same); *Real v. Kim,* 112 Ill. App. 3d 427, 432-33 (1st Dist. 1983) (statute of limitations for a wrongful death action); *Durham v. Michael Reese Hosp. Foundation,* 254 Ill. App. 3d 492, 495-96 (1st Dist. 1993) (same).

In each of these cases, the court held that even though the action would have been timely under these other statutes, the "in no event" language of Section 5/13-212(a) left no room to create a further exception to the statute of repose not provided by the legislature. As this Court reasoned in *Uldrych*, 239 Ill. 2d at 542, such a result "is simply inconsistent with the legislature's statutory scheme" and "irreconcilable with the aim and purpose of the medical malpractice statute of repose."

The 4-year statute of repose contained in Section 13-212(a) permits of no exception for the relation-back statute any more than it did for the otherwise applicable statute of limitations in the above-cited cases. There is simply nothing in the legislative history, the public policy behind the statute, or the express language of the statute to indicate an exception for those death cases in which plaintiff filed a timely Survival Act claim.

It is fundamental that "[t]he cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature," and "[t]hat intent is best

gleaned from the words of the statute itself, and where the statutory language is clear and unambiguous, it must be given effect." *Orlak*, 228 Ill. 2d at 8 (citation omitted). While the Appellate Court in the instant case purported to follow the clear and unambiguous language of the statutes, it did not do so with respect to Section 13-212(a)'s clear and unambiguous command that, except for fraudulent concealment cases, "in no event" shall an action . . . for death against any physician or hospital "be brought more than 4 years after the date on which occurred the act or omission or occurrence of the alleged in such action to have been the cause of such . . . death."

In *Heneghan,* 181 Ill. App. 3d at 246, the appellate court held that no public policy justified creating a contribution action exception to the 4-year statute of repose for medical malpractice actions, stating:

> If, in fact, the public policy underlying the Contribution Act was intended to prevail over the policy that led to the enactment of a four year medical malpractice statute of repose, that is an issue that should be addressed by the legislature rather than by the courts.

The same is true here. If the relation-back statute is allowed to undermine the policy behind the 4-year statute of repose for wrongful death medical malpractice actions, that is a decision that must be made by the Illinois legislature.

IV. The Plaintiff Will Not Be Left Without Remedies if the 4-Year Statute of Repose is Enforced.

This Court has repeatedly noted that application of the 4-year statute of repose in Section 5/13-212(a) may have harsh consequences whereby a plaintiff is barred from bringing an action before he or she even knows that it exists:

> The statute of repose sometimes bars actions even before the plaintiff has discovered the injury. While this may result in harsh consequences, the legislature enacted the statute of repose for the specific purpose of curtailing the "long tail" exposure to medical malpractice claims brought about by the advent of the discovery rule.

Orlak, 228 Ill. 2d at 7-8.

> Although such a result a cause of action barred before its discovery seems harsh and unfair, the reasonableness of the statute must be judged in light of the circumstances confronting the legislature and the end which it sought to accomplish.

Anderson, 79 Ill. 2d at 312.

> The period of repose gives effect to a policy different from that advanced by a period of limitations; it is intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge or his cause of action.

Mega, 111 Ill. 2d at 422-23.

Here, as amplified in Defendants-Appellants' Brief, Plaintiff did not know of the existence of a wrongful death cause of action during the period of repose because such an action did not even exist during that time. However, applying a 4-year statute of repose to Plaintiff's wrongful death action in the instant case will not have anywhere near as harsh a result as this Court's decisions in *Anderson*, *Mega*, *Hayes, Orlak* and *Uldrych*, where application of the 4-year repose period barred plaintiff from any recovery. By its express terms, the statute of repose in 735 ILCS 5/13-212(a) applies separately to actions "for damages for *injury or death,*" and bars only those actions "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). Thus, unlike the cited cases, the instant Plaintiff is not left remediless. Here, by reason of the Survival Act, Plaintiff will be able to maintain her timely filed survival action for all of decedent's injuries up to the time of death – a period of some 6 years.

CONCLUSION

For all the reasons set forth herein, Amici Curiae the Illinois Health and Hospital Association and the Illinois State Medical Society respectfully urge this Court to reverse the Appellate Court and to affirm he circuit court's order dismissing Plaintiff's wrongful death claims.

Respectfully submitted,

By: 

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Supreme Court Rule 341 (c) Certification of Compliance

Pursuant to Supreme Court Rule 341 (c), we certify that this Amici Curiae's Brief conforms to the requirements of Rules 341(a), (b) and 345 (e). The length of this brief, excluding the pages containing Rule 341(d) cover and the Rule 341(h)(i) statement of points and authorities, is 12 pages.

Respectfully submitted,

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