No. 119572

IN THE
SUPREME COURT OF ILLINOIS

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

Plaintiff-Appellant,

v.

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

Defendants-Appellee.

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

REPLY BRIEF OF APPELLANT

Michael T. Reagan, #2295172
Law Offices of Michael T. Reagan
633 LaSalle Street, Suite 409
Ottawa, IL 61350
(815) 434-1400
mreagan@reagan-law.com

Randall W. Moon
Attorney at Law
715 Sara Drive
Washington, PA 15301
(724) 225-6345

Attorneys for Plaintiff-Appellant

ORAL ARGUMENT REQUESTED

ARGUMENT

The brief of the defendants makes it appear that they are at least as interested in fitting the arguments they wish to make into contrived rhetorical devices, and in portraying a skewed version of plaintiff's arguments for the purpose of casting unsupported animadversions, than they are in addressing the merits of the issues here for decision. This Court might be better served by a focus on the substance of the issues rather than rhetorical give and take, but plaintiff must reply to some of defendants' argumentative assertions. In addition to dealing with some of those here at the outset, others will be addressed in the course of this brief.[1]

Defendants write that plaintiff "omits" significant undisputed facts and that plaintiff "provides an argumentative and, in some instances, inaccurate characterization" of defendants' arguments in the circuit and appellate courts. Yet defendants do not state where plaintiff's Statement of Facts was "argumentative" or constituted "inaccurate characterization." (Brief, p. 2) Defendants wanted to present additional facts, which is certainly their right (SCR 341(i)), without need of their unsupported claim that plaintiff had

[1] The appellate court's opinion was filed on April 10, 2015. On June 15, 2015, the court filed an opinion modified upon denial of rehearing. While that modified opinion was properly included in the Petition for Leave to Appeal, the original opinion was inadvertently included in the Appendix to appellant's brief. The modified opinion is contained in the Appendix to this brief. The primary difference is the addition of paragraphs 28 to 30 at the end of the modified opinion. They do not affect the paragraph numbers of the rest of the majority opinion, but they do alter the numbering of the dissent.

misrepresented anything. Most of the factual exchanges relate to whether the facts are sufficient for the discovery rule inquiry to be decided as a matter of law, as opposed to by the jury. As is inherent in that type of question, both sides have facts they wish to assert. This Court will see that many of the facts set out in defendants' brief here, while in the record because the entirety of Randall Moon's deposition was filed, were nonetheless not argued by defendants below, either orally or in writing.

With respect to *Greenock v. Rush-Presbyterian St. Luke's Medical Center*, 65 Ill.App.3d 266 (1st Dist. 1978), defendants write that plaintiff "characterizes (it) as 'stranded' but otherwise fails to discuss (it)." (Brief, p. 14) Plaintiff did not "fail" in any regard. Plaintiff described *Greenock's* holding, and advised this Court that plaintiff has been unable to find any Illinois case which has followed *Greenock* or cited it with approval in the 37 years since it was decided. (Brief, p. 16) Defendants have not disputed plaintiff's advice that no case has followed *Greenock*. *Greenock* involved multiple issues, in addition to the issue before this Court. *Greenock's* entire treatment of the issue before this Court is contained in a single short paragraph. 65 Ill.App.3d 266, 269 (1st Dist. 1978). The majority below cited *Greenock*, once, in support of the statement of its holding, but without any further explanation. *Moon*, ¶ 19.[2]

[2] The majority below stated that, "We are well aware that this decision creates a split in the districts, and, therefore, we anticipate at some point hearing from the supreme court on the issue." If *Greenock* is to be given the credence which defendants suggest here, then it was *Greenock* which created the "split," rather than the majority below. But in view of the many appellate opinions since

In light of the paucity of the discussion in *Greenock* itself, in view of the rejection of *Greenock* in many subsequent cases, and because the majority below did not discuss it, what was left to "discuss?" Considering the number of decisions which have held to the contrary of *Greenock*, in conjunction with the long passage of time, when the portrait of the law on this issue is drawn, *Greenock* is at the vanishing point.

Defendants write that "plaintiff relies extensively on strawman arguments, such as that § 13-212 governs this case."[3] (Brief, p. 10) In the same vein, defendants state that plaintiff "extensively argues a non-issue in this Court, that § 13-212(a) and not the limitations provision set out in the Act, 740 ILCS 180/2, applies...." (Brief, p. 11) Defendants state that "the appellate court ... expressly acknowledged this point."

This is hardly a strawman argument. While the appellate court did write that § 13-212(a) applies, as it had to, it is clear that the majority's opinion was not only animated by the Wrongful Death Act, but that the majority opinion also made frequent reference to the limitations period found in the Wrongful Death Act without offering any clear support for the appropriateness of such a reference. *Moon*, ¶¶ 13, 16, 22, 24 and 25. All of this is plainly set

---

Greenock which support plaintiff's position before this Court, it seems as if the appellate court perhaps did not regard *Greenock* as currently giving rise to a "split."

[3] Although defendants state that plaintiff relied "extensively" on strawman arguments "such as" that one, defendants' brief is devoid of any other claimed such instance.

out in plaintiff's brief. (Pl's Brief, p. 23) Defendants' brief itself makes frequent reference to the Wrongful Death Act for support. (Brief, pp. 22, 27, 29, 31 and 33)

The first sentence of the *amicus* brief filed by the Illinois Association of Defense Trial Counsel, in its formulation of the "Issue Presented," quotes the Wrongful Death Act, rather than § 13-212. The *amicus* brief filed by the Illinois State Medical Society and the American Medical Association asserts that the majority below "correctly harmonized the Wrongful Death Act and the Code of Civil Procedure," thus recognizing, as defendants refuse to, that the majority opinion below purports to be grounded upon, in part, the Wrongful Death Act. (ISMS Brief, p. 2) The first paragraph of the Argument offered by ISMS and the AMA states that overturning the majority opinion below "would misinterpret the plain language" of the statutes, citing both the Wrongful Death Act and § 13-212(a). (ISMS Brief, p. 3) Further, the first detailed section of the ISMS and AMA argument is captioned "The Wrongful Death Act is a creation of statute and must be strictly construed." All of that appropriately recognizes the essential tenor of the majority opinion. It is not a strawman. Nor is plaintiff's argument.

Lastly, it would be impossible to present a rational explication of the law in this area to this Court without first establishing that it is the Limitations Act which is under consideration and which controls, which plaintiff has done. To say, as defendants do, that this is the creation of a strawman is wrong.

Defendants, and their coordinated *amici*, are, at root, attempting to undo this Court's opinions concerning the discovery rule in medical malpractice cases, and in effect, all Wrongful Death and Survival Act cases. Many of their arguments are not specific to death cases, but rather attack the fundamental premises of this Court's opinions concerning the discovery rule. Defendants and the *amici* do not make frank challenges to this Court's opinions, but rather don the protective coloration of strict interpretation of the Wrongful Death Act in order to re-fight policy battles which are long over and which have no legitimate role in the simple question of statutory interpretation presented in this case.

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

Plaintiff will endeavor to fulfill the proper role of a reply brief by responding *seriatim* to the primary arguments offered by defendants.

A. The Words "Injury" and "Death" Must Be Read in a Similar Manner. Plaintiff Does Not Contend That "Death" Means the Same Thing as "Injury."

Defendants make the unsupportable claims that plaintiff "does not address the 'plain language' assertion" of the majority's decision and that "plaintiff instead contends that the discovery rule reference to 'death' means the same thing as 'injury'." (Brief, p. 13) Neither assertion is true, and the latter borders on the fanciful.

The majority below, and defendants here, begin and end their argument by looking only at the "plain language" of § 13-212, although they seek thematic reinforcement at every turn from the Wrongful Death Act and its history. But defendants here, and the majority opinion to an even greater extent, refuse to give any credence to the many years of appellate court opinions interpreting the language at issue, or to this Court's opinions brought to bear on this appeal and by the dissent below. It was the majority's mistake to reject this Court's teachings about the discovery rule, and to correspondingly ignore and dismiss the decades of reasoned analysis from other appellate districts.

After first inaccurately characterizing plaintiff's argument to be that "'death' means the same thing as 'injury'" (Brief, p. 13), seeking shelter in an irrelevant canon of statutory construction defendants conclude that "if 'death' means nothing different than 'injury' the legislature included a redundant term in the statute" (Brief, p. 17).

That is not at all what plaintiff has argued, or the case law holds. Plaintiff argued, and renews that argument here, as follows:

> "What remains for decision here is to determine whether 'death' in the phrase 'injury or death' should be interpreted in a manner radically different than was 'injury' in *Witherell* (*v. Weimer*, 85 Ill.2d 146 (1981))." (Brief, p. 25)

Plaintiff's position is that the terms must be interpreted in the same manner, not that they "mean the same thing."

Witherell recognized that whether "the definition of 'injury' include(es) or exclud(es) its wrongful causation becomes significant." *Witherell*, of course,

although only faintly acknowledged by defendants, held that "the statute starts to run when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused." *Witherell*, at 155, 156.

Both *Young v. McKiegue*, 303 Ill.App.3d 380, 387 (1st Dist. 1999) and *Wells v. Travis*, 284 Ill.App.3d 282, 286 (2nd Dist. 1996) expressly relied upon *Witherell* in interpreting the meaning of "death" as used in § 13-212 in exactly the same manner as "injury." *Young* held, in keeping with many other cases, that "the malpractice limitations period begins to run when the plaintiff knows or should have known not only of the death, but also that the death was wrongfully caused." At 387.

Defendants argue that *Witherell* drew a "significant distinction between 'injury' and 'death'," and say that plaintiff "omitted" a relevant sentence from *Witherell* in plaintiff's brief. See defendants' Brief, p. 17. Defendants place emphasis on the words "the nature of her true condition," and misquote them to be "the true nature of her injury" in the brief. Compare page 17, with page 18. But *Witherell* does not turn upon either version of those words. Rather, the essence of *Witherell* is contained in the sentence following the surplus sentence which defendants refer to where this Court frames the issue as being "whether the statute is triggered by plaintiff's discovery of the injury or not until the discovery of the negligence...." *Witherell*, at 155. That is the issue. Defendants have not offered any cognizable reason why "discovery of the

death" and also "discovery of the negligence" should not be applied to death cases as well as injury cases.

Defendants state that "significantly, in *Wyness* (*v. Armstrong World Industries, Inc.*, 131 Ill.2d 403 (1989)), this Court drew a distinction between personal injury and death." (Brief, p. 16) Defendants conclude their discussion of *Wyness* by saying that *Wyness* answers in the negative plaintiff's question of whether "injury" and "death" should be interpreted in the same manner. (Brief, p. 16) Even if it could be said that *Wyness* drew a distinction between injury and death, it is not within the bound of reason to say that any such distinction bears on any issue before this Court now. Rather than lengthening this brief, defendant respectfully refers the court to its discussion of *Wyness* at pages 19 through 21 of its brief, and asks that that understanding be compared with defendants' argument at pages 16 and 17 of their brief.

The greatest relevance of *Wyness*, as was argued by plaintiff, was left completely unaddressed by defendants. The strong judicial *dicta* in *Wyness* on the precise point here for decision merits repeating here, even though defendants have ignored it:

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

death cases have emphasized this 'discovery' time. *See* (*Arndt, Coleman, Fure,* and *Praznik*)"

Wyness, 131 Ill.2d 403, 413 (1989).

B. The "Policy Considerations" Which Defendants and Their *Amici* Argue at Length are Essentially Irrelevant to this Court's Decision.

After discussing those statutes, fraudulent concealment, and respondents in discovery, defendants conclude that "these statutory alternatives, where applicable, preserve a claimant's cause of action despite expiration of the statute of limitations." That sentence reveals the universality of defendants' objection to the discovery rule, and the irrelevance of the policy reasons advanced in support of the contention that "death" should be treated differently than "injury."

Defendants conjure a toe hold for the many pages of "policy considerations" argued by them (Brief, pp. 18-21) and their coordinated *amici* by stating that "the plaintiff emphasizes public policy considerations," citing page 11 of plaintiff's brief. To the contrary, plaintiff has not "emphasized" public policy considerations in any manner. At page 11, plaintiff merely quoted this Court's very recent opinion in *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 52, as being an efficient encapsulation of "the primary purpose, operation, and procedures concerning the discovery rule." Defendants and their *amici* seek thereby to resurrect "tort reform" and "medical malpractice crises" of years gone by, even though those issues are not rationally connected to the issue before this Court. The

legislature has already dealt with the balance to be achieved among the statute of limitations, the discovery rule, and the period of repose. See defendants' brief, page 13. All that is here for decision is the narrow task of interpreting the word "death" as it appears in § 13-212.

C. Defendants' Discussion of the Numerous Adverse Appellate Opinions Sheds No New Light on the Debate.

Defendants discussed, as they must, the numerous appellate opinions which hold directly contrary to the divided Opinion below. (Brief, pp. 21-27) Those opinions were summarized by plaintiff at pages 14-18 of his brief, and that discussion will not be repeated here. Plaintiff makes only these short additional observations.

In their discussion of *Fure v. Sherman Hospital*, 64 Ill.App.3d 259 (2nd Dist. 1978), defendants implicitly criticize the Second District's use of "common sense" by quoting and italicizing a phrase from the *Fure* opinion as follows:

> "The Second District found that '*reason and common sense*' rather than the language of the statute at issue, required judicial modification of the Wrongful Death Act to include a discovery rule...." (Emphasis in defendants' brief.) (Brief, p. 23)

Setting aside the sobriquet of "judicial modification," the implicit castigation of the Second District's use of "reason and common sense" flies in the face of this Court's recent pronouncement in *Nelson v. Artley*, 2015 IL 118058:

> "With due respect to the appellate court panel..., we do not believe this criticism is valid. For one thing, there is nothing inherently objectionable about using common sense when deciphering a statute. To the contrary, our court has specifically cited with approval the proposition that courts 'do not set aside common experience and common sense when construing statutes.'" ¶ 29.

Defendants endorse the majority's observation that "we believe that the medical malpractice statute of limitations codifies the extension set forth in *Praznik* (*v. Sport Aero, Inc.*, 42 Ill.App.3d 330 (1976))...." ¶ 21. Both the majority and defendants have not recognized that *Praznik* was decided in 1976, whereas the statute said to have codified *Praznik* was previously enacted to be effective in 1975.

Lastly, defendants conclude their discussion of the cases by stating that none of them "contain a statutory interpretation that adheres to the language contained in § 13-212 or to the limitations provision in the Wrongful Death Act" (Brief, p. 27), despite commencing their brief by saying that only § 13-212 was relevant or was "applied" by the appellate court below. Defendants' reliance on the Wrongful Death Act itself is laid bare.

D. Defendants' Response to Plaintiff's Observation that the Legislature Has Acquiesced in the Numerous Opinions Holding that the Discovery Rule Applies to Wrongful Death Actions Contains Numerous Errors or Misperceptions of the Law.

For 37 years, the appellate court has held in many cases that the discovery rule is to be applied in wrongful death cases, yet the legislature has never amended the Limitations Act or the Wrongful Death Act to alter the outcome of those cases. Plaintiff argued that where the legislature has acquiesced in the court's construction of a statute, that construction becomes part of the fabric of the statute, citing *Charles v. Seigfried*, 165 Ill.2d 482, 492 (1995). (Brief, p. 26) Plaintiff has not argued in the least that application of

that canon of construction is conclusive. It is not. But it is one aid to construction, and it applies here. Defendants describe that argument to be "erroneous." (Brief, p. 30) A number of problems are evident in defendants' brief.

Defendants cite *People v. Marker*, 233 Ill.2d 158, 175 (2009) for the stated proposition that legislative acquiescence is a "weak reed on which to base a determination of ... the drafters' intent." (Brief, pp. 27, 28) Defendants state that this Court in *Marker* was quoting the appellate opinion in *Marker*. However, the quote was in fact from the appellate dissent in *Marker*. But much more tellingly, both this Court and the appellate dissent applied the principle of legislative acquiescence in arriving at their respective conclusions. This Court noted the appellate court's description of legislative acquiescence as being a weak reed, but went on to say it was "appropriate" to examine the interaction between the supreme court rule being examined and judicial interpretations of that rule and ultimately concluded that "we ... believe the doctrine of acquiescence may be applied..." as support for a holding "consistently iterated in both this court and the appellate court for the last 30-plus years." *Marker*, 233 Ill.2d 158, 175, 176 (2009). (The dissent in *Marker* stated that it was "appropriate" to apply the principle of acquiescence, as this Court also did. Dissent, 382 Ill.App.3d 464, 491 (2nd Dist. 2008).)

Defendants write that "the doctrine may be implicated when the legislature amends a statute that previously was interpreted by the court and

does not alter the existing judicial interpretation," citing Justice Garman's dissent in *In re Marriage of Mathis*, 2012 IL 113496, ¶ 91. (Brief, p. 28) Defendants wish to create the impression that it is only where there is a subsequent amendment that the principle of acquiescence may be applied. But that is not so. *Blount v. Stroud*, 232 Ill.2d 302 (2009) states that "where the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of the legislative intent." At 324. *Accord: Miller v. Lockett*, 98 Ill.2d 478, 483 (1983).

Defendants unsuccessfully attempt to argue away the force of 37 years of cases by saying both that some of the cases subsequent to *Fure* did not independently set out the legislative analysis and that there are "competing" decisions. (Brief, p. 28) The *Fure* interpretation has become so well accepted that it need not be repeated in every appellate opinion which agrees with it. One can imagine the chaos and proliferation of words which would occur if defendants' contention on that point is given credence. In addition, where the weight of the case law is clear, as is so here, the principle of acquiescence can still be applied. That is precisely what was done by the majority in *In re Marriage of Mathis*, 2012 IL 113496 – a case cited by defendants. There, this Court noted that there was one case to the contrary of "a long and consistent line of cases." The court referred to "the near unanimous weight of authority," and applied the principle of legislative acquiescence. ¶¶24-26.

Defendants inexplicably write that "other appellate decisions espouse the view that a death is a traumatic event triggering the plaintiff's obligation to inquire, thus precluding application of the discovery rule." (Emphasis added) (Brief, p. 29) Defendants cite *Nordsell v. Kent*, 157 Ill.App.3d 274 (3rd Dist. 1987) and *Lutes v. Farley*, 113 Ill.App.3d 113 (3rd Dist. 1983).

Neither *Nordsell* nor *Lutes*, very similar cases, hold that "a death ... preclud(es) application of the discovery rule." Rather, both cases involve what they termed a stillbirth, with *Lutes* also involving the death of a twin shortly after the stillbirth of the first twin, but with an identical claim. Those cases hold that those deaths "should prompt some investigation ... and trigger the application of the discovery rule." *Lutes*, at 115. To the same effect, *Nordsell*, at 276. Thus, such a death did not "preclude" application of the discovery rule, but rather "triggered ... the application of the discovery rule."

Defendants claim that an additional excerpt from *Mega v. Holy Cross Hospital*, 111 Ill.2d 416 (1986) supports their position. (Brief, p. 30) Plaintiff stands by his use of *Mega* (Pl's Brief, p. 26), and suggests that defendants' argument has no bearing on this case.

The principle of legislative acquiescence, an aid to construction, is of assistance to this Court.

E. Defendants Give Insufficient Weight to the Modern View of Wrongful Death Actions and to the Fact that What is Here for Decision is the Meaning of the Limitations Act, and not the Wrongful Death Act Itself.

Plaintiff's brief develops the criticism of a too-strict mode of interpretation of the Wrongful Death Act. (Brief, p. 27 et seq.) Defendants have responded by reciting the traditional analysis. (Brief, p. 31 et seq.)

Plaintiff developed the argument that "it is now the intent of the legislature, and legislatively expressed public policy, that the discovery rule, and this Court's prior interpretations of it, be fully applicable to claims for wrongful death, especially when, as here, there is an expressly applicable statute." (Brief, p. 32) Plaintiff relied, in part, upon the opinion of Justice Cardozo in *Van Beeck v. Sabine Towing Co., Inc.*, 300 U.S. 342, 350 (1937) where it is stated that "there are times when uncertain words are to be wrought into consistency and unity with the legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system." Defendants have not squarely confronted that argument, but say only in a footnote that "*Van Beeck* provides no insight into interpretation of the Illinois statutes before this Court." (Brief, p. 34) But as was noted in plaintiff's brief, this Court has already made reference to *Van Beeck*. (Pl's Brief, p. 32)

F. The Discovery Rule Also Applies to Survival Actions.

Defendants have not specifically responded to plaintiff's having stated that this Court applied the discovery rule in a Survival Act case in *Nolan v. Johns-Manville Asbestos*, 85 Ill.2d 161 (1981) and that in *Wyness v. Armstrong World Industries, Inc.*, 131 Ill.2d 403, 412 (1989) this Court described *Nolan* as a case where the plaintiff's administratrix "continued the case pursuant to

the provisions of the survival statute" and related that the discovery rule had been applied there.

II. THE COURTS BELOW ERRED IN DECIDING THAT AS A MATTER OF LAW PLAINTIFF HAD REASON TO KNOW THAT THE DEATH COULD HAVE BEEN WRONGFULLY CAUSED AT SOME UNSPECIFIED TIME MORE THAN TWO YEARS BEFORE THE FILING OF THE COMPLAINT, THEREBY WRONGLY DEPRIVING PLAINTIFF OF A TRIAL ON THAT QUESTION OF FACT. THE DISSENT CORRECTLY DISAGREED.

Justice Lytton wrote at length and in nuanced fashion in concluding that a disputed question of fact exists here as to when the statute of limitations began to run upon application of the discovery rule. Dissent, ¶¶ 55-60. As part of his analysis, he concluded that "a reasonable trier of fact could conclude that plaintiff did not possess sufficient information to know that Kathryn's death was wrongfully caused until May 1, 2011, when he received Dr. Boyd's report finding that (other physicians) were negligent." ¶ 60.

In contrast, the majority treated this issue in one paragraph. Further, the majority did not identify any specific date as to when the statute should have begun to run if the discovery rule were applied, nor facts which would point to such a date. ¶ 27. Rather, the majority concluded only that the complaint was filed "long after he became possessed with sufficient information, which put him on inquiry to determine whether actionable conduct was involved." ¶ 27. In similar fashion, the circuit court also did not point to a particular date upon which the statute would have run.

Before this Court, defendants are wrong in saying that plaintiff sought to "engineer the accrual of the limitations period" (Brief, p. 36), that plaintiff and the dissent ask this Court to "radically change Illinois law by adopting the bright line of the dissent" (Brief, p. 37), and that "the dissent articulated a new version of the discovery rule" (Brief, p. 39).

The dissent is grounded on established law, plaintiff concurs with the dissent's view of that law, and reversal by this Court would be in accord with existing law without the need for any "radical change" or any "bright line rule."

Application of the discovery rule is, in most cases, to be resolved by the finder of fact. *Witherell v. Weimer*, 85 Ill.2d 136, 156 (1981). *See also Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 181139, ¶ 52. Plaintiff's position is grounded in large part upon *Young v. McKiegue*, 303 Ill.App.3d 380, 390 (1st Dist. 1999); defendants have not addressed that case. *Young* points out:

> "[S]uspecting wrongdoing clearly is not the same as knowing that a wrong was probably committed.... The fact that a party suspects wrongful conduct, without examining the reasons underlying those suspicions, is not enough to constitute constructive knowledge that an injury was wrongfully caused." At 390.

It is an unfair characterization of the dissent to say that Justice Lytton "articulated a new version of the discovery rule." (Brief, p. 39) He merely pointed out, as one factor in the analysis, three cases, *Clark*, *Young*, and *Wells*, all of which support his proposition that the statute of limitations has been deemed to run when the plaintiff receives a report from a medical expert

finding negligence against any medical professional. ¶ 58. For instance, *Wells v. Travis*, 284 Ill.App.3d 282 (3rd Dist. 2015) identified as "the basis of our decision" that plaintiff was "placed on inquiry of actionable conduct based upon the ... report of (a physician), thereby triggering the running of the limitations." At 290.

Plaintiff takes issue with the gloss which defendants place on several aspects of the facts. Defendants wrote that "at his deposition, Moon, who had reviewed the doctor's notes, testified that the medical record confirmed Dr. Salimath's evaluation." (Brief, p. 4) However, the "doctor's notes" referred to were only Dr. Salimath's notes – it was only Dr. Salimath "confirming" himself. (C-102-103)

Defendants wrote "Dr. Salimath discussed options with Ms. Moon's family in light of the post-surgical complications," followed immediately by a sentence stating that "the family included ..." four children, and identifying Randall Moon as one of them. (Brief, p. 4) However, defendants do not offer any factual support for the implication they sought to raise that defendant was present. To the contrary, Randall Moon testified that he was not sure whether he was party to that conversation or whether other family members were. (C-101)

Defendants have not pointed to any aspect of the medical records which would have put a reasonable person on inquiry as to whether there was actionable conduct with respect to Dr. Rhode's interpretation of the imaging

studies. Dr. Rhode's actions in that regard only came to light when the imaging studies were reviewed by another doctor in the companion suit against the surgeons.

Defendants are wrong in their statement that plaintiff has suggested that "Dr. Rhode cited nothing in the record other than one statement during Moon's deposition to support the motion for summary judgment." (Brief, p. 39) Examination of the relevant pages of plaintiff's brief shows that plaintiff was complaining of the inordinate weight which defendants were placing on a single answer in plaintiff's deposition. Defendants have doubled down on that effort in their current brief by saying that "Moon's testimony establishes his initial belief that something had gone wrong with his mother's medical care and that her death may have been the result of negligence." (Brief, p. 40) The deposition excerpt cannot begin to support the conclusion that plaintiff believed that negligence had occurred. As is set out at page 37 of plaintiff's brief, plaintiff was asked only to "explain to a jury how your mother's death has affected you." Mr. Moon replied that "even though she was fairly old, my impression was that she was doing okay and that, you know, she should have gotten better treatment than she did." (C-98, ¶ 43) The question had nothing to do with wrongdoing or negligence, and the answer was only an expression of a wish that decedent had received better treatment.

III. IN THE CONTEXT OF THIS CASE, THE APPELLATE COURT ABUSED ITS DISCRETION IN DECIDING AN ISSUE NEVER RAISED BY THE DEFENDANTS IN THE CIRCUIT COURT.

Defendants begin their justification of the appellate court's decision of a major issue never raised by defendant by accusing plaintiff of "misstating the appellate court's ruling." The page cite offered by defendants in support of that charge lends them no support.

Plaintiff did not write anything about what the trial court "held," as defendant wrote, nor even anything about what the appellate court held. Rather, plaintiff only described what the defendants didn't argue. Defendants put far too bland a gloss on the appellate court's ruling by saying that "the appellate court held that the discovery rule as written by the General Assembly in § 13-212(a) governs wrongful death and survival actions in medical malpractice cases." (Brief, p. 43) That offers no hint of the appellate court's action that the only aspect of "discovery" which the majority would accept would be discovery of the death itself, as in *Praznik v. Sport Aero, Inc.*, 42 Ill.App.3d 330 (1st Dist. 1976); *Moon*, ¶ 21.[4]

Defendants have not contested the fundamental circumstance that they never argued that the discovery rule was not legally available to plaintiff to delay the commencement of the running of the statute of limitations. Defendants' entire argument was that plaintiff had sufficient information at

[4] The IDC *amicus* brief is correct in saying that plaintiff inadvertently included *Praznik* in a group of medical malpractice cases. But *Praznik* did apply the discovery rule to a wrongful death case, and the remaining cases cited by plaintiff are medical malpractice cases. The distinction is acknowledged, and merits being noted, but perhaps not being included in a major caption, as in that brief.

the moment of death to permit commencement of the statute of limitations. Defendants never contended that plaintiffs were completely barred from asserting the application of the conventional discovery rule. Defendants have never argued that they did. See plaintiff's brief, page 40, for record support for those propositions.

Defendants claim that support for their not having raised the issue concerning the availability of the discovery rule is afforded by *1010 Lake Shore Association v. Deutsche Bank Nat'l Trust Ass'n*, 2015 IL 118372. That case does not excuse what happened here. *1010 Lake Shore Association* permitted a party to make an argument on an issue by means of canons of statutory construction which had not been relied on before. In approving that, this Court said, "Even if defendant did not make that specific argument in the trial or appellate court, defendant has consistently disputed the issue of statutory construction." ¶ 18. Use of the canons of statutory construction was merely an argument, on an issue which had been clearly raised. What defendants did not do here was raise the issue of whether the discovery rule is legally available in Wrongful Death Act and Survival Act cases.

The more pertinent part of *1010 Lake Shore Association* is a prior part of the opinion where this court held that an issue was forfeited because defendant had not raised it in the trial court. ¶15. That is precisely what occurred here.

Defendants' brief also elides significant statements in plaintiff's brief by charging that plaintiff "fails to fully acknowledge the governing legal principles that rebut his contention that the appellate court abused its discretion." (Brief, p. 43) To the contrary, plaintiff frankly acknowledged at several points in his brief that "a reviewing court has the power to decide a case on an issue not raised in a party, and that the principle has particular application where the new issue is invoked in service of affirmance." (Emphasis added.) (Pl's Brief, p. 41, 44 and 45)

Plaintiff has raised the contention that the action of the majority below was an abuse of the court's discretion. Plaintiff relies in part on *Hiatt v. Western Plastics, Inc.*, 2014 IL App (2d) 140178, for the limitation that an issue raised by an appellee for the first time on appeal "must at least be commensurate with the issues presented in the trial court." *Hiatt*, ¶ 107. (Brief, p. 41) Defendants make only two comments upon *Hiatt*, neither one of which survive scrutiny. Defendants first state that "the appellate court in *Hiatt* fail(ed) to recognize the well-established rule that a reviewing court may affirm the judgment on any basis established by the record." (Brief, p. 45) However, the *Hiatt* court, in the paragraph cited by plaintiff, commenced its discussion by stating, "We recognize the general rule that, although a defense not raised in the trial court may not be raised for the first time on appeal by an appellant, the appellee may urge any point in support of a judgment on appeal ... so long as the factual basis for such point was before the trial court." *Hiatt*, ¶ 107. The

Hiatt court did not "fail" to recognize that principle. The court went on to articulate the limitation that the issue raised for the first time on appeal "must at least be commensurate with the issues presented in the trial court." ¶ 107.

The second criticism raised by defendants of *Hiatt* is that "the majority also served as advocate for the plaintiff 'by raising an issue and making arguments that plaintiff has never articulated,'" citing to a paragraph of the opinion – without explaining that the quote is from the dissent. (Brief, p. 46)

Defendants conclude their argument by posing their rhetorical question: "What happens when neither party to the appeal offers a correct or cognizable argument?" (Brief, p. 47) There are a number of jurisprudentially wise answers to that question. The fundamental premise is that the reviewing court should exercise its discretion in a fair manner. In some cases, perhaps a fair appeal could be afforded by the appellate court in fact addressing the proper argument. In other cases, such as here, appropriately fair options existed, such as a) raising the issue either in advance of or at the time of oral argument and requesting supplemental briefing; b) granting the rehearing and an opportunity for briefing on the point which was requested by plaintiff but denied; or c) identifying the issue, for future litigants and so as to properly qualify the court's decision, but not decide the issue because it was forfeited by defendants' not having raised it.

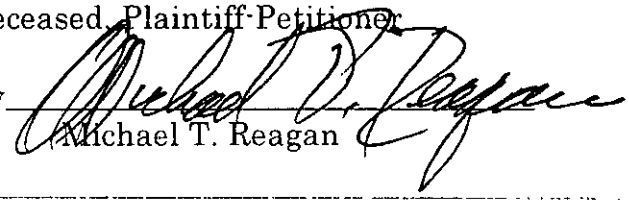
Here, this issue of the claimed unavailability of the full scope of the discovery rule as it has been developed by this Court through statutory

interpretation over many years, came out of the figurative blue, at the time of the issuance of the opinion. In denying the requested hearing on that point, the majority stated that plaintiff had "the duty to address this issue." *Moon,* ¶ 30. It is hard to conceive of how that duty arose when for 37 years there has been an unbroken string of appellate opinions recognizing the availability of the discovery rule, and when *dicta* in *Wyness v. Armstrong World Industries*, 131 Ill.2d 403, 413 (1989) could fairly be read as approval of that line of cases.

With respect, plaintiff submits that he was not afforded a fundamentally fair appeal below on this issue. It lies within the wisdom and supervisory role of this Court to give guidance to reviewing courts as to when vital and controvertible issues should be decided *sua sponte*, without a party being given any chance to respond.

Respectfully submitted,

RANDALL W. MOON, Executor of
the Estate of KATHRYN MOON,
Deceased, Plaintiff-Petitioner

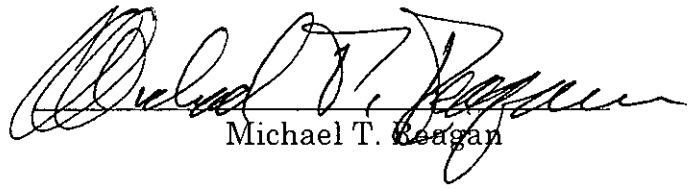
By 
Michael T. Reagan

Michael T. Reagan, #2295172
Law Offices of Michael T. Reagan
633 LaSalle Street, Suite 409
Ottawa, IL 61350
(815) 434-1400
mreagan@reagan-law.com

Randall W. Moon
Attorney at Law
715 Sara Drive
Washington, PA 15301
(724) 225-6345

CERTIFICATE OF COMPLIANCE WITH RULE 341

The undersigned hereby certifies that this Brief complies with the form and length requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the appendix, is 6,272 words.



Michael T. Reagan

Michael T. Reagan, #2295172
Law Offices of Michael T. Reagan
633 LaSalle Street, Suite 409
Ottawa, IL 61350
(815) 434-1400
mreagan@reagan-law.com

APPENDIX

TABLE OF CONTENTS
OF APPENDIX

Illinois Official Reports

Appellate Court

***Moon v. Rhode*, 2015 IL App (3d) 130613**

Appellate Court Caption	RANDALL W. MOON, Executor of the Estate of Kathryn Moon, Deceased, Plaintiff-Appellant, v. CLARISSA F. RHODE, M.D., and CENTRAL ILLINOIS RADIOLOGICAL ASSOCIATES, LTD., Defendants-Appellees.
District & No.	Third District Docket No. 3-13-0613
Filed	April 10, 2015
Modified upon denial of rehearing	June 15, 2015
Decision Under Review	Appeal from the Circuit Court of Peoria County, No. 13-L-69; the Hon. Richard D. McCoy, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Randall W. Moon (argued), of Washington, Pennsylvania, *pro se*, and Michael T. Reagan, of Law Offices of Michael T.Re agan, of Ottawa, for appellant. Nicholas J. Bertschy, Craig L. Unrath (argued), and J. Matthew Thompson, all of Heyl, Royster, Voelker & Allen, of Peoria, for appellees.

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

OPINION

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

¶ 2 Plaintiff appeals, arguing that the trial court erred in granting defendants' motion. Specifically, plaintiff contends that the discovery rule applied and that the statute of limitations did not begin to run until the date on which he knew or reasonably should have known of defendants' negligent conduct.

¶ 3 BACKGROUND

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

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

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

¶ 7 On May 10, 2011, plaintiff filed a separate medical negligence action against Drs. Williamson and Salimath. On March 8, 2012, plaintiff testified at his deposition that "even though [my mother] was fairly old, my impression was that she was doing okay and that, you know, she should have gotten better treatment than she did."

¶ 8 In February of 2013, almost four years after decedent's death and almost three years after receipt of her medical records, plaintiff sent radiographs to Dr. Abraham Dachman for review. On February 28, 2013, Dachman reviewed the May 24, 2009, CT scan. Dachman provided plaintiff with a report stating that the radiologist who read and interpreted the CT scan failed to

identify the breakdown of the anastomosis, which a "reasonably, well-qualified radiologist and physician would have identified." Dachman further stated that the radiologist's failure to properly identify the findings caused or contributed to the injury and death of the patient. On March 18, 2013, plaintiff filed both wrongful death and survival claims against Dr. Rhode and her employer, Central Illinois Radiological Associates, Ltd. Plaintiff alleged that he did not discover that Rhode was negligent until Dachman reviewed the CT scan.

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

¶ 10 Plaintiff appeals. We affirm.

¶ 11 ANALYSIS

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

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

¶ 14 Plaintiff relies on *Young v. McKiegue*, 303 Ill. App. 3d 380 (1999), and *Wells v. Travis*, 284 Ill. App. 3d 282 (1996), to support his position that the discovery rule applied in this case. The *Young* and *Wells* courts held that where a wrongful death claim is predicated upon a claim of medical malpractice that was not apparent to the plaintiff at the time of death, the statute of limitations applicable to medical malpractice actions governs the time for filing. *Young*, 303 Ill. App. 3d at 389; *Wells*, 284 Ill. App. 3d at 286-87. These two cases also held that the discovery rule applied to wrongful death suits against physicians. We believe that to the extent

both cases read into section 13-212(a) language "which is clearly not there," *Young* and *Wells* were incorrectly decided and refuse to follow them for the following reasons. See *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 416 (1989).

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

> "[N]o action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant *knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death* for which damages are sought in the action, whichever of such date occurs first ***." (Emphasis added.) 735 ILCS 5/13-212(a) (West 2010).

¶ 16 However, section 13-212 does not create a cause of action. Instead, it merely places a limitation on the filing of medical malpractice actions. Here, plaintiff's cause of action was for wrongful death, a cause of action that did not exist at common law. *Young* and *Wells* relied on *Witherell v. Weimer*, 85 Ill. 2d 146 (1981), a *common law personal injury action*, to attach a discovery rule to a wrongful death action against a physician. A reading of *Witherell* simply does not support such a holding. The *Witherell* court read section 13-212(a) within the context of the discovery rule to mean that the two-year malpractice limitations period begins to run when one knew or should have known of the injury and also knew or should have known that the injury was wrongfully caused. *Witherell*, 85 Ill. 2d at 156. However, the discovery rule cannot be found in the plain language of either the Act or section 13-212(a). Personal injury actions were born of the common (judge-made) law and are susceptible to changes by the judiciary. Not so with respect to wrongful death actions, which are creatures of the legislature. Likewise, at common law your personal injury action died with you. The Survival Act, too, is a creature of the legislature (755 ILCS 5/27-6 (West 2010)). It allows for recovery of damages the injured party could have recovered, had she survived.

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

¶ 18 So what did the General Assembly provide with respect to the filing of wrongful death and survival actions against physicians? It clearly provided that a claimant must file a wrongful death action within two years from the date on which "the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date [*sic*] occurs first." 735 ILCS 5/13-212(a) (West 2010). The required knowledge is of the death or injury, not of the negligent conduct. If the General Assembly wanted to provide a limitations period in the Act commencing when one had knowledge of the negligent conduct, it would have done so. *Wyness*, 131 Ill. 2d at 416.

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

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

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

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

death, not upon notice of a potential defendant's negligent conduct. The statute gives a claimant two years from the date of that knowledge or notice to figure out whether there is actionable conduct.

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

¶ 24 Further, the dissent states that "[f]inally, the supreme court, in *dicta*, has approved the use of the discovery rule in wrongful death cases." *Infra* ¶ 39. The dissent cites *Wyness*, 131 Ill. 2d at 413, for this proposition. In *Wyness*, a wrongful death action, the defendants were arguing that the statute of limitations should have started running before the death because the plaintiff knew of decedent's injuries and the cause of those injuries before the death. We fail to understand how anyone could read *Wyness* to support the proposition that the common law discovery rule applies to wrongful death actions. The actual issue before the court in *Wyness* was whether the two-year limitations period of the Wrongful Death Act could be triggered by the discovery rule such that a cause of action could accrue prior to the death of plaintiff's decedent. *Wyness*, 131 Ill. 2d at 406. In fact, the *Wyness* court observed that "this court has not to date applied the discovery rule to wrongful death actions." *Id.* at 409. It still has not. The Wrongful Death Act was first enacted in 1853. The supreme court has had over 160 years to apply the discovery rule to a wrongful death action and has, to date, resisted the urge.

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

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

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

¶ 27 Even if we were to apply the discovery rule, we would find, as the trial court did, that plaintiff's complaint was untimely. Our supreme court stated that " 'if knowledge of negligent conduct were the standard, a party could wait to bring an action far beyond a reasonable time when sufficient notice has been received of a possible invasion of one's legally protected interests.' " *Knox College v. Colotex Corp.*, 88 Ill. 2d 407, 415 (1981) (quoting *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 170-71 (1981)). Furthermore, the court held that "plaintiff need not have knowledge that an actionable wrong was committed." *Knox College*, 88 Ill. 2d at 415. "At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person o inquiry to determine whether actionable conduct is involved. At that point, under the discovery rule, the running of the limitations period commences." *Id.* at 416. Here, plaintiff did not obtain Kathryn's medical records until eight months after her death. Plaintiff did not argue that he became possessed with new information within those eight months, which caused him to obtain the records. Furthermore, he waited 14 months after receiving the records before submitting them to a medical consultant firm. Plaintiff points to nothing to explain the delay in either obtaining the records or submitting them for review. Moreover, he did not send the reports to Dr. Dachman for review until almost four years after Kathryn's death. Plaintiff filed his complaint long after he became possessed with sufficient information, which put him on inquiry to determine whether actionable conduct was involved. The trial court did not err in granting defendants' motion to dismiss.

¶ 28 Plaintiff-appellant, along with new counsel, has filed a petition for rehearing in this court. The petition accuses this court of deciding an issue never raised in either the circuit court or before this court.

¶ 29 The predominant issue on appeal is and always has been whether the common law discovery rule was available to plaintiff-appellant. The trial court ruled that it was not, but that even if it were, plaintiff-appellant's suit was nonetheless untimely. As plaintiff-appellant is well aware, we review the trial court's judgment, not its reasoning. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 30 The gravamen of the petition for rehearing is that by discussing whether the common law discovery rule is available in a statutory cause of action, we have raised a new issue. This is not a new issue, it is simply some of our reasoning for affirming the trial court. Plaintiff-appellant suggests that the parties "never had the opportunity to weigh in on that debate nor to address the third justice on the panel on that issue." To the contrary, plaintiff-appellant not only had the

opportunity, but the duty to address this issue of whether the common law discovery rule is applicable to a wrongful death action. Furthermore, we explained why we agreed with the trial court that the plain language of section 13-212(a), which is applicable to even wrongful death actions against physicians, must be strictly construed. In a nutshell, plaintiff-appellant's argument in the petition for rehearing is that he can raise an issue on appeal, avoid contrary law in his brief and then cry foul when the reviewing court applies what it believes to be the correct law to the issue raised. We are well aware that this decision creates a split in the districts, and, therefore, we anticipate at some point hearing from the supreme court on the issue. However, until that time, we follow the supreme court and "will not read into a statute language which is clearly not there." *Wyness*, 131 Ill. 2d at 416. If that language is to be added, it is to be added by the General Assembly, not the courts. *Id.* Petition for rehearing denied.

¶ 31 CONCLUSION

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

¶ 33 Affirmed.

¶ 34 JUSTICE LYTTON, dissenting.

¶ 35 I dissent. The majority's conclusion that the discovery rule set forth in section 13-212(a) of the Code does not apply to wrongful death or survival actions conflicts with over 30 years of precedent (see *Advincula v. United Blood Services*, 176 Ill. 2d 1, 42-43 (1996); *Young v. McKiegue*, 303 Ill. App. 3d 380, 386 (1999); *Wells v. Travis*, 284 Ill. App. 3d 282, 287 (1996); *Neade v. Engel*, 277 Ill. App. 3d 1004, 1009 (1996); *Durham v. Michael Reese Hospital Foundation*, 254 Ill. App. 3d 492, 495 (1993); *Janetis v. Christensen*, 200 Ill. App. 3d 581, 585-86 (1990); *Cramsey v. Knoblock*, 191 Ill. App. 3d 756, 764 (1989); *Arndt v. Resurrection Hospital*, 163 Ill. App. 3d 209, 213 (1987); *Hale v. Murphy*, 157 Ill. App. 3d 531, 533 (1987); *Eisenmann v. Cantor Bros., Inc.*, 567 F. Supp. 1347, 1352-53 (N.D. Ill. 1983); *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill. App. 3d 525, 533 (1982); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1239 (N.D. Ill. 1981); *Fure v. Sherman Hospital*, 64 Ill. App. 3d 259, 268 (1978); *Praznik v. Sport Aero, Inc.*, 42 Ill. App. 3d 330, 337 (1976)), as well as the plain language of the statute (735 ILCS 5/13-212(a) (West 2010)).

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

¶ 37 I. CASE LAW

¶ 38 A. Wrongful Death Actions

¶ 39 Thirty-eight years ago, the First District applied the discovery rule to a wrongful death cause of action. See *Praznik*, 42 Ill. App. 3d at 337. Two years later, the Second District followed suit, "reject[ing] the idea that no wrongful death action can ever be brought more than 2 years after the plaintiff knows of the death in question." *Fure*, 64 Ill. App. 3d at 272. The court discussed the inequity of applying the discovery rule to personal injury actions but not wrongful death actions, concluding: "In our opinion there should be no barrier to the application of the 'discovery' rule based on the ultimate tragedy of death where the circumstances of the death would have permitted an extension of the time limitation for the

mere wounding or injury of the person and we hold that the fact of death does not *per se* foreclose the use of the discovery doctrine." *Id.* at 270. The Second District reaffirmed its holding four years later, stating, "the discovery rule *** is applicable in a wrongful death case." *Coleman*, 108 Ill. App. 3d at 533. Five years after that, the Fifth District also ruled that "[s]ection 13-212 is applicable to an action brought under the Wrongful Death Act." *Hale*, 157 Ill. App. 3d at 533. The court refused to find that a decedent's date of death triggered the start of the two-year statute of limitations for a plaintiff's wrongful death claim because the "[p]laintiff could have reasonably believed [the decedent's] death was the result of a nonnegligent factor." *Id.* at 535.

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

¶ 41 While our supreme court has not directly decided this issue, several courts have determined that the supreme court would likely apply the discovery rule to wrongful death cases. See *Arndt*, 163 Ill. App. 3d at 213; *Eisenmann*, 567 F. Supp. at 1352-53; *Johns-Manville*, 511 F. Supp. at 1239. The Second District concluded that because a petition for leave to appeal was filed by the defendants in *Coleman* but was denied by the supreme court, "the supreme court has granted its tacit approval" of applying the discovery rule to wrongful death actions. *Arndt*, 163 Ill. App. 3d at 213. Additionally, the United States District Court for the Northern District of Illinois has twice ruled that our supreme court would likely apply the discovery rule to wrongful death cases. See *Eisenmann*, 567 F. Supp. at 1352-53; *Johns-Manville*, 511 F. Supp. at 1235. The federal court in *Eisenmann* stated:

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

¶ 42 Finally, the supreme court, in *dicta*, has approved the use of the discovery rule in wrongful death cases, stating: "[T]he delay of the running of the limitation period accepted by the

appellate court in some districts assures that a wrongful death action may be filed after death when plaintiffs finally know or reasonably should know of the wrongfully caused injury which led to death." *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 413 (1989).

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

¶ 44 B. Survival Actions

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

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

> "A survivor takes the rights of the decedent–no more *and no less*. Therefore if the decedent would have had a cause of action during his lifetime, but for the invidious nature of his disease and his inability to link the injury to the wrongdoer, then that cause of action, when discovered, should survive his death. Adoption of any other rule will represent a relapse to the incongruous injustice which the Supreme Court expressly wanted to avoid when 'the injury caused is so severe that death results, [and] the wrongdoer's liability [is thereby] extinguished.' [Citation.] I do not believe the Illinois Supreme Court would impose on survivors the statute of limitations *constraints* which decedent's would have faced had they lived without also allowing them the *benefits* of the 'discovery rule' which would have inured to them had their injuries not been so severe as to cost them their lives." (Emphases in original.) *Id.* at 1354.

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

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

¶ 49 II. STATUTE

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

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

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

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

¶ 54 III. APPLICATION OF DISCOVERY RULE

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

¶ 56 When a complaint alleges wrongful death caused by medical malpractice, the statute of limitations begins to run when the plaintiff knows or should have known that the death was "wrongfully caused." *Young*, 303 Ill. App. 3d at 388. " '[W]rongfully caused' does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action." *Id.* Rather, it refers to "that point in time when 'the injured party becomes possessed of sufficient information concerning his [or her] injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.' " *Id.* (quoting *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981)).

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

known that the decedent's death may have resulted from negligent medical care, are questions best reserved for the trier of fact. *Id.*

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

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

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