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.,

Defendant-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

BRIEF AMICUS CURIAE OF THE ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE

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POINTS AND AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE

The Illinois Trial Lawyers Association ("ITLA") is a nonprofit association of over 2,000 attorneys who represent injured workers and consumers in the courts of this state, including victims of medical negligence. The question presented by this case is of great importance to ITLA, its members, and the citizens that ITLA's members represent. In particular, ITLA is concerned that if this Court accepts the arguments pressed by defendants-appellants and holds that a wrongful-death claim cannot relate back to a timely filed medical-negligence case when the patient dies during the pendency of the litigation, such a conclusion would prevent the families of victims from obtaining a full recovery, and arbitrarily benefit the tortfeasor. As we explain in greater detail in this brief, avoiding such harsh and unjust results, caused by a fortuitous death of a tort victim, is precisely what the legislature intended when it enacted the Wrongful Death Act and the Survival Act. In addition, ITLA respectfully disagrees with defendants' amici that affirming the appellate court's judgment would materially increase malpractice premiums, affect the affordability of health care in this state, or drive physicians out of state.

STATUTES INVOLVED

Section 5/2-616(b) of the Code of Civil Procedure, 735 ILCS 5/2-616(b) (West 2012), in relevant part:

> The cause of action ... set up in any amended pleading shall not be barred by lapse of time under any statute ... prescribing or limiting the time

within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted... in the amended pleading grew out of the same transaction or occurrence set up in the original pleading....

Section 5/13-212(a) of the Code of Civil Procedure, 735 ILCS 5/13-212(a) (West 2012):

Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.

Section 1 of the Wrongful Death Act, 740 ILCS 180/1 (West 2012), in relevant part:

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured....

ARGUMENT

The decedent timely filed a medical-malpractice action against defendants during her lifetime, alleging that they negligently failed to diagnose cancer. After she died from cancer, her executor was substituted as plaintiff, and an amended complaint was filed, which contained the same substantive allegations of medical negligence, but was brought pursuant to

the Survival Act, 755 ILCS 5/27-6, and the Wrongful Death Act, 740 ILCS 180/1 et seq., in light of decedent's death. The appellate court correctly held that the claims asserted in the amended complaint were not time-barred, and that judgment should be affirmed. The ominous warnings sounded by defendants and their amici that the decision below threatens "continued availability of affordable malpractice insurance," Brief of Appellants 29 ["Defs. Br."], and "access to health care in Illinois, especially in rural communities," Amici Curiae Brief of the Illinois Health and Hospital Association and the Illinois State Medical Society in Support of Defendants-Appellants 5 ["IHHA Br."] are not well founded, and do not warrant a different conclusion.

I. THE APPELLATE COURT CORRECTLY CONCLUDED THAT PLAINTIFF'S WRONGFUL-DEATH COUNT WAS NOT TIME-BARRED WHERE THE UNDERLYING TORT CLAIM WAS TIMELY FILED.

The Survival Act and the Wrongful Death Act were enacted to "alleviate the harsh and unjust" common-law rule that injured tort victims' legal claims die with them. Mattyasovszky v. West Towns Bus Co., 21 Ill. App. 3d 46, 52 (2d Dist. 1974). For its part, the Survival Act allows the injured victim's claims to continue after death unabated, as an asset of the victim's estate. 755 ILCS 5/27-6. And the Wrongful Death Act ensures that "full liability" for a death translates into a "full recovery," by allowing the decedent's next of kin to recover the pecuniary injuries sustained by them as a result of the decedent's death. Murphy v. Martin Oil Co., 56 Ill. 2d 423,

428-29 (1974). Together, these statutes ensure that a "fortuitous event such as a death" does not extinguish a valid action, arbitrarily limit the damages available, or serve to benefit the tortfeasor. Id. at 429 (quoting Prosser, Handbook of the Law of Torts (4th ed.)). Neither Act creates new substantive theories of liability; instead, both Acts are derivative in nature, and operate to define the scope of a tortfeasor's liability upon the victim's death. Indeed, since the enactment of the Wrongful Death Act in 1853, this Court has repeatedly emphasized that the Act serves merely as a vehicle for advancing an underlying tort claim:

> An injury resulting from the wrongful act, neglect, or default of another gives the victim, if she survives the injury a right of action; if the victim dies, the Act transfers the right of action to the victim's personal representative. In either case the cause of action is the same.

Williams v. Manchester, 228 Ill. 2d 404, 420 (2008) (quoting Crane v. Chicago & Western Indiana R.R. Co., 223 Ill. 259 (1908)) (emphasis added); accord Holton v. Daly, 106 Ill. 131 (1882) (overruled on other grounds).

The decision below, which allows the estate's survival action and the representative's wrongful death action to proceed, heeds these principles. As the appellate court correctly explained its decision, the representative's wrongful death claim related back to the decedent's timely filed medical-malpractice claim, where those claims advanced the same allegations against the same defendants. Lawler v. University of Chicago, 2016 IL App (1st) 143189, ¶¶ 38-52. The relation back statute addresses when claims in an

amended complaint are treated as having been filed, and expressly states that claims in an amended pleading "shall not be barred by lapse of time under any ... statute prescribing or limiting the time within which an action may be brought... if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted... in the amended pleading grew out of the same transaction or occurrence set up in the original pleading...." 735 ILCS 5/2-616(b). It has long been settled in Illinois that claims which relate back under section 2-616(b) of the Code of Civil Procedure are timely, even where first invoked in an amended complaint filed after expiration of the repose period. See, e.g., Avakian v. Chulengarian, 328 Ill. App. 3d 147, 153 (2d Dist. 2002) ("Section 2-616(b) provides that an amended claim will not be barred by the statute of repose, even if filed outside the four-year period, as long as it relates back to an original timely filed complaint.") (collecting cases). Despite defendants' insistence to the contrary, Defs.' Br. 32-36, the relation back statute and the repose statute can be read together, as the appellate court indicated, see Lawler, 2016 IL App (1st) 143189 at ¶ 16 (explaining that where there is an apparent inconsistency between two statutes, Illinois courts attempt to construe them "together, in pari materia"): the statute of repose defines when an action may first be brought, and the relation back statute defines when an added claim is treated as having been brought, in an existing action between the same

parties. For the reasons more fully explained in the appellate court's opinion itself, and elucidated in plaintiff-appellee's brief, ITLA respectfully urges this Court to affirm the decision below, and hold that where an otherwise time-barred count relates back to an existing, timely filed medical-malpractice claim, the added claim shall be allowed to proceed as if timely filed.

Even setting aside the relation back statute, plaintiff's wrongful-death claim should not be deemed time-barred where it is merely derivative of plaintiff's timely-filed claim for medical negligence. As we have noted, the legislature enacted the Wrongful Death Act and the Survival Act to ensure that tort remedies did not abate upon death, that the tortfeasor does not benefit from the fortuitous death of the injured victim, and that tortfeasors are held fully liable for the damages they cause. When the Wrongful Death Act is properly understood, consistent with this Court's pronouncements, as furnishing a vehicle for pressing an underlying cause of action, it follows that the wrongful-death claim asserted here does not run afoul of the repose statute because the underlying cause of action for medical negligence was timely advanced. Again, whether a cause of action is brought by the direct living victim, or the decedent's representative upon the victim's death pursuant to the Wrongful Death Act, "the cause of action is the same." Williams, 228 Ill. 2d at 420. Accordingly, under the specific facts of this case, where the wrongful-death claim is entirely derivative of the timely filed medical-negligence claim, the "action for damages for injury or death against

any physician ... or hospital... whether based on tort... or otherwise..." can indeed be said to have been brought within "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" because the underlying tort action was timely filed. 735 ILCS 5/13-212(a). Thus, even if this Court were to disagree with the appellate court on the applicability of relation back, this Court should nevertheless allow the wrongful-death claim to proceed since it merely advances an existing, underlying cause of action that was timely asserted.

Contrariwise, dismissal of plaintiff's wrongful-death claim on these facts would lead to precisely the results that the legislature sought to avoid by enacting the Wrongful Death Act and the Survival Act. There is no dispute that had the decedent lived, she could have recovered all damages proximately caused by defendants' negligence, as well as those damages she would have likely sustained in the future, even if those damages stretched many years, or even decades, beyond the defendants' negligent acts and omissions. Under defendants' view that plaintiff's wrongful-death claim is forever time-barred–and indeed was extinguished before it accrued–the patient's death operates to arbitrarily limit defendants' liability, and prevents a full recovery. So, by virtue of the fortuitous death of the direct victim, the tortfeasor has escaped the consequences of his or her actions: exactly the type of harsh and unjust result that the Wrongful Death Act and

the Survival Act seek to avoid.[1]

II. DEFENDANTS' AND THEIR AMICI'S OMINOUS WARNINGS ABOUT THE CONSEQUENCES OF AFFIRMING THE APPELLATE COURT'S JUDGMENT ARE WITHOUT MERIT.

The fact that this case presents an issue of first impression for Illinois reviewing courts, and has not arisen ever before in the four decades since the medical malpractice statue of repose was enacted, shows how rare this particular fact pattern is. Given how infrequently such a case will arise, defendants' and their amici's claims that the Court's decision in this case will have any material impact on medical malpractice insurance premiums, thwart access to affordable healthcare, or drive physicians away from Illinois, is makeweight.

And it is incorrect besides. This is not the kind of "long tail" liability suit that prompted the legislature to enact a four-year statute of repose, where a plaintiff uses the discovery rule or other equitable tolling principles to stretch the time for filing many years beyond the initial negligent conduct. The acts and omissions at issue in this case were already actively being litigated by the parties at the time of the decedent's death. Insurance coverage under any available policies had already been triggered, and defense counsel was appointed and actively involved in the case, at the time

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[1] Defendants' amici observe that the plaintiff is not left wholly "without remedies" since plaintiff can proceed on the survival act counts asserted in the amended complaint. IHHA Br. 9-11. But the key point, of course, is that that remedy is incomplete and does not allow "full recovery" for "full liability," based solely on the fortuitous event of decedent's death. Murphy, 56 Ill. 2d at 428-29.

of the patient's death. To be sure, the wrongful-death claim does involve a different measure of damages than that of the survival claim; the focus is the next of kin's pecuniary loss rather than the decedent's conscious pain and suffering or medical bills, see, e.g., Moon v. Rhode, 2016 IL 119572, ¶ 18. But this is not a "long-tail liability" problem; rather, it merely affects the appropriate amount of damages in a given case, much like amending a complaint to include a new category of damages that were not previously incurred. Insurers account for the risk that a single case will involve significant damages by including maximum limits of coverage in the insurance policies they write. This situation therefore does not create the kind of difficulties for insurers or insureds that were present in Illinois prior to the enactment of the four year statute of repose, where entirely new medical malpractice cases could be filed many years after the patient's treatment occurred. As the appellate court emphasized, the defendants here had notice of decedent's complaints about her treatment, and indeed were actively litigating those issues, at the time of the amendment. Lawler, 2016 IL App (1st) 143189, ¶¶ 46-52.

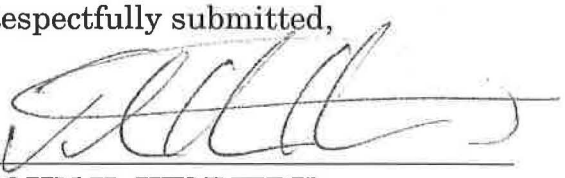
In sum, there is no reason to believe that affirming the appellate court's decision will have any observable impact on the insurance premiums, much less prevent Illinoisans from accessing health care, or driving physicians away from rural communities. Instead, affirming the appellate court will reinforce the sound public policies that motivated the enactment of

the Survival Act and Wrongful Death Act and ensure that tortfeasors are held accountable for the damage that they cause, regardless that the individual victim deceased.

CONCLUSION

The judgment of the appellate court should be affirmed.

Respectfully submitted,

By: 

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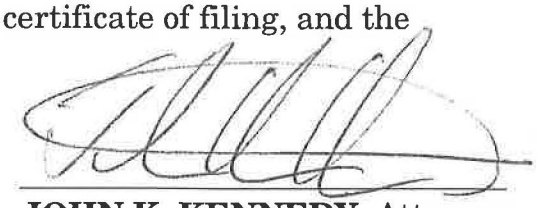
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms with the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of filing, and the certificate of service is 10 pages.



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