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-Appellees.

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

BRIEF OF DEFENDANTS-APPELLEES DR. CLARISSA F. RHODE and CENTRAL ILLINOIS RADIOLOGICAL ASSOCIATES, LTD.

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

Plaintiff appeals the Section 2-619 dismissal of his Wrongful Death and Survival Act claims sounding in medical negligence. The plaintiff, the son of the decedent, the executor of the estate, and the estate's medical malpractice lawyer, failed to file the action until more than three years after he began his investigation into the care given his mother and nearly four years after his mother's death. Citing 735 ILCS 5/13-212(a) and 740 ILCS 180/2, the defendants, a radiologist and her putative employer, moved to dismiss the action based on the two-year statute of limitations. The trial court granted the motion and dismissed the case with prejudice.

ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court correctly applied the plain language contained in Section 13-212(a) in dismissing the plaintiff's wrongful death and survival claims.

2. Alternatively, whether the trial court, resolving all doubts in favor of the plaintiff, correctly concluded that the limitations period had long expired by the time plaintiff filed the complaint given plaintiff's discovery of the death and a potential wrongful cause more than three years before the filing.

3. Whether an appellate court may affirm a judgment based on an analysis that differs from the trial court's reasoning.

STATUTES INVOLVED

735 ILCS 5/13-212. Physician or hospital.

> (a) Except as provided in Section 13-215 of this Act [735 ILCS 5/13-215], 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.
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> * * *

740 ILCS 180/2 [Eligibility to bring action; recovery; limitation of actions; defense]

> Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person.
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> * * *
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> Every such action shall be commenced within 2 years after the death of such person but an action against a defendant arising from a crime committed by the defendant in whose name an escrow account was established under the "Criminal Victims' Escrow Account Act" [725 ILCS 145/1 et seq.] shall be commenced within 2 years after the establishment of such account. For the purposes of this Section 2 [740 ILCS 180/2], next of kin includes an adopting parent and an adopted child, and they shall be treated as a natural parent and a natural child, respectively. However, if a person entitled to recover benefits under this Act [P.A. 91-380], is, at the time the cause of action accrued, within the age of 18 years, he or she may cause such action to be brought within 2 years after attainment of the age of 18.
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STATEMENT OF FACTS

In describing the facts and procedural background of this case, the plaintiff omits significant undisputed facts of record that support the circuit court's dismissal of the action based on the applicable two-year statute of limitations. Plaintiff also provides an argumentative and, in some instances, inaccurate characterization of the defendants' arguments in the circuit and appellate courts. So that this Court has a complete and accurate

rendition of the factual and procedural record, the defendants, Clarissa F. Rhode, M.D., and Central Illinois Radiological Associates, Ltd. (collectively, "Dr. Rhode"), provide a supplemental statement of facts.

Kathryn Moon's Hospitalization and Death in May 2009

Prior to experiencing bowel problems that led to a May 18, 2009 hospitalization, plaintiff's decedent, Kathryn Moon, lived independently in a condominium in Peoria, Illinois. (C. 71, 72.) Able to drive locally, Ms. Moon, a 90-year-old retiree, lived without a caretaker. (C. 42, 71.) In frequent contact with her four children, two of whom lived nearby and two of whom resided in Pennsylvania, Ms. Moon managed her own grocery shopping and hosted her son, plaintiff Randall Moon, when he visited every few months from Pennsylvania. (C. 71-73, 80.) Moon recalled that his mother had a history of arthritis and heart problems but did not recall any history of respiratory issues. (C. 71, 76.) In Moon's estimation, his mother "was doing okay." (C. 98.)

Kathryn Moon sought medical assistance after experiencing bowel problems for two months. (C. 77.) She arrived at the emergency room at Proctor Hospital on May 18, 2009, and later was admitted to the hospital under the care of Jeffrey Williamson, M.D., for treatment of a rectal prolapse. (C. 1.) Two days later, Dr. Williamson performed a perineal proctectomy and followed Ms. Moon postoperatively. (C. 1.) Dr. Jayaraj Salimath became involved with the patient's postoperative care on May 23. By then, Ms. Moon had developed complications, including labored breathing, pulmonary infiltrates, and an elevated white blood cell count. (C. 2.)

The plaintiff traveled to Peoria and checked on his mother on May 22. (C. 87.) She complained about pain in her abdomen but was awake and alert. On May 24, she seemed a

little better and was able to walk with assistance. (C. 87-88.) Communication became more difficult because, on or about that date, she was using an oxygen mask. (C. 88.) Dr. Rhode, a radiologist, interpreted a number of imaging studies of Kathryn Moon's chest and abdominal area on May 23 and 24. (C. 2, 5-6.)

Dr. Salimath discussed options with Ms. Moon's family in light of the post-surgical complications. (C. 101.) The family included Ms. Moon's four adult children: two dentists residing in Illinois, Roger Moon and Richard Moon (C. 45, 69); and two attorneys residing in Pennsylvania, the plaintiff, Randall Moon ("Moon"), and his sister, Linda Davis. (C. 45, 46, 69.) Roger, who resided in Peoria near his mother, held medical power of attorney for her. (C. 79, 111.) Dr. Salimath explained that he could perform a surgical re-exploration or could continue observation of Ms. Moon. (C. 101.) Given her age and condition, a second surgery posed a high risk of mortality, in Dr. Salimath's estimation. (C. 101-102.) At his deposition, Moon, who had reviewed the doctor's notes, testified that the medical record confirmed Dr. Salimath's evaluation. (C. 102-103.) Plaintiff and his siblings discussed the options with their mother; the Moon children recommended waiting rather than proceeding with surgery. (C. 103-104.) The family decided to wait 24 hours and see what developed. (C. 102-103.)

Then working as an administrative law judge, the plaintiff returned to Pennsylvania on May 25 for hearings on May 26. (C. 63, 94.) He drove back to Illinois on May 27. (C. 94.) Arriving in Peoria the evening of May 27, Moon learned that his mother's oxygen levels had significantly deteriorated. (C. 94.) She was not responsive. (C. 94-95.) Ms. Moon passed away on May 29, 2009. (C. 2.)

Attorney Randall Moon's Investigation of Medical Malpractice Actions

Less than two weeks after Kathryn Moon's death, on June 9, 2009, Moon was appointed executor of his mother's estate. (C. 44.) An Illinois-licensed lawyer, Moon had practiced law for 22 years in Peoria, from 1971 to 1993, prior to moving to Pennsylvania. (C. 61-62.) After moving to Pennsylvania, Moon continued to practice law until 1996, when he became an administrative law judge. (C. 64.) Over the course of his legal career, about 25% of Moon's law practice was devoted to personal injury work. (C. 65.)

Approximately eight months after his appointment as executor, on February 26, 2010, Moon ordered his late mother's complete medical file – including all x-ray reports and films – from Proctor Hospital, dating back to 2007. (C. 42.) Moon sought the records in his capacity as administrator of his mother's estate and received the records about two weeks after requesting them, on or about March 10, 2010. (C. 42.)

Thirteen months passed before Moon contacted a medical consulting firm on April 11, 2011. (C. 142.) Ten days after sending the consulting firm copies of Kathryn Moon's medical records, on April 21, 2011, a consultant verbally reported to Moon the finding that "there was negligent conduct in the case." (C. 142.) A few weeks later, on May 2, 2011, Moon learned that he would soon receive a written report from a qualified consulting surgeon who opined that the surgeons, Williamson and Salimath, had negligently treated the patient and contributed to her demise. (C. 136, 142.)

Moon acted as his own legal counsel in pursuing the medical malpractice action. On May 10, 2011, Moon filed a complaint against Dr. Williamson and Dr. Salimath and alleged that they failed to diagnose and/or timely treat pneumonia and respiratory distress. (C. 131-32, 142.) The physician's report appended to the complaint in that case, Peoria County

Docket No. 11 L 147, stated that the decedent suffered postoperatively from labored breathing, pneumonia, and abdominal compartment syndrome. (C. 136.) In the report, the consulting surgeon criticized the defendants for waiting "almost a week to attempt to treat the infection and supply sufficient oxygen" to the elderly patient. (C. 136.)

Almost four years after his mother's death, on March 18, 2013, Moon, again wearing the hat of medical malpractice attorney, filed a separate action against Dr. Rhode. (C. 1.) He alleged that he did not discover that he had a claim against Dr. Rhode until February 28, 2013, when Abraham H. Dachman, M.D., reviewed the CT scans. (C. 2.)

Dismissal of Plaintiff's Complaint

Asserting that no legitimate basis supported application of the discovery rule to extend the two-year statute of limitations, Dr. Rhode moved to dismiss the case based upon 735 ILCS 5/13-212(a) and 740 ILCS 180/2. (C. 26-40.) Alternatively, Dr. Rhode argued that, if the discovery rule applied, the plaintiff, nevertheless, did not timely file the action, because the limitations period accrued in February 2010, when attorney Moon requested the medical records, more than three years before the filing. (C. 28, 30, 37.) Dr. Rhode argued that the limitation period commences when an injured party possesses sufficient information to put a reasonable person on inquiry to determine whether actionable conduct is involved. (C. 31.) At that point, Dr. Rhode argued, an injured party has the burden to move forward with his investigation. (C. 31.)

In addition to citing Moon's investigation as the estate's malpractice attorney, an investigation that undisputedly began in February 2010, Dr. Rhode pointed to Moon's deposition testimony, where he stated that, even though his mother "was fairly old, my impression was that she was doing okay and … she should have gotten better treatment than

she did." (C. 98.) Dr. Rhode argued that the testimony demonstrated that Moon considered his mother's medical care to have been substandard and that it may have contributed to her death. (C. 36.) Thus, Dr. Rhode argued, from the time of his mother's death, Moon was on notice to determine whether actionable conduct was involved in all aspects of the medical care – not just the surgeons' – rendered during the hospitalization beginning on May 18, 2009, and ending with Kathryn Moon's death on May 29, 2009. (C. 36-38.)

Arguing that he did not discover Dr. Rhode's alleged negligence in this case until a retained expert reviewed a May 24, 2009, CT scan, Moon relied solely on the timing of his requests for an expert review to assert that a fact question existed concerning discovery of the claim. (C. 139-40.) Moon distinguished the authority Dr. Rhode cited in challenging application of the discovery rule, *Golla v. General Motors Corp.*, 167 Ill. 2d 353 (1995), and *Castello v. Kalis*, 352 Ill. App. 3d 736 (1st Dist. 2004); argued that the discovery rule applied; and cited appellate decisions in which, Moon contended, the date of receiving a report confirming negligence in a medical malpractice case establishes the date the statute of limitations commences. (C. 139.) To support his argument that the two-year statute of limitations did not commence until May of 2011, Moon provided an affidavit stating the chronology of his contact of a medical consultant and obtaining a physician's report and certificate of medical malpractice on May 10, 2011, for the action against the surgeons. (C. 142-43.)

The circuit court concluded that the limitation period commenced on the date of Kathryn Moon's death. (R. 17.) In addition, the court considered the discovery of alleged malpractice as an alternative basis for dismissing the case. The judge stated: "[E]ven if we were to give everybody the benefit of the doubt and try to fix the 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" on March 18, 2013. (R. 17.) The trial court dismissed the case with prejudice. (R. 17.)

Proceedings in the Appellate Court

The appellate court affirmed. It ruled that the plain language of the discovery rule contained in 735 ILCS 5/13-212(a) starts the limitations clock upon knowledge or notice of death, not knowledge of wrongful conduct. *Moon v. Rhode*, 2015 IL App (3d) 130613, ¶ 18. The appellate court held that, in a wrongful death case, the General Assembly clearly established that the required knowledge is of the death, not of negligent conduct. The appellate court observed that Illinois common law does not provide an action for wrongful death, and that the Wrongful Death Act, the statute creating the cause of action, must be strictly construed.

Acknowledging a split of authority, the appellate majority found that other districts of the appellate court incorrectly had ruled that, in a wrongful death action, section 13-212(a) articulates a discovery rule encompassing knowledge of wrongful causation in addition to knowledge of death. *Moon*, ¶¶ 15-16. The appellate court similarly applied a strict construction to the survival action and held that the law established two years from the date of Ms. Moon's death as the outer limit for filing a lawsuit. *Id.*, ¶ 26.

In the alternative, the appellate court found that, even assuming that the discovery rule contains a wrongful cause component, the circuit court had correctly determined that the plaintiff's complaint was untimely. *Id.*, ¶ 27. Citing this Court's precedent, the appellate court explained that " 'if knowledge of negligent conduct were the standard, a plaintiff could wait to bring an action far beyond a reasonable time when sufficient notice had been received

of a possible invasion of one's legally protected interests.'" *Id*. (quoting *Knox College v. Celotex Corp*., 88 Ill. 2d 407, 415 (1981)).

The plaintiff moved for rehearing, in part on the basis that the parties had not briefed the precise statutory reasoning that the appellate court set out as the first ground for affirming the order dismissing the action. *Moon*, ¶¶ 28-30. Rejecting this argument, the appellate court observed that the predominant issue on appeal "is and always has been whether the common law discovery rule was available to plaintiff-appellant." *Id.*, ¶ 29. The appellate court defined its role as reviewing the trial court's judgment, not its reasoning, and characterized the appellate court's analysis of the applicability of the discovery rule as framed in the common law as "not a new issue, … [but] simply some of our reasoning for affirming the trial court." *Id*., ¶ 30.

ARGUMENT

This appeal requires the Court to interpret the plain and unambiguous operative language of the medical malpractice limitations provision: "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," 735 ILCS 5/13-212(a), and to apply it in the context of a wrongful death case, a statutory action in derogation of the common law.

Moon undisputedly knew that his mother passed away on May 29, 2009. Believing – his own conclusion – that his elderly but active and independent mother should have received better medical care, about eight months later, Moon asked the hospital to release her medical records, including all films and related reports. Within a few weeks, on approximately March 10, 2010, Moon had the records. Yet, more than another year passed

before Moon, acting as counsel for the estate, looked into locating medical testimony to support a medical malpractice claim. Just 10 days after Moon contacted a medical consulting firm, in April 2011, Moon received a verbal report that the consulting firm had located a physician who would certify an Illinois medical malpractice complaint. Based upon the written report he obtained, Moon filed a lawsuit against the surgeons in May 2011. Nearly two years later, and more than three years after beginning his investigation, on March 18, 2013, Moon filed this lawsuit against Dr. Rhode. The circuit court granted the defendants' motion to dismiss the lawsuit as untimely filed.

The appellate court agreed that the undisputed facts supported the conclusion that, more than two years before Moon filed the lawsuit against Dr. Rhode, Moon had sufficient knowledge of the death *and* of wrongful causation, under the formulation of the discovery rule contained in the appellate opinions that plaintiff cites. *Moon*, ¶ 27. Taking a closer look at the applicable statutory provisions, however, the appellate court found a more fundamental reason for upholding the circuit court's order: neither section 13-212 nor the Wrongful Death Act refer to knowledge or notice of wrongful conduct as the trigger for the two-year filing deadline. Both aspects of the appellate court's reasoning call for this Court to affirm.

Consistent with the errant analysis of the dissent, in this Court the plaintiff relies extensively on strawman arguments, such as that section 13-212 governs this case. (Plaintiff's brief at 13-15, 22-24.) The appellate court, however, expressly acknowledged this point. It stated: "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." *Moon*, ¶ 22.

Like the dissenting justice, the plaintiff has failed to meaningfully confront the bedrock of the majority's reasoning: that the statute, in plain and unambiguous terms, omits any language indicating that the General Assembly intended to extend the discovery rule to encompass the concept of knowledge of negligent treatment. The plaintiff not only advocates that this Court read language into the statute that it does not contain, but, in effect, also asks the Court to edit the two-year limitations period out of the statute, and replace it with the four-year period of repose, by allowing a medical malpractice plaintiff to unilaterally control when his limitations period begins, based on when he seeks and receives a medical expert's review.

I. THE APPELLATE COURT CORRECTLY APPLIED THE PLAIN LANGUAGE OF THE LIMITATION PROVISION IN SECTION 13-212 FOR THE PLAINTIFF'S WRONGFUL DEATH AND SURVIVAL CLAIMS.

Section 13-212(a) creates no cause of action. It provides deadlines for filing medical malpractice claims and encompasses all cases arising out of the provision of medical care. See *Orlak v. Loyola University Health Systems*, 228 Ill. 2d 1, 7-8 (2007). Plaintiff, who pleaded an action under the Wrongful Death Act, 740 ILCS 180/1 (C. 1), extensively argues a non-issue in this Court, that section 13-212(a) and not the limitations provision set out in the Act, 740 ILCS 180/2, applies to Moon's wrongful death action, a point that the appellate court acknowledged repeatedly in its opinion. *Moon*, ¶¶ 15, 16, 22. The application of 13-212(a), however, does not transform the wrongful death claim into a personal injury action.

Dr. Rhode respectfully requests that, upon *de novo* review of the dismissal of the action pursuant to 735 ILCS 5/2-619, this Court should affirm the judgments below based upon construction of the applicable statutes. See *Wilkins v. Williams*, 2013 IL 114310, ¶ 13; *Friends of the Parks v. Chicago Park District*, 203 Ill. 2d 312, 319-20 (2003).

A. Plaintiff's Statutory Interpretation Disregards Fundamental Rules of Construction and this Court's Strict Construction of Wrongful Death Actions.

As the first step in a statutory construction analysis, a court seeks to glean the legislature's intent from the words used in the statute. See *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 235 (2007). Where a statute is clear and unambiguous, a court determines legislative intent from the statutory language, according to its plain and ordinary meaning. See *Orlak*, 228 Ill. 2d at 8. The Court should give such language effect without resorting to other aids of construction. *People v. Woodward*, 175 Ill. 2d 435, 443 (1997). In ascertaining legislative intent, courts read a statute in question as a whole and construe it so that no word or phrase is rendered meaningless. See *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990). Conversely, terms not included should not be inferred. The legislature knows how to include terms or phrases it intends to include. See *Brucker v. Mercola*, 227 Ill. 2d 502, 532 (2007). It knows how to do so in drafting a limitations provision. *Wyness v. Armstrong World Industries*, 131 Ill. 2d 403, 416 (1989).

The operative phrase "knew, or should have known … the existence of the injury or death" is clear and unambiguous, and omits any hint of the discovery of wrongful conduct in a wrongful death action within the ambit of 13-212. Neither the plaintiff nor the dissenting justice contend that the statute presents an ambiguity. To the contrary, Justice Lytton determined that section 13-212 contains clear, unambiguous language. *Moon* (Lytton, J., dissenting), ¶ 51. Interpreting section 13-212's plain language, the dissent stated that it "expressly refers to 'damages resulting in death.'" *Id.*, ¶ 52 (quoting *Beetle v. Wal-Mart Associates, Inc.*, 326 Ill. App. 3d 528, 536 (2d Dist. 2001). While finding the statutory language to be "clear and unambiguous," and citing no language in the rule, plain or

otherwise, that refers to discovery of wrongful cause, the dissenting justice nonetheless concluded that knowledge of wrongful cause is a component of the statute. Without additional statutory analysis, Justice Lytton assumed that section 13-212 necessarily requires application of a discovery rule that includes notice of wrongful cause. *Moon* (Lytton, J., dissenting), ¶¶ 52-56.

The plaintiff does not address the "plain language" assertion in either the majority's decision or Justice Lytton's dissent. Noncommittal on this first step in the statutory analysis, the plaintiff instead contends that the discovery rule reference to "death" means the same thing as "injury." (Plaintiff's brief at 24-25.)

As the appellate court observed, the action before the Court exists in Illinois only by virtue of the Wrongful Death Act, as case after case of this Court establishes. See *Moon*, ¶ 17. No action for wrongful death existed at common law. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 612 (1956). At common law, personal actions abated at the death of the injured party. See *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 32 (citing *Williams v. Manchester*, 228 Ill. 2d 404, 418 (2008)). The Wrongful Death Act created a new cause of action for pecuniary losses suffered by the deceased's spouse and next of kin by reason of the death of the injured party. *Id*., ¶ 32 (citing *Nudd*, 7 Ill. 2d at 612). The judiciary, therefore, must strictly construe the applicable statutory provisions, which are in derogation of the common law. *Williams*, 228 Ill. 2d at 420; *Pasquale v. Speed Products*, 166 Ill. 2d 337, 360 (1995).

This Court's analysis in *Williams* fully supports the appellate court's statutory construction. In *Williams*, this Court observed that the 1853 enactment of the Wrongful Death Act conferred a cause of action, unknown at common law, for wrongful death; the

legislature determined by statute who may sue under the Act and the conditions for proceeding with such a lawsuit. The Court observed that because "this is a statutory action, where the right is conditional, the plaintiff must bring the case clearly within the prescribed requirements necessary to confer the right of action." *Williams*, 228 Ill. 2d at 420. The appellate court followed the letter and spirit of this Court's statutory interpretation as set forth in *Wyness*, in which the Court observed that "this Court has not to date applied the discovery rule to wrongful death actions." See *Moon*, ¶ 24 (quoting *Wyness*, 131 Ill. 2d at 413).

In *Greenock v. Rush Presbyterian St. Luke's Medical Center*, 65 Ill. App. 3d 266 (1st Dist. 1978), the First District reached the same conclusion as the Third District below. In *Greenock*, a case plaintiff categorizes as "stranded" but otherwise fails to discuss, the appellate court considered the timeliness of plaintiff's wrongful death action arising from allegations of medical negligence. (Plaintiff's brief at 16.) The circuit court denied the defendant hospital's motion to dismiss, in which the hospital pleaded the two-year statute of limitations found in the Wrongful Death Act, but certified the issue of timeliness for immediate appeal. *Greenock*, 65 Ill. App. 3d at 268.

The appellate court first examined section 21.1 of the Limitations Act (now codified in section 13-212(a)). The First District considered the plain language of the statute, which precludes actions "for damages for injury or *death*" against healthcare providers "brought *more than 2 years after the date on which the claimant knew*, or through the use of reasonable diligence should have known … of the existence *of the* injury or *death for which damages are sought in the action*.…" *Id*. at 269 (emphasis in original). Based on the plain language contained in section 21.1, the appellate court ruled that the date the plaintiff knew

of the death commences the statute. *Id*. at 270. The First District refused to "read into section 21.1 an extra extension of time for plaintiff to bring suit following death when it is not clearly provided for by the statute." *Id*. Based on the clear and unambiguous language of the statute, the appellate court rejected the plaintiff's citation of the landmark decision in *Lipsey v. Michael Reese Hospital*, 46 Ill. 2d 32 (1970), in which this Court incorporated knowledge or notice of wrongful cause into the discovery rule set forth in section 21.1 in a common law action that did not involve a wrongful death. *Greenock*, 65 Ill. App. 3d. at 269. The appellate court reasoned that the plain language of section 21.1 did not support the plaintiff's interpretation. *Id*. at 269-70. The appellate court also determined that it need not consider the hospital's contention that section 21.1 unconstitutionally amended the Wrongful Death Act given the absence of any conflict in that case between section 21.1 of the Limitations Act and the Wrongful Death Act. *Id*. at 269.

B. This Court's Precedent Recognizes a Distinction Between "Injury" and "Death" in the Context of the Discovery Rule.

This Court has not addressed the specific issue of statutory interpretation that this case presents; yet, like the legislature in section 13-212, the Court has recognized a distinction between actions for death and actions for injury. In *Wyness*, a decision both the majority and dissent cited below, this Court considered a different issue in an asbestos case: whether the discovery rule could trigger the two-year limitations period of the Wrongful Death Act where the plaintiff knew of the decedent's injuries and the cause of those injuries before the death. *Wyness*, 131 Ill. 2d at 412-13. Commenting that the defendant had mixed apples with oranges in its analysis, this Court emphasized that the Wrongful Death Act in 1853 created a *new* cause of action for *death* which the legislature intended to compensate the survivors. *Id*. at 413 (emphasis in original).

Significantly, in *Wyness*, this Court drew a distinction between personal injury and death. It found "folly inherent in initiating a wrongful death action prior to death" based on the difference between an injury "which opens the door to initiation of a personal injury suit," and the injury giving rise to a wrongful death lawsuit. *Id*. at 414. This Court observed that "injury at the hands of another is not the sole thread which weaves the fabric undergirding both causes of action. A wrongful death action can only be instituted for the benefit of the next of kin who have suffered an 'injury' because a family member has died when that family member's death resulted from an injury wrongfully caused by another." *Id*. Thus, this Court held that a wrongful death action must be commenced with within two years following the death of an individual who, prior to his death, had a viable cause of action for wrongful injury. *Id*. at 415.

In *Wyness*, this Court acknowledged that it had not applied the discovery rule to wrongful death actions and rejected the defendants' argument that the limitations period commenced before the death of the plaintiff's decedent because the decedent's spouse knew, prior to his death, that the decedent suffered from lung cancer due to asbestosis. *Id*. at 409. The Court found no basis to apply the discovery rule in the fashion that the defendant suggested given that precipitating injury was the death, not the illness leading up to it. *Id*. at 415. The Court also rejected the defendant's argument urging the Court to read the Wrongful Death Act to contain a period of repose. This Court refused to "read into a statute language which is clearly not there." *Id*. at 416.

Thus, *Wyness* answers the rhetorical question the plaintiff posed in his brief: whether "death" in the phrase "injury or death" should be interpreted in the same manner. (Plaintiff's brief at 25.) The answer is "no." This Court provided that insight in *Wyness*; in addition,

and more importantly, the General Assembly provided a reason to interpret the terms differently by the language used in section 13-212, which pertains to "injury or death." The rules of construction require the court to construe these terms to give effect to both of them; if "death" means nothing different than "injury," the legislature included a redundant term in the statute. This Court should not read the statute in that fashion. See *Kraft*, 138 Ill. 2d at 189.

Plaintiff cited *Witherell v. Weimer*, 85 Ill. 2d 146 (1981), in arguing that no good reason calls for interpreting "death" differently than "injury." (Plaintiff's brief at 25.) In arguing the meaning of "injury," the plaintiff quotes this Court's opinion in *Witherell* but omits language from the quoted passage which demonstrates a significant distinction between "injury" and "death," a distinction this Court recognized in *Wyness* and which provides insight into the General Assembly's distinction of "death" from "injury."

The quotation found in plaintiff's brief, page 24, omitted the bolded sentence:

> Where substantial intervals exist between the time at which a plaintiff should have known of the physical injury and the time at which he should have known that it was negligently caused, the definition of "injury" as including or excluding its wrongful causation becomes significant. **Since plaintiff here has alleged that she did not know until May 1976 the nature of her true condition and that it had resulted from the negligence of the doctors in continuing to prescribe Ortho-Novum, plaintiff urges her suit filed less than two years thereafter is timely**. It is suggested that our opinions have left unresolved the question whether the statute is triggered by plaintiff's discovery of the injury or not until discovery of the negligence where, as alleged here, knowledge of the injury substantially preceded knowledge of its cause.

Witherell, 85 Ill. 2d at 155 (emphasis added).

Thus, in reaching the conclusion that the wrongful cause component of the discovery rule should apply in an injury claim, in *Witherell* this Court relied on the fact that the

plaintiff was not aware of the true nature of her injury. No such question is involved when a death has occurred.

C. This Court Has Recognized the Important Policy Considerations Supporting the Third District's Construction of Section 13-212.

The plaintiff emphasizes public policy considerations pertaining to the discovery rule but does not acknowledge the competing, equally significant policy considerations supporting statutes of limitation in medical malpractice and other actions. (Plaintiff's brief at 11.) The policy of providing a remedy for every wrong is tempered by the policy of the statute of limitations, which bars actions after a legislatively determined period of time, when the problems of proof become so difficult as to pose a danger of injustice. See *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 609 (7th Cir. 1975). The statute of limitations protects defendants from false or fraudulent claims that might be difficult to defend if the claimant does not assert them until, with the passage of time, witnesses have become unavailable and relevant evidence is lost or destroyed. The General Assembly determines the appropriate time for limitations statutes to provide repose to litigants.

The General Assembly has recognized the acute need for imposing statutory limitations on medical malpractice actions. As this Court observed in *Anderson v. Wagner*, 79 Ill. 2d 295 (1979), in the early 1970s, jurisdictions throughout the United States faced a medical malpractice insurance crisis resulting from an increasing reluctance of insurers to write medical malpractice insurance coverage and, for the companies continuing to write medical malpractice policies, a dramatic rise in premiums. The difficulty in obtaining insurance for a reasonable premium forced many healthcare providers to restrict their services or even cease the practice of medicine. *Anderson*, 79 Ill. 2d at 301.

Legislatures, including the Illinois General Assembly, responded with a variety of changes in tort law principles. *Id*. Among other efforts, the General Assembly enacted a statute of repose, an outside time limit that curtailed actions, regardless of discovery. *Id.* at 307. Perceiving that the discovery rule played a significant role in the medical insurance industry crisis by creating a "long tail" of liability, the legislature sought to steady healthcare costs by creating a liability cutoff date. *Id.* at 312; see *Mega v. Holy Cross Hospital*, 111 Ill. 2d 416, 428 (1986) (recognizing that the legislature intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge of his cause of action); see also *Uldrych v. VHS of Illinois, Inc.*, 239 Ill. 2d 532, 546 (2011) (recognizing that the legislature intended to preclude all actions arising out of patient care brought more than four years after the alleged malpractice to give effect to the legislature's intention to limit a physician's exposure to liability).

Of course, even outside the medical malpractice realm, important policy considerations have prompted the legislature to enact limitations provisions. Statutes of limitation exist to afford injured parties particular periods of time to begin and conclude inquiries into whether they have a cause of action to remedy their injuries. See *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981) (finding that statutes of limitation "require the prosecution of a right of action within a reasonable time to prevent the loss or impairment of available evidence and to discourage delay in the bringing of claims"). Thus, a plaintiff's conclusion that he has a viable cause of action does not signify the beginning of a limitations period; rather, a plaintiff must reach such a conclusion by the period's end. Statutes of limitation "are practical and pragmatic devices [which] spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have

faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

Here, the plaintiff lopsidedly emphasizes the difficulties facing claimants. Plaintiff fails to give due recognition to the General Assembly's perspective of the other side of the medical malpractice equation.

In emphasizing the benefits of and need for a judicially-enhanced version of the discovery rule, the plaintiff also overlooks other statutory provisions that balance barring stale claims with extending a claimant's ability to assert a medical malpractice claim. For example, 735 ILCS 5/2-402 permits plaintiffs to designate respondents-in-discovery and, in effect, extend the statute of limitations. The proponents of the legislation intended it to reduce the number of needless lawsuits and reduce medical malpractice premiums. 79th Ill. Gen. Assem., House Proceedings, June 10, 1976 at 33. The current version of the statute, 735 ILCS 5/2-402, permits a plaintiff in a civil action to designate as respondents-in-discovery individuals or entities in addition to the named defendants whom the plaintiff believes have information "essential to the determination of who should properly be named as additional defendants in the action." 735 ILCS 5/2-402. The statute provides six months after an individual or entity is named as a respondent-in-discovery to be named as a defendant, even if the time for initiating an action against the respondent-in-discovery expires during the six-month period. See *Robinson v. Johnson*, 346 Ill. App. 3d 895, 902 (1st Dist. 2004).

The fraudulent concealment statute, 735 ILCS 5/13-215, provides another exception to the time limits contained in section 13-212(a). When a cause of action is fraudulently concealed, the plaintiff may bring an action within five years of discovery of the cause of

action. See *Orlak*, 228 Ill. 2d at 18. As the Seventh Circuit observed in *Gates*, "Illinois has not engrafted the discovery rule on all of its limitations law. Otherwise the statutory authorization for tolling by reason of the defendant's fraudulent concealment would be entirely superfluous." *Gates*, 508 F.2d at 612. The concealment recognized in section 13-215 consists of affirmative acts or representations calculated to lull or induce a claimant into delaying the commencement of her claim or to prevent the plaintiff from discovering the claim. *Id.*[1]

735 ILCS 5/2-622, in effect, provides another means of extending the medical malpractice filing deadline. Section 2-622(a)(2) and (3) allows the plaintiff or a plaintiff's attorney who files a malpractice complaint to obtain an additional three months or more to obtain medical records and a consulting health professional's certificate and written report.

The existence of the statutory provisions described above demonstrates a flaw in the dissent's presumption that the legislature intended the discovery rule, as judicially interpreted to be applicable to common law personal injury claims, also to be applicable to wrongful death actions. These statutory alternatives, where applicable, preserve a claimant's cause of action despite expiration of the statute of limitations.

D. The Third District Correctly Held That Sister District Decisions Failed to Adhere to the Plain Language of Section 13-212(a) in Determining That, in Wrongful Death Cases, the Discovery Rule Has a Wrongful Cause Component.

In the appellate decisions that reach a conclusion contrary to the Third District's opinion below and to the First District's decision in *Greenock*, the appellate panels fail to reconcile their rulings with the plain language of section 13-212(a) . Two days before the

[1] Similarly, principles of equitable estoppel may prevent a defendant from invoking a repose period as a bar. *Mega*, 111 Ill. 2d at 424-25 (citing *Witherell*, 85 Ill. 2d 146).

First District released its decision in *Greenock*, the Second District interpreted the discovery rule in a medical malpractice case in a contrary manner and determined that the discovery rule applicable to medical negligence cases applies to a wrongful death action where the death is known but the negligence is not discovered until sometime after the death. *Fure v. Sherman Hospital*, 64 Ill. App. 3d 259, 268, 272 (2d Dist. 1978). In *Fure*, the defendant hospital cited both the two-year statute of limitations contained in the wrongful death statute and Section 21.1 of the Limitations Act and argued that any judicial modification, such as the discovery rule of *Lipsey v. Michael Reese Hospital*, did not affect the statute. *Fure*, 64 Ill. App. 3d at 265-66. The defendant also argued that section 21.1 of the Limitations Act, amended post-*Lipsey*, extended the time for filing suit to two years beyond knowledge of the decedent's death, a provision that did not encompass the claimant's knowledge of the negligence that caused the death. *Id.* at 265-66. Citing *Lipsey*, the plaintiff argued that the amendment of section 21.1 of the Limitations Act recognized the discovery rule and that the term "injury" incorporated "negligent treatment." *Id.* at 265.

Focusing its analysis on the Wrongful Death Act, the Second District rejected the hospital's argument and ruled that the Act's statute of limitations was not beyond judicial construction. *Id.* at 267. The appellate court made no effort to reconcile its decision with the words the General Assembly placed in section 13-212(a). Rather, the appellate court cited the appellate decision in *Wilbon v. D.F. Bast Co*, 48 Ill. App. 3d 98, 102 (1977), *aff'd* 73 Ill. 2d 58 (1978), a decision driven by the appellate court's determination that it should interpret the Wrongful Death Act in accordance with the policy goal of protecting minors as the legislature expressed in a Limitations Act tolling provision applicable to minors. *Fure*, 64 Ill. App. 3d at 267-68. The appellate court also cited *Prosser on Torts* and rejected any legal

distinction allowing the law to give more protection to the family of a person who is wounded than the family of a person who has died. *Id.* at 269-70 (citing *Prosser on Torts* § 126 at 898 (4th ed. 1971)).

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, *Fure*, 64 Ill. App. 3d at 270 (emphasis added), under the "unique circumstances of the case, where the death certificate contained language from which a layperson could not discern the cause of death and the decedent left four minor children." *Id.* at 272-73. The appellate court declined to consider the plaintiff's argument that an amendment of section 21.1 effective in September, 1976, after the action was filed, preserved the minor children's right to pursue a wrongful death action until two years after attaining the age of 18. *Id.* at 273.

In a more abbreviated fashion, the Second District addressed the issue again, and again failed to adhere to the plain language of the statute, in *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill. App. 3d 525 (2d Dist. 1982). In *Coleman*, the Second District compared the First District decision in *Greenock*, in which the appellate court determined that the plain language of section 21.1 focused the inquiry on whether the claimant knew or should have known of the death, to the Second District's decision in *Fure*, in which the court "*went beyond the plain language of the statute* and reached a different conclusion." *Coleman*, 108 Ill. App. 3d at 530 (emphasis added). Citing this Court's 1981 decision in *Witherell*, the Second District rejected the plain language interpretation of section 21.1 and followed the *Fure* interpretation, which requires discovery not only of the death but also of wrongful causation of the death. *Id.* at 531.

The First District followed with its 1987 decision in *Arndt v. Resurrection Hospital*, in which the appellate panel discussed the decisions in *Fure*, *Greenock* and *Coleman*. Rather than undertaking an analysis of the statutory language, the appellate court erroneously determined that this Court "resolved" the conflict between *Greenock* and *Fure* in *Coleman* by denying leave to appeal the *Coleman* opinion. *Arndt*, 163 Ill. App. 3d 209, 213 (1st Dist. 1987). The reasoning of the appellate court in *Arndt* rests on a faulty assumption concerning the precedential effect of this Court's denial of a petition for leave to appeal. In *People v. Ortiz*, the Court reiterated the well-settled principle that denials of leave to appeal are not decisions on the merits, "'carry no connotation of approval or disapproval of the appellate court action, and signify only that four members of the court, for reasons satisfactory to them, have not voted to grant leave.'" *Ortiz*, 196 Ill. 2d 236, 257 (2001) (quoting *People v. Vance*, 76 Ill. 2d 171, 183 (1979)). Without any acknowledgement of this Court's case law demonstrating the appellate court's error, the plaintiff here repeats the *Arndt* panel's error. (Plaintiff's brief at 21.)

The plaintiff and the dissenting Justice cited additional decisions that, without any recognition of the plain language of the statute or, for that matter, any other statutory analysis, applied the judicially-enhanced discovery rule articulated in *Fure*. *Moon* (Lytton, J., dissenting), ¶ 40. (Plaintiff's brief at 17.) See *Hale v. Murphy*, 157 Ill. App. 3d 531, 534-35 (5th Dist. 1987) (reversing dismissal of complaint based on expiration of the statute of limitations without consideration of the formulation of the discovery rule); *Neade v. Engel*, 277 Ill. App. 3d 1004, 1009 (2d Dist. 1996) (citing *Arndt*, and reversing dismissal of a medical malpractice action based upon the statute of limitations without addressing the correct statutory interpretation of section 13-212) ; *Young v. McKiegue*, 303 Ill. App. 3d 380,

386-87 (1st Dist. 1999) (applying discovery rule in a wrongful death case based upon medical malpractice without considering whether the language of section 13-212 supports the *Fure* formulation of the discovery rule).

The dissent and the plaintiff also cite *Cramsey v. Knoblock*, 191 Ill. App. 3d 756 (4th Dist. 1989), a case in which the appellate court cited *Arndt*, upheld the circuit court's order dismissing plaintiff's malpractice complaint and found that the statute of limitations expired two years from the date of the death of the plaintiff's decedent given the plaintiffs' notice of the alleged failure to diagnose prior to the death. *Cramsey*, 191 Ill. App. 3d at 764-65. The Fourth District's decision provides no insight into the statutory interpretation issue before this Court. The same is true of another decision cited by the dissent and by the plaintiff, *Durham v. Michael Reese Hospital Foundation*, 254 Ill. App. 3d 492 (1st Dist. 1993), in which the appellate court did not even address the discovery rule. Rather, in *Durham*, the First District upheld the dismissal of a medical malpractice action based on the statute of repose in section 13-212. *Durham*, 254 Ill. App. 3d at 496.

The plaintiff cites another Second District decision, also cited by the dissent, *Wells v. Travis*, 284 Ill. App. 3d 283 (2d Dist. 1996). *Moon* (Lytton, J., dissenting), ¶¶ 35, 40. (Plaintiff's brief at 17.) The thrust of the court's analysis in *Wells* pertains to rejecting the plaintiff's argument that, until the plaintiff knows of the malpractice of a specific medical malpractice defendant, the statute of limitations does not commence. *Wells*, 284 Ill. App. 3d at 287-89. Given the absence of any consideration of the statutory interpretation issue presented in this case, *Wells* does not aid Moon's argument.

While rejecting the application of the Wrongful Death Act statute of limitations, plaintiff also cites a First District decision and two federal district court decisions that

construe the Wrongful Death Act – the statute plaintiff contends is inapplicable. (Plaintiff's brief at 14, 17, 21-22.) See *Eisenmann v. Cantor Bros., Inc.*, 567 F.Supp. 1347 (N.D. Ill. 1983); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235 (N.D. Ill. 1981). The dissenting Justice also emphasized the district court decision in *Eisenmann*. *Moon* (Lytton, J., dissenting), ¶ 41 (citing *Eisenmann*, 567 F. Supp. 1347). Both Justice Lytton and the district court judge usurp a legislative function by emphasizing the necessity of effectuating a policy to ensure full recovery for a decedent's family, rather than fulfilling the judicial function of giving effect to the intent of the General Assembly, as manifested by the plain language of the statute. *Moon* (Lytton, J., dissenting), ¶ 40 (citing *Eisenmann*, 567 F.Supp. at 1352-53). Neither *Eisenmann* nor *Johns-Manville* hold any precedential value in construing Illinois statutes. See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 182 (1978); see also *Lozman v. Putnam*, 379 Ill. App. 3d 807, 828 (1st Dist. 2008). Rather than utilize an appropriate analysis of statutory intent, the federal district court in *Eisenman*, like the appellate panel in *Fure*, employed a unilateral judicial policy analysis. *Eisenmann*, 567 F.2d at 1352-53; *Johns-Manville*, 511 F. Supp. at 1238. The dissent and the district court in *Eisenmann* failed to recognize the applicable principle of statutory construction that should have guided the analysis: that statutes in derogation of the common law are strictly construed, and that a court is not at liberty to read into a statute language it does not contain. *Moon*, ¶ 23 (citing *Wyness*, 131 Ill. 2d at 416; *In re W.W.*, 97 Ill 2d at 57).

Like the federal decisions, the other First District case that the plaintiff and the dissent cite, *Praznik v. Sport Aero, Inc.*, 42 Ill. App. 3d 330 (1976), sets forth an interpretation of the Wrongful Death Act statute of limitations, not of section 13-212(a). *Praznik*, 42 Ill. App. 3d at 337. As the appellate majority observed, the medical malpractice

statute of limitations appears to codify the extension set forth in *Praznik* in lawsuits against healthcare providers. *Moon*, ¶ 21. *Praznik* involved an airplane crash. The wreckage was not discovered until more than two years after the death occurred. Acknowledging this decision, which suggests that the death was not discovered until more than two years after it occurred, the appellate court reasoned that *Praznik* presented the type of circumstance where the discovery rule may be invoked within the language of section 13-212. *Moon*, ¶ 21 (citing *Praznik*, 42 Ill. App. 3d at 337 and *Fure*, 64 Ill. App. 3d at 270).

Regardless of the greater number of appellate decisions creating out of whole cloth the notice of wrongful conduct amendment to section 13-212, unlike the opinions applying the plain language of the statute, *Fure* and its progeny do not contain a statutory interpretation that adheres to the language contained in section 13-212 or to the limitations provision in the Wrongful Death Act. By contrast, the Third District's decision below and the First District's analysis in *Greenock* faithfully interpret the language contained in the statutes, and this Court should adopt that analysis.

E. Plaintiff Errs in Concluding That the General Assembly Has Signaled Acquiescence in *Fure* and Subsequent Appellate Decisions.

Citing *Charles v. Seigfried*, 165 Ill. 2d 482 (1995), plaintiff contends that the legislature has acquiesced in the cases "interpreting 'injury' to include knowledge of wrongful causation." (Plaintiff's brief at 26.) Setting aside the fact that the question before the Court is whether "death" includes knowledge of wrongful causation, neither *Charles*, nor other Illinois decisions, nor the relevant legislative history, support this analysis.

This Court has observed that the doctrine of legislative acquiescence, a jurisprudential principle and not a rule of law, is a "weak reed on which to base a determination of … the drafters' intent." *People v. Marker*, 233 Ill. 2d 158, 175 (2009)

(quoting *People v. Marker*, 382 Ill. App. 3d 464, 491 (2d Dist. 2008)). The Court repeatedly has rejected the notion that the judicial soundness of case law should be judged by the presence or absence of corrective legislation. See *Lipsey*, 46 Ill. 2d at 40; *Nudd*, 7 Ill. 2d at 615. 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. See *In re Marriage of Mathis*, 2012 IL 113496, ¶ 91 (Garman, J., dissenting) (citing *People v. Villa*, 2011 IL 110777, ¶ 36).

The decisions that plaintiff cites as having been implicitly approved by the legislature include three decisions of the appellate court in 1978 (*Fure*), 1982 (*Coleman*) and 1987 (*Arndt*), which conflict with another 1978 decision (*Greenock*). Plaintiff cites additional decisions that followed the statutory interpretation of *Fure* but did not provide any legislative analysis. The contention that the legislature's silence in light of the competing decisions provides little guidance with respect to the legislature's intent in selecting this terminology.

By contrast, the single decision plaintiff cites on this subject, *Charles v. Seigfried*, adhered to 100 years of unanimous precedent denying the existence of a cause of action against social hosts for serving alcoholic beverages to minors who are subsequently injured. *Charles*, 165 Ill. 2d at 483. *Charles* involved a distinctly different situation involving preemption of the field of alcohol-related liability by the General Assembly in conjunction with a consistent body of judicial determinations, both before and after the enactment of the Dramshop Act, establishing that no liability exists in Illinois for the sale or gift of alcoholic beverages, outside the Dramshop Act.

The case law of the appellate court pertaining to the application of the discovery rule does not unanimously interpret the discovery provision of section 13-212 in the instance of a

wrongful death. As fully discussed above, the First District in *Greenock* and the Second District in *Fure* and its progeny came to expressly different conclusions with respect to the application of the discovery rule in a medical malpractice case arising from a wrongful death. In addition, 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. See *Nordsell v. Kent*, 157 Ill. App. 3d 274 (3d Dist. 1987) (holding as a matter of law that a stillborn death was a traumatic injury requiring a plaintiff to investigate the existence of a cause of action); *Lutes v. Farley*, 113 Ill. App. 3d 113 (3d Dist. 1983) (same).

Moreover, the Court's preemption analysis in *Charles* and the Court's long history of exercising judicial restraint with respect to social host liability further distinguishes the decision from the inconsistent body of case law addressing the discovery rule in the wrongful death/medical malpractice context. *Charles*, 165 Ill. 2d at 488-89. The Court's finding of legislative acquiescence was rooted in its long-standing deference to the legislature regarding the public policy issues giving rise to the enactment of the Dramshop Act and the resulting confinement of social host liability to the statutory remedy. *Id*. at 493-94. Here, injecting discovery of wrongful cause into a wrongful death case limitations rule would expand liability beyond the limitations the legislature stated in section 13-212 and in the Act, a result this Court sought to avoid in *Charles*. *Id.* at 494-95; see also *Hall v. Gillins*, 13 Ill. 2d 26, 29 (1958) (finding that a common law remedy for wrongful death did not exist, and would subvert legislative intent); *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 527 (1996) (finding no common law fraud action existed where 215 ILCS 5/155 provided the cause of action).

The reasoning this Court described in *Charles* calls for deference to the legislature regarding the legislative policy decisions driving enactment of section 21.1 of the Limitations Act. See 79th Ill. Gen. Assem., House Proceedings, June 10, 1976 at 30. State representatives requested information and guidance from lawyers and doctors to strike the balance between the varied interests of physicians and claimants with respect to medical malpractice litigation. From that inquiry into public policy, the General Assembly crafted legislation it determined best served the public interest.

Plaintiff concludes his erroneous legislative acquiescence argument by quoting, in isolation, a line from this Court's decision in *Mega*, 111 Ill. 2d 416, and omitting the next line of the decision, which demonstrates that the opinion supports Dr. Rhode's position. In *Mega*, this Court refused to apply the discovery rule based upon the four-year repose bar. In recounting the legislative history and development of the discovery rule in medical malpractice cases, the Court, citing *Lipsey*, observed that "the discovery rule may be applied by the court in the absence of the expression of a contrary intent by the legislature," a passage that plaintiff emphasizes in his brief. (Plaintiff's brief at 26.) Significantly, however, plaintiff omitted the sentence following the Court's citations to *Lipsey*, 46 Ill. 2d 32, and to *Mosby v. Michael Reese Hospital*, 49 Ill. App. 2d 336 (1st Dist. 1964), in which this Court stated "[t]hat a contrary intent has been expressed here is apparent in the repose period itself." *Mega*, 111 Ill. 2d at 428. The legislature's enactment of the statute of repose in response to the judicially created discovery rule established the legislature's intent.

Similarly, the legislature's selection of the language defining the commencement of the statute of limitations in wrongful death cases indicates an intent contrary to expanding the statutory language to require discovery of negligent conduct. The Wrongful Death Act

requires a plaintiff to commence an action "within 2 years after the death …." 740 ILCS 180/2. The Act contains no discovery rule, as is underscored by legislation introduced to the Illinois House on February 11, 2016. Under this proposed legislation, H.B. 6083, an action for damages under the Act "shall be commenced within 2 years after the DISCOVERY OF EVIDENCE INDICATING THAT A WRONGFUL DEATH MAY HAVE OCCURRED …." 2015 Bill Text IL H.B. 6083, Section 10 (capitals in original).[2] Notably, the legislature included no such language in the current version of either the Wrongful Death Act or of section 13-212(a) . Had the legislature intended either limitations provision to hinge on discovery of evidence indicating wrongful cause, it would have said so. See *Sanelli v. Glenview State Bank*, 108 Ill. 2d 1, 14 (1985).

F. Despite Plaintiff's Unavailing Effort to Identify a Contrary Modern American Trend, in Illinois, a Wrongful Death Action Is and Always Has Been a Statutory Creation, in Derogation of the Common Law, to Be Strictly Construed.

Plaintiff finds fault with the appellate decision below based on the suggestion that the Wrongful Death Act should be treated as a common law creation subject to judicial changes. Plaintiff errs in this analysis.

As discussed above, in section I-A, this Court repeatedly has held that the Wrongful Death Act created a new cause of action, not existing at common law. This Court's identification of this principle dates back to cases before 1900 and continues to be recognized in the modern era. See, *e.g.*, *Conant v. Griffin*, 48 Ill. 410, 413 (1868);

[2] The legislation, entitled "Molly's law," was proposed in response to the death of a young woman, Molly Young, her father's efforts to obtain information concerning her death from a municipal police department and from the Illinois State Police, and the dismissal of a wrongful death lawsuit Mr. Young filed under the Wrongful Death Act statute of limitations. Mr. Young appealed the dismissal order, and the matter remains pending in the appellate court, docket number 5-15-0268.

Ohnesorge v. Chicago City Ry. Co., 259 Ill. 424, 430 (1913); *Nudd*, 7 Ill. 2d at 612; *Hall*, 13 Ill. 2d at 29; *Li Petri v. Turner Construction Co.*, 36 Ill. 2d 597, 600 (1967); *Wyness*, 131 Ill. 2d at 413; *Carter*, 2012 IL 113204, ¶ 32. No cause of action existed at common law to recover damages for the wrongful death of another; the decedent's cause of action for personal injury abated with his death. *Id.*

The appellate court correctly stated and followed the legal principle that statutes in derogation of the common law are to be strictly construed. *Moon*, ¶ 16; see *Williams*, 228 Ill. 2d at 420. In *Williams*, the mother of an unborn fetus brought a wrongful death action following a motor vehicle accident in which the plaintiff fractured her pelvis and required surgery to repair the fracture. *Williams*, 228 Ill. 2d at 411-12. To have the surgery, the mother terminated the pregnancy. *Id.* at 412. The circuit court entered summary judgment in favor of the defendant driver on the wrongful death claim the mother brought on behalf of the fetus, and the appellate court reversed the ruling. *Id.* at 413, 415. This Court upheld the circuit court's entry of summary judgment based on the plaintiff's failure to establish that the decedent had a claim for personal injuries at the time of death. *Id.* at 421. In reaching its analysis, this Court observed as follows:

> The Act alone is the source of the right to sue. The legislature, having conferred a cause of action for wrongful death, has determined who shall sue and the conditions under which the suit may be brought. *Wilson v. Tromly*, 404 Ill. 307, 310, 89 N.E. 2d 22 (1949); accord *Hall*, 13 Ill. 2d at 29 (observing that the legislature "created both the right and the remedy"). Because this is a statutory action, where the right is conditional, the plaintiff must bring the case clearly within the prescribed requirements necessary to confer the right of action. *Hartray v. Chicago Rys. Co.*, 290 Ill. 85, 86-87 124 N.E. 849 (1919). Also, this court has repeatedly held that the Act "'should be strictly construed.'" *Pasquale*, 166 Ill. 2d at 360, quoting *Wilson*, 404 Ill. at 310; *Kessinger v. Grefco, Inc.*, 251 Ill. App. 3d 980, 983, 623 N.E.2d 946, 191 Ill. Dec. 356 (1993) (same). This appeal turns on one such statutory requirement.

Williams, 228 Ill. 2d at 420.

As a statute creating a new cause of action unknown at common law, the Wrongful Death Act should not be extended beyond the language chosen by the legislature. *Id.* at 420 (quoting *City of Chicago v. Major*, 18 Ill. 349, 356 (1857)). In *Williams*, a 2008 opinion, this Court made clear that "[t]his understanding of the Act continues to the present day." 228 Ill. 2d at 420 (citing *Pasquale*, 166 Ill. 2d at 360 (collecting cases)).

In search of a contrary view, plaintiff extensively discusses *Wilbon v. D.F. Bast Co., Inc.*, 73 Ill. 2d 58 (1978). Although *Wilbon* predates *Williams* by 30 years, plaintiff cites the earlier case in purporting to identify a "modern" trend. (Plaintiff's brief at 28-29.) In *Wilbon*, a wrongful death action dismissed by the circuit court based upon the two-year statute of limitations contained in the Wrongful Death Act, this Court at length discussed *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), and *Gaudette v. Webb*, 362 Mass. 60 (1972), in critiquing the fairness of the principle that the court acknowledged: that a right to recover for wrongful death did not exist at common law, and that the limitations provision in the Wrongful Death Act is a condition precedent to bringing a cause of action. *Wilbon*, 73 Ill. 2d at 61-66. Ultimately, the Court held that a 1977 amendment to the Wrongful Death Act, which exempted minors from the two-year limitations provision, provided persuasive evidence that the General Assembly did not intend the two-year bar to apply to claims of minors. *Id.* at 73.

As this Court observed in *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31 (1975), *Moragne* supplied a remedy for a unique situation falling between the cracks of state and federal statutes relating to the injuries and deaths of seamen, longshoremen and others. *Mattyasovszky*, 61 Ill. 2d at 34. This Court also commented on the circumstances in the

Massachusetts *Gaudette* decision, in which the court relied upon *Moragne* to permit a widow with three minor children to maintain a wrongful death action after the statute of limitations expired. *Mattyasovszky*, 61 Ill. 2d at 34. This Court observed that "the Massachusetts decision seems not to have disturbed the statutory wrongful death action in that state" in any other respect. *Id.* at 35. In *Mattyasovszky*, the Court signaled its view that the situation of claims for minors presents a unique matter that does not call for departing from well-established rules of statutory construction outside of that particular situation. Accordingly, this Court rejected the plaintiff's plea to enlarge the historical construction of the Survival Act to authorize an award of punitive damages. *Id.* at 37.[3]

G. The Appellate and Circuit Courts Also Ruled Correctly in Upholding the Dismissal of the Survival Action.

The chief authority that plaintiff cites with respect to the survival action, *Advincula v. United Blood Services*, 176 Ill. 2d 1 (1996), establishes that the appellate court reached the correct decision in upholding the dismissal of plaintiff's Survival Act claim. In *Advincula*, this Court rejected the notion that the two-year limitations period commences on the date the decedent's representative learns of a cause of action. *Advincula*, 176 Ill. 2d at 41-43. To the

[3] Plaintiff's citations to *Van Beck v. Sabine Towing Co.*, 300 U.S. 342 (1937), and *Haakanson v. Wakefield Seafoods*, 600 P.2d 1087 (Ala. 1979), are similarly unavailing. (Plaintiff's brief at 30, 32.) In *Van Beck*, the Supreme Court interpreted the Merchant Marine Act of 1920, 46 U.S.C. § 688, and found within the statute a legislative policy supporting a cause of action. *Van Beck*, 300 U.S. at 347, 350-51. *Van Beck* provides no insight into interpretation of the Illinois statutes before this Court. Similarly, the Alaska Supreme Court decision in *Haakanson* followed the lead of *Moragne* and *Gaudette* in the instance of preserving a cause of a wrongful death action brought on behalf of five minor children whose parents were killed in a car accident. 600 P.2d at 1091-92. Other jurisdictions have flatly rejected this approach. See, *e.g.*, *Justus v. Atchison*, 19 Cal. 3d 564, 573 (1977) (rejecting the analysis in *Gaudette* concerning the common law origins of the Massachusetts wrongful death action); *Bregant v. Fink*, 724 S.W.2d 337, 339 (Mo. Ct. App. 1987) (expressly rejecting *Gaudette*); *Ecker v. West Hartford*, 205 Conn. 219, 230 (1987) (rejecting the analysis in *Haakanson* and *Gaudette* that the common law supports a wrongful death action).

contrary, the Court determined that the date the deceased learns of his injury, not the date the representative discovers it, controls the limitations issue. *Id.* at 42.

As the appellate court here recognized, the outer limit for filing the survival action was two years from the date of the decedent's death on May 29, 2009, because, at the latest, the limitations period for a survival action begins to run when the injured party dies. See 735 ILCS 5/13-209(a)(1); *Wolfe v. Westlake Community Hospital*, 173 Ill. App. 3d 608, 611-12 (1st Dist. 1988). The two-year limitations period in this case, at the latest, expired on May 30, 2011. Plaintiff did not file the complaint until March 18, 2013 (C. 1); accordingly, the Circuit Court correctly dismissed the Survival Act claims contained in Counts II and IV.

II. ALTERNATIVELY, THE APPELLATE COURT CORRECTLY CONCLUDED THAT, AS A MATTER OF LAW, PLAINTIFF HAD SUFFICIENT INFORMATION CONCERNING BOTH THE DEATH AND A POTENTIAL WRONGFUL CAUSE, AND THUS "DISCOVERED" THE ACTION NO LATER THAN FEBRUARY 2010, MORE THAN THREE YEARS BEFORE HE FILED THE LAWSUIT.

What sets this case apart from the typical case where discovery of a claim constitutes a question of fact, and rendered this case particularly appropriate for section 2-619 dismissal by the trial court, is attorney Moon's undisputed knowledge derived from his multiple roles, as the son of the decedent, the executor of her estate, and attorney for the estate. Moon had first-hand knowledge of his mother's relatively good health prior to her final illness and rapid deterioration in the final days of her hospitalization. After his mother died, due to his professional experience as a personal injury lawyer and, later, an administrative law judge who routinely reviewed medical records, Moon understood the significance of his mother's medical records and the need to move forward in a timely fashion. (C. 61, 63-65, 103.) When Moon ordered his mother's medical records in February 2010, he demonstrated not only possession of sufficient information to put a reasonable person on inquiry, but that he was

taking steps to conduct the inquiry, to determine whether actionable conduct was involved. See *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981).

Plaintiff repeatedly mentions, and implicitly criticizes, the appellate court with respect to the length of its analysis of this alternative basis for upholding the judgment below. (Plaintiff's brief at 7, 33, 34, 38, 39.) Plaintiff also takes issue with the quantity of the circuit court's analysis. (Plaintiff's brief at 34.) As the plaintiff acknowledges, this Court reviews the lower courts' judgments *de novo*, and will reach a decision based on whether the judgments were correct, not whether the reasoning is correct or sufficiently long. Moreover, in this instance, the length of the appellate court's analysis should be attributed to the clarity of the record with respect to Moon's knowledge. Accordingly, in the alternative to the basis set forth in Argument I above, the Court should affirm the judgments below upon *de novo* review. See *Friends of the Parks v. Chicago Park District*, 203 Ill. 2d 312, 319-20 (2003).

A. This Court's Precedent Makes Clear That the Date a Plaintiff Gains Knowledge That a Cause of Action Exists Does Not Trigger the Limitations Statute.

If, as Moon contends, a plaintiff in a medical negligence case can engineer the accrual of the limitations period by delaying consultation with a qualified expert, he could, in effect, abolish the two-year limitations period and replace it with the four-year statute of repose. This Court's precedent does not support, and should not support, a rule of law that permits a plaintiff to manufacture his own limitations period.

A plaintiff's knowledge that an injury was "wrongfully caused" does not mean that the plaintiff must have knowledge of the existence of a cause of action. It does not mean knowledge of a specific defendant's allegedly negligent conduct or that the plaintiff has

located a consultant who deems the action meritorious. See *Castello*, 352 Ill. App. 3d at 744. As this Court explained:

> [W]e have held that the event which triggers the running of the statutory period is not the first knowledge the injured person has of his injury, and, at the other extreme, we have also held that it is not the acquisition of knowledge that one has a cause of action against another for an injury he has suffered.

Knox College, 88 Ill. 2d at 415. Accordingly, discovery of "wrongful causation" does not mean that the plaintiff must have knowledge of the defendant's alleged negligence before the statute of limitations commences. *Id.* This Court further observed in *Nolan v. Johns-Manville Asbestos* 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." *Nolan*, 85 Ill. 2d at 170-71. Thus, this Court has expressly disavowed the contention that a plaintiff must first be aware of actionable conduct before his limitations clock starts to tick.

B. Plaintiff Urges This Court to Radically Change Illinois Law by Adopting the Bright Line of the Dissent: That the Only Relevant Fact Concerning Application of the Discovery Rule in a Medical Malpractice Case Is the Date of Obtaining an Expert's Report Finding Negligence.

Both the plaintiff and the dissenting Justice ignore significant portions of the undisputed factual record. Moon, an Illinois-licensed lawyer, practiced law for 22 years in Peoria, from 1971 to 1993, prior to moving to Pennsylvania. (C. 61-62.) After making the move, Moon practiced law until 1996, when he became an administrative law judge. (C. 64.) In Moon's many years of law practice, he devoted a significant portion of his time, approximately 25%, to personal injury work (C. 65), and demonstrated his familiarity with the review of medical records at his discovery deposition, familiarity likely gained during his law practice as well as during his years as an administrative law judge. (C. 63, 96.)

Moon knew that, before his mother experienced bowel problems that led to a May 18, 2009 hospitalization, she lived independently. At his discovery deposition, Moon testified that Ms. Moon was able to drive locally; managed day-to-day tasks on her own, such as grocery shopping; and traveled to visit two of her adult children who resided in Pennsylvania every few months. (C. 71-73, 80.) Moon knowledgeably described his mother's relatively good health before her May 2009 hospitalization.

Moon acted as medical malpractice counsel on behalf of his mother's estate and the beneficiaries of her estate, including his two brothers, both dentists, and Moon's sister, a lawyer. On February 26, 2010, Moon began his investigation concerning the quality of the medical care given to Ms. Moon by submitting a written request for his mother's medical file from Proctor Hospital, where Ms. Moon was treated for the illness in the weeks prior to her death. (C. 42.) Moon requested, and presumably obtained, all of the records – including scans – as the requisition form indicates. (C. 42.) Moon acknowledges that he received the records about two weeks after requesting them, on or about March 10, 2010. (Plaintiff's brief at 4; C. 42.)

The record provides no explanation for the ensuing 13-month delay between Moon's receipt of the records and his first contact with a medical consultant firm during the week of April 11, 2011. (C. 142.) Receiving a verbal report from the medical consultant 10 days later, Moon received confirmation that, arguably, actionable negligent conduct played a role in his mother's death. (C. 142.) Despite having commenced his investigation in February, 2010, and filing a medical malpractice complaint against two surgeons in early May, 2011, plaintiff did not commence an action against Dr. Rhode until March 18, 2013, *more than three years after Moon initiated his inquiry* into the medical treatment of his mother. (C. 1.)

The dissenting justice limited his comment on the factual record to two dates: the date of death and the date that Moon received a report stating that the surgeons were negligent in treating Ms. Moon. *Moon*, ¶ 59. The dissent articulated a new version of the discovery rule: "[w]hen 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." *Moon* (Lytton, J., dissenting), ¶ 58 (citing *Clark v. Galen Hospital Illinois, Inc.*, 322 Ill. App. 3d 64, 74-75 (1st Dist. 2001), *Young v. McKiegue*, 303 Ill. App. 3d 380, 389 (1st Dist. 1999), and *Wells v. Travis*, 284 Ill. App. 3d 282, 287 (2d Dist. 1996)). The dissent made no effort to base this shift in the law on the plain language employed by the legislature in section 13-212.

Plaintiff urges this Court to adopt this version of the discovery rule, based on the erroneous suggestion that Dr. Rhode cited nothing in the record other than one statement during Moon's deposition to support the motion for summary judgment. (Plaintiff's brief at 37, 39.) The deposition testimony Moon refers to supports the inference that the limitations period began to run on the day of Ms. Moon's death. At his deposition taken in the separate lawsuit against the surgeons, Moon testified as follows:

> Q: As you know, if this case ever goes to trial, one of the things that you're going to have the opportunity to do is to get up on the stand in front of a jury and explain to a jury how your mother's death has affected you. Can you just briefly describe that to me?
>
> A: Well, yeah. 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.)

Dr. Rhode disagrees that this testimony should be disregarded, as plaintiff argues, based on his critique of the extent of the deposition questioning. (Plaintiff's brief at 37.) 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. Defendant submits, accordingly, that under this Court's precedent and the appellate case law, the limitations period commenced upon Kathryn Moon's death. At that point, Moon had two years to determine whether he had an actionable claim. The conclusion that an actionable claim existed, with supporting medical testimony, did not mark the commencement of the limitations period. Rather, Moon had two years to reach that conclusion after his mother's death.

C. Moon's Investigation, as a Malpractice Attorney, Also Proves the Requisite Notice.

Yet, even if the Court accepts plaintiff's view of the testimony quoted above, extensive record evidence not acknowledged by the plaintiff or the dissent supports the judgment. The plaintiff omits any acknowledgment of his status as a medical malpractice attorney for his mother's estate. The appellate court, however, has found the date that a plaintiff retains an attorney significant in determining when the limitations period commences in a professional negligence case. For example, in *Hoffman v. Orthopedic Systems, Inc.*, the plaintiff hired an attorney within six months of her surgery. 327 Ill. App. 3d 1004, 1010 (1st Dist. 2002). The appellate court observed that hiring an attorney demonstrated "that she then was on inquiry as to whether the injury was wrongfully caused, thereby commencing the two-year limitations period." *Id*. Similarly, in *Nair v. Bloom*, the appellate court held that "when plaintiffs retained two attorneys to investigate a claim on their behalf, plaintiffs knew or reasonably should have known of their injuries and that the

injuries were wrongfully caused." *Nair*, 383 Ill. App. 3d 867, 873 (1st Dist. 2008). Likewise, in *Castello*, the appellate court found that the limitations period began to run after the plaintiff requested her medical file, discussed her missed diagnosis with a physician, and hired an attorney. *Castello*, 352 Ill. App. 3d at 749.

Viewing all of the relevant undisputed facts, rather than focusing solely on the date on which Moon received an expert report, the record here is indistinguishable from *Hoffman* and *Nair*, in which the appellate court upheld the entry of summary judgment based on the failure to timely file the actions. The record calls for the Court to affirm the circuit court's ruling even if the Court discounts – even ignores – the deposition testimony quoted above. Moon sought his mother's entire file from the hospital on February 26, 2010, concrete evidence that he believed a cause of action may well exist and should be investigated. Using that date as the trigger, the statute of limitations barred the complaint for more than one year prior to filing.

A plaintiff does "not need a professional opinion concerning the defendants' putative misconduct to know he was wrongfully injured." *Morris v. Margulis*, 197 Ill. 2d 28, 37 (2001). A critical policy rationale supports this statement of the law. If plaintiffs could wait to "ask" a professional whether conduct constituted actionable malpractice, the statute would begin only when a putative plaintiff decided he wanted it to begin. A plaintiff would be free to schedule his own limitation deadline under the plaintiff's argument and the dissent's analysis. The law, however, says otherwise.

D. Moon Did Not Act Diligently.

Assuming, solely for the purpose of argument, that the limitations period began to run only when Moon received an expert's report identifying an actionable claim, Moon's

lack of diligence in obtaining that report destroys any argument that he timely filed his claim. The very existence of the May 1, 2011 "trigger date," by Moon's argument, resulted purely from Moon's lack of diligence. He created this date, more than two years after his mother's death, simply by his own neglect in pursuing and investigating his claim.

Plaintiff's argument in this respect contradicts not only the precedent of this Court but of the United States Supreme Court. See *Knox College*, 88 Ill. 2d at 416 (citing *United States v. Kubrick*, 444 U.S. 111 (1979)). In *Kubrick*, the Supreme Court found that plaintiff's medical malpractice action under the Federal Tort Claims Act was barred under the applicable statute of limitations. The Court held plaintiff responsible for the failure to timely complete his investigation into the potential for a cause of action. *Kubrick*, 444 U.S. at 123. The Supreme Court observed that the plaintiff had consulted several specialists about the injury, loss of hearing, and was in possession of the facts concerning his cause of injury, which triggered the commencement of the statute of limitations. The Supreme Court rejected the notion that accrual of the plaintiff's claim necessarily awaited plaintiff's awareness that his injury was negligently inflicted.

Several appellate decisions amply illustrate this principle; the reasoning of those decisions negates Moon's legal argument. Justice Green, writing for the Fourth Appellate District, wrote as follows:

> Holding that the limitation period is not triggered until a prospective malpractice plaintiff secures an expert witness qualified to testify to the described necessary elements for a *prima facie* case would clearly extend the limitation period unduly and leave the four-year period of section 13-212, after which a defendant has absolute repose, as the only substantial protection that such a defendant would have against stale claims.

Beasley v. Abusief, 146 Ill. App. 3d 54, 60 (4th Dist. 1986). The appellate court concluded that the limitations period starts when the injured party knows or should have known of the

injury and "has reason to believe that it is very likely that the injury resulted from negligent treatment." *Beasley*, 146 Ill. App. 3d at 60. See also *Urchel v. Holy Cross Hospital*, 82 Ill. App. 3d 1050, 1052-53 (1st Dist. 1980).

This Court should reject the rule of law proposed by the dissent and urged by the plaintiff. It not only rewards a claimant for his lack of diligence but also permits the claimant to unilaterally control the date that the statutory period begins to run. Nothing in section 13-212 or in the Wrongful Death Act supports this wayward interpretation of the plain language defining the limitations period for a medical malpractice wrongful death action.

III. THIS COURT HAS LONG HELD THAT A REVIEWING COURT MAY AFFIRM A JUDGMENT ON ANY GROUND THE RECORD SUPPORTS, REGARDLESS OF WHETHER THE APPELLEE RAISED THE ISSUE IN THE TRIAL COURT.

Plaintiff begins his procedural challenge by misstating the appellate court's ruling. The trial court did not hold, as plaintiff argues, that the discovery rule "could never be applied in a Wrongful Death Act or Survival Act case." (Plaintiff's brief at 40.) Rather, the appellate court held that the discovery rule as written by the General Assembly in section 13-212(a) governs wrongful death and survival actions in medical malpractice cases. *Moon*, ¶¶ 16, 18, 20. The plaintiff not only misstates the ruling below, but also fails to fully acknowledge the governing legal principles that rebut his contentions that the appellate court abused its discretion in undertaking a statutory analysis and that the defendants waived or forfeited arguments concerning the scope of the statutory discovery rule.

This Court has made clear that a reviewing court may – and should – search a record for unargued and unbriefed reasons to affirm it. See *People v. Givens*, 237 Ill. 2d 311, 323 (2010). Similarly, in *People v. Veronica C.*, 239 Ill. 2d 134 (2010), this Court upheld the

judgment of the appellate and circuit courts in a juvenile criminal proceeding. This Court based its decision on an argument the state did not raise in the appellate court – the defendant's lack of standing to raise a constitutional claim. *Veronica*, 239 Ill. 2d at 150-51. Recognizing that the state did not argue standing in the appellate court, this Court observed that an appellee may raise any argument or basis supported by the record, even if he had not previously advanced such an argument, in seeking an affirmance of the judgment. *Id*. at 151. Regardless of whether the lower court's reasoning was correct, and regardless of whether the lower court relied on the grounds of the reviewing court, an appellate court can sustain the decision of a lower court on any ground supported by the record. See *Leonardi v. Loyola University*, 168 Ill. 2d 83, 97 (1995) (citing *Bell v. Louisville & Nashville R.R. Co.*, 106 Ill. 2d 135, 148 (1985)).

Plaintiff's procedural argument depends largely on authorities addressing an entirely different situation: reversal of judgments or sentences in criminal cases, rather than affirmances. For example, plaintiff extensively cites this Court's decision in *People v. Givens*, 237 Ill. 2d 311. (Plaintiff's brief at 42, 43-44.) In *Givens*, this Court determined that the appellate court had erred in *reversing* a defendant's conviction for possession of a controlled substance based on theories never raised by the defendant or addressed by the parties in their appellate briefs. *Givens*, 237 Ill. 2d at 323. This Court emphasized the difference between a reviewing court relying on unbriefed reasons to *reverse* a trial court judgment and a reviewing court examining the record for unbriefed reasons to affirm a judgment. *Id*. at 323 (emphasis in original). Additional authorities that plaintiff cites are similarly inapposite. (Plaintiff's brief at 453-45.) See *Greenlaw v. United States*, 554 U.S. 237, 244-45 (2008) (absent a government cross-appeal, the court of appeals erred in

increasing the defendant's criminal sentence); *People v. Rodriguez*, 336 Ill. App. 3d 1, 12-13 (2012) (addressing, *sua sponte*, the trial court's obvious error in convicting the defendant of four separate counts of first-degree murder, although neither party raised the issue, and declining to consider the defendant-appellant's new arguments challenging convictions for both aggravated and reckless discharge of a firearm).

The plaintiff also extensively cites a decision of the Second District in which the appellate majority declined to affirm the entry of summary judgment in a case where the parties briefed whether a triable issue of fact existed concerning the existence of a joint venture. See *Hiatt v. Western Plastics, Inc.*, 2014 IL App (2d) 140178. (Plaintiff's brief at 41.) The trial court entered summary judgment in favor of the defendant based on the absence of a genuine issue of material fact concerning the formation of a joint venture. The trial court also found that the defendant was entitled to summary judgment on a ground not briefed by the parties: that the exclusive remedy provision of the Workers' Compensation Act barred the claim. The appellate court vacated the judgment for the defendant based on its analysis of the evidence pertaining to the formation of a joint venture. *Hiatt*, 2014 IL App (2d) 140178, ¶¶ 80-85. The majority also determined that the trial court had erred in *sua sponte* raising the exclusive remedy provision of the Workers' Compensation Act as an alternative basis to grant the motion for summary judgment, despite the briefing of the issue by the parties in the appellate court and despite the absence of any objection by the plaintiff to consideration of the issue in the appellate court. *Hiatt*, 2014 IL App (2d) 140178 (Burke, J. dissenting) ¶¶ 136-37. Not only did the appellate court in *Hiatt* fail to recognize the well-established rule that a reviewing court may affirm a judgment on any basis established by the

record, the majority also served as advocate for the plaintiff "by raising an issue and making arguments that plaintiff has never articulated." *Id.*, ¶ 137.

Dr. Rhode did not forfeit or waive any argument. The well-settled principle that a reviewing court may affirm based upon any argument supported by the record, even if not raised by the appellee, disposes of plaintiff's forfeiture argument. Moreover, even if Dr. Rhode were the appellant here, she appropriately could have raised the argument that the appellate court identified concerning the correct interpretation of the discovery rule under the statutory language. The appellate court raised what is simply an alternative argument relating to the issue on appeal: whether and to what extent the discovery rule was available to the plaintiff. See *Moon*, ¶ 29. As the Court recently explained in *1010 Lakeshore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, this Court "only requires parties to preserve issues or claims for appeal. They are not required to limit their arguments in this court to the same ones made in the trial and appellate courts." *1010 Lakeshore*, ¶ 18 (citing *Brunton v. Kruger*, 2015 IL 117663, ¶ 76). Thus, in *1010 Lakeshore*, this Court determined that a defendant did not forfeit a statutory construction argument that differed from arguments previously articulated concerning the proper construction of the statute in question.

Plaintiff cites Supreme Court Rule 341(h)(6) for the proposition that "points not argued are waived.…" (Plaintiff's brief at 45.) Yet plaintiff cites no decision finding waiver or forfeiture based upon that provision in the context before the Court. Dr. Rhode has located no such case law. Moreover, Rule 341(h)(7) places limits on parties, not on the appellate court or on this Court. See *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 504-505 (2002).

Tellingly, the plaintiff does not disclose what action he proposes this Court should take when faced with an appellate court decision that affirms a judgment based upon a ground that the parties did not brief. Under the plaintiff's theory, justices serving in courts of review would be required to set aside their powers of analysis and bound to adopt the reasoning of either the appellant or the appellee. The plaintiff leaves unanswered the question: what happens when neither party to the appeal offers a correct or cognizable argument? In that situation, plaintiff's position would require the reviewing court to adopt the least irrational choice – even if wrong – under the law. The plaintiff, in essence, invites the Court to eliminate Supreme Court Rule 366 and encourage the justices in Illinois to serve as umpires rather than jurists. Dr. Rhode respectfully urges this Court to decline that invitation.

CONCLUSION

WHEREFORE, the defendants-appellees, Clarissa F Rhode, M.D. and Central Illinois Radiological Associates, Ltd, respectfully request that this Court affirm the judgment of the appellate and circuit courts.

Dated: March 16, 2016

Respectfully submitted,

By: /s/ Karen Kies DeGrand

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 48 pages.

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

NOTICE OF ELECTRONIC FILING / PROOF OF SERVICE

I hereby certify that on March 16, 2016, I electronically served and filed the foregoing **Brief of Defendants-Appellees Dr. Clarissa F. Rhode and Central Illinois Radiological Associates, Ltd.** with the Clerk of the Supreme Court of Illinois using the electronic filing provider I2F Internet Case Filing System. I further certify that the above-mentioned document has been served upon the attorneys of record hereinafter indicated by e-mail transmission and by placing one copy of the same into envelopes properly addressed, to the best of the undersigned's knowledge, and depositing the envelopes so addressed, sealed and with requisite postage, into the U.S. mail chute located in the building at 140 South Dearborn Street, Chicago, Illinois.

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