119572

No.

IN THE
SUPREME COURT OF ILLINOIS

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

Plaintiff-Petitioner,

v.

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

Defendants-Respondent.

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

PETITION FOR LEAVE TO APPEAL

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

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

Attorneys for Plaintiff-Petitioner

IF PETITION IS ALLOWED, ORAL ARGUMENT REQUESTED

PRAYER FOR LEAVE TO APPEAL

Pursuant to Supreme Court Rule 315, Randall W. Moon, Executor of the Estate of Kathryn Moon, Deceased, prays for leave to appeal to the Supreme Court of Illinois from the modified opinion upon denial of rehearing, 2015 IL App (3d) 130613, filed on June 15, 2015.

DATE UPON WHICH JUDGMENT WAS ENTERED

The Appellate Court, Third District, issued its Opinion on April 10, 2015, which affirmed the dismissal of plaintiff's complaint by the Circuit Court of Peoria County. On April 22, 2015, the Appellate Court issued a corrected opinion. Plaintiff, with new additional counsel, timely filed his Petition for Rehearing on May 1, 2015.

The Appellate Court denied that Petition for Rehearing and also entered its modified opinion upon denial of rehearing on June 15, 2015.

STATEMENT OF POINTS RELIED UPON IN ASKING THE SUPREME COURT TO REVIEW

In some cases a plaintiff might reasonably not know of either the fact of injury or damage, or that such injury or damage was wrongfully caused, until after the statute of limitations might already be running. This Court found that "the ends of justice are served by permitting plaintiff to sue within the statutory period computed from the time which he knew or should have known of the existence of the right to sue," and, in interpreting "'accrues' as that word is used in various statutes of limitation in this state," introduced the "discovery

rule" into this Court's jurisprudence. *Rozny v. Marnul*, 43 Ill.2d 54, 70 (1969). In *Lipsey v. Michael Reese Hospital*, 46 Ill.2d 32 (1970), this Court extended the operation of the discovery rule to medical malpractice cases, stating in part that "it is impossible to justify the applicability of the discovery rule to one kind of malpractice and not to another." *Lipsey*, at 41.

The discovery rule has been expressly embodied in the Limitations Act for medical malpractice cases. That first took place in limited fashion when in 1965 Ch. 83 Ill.Rev.Stat. § 21.1 was adopted, which established the discovery rule for the narrow class of medical malpractice cases involving foreign bodies wrongfully introduced into a person. After this Court's decision in *Lipsey*, § 21.1 was amended in 1975 to extend the discovery rule to all cases of medical malpractice for injury or death. "Thus, the legislature codified the rule in *Lipsey* but restricted its operation by imposing a five year period of repose." *Mega v. Holy Cross Hospital*, 111 Ill.2d 416, 426, 427 (1986). § 21.1 has been recodified to 735 ILCS 5/13-212(a), its current incarnation, with the two provisions being identical in all relevant respects. *Mega*, 111 Ill.2d 416, 420.

In *Fure v. Sherman Hospital*, 64 Ill.App.3d 259 (2nd Dist. 1978), a medical malpractice action for wrongful death, the appellate court, rejecting the considerations espoused by the majority in the opinion here on appeal, construed § 21.1 of the Limitations Act to apply the discovery rule. In rejecting the types of comments made by the majority below about the unique and strict nature of the Wrongful Death Act, the court said "it becomes rather difficult to

maintain the severe legal distinction which allows the court to give more protection to the wounding of a man than to the ultimate disaster of his death." *Fure*, at 270. Many Illinois appellate cases have reached the same holding, and this Court has denied leave to appeal in at least two of those cases.[1]

Here, defendants never argued, in either the circuit or appellate courts, that the discovery rule cannot be applied in Wrongful Death Act or Survival Act cases. Rather, defendants argued, and the trial court ruled, that on a *factual* basis, the discovery rule did not afford relief to plaintiff in this case.

On appeal, in a majority opinion authored by Justice Schmidt, the court ruled *sua sponte* that pursuant to 735 ILCS 5/13-212(a) "the required knowledge is of the death or injury, not of the negligent conduct." (¶18) The court held that "the plain language of the Act required the plaintiff to file a wrongful death claim within two years of the date on which plaintiff knew of the death." (¶19) The majority then listed seven appellate opinions which Justice Schmidt described as either "wrongly decided" or such that he "decline[d] to follow (those) similar cases." (¶19) Justice Lytton dissented, at length. He stated "the majority's conclusion that the discovery rule set forth in §13-212(a) of the Code does not apply to wrongful death or survival actions

---

[1] *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill.App.3d 525 (2nd Dist. 1982), app. den. 92 Ill.2d 567; *Neade v. Engel*, 277 Ill.App.3d 1004 (2nd Dist. 1996), app. den. 168 Ill.2d 599.

conflicts with over thirty years of precedent," citing thirteen cases in support, "as well as the plain language of the statute." (¶35)

Plaintiff's petition for rehearing, which, among other items of relief, asked that the appellate opinion be vacated because the issue had been forfeited, or alternatively for the opportunity to brief the issue, which had never been raised before the opinion issued, was denied, with the majority stating that plaintiff had the "duty" to address the issue. (¶30)

Justice Schmidt, for the majority, realizes that his opinion is at odds with all of the other districts which have addressed this matter:

> "We are well aware that this decision creates a split in the districts and, therefore, we anticipate at some point hearing from the supreme court on the issue." (¶30)

The legal community has widely taken note that this opinion departs from precedent. Under the headline of "Panel Breaks From Past on Date to File," the Chicago Daily Law Bulletin story on the case began:

> "We now have dueling decisions from the Illinois Appellate Court on whether the discovery rule governs the two-year countdown for wrongful-death complaints based on alleged medical malpractice." (4/30/15)

With that as background, the points relied upon for review are:

I. The majority erred in holding that 735 ILCS 5/13-212(a), which has been interpreted by this court to embody the discovery rule for medical malpractice cases, does not permit application of that rule in any case brought under the Wrongful Death Act or pursuant to the Survival Act. The dissent correctly sets out thirty years of precedent to the contrary. The majority

opinion creates a stark conflict with many express contrary rulings in other districts.

II. The majority erred in deciding, in one paragraph, that even if the discovery rule were to be applied, as a matter of law plaintiff had reason to know that the death could have been wrongfully caused at some unspecified time more than two years before the filing of this complaint, thereby wrongly depriving plaintiff of a trial on that question of fact. The dissent correctly disagreed, concluding that a question of fact is presented of when plaintiff became aware that decedent's death was wrongfully caused, identifying a specific date and event as to when a reasonable trier of fact could conclude that plaintiff possessed the requisite information.

III. The majority erred in deciding *sua sponte* the issue identified in Point "I", when neither the defendants nor the trial judge had suggested in any manner that the discovery rule was not an available theory for plaintiff to pursue. Plaintiff never had reason or occasion to brief or argue that issue. Plaintiff's request in his Petition for Rehearing for an opportunity to brief the issue identified by the majority for the first time in its Opinion was refused. Plaintiff has thus been deprived of a fundamentally fair appeal. Bench and bar would benefit from this Court's guidance as to how a reviewing court's discretion is to be exercised in taking up issues *sua sponte* for the purpose of affirmance.

IV. The issue identified in Point "I", having never been raised by defendants, should be regarded as being forfeited.

STATEMENT OF FACTS

Kathryn Moon was admitted through the emergency room to Proctor Hospital in Peoria on May 18, 2009, under the care of Dr. Jeffrey Williamson for a prolapsed rectum. (C-1) Williamson performed a peritoneal proctectomy on Kathryn on May 20, 2009. He and his associate, Dr. Salimath, attended Kathryn through May 28, 2009. (C-2) During the postoperative period Kathryn developed pain, labored breathing, fluid overload, pulmonary infiltrates, ileus, and pneumoperitoneum. She died in the hospital on May 29, 2009. (C-2) The defendant, Dr. Rhode, interpreted two CT scans performed on the decedent on May 23 and May 24, 2009.

Randall Moon, one of Kathryn's four children, was appointed as Executor of the Estate of Kathryn Moon in 2009. (C-44) Randall Moon is a licensed attorney in Illinois but for more than 15 years has resided in Pennsylvania. He retired from the Social Security Administration at the end of 2009, having worked as an administrative law judge. (C-61-63)

In his capacity as executor of the estate he requested Kathryn's medical records from Proctor Hospital on February 26, 2010. He received the records on or about March 10, 2010. (C-42) Randall Moon contacted a medical consultant firm during the week of April 11, 2011, and then sent a copy of the hospital records for review. (C-142) He received a verbal report from the

consultant firm by April 21, 2011, that there was negligent conduct in the case and they would obtain a written report from a qualified doctor. (C-142) He received the physician's report and certificate of medical malpractice, which was attached to the complaint filed against the surgeons, Dr. Williamson and Dr. Salimath, on May 10, 2011. (C-131, 136, 142)

Plaintiff's discovery deposition was taken in the lawsuit against the two surgeons, 11 L 147, on March 8, 2012. The following question and answer took place: Q. "As you know, if this case ever goes to trial, one of the things that you are going to have the opportunity to do is get up on the stand in front of the jury and explain to a jury your mother's death has affected you. Can you 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, ¶43)

Paragraph 14 of Count I of the complaint filed March 18, 2013 against Dr. Rhode and CIRA (C-2) states that plaintiff did not discover that the defendant, Dr. Clarissa Rhode, had failed to diagnose the breakdown of the anastomosis until on or about February 28, 2013, when Dr. Abraham Dachman reviewed the May 24, 2009 CT scan for the lawsuit against the surgeons. (C-48)

On May 21, 2013, defendants Rhode and CIRA filed a motion to dismiss pursuant to 735 ILCS 5/2-619(a)(5). (C-26) Plaintiff responded on June 19, 2013. (C-138) Defendants filed a reply to plaintiff's response on July 10, 2013.

(C-148). On July 26, 2013, the circuit court granted the defendants' motion to dismiss with prejudice for the reasons stated by the court on the record. (C-161)

INTRODUCTION

While there is a great deal of law to be brought to bear on the points raised by this Petition in a subsequent brief if the Petition is granted, in accordance with SCR 315(c)(5) this section is designedly short: The conflict of this opinion with the other districts, and with the general statements of the law set out in this Court's opinions, is patently evident from the majority and dissenting opinions.

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

The origin of the discovery rule is set out in the introductory section of the "Statement of Points Relied Upon" above.

The creation and application of the discovery rule is at root a question of statutory interpretation, rather than of "applying common law rules" as the majority posits what this Court has done. (Op., ¶23) The *Rozny* opinion noted the issue to be "determining when an action 'accrues' as that word is used in various statutes of limitation," and phrased its holding as being that plaintiffs' "cause of action 'accrued' when they knew or should have known of the defendant's error...." At 70, 72.

Section 21.1 of the Limitations Act, demonstrated above to be the legislative codification of this Court's view of the discovery rule, provided, as does §13-212(a), that in medical malpractice cases suit must be filed within two years after the date on which the plaintiff through a reasonable diligence, "should have known, or received notice in writing of the existence of the injury or death for which damages are sought...." The court took up the meaning of "injury" in *Witherell v. Weimer*, 85 Ill.2d 146 (1981). The court stated the issue to be the meaning of the term "injury":

> "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." At 155.

Witherell interpreted the applicable section of the Limitations Act to include both knowledge of the injury and of the potential for wrongful causation, as a matter of statutory interpretation.

Young v. McKiegue, 303 Ill.App.3d 380 (1st Dist. 1999) plainly stated the statutory dimension of the rule:

> "Section 13-212(a) has been read within the context of the 'discovery rule' to mean that the two-year malpractice limitations begins to run when the party 'knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused.'" At 387.

The discovery rule as currently applied stems from the interpretation of the statutes and is not an overlay of a common law principle unconnected to a statute.

It is clear beyond any argument that what is at issue in this case, and what controls plaintiffs' claim here, is the Limitations Act, 735 ILCS 5/13-212(a) and not the general limitations set out in the Wrongful Death Act 740 ILCS 180/2: "[W]e believe the relevant case law inextricably leads to the conclusion that all actions for injury or death predicated upon the alleged negligence of a physician are governed by § 13-212(a)." *Durham v. Michael Reese Hospital Foundation*, 254 Ill.App.3d 492, 495 (1st Dist. 1993). "[T]he limitations period set forth in § 2 (of the Wrongful Death Act) is inapplicable in cases where the wrongful death claim is predicated upon a claim of medical malpractice that was not apparent to the plaintiff at the time of death." *Young v. McKiegue*, 303 Ill.App.3d 380, 386 (1st Dist. 1999).

Several courts have determined that this Court would most likely apply the discovery rule to wrongful death cases. *Arndt v. Resurrection Hospital,* 163 Ill.App.3d 209, 213 (1st Dist. 1987) (interpreting the denial of leave to appeal in *Coleman v. Hinsdale Emergency Medical Corporation*, 108 Ill.App.3d 525 (2nd Dist. 1982) as "tacit" approval by this Court of such a rule) at 213; *Eisenmann v. Cantor Brothers, Inc.*, 567 F.Supp. 1347, 1352 (N.D.Ill. 1983); *In the Matter of Johns-Manville*, 511 F.Supp. 1235, 1239 (N.D. Ill. 1981). In *dicta*, but strongly rejecting the sometimes narrow reading given to the Wrongful Death Act, this Court has stated:

> "Although never addressed by this Court, and indeed not now before us, the delay of the running of the limitation period accepted by the appellate court in some districts assures that a wrongful death action may be filed after death when plaintiffs

> finally know or reasonably should know of the wrongfully caused injury which led to death. Many wrongful death cases have emphasized this 'discovery' time. [Citations]"

Wyness v. Armstrong World Industries, Inc., 131 Ill.2d 403, 413 (1989).

The principle of legislative acquiescence to judicial action applies in this situation. Since *Fure v. Sherman Hosp.*, 64 Ill.App.3d 259 (2nd Dist. 1978), except for *Greenock v. Rush-Presbyterian St. Luke's Medical Center*, 65 Ill.App.3d 266 (1st Dist. 1978), every case to take up the question presented in this case has ruled consistently with *Fure* and as plaintiff advocates here. As noted, these cases are statutory interpretation matters. Where the legislature has acquiesced in the courts' construction of a statute, that construction becomes part of the fabric of the statute. *Charles v. Seigfried*, 165 Ill.2d 482, 492 (1995). Despite that long history of judicial decisions, the legislature has not chosen to alter the outcome of the cases. "The discovery rule may be applied by the court in the absence of the expression of a contrary intent by the legislature." *Mega v. Holy Cross Hosp.*, 111 Ill.2d 416, 428 (1986).

For the purposes of SCR 315(a), the existence of a conflict between the decision here and many cases from other appellate districts is plainly laid out in the competing majority and dissenting opinions. The majority opinion lists many, but not all, of the opinions which are contrary to its holding, and which the majority concludes were "wrongly decided." (Op., ¶¶ 19, 21) The dissent commences with a list of 13 cases which decided this issue differently than the majority opinion. (Op., ¶ 35) This Court's *dicta* in *Wyness v. Armstrong World*

Industries, Inc., 131 Ill.2d 403, 413 (1989) gives rise to a conflict with an opinion of this Court, at the level of judicial *dicta*. *Wyness*, immediately following the quotation employed above, cited with apparent approval *Arndt v. Resurrection Hosp.*, *Coleman v. Hinsdale Emergency Medical Corp.*, *Fure v. Sherman Hosp.*, and *Preznik v. Sport Aero, Inc.*, all cases which the majority refused to follow below here. Fundamentally, of course, the conflict was stated to exist by Justice Schmidt, as was his anticipation of "hearing from the supreme court on the issue." (Op., ¶ 30)

All of the appellate opinions on the point at issue here rule as Justice Lytton would have ruled in his dissent, with the sole exception of *Greenock v. Rush-Presbyterian St. Luke's Medical Center*, 65 Ill.App.3d 266 (1st Dist. 1978). As best as can be determined by plaintiff's counsel, no Illinois case has followed *Greenock* in the 37 years since it was decided – until the opinion below. The majority below cites *Greenock*, but never discusses it in the slightest. (Op., ¶ 19)

The majority parenthetically describes *Arndt v. Resurrection Hosp.*, 163 Ill.App.3d 209 (1987) and *Hale v. Murphy*, 157 Ill.App.3d 531 (1987) as either "relying on" or "following" *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill.App.3d 525 (1982). (Op., ¶ 19) But that brief characterization does not do justice to the quality of the judicial work in both *Arndt* and *Hale*. Both cases independently analyzed the issue and came to the same conclusion as *Coleman* did.

The essence of the majority opinion is that "personal injury actions were born of the common (judge-made) law and are susceptible to changes by the judiciary (,) not so with respect to wrongful death actions which are creatures of the legislature" (¶ 16), that the Wrongful Death Act, creating a new cause of action in 1853, must be "strictly construed" as it is in derogation of the common law (¶ 17), and that contrary cases "are applying common law rules to statutory causes of action contrary to age-old rules of statutory construction" (¶ 23). Although the majority opinion states that the case is an interpretation of § 13-212(a) (¶ 20), references are made elsewhere in that opinion to the absence of discovery rule language in the Wrongful Death Act itself. (e.g. ¶ 25) That line of thinking has been squarely rejected by other districts which have taken up a similar argument made by defendants in those cases.

In *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill.App.3d 525 (2nd Dist. 1982), the defendant unsuccessfully made the arguments crafted by the majority below, contending that a wrongful death action is "wholly statutory" and must be "strictly construed." The defendant there also argued, as the majority states below here, that the Limitations Act "extends the time to file only until two years after the discovery of death," foreclosing the application of the discovery rule. *Coleman* rejected both arguments:

> "The strict application of the two-year limitation on wrongful death action espoused in *Wilson v. Tromly* (404 Ill. 307 (1949)) has lessened. In *Wilbon v. D. F. Bast Co.*, 73 Ill.2d 58 (1978), the supreme court characterized this strict application of the act as a 'much criticized concept stemming from questionable antecedents' and held that the two-year limitation period on a

> wrongful death action does not begin to run against minors until they reach majority."

Coleman, at 527.

Fure v. Sherman Hosp., 64 Ill.App.3d 259 (2nd Dist. 1979), is to the same effect. "When we consider the origin of Lord Campbell's Act as Prosser says ... it becomes rather difficult to maintain the severe legal distinction which allows the law to give more protection to the wounding of a man than to the ultimate disaster of his death." At 270. And, as already established, it is not the Wrongful Death Act which is being interpreted in these cases, but the Limitations Act exclusively.

The majority makes frequent reference to *Wyness v. Armstrong World Industries, Inc.*, 131 Ill.2d 403 (1989). But what was for decision before this Court in *Wyness* was entirely different than what is for decision here. *Wyness* involved an attempt by defendant to have the discovery rule be used in such a manner that the wrongful death action would be regarded as accruing prior to the death. The court rejected the effort, saying in part that "this contention misapplies the law to the instant action in a manner approaching the absurd." At 412. The majority's references to *Wyness* frequently allude to this Court's rejection of that argument, but without noting that distinction.

The dissent makes far more appropriate use of the *dicta* in *Wyness* in which this Court seemed to approve of the application of the discovery rule in wrongful death cases, and seemed to cite with approval the cases with which the majority below finds fault. Dissent, ¶ 42.

The majority opinion states that "we believe that the medical malpractice statute of limitations codifies the extension set forth in *Praznik* (*v. Sport Aero Inc.*, 42 Ill.App.3d 330 (1976)) at least in suits against healthcare providers." ¶ 21. *Praznik* was decided in 1976; the statute was enacted to be effective in 1975.

The same reasoning and holding applicable to actions under the Wrongful Death Act apply to the Survival Act claim in this case. Indeed, the application is even clearer because the claim in a Survival Act case was not "created" by the legislature but merely enabled to be maintained. But that distinction, favorable to plaintiff, is not even necessary. This Court has already recognized that the discovery rule should be applied in Survival Act cases. In *Nolan v. Johns-Manville Asbestos*, 85 Ill.2d 161 (1981), the complaint was filed by a worker with an asbestos related disease. His personal injury cause of action was dismissed on the basis of a two-year statute, and he appealed. He died while the appeal was pending and his wife was substituted as administratrix to prosecute the appeal, which could only have been maintained under the Survival Act. This Court went on to decide that the discovery rule should have been applied. In *Wyness*, this Court describes *Nolan* as a case where the plaintiff's administratrix "continued the case pursuant to the provisions of the survival statute," and related that the discovery rule had been applied there. 131 Ill.2d 403, 412 (1989).

II. THE MAJORITY ERRED IN DECIDING THAT EVEN IF THE DISCOVERY RULE WERE TO BE APPLIED, AS A MATTER OF LAW PLAINTIFF HAD REASON TO KNOW THAT THE DEATH COULD HAVE BEEN WRONGFULLY CAUSED AT SOME UNSPECIFIED TIME MORE THAN TWO YEARS BEFORE THE FILING OF THIS COMPLAINT.

The majority's primary holding is that the discovery rule is not available to the plaintiff as a matter of law. Thus, the majority affirmed dismissal on that ground. The opinion stated, however, "even if we were to apply the discovery rule" the complaint was untimely. The majority did not identify any specific date on which it believed the statute should have begun, as a matter of law. The court disposed of that issue in one paragraph. ¶27.

The dissent disagreed with the majority on this issue as well. (¶¶52-57)

The dissent wrote about a circumstance which did not find expression in the majority's discussion of the application of the discovery rule. The dissent notes that the statute can begin to run under the discovery rule when plaintiff became aware that any defendant committed medical negligence, as opposed to deferring that moment until there is specific knowledge relating to the defendant in question. The dissent noted that a reasonable trier of fact could conclude that the plaintiff did not possess sufficient information to know that Kathryn Moon's death was wrongfully caused until May 1, 2011, when he received the expert's report finding that doctors other than the defendants in this case were negligent. (Dissent, ¶57) That occurred on May 1, 2011. The complaint against these defendants was filed within two years of that date.

The application of the discovery rule is almost always a question of fact:

> "In many, if not most, cases the time at which an injured party knows or reasonably should have known both of his injury and that it was wrongfully caused will be a disputed question to be resolved by the finder of fact."

Witherell v. Weimer, 85 Ill.2d 136, 156 (1981).

See also *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 416 (1981).

Here, the justices in the majority and the dissenting justice, reasonable minds all, have a disagreement in the interpretation of the facts as to when plaintiff should have known of the possibility of wrongful conduct. *Ipso facto* it cannot be said that reasonable minds could not differ and accordingly, a question of fact exists for decision by the jury, under well recognized procedures.

III. THE MAJORITY ERRED IN DECIDING *SUA SPONTE* THE ISSUE IDENTIFIED IN POINT "I", WHEN NEITHER THE DEFENDANTS NOR THE TRIAL JUDGE HAD SUGGESTED IN ANY MANNER THAT THE DISCOVERY RULE WAS NOT AN AVAILABLE THEORY FOR PLAINTIFF TO PURSUE.

The majority plainly decided a legal issue that was never presented by defendants in the circuit or appellate courts. Defendants, in arguing in both counts that the discovery rule did not apply on a factual basis, argued only that there was no need for application of the discovery rule because, in defendants' view, plaintiff had all necessary knowledge on the date of death. (Defendants also had alternative arguments as to subsequent dates on which the statute might be regarded to have begun to run.) The majority reached out on its own to decide the completely separate legal issue of whether the discovery rule was available in any Wrongful Death Act or Survival Act case, as a matter of law.

Plaintiff acknowledges that a reviewing court has the power to decide a case on an issue not raised by a party, and that that principle has particular application where the new issue is invoked in service of affirmance. However, the exercise of that power is within the court's discretion. *Busch v. Graphic Color Corp.*, 169 Ill.2d 325, 347 (1996).

There is a loose linkage between that principle and the general principle that an appellee may raise a previously un-argued point in support of affirmance. But there are limitations upon that rule:

> "[W]hile an appellee is not as limited in the scope of review as is an appellant, nevertheless, the review cannot go beyond the issues appearing in the record. ... The issues are determined from the pleadings and the evidence. [Citation] To permit a change of theory on review 'would not only greatly prejudice the opposing party but would also weaken our system of appellate jurisdiction.' *Kravis v. Smith Marine, Inc.*, 60 Ill.2d 141, 148 (1975) (quoting *In re Estate of Leichtenberg*, 7 Ill.2d 545, 548 (1956)). Thus, an issue raised by an appellee for the first time on appeal 'must at least be commensurate with the issues' presented in the trial court. *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 509 (1988)."

Hiatt v. Western Plastics, Inc., 2014 IL App (2d) 140178, ¶ 107.

Here, the appellees have not raised the new issue, but those limitations on an appellee help to inform the allowable range of discretion for an appellate court which undertakes to affirm a case on a non-argued issue *sua sponte*.

This Court, in recent years, has given express guidance to the appellate court for situations where consideration is being given to reversing a circuit court on the basis of an issue raised *sua sponte*. *People v. Givens*, 237 Ill.2d 311 (2010). After setting out the principle of "party representation" outlined

in *Greenlaw v. United States*, 554 U.S. 237 (2008), and noting the need to avoid transforming a court's role from that of jurist to advocate in explained in *People v. Rodriguez*, 336 Ill.App.3d 1 (2002), *Givens* states, "a reviewing court does not lack authority to address unbriefed issues and may do so in the appropriate case, i.e. when a clear and obvious error exists in the trial court proceedings." At 325. In *Givens*, the court agreed with the appellants' contention that "the appellate court deprived (appellant) of a fair proceeding when it reversed ... (on) a theory never raised by defendant or addressed by the parties in their appellate briefs." At 323.

Here, plaintiff had no reason to brief the legal status of the discovery rule in a death case. And it could never be said that the issue the majority decided was to correct a clear and obvious error. After the appellate court decided that issue *sua sponte*, plaintiff's petition for rehearing requesting that the opinion be vacated and that briefing on the issue be allowed was denied.

Litigants and courts would benefit from this Court's guidance as to when an issue may be reached *sua sponte* for purposes of affirmance, just as *People v. Givens* gave analogous guidance where the new issue was used for reversal.

IV. THE ISSUE IDENTIFIED IN POINT "I", HAVING NEVER BEEN RAISED BY DEFENDANTS, SHOULD BE REGARDED AS BEING FORFEITED.

Defendants are not to be faulted for not having raised the issue on which the majority decided this case in view of the mass of authority to the contrary and the dearth of authority in support of such a position. But the fact remains

that they have not advocated that issue in either court below. It is requested that this Court rule that the majority abused its discretion in deciding the issue. But if that is not done, then defendants would be placed in the position of advocating the merits of an issue they never raised. SCR 341(h)(7) provides that "points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." The avo idance of deciding forfeited issues is an important task of any reviewing court. *People v. Smith*, 228 Ill.2d 95, 106 (2008).

The issue of the legal applicability of the discovery rule should be regarded as forfeited. In that event, further impetus is added to this Court concluding that the appellate court abused its discretion in deciding the issue.

CONCLUSION

It is respectfully requested that this Petition for Leave to Appeal be granted, and that the appellate and trial courts be reversed, with this matter remanded for trial.

Respectfully submitted,

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

By _____
Michael T. Reagan

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

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

CERTIFICATE OF COMPLIANCE WITH RULE 341

The undersigned hereby certifies that this Brief complies with the form and length requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the appendix, is 20 pages.

Michael T. Reagan

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

APPENDIX

2015 IL App (3d) 130613

Opinion filed April 10, 2015
Modified Opinion Upon Denial of Rehearing filed June 15, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

RANDALL W. MOON, Executor of the Estate of Kathryn Moon, Deceased, Plaintiff-Appellant, v. CLARISSA F. RHODE, M.D., and CENTRAL ILLINOIS RADIOLOGICAL ASSOCIATES, LTD., Defendants-Appellees.	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois. Appeal No. 3-13-0613 Circuit No. 13-L-69 Honorable Richard D. McCoy Judge, Presiding.

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

OPINION

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

¶ 2 Plaintiff appeals, arguing that the trial court erred in granting defendants' motion. Specifically, plaintiff contends that the discovery rule applied and that the statute of limitations

did not begin to run until the date on which he knew or reasonably should have known of defendants' negligent conduct.

¶ 3 BACKGROUND

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

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

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

¶ 7 On May 10, 2011, plaintiff filed a separate medical negligence action against Drs. Williamson and Salimath. On March 8, 2012, plaintiff testified at his deposition that "even

though [my mother] was fairly old, my impression was that she was doing okay and that, you know, she should have gotten better treatment than she did."

¶ 8 In February of 2013, almost four years after decedent's death and almost three years after receipt of her medical records, plaintiff sent radiographs to Dr. Abraham Dachman for review. On February 28, 2013, Dachman reviewed the May 24, 2009, CT scan. Dachman provided plaintiff with a report stating that the radiologist who read and interpreted the CT scan failed to identify the breakdown of the anastomsis, which a "reasonably, well-qualified radiologist and physician would have identified." Dachman further stated that the radiologist's failure to properly identify the findings caused or contributed to the injury and death of the patient. On March 18, 2013, plaintiff filed both wrongful death and survival claims against Dr. Rhode and her employer, Central Illinois Radiological Associates, Ltd. Plaintiff alleged that he did not discover that Rhode was negligent until Dachman reviewed the CT scan.

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

¶ 10 Plaintiff appeals. We affirm.

¶ 11 ANALYSIS

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

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

¶ 14 Plaintiff relies on *Young v. McKiegue*, 303 Ill. App. 3d 380 (1999), and *Wells v. Travis*, 284 Ill. App. 3d 282 (1996), to support his position that the discovery rule applied in this case. The *Young* and *Wells* courts held that where a wrongful death claim is predicated upon a claim of medical malpractice that was not apparent to the plaintiff at the time of death, the statute of

limitations applicable to medical malpractice actions governs the time for filing. *Young*, 303 Ill. App. 3d at 389; *Wells*, 284 Ill. App. 3d at 286-87. These two cases also held that the discovery rule applied to wrongful death suits against physicians. We believe that to the extent both cases read into section 13-212(a) language "which is clearly not there," *Young* and *Wells* were incorrectly decided and refuse to follow them for the following reasons. See *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 416 (1989).

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

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

¶ 16 However, section 13-212 does not create a cause of action. Instead, it merely places a limitation on the filing of medical malpractice actions. Here, plaintiff's cause of action was for wrongful death, a cause of action that did not exist at common law. *Young* and *Wells* relied on *Witherell v. Weimer*, 85 Ill. 2d 146 (1981), a *common law personal injury action*, to attach a discovery rule to a wrongful death action against a physician. A reading of *Witherell* simply does not support such a holding. The *Witherell* court read section 13-212(a) within the context

of the discovery rule to mean that the two-year malpractice limitations period begins to run when one knew or should have known of the injury and also knew or should have known that the injury was wrongfully caused. *Witherell*, 85 Ill. 2d at 156. However, the discovery rule cannot be found in the plain language of either the Act or section 13-212(a). Personal injury actions were born of the common (judge-made) law and are susceptible to changes by the judiciary. Not so with respect to wrongful death actions, which are creatures of the legislature. Likewise, at common law your personal injury action died with you. The Survival Act, too, is a creature of the legislature (755 ILCS 5/27-6 (West 2010)). It allows for recovery of damages the injured party could have recovered, had she survived.

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

¶ 18 So what did the General Assembly provide with respect to the filing of wrongful death and survival actions against physicians? It clearly provided that a claimant must file a wrongful death action within two years from the date on which "the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date [*sic*] occurs

first." 735 ILCS 5/13-212(a) (West 2010). The required knowledge is of the death or injury, not of the negligent conduct. If the General Assembly wanted to provide a limitations period in the Act commencing when one had knowledge of the negligent conduct, it would have done so. *Wyness*, 131 Ill. 2d at 416.

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

¶ 20 Applying the limitation period set forth in section 13-212(a) to the present case, plaintiff had two years from the date on which he knew or should have known of Kathryn's death to file a complaint (735 ILCS 5/13-212(a) (West 2010)). It is undisputed that plaintiff filed this action more than two years after he knew or should have known of Kathryn's death. Therefore, we need not discuss a situation where plaintiff filed a medical malpractice suit within two years of learning of a death, but more than two years after the death. Plaintiff filed a wrongful death

claim against defendants beyond the time allowed in either the Act (740 ILCS 180/2 (West 2010)) or the medical malpractice statute of limitations (735 ILCS 5/13-212(a) (West 2010)). The trial court did not err in granting defendants' motion to dismiss.

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

¶ 22 The dissent argues that we concluded "that the discovery rule set forth in section 13-212(a) of the Code does not apply to wrongful death or survival actions." *Infra* ¶ 32. This, of

course, is wrong. We do hold that section 13-212(a) applies and that the plain language of section 13-212(a) provides that the clock starts ticking upon knowledge or notice of the injury or death, not upon notice of a potential defendant's negligent conduct. The statute gives a claimant two years from the date of that knowledge or notice to figure out whether there is actionable conduct.

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

¶ 24 Further, the dissent states that "[f]inally, the supreme court, in *dicta*, has approved the use of the discovery rule in wrongful death cases." *Infra* ¶ 39. The dissent cites *Wyness*, 131 Ill. 2d at 413, for this proposition. In *Wyness*, a wrongful death action, the defendants were arguing that

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

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

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

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

¶ 27 Even if we were to apply the discovery rule, we would find, as the trial court did, that plaintiff's complaint was untimely. Our supreme court stated that " 'if knowledge of negligent conduct were the standard, a party could wait to bring an action far beyond a reasonable time when sufficient notice has been received of a possible invasion of one's legally protected interests.' " *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981) (quoting *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 170-71 (1981)). Furthermore, the court held that "plaintiff need not have knowledge that an actionable wrong was committed." *Knox College*, 88 Ill. 2d at 415. "At some point the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. At that point, under the discovery rule, the running of the limitations period

commences." *Id.* at 416. Here, plaintiff did not obtain Kathryn's medical records until eight months after her death. Plaintiff did not argue that he became possessed with new information within those eight months, which caused him to obtain the records. Furthermore, he waited 14 months after receiving the records before submitting them to a medical consultant firm. Plaintiff points to nothing to explain the delay in either obtaining the records or submitting them for review. Moreover, he did not send the reports to Dr. Dachman for review until almost four years after Kathryn's death. Plaintiff filed his complaint long after he became possessed with sufficient information, which put him on inquiry to determine whether actionable conduct was involved. The trial court did not err in granting defendants' motion to dismiss.

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

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

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

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

¶ 31 CONCLUSION

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

¶ 33 Affirmed.

¶ 34 JUSTICE LYTTON, dissenting.

¶ 35 I dissent. The majority's conclusion that the discovery rule set forth in section 13-212(a) of the Code does not apply to wrongful death or survival actions conflicts with over 30 years of precedent (see *Advincula v. United Blood Services*, 176 Ill. 2d 1, 42-43 (1996); *Young v. McKiegue*, 303 Ill. App. 3d 380, 386 (1999); *Wells v. Travis*, 284 Ill. App. 3d 282, 287 (1996); *Neade v. Engel*, 277 Ill. App. 3d 1004, 1009 (1996); *Durham v. Michael Reese Hospital Foundation*, 254 Ill. App. 3d 492, 495 (1993); *Janetis v. Christensen*, 200 Ill. App. 3d 581, 585-86 (1990); *Cramsey v. Knoblock*, 191 Ill. App. 3d 756, 764 (1989); *Arndt v. Resurrection Hospital*, 163 Ill. App. 3d 209, 213 (1987); *Hale v. Murphy*, 157 Ill. App. 3d 531, 533 (1987); *Eisenmann v. Cantor Bros., Inc.*, 567 F. Supp. 1347, 1352-53 (N.D. Ill. 1983); *Coleman v.*

Hinsdale Emergency Medical Corp., 108 Ill. App. 3d 525, 533 (1982); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1239 (N.D. Ill. 1981); *Fure v. Sherman Hospital*, 64 Ill. App. 3d 259, 268 (1978); *Praznik v. Sport Aero, Inc.*, 42 Ill. App. 3d 330, 337 (1976)), as well as the plain language of the statute (735 ILCS 5/13-212(a) (West 2010)).

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

¶ 37 I. CASE LAW

¶ 38 A. Wrongful Death Actions

¶ 39 Thirty-eight years ago, the First District applied the discovery rule to a wrongful death cause of action. See *Praznik*, 42 Ill. App. 3d at 337. Two years later, the Second District followed suit, "reject[ing] the idea that no wrongful death action can ever be brought more than 2 years after the plaintiff knows of the death in question." *Fure*, 64 Ill. App. 3d at 272. The court discussed the inequity of applying the discovery rule to personal injury actions but not wrongful death actions, concluding: "In our opinion there should be no barrier to the application of the 'discovery' rule based on the ultimate tragedy of death where the circumstances of the death would have permitted an extension of the time limitation for the mere wounding or injury of the person and we hold that the fact of death does not *per se* foreclose the use of the discovery doctrine." *Id.* at 270. The Second District reaffirmed its holding four years later, stating, "the discovery rule *** is applicable in a wrongful death case." *Coleman*, 108 Ill. App. 3d at 533. Five years after that, the Fifth District also ruled that "[s]ection 13-212 is applicable to an action brought under the Wrongful Death Act." *Hale*, 157 Ill. App. 3d at 533. The court refused to find that a decedent's date of death triggered the start of the two-year statute of limitations for a

plaintiff's wrongful death claim because the "[p]laintiff could have reasonably believed [the decedent's] death was the result of a nonnegligent factor." *Id.* at 535.

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

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

Illinois has twice ruled that our supreme court would likely apply the discovery rule to wrongful death cases. See *Eisenmann*, 567 F. Supp. at 1352-53; *Johns-Manville*, 511 F. Supp. at 1235. The federal court in *Eisenmann* stated:

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

¶ 42 Finally, the supreme court, in *dicta*, has approved the use of the discovery rule in wrongful death cases, stating: "[T]he delay of the running of the limitation period accepted by the appellate court in some districts assures that a wrongful death action may be filed after death when plaintiffs finally know or reasonably should know of the wrongfully caused injury which led to death." *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 413 (1989).

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

¶ 44 B. Survival Actions

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

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

> "A survivor takes the rights of the decedent – no more *and no less*. Therefore if the decedent would have had a cause of action during his lifetime, but for the invidious nature of his disease and his inability to link the injury to the wrongdoer, then that cause of action, when discovered, should survive his death. Adoption of any other rule will represent a relapse to the incongruous injustice which the Supreme Court expressly wanted to avoid when 'the injury caused is so severe that death results, [and] the wrongdoer's liability [is thereby] extinguished.' [Citation.] I do not believe the Illinois Supreme Court would impose on survivors the statute of limitations *constraints* which decedent's would have faced had

they lived without also allowing them the *benefits* of the 'discovery rule' which would have inured to them had their injuries not been so severe as to cost them their lives." (Emphases in original.) *Id.* at 1354.

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

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

¶ 49 II. STATUTE

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

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

rendered meaningless. *Id.* Statutory language that is clear and unambiguous, must be given effect. *Id.*

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

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

¶ 54 III. APPLICATION OF DISCOVERY RULE

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

¶ 56 When a complaint alleges wrongful death caused by medical malpractice, the statute of limitations begins to run when the plaintiff knows or should have known that the death was "wrongfully caused." *Young*, 303 Ill. App. 3d at 388. " '[W]rongfully caused' does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause

of action." *Id.* Rather, it refers to "that point in time when 'the injured party becomes possessed of sufficient information concerning his [or her] injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved.' " *Id.* (quoting *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 416 (1981)).

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

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

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

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