IN THE SUPREME COURT OF ILLINOIS

No. 119572

RANDALL W. MOON

Plaintiff-Appellant,

v.

CLARISSA F. RHODE, etc., et al.,

Defendant-Appellee.

Appeal from the Appellate Court of Illinois, Third District,
No. 3-13-0613

There on Petition for Review of an Order of the Circuit Court of Peoria County,
Illinois, The Honorable Richard D. McCoy
Case no. 13-L-69

BRIEF OF *AMICUS CURIAE* ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL ON BEHALF OF APPELLEE CLARISSA F. RHODE, etc., et al.

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Points and Authorities

Issue Presented

The Illinois Wrongful Death Act states a Plaintiff must commence an action "within 2 years after the death of such person." When a wrongful death action sounds in medical malpractice, it must be brought within "2 years after . . . the claimant knew . . . of the injury or death. . . ." Neither statute describes 'knowledge of negligent conduct,' as the trigger for the two-year period to begin. Given that the Wrongful Death Act is to be strictly construed, did the appellate court correctly construe the statute of limitations applicable in the Wrongful Death Act and 13-212 to begin running upon discovery of death?

Provisions Construed

§ 180/2 Parties to suit; beneficiaries; damages; distribution; limitation of actions; contributory negligence.

> Every such action shall be commenced within 2 years after the *death* of such person […]
>
> 740 ILCS 180/2 (Emphasis added)

§ 5/13-202 Personal Injury – Penalty.

> Actions for damages for an injury to the person[…] shall be commenced within 2 years next after the cause of action accrued[…]
>
> 735 ILCS 5/13-202 (Portions omitted)

§ 5/13-212(a) Physician or hospital.

> Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach

> of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.
>
> 735 ILCS 5/13-212(a)

Argument

The Illinois Association of Defense Trial Counsel ("IDC") as amicus urges this Court to reject the cases relied upon by the Appellant and the Dissent from the Appellate Court for their contention that discovery of negligent conduct is necessary to trigger the limitations period of the Wrongful Death Act and 13-212. Additionally, the IDC highlights the persuasive authority of the high Courts of numerous other states which have properly construed other state statutes with similar language and history to that of the provisions at issue here.

I. NEITHER PRAZNIK, NOR NOLAN, NOR THE PLAIN LANGUAGE OF THE WRONGFUL DEATH ACT OR THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS SUPPORT THE APPLICATION OF A NEGLIGENT CONDUCT DISCOVERY RULE TO CAUSES OF ACTION ARISING OUT OF THE WRONGFUL DEATH ACT.

Appellant in this case and the author for the Dissent at the Appellate Court rely on a series of decisions which have improperly ignored the clear and unambiguous language of the statute of limitations provisions of the Wrongful Death Act and of Section 13-212 of the Code of Civil Procedure. These statutes were properly analyzed in *Greenock* in 1978, and by the majority below in 2015.

Grennock v. Rush Presbyterian St. Lukes Medical Center, 65 Ill.App.3d 266 (1st Dist. 1978). In between these two decisions, several appellate courts attempted to expansively and unilaterally amend the limitations provisions without any deference whatsoever to the constitutional prerogative of the General Assembly to balance competing policy interests by crafting fair, and clear, limits on wrongful death and medical malpractice actions. This case presents this Court with a unique opportunity to properly interpret the clear language of the limitations provisions and restore the policy balance crafted by the legislature.

A. Discovery of death, a statutory and obvious requirement for a wrongful death action, is not the same as discovery of negligence, a phrase not present in the general Wrongful Death Act limitations provision, or in § 13-212.

Plaintiff has stated, "With the exception of *Greenock*, the appellate court has applied the discovery rule to medical malpractice wrongful death cases without exception, until the divided opinion below. The following listing of cases is illustrative, but not exhaustive. *Praznik v. Sport Aero, Inc.* 42 Ill. App.3d 330 (1st Dist. 1976). […]." Brief and Argument of Appellant at P.17.

Praznik v. Sport Aero did not involve the application of the discovery rule to a medical malpractice case as the Appellant has claimed. In *Praznik*, a wrongful death action was filed more than two years after an aircraft and its two occupants went missing. *Praznik*, 42 Ill. App. 3d at 331. No wreckage was discovered until more than two years after the suspected accident. *Id.* at 332-33. Administrator for the estates of the two occupants of the aircraft filed suit more than two years after the final radio

communication was made with the plane, but less than two years after the discovery of the plane and the remains of the two decedents. *Id.*

In *Praznik,* the appellate court found that the cause of action for wrongful death of the two occupants of the aircraft did not accrue until the wreckage of the aircraft was found, in light of the fact that whether the aircraft had actually crashed was unknown until the wreckage was found. *Id.* at 336. Further removing this case from the realm of discovery rule precedent in death cases, the Appellate Court cited then existing authority that "no legal presumption of their death would arise until seven years after their disappearance." *Id.* at 336; citing *Presbyterian Church v. St. Louis Trust Co.* 18 Ill. App.3d 713 (5th Dist. 1974).

A critical distinction lost on the Appellant to this Court, and the Dissent in the Appellate Court, was that *Praznik* did not discuss whether knowledge of negligence had any application to the statute of limitations applicable to the Wrongful Death Act. *Praznik* at 336. Plaintiff in that case did not argue that they filed their cause of action within two years of learning that the plane at issue crashed due to negligent conduct; rather plaintiff argued that the filing was within two years of the knowledge of the death, the proper trigger from the clear language of the Wrongful Death Act. The Court in *Praznik* drew special attention to the fact that plaintiff "did not know, nor could she have known with any degree of certitude of her right to sue until the fact of decedents' deaths and the wreckage of the Sport Aero aircraft were discovered in November of 1971." *Id.* Until that time, there was still the real possibility that the decedents were still alive in some remote location. *Id.*

Appellant's reliance on *Praznik* is misguided. The rule from *Praznik* more appropriately establishes that a death cannot be presumed where there is a possibility of survival, and that when death is known, the limitations period for filing suit begins to run against the Plaintiff. The case is not illustrative of an appellate court applying the discovery rule to medical malpractice wrongful death cases, and more appropriately, demonstrates an entirely appropriate construction of the limitations language of the Wrongful Death Act.

B. In addressing Nolan v. Johns-Manville, the plaintiff misconstrues the questions on appeal, as the question before the Court had no relation to the Wrongful Death Act or Survival Act.

Petitioner represents to the Court that the discovery rule was applied to a Survival Act case in *Nolan v. Johns-Manville Asbestos*. Brief and Argument of Appellant at. P.19, *Nolan* at 85 Ill.2d 161 (1981)("This Court also applied the discovery rule in a Survival Act case in *Nolan v. Johns Manville Asbestos*[…]"). *Nolan* is plainly distinguishable.

At the trial court level, plaintiff in *Nolan* had brought suit for his alleged asbestos related disease. *Id.* at 163-64. During the appeal of the case, plaintiff died and his wife continued as a party to the case as the administrator of his estate. *Id.* The Court was not then asked to consider the limitations provisions of a claim brought pursuant to the Survival Act, but instead was asked to consider the discovery rule as it related only to the common law cause of action. *Id.* at 166. Clearly, neither the Survival Act limitations, nor any question relating to the Survival Act could be before the court, as there was no ruling on such an issue at the trial court to be considered.

Plaintiff's reliance on *Wyness v. Armstrong World Industries, Inc.*, and that Court's observation that in *Nolan* the adminstratrix "continued the case pursuant to the

provisions of the survival statute," ignores the context of *Nolan*. *Wyness*, 131 Ill.2d 403 (1989). The Court in *Wyness* makes clear that the two cases are dissimilar in fundamental ways:

> *Nolan* is distinguishable from the case before us despite the fact that it also deals with an asbestos-related injury; unlike the instant wrongful death action, *Nolan* was a personal injury action brought by a plaintiff who died while the case was pending and whose administratrix continued the case pursuant to the survival statute. Because the deceased in *Nolan* had first become aware of a health problem in 1957 when he suffered from shortness of breath, resolution of the case required a determination of decedent's knowledge sufficient to trigger the running of the statute of limitations under the personal injury statute.

Id. at 412. This Court in *Wyness* found that it had not applied the discovery rule to wrongful death cases in the past. *Id.* at 409. This Court instead interpreted the statutory language of the Wrongful Death Act to mean that there is no cause of action arising prior to death. *Id.* at 412. The Court made very clear that the petitioner there was mixing "apples with oranges" when it came to provisions and rules related separately to the survival action and the wrongful death action. *Id.* at 413. While the Plaintiff points to *dicta* of the Court, the precedent established from *Wyness*, as cited by the majority at the Appellate Court below, is both logical and convincing. The *Wyness* Court refused to read into the Wrongful Death Act, to the benefit of defendants, a provision which would start the running of the statute upon the decedent's knowledge of a wrongfully caused injury during the lifetime of the then viable plaintiff. *Id.* at 415. This Court's refusal in *Wyness*

to "read into a statute language which is clearly not there," is fundamental to proper statutory construction, and well founded in the precedent of this Court. *Id.* at 416.[1]

II. THE APPELLATE COURT'S HOLDING IS CONSISTENT WITH THE HIGH COURTS OF NUMEROUS OTHER STATES.

The Appellate Court correctly found that the clear and unambiguous language in Section 13–212(a) dictates that the statute of limitations in a wrongful death action based on medical malpractice accrues at the time of death, not at the time the plaintiff becomes aware of the alleged negligent act or omission. *Moon*, 34 N.E.3d at 1058. This position is consistent with the decisions held by numerous courts across the country interpreting statutes with similar language and history as that of Illinois' Section 13–212(a).

In a case echoing the issues of the case at bar, the Supreme Court of Iowa held that the two year statute of limitations in a wrongful death action based on medical malpractice, provided in Iowa Code Section 614.1(9)(a), begins to run at the time the plaintiff discovers the death. *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47, 48 (Iowa 1990). The Supreme Court of Iowa further noted that the clear and unambiguous language of Section 614.1(9)(a) supports the position that a discovery rule premised upon knowledge of negligent conduct does not delay the running of the statute to the period plaintiff discovered the wrongful act. *Schultze*, 463 N.W.2d at 49.

[1] The Appellate Court below extensively cited the established precedent of this Supreme Courts, that "[i]t is well established that we will strictly construe a statute that is in derogation of the common law," and "[t]he Court will not read language into a statute that is not there." *Moon v. Rhode*, 2015 IL App (3d) 130613, ¶ 17, 34 N.E.3d 1052, 1058, as modified on denial of reh'g (June 15, 2015), appeal allowed, 39 N.E.3d 1004 (Ill. 2015), citing to *In re W.W.*, 97 Ill.2d 53, 57 (1983), and *Wyness*, 131 Ill.2d at 416; see also *People v. Martinez*, 184 Ill.2d 547 (1998).

In pertinent part, Iowa Code section 614.1(9)(a) provides that a wrongful death action emanating from medical malpractice must be brought "within two 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 the dates occurs first." In *Schultze* the plaintiff filed a cause of action for wrongful death based on alleged medical malpractice more than two years after the decedent died, but less than two years after the plaintiff discovered the alleged negligence of the defendant. *Schultze,* 463 N.W.2d at 48. The defendant moved for summary judgment on the grounds that the plaintiff was time-barred by Section 614.1(9)(a). *Id.* The district court subsequently denied the motion, concluding "that the limitation period commenced when 'a claim for death is ascertainable.'" *Id.* The Supreme Court of Iowa reversed the district court's decision and explained:

> There is no suggestion or hint in [the language of Section 614.1(9)(a)] that the legislature intended that we impose a different commencement date for the limitation period by imposing an additional condition that plaintiff knew the death was wrongful. *To further extend the limitation period would be contrary to the plain language of the subsection and the legislature's intent to restrict the length of time for commencing malpractice actions.* Additionally, it would create a discovery rule that supersedes a statutorily imposed discovery rule. This is contrary to the legislative intent.

Id. at 50. (Emphasis added.) The Iowa Supreme Court also highlighted that its "review of the case law reveals that a majority of jurisdictions do not apply [a negligent conduct] discovery rule when the applicable wrongful death statute of limitations has specific 'date of death,' 'after death,' 'from death,' or similar language." *Id.* (Collecting cases.)

In addition to Iowa, many other jurisdictions have held that a negligent conduct discovery rule is not available to extend the applicable statute of limitations in a wrongful

death action. The Supreme Court of Pennsylvania in interpreting its respective wrongful death statute expressed:

> Upon the death of an individual, survivors are put on clear notice thereof, and they have the opportunity to proceed with scientific examinations aimed at determining the exact cause of death so that a wrongful death action, if warranted, can be filed without additional delay…. *Because death is not an event that is indefinite as to the time of its occurrence, and because survivors are immediately put on notice that they may proceed to determine the cause of death, there is no basis to regard the cause of action for death as accruing at any time other than at death*.

Pastierik v. Duquesne Light Co., 514 Pa. 517, 522 (1987). (Emphasis added.) Similarly, the Supreme Court of Kentucky held that "the statute of limitations for wrongful death actions runs from the death of the decedent…." *Farmers Bank & Trust Co. of Bardstown v. Rice*, 674 S.W.2d 510, 512 (Ky. 1984). The Supreme Court of Georgia also declined to apply the discovery rule to its two-year wrongful death statute of limitations reasoning, "[t]o prolong the running of this period would be to subject the defendants to potentially infinite liability...." *Miles v. Ashland Chem. Co.*, 261 Ga. 726, 728 (1991).

Some jurisdictions, such as the State of Wyoming, have gone as far as making the prescribed period for bringing a wrongful death action a "condition precedent" as opposed to a "statute of limitation." *See, Corkill v. Knowles*, 955 P.2d 438, 443 (Wyo. 1998) ("The time period authorized by a condition precedent, absent a savings clause, cannot be extended by the exceptions usually allowed for general statutes of limitation (*e.g.*, extending the time for appointment of an administrator or minority tolling periods or the discovery rule)."). Additionally this same Court noted that it cannot apply the discovery rule to the wrongful death statute because the statute does not "contain language which permits tolling of the statutory time limit until the elements of the cause

of action are discovered." *Corkill*, 955 P.2d 438 at 443. This practice of strict statutory construction to wrongful death statutes is consistent with Illinois law and numerous other jurisdictions across the country. *See, e.g., Wilson v. Tromly*, 404 Ill. 307, 310, 89 N.E.2d 22, 24 (1949); *Babb v. Matlock*, 340 Ark. 263, 265, 9 S.W.3d 508, 509 (2000); *Crosby v. Glasscock Trucking Co., Inc.*, 340 S.C. 626, 628, (2000); *Durham ex rel. Estate of Wade v. U-Haul Int'l*, 745 N.E.2d 755, 767 (Ind. 2001).

Conclusion

For the foregoing reasons, and the reasons set forth in the briefing of the Appellee, the Illinois Association of Defense Trial Counsel respectfully submit that this Court should affirm the Illinois Appellate Court and affirm the circuit court's dismissal on statute of limitations grounds.

Respectfully submitted,

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Supreme Court Rule 341(c) 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 containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 10 pages.

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Certificate of Filing and Service

The undersigned attorney certifies that that he filed the original on March 17, 2016, and will subsequently mail, after approval, twenty (20) copies of the foregoing Brief of Amicus Curiae Illinois Association of Defense Trial Counsel to the Illinois Supreme Court, Springfield, Illinois, and three (3) copies to the following persons at the addresses shown by enclosing same in an envelope addressed to them and depositing same in a United States mailbox at Springfield, Illinois by the date specified by the Illinois Supreme Court.

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