

# Dispositive Motions: Timing is Everything, Even in Death

*Amundsen Davis Health Care Alert*

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Recently, the 1st District Appellate Court affirmed that the “wrongful act, neglect or default causing death” is the cause of action, not the death itself. Therefore, unless the decedent has a cause of action at the time of death, his/her death alone does not create a wrongful-death right of action.

In *Osten v. Northwestern Memorial Hospital et al.*, plaintiff alleged professional negligence including a wrongful death action against defendant-facilities and their apparent agents for a failure to properly work up decedent’s screening mammogram. Plaintiff claimed that on April 21, 2011, his wife, Gail, underwent a screening mammogram. According to the complaint, the mammogram revealed bilateral benign calcification and no other masses or malignancy. No further tests were ordered. In December 2011, Gail was diagnosed with breast cancer. The complaint did not allege who made the breast cancer diagnosis or whether defendants had any contact with Gail after the December 2011 diagnosis. On March 19, 2015, Gail died. On January 20, 2017, Osten filed suit.

The defendants moved to dismiss and argued that under Section 13-212 of the Illinois Code of Civil Procedure, the medical negligence claims were time-barred by both the two-year statute of limitations and four-year statute of repose. Defendants argued that the limitations period began tolling on the date of the screening on April 21, 2011 and therefore, lapsed on April 21, 2013 (prior to Gail’s death) or at the latest, December 2013 (two years after the breast cancer diagnosis). Likewise, defendants argued that the four-year statute of repose lapsed on April 21, 2015. Osten disagreed and contended that neither the limitations nor repose period began to run until Gail died on March 19, 2015 and therefore, his January 20, 2017 complaint was timely filed.

The court underscored that in a wrongful death action: the “wrongful act, neglect or default causing death” is the cause of action, not the death itself. Therefore, unless the decedent has a cause of action at the time of death, their death alone does not create a wrongful-death right of action. Section 13-212(a) states that “in no event shall such action be brought more than [four] years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.” Because the plaintiff filed suit almost six years after the allegedly negligent act and failed to put forth any facts to establish that Gail continued treatment with any defendants after April 21, 2011, dismissal was proper.

Unless the plaintiff puts forth some fact to suggest that treatment was continuous through the date of death, death alone will not create a wrongful-death right of action. Accordingly, it is advised to fully evaluate the complaint and associated physician's report to determine whether, based on the facts alleged, a motion to dismiss may be appropriate.

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