

In the
Supreme Court of Ohio

REV. IYABO NADRA, : Case No. 2007-0525
: :
Plaintiff-Appellee, : :
: :
v. : :
: : On Appeal from the
: : Franklin County
: : Court of Appeals,
SUSAN MBAH AND MINDY GROTE, : : Tenth Appellate District
: :
Defendants-Appellants. : : Court of Appeals Case
: : No. 06AP-829
: :

**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO IN SUPPORT OF
DEFENDANTS-APPELLANTS SUSAN MBAH AND MINDY GROTE**

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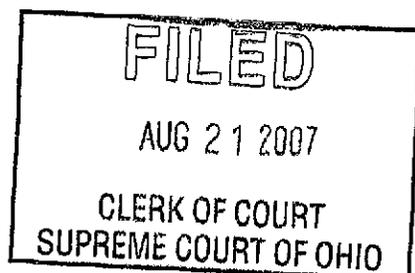


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INTRODUCTION

The sole issue in this case is which statute of limitations governs 42 U.S.C. § 1983 (“Section 1983”) claims in federal and state courts in Ohio. In 1871, Congress sought to guard against the campaign of violence in some States in the aftermath of the Civil War by passing the Civil Rights Act of 1871, the legislation creating Section 1983. “By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement.” *Wilson v. Garcia*, 471 U.S. 261, 277. Section 1983 remains a powerful tool for the defense of constitutional rights in both state and federal courts.

However, Section 1983 and associated statutes do not supply a statute of limitations. *Wilson, Owens v. Okure* (1989), 488 U.S. 235. In the absence of a limitations period for a federal cause of action, courts adopt a state statute of limitations if it is not inconsistent with federal law or policy. 471 U.S. at 266-267. The choice of a statute of limitations is a matter of federal, not state, law. 471 U.S. at 268-270.

Section 1983 arose from injuries to a person’s federal rights. While Section 1983 claims can encompass “a broad range of potential tort analogies,” the language of the Fourteenth Amendment makes clear that a violation of its command “is an injury to the individual rights of the person.” *Id.* Therefore, *Wilson* held that Section 1983 claims are, as a matter of federal law, subject to the state statute of limitations for personal injury actions. Where a State has more than one personal injury statute of limitations, *Owens* held that courts are to borrow the general or residual statute for personal injury actions. 488 U.S. at 249-250.

Most courts to have considered the issue have correctly concluded that the two-year limitations period for personal injury actions in R.C. 2305.10(A) is the appropriate statute for Section 1983 actions in Ohio. See, e.g., *Browning v. Pendleton* (6th Cir. 1989), 869 F.2d 989;

Peoples Rights Org., Inc. v. Montgomery, Ohio Att'y Gen. (12th Dist, 2001), 142 Ohio App.3d 433 at 483.

This is because in Ohio, the general statute of limitations for unspecified personal injury actions is R.C. 2305.10(A), which provides a two-year limitation for an action for “bodily injury or injuring personal property.” Accordingly, this Court and lower Ohio courts have consistently applied R.C. 2305.10(A) to claims for personal injuries where no other statute supplies a limitations period. See e.g., *Browning v. Burt* (1993), 66 Ohio St. 3d 544; *Duckworth v. Burger King Corp.* (10th Dist.), 159 Ohio App. 3d 540, 2005-Ohio-294. Revised Code 2305.10(A) applies only to personal injury actions without specific statutes of limitations, unlike, for example, assault and battery (R.C. 2305.11.1) and medical malpractice (R.C. 2305.113). Therefore, the two-year limitation period in R.C. 2305.10(A) is Ohio’s general and residual statute of limitations for personal injury actions.

Under *Wilson* and *Owens*, therefore, the two-year limitation in R.C. 2305.10(A) should be applied to claims under Section 1983. Indeed, the federal Sixth Circuit Court of Appeals has already so held. *Browning v. Pendleton* (1989), 869 F. 2d 989, 992.

And, while most Ohio courts of appeals have followed the reasoning in *Browning*, the Tenth District below incorrectly held that R.C. 2305.09(D) supplied the appropriate limitations period for Section 1983 claims. But R.C. 2305.09(D) is Ohio’s residual non-personal injury tort statute of limitations; it explicitly *excludes* all personal injury claims. *Wilson* and *Owens* specifically held that such a “catchall clause” should not apply to Section 1983 claims. 471 U.S. at 278; 488 U.S. at 250 n.12.

In short, correct analysis under *Wilson* and *Owens* compels the conclusion that the two-year statute of limitations in R.C. 2305.10(A) applies to Section 1983 claims in federal and state courts in Ohio.

STATEMENT OF AMICUS INTEREST

The State of Ohio has a strong interest in ensuring the fair adjudication of civil rights actions in both federal and state courts in Ohio. The State of Ohio has an interest in a statute of limitations for civil rights actions that is long enough to permit plaintiffs time to bring their claims, while preventing claims brought after memories have faded and evidence lost. The Ohio General Assembly has shown that it favors statutes of limitations of two years or less for cases filed against government entities, and in the civil rights context. For example, actions against both the state and political subdivisions have two-year statutes of limitations (R.C. 2743.16; R.C. 2744.04) and a complaint with the Ohio Civil Rights Commission must be filed within six months (R.C. 4112.05).

At the same time, because the proper limitations period is a question of federal law, Ohio cannot directly pass a law establishing a specific statute of limitations for federal civil rights actions. See *Arnold v. Duchesne County* (10th Cir. 1994), 26 F. 3d 982, 987 (Utah statute specific to Section 1983 held invalid, as Utah's legislature "usurped the role of federal law in characterizing the essence of such actions.").

Thus, Ohio has a strong interest in ensuring, as a matter of federal law, that the two-year limitation in R.C. 2305.10(A) is used for Section 1983 actions in Ohio.

STATEMENT OF THE CASE AND FACTS

On February 25, 2005, Plaintiff-Appellee Rev. Iyabo Nadra ("Nadra") filed a civil complaint pro se in the Franklin County Court of Common Pleas against Defendants-Appellants Susan Mbah ("Mbah"), a Franklin County Children Services caseworker, and Mindy Grote

("Grote"), a Franklin County Children Services intake worker. Trial Court Record 2 ("Tr. R. 2"). Nadra alleged that, in 2002, Mbah and Grote committed fraud in removing her minor son, M.M., from her custody and by filing a complaint against her in court. Tr. R. 2.

Nadra's complaint did not specifically assert Section 1983 claims. However, Mbah and Grote argued in a motion for summary judgment that any claims that could be construed as Section 1983 claims were subject to a two-year statute of limitations and, thus, would be time-barred. Tr. R. 52. The trial court granted summary judgment as to the Section 1983 claims involving the removal of M.M. from custody and the filing of the complaint. Tr. R. 61. However, the trial court denied summary judgment as to the claims that alleged Section 1983 violations for failure to return M.M. to Nadra's custody. Tr. R. 61.

The trial court later granted Mbah and Grote leave to file a second motion for summary judgment, in which they argued that Nadra's remaining Section 1983 claims were time-barred by a two-year statute of limitations, because Franklin County Children Services' custody of M.M. terminated August 20, 2002. Tr. R. 73 at The trial court granted the motion, and dismissed Nadra's case. Tr. R. 76.

Nadra appealed, and the Tenth District held that the trial court had used the wrong statute of limitations. *Nadra v. Mbah* (10th Dist.), 2007 Ohio App. Lexis 448, 2007-Ohio-501. The statute used by the trial court establishes a two-year limitation on claims:

an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues.

R.C. 2305.10(A). The Tenth District held instead that "the four-year statute of limitations contained in R.C. 2305.09(D) is Ohio's general or residual personal injury statute of limitations and, thus, applie[s] to Section 1983 claims arising in Ohio." 2007-Ohio-501, ¶ 40. That statute states that:

[a]n action for any of the following causes shall be brought within four years after the cause thereof accrued: . . . (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12 and 2305.14 of the Revised Code

R.C. 2305.9(D). The Tenth District held that it “has repeatedly refused to follow *Browning*” [*v. Pendleton* (6th Cir. 1989), 869 F. 2d 989]—a federal Sixth Circuit decision holding that R.C. 2305.10 is the proper statute—and concluded that “the Sixth Circuit was incorrect in its determination that former R.C. 2305.10 set forth Ohio’s general or residual statute of limitations for personal injury actions.” *Id.* Relying extensively on its decision in *Prohazka v. Ohio State Univ. Bd. of Trustees* (10th Dist.), 1999 Ohio App. Lexis 6475, the Tenth District reiterated that “the question of which Ohio statute of limitations constitutes the [S]tate’s general or residual statute of limitations is a question of state law.” *Id.* The Tenth District reversed the trial court and reinstated Nadra’s Section 1983 claims. *Id.* at ¶ 46

Mbah and Grote timely appealed. This Court accepted the case as a discretionary appeal. See *06/20/2007 Case Announcements*, 2007-Ohio-2904.

ARGUMENT

Enacted by Congress to enforce the Fourteenth Amendment, 42 U.S.C. § 1983 (“Section 1983”) is a remedial statute that provides a cause of action against state actors to who violate rights protected by federal law. Only two elements are required to assert a Section 1983 claim: “(1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States.” *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St. 3d 33, 34 (citing *Parratt v. Taylor* (1981), 451 U.S. 527, 535); *Felder v. Casey* (1988), 487 U.S. 131, 141. State and federal courts have jurisdiction to hear Section 1983 claims against state

officers and employees. *Conley v. Shearer* (1992), 64 Ohio St. 3d 284, 293; *Felder*, 487 U.S. at 147. Therefore, both state and federal courts adjudicate Section 1983 claims.

Section 1983 does not explicitly provide a statute of limitations. *Wilson*, 471 U.S. at 266; *Owens*, 488 U.S. at 239 *Nadra*, 2007-Ohio-501, ¶ 38. In the absence of limitations periods for federal causes of action, “the settled practice has been to adopt a local time limitation as federal law if not inconsistent with federal law or policy . . .” *Wilson*, 471 U.S. at 266-267. Thus, Section 1983 actions brought in Ohio courts and federal courts in Ohio are, as a matter of federal law, subject to an Ohio statute of limitations. That is, although the particular time period in a state statute of limitations is applied in these circumstances, the choice of rule mandating that application is a matter of federal law. As explained below, the U.S. Supreme Court has held that federal law requires that the appropriate statute of limitations to apply to a Section 1983 claim is the state statute of limitations for general personal injury claims. In Ohio, that statute is R.C. 2305.10(A).

Amicus Curiae Attorney General’s Proposition of Law:

Ohio’s two-year general statute of limitations for unspecified personal injury actions, R.C. 2305.10(A), governs claims asserted under Section 1983.

A. Claims asserted under Section 1983 are subject to States’ general statutes of limitations for unspecified personal injury actions.

The United States Supreme Court has held that a State’s general or residual statute of limitations for unspecified personal injury actions governs Section 1983 claims in federal and state courts within that State. *Owens*, 488 U.S. at 249-250. Statutes of limitations for intentional torts and any residual statute for unspecified tort actions do not apply. *Id.* at 250; 250 n. 12.

The U.S. Supreme Court first explored the issue in *Burnett v. Grattan* (1984), 468 U.S. 42. There, the Court interpreted 42 U.S.C. § 1988 (“Section 1988”) to require that federal courts

follow a three-step process to apply appropriate state rules of decision to federal civil rights claims, including claims under Section 1983:

First, courts are to look to the laws of the United States “so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.” If no suitable federal rule exists, courts undertake the second step by considering application of state “common law, as modified and changed by the constitution and statutes” of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not “inconsistent with the Constitution and laws of the United States.”

Id. at 47-48 (quoting 42 U.S.C. §1988). Thus, in seeking a rule of decision in a federal civil rights claim, a court should first determine if an appropriate federal rule exists. If no suitable federal rule exists, a court should borrow a state rule, but only if it is consistent with the U.S. Constitution and laws.

As explained above, Section 1983 and associated sections contain no applicable statute of limitations, so courts must proceed to the second *Burnett* step. *Burnett* interpreted the second step to require courts to select a state cause of action that was “analogous” to the Section 1983 claim asserted and apply the statute of limitations governing it. 468 U.S. at 49.

However, the *Burnett* “analogous” rule soon proved unworkable. In finding “analogies,” federal courts inconsistently characterized civil rights claims as various state actions, subjecting Section 1983 claims to widely differing limitations periods. See *Garcia v. Wilson* (10th Cir. 1984), 731 F. 2d 640, 643-648, *aff’d*, (1985), 471 U.S. 261 (examining the methods of evaluating the applicability of state statutes of limitations to Section 1983 claims in each federal circuit). The result was “uncertainty, confusion, and lack of uniformity in selecting the applicable statute of limitations in [Section] 1983 suits.” 471 U.S. at 272, n. 25.

Recognizing the need for “a simple, broad characterization of all [Section] 1983 claims,” the Court in *Wilson v. Garcia* held that all civil rights claims asserted under Section 1983 are subject to States’ statutes of limitations for personal injury actions. *Wilson v. Garcia* (1985), 471

U.S. 261 at 268, 272, 279. The *Wilson* Court based its holding on several factors. First, federal law controls the manner in which Section 1983 claims are characterized for statute of limitations purposes; state law only provides the applicable limitations periods as “neutral rules of decision.” 471 U.S. at 268-270. A single characterization of Section 1983 claims serves “[t]he federal interest in uniformity, certainty, and the minimization of unnecessary litigation . . .” *Id.* at 275. The *Wilson* Court held that Section 1988 “is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all [Section] 1983 claims.” *Id.*

Second, the harm Congress sought to guard against in the Civil Rights Act of 1871—the legislation creating Section 1983—arose from injuries to a person’s federal rights. Section 1983 actions can encompass “a broad range of potential tort analogies.” However, the language of the Fourteenth Amendment: “all ‘*persons*’ shall be accorded the full privileges of citizenship; no person shall be deprived of life liberty or property . . .” makes clear that a violation of its command “is an injury to the individual rights of the person.” 471 U.S. at 277 (emphasis in original).

Finally, because of the sheer volume of personal injury actions in state courts, States are unlikely to alter or fix their statute of limitations for general personal injury claims to discriminate against or be inconsistent with the federal interests reflected in Section 1983. 471 U.S. at 279. “The characterization of all [Section] 1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by [Section] 1983.” *Id.* And States’ more recently enacted “catchall” periods of limitations were held to be inapplicable to Section 1983 claims. 471 U.S. at 278. Because States’ “catchall” statutes of limitations for tort actions came about after Congress

had passed the Civil Rights Acts of 1871, those statutes could not have been intended to apply to Section 1983 claims. *Id.*

Though *Wilson* provided that Section 1983 claims are to be characterized as personal injury actions for statute of limitations purposes, federal courts often disagreed on how to select the appropriate statute in a State with multiple statutes of limitations for personal injury actions. See *Browning*, 869 F.2d at 991. In *Owens v. Okure* (1989), 488 U.S. 235, the U.S. Supreme Court clarified *Wilson*, holding that “where state law provides multiple statutes of limitations for personal injury actions, courts considering [Section] 1983 claims should borrow the general or residual statute for personal injury actions.” 488 U.S. at 249-250. The Court reasoned that States’ general or remedial statutes of limitations for personal injury actions “are easily identifiable by language or application,” and therefore easily determined with little risk of confusion. 488 U.S. at 247-248.

The *Owens* Court underscored that courts were not to apply either a State’s statute of limitation for intentional torts, 488 U.S. at 243-245, or a State’s “catchall” tort statute of limitations to Section 1983 claims. “Courts should resort to residual statutes of limitations only where state law provides multiple statutes of limitations *for personal injury actions* and the residual one embraces, either explicitly or by judicial construction, *unspecified personal injury actions*.” 488 U.S. at 250, n.12 (emphasis added).

Thus, the characterization of Section 1983 claims for statute of limitations purposes in Ohio courts is a matter of federal law. 471 U.S. at 268-270. *Wilson* and *Owens* require that Ohio’s general or residual statute of limitations for unspecified personal injury actions governs Section 1983 claims in Ohio courts. 488 U.S. at 249-250. Statutes of limitations for intentional

torts and any residual statute for unspecified tort actions do not apply. *Id.* at 250; 250 n. 12. In Ohio, the appropriate statute is R.C.2305.10(A).

B. R.C. 2305.10(A) is Ohio’s general statute of limitations for unspecified personal injury actions, so it supplies the limitations period for Section 1983 claims in Ohio.

As this Court has acknowledged, all actions for personal injuries, unless expressly governed by another statute of limitations, are subject to R.C. 2305.10(A). “When bodily injury results from negligence, the two-year statute of limitations, R.C. 2305.10, is the appropriate statute of limitations.” *Love v. Port Clinton* (1988), 37 Ohio St. 3d 98, 99. The two-year limitations period contained in R.C. 2305.10(A) is Ohio’s “general [limitations] provision which applies to all personal injury actions with certain specific exceptions . . .” *Owens*, 488 U.S. at 246-247. Accordingly, R.C. 2305.10(A) governs Section 1983 claims in Ohio.

Revised Code 2305.10(A) provides in part that “an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues.”¹ The provision is the modern analogue of the two-year statute of limitations originally found in Section 11224-1 General Code, which provided that “[a]n action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.” *Peoples Rights Org., Inc. v. Montgomery, Ohio Att’y Gen.* (12th Dist, 2001), 142 Ohio App. 3d 443 at 482.

General Code Section 11224-1 was “not confined to any particular type of injury, nor [did] it concern itself with the circumstances under which an injury was inflicted. On its face, it clearly cover[ed] all actions based on a claim respecting bodily injury.” *Andrianos v. Cmty. Traction Co.* (1951), 155 Ohio St. 47, 51. Similarly, R.C. 2305.10(A) relates to unspecified personal injury actions. *Id.* at 50. And, despite its wide application, R.C. 2305.10(A) is not a “catchall” statute of

¹ R.C. 2305.10(A) was recently amended to also apply to products liability claims.

limitations for all general negligence actions; it specifically applies only to bodily injury and injury to personal property.

Accordingly, this Court and lower Ohio courts have consistently applied R.C. 2305.10(A) to claims for a personal injury where no other statute supplies one. For example, in *Browning v. Burt* (1993), 66 Ohio St. 3d 544, this Court applied R.C. 2305.10(A) to claims against a hospital for the negligent credentialing of a physician, because the action fell “under the umbrella of R.C. 2305.10” as “a claim for bodily injury arising out of negligence . . .” *Id.* at 558. See also *Lawyers Coop. Publ’g Co. v. Muething* (1992), 65 Ohio St. 3d 273, 280-281 (R.C. 2305.10 governs claims for negligent infliction of emotional distress; “quantifiable physical loss” alleged in such claims “is clearly identifiable as a ‘bodily injury.’”); *Wells v. Michael* (10th Dist.), 2006 Ohio App. Lexis 5813, 2006-Ohio-5871, ¶ 3 (injuries sustained in a car accident); *Duckworth v. Burger King Corp.* (10th Dist.), 159 Ohio App. 3d 540, 2005-Ohio-294, ¶ 3 (injuries from food poisoning); *Amerisure Co. v. Statesman Ins. Co.* (1st Dist. 1991), 77 Ohio App. 3d 239, 240 (injuries from exposure to formaldehyde); *Holman v. Grandview Hosp. & Med. Ctr.* (2nd Dist. 1987), 37 Ohio App. 3d 151, 154 (respondeat superior claim against a hospital for injuries); *Callaway v. Nu-Cor Automotive Corp.* (10th Dist.), 166 Ohio app. 3d 56, 2006-Ohio-1343, ¶ 24 (harm from witnessing a spouse’s injury).

Even the Tenth District, in a 2005 case, acknowledged that causes of action “for recovering damages growing out of the underlying claim of personal injury . . . [are] barred by the two-year statute of limitations for personal injury actions contained in [R.C.] 2305.10.” *Duckworth*, 2005-Ohio-294, ¶ 16.

At the same time, R.C. 2305.10(A) does not apply to actions where specific statutes of limitations exist for a particular personal injury. See *Gambill v. Bonded Oil Co.* (1990), 52 Ohio

St. 3d 90, 93. “A special statutory provision which relates to the specific subject matter involved in litigation is controlling over a general statutory provision which might otherwise be applicable.” *Andrianos*, 155 Ohio St. 47, paragraph 1 of the syllabus. Accordingly, claims for assault and battery (R.C. 2305.11.1), for wrongful death (R.C. 2125.02(D)), against the Dalkon Shield claimants’ trust (R.C. 2305.101) and for medical malpractice (R.C. 2305.113) are not governed by the two-year statute of limitations in R.C. 2305.10(A).

Therefore, the two-year limitation period in R.C. 2305.10(A) is Ohio’s residual statute of limitations for personal injury actions. Accordingly, all but three Ohio appellate districts have correctly held that R.C. 2305.10(A) supplies the limitations period for Section 1983 claims. *Erkins v. Cincinnati Mun. Police Dept.* (1st Dist. 1998), 1998 Ohio App. Lexis 4927, *8; *Bowshier v. The Vill. of North Hampton, Ohio, a Muni. Corp.* (2nd Dist.), 2002 Ohio App. Lexis 2300, 2002-Ohio-2273, at ¶ 13; *Lutchev v. City of Napoleon* (3rd Dist.), 1999 Ohio App. 6106, 1999-Ohio-962, *3; *Conley v. Willis* (4th Dist.), 2001 Ohio App. Lexis 2735, 2001-Ohio-2410, at *10; *Rowe v. Artis* (5th Dist. 2001), 2001 Ohio App. Lexis 71, *11-*12; *Gaston v. City of Toledo* (6th Dist. 1995), 106 Ohio App. 3d 66, 78; *Harman v. Gessner* (7th Dist. 1997), 1997 Ohio App. Lexis 4054, *6-*7; *Harris v. Walker* (8th Dist. 2000), 2000 Ohio App. Lexis 2346, *7; *Peoples Rights Org., Inc. v. Montgomery, Ohio Att’y Gen.* (12th Dist. 2001), 142 Ohio App. 3d 443, 482-483 (applying R.C. 2305.10(A) to Section 1983 claims).

Only the Tenth and Eleventh Districts have incorrectly held that Section 1983 claims are subject to the four-year statute of limitations in R.C. 2305.09(D). *Prohazka*, 1999 Ohio App. Lexis 6475 *21-*28; *Bojac Corp. v. Kutevac* (11th Dist. 1990), 64 Ohio App. 3d 368, 370-371. The Ninth District erroneously applied the pre-*Wilson* “analogous claim” method and used the

one-year limitations period for assault and battery claims in R.C. 2305.111 for Section 1983 claims. *Dodrill v. Lorain County Sheriff* (9th Dist. 1988), 53 Ohio App. 3d 79 *81.

In addition, the Sixth Circuit has already found that R.C. 2305.10(A) governs Section 1983 claims in Ohio. *Browning v. Pendleton* (1989), 869 F. 2d 989 (en banc). And, while *Browning* is not binding, it is at least persuasive authority that R.C. 2305.10(A) is the appropriate statute of limitations for Section 1983 claims brought in Ohio.

C. Because it applies to claims other than personal injury, the four-year limitations provision found in R.C. 2305.09(D) cannot be applied to Section 1983 claims.

As explained above, contrary to the holdings of almost all the other Ohio courts of appeals and the federal Sixth Circuit, the court below held that R.C. 2305.09(D) is the appropriate statute of limitations to apply to Section 1983 claims in Ohio. As explained below, R.C. 2305.09(D) is inappropriate as a statute of limitations for Section 1983 claims.

Revised Code 2305.09(D) does not apply to personal injury causes of action, and therefore under *Wilson* and *Owens*, its four-year limitations period cannot apply to Section 1983 claims in Ohio. Indeed, R.C. 2305.09(D) explicitly *excludes* all personal injury claims. The statute states: “[a]n action for any of the following causes shall be brought within four years after the cause thereof accrued . . . [f]or an injury to the rights of the plaintiff not arising on contract *nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14* of the Revised Code.” R.C. 2305.09(D)(emphasis added). By its express terms, R.C. 2305.09(D) excludes a variety of personal injury actions in the enumerated sections: R.C.2305.11 (libel, slander, malicious prosecution, false imprisonment, malpractice other than medical and related); 2305.111 (assault and battery); 2305.113 (medical and related malpractice); 2305.115 (assault and battery against medical professional, sexual contact). And it specifically excludes claims subject to R.C. 2305.10(A)—that is, all personal injury actions that do not have any other limitations period.

Thus, R.C. 2305.09(D) is Ohio's residual non-personal injury tort statute of limitation—the very “catchall clause” that *Wilson* and *Owens* held should not apply to Section 1983 claims. 471 U.S. at 278; 488 U.S. at 250 n.12. This Court has held that R.C. 2305.09(D) is the “catchall clause . . . prescribing a four-year period for the commencement of certain actions not otherwise limited.” *Corpman v. Boyer* (1960), 171 Ohio St. 233, 234. It “provides a general limitations period . . . for tort actions not specifically covered by other sections of the Ohio Revised Code.” *Investors Reit One v Jacobs* (1989), 46 Ohio St. 3d 176 at 179. Specifically, this Court has found that the four-year limitations provision in R.C. 2305.09(D) governs “general claims of professional negligence which are outside the ambit of R.C. 2305.10 and 2305.11,” *id.*; the wrongful discharge of an employee in violation of public policy, *Pytlinski v. Bocar Products, Inc.*, 94 Ohio St. 3d 77, 81, 2002-Ohio-66; damage to real property, *Harris v. Liston* (1999), 86 Ohio St. 3d 203, 205; loss of consortium, *Richards v. St. Thomas Hospital* (1986), 24 Ohio St. 3d 27, 29; and actions by a vendee against a builder-vendor for damages, *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St. 2d 376, 378. These actions were subject to the limit in R.C. 2305.09(D) because they do not fit anywhere else.

The Tenth District's reasoning to the contrary is misplaced. The court below relies primarily on its own earlier holding in *Prohazka v. Ohio State Univ. Bd. of Trustees*, 1999 Ohio App. Lexis 6475. In *Prohazka*, the Tenth District found that based on the “plain language” of R.C. 2305.09(D) and R.C. 2305.10(A), the former governed Section 1983 claims. 1999 Ohio App. Lexis 6475 at *26. After first incorrectly finding that “the question of which Ohio statute of limitations constitutes the state's general or residual statute of limitation is a question of state law,” the Tenth District construed the *Owens* decision to suggest that R.C. 2305.10(A) is a

statute of limitations for “enumerated intentional torts,” and that “R.C. 2305.09(D), by contrast, applies . . . otherwise to all undelineated personal injury actions.” *Id.* at *22, *27, *26.

In an even earlier case, *Weethee v. Boso* (10th Dist. 1989), 64 Ohio App. 3d 532, the Tenth District similarly found that “[t]he applicable statute of limitations is not R.C. 2305.10, which is two years. That provision applies to bodily injury or injury to personal property which is not pertinent herein.” *Id.* at 534. Despite noting that the United States Supreme Court had determined “that a state residual or [catchall] limitations provision was inappropriate for [Section] 1983 actions,” the Tenth District held that R.C. 2305.09(D) governed Section 1983 claims.

Contrary to the Tenth District’s assertions, R.C. 2305.10(A) does not apply broadly to intentional tort claims. In *Prohazka*—on which it relied below—the Tenth District found that R.C. 2305.10 was a “statute of limitations for certain enumerated intentional torts.” 1999 Ohio App. Lexis 6475 *27. But the distinction made by *Wilson* and *Owens* is not whether a statute of limitations covers intentional or non-intentional torts; it is whether the statute of limitations covers *personal injury* causes of action, intentional or not. In Ohio, R.C. 2305.10(A) covers personal injuries that have no other statute of limitations. R.C. 2305.09(D), on the other hand, covers all torts not specifically excluded—and personal injury torts are specifically excluded.

Moreover, the Tenth District misinterpreted *Owens*’ citation to R.C. 2305.10(A) to mean that it is “one of Ohio’s several enumerated torts statutes.” See *Prohazka*, 1999 Ohio App. Lexis 6475 at *27. In discussing the “different configurations” States use to provide limitations periods for intentional torts, the *Owens* Court stated:

[i]n Ohio, separate provisions govern “bodily injury,” [R.C. 2305.10], “libel, slander, malicious prosecution, or false imprisonment,” [R.C.] 2305.11, and “assault or battery,” [R.C.] 2305.111. Similarly, in Pennsylvania, separate provisions govern “libel, slander or invasion of privacy,” “assault, battery, false imprisonment, false

arrest, malicious prosecution or malicious abuse of process,” “injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another,” and “[a]ny other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious [sic] conduct.”

Owens, 488 U.S. at 244 (citations omitted).

But the passage in *Owens* did not mean that all the statutes cited were “enumerated intentional tort statutes.” Rather, the *Owens* Court was pointing out that Ohio and Pennsylvania have specific statutes of limitations for intentional torts and general statutes of limitations for unspecified personal injury actions. The passage continues: “every State has one general or residual statute of limitations governing personal injury actions. Some States have a general provision which applies to all personal injury actions with specific exceptions. Others have a residual provision which applies to all actions not specifically provided for, including personal injury actions.” 488 U.S. at 245-247. In Ohio, R.C. 2305.10(A) fills that bill, as it is a “general provision [that] applies to all personal injury actions with specific exceptions.”

Furthermore, the Tenth District misunderstood that the choice of statute is a matter of federal law. As explained above, characterizing Section 1983 claims as personal injury claims for statute of limitations purposes serves the *federal* interest of promoting uniformity among state and federal courts in a particular State. *Wilson*, 471 U.S. at 275. Federal law controls the characterization of Section 1983 claims, which, in turn, dictates the state statute of limitations that will be applied to it. Indeed, “[o]nly the length of the limitations period . . . [is] to be governed by state law.” *Wilson*, 471 U.S. at 269.

Therefore, although R.C. 2305.09(D) is a residual statute of limitations for miscellaneous tort actions, personal injury claims are not within its scope. R.C. 2305.09(D) provides the catchall limitations period for unspecified negligence actions. It is neither “a general provision which applies to all personal injury actions with certain specific exceptions,” nor “a residual

provision which applies to all actions not specifically provided for, including personal injury actions.” R.C. 2305.09(D) cannot be applied to Section 1983 claims as it “would be inconsistent with the underlying policies of the federal statute.” *Id.*

* * *

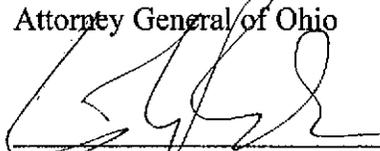
In short, U.S. Supreme Court precedent holds that claims asserted under Section 1983 are subject to States’ general statutes of limitations for unspecified personal injury actions. In Ohio, R.C. 2305.10(A) is the general or residual statute of limitations for personal injury actions. Revised Code 2305.09(D) is the residual provision for all negligence actions and specifically excludes actions for personal injury. It therefore does not apply under *Wilson* and *Owens* as a statute of limitations for Section 1983 actions.

CONCLUSION

For the reasons explained above, this Court should reverse the decision of the Tenth District Court of Appeals and hold that R.C. 2305.10(A) provides the statute of limitations for Section 1983 claims.

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I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Defendants-Appellants Susan Mbah and Mindy Grote was served by U.S. mail this 21st day of August, 2007, upon the following counsel:

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