

IN THE SUPREME COURT OF OHIO

RANDY J. EPPLEY, ETC., ) SUPREME COURT CASE  
 ) NO. 2008-0366  
 )  
 Appellee/Cross Appellant, )  
 )  
 v. ) ON APPEAL FROM THE JUDGMENT  
 ) ENTERED IN THE MUSKINGUM  
 TRI-VALLEY LOCAL SCHOOL DISTRICT, *et* ) COUNTY COURT OF APPEALS,  
 *al.*, ) FIFTH APPELLATE DISTRICT  
 ) COURT OF APPEALS  
 Appellant/Cross Appellee. ) CASE NO. 2007-CT-0022

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MEMORANDUM IN RESPONSE TO CROSS APPEAL  
OF APPELLEE/CROSS APPELLANT'S MEMORANDUM  
IN SUPPORT OF JURISDICTION

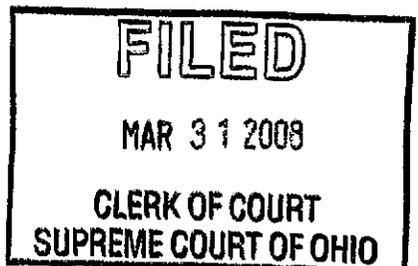
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## INTRODUCTION

The Board timely filed its appeal. The Fifth District Court of Appeals issued its decision on January 3, 2008. Pursuant to S.Ct. R. Prac. II §2(A)(1)(a) and S.Ct. R. Prac. XIV, §3(A), the Board's Notice of Appeal and Memorandum in Support of Jurisdiction were due on or before February 19, 2008.<sup>1</sup> The Board filed its Notice of Appeal and Memorandum in Support of Jurisdiction on February 15, 2008.

The Board mistakenly attached to the Memorandum in Support of Jurisdiction material that should not have been attached. When the mistake was discovered, the Board timely filed an Amended Memorandum in Support of Jurisdiction on February 19, 2008, pursuant to S.Ct. R. XIII, §7.

Revised Code §2125.04 is a specific statute applicable only to wrongful death claims. Revised Code §2305.19 is a general statute applicable to all other claims. It is well settled that a specific statute takes precedence over a general statute. No constitutional issue is involved and this issue is of no general or great public interest.

Moreover, under our system of government, the legislature enacts statutes. Contrary to that system, Appellee/Cross Appellant would have this Court rewrite two statutes. This Court cannot write or rewrite the law to conform to its notion of what the law should be. Therefore, this Court should decline jurisdiction over the propositions of law advanced by Appellee/Cross Appellant.

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<sup>1</sup> February 17, 2008 was forty-five days from January 3, 2008, however, since it was a Sunday and February 18, 2008 was President's Day and the Court was closed, the Notice of Appeal and Memorandum in Support of Jurisdiction were due on February 19, 2008.

## STATEMENT OF FACTS

Appellee/Cross Appellant alleges that Joshua M. Eppley was placed in the care of the Board, “through its employees, who recklessly, wantonly, and willfully engaged in conduct which caused harm to Joshua M. Eppley ... when they allowed Corey W. Jenkins to remove him from the premises without the authority of [Joshua M. Eppley’s] parents. Subsequently, while in the custody of Corey W. Jenkins, Corey W. Jenkins crashed his vehicle killing Joshua.”  
Complaint, ¶4.

Based on the allegations in the Complaint, including those in ¶4, the record on appeal, the Appellate Briefs filed by the parties and the arguments of counsel, the Fifth District Court of Appeals found that:

Appellees argue Joshua’s death was caused by the negligent operation of a motor vehicle, but the operator of the motor vehicle was not one of the Board’s employees. The Board did not own the road on which the accident occurred, and the accident did not occur on school grounds. Decedent’s death was not caused by a defect on or within the grounds or buildings used by the Board.

Opinion, ¶48. (Emphasis added.)

### ARGUMENT IN OPPOSITION TO APPELLEE/CROSS APPELLANT’S PROPOSITIONS OF LAW

#### 1. Ohio Revised Code §2305.19 Does Not Apply To All Causes Of Action Filed In Ohio Courts.

Wrongful death claims did not exist under the common law. A wrongful death claim is a statutory claim and the statutes applicable to it must be strictly construed and applied. See, *Samonas v. St. Elizabeth Health Center*, 2006 WL 338366, 2006 Ohio 571, Ohio Ap. 7 Dist., Feb. 6, 2006. See, also, *In Re Estate of Taylor*, 2004 WL 2808402, 2004 Ohio 6504, Ohio App. 7 Dist., Dec. 1, 2004, at P23.

Revised Code Chapter 2125 sets forth the procedures for making a wrongful death claim. Revised Code Section 2125.02(D) provides that a civil action for wrongful death shall be commenced within two years after the decedent's death. Revised Code Section 2125.04 permits a wrongful death claim to be dismissed and refiled within one year after the action fails otherwise than upon the merits, if the failure occurs after the time to bring the claim has expired. Otherwise, the refiling must occur before the expiration of the two year period provided in Revised Code Section 2125.02(D).

The version of Revised Code Section 2305.19 upon which Appellee/Cross Appellant mistakenly relied in refiling his Complaint became effective May 31, 2004. Revised Code Section 2305.19, however, does not apply to wrongful death claims. It is a general statute applicable to all other claims.

If a statute conveys a meaning that is clear, unequivocal, and definite, a court must not look any further. When a statute is clear and unambiguous, a court must apply it rather than interpret it. *Columbus City School Dist. Bd. of Edn. v. Wilkins*, 101 Ohio St.3d 112, 2004-Ohio-296, 802 N.E.3d 637, P26. *Specialty Restaurants Corp. v. Cuyahoga Cty. Bd. of Revision*, 96 Ohio St.3d 170, 2002-Ohio-4032, 772 N.E.2d 1165, P11.

Revised Code Sections 2125.02 and 2125.04 are clear and unambiguous. A wrongful death claim must be filed within two years of the date of death. The savings statute, Revised Code Section 2125.04, applies only if a wrongful death claim is filed and dismissed after the time to file it has expired.

Appellee/Cross Appellant is asking this Court to ignore well-settled rules of statutory construction to get the result he wants. This Court cannot do so even if it would like to.

We must follow well-settled principles of statutory interpretation.  
Courts do not have the authority to ignore, in the guise of statutory

interpretation, the plain and unambiguous language of a statute . . . .  
If the language is unambiguous, there is no reason to resort to other  
means of interpretation . . .

The trial court aptly described a major flaw inherent in the savings  
statute. However, the language of the statute is clear . . . . We  
cannot ignore the statute's plain language in an attempt to make it  
better.

*Grubb v. Hollingsworth*, 1992 WL 276547, Ohio App. 12 Dist., 1992, at pages 7 and 8.

The legislature, pursuant to our system of government, enacts the statutes. If this Court  
were to do what Appellee/Cross Appellant requests, this Court would be engaging in the  
legislative function contrary to our constitutional system of government. It is not in the public  
interest for this Court to ignore our system of government and to rewrite statutes with which it  
may disagree or to rewrite statutes to conform to what it, rather than the legislature, thinks the  
law should be.

In our tripartite system of government, the power to make law is  
vested within the legislative and not the judicial branch. No  
legislature, regardless of foresight, can anticipate every situation  
that is likely to arise. Therefore, courts are called upon to interpret  
laws when unique fact patterns are present and not legislate.  
*Seeley v. Expert Inc.* (1971), 26 Ohio St.2d 61, 55 O.O. 2d 120,  
269 N.E.2d 121. It is not the judiciary's function to rewrite laws  
according to what the court perceives as just but to enforce the  
literal writing of the statute whenever possible. *Bd. of Edn. v.*  
*Fulton Cty. Bridget Comm.* (1975), 41 Ohio St.2d 147, 70 O.O. 2d  
300, 324 N.E.3d 566.

*Wright v. State of Ohio* (1990), 69 Ohio App.3d 775, 781, 591 N.E.2d 1279, 1283.

Further, Revised Code Section 2125.04 is a specific statute applicable only to wrongful  
death claims. A specific statute takes precedence over a general statute, such as Revised Code  
Section 2305.19.

If a general provision conflicts with a special or local provision,  
they shall be construed, if possible, so that effect is given to both.  
If the conflict between the provisions is irreconcilable, the special

or local provision prevails as an exception to the general provisions, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Revised Code Section 151. See, *State v. Volpe* (1988), 38 Ohio St.3d 191, 527 N.E.2d 818.

Revised Code Section 2305.19 was amended, effective May 31, 2004. Revised Code Section 2125.04 was amended, effective April, 2005. The legislature did not, however, amend Revised Code Section 2125.04 to make it identical to Revised Code Section 2305.19. Inaction is a factor in ascertaining the manifest intent of the legislature. *State ex rel. Myers v. Chiaramonte* (1976), 46 Ohio St.2d 230, 239, 348 N.E.3d 323, 329. If two statutes are inconsistent, ordinarily the one which is the later declaration of the legislative intent should prevail. *Adkins v. Arnold* (1914), 235 U.S. 417, 35 S.Ct. 118, 59 L.Ed. 294. See, also, Revised Code Section 1.52.

Revised Code Sections 2305.19 and 2125.04 are not inconsistent. Revised Code Section 2305.19 applies to all non-wrongful death claims. Revised Code Section 2125.04 applies only to wrongful death claims. But assuming they are inconsistent, this Court would have to ignore relevant case law and Revised Code Sections 1.51 and 1.52 to obtain the result Appellee/Cross Appellant seeks. It is not in the public interest for this Court to do what Appellee/Cross Appellant proposes. This Court would be creating unpredictability in the law if it were to rewrite Revised Code Section 2125.04 to make it identical to Revised Code Section 2305.19.

Revised Code Sections 2125.02 and 2125.04 are clear and unambiguous. Therefore, they must be applied as written, and as written, they do not save Appellee/Cross Appellant's cause of action. The Fifth District Court of Appeals properly held that Revised Code Section 2125.04 controls over wrongful death actions. Opinion, at ¶22. Its ruling should not be disturbed particularly if doing so would require this Court to ignore well-settled rules of statutory construction and would unnecessarily create unpredictability in the law.

**2. The Effect Of Ohio Revised Code Section 2125.04 Cannot Be Limited To The Substantive Revisions Contained In The 2004 Amendment So As To Avoid A Constitutional Issue.**

Appellee/Cross Appellant in his second proposition of law is merely restating the arguments raised in support of his first proposition of law and is asking this Court to rewrite a statute with which he disagrees.

Appellee/Cross Appellant acknowledges the fact that the two statutes apply to different claims and that they are not the same or have the same effect. Appellee/Cross Appellant speculates that these differences are attributable to a scrivener's error or inadvertent oversight.

The difference between Revised Code Sections 2125.04 and 2305.19 are not due to a scrivener's error, nor is it inadvertent. The difference is what the legislature intended. The simple fact is that the legislature could have amended Revised Code Section 2125.04 when it amended Revised Code Section 2305.19; the legislature could have amended Revised Code Section 2125.04 in April, 2005 to have it read the same as Revised Code Section 2305.19; or if Revised Code Section 2305.19 was truly meant to apply to all claims, including wrongful death claims, the legislature could have repealed Revised Code Section 2125.04 entirely. The legislature chose not to do any of these things.

It is not for this Court to write or rewrite statutes if it disagrees with them. This Court must apply the intent of the legislature as the Fifth District properly did in deciding Appellee/Cross Appellant's second assignment of error.

This Court will not assume the Legislature intended for R.C. 2125.04 to be read other than as it is written, and we will not revise it to mirror the general savings statute.

Opinion, at ¶23. There is no constitutional issue presented by Appellee/Cross Appellant's second proposition of law, nor is the issue one of great or general public interest.

**CONCLUSION**

Appellee/Cross Appellant's propositions of law, if accepted for review and approved by this Court, would create the very unfairness and unpredictability Appellee/Cross Appellant claims to want and value. Appellee/Cross Appellant's propositions of law do not raise a substantial constitutional question nor are they matters of great or public general interest. Therefore, this Court should decline jurisdiction over Appellee/Cross Appellant's Appeal.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing *Memorandum in Response to Cross Appeal of Appellee/Cross Appellant's Memorandum in Support of Jurisdiction* was sent this 27<sup>th</sup> day of March, 2008, via regular U.S. mail, postage-prepaid upon the following:

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