

IN THE SUPREME COURT OF OHIO

Tracy Ruther, Individually and as
Administrator of the Estate of Timothy
Ruther, Deceased,

Plaintiffs/Appellees,

vs.

George Kaiser, D.O., et al.,

Defendants/Appellants.

Case No.

11-0899

On Appeal from the Warren
County Court of Appeals, Twelfth
Appellate District
Case No. CA2010-07-066

**MERIT BRIEF OF APPELLANTS GEORGE KAISER, D.O. AND WARREN
COUNTY FAMILY PRACTICE PHYSICIANS, INC.**

John B. Welch, Esq. (0055337) Counsel of Record
Karen L. Clouse, Esq. (0037294)
Arnold Todaro & Welch Co., L.P.A.
580 Lincoln Park Blvd., Suite 222
Dayton, OH 45429-3493
Phone: (937) 296-1600
Fax (937) 296-1644
Counsel for Defendants-Appellants

John D. Holschuh, Jr., Esq. (0019327)
Sarah Tankersley, Esq. (0068856)
Santen & Hughes
600 Vine Street, Suite 2700
Cincinnati, OH 45202
Phone: 513-721-4450
Fax: 513-721-0109
Counsel for Plaintiff-Appellee

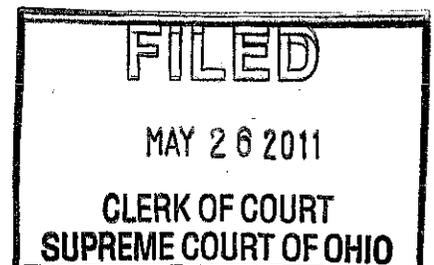


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION AND QUESTION OF GREAT PUBLIC AND GENERAL INTEREST ARE PRESENTED	1
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	4
LAW AND ARGUMENT.....	5
 <u>Proposition of Law No. I:</u>	
The medical malpractice statute of repose contained in O.R.C. §2305.113(C) does not violate the open courts provision (Section 16, Article I) and is therefore constitutional.....	
A. Ohio’s statute of repose as applied does not bar appellees from pursuing a vested right.....	6
B.. The medical malpractice statute of repose like others upheld as constitutional, properly strikes a balance between the rights of claimants and defendants.....	8
C. The legislative adoption of a medical malpractice statute of repose is consistent with the position taken by a majority of states.....	13
CONCLUSION.....	14
PROOF OF SERVICE.....	16
APPENDIX	<u>Appx. Page</u>
Opinion of the Warren County Court of Appeals (April 11, 2011).....	1
Judgment Entry of the Warren County Court of Appeals (April 11, 2011).....	11

	<u>Page</u>
<u>CASES:</u>	
<i>Aicher v. Wisconsin Patients Compensation Fund</i> , 237 Wis.2d 99, 613 N.E.2d 849 (2000).....	13, 14
<i>Arbino v. Johnson & Johnson</i> , 2007-Ohio-6948	11
<i>Baird v. Loeffler</i> (1982), 69 Ohio St.2d 533, 453 N.E.2d 192.....	7
<i>Choroszy v. Tso</i> , 647 A.2d 803 (Me.1992).....	13
<i>Cook v. Matvejs</i> (1978), 56 Ohio St.2d 234, 383 N.E.2d 601	7
<i>Dewey v. Schendt</i> , 246 Neb. 573, 520 N.E.2d 541 (1994).....	14
<i>Dunn v. St. Francis Hospital, Inc.</i> (Del. 1982), 401 A.2d 77	10, 13
<i>Gaines v. Pre-Term Cleveland, Inc.</i> (1987), 33 Ohio St.3d 54.....	10
<i>Goldman v. Johnson Memorial Hospital</i> , 785 A.2d 234 (Conn. App. 2001).....	13
<i>Gregory v. Flowers</i> (1972), 32 Ohio St.2d 48, 290 N.E.2d 181.....	7
<i>Groch v. General Motors Corporation</i> , 117 Ohio St.3d 192, 2008-Ohio-546.....	8, 9, 10, 12
<i>Hardy v. Vermuelen</i> , 32 Ohio St.3d 45, 512 N.E.2d 626 (1997).....	1, 8, 9
<i>Hill v. Fitzgerald</i> , 304 Md.689, 501 A.2d 27 (1985).....	14
<i>Lima v. State</i> , 117 Ohio App.3d 744, 2007-Ohio-6419 at ¶8-9.....	5
<i>McClure v. Alexander</i> , 2008-Ohio-1313	9
<i>Nickell v. Leggett and Platt, Inc.</i> , 2008-Ohio-5544 at ¶5	8, 9
<i>Oliver v. Kaiser Community Health Foundation</i> , 5 Ohio St.3d 111, 449 N.E.2d 438 (1983).....	1, 7
<i>Owen v. Wilson</i> , 286 Ark. 21, 537 S.W.2d 543 (1976)	14
<i>Plummer v. Gillieson</i> , 44 Mass. App. Ct. 587, 692 N.E.2d 582 (1998)	14
<i>Pratte v. Stewart</i> , 2010-Ohio-1860.....	11, 12, 13

<i>Proctor v. Kardassilaris</i> , 115 Ohio St.3d 71 (Ohio 2007), at ¶12, 17-19	6
<i>Sills v. Oakland General Hospital</i> , 220 Mich. App. 303, 559 N.W.2d 348 (1997).....	14
<i>State v. Perry</i> (2008), 8 th Dist. No. 89819, 2008-Ohio-2368 at ¶22	5, 6
<i>Stephens v. Snyder Clinical Association</i> , 230 Kan. 115; 631 P.2d 222 (KS 1981).....	14

CIVIL RULES:

Ohio Rules of Civil Procedure §2305.10	9
Ohio Rules of Civil Procedure §2305.11	10
Ohio Rules of Civil Procedure §111(C).....	11
Ohio Rules of Civil Procedure §2305.113	12
Ohio Rules of Civil Procedure §2305.113(C).....	1, 3, 4, 5, 6, 9, 15
Ohio Rules of Civil Procedure §2305.113(E)(3).....	6
Ohio Rules of Civil Procedure §2305.116.....	6

OHIO CONSTITUTION

Section 16, Article I.....	1, 5, 7, 10
----------------------------	-------------

EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION AND QUESTION OF GREAT PUBLIC AND GENERAL INTEREST ARE PRESENTED

This case concerns the constitutionality of the medical malpractice statute of repose contained in O.R.C. §2305.113(C) which has not been considered by this Court since it was enacted by the legislature in 2003. In addition to presenting a constitutional question, great public and general interest questions are also presented, as statutes of repose remain a topic of great debate among legislatures, courts, and the public, not only in this state but throughout the country. The competing concerns of permitting plaintiffs adequate opportunity to bring their claims, requiring defendants to maintain records and other evidence for a reasonable period of time beyond which they may be free from the risk of litigation, and permitting the courts to try cases while memories are fresh, evidence remains available and standards remain unchanged are all interests which must be balanced in determining an appropriate statute of repose.

The lower courts held that O.R.C. §2305.113(C) was unconstitutional as applied because it barred the appellees' claim after it had vested but before they could reasonably have known about the claim in violation of the right to a remedy provision of Section 16, Article I of the Ohio Constitution. Thus, the lower courts concluded that, as applied to the facts of this case, the new statute of repose suffered the same constitutional infirmities as the prior statute of repose found unconstitutional in *Hardy v. Vermuelen*, 32 Ohio St.3d 45, 512 N.E.2d 626 (1997). However, this Court in *Hardy* emphasized that the statute of repose was unconstitutional only to the extent that it divested a plaintiff of a vested right.

If a plaintiff's cause of action has not accrued, no vested cause of action exists. Since *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St.3d 111, 449 N.E.2d 438 (1983), this Court has said that a cause of action for a medical malpractice accrues and the statute of

limitation commences to run when a patient discovers or in the exercise of reasonable care and diligence should have discovered the resulting injury. By that definition, appellees' cause of action for medical malpractice never accrued until after the statute of repose barred that claim. Since the cause of action had not accrued, it was not a vested right and it is not an unconstitutional application of the statute of repose in this case to bar that medical negligence claim.

Timothy Ruther was treated by Dr. Kaiser and his practice from 1995 until 1998, with the group last receiving records from other providers concerning Mr. Ruther's care in the year 2000. Mr. Ruther was diagnosed with liver cancer in 2008 and died of that condition in 2009, shortly after filing suit. The allegation in the lawsuit is that certain lab tests ordered by Dr. Kaiser's practice contained elevated liver enzymes which purportedly should have led to further testing and earlier diagnosis of liver cancer.

Had Mr. Ruther bought a product in 1995 which injured him in 2008 or contracted for services in his home in 1995 which proved to be defective and caused an injury in 2008, applicable and constitutional statutes of repose would bar those claims. However, appellees maintain that because Mr. Ruther received medical services in 1995 – 1998 which they now allege were provided negligently, the statute of repose should not bar them from maintaining a cause of action for his injuries.

It is a substantial constitutional question whether the statute of repose unconstitutionally bars appellees' claim. Although the lower courts have framed this as an "as applied" decision, it simply cannot be the case that the lower courts can selectively determine when a statute is "unconstitutional" while otherwise technically leaving the law on the books for potential future application. Such a decision leaves future plaintiffs and defendants at a

loss as to when the statute does and does not apply. For that reason, this case also presents a question of great public and general interest as the lower courts, plaintiffs, and defendants must know when statutes of repose apply.

If statutes of repose are constitutional in product liability, construction, and other tort litigation, as they have recently been found to be, it is of great public and general interest that this Court hear this case and determine the constitutional and public interest issues it presents in the medical malpractice arena.

STATEMENT OF THE CASE

This appeal arises out of a medical negligence and wrongful death action filed in the Court of Common Pleas of Warren County, Ohio. On May 21, 2009, Plaintiffs-Appellees, Timothy and Tracy Ruther filed a Complaint against Defendants-Appellants George Kaiser, D.O. and Warren County Family Practice Physicians. Shortly after the suit was commenced, Timothy Ruther died on June 22, 2009, and an amended complaint was filed substituting Tracy Ruther as Administrator of the Estate of Timothy Ruther, restating the original claims for malpractice and adding a wrongful death claim. Appellees allege that Appellants failed to properly evaluate and assess certain laboratory results during their treatment of Timothy Ruther in the late 1990's, including elevated liver enzymes, allegedly resulting in Timothy Ruther's eventual death from liver cancer.

Appellants filed a Motion for Summary Judgment on October 12, 2009 on the basis that the Complaint and First Amended Complaint were barred by the statute of repose as contained in O.R.C. §2305.113 as more than ten years elapsed between the date of the alleged malpractice and the date when the suit was filed.

By Decision and Entry dated June 21, 2010, the trial court denied the Motion for Summary Judgment. The court found that the wrongful death claim was filed within two months of Timothy Ruther's death and was consequently timely. The court further concluded that the statute of repose is unconstitutional as applied to this case as Appellees could not have discovered that malpractice had occurred resulting in Timothy Ruther's injury before the expiration of the statute of repose, such that the statute of repose denied Appellees a remedy. Only the decision regarding the constitutionality of the statute of repose was appealed to the 12th District Court of Appeals which agreed with the trial court that O.R.C. §2305.113(C) is unconstitutional as applied to Appellees and thus upheld the trial court's ruling by decision and entry dated April 11, 2011. (Attached hereto). It is that appellate decision which presents the substantial constitutional question and issues of great public and general interest for this Court's review.

STATEMENT OF THE FACTS

George Kaiser, D.O. is a board certified family practitioner and President of Warren County Family Practice Physicians, Inc. in Lebanon, Ohio. Appellee Tracy Ruther was an employee of Warren County Family Practice for approximately ten years, ending in 2006. Throughout her employment, she and other family members received medical care from physicians at Warren County Family Practice, including Dr. Kaiser.

The decedent, Timothy Ruther, received care and treatment on several occasions at Warren County Family Practice, including two visits on which he was treated by Dr. Kaiser. On October 24, 1995, Dr. Kaiser removed a toenail and on June 9, 1997, Dr. Kaiser saw him to complete a worker's compensation disability form in connection with a work related left knee injury which necessitated arthroscopic surgery (not performed by Dr. Kaiser). The

records from Warren County Family Practice Physicians reflect that Timothy Ruther's other occasional office visits to the practice were with other members of the group, ending with an office visit on April 3, 1998. As reflected in Dr. Kaiser's Affidavit, submitted in connection with his Motion for Summary Judgment, the last communication the office received concerning Timothy Ruther was a courtesy copy of records from Bethesda Hospital concerning his visit to the emergency department on April 11, 2000.

Appellees allege that Dr. Kaiser failed to follow up on allegedly abnormal lab results contained in the group's office chart, dated July 19, 1995, May 27, 1997, and October 21, 1998, none of which correspond to dates when Dr. Kaiser saw Mr. Ruther and none of which were ordered by Dr. Kaiser related to the treatment he provided to Mr. Ruther. Mrs. Ruther alleges that Timothy Ruther continued to receive treatment at Warren County Family Practice Physicians until she left her employment with that group in 2006 despite the fact that there are no records to document any treatment after 1998.

LAW AND ARGUMENT

Proposition of Law: The medical malpractice statute of repose contained in O.R.C. §2305.113(C) does not violate the open courts provision (Section 16, Article I) and is therefore constitutional.

Whether a statute is constitutional is a question that the appellate court reviews *de novo*. *State v. Perry* (2008), 8th Dist. No. 89819, 2008-Ohio-2368 at ¶22. citing *Lima v State*, 177 Ohio App.3d 744, 2007-Ohio-6419 at ¶ 8 – 9. A *de novo* review is performed independently and without deference to the trial court's determination. All statutes are presumed constitutional, such that the party challenging the statute has the burden to prove beyond a reasonable doubt that the statute is not constitutional. The question for the

reviewing court is not the wisdom of the statute or the policy behind it but whether the General Assembly acted within its legislative power. *Perry* at ¶22

This Court's role in reviewing a statute like O.R.C. §2305.113(C) is therefore limited to: (1) ascertaining the meaning of the statute based upon the plain and normal meaning of the language used and; (2) determining whether that meaning is permitted by the state and federal constitution. See, *Proctor v. Kardassilaris*, 115 Ohio St.3d 71 (Ohio 2007), at ¶12, 17 – 19. As will be discussed below, it is important to note that this Court has already determined that statutes of repose are constitutional in other contexts; thus, when construing whether the meaning is permitted by the state and federal constitution, the analysis should yield the result that §2305.113(C) is likewise constitutional.

A. Ohio's statute of repose as applied does not bar appellees from pursuing a vested right

Appellees' claims against Dr. Kaiser and his corporation unquestionably fall within the definition of a medical claim as set forth in O.R.C. §2305.113(E)(3) as "any claim that is asserted in any civil action against a physician...and that arises out of medical diagnosis, care, or treatment of any person". An allegation that Dr. Kaiser failed to acknowledge and follow up on allegedly abnormal lab results falls well within that definition.

A medical claim is subject not only to the statute of limitations but also the statute of repose as set forth in §2305.113(C):

Except as to those persons within the age of minority or of unsound mind as provided in §2305.16 of the Revised Code and except as provided in Division (D) of this section, both of the following apply: ~~(1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.~~ (2) **If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the act or omission constituting**

the alleged basis of the medical, dental, optometric, or chiropractic claim, then, **any action upon that claim is barred.** (Emphasis added)

In this case, the latest lab report upon which Dr. Kaiser should allegedly have taken some action was **October 21, 1998**. Thus, pursuant to the Revised Code, Appellees had four years from that date to commence their medical negligence action against Dr. Kaiser.

In Ohio, a cause of action for a medical malpractice does not accrue until the patient discovers, or in the exercise of reasonable care and diligence should have discovered the resulting injury. See *Oliver* at Syllabus. This Court has long held that only accrued causes of action are vested, substantive rights. *Gregory v. Flowers* (1972), 32 Ohio St.2d 48, 290 N.E.2d 181; *Cook v. Matvejs* (1978), 56 Ohio St.2d 234, 383 N.E.2d 601; *Baird v. Loeffler* (1982), 69 Ohio St.2d 533, 453 N.E.2d 192. Until a cause of action accrues, the party does not have a vested property right in that cause of action. To hold otherwise would lead to the conclusion that no change could ever be made in a common law cause of action such as for medical negligence. No statute of limitations could be enacted that did not exist at common law, no limitation on damages such as those that have recently been upheld and certainly no statute of repose could ever withstand constitutional scrutiny under the right to a remedy analysis whether it be four years, fourteen years, or forty years. Regardless of the period of repose granted by statute, if an alleged injury has not been discovered within that time, under the lower courts' analysis, the argument would be that the injured party is denied access to the courts to pursue a remedy.

The lower courts concluded that the statute of repose is unconstitutional as applied to this case because it barred appellee's claim after it had vested "but before she or the decedent knew or reasonably could have known about the claim" in violation of the right to a remedy provision of Section 16, Article I of the Ohio Constitution. (Decision at ¶ 38). This analysis

is flawed because Timothy Ruther's cause of action did not accrue until 2008 when he discovered he had liver cancer, until that discovery, he had no vested right. Thus, the statute of repose did not divest him of a vested right and is not unconstitutional in its application.

As noted, any constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation, and it is not a court's duty to assess the wisdom of a particular statute. *Nickell v. Leggett and Platt, Inc.*, 2008-Ohio-5544 at ¶ 5 citing *Groch v. General Motors Corporation*, 117 Ohio St.3d 192, 2008-Ohio-546. Because legislative enactments are presumed constitutional, it must appear beyond reasonable doubt that the legislation and constitutional provisions are clearly incompatible before a court may declare the legislation unconstitutional. *Nickell at ¶ 17*. Rather than attempting to reconcile the statute and constitution, the lower courts looked only to the similarities of the new statute and the prior statute found unconstitutional in *Hardy*. This is not the analysis used to determine whether a statute is unconstitutional.

This Court in *Hardy* concluded that the prior statute of repose was unconstitutional because it violated the open courts provision of the Ohio Constitution and denied the Plaintiff a "right to a remedy". While disapproving of that particular statute, the Court in *Hardy* recognized that the common law was not immutable such that the legislature can and should adapt the common law to changing circumstances. 32 Ohio St.3d at 49. In applying that analysis to the new statute of repose, the legislature adopted an appropriate balance between the rights of plaintiffs and defendants and as applied in this case did not divest the Ruthers of a vested cause of action.

B. The medical malpractice statute of repose like others upheld as constitutional, properly strikes a balance between the rights of claimants and defendants

Since Hardy, there have been multiple constitutional challenges to the tort reform legislation enacted by the Ohio Legislature in 2003 and 2005, including challenges to the statutes of repose contained in those tort reform bills. Until now, the courts have upheld those statutes of repose against constitutional challenges without exception. In Nickell the 12th District Court of Appeals upheld the statute of repose for wrongful death claims arising from product liability against constitutional challenges. That court relied upon this Court's holding in Groch, which found the product liability statute of repose contained in §2305.10 to be constitutional. In McClure v. Alexander, 2008-Ohio-1313, the real property improvement statute of repose was upheld against constitutional challenge. In McClure, the court acknowledged that the facts of the case illustrated the validity of the legislature's concern regarding stale litigation. The case involved a home addition which was completed fifteen years before the Plaintiff discovered the defect. The contractor was deceased which further made defense of the claim problematic. The legislative history regarding the ten year statute of repose for improvements to real property included the General Assembly's concerns regarding the availability of witnesses and evidence and the difficulty in maintaining records for greater than ten years.

The legislative history of §2305.113(C) illustrated that the legislature recognized similar concerns in the enactment of the four year statute of repose for medical negligence claims:

(6)(a) That a statute of repose on medical, dental, optometric, and chiropractic claims strikes a rational balance between the rights of prospective claimants and the rights of hospitals and healthcare practitioners. (b) Over time the availability of relevant evidence pertaining to an incident and the availability of witnesses knowledgeable with respect to the diagnosis, or treatment of a prospective claimant becomes problematic. (c) The maintenance of records and other documentation related to the delivery of medical

services, for a period of time in excess of the time presented in the statute of repose, presents an unacceptable burden to hospitals and healthcare practitioners. (d) Over time, the standards of care pertaining to various healthcare services may change dramatically due to advances being made in healthcare, science, and technology, thereby making it difficult for expert witnesses and triers of fact to discern the standard of care relevant to the point in time when the relevant healthcare services were delivered. (e) This legislation precludes unfair and unconstitutional aspects of state legislation but does not affect timely medical malpractice actions brought to redress legitimate grievances. (f) This legislation addresses the aspect of current division (B) of §2305.11 of the Revised Code, the application of which was found by the Ohio Supreme Court to be unconstitutional in *Gaines v. Pre-Term Cleveland, Inc.* (1987), 33 Ohio St.3d 54. In *Dunn v. St. Francis Hospital, Inc.* (Del. 1982), 401 A.2d 77, the Delaware Supreme Court found the Delaware three year statute of repose constitutional as not violative of the Delaware constitution's open court provision.

In *Groch*, this Court reiterated that the right to a remedy provision of Section 16, Article 1 of the Ohio Constitution only applies to existing, vested rights and it is state law which determines what injuries are recognized and what remedies are available. *Groch at ¶ 119*. The Court found that the ten year statute of repose did not offend the Open Courts' provision because a claim never vests if the product allegedly causing an injury is not delivered to the end user more than ten years before the injury occurred. Thus, the cause of action never accrues against the manufacturer or supplier of the product and never becomes a vested right. In that same way, Appellees' claim against Dr. Kaiser never became a vested right as his cause of action did not accrue until discovery which was more than four years after the event at issue, i.e. the abnormal lab tests which allegedly should have given rise to treatment.

A Plaintiff cannot use discovery of injury as both a shield and a sword, arguing for statute of limitations purposes that the cause of action does not accrue until there is discovery of the resulting injury but arguing for statute of repose purposes that late discovery cannot bar a cause of action. A defendant is entitled to a degree of certainty as to when a claim can be

brought against him and a point in time at which stale claims can no longer be pursued. The statute of limitations and statute of repose balance the interests of plaintiffs in being granted a reasonable period of time to discover and pursue their claims with those of defendants in being granted closure or repose after a reasonable time.

In Arbino v. Johnson & Johnson, 2007-Ohio-6948, this Court upheld multiple provisions of the tort reform statutes. The Court noted that the General Assembly must be able to make policy decisions to achieve a public good. Arbino at ¶ 61. The open courts provision requires only that an opportunity be granted at a meaningful time and in a meaningful way. Arbino at ¶ 44.

A prospective Plaintiff in a medical negligence action is typically granted only one year to pursue a claim. The statute of repose grants a prospective Plaintiff four years to pursue that claim. The legislature has consequently given a prospective Plaintiff a meaningful opportunity to pursue a claim. No statute of repose will give every prospective Plaintiff an opportunity to pursue a claim, but the legislature struck a reasonable balance between the rights of prospective claimants and the rights of prospective Defendants to have protection from litigation and an end to stale litigation.

In Pratte v. Stewart, 2010-Ohio-1860, this Court rejected the notion that the twelve year statute of limitations contained in O.R.C. §2305.111(C), which does not contain explicit discovery tolling provision, unconstitutionally infringed upon the open courts provision. That statute provides that the cause of action for victims of childhood sexual abuse accrues on the date when the victim reaches the age of majority. The Plaintiff failed to bring the cause of action within twelve years of the date on which she turned eighteen; she claimed to have had repressed memories such that she did not discover the abuse within twelve years. This Court

upheld the dismissal of the Plaintiff's claim, concluding that the Plaintiff did not have a vested right, despite the fact that she had been injured as a child, and did not "discover" or remember those injuries until later in life. The Court affirmed the position that it had taken in Groch regarding the statute of repose in stating "this Court would encroach upon the legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the legislature rejects some cause of action currently preferred by the courts...such a result would offend our notion of the checks and balances between the various branches of government, and the flexibility required for the healthy growth of the law." Pratte at ¶ 117 citing Groch at ¶ 118.

This Court in Pratte recognized this important gatekeeping function served by statutes of limitations, including fairness to the defendant, prompt prosecution of a claim, suppressing stale claims, and avoiding the inconveniences of delay. Pratte at ¶42. Those same gatekeeping functions are inherent in the statute of repose contained in O.R.C. §2305.113 and are in fact delineated by the General Assembly in its findings of fact. The legislature attempted to and did strike an appropriate balance by providing prospective Plaintiffs a four year statute of repose, rather than the normal one year statute of limitations in which to present their claims. This ensures fairness to the Defendant as well as to a Plaintiff who for some reason might not be able to present a claim within the normal one year statute of limitations. This nonetheless encourages prompt prosecution of causes of action while suppressing stale or fraudulent claims and avoiding the difficulties of proof in old and stale claims. Just as the plaintiff in Pratte had no vested right in her cause of action, Timothy Ruther had no vested right to his cause of action. In both cases, specific events define accrual of the cause of action; until then, no vested right exists despite the fact that an injury may have occurred (i.e., alleged

sexual abuse or alleged medical negligence). Thus, just as the statute of limitations did not divest the plaintiff of a vested right in *Pratte*, application of the statute of repose did not divest Timothy Ruther of a vested right. Consequently, the lower courts erred in finding the statute of repose unconstitutional and thereby denying Appellants' motion for summary judgment.

C. The legislative adoption of a medical malpractice statute of repose is consistent with the position taken by a majority of states

More than half the states throughout the country have adopted and upheld medical negligence statutes of repose. For example, the Ohio General Assembly relied upon *Dunn v. St. Francis Hospital, Inc.* 401 A.2d 77 (Del. 1979) which upheld a three-year statute of repose for medical negligence claims in addition to its general two-year statute of limitations for medical negligence. As that Court found, the statute of repose is a limited extension beyond the statute of limitations designed to give consideration to the problem of an injury which is not physically ascertainable during the initial two-year statute of limitations provide by Delaware law. The Delaware Supreme Court rejected the argument that the statute of repose violated the open courts provision of the Delaware constitution; the test for constitutionality is whether the time period is so short as to amount to a denial of the right itself which the court concluded that it did not. The court recognized that statutes of limitations are by definition arbitrary but concluded that society is best served by complete repose after a certain number of years, even if "a few unfortunate cases" are sacrificed. 401 A.2d at 81. At some point, a final cut-off is necessary regardless of a patient's knowledge. The court noted that it is for the legislature, not the court to determine that timeframe.

Among the other states finding their statutes of repose to be constitutional are Connecticut, *Goldman v. Johnson Memorial Hospital*, 785 A.2d 234 (Conn. App. 2001); Maine, *Choroszy v. Tso*, 647 A.2d 803 (Me. 1992); Wisconsin, *Aicher v. Wisconsin Patients*

Compensation Fund, 237 Wis.2d 99, 613 N.W.2d 849 (2000); Michigan, *Sills v. Oakland General Hospital*, 220 Mich. App. 303, 559 N.W.2d 348 (1997); Arkansas, *Owen v. Wilson*, 286 Ark. 21, 537 S.W.2d 543 (1976); Kansas, *Stephens v. Snyder Clinical Association*, 230 Kan. 115; 631 P.2d 222 (KS 1981); Massachusetts, *Plummer v. Gillieson*, 44 Mass. App. Ct. 587, 692 N.E.2d 582 (1998); Nebraska, *Dewey v. Schendt*, 246 Neb. 573, 520 N.W.2d 541 (1994); and Maryland, *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985). The consistent theme of these cases is that statutes of repose do not violate constitutional guarantees of a right to a remedy, equal protection or due process.

A plaintiff's right to a remedy requires a meaningful time and opportunity to present a claim, not an opportunity, in perpetuity to present a claim. A statute of repose that provides a reasonable amount of time for a plaintiff to present a claim strikes a reasonable balance between a claimant's right to pursue a claim and the rights of defendants and the judicial system to be free of stale and potentially fraudulent claims as well as eliminating the difficulties presented by litigating stale claims due to lost evidence and missing witnesses. The courts in other states have recognized the importance of balancing these competing interests as the legislature did in enacting the Ohio medical malpractice statutes of repose. The courts in other states recognized in upholding medical malpractice statutes of repose, as this Court has recognized in upholding other statutes of repose, that there is a rational basis for such a statute of repose and that every presumption must be given in favor of the constitutionality of statutes enacted by the legislature.

CONCLUSION

Defendants-Appellants George Kaiser, D.O. and his corporation appropriately moved for summary judgment on the basis that Appellees' claims for medical negligence were barred

by the statute of repose. However, the lower courts erroneously concluded that O.R.C. 2305.113(C) was unconstitutional as applied to this case and therefore denied summary judgment. The overwhelming weight of authority both in Ohio and from around the country supports the constitutionality of statutes of repose in general and the constitutionality of this statute of repose enacted by the legislature in 2003. The legislature specifically addressed and remedied concerns which the this Court had identified with Ohio's prior medical malpractice statute of repose. The current statute of repose is in all respects constitutional such that this Court must overturn the decisions of the lower courts which found that the statute was unconstitutional as applied, find that the statute is constitutional in all respects, and order summary judgment in favor of Defendants-Appellants on appellees' medical malpractice claims.

Respectfully submitted,

ARNOLD TODARO & WELCH CO., L.P.A.

By: _____


John B. Welch (0055337)

Karen L. Clouse (0037294)

580 Lincoln Park Blvd., Suite 222

Dayton, OH 45429-3493

jwelch@arnoldlaw.net

Phone (937) 296-1600

Fax (937) 296-1644

Counsel for Defendants-Appellants George

Kaiser, D.O. and Warren County Family Practice

Physicians, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon all parties or counsel of record by regular U.S. mail, postage prepaid, this

20th day of May, 2011.

John D. Holschuh, Jr., Esq.
Sarah Tankersley, Esq.
Santen & Hughes
600 Vine Street, Suite 2700
Cincinnati, OH 45202
P: 513-721-4450
F: 513-721-0109
SBT@santen-hughes.com
Counsel for Plaintiff-Appellee

Robert Eskridge III, Asst. Attorney General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
P: 614-466-2872
F: 614-728-7592
Counsel for Attorney General, State of Ohio



Karen L. Clouse



IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

TRACY RUTHER, Individually and :
Administrator of the Estate of Timothy :
Ruther, : CASE NO. CA2010-07-066
 :
Plaintiff-Appellee, : OPINION
 : 4/11/2011
- vs - :
GEORGE KAISER, D.O., et al., :
 :
Defendants-Appellants. :

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09 CV 74405

Santen & Hughes, John D. Holschuh, Jr., Sarah Tankersley, 600 Vine Street, Suite 2700,
Cincinnati, Ohio 45202, for plaintiff-appellee

Arnold Todaro & Welch Co., L.P.A., Karen L. Clouse, John B. Welch, 580 Lincoln Park Blvd.,
Suite 222, Dayton, Ohio 45429, for defendants-appellants, George Kaiser, D.O. and Warren
County Family Practice Physicians, Inc.

Richard Cordray, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio
43215, pro se

BRESSLER, P.J.

{¶1} Defendants-appellants, George Kaiser, D.O. and the Warren County Family
Practice Physicians, appeal the decision of the Warren County Court of Common Pleas
denying appellants' motion for summary judgment and finding that a portion of R.C. 2305.113

is unconstitutional as applied to plaintiff-appellee, Tracy Ruther, individually and as administrator of the estate of Timothy Ruther, in a wrongful death and medical malpractice action.

{¶2} This matter is a medical malpractice action filed by appellee and Timothy Ruther ("decendent") against appellants, which arose out of medical treatment decendent received. Before decendent's death, appellee and decendent filed a complaint alleging that appellants were negligent and deviated from the standard of care by failing to properly assess, evaluate, and respond to abnormal laboratory results.

{¶3} While decendent was a patient of Kaiser, decendent had lab work performed on ~~July 19, 1995, May 27, 1997, and October 21, 1998.~~ Each of these tests revealed decendent had significantly elevated liver enzyme levels, but Kaiser did not notify decendent of these abnormalities.

{¶4} In late 2008, after decendent ceased being a patient of Kaiser, decendent began to experience abdominal pain. On December 22, 2008 decendent was diagnosed with a liver lesion and hepatitis C, and on December 30, 2008 he was diagnosed with liver cancer. Based on decendent's affidavit, it was around this time that he became aware of his lab results from 1995, 1997, and 1998.

{¶5} On May 21, 2009, decendent and his family filed a complaint against appellants for medical malpractice. Decendent died approximately one month later, and appellee amended the complaint to add a wrongful death claim.

{¶6} Appellants moved for summary judgment on both claims. The trial court granted summary judgment to appellants as to the wrongful death claim, which has not been appealed. However, the trial court overruled appellants' motion with respect to the medical malpractice claim, and further found that Ohio's statute of repose for medical malpractice claims contained in R.C. 2305.113(C) is unconstitutional as applied to appellee. Appellants

appeal the trial court's decision and raise the following assignment of error.

{¶7} "THE TRIAL COURT ERRED IN DECLARING THE STATUTE OF REPOSE CONTAINED IN [R.C.] 2305.113(C) UNCONSTITUTIONAL AND CONSEQUENTLY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT."

{¶8} Appellants argue that the trial court erred in finding that the statute of repose contained in R.C. 2305.113(C) is unconstitutional as applied to appellee. Further, appellants argue that this statute applies to appellee and bars her claims.

{¶9} Initially, we note that pursuant to R.C. 2505.02(B)(6), this matter is a final appealable order. R.C. 2505.02(B)(6) provides, "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: * * * [a]n order determining the constitutionality of any changes to the Revised Code made by * * * the enactment of section[] 2305:113 * * * Revised Code."

{¶10} "Any constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation, and the understanding that it is not [a] court's duty to assess the wisdom of a particular statute." *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶141. "The only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 456, 1999-Ohio-123, quoting *State ex rel. Bowman v. Allen Cty. Bd. of Commrs.* (1931), 124 Ohio St. 174, 196. "It is axiomatic that all legislative enactments enjoy a presumption of constitutionality." *State v. Dorso* (1983), 4 Ohio St.3d 60, 61.

{¶11} ~~Because enactments of the General Assembly are presumed constitutional,~~ "before a court may declare [one] unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Woods v. Telb*, 89 Ohio St.3d 504, 510-11, 2000-Ohio-171, quoting *State ex rel. Dickman v. Defenbacher*

(1955), 164 Ohio St. 142, paragraph one of the syllabus. "[T]he party challenging the constitutionality of a statute bears the burden of proving the unconstitutionality of the statute beyond a reasonable doubt." *Woods* at 511, citing *State v. Thompkins*, 75 Ohio St.3d 558, 560, 1996-Ohio-264.

{¶12} A statute may be challenged as unconstitutional on its face or as applied to a particular set of facts. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334 ¶37, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph four of the syllabus. The party who makes an as applied constitutional challenge "bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statute * * * unconstitutional and void when applied to those facts." *Harrold* at ¶38, citing *Beldon* at paragraph six of the syllabus. "In an as applied challenge, the party challenging the constitutionality of the statute contends that the 'application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative.'" *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, ¶14, quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists* (1992), 506 U.S. 1011, 113 S.Ct. 633. (Some internal quotations omitted.)

{¶13} In finding that R.C. 2305.113(C) is unconstitutional as applied to appellee, the trial court examined the previous version of Ohio's Statute of Repose, which was found to be unconstitutional as applied to the plaintiff in *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45. The trial court concluded that "[i]n essence, the amended statute of repose is functionally identical to the former statute. The statute continues to deny a plaintiff a remedy for the injury and malpractice that occurred within the four-year statute of repose, even though [the injury] could not [have been] discovered within that time frame."

{¶14} The prior version of Ohio's Statute of Repose, which the Ohio Supreme Court found to be unconstitutional in *Hardy*, 32 Ohio St.3d 45, provided in R.C. 2305.11(B)(2):

{¶15} "Except as to persons within the age of minority or of unsound mind, as provided by section 2305.16 of the Revised Code:

{¶16} "In no event shall any action upon a medical, dental, optometric, or chiropractic claim be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.

~~{¶17} "If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, notwithstanding the time when the action is determined to accrue under division (B)(1) of this section, any action upon that claim is barred."~~

{¶18} The currently enacted version of Ohio's Statute of Repose for bringing a medical claim is in R.C. 2305.113(C), which provides in relevant part:

{¶19} "Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply:

{¶20} "(1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.

~~{¶21} "(2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred."~~

{¶22} Article I, Section 16 of the Ohio Constitution provides:

{¶23} "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

{¶24} In *Hardy* at 46-47 the court explained, "[R.C. 2305.11(B)] is not a traditional statute of limitations, since the appellant was not aware of his injury and thus his cause of action was extinguished before he could act upon it. * * * R.C. 2305.11, if applied to those who suffer bodily injury from medical malpractice but do not discover that injury until four years after the act of malpractice, accomplishes one purpose-to deny a remedy for the wrong. In other words, the courts of Ohio are closed to those who are not reasonably able, within four years, to know of the bodily injury they have suffered."

{¶25} The court in *Hardy* continued at 46-47 and stated, "[w]e agree with the reasoning of the Supreme Court of South Dakota in *Daugaard v. Baltic Co-op. Bldg. Supply Assn.* (S.D.1984), 349 N.W.2d 419, 424-425, that a statute such as R.C. 2305.11(B) unconstitutionally locks the courtroom door before the injured party has had an opportunity to open it. When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner."

{¶26} After the Ohio Supreme Court decided *Hardy*, it similarly held in *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 61, that the statute of repose is unconstitutional as applied to litigants who discover malpractice injuries before the four-year repose period expires, but at such a time as affords them less than one full year to pursue their claims pursuant to the statute.

{¶27} However, in *Sedar v. Knowlton Construction Company* (1990), 49 Ohio St.3d 193, the Ohio Supreme Court found that the statute at issue in *Hardy* is actually a statute of

limitation which prevents a plaintiff from bringing suit for an injury that had already occurred, but which had not been discovered prior to the expiration of the statutory period. The statute at issue in *Sedar* was, according to the court, a true "statute of repose" that did not limit an already established or vested right of action, but rather prevented an action from ever accruing. *Id.* at 195. The court in *Sedar* upheld the application of an absolute cut-off for tort claims against certain service providers who performed work related to the design and construction of real property, even though it had previously held in *Hardy* that an absolute cut-off period for claims for medical malpractice actions is unconstitutional because it violates the right-to-remedy guaranteed by the Ohio Constitution. *Id.*

~~{¶28}~~ Later, the Ohio Supreme Court decided *Burgess v. Eli Lilly & Co.*, 66 Ohio St.3d 59, 61, 1993-Ohio-193, in which it held that the General Assembly is constitutionally precluded from eliminating the right to remedy "before a claimant knew or should have known of her injury." In *Burgess*, the court applied the reasoning from *Hardy*, and specifically extended that reasoning to invalidate statutes of repose on all types of claims. Then, in *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 1994-Ohio-322, at paragraph two of the syllabus, the Ohio Supreme Court specifically overruled *Sedar*.

{¶29} More recently, in *Groch*, 2008-Ohio-546, the Ohio Supreme Court reinstated the *Sedar* holding. In doing so, the court stated at ¶153:

{¶30} "Petitioners also cite three cases from 1986 and 1987 in which this court struck down different aspects of a medical-malpractice statute of repose on various grounds and as applied to various factual circumstances—*Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, *Hardy*, 32 Ohio St.3d 45, and *Gaines*, 33 Ohio St.3d 54. However, as explained in *Sedar*, 49 Ohio St.3d at 202, those cases are distinguishable because the medical-malpractice statute of repose interpreted in them took away an *existing, actionable negligence claim* before the injured person discovered the injury (when the injury had already occurred) or gave the

injured person too little time to file suit, and therefore denied the injured party's right to a remedy for those reasons. The three medical-malpractice cases petitioners rely on therefore do not support a contrary result here." (Emphasis added and some citations omitted.)

{¶31} Shortly thereafter, the United States District Court for the Northern District of Ohio analyzed *Groch* in *Metz v. Unizen Bank* (N.D. Ohio 2008), Slip Op. No. 5:05 CV 1510 and stated:

{¶32} "In *Groch*, the Court compared and contrasted the statutes at issue in *Sedar* and those at issue in *Hardy* and other medical malpractice cases; the key distinction being that in *Sedar*, no injury had occurred before the expiration of the statutory limitations period, while in *Hardy*, an injury had occurred, but had not yet been discovered. The Court also revisited the *Brennaman* case, chastising the opinion for its lack of detailed reasoning and overbroad conclusions. Although the *Groch* Court did not overrule the specific finding that the statute at issue in *Brennaman* was unconstitutional, it limited the holding in that case to the specific statute and facts at issue therein.

{¶33} "The *Groch* case did not overrule or cast aspersions on the reasoning behind *Hardy* or the other medical malpractice cases which found the applicable limitations periods to be unconstitutional in those circumstances. Rather, it served to clarify the distinctions between the limitations statutes at issue in those cases and the constitutionally valid limitations periods applicable to the products liability issues in *Groch* and *Sedar*. Therefore, *Hardy*, *Gaines*, *Sedar*, and *Groch* all remain valid precedent under Ohio law." (Footnotes and citations omitted.)

{¶34} In addition, the Ohio Second Appellate District analyzed *Groch* in *McClure v. Alexander*, Greene App. No. 2007 CA 98, 2008-Ohio-1313. In *McClure* at ¶21-22, the court noted that:

{¶35} "With respect to the right-to-a-remedy provision, Sedar argued that the statute of repose violated that provision of the Constitution based on the Court's recent decision regarding the four-year statute of repose for medical malpractice actions in *Hardy* * * *. The *Sedar* court distinguished the issue presented in the medical malpractice cases from the issue presented in *Sedar* as follows: 'Operation of the medical malpractice repose statute takes away an existing, actionable negligence claim before the injured person discovers it. Thus, "it denies legal remedy to one who has suffered bodily injury, * * *" in violation of the right-to-a-remedy guarantee. * * * In contrast, R.C. 2305.131 does not take away an existing cause of action, as applied in this case. "[sic] * * * [I]ts effect, rather, is to prevent what ~~might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten~~ years after the negligent act allegedly responsible for the harm, forms no basis for recovering. The injured party literally has no cause of action. * * * *Sedar*, at 201-02." (Some citations omitted.)

{¶36} Further, in *McClure* at ¶36, the court stated:

{¶37} "In completing its analysis, the [*Groch*] Court noted that the statute before it differed from the statute of repose analyzed in *Sedar* and *Brennaman*, but that it similarly potentially bars a plaintiff's suit before it arises. The statute, therefore, prevents the vesting of a plaintiff's claims if the product that caused the injury was delivered to the end user more than ten years after the plaintiff was injured. This feature of the statute triggers the portion of *Sedar*'s fundamental analysis concerning Section 16, Article I that is dispositive of our inquiry here. Because such an injured party's cause of action never accrues against the manufacturer or supplier of the product, it never becomes a vested right.' [*Sedar*] at ¶149."

{¶38} Based on the above, we agree with the trial court's determination that Ohio's current statute of repose for medical malpractice claims contained in R.C. 2305.113(C) is unconstitutional as applied to appellee. Contrary to appellants' arguments, *Groch* is

distinguishable from this case because it involved a different statute of repose that can potentially bar a claim before the claim vests. However, the medical-malpractice statute of repose in R.C. 2305.113(C), as applied to appellee, bars her claim after it had already vested, but before she or the decedent knew or reasonably could have known about the claim. This is a violation of the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution. While the statute in its current form is not identical to the statute found to be unconstitutional in *Hardy*, the statute in its current form is not substantially different than the one found unconstitutional in *Hardy*. Our holding should not be construed to mean that R.C. 2305.113(C) is facially unconstitutional; rather, we hold only that the statute is unconstitutional as applied to appellee. Accordingly, appellants' assignment of error is overruled.

{¶39} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>



IN THE COURT OF APPEALS

COURT OF APPEALS
WARREN COUNTY
FILED

TWELFTH APPELLATE DISTRICT OF OHIO

APR 11 2011

WARREN COUNTY

James L. Spaeth, Clerk
LEBANON OHIO

701 636

TRACY RUTHER, Individually and
Administrator of the Estate of Timothy
Ruther,

CASE NO. CA2010-07-066

Plaintiff-Appellee,

JUDGMENT ENTRY

- vs -

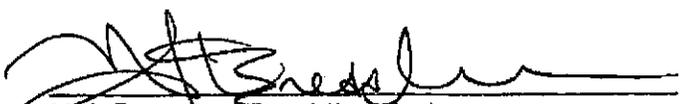
GEORGE KAISER, D.O., et al.,

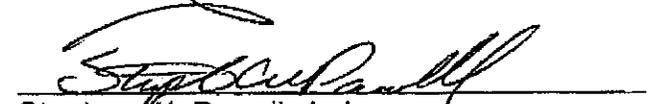
Defendants-Appellants.

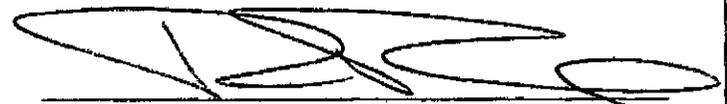
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


H.J. Bressler, Presiding Judge


Stephen W. Powell, Judge


Robert P. Ringland, Judge

