

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

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

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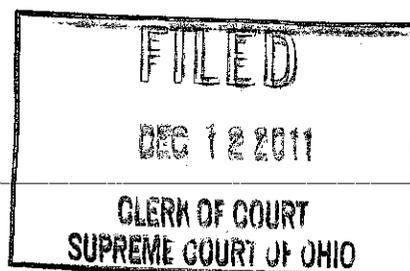


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STATEMENT OF THE CASE

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, 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 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. (See S-1 to S-7)

By Decision and Entry dated June 21, 2010, the trial court denied the Motion for Summary Judgment. (A-16 to A-26) 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 and caused 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 R.C.

§2305.113(C) is unconstitutional as applied to Appellees. The appellate court therefore upheld the trial court's ruling by decision and entry dated April 11, 2011. (A-4 to A-15) Appellants sought review of that Decision by this Court, and this Court accepted jurisdiction of this discretionary appeal by Entry filed September 21, 2011.

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. (S-6) 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. (S-18).

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 various 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. (S-6 to S-7)

Appellees allege that Dr. Kaiser failed to follow up on 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 in connection with 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. (S-18 to S-19)

LAW AND ARGUMENT

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

Whether a statute is constitutional is a question that the appellate court reviews *de novo*. *State v. Perry*, 8th Dist. No. 89819, 2008-Ohio-2368 at ¶22. citing *Lima v State*, 177 Ohio App.3d 744, 2007-Ohio-6419 (3rd Dist.) at ¶ 8 – 9. A *de novo* review is performed independently and without deference to the lower 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

Thus, the constitutionality of a statute like R.C. §2305.113(C), is decided by: (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 constitutions. See, *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872 at ¶12, 17 – 19. Importantly, 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 same reasoning should yield the result that R.C. §2305.113(C) is 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 fall within the definition of a medical claim described in 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 one year statute of limitations contained in R.C. §2305.113(A) but also the four year statute of repose as set forth in R.C. §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) (A-28 to A-29)

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

Statutes of repose have been the subject of considerable discussion 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 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 Article I, Section 16 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. More recently, this Court has found that it is not unconstitutional for a statute of repose to bar a claim which does not vest until after the period provided by the statute of repose has expired. *Groch v. General Motors Corporation*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377.

If a plaintiff's cause of action has not accrued, no vested cause of action exists. This Court has held that a cause of action for a medical malpractice accrues when a patient discovers or in the exercise of reasonable care and diligence should have discovered the resulting injury. See *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St.3d 111, 449 N.E.2d 438 (1983); *Hershberger v. Akron City Hospital*, 34 Ohio St.3d 341, 516 N.E.2d 204 (1987). By that definition, appellees' cause of action for medical malpractice did not accrue until well after the statute of repose barred that claim. Since the cause of action had not

accrued and become a vested right, it is not an unconstitutional application of the statute of repose in this case to bar that medical negligence claim.

In *Hardy*, this court 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 application of the prior 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:

We do not suggest that causes of action as they existed at common law or the rules that govern such causes are immune from legislative attention. ...No one has a vested right in rules of the common law. Rights of property vested under the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will of the legislature unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed and to adapt to new circumstances. *Hardy*, 32 Ohio St.3d at 49 citing *Fassig v. State ex rel Turner*, 95 Ohio St. 232, 248, 116 N.E. 104 (1917).

In his dissent in *Hardy*, Justice Wright recognized that the open courts provision does not provide the right, in perpetuity, to present a claim for injuries. Instead, unless the right is vested or the claim involves a fundamental right, the General Assembly can limit or regulate access to the courts so long as a rational basis exists for that limitation. Justice Wright raised the same questions that the lower courts’ decisions declaring R.C. §2305.113(C) presents today:

Is an undiscovered claim for damages a constitutional right inviolate against legislative limitation as to time constraints? Does Section 16, Article I forever provide a remedy to an as yet undiscovered claim? To suggest, as does the majority, that every common law right is indelibly embedded in the Ohio Constitution and that subjective awareness of a claim is required prior to the abolition of a cause of action is sheer legal fiction. *Hardy* at 55.

Justice Wright noted that the flaw in the majority's reasoning in declaring the prior medical malpractice statute of repose unconstitutional was that the Ohio Constitution, Article I, Section 16 does not provide remedies for any perceived injury but rather provides that the courts shall be open to seek remedy "by due course of law". As Justice Wright noted and as subsequent cases have found, the "due course of law" provision is functionally equivalent to due process of law. Since no vested or fundamental right is involved in determining this question, the due process analysis is performed using a rational basis standard. Under the rational basis standard of review, a statute will be upheld if it is rationally related to a legitimate government purpose and is not unreasonable or arbitrary. *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 503 N.E.2d 717 (1986). The legislative history setting forth the legislature's reasoning in adopting the new medical malpractice statute of repose demonstrates that the statute bears a real and substantial relation to public health, safety, morals, and general welfare of the public and is not unreasonable or arbitrary. Thus, the statute survives not only the open courts challenge but also a due process challenge to constitutionality.

This Court has long held that only accrued causes of action are vested, substantive rights. See *Gregory v. Flowers*, 32 Ohio St.2d 48, 290 N.E.2d 181 (1972); *Cook v. Matvejs*, 56 Ohio St.2d 234, 383 N.E.2d 601 (1978); *Baird v. Loeffler*, 69 Ohio St.2d 533, 453 N.E.2d 192 (1982). 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 *Hardy* court's 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, the argument would be that the injured party is denied access to the courts to pursue a remedy.

In *Groch*, this court reiterated that the right to a remedy provision of Article I, Section 16 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* 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377 at ¶ 119. 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 delivered to the end user more than ten years before the injury occurred. The open courts provision applies only to determining vested rights; *Groch* at ¶ 150. When the cause of action does not accrue against the manufacturer or supplier of the product, it never becomes a vested right and application of the statute of repose does not offend the right to a remedy clause. 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.

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 the Ohio Constitution, Article I, Section 16. (A-15, A-26). This analysis is flawed because Timothy Ruther's cause of action did not accrue until 2008 when he discovered he had liver cancer and that certain previous lab tests detected elevated liver

enzymes; 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 to this case.

As noted, any constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation, regardless of the court's views as to the wisdom of a particular statute. *Nickell v. Leggett and Platt, Inc.*, 12th Dist. No. CA 2008-02-016, 2008-Ohio-5544 at ¶ 5 citing *Groch*. Because legislative enactments are presumed constitutional, it must be concluded 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 constitutional.

In enacting the new statute of repose, the legislature addressed the constitutional infirmities identified by this court in a series of cases including *Hardy*, *Mominee*, and *Gaines v. Pre-Term Cleveland, Inc.*, 33 Ohio St.3d 54, 514 N.E.2d 709 (1987). The new medical malpractice statute of repose provides a four year time within which claims must be brought except for persons within the age of minority or of unsound mind, addressing the concern raised in *Mominee* and eliminates the “gap” found to be constitutionally infirm in claims by patients who discover their injury more than three years but less than four years after the claimed act or omission, allowing in subparagraph (D) for such persons to have one year from the date of discovery. Subsection (D) further provides that patients whose injuries due to a retained foreign object must commence the claim within one year after discovery of the foreign object or not later than one year after a person using reasonable care and diligence should have discovered the foreign object. While the statute of repose still imposes a general

four year limitation for bringing a medical malpractice claim, the legislative history defines a rational basis which balances the rights of prospective plaintiffs and prospective defendants. A plaintiff such as Timothy Ruther whose cause of action does not accrue after the four year statute of repose has expired is not deprived of any vested right. Accordingly, the lower courts erred in finding the statute of repose unconstitutional as applied in this case.

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 various 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 (the same court that has now found the medical malpractice statute of repose unconstitutional) 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 R.C. §2305.10 to be constitutional.

In *McClure v. Alexander*, 2nd Dist. No. 2007 CA 98, 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 by a contractor who had since died, making 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.

Some of those same concerns were reviewed by the legislature in applying R.C. §2305.113(C); the legislation outlined their concerns and the rationale for adopting the new medical malpractice statute of repose in the legislative history of R.C. §2305.113(C):

(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 noted that despite having ruled the previous statute of repose for product liability claims unconstitutional based upon the open courts provision, the current statute passed constitutional muster, when considered "in its own light." *Groch* 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377 at ¶126 – 129. Since the right to a remedy provision applies only to existing, vested rights, this Court held that the statute of repose is not

unconstitutional if it “does not deny a remedy for a vested cause of action but, rather, bars the action before it ever arises.” *Groch* at ¶142. Applying that same reasoning and analysis to the medical malpractice statute of repose, it must similarly be concluded that the statute does not violate a party’s right to a remedy for a cause of action which does not vest until after it is barred by the statute of repose.

As this court recognized in *Groch*, “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.” *Groch* at ¶149. The right to a remedy provision of the Ohio Constitution, Article I, Section 16 protects only vested rights; state law determines the injuries that are recognized and the remedies that are available. *Groch* at ¶150 citing *Sedar v. Knowlton Constr. Co.*, 49 Ohio St.3d 193, 551 N.E.2d 938 (1990). Thus, using the same reasoning that this court applied in *Groch*, Timothy Ruther’s claim never accrued and became a vested right since his injury was not discovered until well after the four year timeframe set forth in the statute of repose had elapsed.

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.

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 to pursue their allegations and the rights of prospective defendants to have protection from litigation and an end to stale litigation.

In *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 (2007), 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. This court accepted the evidence regarding the need to reform civil litigation in Ohio and found that the statutory provisions at issue in *Arbino* bore a rational relationship to the General Assembly's goal of eliminating the uncertainty and subjectivity in the Ohio justice system which was harming the state's economy, with provisions such as the punitive damage statute rationally relating to the general goal of making the justice system more predictable. Those same considerations lead to the conclusion that the medical malpractice statute of repose, which was enacted to provide certainty in the litigation of malpractice claims, likewise withstands constitutional scrutiny.

In *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415 (2010) this court rejected the notion that the twelve year statute of limitations contained in R.C. §2305.111(C), which does not contain an 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 the 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 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 defendants 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.

The plaintiff in *Pratte* lost her ability to pursue her cause of action when she failed to “discover” and file her claim within twelve years of reaching the age of majority which is the statutorily defined date of accrual. Proper application of the statute of repose likewise precludes Timothy Ruther’s claim from being pursued as Appellees did not discover his injury and the cause of action therefore did not accrue or vest until after it was barred by the four year statute of repose. Both circumstances involve alleged injuries which occurred many years before a lawsuit was instituted, with the allegation that discovery did not occur until shortly before the case was filed. Although different statutes are involved, the result is the same in that the cause of action for that stale claim is time barred. 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 the state’s 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 cut off.

The Connecticut statute of repose was upheld against constitutional challenge in *Goldman v. Johnson Memorial Hospital*, 66 Conn. App. 518, 785 A.2d 234 (Conn. App. 2001). The plaintiff in *Goldman* had a lymph node removed from his neck which was found by pathology to be benign; twelve years later, he was diagnosed with Hodgkin’s Lymphoma and re-review of the pathology slides from the initial lymph node removal showed that node to be consistent with Hodgkin’s Disease. The court found that the plaintiff’s malpractice case against the pathologist was barred by Connecticut’s three year statute of repose, concluding that a statute of repose allows people to plan with certainty after a reasonable period of time, knowing that they will be free of the burden of protracted litigation as well as avoiding the evidentiary problems faced by the parties and the courts in establishing older claims. The Connecticut court noted that “statutes of repose are constitutional enactments that involve a balancing of the hardship caused by the potential bar of a just claim with the advantage of barring stale claims. ...When the right exists at common law, the statute of repose functions only as a qualification upon the remedy to enforce the pre-existing right.” 785 A.2d at 244.

Similarly, in *Choroszy v. Tso*, 647 A.2d 803 (Me. 1992) the Maine Supreme Court upheld that statute’s three year statute of repose against constitutional challenge. Although such a statute may cause hardship to individual plaintiffs, the legislature had weighed the

rights of respective parties and concluded that the overall benefit was outweighed by the risk of individual cases where hardship might result to a particular plaintiff. The court noted that “The immunity afforded by a statute of repose is a right which is as valuable to a defendant as a right to recovery of judgment is to a plaintiff; the two are but different sides of the same coin.” 647 A.2d at 807. Further, as the Supreme Court of Kansas noted in upholding that state’s statute of repose in *Stephens v. Snyder Clinical Association*, 230 Kan. 115, 631 P.2d 222 (Kan. 1981), all statutes of limitation are essentially arbitrary and are based on public policy decisions which draw no distinction between just and unjust claims or avoidable versus unavoidable delay. The court describes them as “practical and pragmatic devices to spare the courts from litigation of stale claims and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and the evidence has been lost.” 230 Kan. at 132 citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S. Ct. 1137, 89 L.Ed. 1628 (1945).

Thirty-two states have enacted medical malpractice statutes of repose and at least nineteen of those states have upheld their statutes of repose for medical malpractice cases against constitutional challenges that the statute violated those states’ right to a remedy provision. Aside from the lower court’s opinion finding Ohio’s medical negligence statute of repose unconstitutional, only one other state court has found a medical negligence statute of limitation to be unconstitutional as denying a right to a remedy. *McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15 (Ky. 1990).

Among the other states finding their statutes of repose to be constitutional are Wisconsin, *Aicher v. Wisconsin Patients Compensation Fund*, 237 Wis.2d 99, 613 N.W.2d 849 (Wis. 2000); Michigan, *Sills v. Oakland General Hospital*, 220 Mich. App. 303, 559 N.W.2d

348 (Mich. App. 1997); Arkansas, *Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (Ark. 1976); Massachusetts, *Plummer v. Gillieson*, 44 Mass. App. Ct. 587, 692 N.E.2d 528 (Mass. App. 1998); Nebraska, *Dewey v. Schendt*, 246 Neb. 573, 520 N.W.2d 541 (Neb. 1994); and Maryland, *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (Md. 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 the appropriate 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, that such statutes do not offend the right to a remedy provision 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 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 the medical malpractice statute of repose enacted by the legislature in 2003. The legislature specifically addressed and remedied concerns which 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,

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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

12th day of Dec, 2011.

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Karen L. Clouse

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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.

11-0899

Case No.

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

NOTICE OF APPEAL OF APPELLANTS GEORGE KAISER, D.O. AND WARREN
COUNTY FAMILY PRACTICE PHYSICIANS, INC.

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FILED
MAY 26 2011
CLERK OF COURT
SUPREME COURT OF OHIO

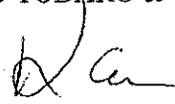
Notice of Appeal of Appellants George Kaiser, D.O. and Warren County Family Practice
Physicians, Inc.

Appellants George Kaiser, D.O. and Warren County Family Practice Physicians, Inc. hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Warren County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals case No. CA2010-07-066 on April 11, 2011.

This case raises a substantial constitutional question and is one of great public or general interest.

Respectfully submitted,

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

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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 25th day of May, 2011.

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Karen L. Clouse



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 - :

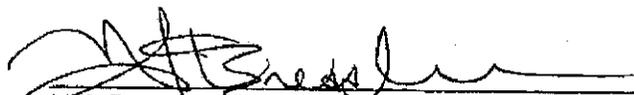
GEORGE KAISER, D.O., et al., :

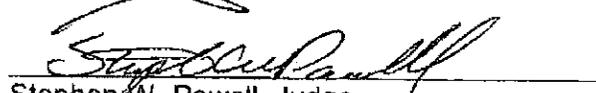
Defendants-Appellants. :

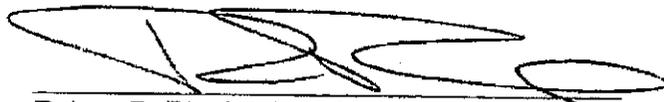
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

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



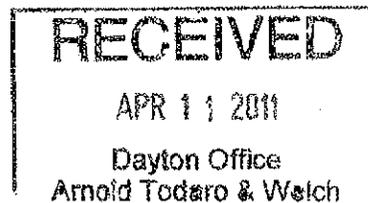
ATTENTION

Please find enclosed a copy of this court's decision in this matter. **The original decision will be officially and publicly released at 9:00 a.m. on April 11, 2011.**

The court is sending you this copy in advance of the official release as a courtesy so that you may review it before either you or the litigants become aware of the court's decision from some other source.

It is anticipated that public comment will not be made prior to the official release of the decision.

The Court of Appeals



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

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

Plaintiff-Appellee,

- vs -

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

Defendants-Appellants.

CASE NO. CA2010-07-066

OPINION
4/11/2011

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

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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 ("decedent") against appellants, which arose out of medical treatment decedent received. Before decedent's death, appellee and decedent 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 decedent was a patient of Kaiser, decedent had lab work performed on ~~July 19, 1995, May 27, 1997, and October 21, 1998.~~ Each of these tests revealed decedent had significantly elevated liver enzyme levels, but Kaiser did not notify decedent of these abnormalities.

{¶4} In late 2008, after decedent ceased being a patient of Kaiser, decedent began to experience abdominal pain. On December 22, 2008 decedent was diagnosed with a liver lesion and hepatitis C, and on December 30, 2008 he was diagnosed with liver cancer. Based on decedent'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, decedent and his family filed a complaint against appellants for medical malpractice. Decedent 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:

Warren CA2010-07-066

{¶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

Warren CA2010-07-066

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>

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IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

Tracy Ruther, Individually and as Administrator of the Estate of Timothy Ruther, Deceased, Plaintiffs	:	CASE NO. 09 CV 74405
	:	JUDGE PEELER
	:	
v.	:	
	:	<u>DECISION AND ENTRY</u>
George Kaiser, D.O., et al, Defendants.	:	<u>DENYING DEFENDANTS'</u>
	:	<u>MOTION FOR SUMMARY</u>
	:	<u>JUDGEMENT</u>

Pending before the Court is the Motion for Summary Judgment of Defendants, George Kaiser, D.O. and Warren County Family Practice Physicians, Ins., on the claims of Plaintiff, Tracy Ruther, Individually and as Administrator of the Estate of Timothy Ruther, Deceased, for medical malpractice and wrongful death. For the reasons set forth below, Defendants' Motion is denied.

The Facts

The relevant facts disclose that Timothy Ruther was a patient of George Kaiser, D.O. ("Dr. Kaiser"). Dr. Kaiser was practicing at Warren County Family Physicians, Inc. ("WCFP"). From 1995 to 1998, Dr. Kaiser ordered lab work done on Ruther, which included tests to determine Ruther's liver enzyme levels. It is disputed when Ruther ceased being a patient of Dr. Kaiser, but it appears to be sometime in or prior to 2006. In 2008, Ruther began suffering abdominal cramps, and later that year he was diagnosed with liver cancer.

In May 2009, Ruther and his wife, Tracy Ruther ("Plaintiff"), filed suit against the Defendants, alleging medical malpractice and loss of consortium. However, Ruther died on

June 22, 2009. Plaintiff then amended the complaint to add a claim for wrongful death.

Plaintiff alleges a claim for medical malpractice against Dr. Kaiser. Specifically, Plaintiff contends that Dr. Kaiser deviated from the accepted standard of care in failing to properly assess, evaluate, and respond to Ruther's abnormal laboratory results, including elevated liver enzymes. Plaintiff further alleges a claim for wrongful death against Dr. Kaiser. Finally, Plaintiff argues that R.C. 2305.113(C) is unconstitutional.

Defendants, on the other hand, argue that Plaintiff's medical malpractice claim is time-barred by statute of limitation set forth in R.C. 2305.113, which they argue is not unconstitutional. Defendant further argues that, since Plaintiff's wrongful death claim arises from the same set of facts and circumstances as the medical malpractice claim, it is also time-barred.

The Summary Judgment Standard

Summary judgment is a procedure for moving beyond the allegations in the pleadings and analyzing the evidentiary materials in the record to determine whether an actual need for a trial exists.¹ "Summary judgment is proper when 1) no genuine issue as to material fact remains to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."² "Regardless of who may have the burden of proof at trial, the burden is upon the party moving for summary judgment to establish that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law."³ "After a proper summary judgment motion has been made, the nonmoving party must supply evidence that a material issue of fact exists, evidence of a

¹ *Ormet Primary Aluminum Corp. v. Employers' Ins. of Wasau* (2000), 88 Ohio St.3d 292, 300.

² *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346.

³ *AAA Enterprises, Inc. v. River Place Comm. Urban Redev. Corp.* (1990), 50 Ohio St.3d 157, paragraph 2 of the syllabus.

possible inference is insufficient.”⁴

Defendants’ Motion for Summary Judgment

1. Wrongful Death

The statute of limitations for a wrongful death claim is governed by R.C. 2125.02, which provides that a wrongful death action must be filed within two years of the date of death of the decedent. In the instant case, Ruther passed away in June 2009. Plaintiff amended the complaint to add a wrongful death claim August 2009, well before the two-year statute of limitations had expired.

Defendant contends that Plaintiff’s claim is a “medical claim,” which falls under the statute of limitations set forth in R.C. 2305.113. Ohio law is clear, however, that claims for medical malpractice and wrongful death are separate and distinct claims.⁵ Wrongful death is a statutory cause of action authorized by R.C. Chapter 2125, which differs from a medical malpractice which is a common law cause of action.⁶

Specifically, the Ohio Supreme Court has held: “Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and the recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong.”⁷

The Third District Court of Appeals expanded the Supreme Court’s holding when it found that, even though the plaintiff’s medical malpractice claim was time-barred, the

⁴ *Cox v. Commercial Parts & Serv.* (1994), 96 Ohio App.3d 417, 421.

⁵ *Koler v. St. Joseph Hosp.* (1982), 69 Ohio St.3d 477, 479, citing *Klema v. St. Elizabeth’s Hosp.* (1960), 170 Ohio St. 519, 521.

⁶ *Id.*

⁷ *Id.*, citing *Klema*, 170 Ohio St. at 521, citing *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U.S. 648.

wrongful death claim had not.⁸ In *McKee*, the decedent contracted silicosis, but failed to file malpractice claim within the then two-year statute of limitations. However, the decedent's administratrix filed a wrongful death action within two years of his death. The Third District upheld the administratrix's wrongful death action as timely filed.⁹

Similarly, the Sixth Appellate District upheld a wrongful death action where the decedent learned he had berylliosis in 1975, passed away in 1987, and his administratrix filed the wrongful death action in 1989.¹⁰ The court held that, although the decedent's medical malpractice claim, filed in 1989, was time-barred, the wrongful death action, filed within two years of the decedent's death, was timely filed.¹¹ "Thus, the *Anderson* court held that the wrongful death claim filed within two years of the decedent's death was not barred due to the decedent's failure to timely pursue his related tort action while he was alive."¹²

Turning back to the case at hand, Plaintiff's wrongful death action is separate and distinct from the medical malpractice claim. Since R.C. 2125.02 provides for the filing of a wrongful death action within two years of the death of the decedent, and Plaintiff amended the complaint two months after Ruther's death, Plaintiff's wrongful death action was timely filed. Defendants' motion for summary judgment on this claim is denied.

2. Medical Malpractice

Defendants argue that R.C. 2305.113 requires a plaintiff to file a medical malpractice claim within four years of the act or occurrence constituting the alleged basis of the medical claim. Defendants contend that since the lab results at issue were available in 1998, and Plaintiff did not file his medical malpractice claim until 2009, Plaintiff's claim is barred by the statute of repose. Plaintiff, on the other hand, contends that the medical malpractice claim is not time-barred because R.C. 2305.113(C) is unconstitutional. Specifically,

⁸ See, *Heck v. Thiem Corp.*, 19.94 Ohio App. LEXIS 5603, at *4, citing *McKee v. New Idea, Inc.* (1942), 44 N.E.2d 697, 717.

⁹ *Id.* at *5.

¹⁰ *Id.* at *6, citing *Anderson v. Brush-Wellman, Inc.* (1991), 77 Ohio App.3d 657.

¹¹ *Id.*

¹² *Id.*

Plaintiff argues that the statute, as applied to this case, is unconstitutional because it bars Plaintiff's claim before it even arose, thus violating the "open court rule."

Section 16, Article 1 of the Ohio Constitution provides, "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." One distinct guarantee contained in this provision is that "all courts shall be open to every person with a right to a remedy for injury to his person, property, or reputation, with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner."¹³

"A party seeking constitutional review of a statute may proceed in one of two ways: present a facial challenge to the statute as a whole or challenge the statute as applied to a specific set of facts."¹⁴ "Statutes which have the effect of denying a remedy to one before it accrues have sometimes been described as statutes of repose and they differ from traditional statutes of limitations which impose a period of time for bringing suit after one's cause of action accrues."¹⁵ The case at hand deals with a challenge to a statute of repose as it is applied to a specific set of facts.

From 1996 to April 11, 2003, R.C. 2305.11(B) governed the time limitations for bringing a medical malpractice claim. R.C. 2305.11(B)(2) stated:

Except as to persons within the age of minority or of unsound mind, as provided by Section 2305.16 of the Revised Code:

(a) 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.

(b) If an action upon a medical, dental, optometric, or chiropractic claim is

¹³ *Groch v. General Motors Corp.* (2008), 117 Ohio St.3d 192, citing *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193.

¹⁴ *Arbino v. Johnson* (2007), 116 Ohio St.3d 468 (internal citations omitted).

¹⁵ *Hardy v. Vermeulen* (1987), 32 Ohio St.3d 45, fn. 2.

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.

The Ohio Supreme Court, in *Hardy v. Vermeulen*¹⁶, found this statute to be unconstitutional. Specifically, the Court held in the syllabus, "R.C. 2305.11(B), as applied to bar the claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article 1 of the Ohio Constitution." In other words, the malpractice had already occurred and the plaintiff had already suffered the injury, but he could not bring forth a medical malpractice claim because he did not discover, nor reasonably could have discovered, either within four years. The Court found that by doing this, the statute "accomplishes one purpose -- to deny a remedy for the wrong."¹⁷ Put another way, "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."¹⁸ Such a statute of repose violates the right-to-a-remedy provision of Section 16, Article 1 of the Ohio Constitution.

On April 11, 2003, the legislature amended the statute of repose by enacting R.C. 2305.113. The statute states in pertinent part:

(C) Except as to persons within the age of minority or of unsound mind as provided in section 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.

¹⁶ *Hardy v. Vermeulen* (1987), 32 Ohio St.3d 45.

¹⁷ *Id.* at 46.

¹⁸ *Id.*

(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.

(D)(1) If a person making a medical, dental, optometric, or chiropractic claim, in the exercise of reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged claim within three years after the occurrence of the act or omission, but, in the exercise of reasonable care and diligence, discovers the injury resulting from that act or omission before the expiration of the four-year period specified in division (C)(1) of this section, the person may commence an action upon the claim not later than one year after the person discovers the injury from that act or omission.

(2) If the alleged basis of the medical claim, dental claim, optometric claim, or chiropractic claim is the occurrence of an act or omission that involves a foreign object that is left in the body of the person making the claim, the person may commence an action upon the claim not later than one year after the person discovered the foreign object or not later than one year after the person, with reasonable care and diligence, should have discovered the foreign object.

(3) A person who commences an action upon a medical claim, dental claim, optometric claim, or chiropractic claim under the circumstances described in division (D)(1) or (2) of this section has the affirmative burden of proving, by clear and convincing evidence, that the person, with reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within the three-year period described in division (D)(1) of this section or within the one-year period described in division (D)(2) of this section, whichever is applicable.

The Court finds that the statute of repose, as amended in R.C. 2305.113, does not cure any of the defects rendering its predecessor, R.C. 2305.11, unconstitutional. In 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 they could not be discovered within that time frame.

Although the statute appears to generously offer the plaintiff one more year to file a medical malpractice claim, such time extension still is predicated on discovery of the injury within four years of it occurring. The Ohio Supreme Court already deemed such a provision unconstitutional.

Ironically, the statute permits the discovery rule to apply when the malpractice involves a foreign object left a plaintiff's body. Division (D)(2) permits a plaintiff to file a medical malpractice claim one year after discovery of a foreign object left in the plaintiff's body. It is illogical that leaving a foreign object in the body of a patient is more important than any other medical malpractice resulting in injury to a patient such that the four-year statute of repose is inapplicable to foreign objects in the body, but applies to patients injured by other forms of malpractice. The statute is inconsistent, which has led to its inconsistent application by the courts. Moreover, the legislature's selection of a four-year period in which to bring forth a medical malpractice claim appears to be unreasonable and arbitrary considering most often the malpractice cannot be discovered within four years of the occurrence of its occurrence.¹⁹

The Court rejects Defendants' argument that it must follow the holdings in the cases cited by Defendants: *Groch v. General Motors Corporation*²⁰, *Arbino v. Johnson*²¹, *Nickell v. Leggett & Platt*²², and *McClure v. Alexander*²³. First, none of these cases dealt with the statutes at issue in this case, but instead dealt with products liability and damages award statutes. Thus, under the doctrine of stare decisis, the Court is not bound by these decisions.²⁴ Second, the Court finds these cases are distinguishable from the case at hand.

Indeed, in *Groch*, the Ohio Supreme Court stated:

¹⁹ See, *Hardy*, 32 Ohio St.3d 45, 49, J. Douglas concurring.

²⁰ 117 Ohio St.3d 192 (2008).

²¹ 116 Ohio St.3d 468 (1987).

²² 2008-Ohio-5545 (12th Dist.).

²³ 2008-Ohio-1313 (2nd Dist.).

²⁴ *Groch*, 117 Ohio St.3d at 472 ("While stare decisis applies to the rulings rendered in regard to specific statutes, it is limited to circumstances "where the facts of a subsequent case are substantially the same as a former case").

[T]he situation presented in the medical malpractice cases, particularly in *Hardy* is clearly distinguishable from the situation presented by the operation of R.C. 2305.131. 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. "***[T]its [*sic*] 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."²⁵

Similarly, in *Arbino*, the Ohio Supreme Court stated:

The definition of rights is well settled. "When the Constitution speaks of a remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner." *Hardy v. Vermeulen* (1987), 32 Ohio St.3d 45, 47. We have interpreted this provision to prohibit statutes that effectively prevent individuals from pursuing relief for their injuries. See, e.g., *Brennaman v. R.M.I Co.* (1994), 70 Ohio St.3d 460 (finding a statute of repose unconstitutional because it deprived certain plaintiffs of the right to sue before they were aware of their injuries); *Gaines v. Preterm-Cleveland, Inc.* (1987), 22 Ohio St.3d 54 (declaring a statute of repose unconstitutional because it did not give certain litigants the proper time to file an action following discovery of their claims).²⁶

In finding the products liability statute at issue before it, R.C. 2315.18, did not violate the right to right-to-a-remedy or the right to an open court provisions of the Ohio Constitution, the *Arbino* court distinguished that statute from statutes of repose, such as the statute at issue in this case - R.C. 2305.113:

While the statute [R.C. 2315.18] prevents some plaintiffs from obtaining the same dollar figures they may have received prior to the effective date of the

²⁵ *Groch*, 117 Ohio St.3d at 212 (internal citations omitted).

²⁶ *Arbino*, 116 Ohio St.3d at 477 (string citations omitted).

statute, it neither forecloses their ability to pursue a claim at all nor "completely obliterates the entire jury award."²⁷

Likewise in *McClure*, the Second District Court of Appeals cited the Ohio Supreme Court, in *Sedar v. Knowlton Construction Co.*²⁸, to distinguish the statute of repose on construction claims from the statute of repose on medical malpractice claims:

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. *** [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.²⁹

In *Nickell*, the Twelfth District Court of Appeals overturned a trial court's finding that a products liability statute of repose was facially unconstitutional. In doing so, the appellate court found that a products liability claim is statutorily created, and therefore, the legislature has the authority to impose limitations on the remedy. Specifically, the statute (R.C. 2125.02) "is a statutorily created right and limitations imposed by the statute are 'restriction[s] which qualif[y] the right of the action rather than *** limit [] *** the remedy.'"³⁰ The Ohio Supreme Court, in *Hardy*, however, found that a medical malpractice claim is not statutorily created, but is a common law right or action that existed at the time the Constitution was adopted. Thus, a legislature's limitation of the right or action, without a reasonable alternative remedy or substitution for the one it abrogated, was in violation of Section 16, Article 1 of the Ohio Constitution.³¹

Turning back to the case at hand, the Court finds that Plaintiff has proven by clear and

²⁷ *Id.* (internal citations omitted).

²⁸ 49 Ohio St.3d 193 (1990).

²⁹ *McClure*, 2008-Ohio-1313, at ¶ 22.

³⁰ *Nickell*, 2008-Ohio-5545, at ¶ 13, citing *Groch*, 117 Ohio St.3d at 219.

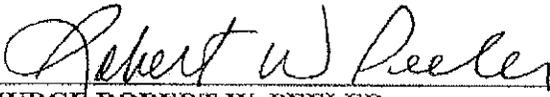
³¹ *Hardy*, 32 Ohio St.3d at 49.

convincing evidence that he could not have discovered the malpractice and the resulting injury, liver cancer, within the four-year limitation set forth in the statute of repose. After the tests were conducted from 1995 to 1998, Plaintiff suffered no symptoms leading to a diagnosis of liver cancer. Indeed, it was not until Plaintiff experienced his first symptom, in 2008, that the malpractice was discovered. Once he discovered the injury and malpractice, Plaintiff promptly filed suit.

The Court finds that Plaintiff could not have discovered the malpractice that had already occurred, and the resulting injury he was suffering, before the expiration of the statute of repose, and therefore, the statute of repose denied Plaintiff a remedy. Accordingly, the Court finds the statute of repose, as applied to the case at hand, is unconstitutional.

Defendants' motion for summary judgment is denied.

It is so ordered.



JUDGE ROBERT W. PEELER

Ohio Constitution

Article I. Bill of Rights

Current through 2010

§ 16. Redress in courts

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.

Ohio Statutes

Title 23. COURTS - COMMON PLEAS

Chapter 2305. JURISDICTION; LIMITATION OF ACTIONS

Includes legislation filed in the Secretary of State's office through 10/21/2011

§ 2305.10. Bodily injury or injury to personal property

(A) Except as provided in division (C) or (E) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues. Except as provided in divisions (B)(1), (2), (3), (4), and (5) of this section, a cause of action accrues under this division when the injury or loss to person or property occurs.

(B)(1) For purposes of division (A) of this section, a cause of action for bodily injury that is not described in division (B)(2), (3), (4), or (5) of this section and that is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(2) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to chromium in any of its chemical forms accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(3) For purposes of division (A) of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(4) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to

diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(5) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to asbestos accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(C)(1) Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(2) Division (C)(1) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(3) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the accrual of the cause of action, has not expired in accordance with the terms of that warranty.

(4) If the cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section but less than two years prior to the expiration of that period, an action based on the product liability claim may be commenced within two years after the cause of action accrues.

(5) If a cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, an action based on the product liability claim may be commenced within two years after the disability is removed.

(6) Division (C)(1) of this section does not bar an action for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(7)(a) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product if all of the following apply:

(i) The action is for bodily injury.

(ii) The product involved is a substance or device described in division (B)(1), (2), (3), or (4) of this section.

(iii) The bodily injury results from exposure to the product during the ten-year period described in division (C)(1) of this section.

(b) If division (C)(7)(a) of this section applies regarding an action, the cause of action accrues upon the date on which the claimant is informed by competent medical authority that the bodily injury was related to the exposure to the product, or upon the date on which by the exercise of reasonable diligence the claimant should have known that the bodily injury was related to the exposure to the product, whichever date occurs first. The action based on the product liability claim shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(D) This section does not create a new cause of action or substantive legal right against any person involving a product liability claim.

(E) An action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, as defined in section 2305.111 of the Revised Code, shall be brought as provided in division (C) of that section.

(F) As used in this section:

(1) "Agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

(2) "Ethical drug," "ethical medical device," "manufacturer," "product," "product liability claim," and "supplier" have the same meanings as in section 2307.71 of the Revised Code.

(3) "Harm" means injury, death, or loss to person or

property.

(G) This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to April 7, 2005.

History. Effective Date: 07-06-2001; 04-07-2005; 08-03-2006

Ohio Statutes

Title 23. COURTS - COMMON PLEAS

Chapter 2305. JURISDICTION; LIMITATION OF ACTIONS

Includes legislation filed in the Secretary of State's office through 10/21/2011

§ 2305.111. Assault or battery actions - childhood sexual abuse

(A) As used in this section:

(1) "Childhood sexual abuse" means any conduct that constitutes any of the violations identified in division (A)(1)(a) or (b) of this section and would constitute a criminal offense under the specified section or division of the Revised Code, if the victim of the violation is at the time of the violation a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age. The court need not find that any person has been convicted of or pleaded guilty to the offense under the specified section or division of the Revised Code in order for the conduct that is the violation constituting the offense to be childhood sexual abuse for purposes of this division. This division applies to any of the following violations committed in the following specified circumstances:

(a) A violation of section 2907.02 or of division (A)(1), (5), (6), (7), (8), (9), (10), (11), or (12) of section 2907.03 of the Revised Code;

(b) A violation of section 2907.05 or 2907.06 of the Revised Code if, at the time of the violation, any of the following apply:

(i) The actor is the victim's natural parent, adoptive parent, or stepparent or the guardian, custodian, or person in loco parentis of the victim.

(ii) The victim is in custody of law or a patient in a hospital or other institution, and the actor has supervisory or disciplinary authority over the victim.

(iii) The actor is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the victim is enrolled in or attends that school, and the actor is not enrolled in and does not attend that school.

(iv) The actor is a teacher, administrator, coach, or other

person in authority employed by or serving in an institution of higher education, and the victim is enrolled in or attends that institution.

(v) The actor is the victim's athletic or other type of coach, is the victim's instructor, is the leader of a scouting troop of which the victim is a member, or is a person with temporary or occasional disciplinary control over the victim.

(vi) The actor is a mental health professional, the victim is a mental health client or patient of the actor, and the actor induces the victim to submit by falsely representing to the victim that the sexual contact involved in the violation is necessary for mental health treatment purposes.

(vii) The victim is confined in a detention facility, and the actor is an employee of that detention facility.

(viii) The actor is a cleric, and the victim is a member of, or attends, the church or congregation served by the cleric.

(2) "Cleric" has the same meaning as in section 2317.02 of the Revised Code.

(3) "Mental health client or patient" has the same meaning as in section 2305.51 of the Revised Code.

(4) "Mental health professional" has the same meaning as in section 2305.115 of the Revised Code.

(5) "Sexual contact" has the same meaning as in section 2907.01 of the Revised Code.

(6) "Victim" means, except as provided in division (B) of this section, a victim of childhood sexual abuse.

(B) Except as provided in section 2305.115 of the Revised Code and subject to division (C) of this section, an action for assault or battery shall be brought within one year after the cause of the action accrues. For purposes of this section, a cause of action for assault or battery accrues upon the later of the following:

(1) The date on which the alleged assault or battery occurred;

(2) If the plaintiff did not know the identity of the person who allegedly committed the assault or battery on the date on which it allegedly occurred, the earlier of the following dates:

(a) The date on which the plaintiff learns the identity of that person;

(b) The date on which, by the exercise of reasonable diligence, the plaintiff should have learned the identity of

that person.

(C) An action for assault or battery brought by a victim of childhood sexual abuse based on childhood sexual abuse, or an action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, shall be brought within twelve years after the cause of action accrues. For purposes of this section, a cause of action for assault or battery based on childhood sexual abuse, or a cause of action for a claim resulting from childhood sexual abuse, accrues upon the date on which the victim reaches the age of majority. If the defendant in an action brought by a victim of childhood sexual abuse asserting a claim resulting from childhood sexual abuse that occurs on or after the effective date of this act has fraudulently concealed from the plaintiff facts that form the basis of the claim, the running of the limitations period with regard to that claim is tolled until the time when the plaintiff discovers or in the exercise of due diligence should have discovered those facts.

History. Effective Date: 05-14-2002; 08-03-2006

Ohio Statutes

Title 23. COURTS - COMMON PLEAS

Chapter 2305. JURISDICTION; LIMITATION OF ACTIONS

Includes legislation filed in the Secretary of State's office through 10/21/2011

§ 2305.113. Medical malpractice actions

(A) Except as otherwise provided in this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the cause of action accrued.

(B)(1) If prior to the expiration of the one-year period specified in division (A) of this section, a claimant who allegedly possesses a medical, dental, optometric, or chiropractic claim gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given.

(2) An insurance company shall not consider the existence or nonexistence of a written notice described in division (B)(1) of this section in setting the liability insurance premium rates that the company may charge the company's insured person who is notified by that written notice.

(C) 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:

(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 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.

(D)(1) If a person making a medical claim, dental claim, optometric claim, or chiropractic claim, in the exercise of reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within three years after the

occurrence of the act or omission, but, in the exercise of reasonable care and diligence, discovers the injury resulting from that act or omission before the expiration of the four-year period specified in division (C)(1) of this section, the person may commence an action upon the claim not later than one year after the person discovers the injury resulting from that act or omission.

(2) If the alleged basis of a medical claim, dental claim, optometric claim, or chiropractic claim is the occurrence of an act or omission that involves a foreign object that is left in the body of the person making the claim, the person may commence an action upon the claim not later than one year after the person discovered the foreign object or not later than one year after the person, with reasonable care and diligence, should have discovered the foreign object.

(3) A person who commences an action upon a medical claim, dental claim, optometric claim, or chiropractic claim under the circumstances described in division (D)(1) or (2) of this section has the affirmative burden of proving, by clear and convincing evidence, that the person, with reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within the three-year period described in division (D)(1) of this section or within the one-year period described in division (D)(2) of this section, whichever is applicable.

(E) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority that is responsible for the operation of any hospital licensed or registered in the state, including, but not limited to, those that are owned or operated by the state, political subdivisions, any person, any corporation, or any combination of the state, political subdivisions, persons, and corporations. "Hospital" also includes any person, corporation, association, board, entity, or authority that is responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care, and treatment to individuals. "Hospital" does not include any hospital operated by the government of the United States or any of its branches.

(2) "Physician" means a person who is licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board or a person who otherwise is authorized to practice medicine and surgery or osteopathic medicine and surgery in this state.

(3) "Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or

residential facility, or against a licensed practical nurse, registered nurse, advanced practice nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes the following:

(a) Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person;

(b) Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies:

(i) The claim results from acts or omissions in providing medical care.

(ii) The claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.

(c) Claims that arise out of the medical diagnosis, care, or treatment of any person and that are brought under section 3721.17 of the Revised Code.

(4) "Podiatrist" means any person who is licensed to practice podiatric medicine and surgery by the state medical board.

(5) "Dentist" means any person who is licensed to practice dentistry by the state dental board.

(6) "Dental claim" means any claim that is asserted in any civil action against a dentist, or against any employee or agent of a dentist, and that arises out of a dental operation or the dental diagnosis, care, or treatment of any person. "Dental claim" includes derivative claims for relief that arise from a dental operation or the dental diagnosis, care, or treatment of a person.

(7) "Derivative claims for relief" include, but are not limited to, claims of a parent, guardian, custodian, or spouse of an individual who was the subject of any medical diagnosis, care, or treatment, dental diagnosis, care, or treatment, dental operation, optometric diagnosis, care, or treatment, or chiropractic diagnosis, care, or treatment, that arise from that diagnosis, care, treatment, or operation, and that seek the recovery of damages for any of the following:

(a) Loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, or any other intangible loss that was sustained by the parent, guardian, custodian, or spouse;

(b) Expenditures of the parent, guardian, custodian, or spouse for medical, dental, optometric, or chiropractic care or treatment, for rehabilitation services, or for other

care, treatment, services, products, or accommodations provided to the individual who was the subject of the medical diagnosis, care, or treatment, the dental diagnosis, care, or treatment, the dental operation, the optometric diagnosis, care, or treatment, or the chiropractic diagnosis, care, or treatment.

(8) "Registered nurse" means any person who is licensed to practice nursing as a registered nurse by the board of nursing.

(9) "Chiropractic claim" means any claim that is asserted in any civil action against a chiropractor, or against any employee or agent of a chiropractor, and that arises out of the chiropractic diagnosis, care, or treatment of any person. "Chiropractic claim" includes derivative claims for relief that arise from the chiropractic diagnosis, care, or treatment of a person.

(10) "Chiropractor" means any person who is licensed to practice chiropractic by the state chiropractic board.

(11) "Optometric claim" means any claim that is asserted in any civil action against an optometrist, or against any employee or agent of an optometrist, and that arises out of the optometric diagnosis, care, or treatment of any person. "Optometric claim" includes derivative claims for relief that arise from the optometric diagnosis, care, or treatment of a person.

(12) "Optometrist" means any person licensed to practice optometry by the state board of optometry.

(13) "Physical therapist" means any person who is licensed to practice physical therapy under Chapter 4755. of the Revised Code.

(14) "Home" has the same meaning as in section 3721.10 of the Revised Code.

(15) "Residential facility" means a facility licensed under section 5123.19 of the Revised Code.

(16) "Advanced practice nurse" means any certified nurse practitioner, clinical nurse specialist, certified registered nurse anesthetist, or certified nurse-midwife who holds a certificate of authority issued by the board of nursing under Chapter 4723. of the Revised Code.

(17) "Licensed practical nurse" means any person who is licensed to practice nursing as a licensed practical nurse by the board of nursing pursuant to Chapter 4723. of the Revised Code.

(18) "Physician assistant" means any person who holds a valid certificate to practice issued pursuant to Chapter 4730. of the Revised Code.

(19) "Emergency medical technician-basic," "emergency medical technician-intermediate," and "emergency medical technician-paramedic" means any person who is

certified under Chapter 4765. of the Revised Code as an emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, whichever is applicable.

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