

ORIGINAL

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.

: Supreme Court Case  
: No. 2011-0899  
:  
:  
: On Appeal from the  
: 12th District Court of Appeals,  
: Warren County, Ohio  
:  
:  
: Court of Appeals Case  
: No. CA201007066  
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MERIT BRIEF OF PLAINTIFFS-APPELLEES

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John D. Holschuh, Jr. \* (0019327)

\* *Counsel of Record*

Sarah Tankersley (0068856)

Brian P. O'Connor (0086646)

SANTEN & HUGHES

600 Vine St., Suite 2700

Cincinnati, OH 45202

(513) 721-4450

(513) 721-0109 (fax)

JDH@santen-hughes.com

*Attorneys for Plaintiffs-Appellees*

Karen L. Clouse (0037294)

John B. Welch \* (0055337)

\* *Counsel of Record*

Arnold Todaro & Welch Co., L.P.A.

580 Lincoln Park Blvd., Suite 222

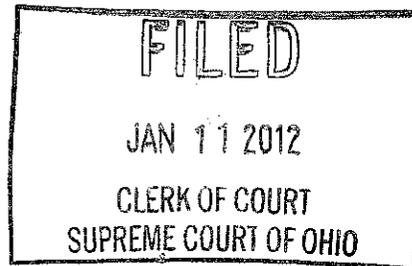
Dayton, OH 45429-3493

(937) 296-1600

(937) 296-1644 (fax)

kclouse@arnoldlaw.net

*Attorneys for Defendants-Appellants*



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## I. STATEMENT OF THE CASE

This cause is before the Court upon discretionary review to determine the constitutionality of R.C. 2305.113(C), the medical malpractice statute of repose, as applied to Plaintiffs-Appellees. Both the court of common pleas and court of appeals below held the statute unconstitutional and in violation of the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution. This Court should similarly determine that R.C. 2305.113(C), as applied to Plaintiffs-Appellees, is unconstitutional because it purports to bar a vested claim for medical malpractice before Plaintiffs-Appellees knew or reasonably could have known about the claim.

### A. STATEMENT OF THE FACTS

This is a medical malpractice action arising out of the treatment which Timothy Ruther received from George Kaiser, D.O., and Warren County Family Practice (collectively, the “Defendants-Appellants”). Mr. Ruther filed a complaint asserting that the Defendants-Appellants were negligent and deviated from the standard of care by failing to properly assess, evaluate, and respond to abnormal laboratory results.

While a patient of the Defendants-Appellants, Mr. Ruther had lab work performed on July 19, 1995, May 27, 1997, and October 21, 1998, all of which showed significantly elevated liver enzymes.<sup>1</sup> Despite these significantly elevated liver enzyme levels, the Defendants-Appellants failed to alert Mr. Ruther of this problem.<sup>2</sup> Unaware of the problem, and having no physical manifestations of any symptoms, Mr. Ruther continued his life oblivious to his illness. Neither Mr. Ruther nor his family had any idea that the Defendants-Appellants’ malpractice was keeping him from seeking treatment before his disease progressed and his condition deteriorated.

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<sup>1</sup> Affidavit of Tracy Ruther at ¶12, T.d. 14 at Exhibit A (“Ruther Affidavit”).

<sup>2</sup> Ruther Affidavit at ¶¶6-8, T.D. 14 at Exhibit A.

Eventually, Mr. Ruther suffered his first abdominal complaints in the late autumn of 2008.<sup>3</sup> On or about December 22, 2008, he was first advised of a liver lesion and of hepatitis C.<sup>4</sup> On or about December 30, 2008, he was made aware that he had liver cancer. At some point around this time, Mr. Ruther and his family learned of the test results which had shown elevated liver enzymes as far back as 1995.<sup>5</sup>

Accordingly, Plaintiffs-Appellees filed suit on or about May 21, 2009 – less than five months after they could have possibly been aware of the theretofore undiscovered injuries caused by the Defendants-Appellants’ medical malpractice.<sup>6</sup> Timothy Ruther died shortly thereafter on or about June 22, 2009, and Plaintiff’s First Amended Complaint added a count for wrongful death.<sup>7</sup> The wrongful death claim remains pending and is not the subject of this appeal.<sup>8</sup>

## **B. PROCEDURAL POSTURE**

The laboratory results in question were obtained on or about July 19, 1995, May 27, 1997, and October 21, 1998.<sup>9</sup> In December 2008, Timothy Ruther was diagnosed with liver cancer, and also became aware for the first time of the laboratory results. Plaintiffs-Appellees filed a Complaint on or about May 21, 2009.<sup>10</sup> Timothy Ruther died on or about June 22, 2009.<sup>11</sup>

Defendants-Appellants filed a motion for summary judgment, asserting that the statute of repose contained in R.C. 2305.113(C) precluded Plaintiffs-Appellees’ survivorship claims.<sup>12</sup>

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<sup>3</sup> Ruther Affidavit at ¶10, T.d. 14 at Exhibit A.

<sup>4</sup> Ruther Affidavit at ¶11, T.d. 14 at Exhibit A.

<sup>5</sup> Ruther Affidavit at ¶12, T.d. 14 at Exhibit A.

<sup>6</sup> T.d. 1; Ruther Affidavit at ¶12, T.d. 14 at Exhibit A.

<sup>7</sup> T.d. 10.

<sup>8</sup> See T.d. 17.

<sup>9</sup> Ruther Affidavit at ¶12, T.d. at Exhibit A.

<sup>10</sup> Ruther Affidavit at ¶11, T.d. at Exhibit A.

<sup>11</sup> See T.d. 10.

<sup>12</sup> T.d. 13.

The court of common pleas denied the motion for summary judgment.<sup>13</sup> Specifically, the court of common pleas held that the statute of repose was unconstitutional as applied to the Plaintiffs-Appellees because Timothy Ruther could not have discovered the malpractice or the resultant injury before the expiration of the statute of repose and, thus, the Plaintiffs-Appellees were denied their right to a remedy in violation of Section 16, Article I of the Ohio Constitution. This decision was a final appealable order because it determined the constitutionality of R.C. 2305.113.<sup>14</sup> From this decision denying their motion for summary judgment, the Defendants-Appellants appealed.<sup>15</sup>

The Twelfth District Court of Appeals affirmed, holding R.C. 2305.113(C) unconstitutional as applied to the Plaintiffs-Appellees.<sup>16</sup> Thereafter, Defendants-Appellants and various amici urged this Court to accept discretionary review and the cause is now before this Court.

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<sup>13</sup> T.d. 17.

<sup>14</sup> See R.C. 2505.02(B)(2).

<sup>15</sup> T.d. 17.

<sup>16</sup> T.d. 27, 28.

## II. ARGUMENT

### PROPOSITION OF LAW:

**R.C. 2305.113(C), as applied to bar the claims of medical malpractice plaintiffs who did not know and could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution.**

### A. SUMMARY OF THE ARGUMENT

Both the court of common pleas and the court of appeals properly determined that R.C. 2305.113(C) is unconstitutional as applied to the Plaintiffs-Appellees. Although the medical malpractice occurred in the late 1990's, Mr. Ruther did not discover the malpractice or the continuing injury resulting therefrom until late 2008 – nor could he have through any reasonable efforts. The mere fact that the Defendants-Appellant's negligence allowed the Plaintiffs-Appellees' injury to continue undetected for a period of years should not absolve the Defendants-Appellants from liability. The statute of repose, as applied in this case, unconstitutionally denies the Plaintiffs-Appellees a right to a remedy in violation of this State's Constitution. The decision below, based on this Court's precedent in Hardy, should be affirmed and this case should be permitted to proceed to trial.

### B. LEGAL STANDARD

“The burden is on the party making the [constitutional] challenge to present clear and convincing evidence of existing facts that make the statute unconstitutional and void when applied.”<sup>17</sup> “Any constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation, and the understanding that it is not this court's duty to assess the

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<sup>17</sup> Reading v. Pub. Util. Comm., 109 Ohio St.3d 193, 196, 2006-Ohio-2181, 846 N.E.2d 840, 844. Accord, Cleveland Gear Co. v. Limbach, 35 Ohio St.3d 229, 231, 520 N.E.2d 188, 191 (1988).

wisdom of a particular statute.”<sup>18</sup> Still, “no general assembly is above the plain, potential provisions of the constitution, and no court, however sacred or powerful, has the right to declare any public policy that clearly contravenes or nullifies the rights declared in the constitution.”<sup>19</sup>

With this in mind, both the court of common pleas and the court of appeals below held that R.C. 2305.113(C), as applied to Plaintiffs-Appellees, was an unconstitutional violation of the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution. The constitutionality of a statute is a question of law.<sup>20</sup> Accordingly, this Court reviews the decision below *de novo*.<sup>21</sup>

When considering whether a legislative enactment violates the right-to-a-remedy provision of Section 16, Article I, this Court has noted that “the right-to-a-remedy provision of Section 16, Article I does not require the analysis of rational-basis that is used to decide due process or equal protection arguments against the constitutionality of legislation.”<sup>22</sup> Instead, this Court has reviewed legislation subject to a right-to-remedy provision challenge with a far more scrupulous eye.<sup>23</sup>

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<sup>18</sup> Groch v. Gen. Motors Corp., 117 Ohio St. 3d 192, 217, 2008-Ohio-546, 883 N.E.2d 377, 402.

<sup>19</sup> Hardy v. VerMeulen, 32 Ohio St.3d 45, 46, 512 N.E.2d 626, 628 (1987)(citing Kintz v. Harriger, 99 Ohio St. 240, 247, 124 N.E. 168, 170(1919)).

<sup>20</sup> *See, e.g., Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 185 Ohio App.3d 707, 719, 2009-Ohio-6993, 925 N.E.2d 641, 650, (10 Dist.).

<sup>21</sup> *See, e.g., Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 697 N.E.2d 208, 209 (1998).

<sup>22</sup> Hardy v. VerMeulen, 32 Ohio St.3d 45, 48, 512 N.E.2d 626, 629 (1987).

<sup>23</sup> Id.

**C. R.C. 2305.113(C) IS UNCONSTITUTIONAL AS APPLIED TO PLAINTIFFS-APPELLEES**

- 1. The General Assembly's revisions to the medical malpractice statute of repose failed to address any of the constitutional infirmities previously identified by this Court in *Hardy v. VerMeulen*.**

The statute of repose at issue here, R.C. 2305.113(C), became effective on April 11, 2003. Prior to that time, the statute of repose was set forth in R.C. 2305.11(B), which stated as follows:

Except as to persons within the age of minority or of unsound mind, as provided by § 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 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.<sup>24</sup>

This Court unmistakably held this former statute unconstitutional as applied to plaintiffs who could not reasonably have known of any injuries or malpractice within the four year repose period proscribed by the statute.<sup>25</sup> In *Hardy*, the Court wrote, "R.C. 2305.11 as 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

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<sup>24</sup> Former RC 2305.11(B)(2).

<sup>25</sup> *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 512 N.E.2d 626 (1987).

other words, the courts of Ohio are closed to those who are not reasonably able, within four years, to know the bodily injury they have suffered.”<sup>26</sup>

Thus, this Court held the statute an unconstitutional infringement upon Section 16, Article I of the Ohio Constitution, which provides in pertinent part, “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...”<sup>27</sup> This Court further stated, “[w]hen 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.”<sup>28</sup>

Given this binding precedent, the question here presented is whether R.C. 2305.113(C) provided the Plaintiffs-Appellees with an opportunity “at a meaningful time and in a meaningful manner” to seek redress for their injury. It is this question, and this question alone, that this Court must confront when deciding the constitutionality of R.C. 2305.113(C) as applied to the Plaintiffs-Appellees. The Appellants misdirect the argument by focusing largely on the legislative intent behind R.C. 2305.113(C). In Hardy, this Court made clear that the right-to-remedy provision of Section 16, Article I is so fundamental that the legislature may not deny it “even if it acted with a rational basis.”<sup>29</sup> As such, this Court’s inquiry is not whether the statute was enacted for tort reform purposes; rather, the sole inquiry is whether the statute denies the Plaintiffs-Appellees a right to a remedy as guaranteed by the Bill of Rights contained in this State’s Constitution.

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<sup>26</sup> Id., 32 Ohio St.3d at 46.

<sup>27</sup> Ohio Constitution, Article I, Section 16.

<sup>28</sup> Hardy v. VerMeulen, 32 Ohio St.3d at 47.

<sup>29</sup> Hardy v. VerMeulen, 32 Ohio St.3d at 48.

A review of R.C. 2305.113(C) can only lead to the conclusion that the statute does, without doubt, deny the Plaintiffs-Appellees a meaningful time and meaningful manner to seek redress for their injuries. The clearest indicium of this is the striking resemblance between the current R.C. 2305.113(C) and the former R.C. 2305.11(B) which, as stated above, was already held unconstitutional as applied to plaintiffs similarly situated to Timothy Ruther.

The full text of these two statutes is attached in the appendix, and a comparison between the two reveals only the following three substantive changes. First, under the new statute, if the injury from malpractice is discovered between three and four years after the occurrence of the malpractice, then the injured party has a full year from the date of discovery to file suit. Second, a specific exception is made for the discovery of a retained foreign body, regardless of when the malpractice occurred. Third, a party claiming the discovery rule either for a retained foreign body or for an injury discovered more than three years after the malpractice has the affirmative burden of proving by clear and convincing evidence that the injury could not reasonably have been discovered in a more timely fashion.

These three changes are simply insufficient to overcome this Court's unequivocal holding in Hardy that statutes such as these are unconstitutional. R.C. 2305.113(C) is a thinly veiled attempt by the General Assembly to circumvent the *stare decisis* effect of Hardy. R.C. 2305.113(C) only carves out a narrow exception for cases involving a retained foreign body and, in a few instances, extends the statute of repose to a maximum of five years instead of four. This amendment does not in any way address the underlying problem of the statute as noted by the Hardy court: that it denies innocent patients a meaningful opportunity to seek redress for their injuries when, through no fault of their own, the tortfeasor's conduct rendered the patients unable to detect their injuries until after the repose period expired.

“It is the policy of courts to stand by precedent and not to disturb a point once settled. The doctrine of *stare decisis* is one of policy which recognizes that security and certainty require that an established legal decision be recognized and followed in subsequent cases where the question of law is again in controversy.”<sup>30</sup> “Any departure from the doctrine of *stare decisis* demands special justification.”<sup>31</sup> In this case, there is no justification (special or otherwise) for departing from the precedent of Hardy. The General Assembly’s minimal revisions to the statute of repose do not remedy the concerns previously announced by this Court. Thus, R.C. 2305.113(C) as applied to plaintiffs who could not have reasonably discovered their vested claims is just as unconstitutional as R.C. 2305.11(B) was under Hardy.

**2. The Plaintiffs-Appellees’ claim was vested as of the first date of the medical malpractice.**

“The right-to-a-remedy provision of Section 16, Article I applies only to existing, vested rights...”<sup>32</sup> Thus, if the Plaintiffs-Appellees’ claims were vested rights, the statute of repose cannot constitutionally bar them. In determining whether a claim is vested, Ohio courts have held that “a right is not regarded as vested in the constitutional sense unless it amounts to something more than a mere expectation or interest based upon an anticipated continuance of existing law.”<sup>33</sup>

In this case, the Plaintiffs-Appellees’ causes of action were vested rights at the very moment that the Defendants-Appellants negligently failed to properly assess, evaluate, and

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<sup>30</sup> Clark v. Snapper Power Equipment, Inc., 21 Ohio St.3d 58, 60, 488 N.E.2d 138, 140 (1986).

<sup>31</sup> Wampler v. Higgins, 93 Ohio St.3d 111, 120, 752 N.E.2d 962, 972 (2001)(citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

<sup>32</sup> Sedar v. Knowlton Const. Co., 49 Ohio St.3d 193, 202, 551 N.E.2d 938, 947 (1990)(overruled on other grounds by Brenneman v. R.M.I. Co., 70 Ohio St.3d 460, 639 N.E.2d 425 (1994)). Accord Groch v. Gen. Motors Corp., 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377 at ¶142 (“a statute of repose does not deny a remedy for a vested cause of action...”).

<sup>33</sup> In re Special Docket No. 73958, 2008-Ohio-4444 at ¶29 (8 Dist.)(citing In re Emery, 59 Ohio App.2d 7, 11, 391 N.E.2d 746 (1978)).

respond to the abnormal laboratory results. Because of the Defendants-Appellants' negligent conduct, Timothy Ruther was immediately injured and suffered the loss of valuable time in the treatment of his illness. Indeed, he ultimately did not discover the disease until it was too late. Consequently, as of the very first instant that the Defendants-Appellants failed to respond to his test results, the Plaintiffs-Appellees had a vested right to a remedy even though the statute of limitations was equitably tolled by the discovery rule. At that point, all of the elements (viz. duty, breach, causation, injury)<sup>34</sup> for a negligence claim were satisfied. Thus, the Plaintiffs-Appellees could have immediately commenced suit if they had somehow discovered the injury that they were continuing to suffer because of the Defendants-Appellants' negligence. Their claims were vested and cannot be barred by a statute of repose without an opportunity at a meaningful time and in a meaningful manner to seek a remedy.

The Defendants-Appellants attempt to argue that the Plaintiffs-Appellees' claims were not vested based on case law regarding the discovery rule and statutes of limitations.<sup>35</sup> While it is true that the discovery rule, for equitable reasons,<sup>36</sup> treats a cause of action for purposes of the *statute of limitations* as if it accrues when a plaintiff discovers or should have discovered the injury, this in no way impacts the *statute of repose* analysis. This Court carefully limited the legal fiction of the discovery rule to the application of the statute of limitations: “[t]he ‘discovery rule’ generally provides that a cause of action accrues **for purposes of the governing statute of limitations** at the time when the plaintiff discovers, or in the exercise of reasonable

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<sup>34</sup> See, e.g., Singleton v. City of Hamilton, 33 Ohio App.3d 187, 515 N.E.2d 8 (12 Dist. 1986).

<sup>35</sup> See Appellants' Brief, p. 5 (citing Oliver v. Kaiser Community Health Foundation, 5 Ohio St.3d 111, 449 N.E.2d 438 (1983)).

<sup>36</sup> See generally Ault v. Jasko, 70 Ohio St.3d 114, 116, 1994-Ohio-376, 637 N.E.2d 870, 871 (1994)(abrogated by statute)(“Use of the discovery rule eases the unconscionable result to innocent victims who by exercising even the highest degree of care could not have discovered the cited wrong.”).

care, should have discovered the complained of injury.”<sup>37</sup> The discovery rule cannot provide the test for vestedness of a cause of action outside of the context of the statute of limitations. As a general matter, a cause of action vests when all of the elements of the claim are met and when a civil action could have been commenced.<sup>38</sup> In this case, the Plaintiffs-Appellees had a vested cause of action (and a right to a remedy) as of the very instant of the Defendants-Appellants’ negligence. *Eo instante*, Timothy Ruther was injured and suffered grave harm as his condition continued to worsen without his knowledge. His claim was, therefore, vested. He had an immediate right to bring suit; he just did not know it.

As their claims were vested, any statute of repose which deprives Plaintiffs-Appellees of this vested right must, in accordance with Hardy, be held unconstitutional as applied to them. To hold otherwise would allow the Defendants-Appellants to profit from the stealthy nature of their

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<sup>37</sup> Investors REIT One v. Jacobs, 46 Ohio St.3d 176,179, 546 N.E.2d 206, 209 (1989)(emphasis added); *See also Id.*, 46 Ohio St.3d at 180 (“This court has determined that, in some circumstances, a discovery rule is appropriate for calculating when a cause of action accrues for purposes of defining a **limitations period**.”)(emphasis added)(citing Oliver v. Kaiser Community Health Foundation, 5 Ohio St.3d 111, 449 N.E.2d 438 (1983)); *See also* Carl L. Brown, Inc. v. Lincoln Nat’l Life Ins., 2003-Ohio-2577 at ¶62 (10 Dist.)(same).

<sup>38</sup> *See* William A. Graham Co. v. Haughey, 646 F.3d 138, 146 (3d Cir. 2011)(“As a general matter, a cause of action ‘accrues’ when it has ‘come into existence as an enforceable claim or right.’ Stated another way, accrual is ‘the event whereby a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action.’ “Accrue’ derives from the Latin words ‘ad’ and ‘cresco,’ to grow to; thus it means to arise, to happen, to come into force or existence.”)(citing BLACK’S LAW DICTIONARY (9th ed. 2009) and BALLENTINE’S LAW DICTIONARY (3d ed. 1969)). *See also* Sterlin v. Biomune Sys., 154 F.3d 1191, 1196 n. 8 (10th Cir. 1998)(“**the phrase ‘a cause of action accrues’ refers to ‘when a suit may be maintained thereon.**”)(emphasis added)(citing Ebrahimi v. E.F. Hutton & Co., Inc., 852 F.2d 516, 520 n.6. (10th Cir. 1988)(quoting BLACK’S LAW DICTIONARY 1334, 19 (5th Ed. 1979)); Wyler v. Tripi, 25 Ohio St.2d 164, 177 (1971)(“The word ‘accrue’ \* \* \* has been widely used in legal terminology in several senses, i.e., one use is the employment of ‘accrue’ as an intransitive verb, meaning to come into existence as an enforceable claim; **another use is to vest as a right, as, a cause of action has accrued when the right to sue has become vested.**”)(emphasis added) (Corrigan, J., dissenting) (the majority in Wyler was overruled by Oliver v. Kaiser Community Health Foundation, 5 Ohio St.3d 111, 449 N.E.2d 438 (1983))).

negligence and exploit the fact that their negligence could not reasonably have been known by the Defendants-Appellants until many years later.

**3. The legislative intent offered by the General Assembly is pretextual, and the statute fails even a deferential, rational-basis review.**

R.C. 2305.113(C) is unconstitutional even under a rational basis analysis: it deprives injured persons of their rights without furthering any legitimate interest of the state.<sup>39</sup> The legislature, in its annotation regarding legislative intent, specifies the following rationales for curtailing the rights of citizens: (1) that a statute of repose “strikes a rational balance” between the rights of injured persons and the rights of healthcare providers; (2) that evidence can be lost or become unavailable over time; (3) that maintaining medical records for more than the time frame set forth in the statute of repose is an unacceptable burden on healthcare providers; (4) that the standard of care may change over time, making it difficult to ascertain whether the standard was met; (5) that “this legislation precludes unfair and unconstitutional aspects of state litigation but does not affect timely medical malpractice actions brought to address legitimate grievances;” and (6) that this legislation addresses the aspects of the previous statute found to be unconstitutional in Gaines v. Pre-Term-Cleveland, 33 Ohio St. 3d 54, (1987).<sup>40</sup> None of these have merit.

Concerns that evidence may be lost or become unavailable over time, concerns that healthcare providers must maintain medical records for a longer period of time, and concerns that the standard of care will change are not legitimate reasons to bar a cause of action. All of

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<sup>39</sup> See Stetter v. R. J. Corman Derailment Servs., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092 at ¶71. See also State ex rel. Vans v. Maple Heights City Council, 54 Ohio St.3d 91, 97, 561 N.E.2d 909 (1990)(Brown, J., dissenting)(“In conducting a ‘rational basis’ review, we should, of course, defer to the wisdom of the legislature, but we should be careful not to substitute unthinking deference for judicial scrutiny and analysis.”)(internal citations omitted).

<sup>40</sup> Baldwin’s Ohio Revised Code Ann. 2305.113, 2002 S 281, Section 3, eff. 4-11-03, General Assembly Statement of Findings and Intent.

these concerns simply go to a plaintiff's burden of proof and may make a plaintiff's case more difficult to prove. This evidentiary difficulty, however, should not preclude the cause of action outright.

Additionally, these concerns are already faced in statutes of limitations, and neither the courts nor the General Assembly have attempted to bar those vested claims. For example, a claim for wrongful death may be brought within two years of the date of death, regardless of when the original mechanism of injury occurs.<sup>41</sup> Claims for injuries to a minor may be brought within a specified time frame after the child's eighteenth birthday, even if the original injury was nineteen or twenty years earlier.<sup>42</sup> Allowing Timothy Ruther to bring his claims within a year after he discovered them (some ten years after his injuries began) is no more burdensome than allowing his wrongful death claim to proceed more than ten years after his injuries began, but within two years of his death. Nor is it any more burdensome than allowing an eighteen-year-old to bring a claim for injuries sustained in early childhood. These supposed rationales are a mere pretext for the true goal of denying the rights of patients guaranteed by the Constitution.

The other rationales set forth by the General Assembly – that this statute strikes a rational balance, that it precludes unfairness while allowing timely and legitimate claims, and that it addresses the unconstitutional aspects of the prior legislation – patently infringe on the role of the judiciary in an attempt to address the ultimate issue of constitutionality. A statute is not constitutional just because the General Assembly wishes it to be. “[The Supreme C]ourt is the ultimate arbiter of what is constitutional. \* \* \* Our role is to determine constitutionality, and we

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<sup>41</sup> R.C. 2125.02.

<sup>42</sup> R.C. 2305.16.

undermine our constitutional role by accepting any impingement on that power by any other branch of government.”<sup>43</sup>

Finally, the remaining rationale given by the General Assembly (that the revisions address the constitutional infirmities previously identified by this Court) is simply wrong. It is true that the aspect of the statute found unconstitutional in Gaines v. Pre-Term-Cleveland<sup>44</sup> is addressed by allowing a full year to bring suit if the injury is discovered more than three years, but less than four years, after the malpractice, but the other constitutional infirmities remain unresolved. The Gaines Court noted that, “after Mominee<sup>45</sup> and Hardy, the four-year statute of repose cannot constitutionally bar the claims of minors or of those plaintiffs who, in the exercise of reasonable diligence, discovered their injuries only after the four years had already passed. Consequently, the only question remaining is whether the statute of repose can be constitutionally applied to bar the claims of medical malpractice litigants who discover their 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.”<sup>46</sup> That was the only issue addressed by Gaines. Tweaking the statute may address the specific issue in Gaines, but it ignores the fact that Gaines is predicated entirely on Hardy,<sup>47</sup> and the General Assembly’s revisions to the statute do not in any way address the underlying unconstitutionality found in Hardy. Nothing fundamental in the statute has changed to make it any less unconstitutional.

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<sup>43</sup> Groch v. Gen. Motors Corp., 117 Ohio St. 3d 192, 235, 2008-Ohio-546, 883 N.E.2d 377 (Pfeifer, J., concurring in part and dissenting in part).

<sup>44</sup> Gaines v. Pre-Term Cleveland, 33 Ohio St.3d 54, 514 N.E.2d 709 (1987).

<sup>45</sup> Mominee v. Scherbath, 28 Ohio St.3d 270, 503 N.E.2d 717 (1986).

<sup>46</sup> Gaines, 33 Ohio St.3d at 57.

<sup>47</sup> Gaines, 33 Ohio St.3d at 60 (“We agree with appellant’s contention that R.C. 2305.11(B) violates the above constitutional provision. This conclusion follows logically from our recent decision in Hardy v. VerMeulen ...”).

For these reasons, the statute of repose for medical claims contained in R.C. 2305.113(C) is still unconstitutional as applied to the Plaintiffs-Appellees, even under a rational-basis review. The legislative intent is inconsistent, incorrect, and pretextual. No legitimate interest of the state is furthered by infringing on the fundamental rights guaranteed to plaintiffs by the Ohio Constitution.

**4. Ohio law regarding other statutes of repose is inapposite. *Hardy* is dispositive in regards to the constitutionality of the medical claim statute of repose.**

The Defendants-Appellants unpersuasively argue that Ohio courts' decisions regarding other statutes not at issue in this case should guide this Court's decision concerning the constitutionality of R.C. 2305.113(C) as applied to the Plaintiffs-Appellees. The Defendants-Appellants argument on this issue is flawed for two reasons. First, it seeks to justify the supposed constitutionality of R.C. 2305.115(C) by looking at the intent of the General Assembly which, as discussed above, is irrelevant to this inquiry regarding the Plaintiffs-Appellees' fundamental rights. The second reason the Defendants-Appellants' argument is flawed is that it ultimately reduces to the comparison of apples and oranges. Medical malpractice claims are dissimilar from products liability or real property improvement claims, and the constitutionality of R.C. 2305.115(C) as applied to this medical malpractice claim must not be determined by reference to case law concerning products liability and real property improvement statutes of repose.<sup>48</sup> As Justice Stevens once wrote, "[o]ne can think of an apple and an orange at the same time; that does not turn them into the same fruit."<sup>49</sup> Medical malpractice claims simply are not

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<sup>48</sup> The Defendants-Appellants' Brief (pp. 13-15) also discusses Pratte v. Stewart, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, a case concerning the constitutionality of a statute of limitations. As discussed in Section C, 2, *supra*, this is yet another attempt to merge the statute of limitations analysis and the statute of repose analysis for the accrual of a claim.

<sup>49</sup> City of Erie v. Pap's A.M., 529 U.S. 277, 301 (2000)(Stevens, J. dissenting).

the same as products liability or real property claims. As such, they should not be influenced by the jurisprudence from those areas of law.

The Defendants-Appellants discuss Groch v. General Motors Corporation,<sup>50</sup> a case concerning the products liability statute of repose, in an attempt to extend its rationale to the present case concerning medical malpractice. This attempt, however, is unsuccessful. In Groch, this Court found the products liability statute of repose constitutional when the product causing injury was delivered to an end user more than ten years before the injury occurred.<sup>51</sup> The Groch Court was clear to note that “[a] central fact in this case is that the trim press that injured Douglas Groch was ‘delivered’ for R.C. 2305.10(C) purposes to the end user, General Motors, more than ten years prior to his injury.”<sup>52</sup> This is in stark contrast to Mr. Ruther’s case. As discussed above, Mr. Ruther’s continuing injury began immediately. His claim was, therefore, a vested right whereas the Plaintiff’s claim in Groch did not vest during the repose period.

Groch is also inapposite because that claim was a statutory, strict products liability claim under the Ohio Products Liability Act.<sup>53</sup> The General Assembly’s denial of a non-vested, statutory cause of action is not nearly the same as the General Assembly’s attempt to extinguish a vested, common law cause of action. Vested, common law claims are the epitome of those rights protected under Article I, Section 16.

Finally, Groch, as a products liability claim, is distinct from the medical malpractice claim because a products liability claim involves a series of distributors, all of whom had custody of the injurious product at some point. That is completely dissimilar from a medical malpractice claim where the party at fault is identifiable immediately and does not change. For example, in

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<sup>50</sup> Groch v. Gen. Motors Corp., 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377.

<sup>51</sup> See Groch 117 Ohio St.3d at ¶99.

<sup>52</sup> Groch, 117 Ohio St.3d at ¶99.

<sup>53</sup> R.C. 2307.71, *et seq.*

this case, the lab results from the 1990's speak for themselves. They were in the possession and control of the Defendant at all times and could not have been altered by anyone else from the time the Defendant first knew about them to the time the Plaintiff finally discovered them after it was too late. There is no way to pass blame to anyone other than the Defendant-Appellant, Dr. Kaiser. Denying a remedy as against him denies a remedy entirely.

In light of these considerations, it is apparent that this medical malpractice claim is different from the products liability claim addressed in Groch. Whereas the injury in Groch occurred years later, the injury to the Plaintiffs-Appellees already occurred and vested years ago. This statute of repose seeks to deny the Plaintiffs-Appellees their vested right to a remedy simply because the injury caused by the tortfeasor was reasonably undetected for years. R.C. 2305.113(C) is, therefore, unconstitutional as applied to the Plaintiffs-Appellees. This analysis is not changed by this State's jurisprudence on statutes of repose in other, dissimilar areas of law.

**5. Other states are divided on the constitutionality of medical malpractice statutes of repose. Ohio should look, first and foremost, to its past precedent that is directly on point.**

Finally, the Defendants-Appellants argue that foreign case law supports the constitutionality of R.C. 2305.113(C). It, of course, goes without saying that this Court is not bound by a foreign state's case law.<sup>54</sup> Moreover, while this Court may or may not accept the decisions of other states' as persuasive authority, those decisions are based on the intricacies of other states' statutes, constitutions, and case law. For an issue as important as the constitutionality of the medical claim statute of repose, Ohio courts should look, first and foremost, to the law of the State of Ohio, including this Court's holding in Hardy. "[N]o court in

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<sup>54</sup> Reygart v. Palmer, Montgomery County Ct. App. No. 9296, Jan 29, 1986, 1986 WL 1340 at \*4 (2 Dist. 1986) ("this Court is not bound by either federal or foreign case state law"); Burgess v. State Farm Mutual Automobile Ins. Co., Belmont County Ct. App. No. 1239, Mar. 7, 1978, 1978 WL 214861 at \*7 (7 Dist. 1978).

this state is bound by a decision of another state court applying that state's own law."<sup>55</sup> Even so, other states, including Colorado,<sup>56</sup> Arizona,<sup>57</sup> and Kentucky<sup>58</sup> have previously struck down similar statutes. Indeed, the Supreme Court of Kentucky held that the Kentucky medical malpractice statute of repose violated Section 14 of the Kentucky Constitution,<sup>59</sup> which is virtually identical to Article I, Section 16 of the Ohio Constitution.<sup>60</sup> Ohio should adhere to its past precedent in Hardy and continue with its constitutional analysis that is joined by other states.

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<sup>55</sup> Solomon v. Cent. Trust Co., N.A., 63 Ohio St.3d 35, 41, 584 N.E.2d 1185, 1190 (1992)(citing Indus. Comm. v. Dell, 104 Ohio St. 389, 401, 135 N.E. 669, 673(1922)).

<sup>56</sup> Austin v. Litvak, 682 P.2d 41, 53 (Colo. 1984)("What is before us is the narrow issue of whether the legislative scheme governing medical malpractice claims which grants an exception from the three-year statute of repose to foreign object and knowing concealment claimants, but not to negligently misdiagnosed claimants, is constitutional. We hold that it is not.").

<sup>57</sup> See generally Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984). See specifically Id. at 980 (Hays, J., concurring) ("A statute of limitations or repose which abrogates an action for damages even before the action arises or can reasonably be discovered is unconstitutional.").

<sup>58</sup> McCullum v. Sisters of Charity of Nazareth Health Corp., 799 S.W.2d 15, 19 (Ky. 1990) ("Thus, we hold that portion of 413.140(2) which purports to cut off negligence and malpractice actions against physicians, surgeons, dentists, and hospitals at five years to be unconstitutional under sections 14, 54, and 241 of the Kentucky Constitution.").

<sup>59</sup> Section 14 of the Kentucky Constitution provides: "All courts shall be open, and every person for an injury done him in lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

<sup>60</sup> Article I, Section 16 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..."

### III. CONCLUSION

Both the court of common pleas and the court of appeals properly determined that R.C. 2305.113(C) is unconstitutional as applied to the Plaintiffs-Appellees. The Plaintiffs-Appellees were unaware of both the medical malpractice and the resultant, continuing injury until after the repose period had expired. Given this, and in light of Hardy, it is clear that the statute of repose as applied to the Plaintiffs-Appellees unconstitutionally denies the Plaintiffs-Appellees their right to a remedy in violation of Article I, Section 16 of the Ohio Constitution. R.C. 2305.113(C) serves only to close the doors of the courthouse on the Plaintiffs-Appellees. The decision of the court of appeals should be affirmed, and this case should be remanded for trial forthwith.

Respectfully submitted,



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John D. Holschuh, Jr. (0019327)

Sarah Tankersley (0068856)

Brian P. O'Connor (0086646)

SANTEN & HUGHES

600 Vine St., Suite 2700

Cincinnati, OH 45202

(513) 721-4450

(513) 721-0109 (fax)

JDH@santen-hughes.com

*Attorneys for Plaintiffs-Appellees*

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing *Merit Brief of Plaintiffs-Appellees* was served by regular U.S. Mail this 11<sup>th</sup> day of January, 2012 upon:

Karen L. Clouse, Esq. (0037294)  
John B. Welch, Esq. (0055337)  
Arnold Todaro & Welch Co., L.P.A.  
580 Lincoln Park Blvd., Suite 222  
Dayton, OH 45429-3493  
(937) 296-1600  
(937) 296-1644 (fax)  
kclouse@arnoldlaw.net  
*Counsel for Defendants-Appellants*

Alexandra T. Schimmer (0075732)  
Michael J. Hendershot (0081842)  
Solicitor General's Office  
30 E. Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-8980  
(614) 466-5087 (fax)  
alexandra.schimmer@ohioattorneygeneral.gov  
*Counsel for State of Ohio*



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Brian P. O'Connor (0086646)

**APPENDIX:**

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Baldwin's Ohio Revised Code Annotated Currentness

## Title XXIII. Courts--Common Pleas

## Chapter 2305. Jurisdiction; Limitation of Actions (Refs &amp; Annos)

## Limitations--Miscellaneous

## → 2305.11 Time limitations for bringing certain actions

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

(B) A civil action for unlawful abortion pursuant to section 2919.12 of the Revised Code, a civil action authorized by division (H) of section 2317.56 of the Revised Code, a civil action pursuant to division (B)(1) or (2) of section 2307.51 of the Revised Code for performing a dilation and extraction procedure or attempting to perform a dilation and extraction procedure in violation of section 2919.15 of the Revised Code, and a civil action pursuant to division (B)(1) or (2) of section 2307.52 of the Revised Code for terminating or attempting to terminate a human pregnancy after viability in violation of division (A) or (B) of section 2919.17 of the Revised Code shall be commenced within one year after the performance or inducement of the abortion, within one year after the attempt to perform or induce the abortion in violation of division (A) or (B) of section 2919.17 of the Revised Code, within one year after the performance of the dilation and extraction procedure, or, in the case of a civil action pursuant to division (B)(2) of section 2307.51 of the Revised Code, within one year after the attempt to perform the dilation and extraction procedure.

(C) As used in this section, "medical claim," "dental claim," "optometric claim," and "chiropractic claim" have the same meanings as in section 2305.113 of the Revised Code.

## CREDIT(S)

(2002 S 281, eff. 4-11-03; 2002 H 412, eff. 11-7-02; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97 (State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward (1999)); 1995 H 135, eff. 11-15-95; 1992 S 124, eff. 4-16-93; 1991 H 108; 1990 S 125, S 80; 1987 H 327; 1985 H 319; 1984 S 183; 1981 H 243; 1976 H 1426; 1975 H 682; 1974 H 989; 1953 H 1; GC 11225)

Amendment Note: 2002 S 281 rewrote divisions (B) through (D) which prior thereto read:

\* \* \*

"(B)(1) Subject to division (B)(2) of this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the cause of action accrued, except that, if prior to the expiration of that one-year period, 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) 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 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.

Baldwin's Ohio Revised Code Annotated Currentness

## Title XXIII. Courts--Common Pleas

▣ Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)

## ▣ Limitations--Miscellaneous

## → 2305.113 Time limitations for bringing medical, dental, optometric, or chiropractic claims

(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.