Supreme Court of Ohio Clerk of Court - Filed December 14, 2015 - Case No. 2015-0467

IN THE SUPREME COURT OF OHIO

DAVID ANTOON, ET AL.	:	
	:	
Appellees,	:	Case No. 2015-0467
	:	
v.	:	On Appeal from Eighth District
	:	Court of Appeals Case No. CA-
CLEVELAND CLINIC FOUNDATION, ET AL.	:	14-101373
	:	
	:	
Appellants.	:	
	:	

MERIT BRIEF OF AMICUS CURIAE THE ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO IN SUPPORT OF APPELLANTS CLEVELAND CLINIC FOUNDATION, JIHAD KAOUK, M.D., RAJ GOEL, M.D., AND MICHAEL LEE, M.D.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Academy of Medicine of Cleveland & Northern Ohio ("AMCNO") is a professional medical association serving the Northern Ohio community. AMCNO functions as a non-profit 501(c)(6) professional organization, representing Northern Ohio's medical community through legislative action and community outreach programs. This professional organization has been in existence since 1824 and became known as The Academy of Medicine in 1902. Now known as the AMCNO, it has a membership of over 5,000 physicians, making it one of the largest regional medical associations in the entire United States.

As this Court is aware, physicians, including those in the Northern Ohio community, are often litigants in a wide variety of civil litigation. Thus, it is appropriate that AMCNO weigh in on matters of important policy, specifically when such matters implicate the interests of its physician members. AMCNO has an interest in the present subject matter because the outcome of this appeal directly impacts AMCNO membership. AMCNO's membership has a direct and vital interest in the continued application and enforcement of Ohio's statute of repose, R.C. 2305.113(C).

R.C. 2305.113(C) was passed for the express purpose of protecting physicians and other medical practitioners from stale lawsuits, expressly precluding lawsuits from being commenced more than four (4) years after the

alleged act of negligence. As this Court has previously held, “the statute of repose exists to give medical providers certainty with respect to the time within which a claim can be brought and after which they may be free from litigation.” *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶19. The certainty provided under R.C. 2305.113(C) is threatened by the decision of the Eighth District Court of Appeals, which has drastically curtailed the application and impact of the statute of repose in a manner fundamentally inconsistent with the express language of R.C. 2305.113(C).

Specifically, the Eighth District's ruling has rendered R.C. 2305.113(C) superfluous and has cast a shadow of uncertainty regarding its application. Further, the purpose of R.C. 2305.113(C) has been rendered moot because it has obfuscated the mandate to preclude cases filed more than four-years after the date of the alleged medical malpractice, essentially requiring Ohio physicians to endure the burden and costs associated with discovery necessary to sufficiently support a statute of limitations argument made under Civ. R. 56(C), or when, as in this case, the motion to dismiss is converted to a motion for summary judgment under Civ. R. 12(B). By interpreting *Ruther* to apply the statute of repose "only if" the cause of action had never vested, then R.C. 2305.113(C) would be duplicative of R.C. 2305.113(A) and would constitute a needless exercise the Ohio General Assembly.

II. STATEMENT OF FACTS

Amicus AMCNO hereby adopts the Statement of Facts of Appellants Cleveland Clinic Foundation, Jihad Kaouk, M.D., Raj Goel, M.D., and Michael Lee, M.D. and will rely upon the same for the purposes of this Brief.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

A. PROPOSITION OF LAW NO. 1

Ohio's statute of repose applies whenever the occurrence of the act or omission constituting the alleged medical malpractice takes place more than four-years prior to when the lawsuit is filed, regardless of whether a cause of action has vested prior to the filing of a lawsuit.

The statute of repose was adopted in Ohio for the purpose of providing certainty to physicians, as well as other medical practitioners, by procedurally barring the filing and/or litigation of stale lawsuits after four-years from the date of the alleged medical malpractice. The statute of repose also serves the critical public policy purposes of prohibiting the litigating of medical malpractice actions after such time because documents are no longer retained and memories are no longer fresh. See generally, *Ruther*, *supra* at ¶19-21.

R.C. 2305.113(C) is plainly worded and unequivocal in its terms. The statute states:

> (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.

R.C. 2305.113(C)(1)-(2).

Under a plain reading of the statute, the filing of a medical malpractice action, more than four-years after the occurrence of the act or omission which forms the basis of the alleged negligence, is prohibited because "**No action *** shall be commenced more than four years after the occurrence**" otherwise it is time barred. *Id.*, emphasis added. There is no language in R.C. 2305.113(C) that restricts its application to **only** those instances where an injured party has not yet realized that he or she may have been injured by an act of medical negligence, nor is there a limitation placed by the statute to apply only to original filings of a case.

Notwithstanding, the Eighth District has interpreted the statute to apply only under such a limited circumstance, severely undercutting the plausible scenarios under which R.C. 2305.113(C) could be effective in limiting the commencement of stale lawsuits. If the Eighth District's holding is to serve as the new standard rule regarding the applicability R.C. 2305.113(C), the statute of repose will never effectively preclude any cause of action from being brought because a right to

remedy is "vested" once a plaintiff becomes aware of his or her potential cause of action, thereby limiting the timeliness of the filing to a statute of limitations analysis only. The effect of this interpretation severely restricts and diminishes the statute of repose to the point of rendering the subsection meaningless.

Moreover, the Eighth District's decision is inconsistent with the holding of this Court in *Ruther*, which not only held that R.C. 2305.113 was constitutional, but also concluded that it represented a critically important public policy in Ohio. The Ohio Supreme Court has identified several important policy considerations underlying R.C.2305.113(C). As this Court acknowledged in *Ruther*, "just as a plaintiff is entitled to a meaningful time and opportunity to pursue a claim, a defendant is entitled to a reasonable time after which he or she can be assured that a defense will not have to be mounted for actions occurring years before." *Id.*, at ¶19. This Court explained that the core purpose underlying a statute of repose is to give medical practitioners a sense of certainty as to the time within which a claim can be brought against them, and a further confidence that "[practitioners] may be free from the fear of litigation" after extended periods of time. *Id*.

Forcing medical providers to defend against claims that occurred years prior will undoubtedly present a number of litigation concerns. See *Id.* Specifically, evidence may be unavailable because of the death or unknown whereabouts of witnesses, evidence is often transported or misplaced, memories fade, and

technology can change so as to create a more stringent standard of care than was feasible at an earlier period of time. *Id.*

In *Ander v. Clark*, 10th App. No. 14AP-65, 2014-Ohio-2664, the Tenth District cited this Court's holding in *Ruther* for the proposition that the statute of repose does not extinguish a vested right. See *Ander*, at ¶6, ("In *Ruther*, syllabus, the Supreme Court of Ohio found that "[t]he medical-malpractice statute of repose found in R.C. 2305.113(C) does not extinguish a vested right and thus does not violate the Ohio Constitution, Article I, Section 16."). The *Ander* decision was then expanded upon by the Eighth District for the additional proposition that the statute of repose can *never* extinguish a vested right. Notably, the Tenth District's decision in *Ander* and the Eighth District's decision in this matter are both inconsistent with this Court's holding in *Ruther* and the plain language of R.C. 2305.113(C).

The statute of repose did not extinguish a vested right in *Ruther*; however, the statute of repose worked to preclude the lawsuit by the time the plaintiff was aware of his cause of action. *Id.* In the instant appeal, Mr. Antoon was obviously aware of the existence of a potential cause of action against Appellants well prior to the running of the statute of repose, <u>but Mr. Antoon failed to file this lawsuit within the four-year period provided under R.C. 2305.113(C)</u>. In this case, and in any other medical malpractice case filed later than four-years after the occurrence

of the purported malpractice, the statute of repose does not arbitrarily extinguish a vested right, but rather the plaintiff's failure to act in a timely manner is what stamps out their claim.

The statute of repose is critically important to physicians, hospitals, and other medical practitioners across Ohio because it was intended to place a hard and fast expiration date on a potential cause of action. Concerns regarding medical malpractice insurance also justify statutes of repose. *Id.* For example, a practitioner may retire and thus no longer carry, or need, professional liability insurance. *Id.* Further, a practitioner's insurer may become insolvent over the span of several years. *Id*. Additionally, institutional medical providers may also have closed since the time of the actionable incident. *Id*. The Eighth District's holding and the *Ander* decision have acted to artificially restrict the application of R.C. 2305.113(C), and, in so doing, have frustrated this important Ohio public policy.

In an effort to address the aforementioned concerns, the Ohio General Assembly enumerated its rationale for adopting the new medical malpractice statute of repose in the legislative history of R.C. 2305.113(C), which provides as follows:

> (A) 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.

In promulgating R.C. 2305.113(C), the Ohio General Assembly relied on the Supreme Court of Delaware's decision in *Dunn v. St. Francis Hospital, Inc.*, 401 A.2d 77 (Del. 1979). As provided by the *Dunn* court, a statute of repose is a "limited extension beyond the statute of limitations," designed to allow consideration of an injury not physically identifiable during the initial statute of limitations. *Dunn*, at 80. Under the Delaware Constitution, the test for constitutionality of the statute of repose is "whether the time period before the bar became effective was so short as to amount to a denial of right itself." *Id*. at 80-

81.[1] In setting a time limit under a statute of repose, "it must be remembered that [a] finite cut-off is probably necessary at some point in time, regardless of the state of the patient's knowledge, if the policy considerations underlying the statute of limitations are to be vindicated." *Id*. The Court concluded that it is the legislature, and not the courts, which must determine that time period, and those legislatures are constrained only in that the time limit must not be unreasonable. *Id*.

Similarly, the Supreme Court of Wisconsin upheld a statute of repose that required medical malpractice actions be initiated no later than five-years after the date of the act or omission, or by the time the injured person reaches the age of ten, whichever is later. *Aicher v. Wisconsin Patients Compensation Fund*, 237 Wis.2d 99, 613 N.W.2d 849 (Wis. 2000). The Supreme Court of Wisconsin held that the statute of repose did not violate the right-to-remedy clause under the Wisconsin Constitution and further stated that a time limitation articulated by statutes of repose are policy considerations better left to the legislative branch. *Aicher*, at 112.

As articulated in *Aicher*, "[n]o right to remedy resides here because the legislature expressly chose not to recognize a right based on a claim discovered

[1] Although Appellee contends that Amicus Appellant has needlessly sought to introduce constitutionality where there is no such issue, Amicus Appellant merely presents the out-of-state cases which have construed similar statutes of repose in favorable manners, in an effort to establish that finite cut-off dates for initiating certain cases have been found to be both necessary and appropriate.

more than five-years after the allegedly negligent act or omission or after the child reaches the age of 10." *Id*. at 127. Further, the Supreme Court of Wisconsin stated that it would not preserve the right of a plaintiff to obtain justice where none exists in the text of the law. *Id*. "Were we to extend a right to remedy outside the limits of these recognized rights, we…would eviscerate the ability of the legislature to enact any statute of repose." *Id*.

The Connecticut statute of repose likewise survived a constitutional challenge. See *Goldman v. Johnson Memorial Hospital*, 66 Conn. App. 518, 785 A.2d 234 (Con. App. 2001). In *Goldman*, doctors removed a lymph node from plaintiff's neck and told him that it was benign. *Goldman*, at 237. Twelve years later, a re-review of the pathology slides showed that the initial node had indicated Hodgkin's disease. *Id.*

In *Goldman*, the court concluded that the plaintiff's malpractice was barred under Connecticut's three-year statute of repose and indicated two principal reasons for upholding the statute. First, the statute reflects the policy of law as declared by the state legislature that after a given length of time a defendant should be sheltered from liability. *Id*. at 241. This supports a recognized policy of allowing people, after the lapse of reasonable time, to plan their affairs with a degree of certainty while remaining free from the disruptive burden of lingering and indefinite potential liability. *Id*. Second, the Court noted that statutes of repose

help to alleviate the difficulty surrounding lost evidence and record keeping that older claims often impose. Thus, the court in *Goldman* affirmed that the repose statute did not violate the "open courts provision" or infringe upon equal protection as provided under the state constitution. *Id*. at 242-243.

In this case, the Eighth District Court of Appeals held that R.C. 2305.113(C) does not apply to causes of action that have vested at the time of the filing of a lawsuit. Specifically:

> "The medical malpractice statute of repose found in R.C. 2305.113(C) does not extinguish a vested right and thus does not violate the Ohio Constitution, Article I, Section 16." *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012–Ohio–5686, 983 N.E.2d 291, syllabus. "A vested right occurs when there is 'the existence of a duty, a breach of that duty and injury resulting proximately therefrom.'" *Id.* at ¶ 16, quoting *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). R.C. 2305.113(C) thus bars claims that have not vested within four years of the negligent act. **Once vesting occurs, the timeliness of the complaint is controlled by the statute of limitations and its relevant tolling provisions such as the discovery rule.** *Ander v. Clark*, 10th Dist. Franklin No. 14AP–65, 2014–Ohio–2664, ¶ 6. (Emphasis added)

Antoon v. Cleveland Clinic Foundation, 8th Dist. Cuyahoga No. 101373, 2015-Ohio-421, at ¶10.

The Eighth District relied upon *Ander* for the proposition that "once vesting occurs, the timeliness of the complaint is controlled by the statute of limitations

and its relevant tolling provisions such as the discovery rule." *Antoon*, at ¶10. While *Ander* purports to cite and discuss this Court's opinion in *Ruther*, the language of the Tenth District is not included therein. Thus, the decision of the Eighth District misconstrues this Court's holding in *Ruther*, in addition to the express language of the statute, as standing for the proposition that R.C. 2305.113(C) has no application in medical malpractice actions subsequent to the vesting of a legal right, i.e., when the patient discovers or should have discovered the injury.

As this Court is aware, <u>there is no language in *Ruther* consistent with the Eighth District's interpretation of R.C. 2305.113(C) that limits the statute of repose's application only to situations where a cause of action has not yet vested</u>. See *Antoon, supra*. The Eighth District's decision is directly inapposite of the express language and the stated purpose of R.C. 2305.113(C) because the vesting of a claim would in most, if not all, cases precede the filing of a lawsuit, thereby rendering the statute of limitations as the sole procedural vehicle for determining whether the case was commenced in a timely manner. See *Antoon*, at ¶13, (The Eighth District in this case noted, "To be properly raised, the 'complaint must show the relevant statute of limitations and the absence of factors which would toll the statute or make it inapplicable.'").

In this case, and many others where the four-year deadline imposed by R.C. 2305.113(C) would apply, the complaint will not definitively allow for a Civ. R. 12(B)(6) analysis on the statute of limitations issue, resulting in an outright denial of the motion, or the need to convert the motion to dismiss into a motion for summary judgment under Civ. R. 12(B). In turn, this subjects what should be a simple procedural question to a Civ. R. 56(F) motion, additional discovery, the time and costs associated therewith, and the prolonged uncertainty that litigation brings. By restricting the statute of repose to only those situations where vesting has not occurred, the Eighth District has drastically constrained the application of the statute of repose and has created a situation where it will have very little meaningful impact. The public policy reasons cited by this Court in *Ruther* will not be served by limiting the application of R.C. 2305.113(C) to those situations suggested by the Eighth and Tenth Districts because the continued litigation of matters filed beyond the four-year statute of repose, rather than an early Civ. R. 12(B)(6) dismissal, would require the exhaustion of time and resources that R.C. 2305.113(C) was enacted to prevent. See *Antoon*, at ¶13.

IV. CONCLUSION

The Eighth District Court of Appeals has incorrectly limited the applicability of R.C. 2305.113(C) and in doing so, has rendered the statute of repose moot in Ohio. By precluding R.C. 2305.113(C) from being used to dispose of vested

claims, the Eighth District's decision, if upheld, would run contrary to the language of R.C. 2305.113(C) and the stated purpose of the General Assembly in enacting the statute.

For these reasons, amicus curiae Academy of Medicine of Cleveland & Northern Ohio requests that this Court reverse the holding of the Eighth District Court of Appeals and reinstate the trial court's decision to dismiss this matter under R.C. 2305.113(C).

Respectfully submitted,

/S/ Bret C. Perry

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CERTIFICATE OF SERVICE

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