

**IN THE SUPREME COURT OF OHIO**

DAVID ANTOON, ET AL.	:	Case No. 15-0467
	:	
Appellees,	:	On Appeal from The Ohio Eighth
	:	District Court of Appeals, Case No.
v.	:	CA-14-101373
	:	
CLEVELAND CLINIC FOUNDATION, ET AL.	:	
	:	
Appellants.	:	
	:	

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**MERIT BRIEF 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 THE CASE AND FACTS**

### **A. THE COMPLAINT OF RECORD IN THIS APPEAL**

Plaintiff-appellees David and Linda Antoon (the “Antoons”) filed this medical malpractice action in the Cuyahoga County Court of Common Pleas (Case No. 817237) on November 13, 2013. The causes of action asserted in the complaint all related to the provision of medical services to Mr. Antoon arising from a January 8, 2008 prostatectomy surgery. *See e.g.*, Complaint at ¶49, 53. The complaint included sixteen causes of action, each asserted against all four defendants. Complaint, ¶7-10. These were all “medical claims,” derivative claims, or related causes of action, as defined by statute, each governed by the one-year statute of limitations for medical malpractice actions. *See* R.C. 2305.113(E)(3).

Although this case has an unusual procedural history, the facts relevant to this appeal, as well as to the court of appeals’ Journal Entry and Opinion, are straightforward.

### **B. THE JUNE 1, 2010 COMPLAINT**

On June 1, 2010, the Antoons initially filed essentially the same malpractice action in Cuyahoga County (Case No. 728174). That case was voluntarily dismissed on June 3, 2011. In the complaint below the Antoons attempted to justify the twenty-nine months between voluntary dismissal and refile as follows:

Plaintiff originally filed an action against these defendants in Cuyahoga Common Pleas Court, Case No. 728174, which was dismissed without prejudice on June 13, 2011. Plaintiff then filed a cause of action in the Southern District of Ohio on January 31, 2012 within the one-year savings period of R.C. 2305.19. That case was dismissed by the federal district court on October 16, 2013. Plaintiffs’ instant action is being filed within the 30-day period permitted under 42 U.S.C. 1367(d). Complaint at ¶12.

This analysis is both incomplete and incorrect. The "cause of action" referenced as having been filed in the Southern District of Ohio was a federal *qui tam* action, **not** a medical malpractice action. The Antoons sought leave to amend the federal *qui tam* complaint (more than a year after it was filed) to add "medical malpractice" causes of action, but leave to amend was denied. See Motion to Dismiss of December 30, 2013, Exs. "C" and "D".

### C. THE TRIAL COURT GRANTS APPELLANTS' MOTION TO DISMISS

Based on the nearly six year time lapse between the date of the alleged negligence and the filing of the lawsuit, defendant-appellants, Cleveland Clinic Foundation, Jihad Kaouk, M.D., Raj Goel, M.D., and Michael Lee, M.D. ("appellants") moved to dismiss on December 30, 2013 based on 1) the Antoons' failure to file their action within four years as required by Ohio's statute of repose, and 2) the Antoons' failure to comply with Ohio's one-year medical malpractice statute of limitations, per R.C. 2305.113(A).

The trial court granted appellants' Motion to Dismiss on April 14, 2014. The trial court determined in granting the motion that 1) the case was not re-filed within one year after voluntary dismissal, and 2) the filing was barred by Ohio's four-year statute of repose found at R.C. 2305.113(C):

This case was filed outside the applicable statute of limitations and outside the one year allowed by Ohio's saving statute. R.C. 2305.19. **Further this filing is also outside the statute of repose, R.C. 2305.113(C)** which requires that a medical claim be filed no more than four years after the alleged malpractice. (Emphasis added)

*Antoon v. Cleveland Clinic Found.*, Cuy. Cty. Common Pleas No. 817237, Journal Entry, April 14, 2014.

#### D. THE EIGHTH DISTRICT'S DECISION

A Notice of Appeal to the Eighth District Court of appeals was filed on May 13, 2014. In its Journal Entry and Opinion of February 5, 2015 the court of appeals reversed the trial court. Although the court of appeals did not issue a substantive opinion on the statute of limitations issues (finding that the matters raised in the Motion to Dismiss were beyond the purview of Civ.R. 12(B)),<sup>1</sup> the court did substantively address the application of the statute of repose.

In applying the statute of repose this case, the court of appeals found that the trial court erred in dismissing the lawsuit for failure to comply with R.C. 2305.113(C). In so doing, the court of appeals interpreted the statute of repose very narrowly, misapplying the concept of vesting as applied to the statute of repose. The appeals court explicitly determined that once a cause of action vests the statute of repose is moot and is no longer relevant to a determination of the timeliness of the filing of a complaint. *See generally, Antoon v. Cleveland Clinic Foundation, supra.*

In reaching this conclusion, the court of appeals cited this Court's decision in *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291 syllabus, for the proposition that the statute of repose "does not extinguish a vested right and thus does not violate the Ohio Constitution, Article 1, Section 16." *Id.* at ¶10. The court of appeals concluded that because the statute of repose can never extinguish a vested right, it is only applicable when a right has not yet vested. The court of appeals concluded that, per *Ruther*, the statute of repose is only constitutional when narrowly construed in this fashion.

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<sup>1</sup> There were no objections by the Antoons to the consideration by the trial court of the docket of the Southern District of Ohio proceedings, nor was this issue assigned as error to the Eighth District or raised in the briefings or at oral argument.

The court of appeals concluded that the medical malpractice statute of repose has no application whenever a claim or cause of action vests within the four-year period provided by R.C. 2305.115(C) as follows:

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.

*Antoon v. CCF*, 2015-Ohio-421, ¶10.

A Notice of Appeal and Memorandum in Support of Jurisdiction was filed with this Court by appellants on March 20, 2015. This Court accepted jurisdiction on September 16, 2015, to decide the question of whether Ohio’s medical malpractice statute of repose applies even to fully vested causes of action.

## **II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 1**

### **PROPOSITION OF LAW NO. 1**

*Ohio’s medical malpractice 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. This statute of repose applies regardless of whether a cause of action has vested prior to the filing of a lawsuit.*

#### **A. OHIO’S MEDICAL MALPRACTICE STATUTE OF REPOSE**

R.C. 2305.113(C) provides:

(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.<sup>2</sup>

The statute's language requires that all medical claims "shall" be filed within four years of the act or omission constituting the alleged negligence (subsection (1)) and further provides that any action not commenced within four years "is barred" (subsection (2)). There are no other relevant conditions or caveats. Either an action is filed within the four-year window or it is barred. Construing this statute in the limited sense of only applying where a cause of action is not discovered within four years from

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<sup>2</sup> Although R.C. 2305.113(C) is generally considered to be Ohio's medical malpractice statute of repose, R.C. 2305.113(D) operates in conjunction with R.C. 2305.113(C). The discovery period provided in R.C. 2305.113(D) was critical to the court of appeals' decision.

the underlying negligent act or omission (as did the court of appeals) is inconsistent with the plain meaning of the statute.

The below excerpt demonstrates that the court of appeals misinterpreted *Ruther v. Kaiser*, *supra*, as standing for the proposition that the statute of repose is rendered inoperative upon the vesting of a right or a cause of action:

“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*, 2015-Ohio-421 at ¶10. (Emphasis added.)

#### **B. THE COURT OF APPEALS MISCONSTRUED THE IMPORT OF *RUTHER V. KAISER***

The Eighth District seemingly misapprehended the import of this Court’s straight-forward holding in *Ruther* that Ohio’s statute of repose did not extinguish a vested right under the *Ruther* facts. Simply because the statute of repose did not extinguish a vested right in *Ruther* does not mean that it only applies to rights that have not vested. *Ruther*, which affirmed the constitutionality of the medical malpractice statute of repose, should not be interpreted as standing for the proposition that the statute of repose has no application once a cause of action has vested. Such an interpretation unduly restricts the application of R.C. 2305.113(C)-(D).

The decision below erroneously interpreted the medical malpractice statute of repose to apply only to claims that have not “vested” within four years. A claim is deemed to have vested when “a patient discovers or in the exercise of reasonable care and diligence should have discovered the resulting injury that a cause of action for medical malpractice accrues \*\*\*.” See *Oliver v. Kaiser Community Health Found.*, 5 Ohio St.3d 111, 449 N.E.2d 438 (1983); *Hershberger v. Akron City Hosp.*, 34 Ohio St.3d 1, 516 N.E.2d 204 (1987).

Based on this holding, few if any medical malpractice actions will be subject to the limits of the statute of repose because the claims seeking to be vindicated will usually have previously vested, rendering the statute of repose irrelevant.

Mr. Antoon’s cause of action vested when he first understood that he had been injured as a result of the January, 2008 surgery. There is no dispute that Mr. Antoon came to such a realization shortly after his surgery. This does not mean that the statute of repose no longer limited the time for filing of the lawsuit, simply because the action vested. The language of R.C. 2305.113(C)-(D) does not remotely justify this interpretation. Rather, the four-year limitation imposed by the statute of repose remained in force to protect defendants from stale claims.

Properly construed, *Ruther* stands for the decidedly different proposition that “even if” a cause of action takes four years or more to vest, i.e., for the plaintiff to understand that he or she may have been injured by negligent medical treatment, the cause of action is barred. But, *Ruther* does not support the additional proposition that the vesting of a cause of action prior to the expiration of a four-year period nullifies the statute of repose.

*Ruther* highlights a number of pertinent policy concerns relevant to the statute of repose:

Many policy reasons support this legislation. 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. The statute of repose exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation.

Forcing medical providers to defend against medical claims that occurred 10, 20, or 50 years before presents a host of litigation concerns, including the risk that evidence is unavailable through the death or unknown whereabouts of witnesses, the possibility that pertinent documents were not retained, the likelihood that evidence would be untrustworthy due to faded memories, the potential that technology may have changed to create a different and more stringent standard of care not applicable to the earlier time, the risk that the medical providers' financial circumstances may have changed—i.e., that practitioners have retired and no longer carry liability insurance, the possibility that a practitioner's insurer has become insolvent, and the risk that the institutional medical provider may have closed.

Responding to these concerns, the General Assembly made a policy decision to grant Ohio medical providers the right to be free from litigation based on alleged acts of medical negligence occurring outside a specified time period. This decision is embodied in Ohio's four-year statute of repose for medical negligence, set forth in R.C. 2305.113(C). **The statute establishes a period beyond which medical claims may not be brought *even if* the injury giving rise to the claim does not accrue because it is undiscovered until after the period has ended.** (Emphasis added)

*Ruther v. Kaiser*, at ¶19-21.

The decision below ignored these public policy issues relating to why stale medical malpractice claims are barred. Stale claims should not be litigated regardless of whether they vested within the four-year statute of repose period.

The court of appeals essentially replaced the words “*even if*” from *Ruther* with the words “*only if*.” This is a significant distinction. The end result is that R.C. 2305.113(C) has been modified to apply “only” to those claims where a cause of action does not vest within four years, rather than applying to those claims, as well as to all other malpractice claims not filed within four years of the act or omission underlying the claim.

*Ruther* did not limit the application of the statute of repose to only medical malpractice actions with facts identical to that case. Yet, that was precisely the determination below. In this respect, the “policy decision” made by the General Assembly, as detailed in *Ruther*, has been ignored. The holding below turned the *Ruther* case on its head, taking it from a decision affirming the constitutionality and viability of the statute of repose to one that severely restricts its application.

The important public policies of 1) providing medical providers with certainty, 2) permitting claims to be litigated while memories are fresh and documents available, and 3) dealing with challenges posed by changing technology, are implicated regardless of whether a claim has vested prior to the running of the four-year statute of repose. It is unreasonable, as well as inconsistent with the plain language of R.C. 2305.113, to conclude that the statute of repose bars only those claims that have not vested within four years.

**C. *RUTHER* MUST BE VIEWED WITHIN THE CONTEXT OF *HARDY* V. *VERMEULEN***

The language from *Ruther* cited below can only be properly understood in the context of *Ruther*'s overruling of *Hardy v. VerMeulen*, 32 Ohio St.3d 45, 512 N.E.2d 626 (1987). *Hardy* stood for the proposition that an earlier version of the statute of repose

was unconstitutional and violated Ohio's constitutional right-to-remedy because it prohibited the filing of a medical malpractice claim more than four years after the act or omission constituting the basis of the claim, even if such act or omission went undiscovered for the entire four-year period. *Ruther* held that under such circumstances the statute of repose still passes constitutional muster because the plaintiff does not have a vested cause of action extinguished, as the cause of action never vested.

*Ruther* clearly adopted a more narrow view of the right-to-remedy provision than did *Hardy*. The thrust of the *Ruther* opinion is that the medical malpractice statute of repose is constitutional, not that it is limited to unusual circumstances where a cause of action fails to vest within four years. See *Ruther*, 134 Ohio St.3d 410-412, 983 N.E.2d at 294-95 (reasoning that the statute of repose "has a strong presumption of constitutionality" and that the right-to-remedy provision "does not prevent the General Assembly from defining a cause of action").

The court of appeals' decision is not an outlier. Since *Ruther*, two other courts have interpreted *Ruther* as voiding this statute of repose upon the vesting of a claim. See *Ander v. Clark*, 10<sup>th</sup> App. No. 14AP-65, 2014-Ohio-2664 and *Kennedy v. U.S. Veterans Admin.*, 526 Fed.Appx. 450, 457 (6th Cir.2013). Appellants respectfully submit that these decisions misconstrue the reasoning and the holding of *Ruther*, necessitating clarification from this Court.

#### **D. ANDER V. CLARK**

*Ander v. Clark*, *supra*, 2014-Ohio-2664, was purportedly based on *Ruther*. In, *Ander* the court stated in *dicta* 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." *Id.* at ¶6. This limiting language of *Ander* (that was adopted below) is

simply not found in *Ruther*. The seminal question posed by this appeal is whether this language is consistent with *Ruther*'s holding.

*Ander* determined that the statute of repose operated as a "general discovery period of four years" but then ceases operation upon the discovery of the cause of action, yielding at that juncture to the one-year statute of limitations:

"[T]he General Assembly recognized in R.C. 2305.113 that in some cases, an injury may not manifest itself within one year of a breach of a duty of care and so has provided the general discovery period of four years. Within that boundary, when the patient discovers or should have discovered the injury, or when the relationship with the doctor terminates, whichever is later, the one-year statute of limitations begins to run." *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012–Ohio–5686, ¶ 18. 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." 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.2d 314, 318 (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. *Id.*, at ¶16.

This view of the medical malpractice statute of repose is far too limited. R.C. 2305.113(D)(1) is indeed a "general discovery period of four years." But R.C. 2305.113(C)(1)-(2) "bars" medical malpractice claims not brought within four years of the occurrence of the act or omission constituting the alleged basis of the claim, subject only to the limited exceptions of R.C. 2305.113(D).

This Court's decision in *Ruther* was focused on R.C. 2305.113(C). But *Ander* (and the decision below) emphasize the provisions of R.C. 2305.113(D). R.C. 2305.113(D)(1), at its essence, is a limited exception to the preclusive operation of R.C. 2305.113(C)(1)-

(2), and is applicable only to those situations where a cause of action is discovered more than three years, but less than four years after the occurrence of the act or omission constituting the alleged basis of the claim.

**E. *KENNEDY V. U.S. VETERANS ADMIN.***

In *Kennedy v. U.S. Veterans Admin.*, 526 Fed.Appx. 450 (6th Cir. 2013), a divided Sixth Circuit determined that *Ruther* stands for the proposition that this statute of repose only bars actions that have not yet vested. *Kennedy* addressed the issue of whether Ohio's medical malpractice statute of repose was preempted by the Federal Tort Claims Act (FTCA), 28 USC § 2401(b). *Id.* at 457.

"FTCA claims involve a two-step inquiry: 1) whether local law permits liability and, if so, what are the damages, and then 2) whether the federal law bars the state-mandated recoveries." *Id.*, citing, *Premo United States*, 599 F.3d 540, 545 (6<sup>th</sup> Cir. 2010).

In *Kennedy*, if the local law (Ohio's medical malpractice statute of repose) barred the medical malpractice action against the Veterans Administration Medical Center in Cincinnati, it would have been necessary to determine if the local law was preempted by the FTCA. The two judges constituting the plurality found that there was no need to reach the preemption issue because the statute of repose, per *Ruther*, could not operate to extinguish a vested claim.

In light of the *Ruther* decision, it is clear that Plaintiff's claim vested well within the repose period. The complaint suggests that the date of accrual was the date of injury, in November 2006, and at the very latest, it is clear that Plaintiff knew of the injury by November 2008, the time he filed his administrative claim. Thus, **Plaintiff's discovery of his injury within the four-year repose period vested him with a substantive right of action that could not be extinguished by Ohio Rev.Code § 2305.113(C).** See *Ruther*, 983 N.E.2d at 296.

Consequently, the statute of repose's bar is not at play here and we need not decide whether it is preempted by the FTCA. (Emphasis added.)

The *Kennedy* plurality opinion also made the curious footnote observation that, unlike Ohio's medical malpractice statute of repose, Tennessee's three-year statute of repose applies equally to vested and unvested causes of actions:

Unlike Ohio's statute of repose, Tennessee's statute would bar the use of the one-year statute of limitations for claims that vest even within the third year in the absence of fraudulent concealment by the defendant. See Tenn Code Ann. § 29-26-116(a)(3). This suggests that Tennessee's statute is harsher than Ohio's statute as the former does more than just limit the time frame for accrual; it extinguishes some claims before the statute of limitations expires despite accrual within the three-year repose period. *Kennedy*, at footnote 2.

In fact, the Tennessee statute does not materially differ from the Ohio statute, with the exception that Ohio's version provides an additional year for discovery prior to barring claims. Nor does the Tennessee statute seem notably "harsher" than Ohio's, other than in the sense that Ohio's statute of repose is extended in some cases where a cause of action is not discovered until the fourth year after the underlying act or omission. Tennessee's medical malpractice statute of repose reads:

In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

See Tenn. Code Ann. § 29-26-116(a)(3).

The distinction between the two statutes made in *Kennedy* was premised on an overly narrow reading of *Ruther*. This distinction ignored the fundamental difference in

construction and legislative intent of the statute of repose and statute of limitations respectively.

Judge White's concurring opinion in *Kennedy* persuasively argued that the majority was incorrect on the application of the statute of repose to actions that vest within the four-year statutory period. Judge White correctly noted that the mere fact that this Court stated that the statute of repose did not extinguish a vested right under the circumstances of *Ruther* does not mean that the statute of repose applies **only** to rights that have not yet vested:

“[t]he statement that “the medical-malpractice statute of repose ... does not extinguish a vested right” **does not mean that it applies only to rights that have not vested.** Rather, it means that because the claim that is extinguished has not accrued, and thus has not vested to give the plaintiff a substantive right in a cause of action, there can be no violation of the Ohio right-to-remedy provision.” (Emphasis added)

This is especially so because *Ruther* set forth a more narrow view of the right-to-remedy provision than the view that formed the basis for the *Hardy* decision, and the entire thrust of the *Ruther* opinion is that the medical-malpractice statute of repose is constitutional. *See* 983 N.E.2d at 294–95 (reasoning that the statute of repose “has a strong presumption of constitutionality” and that the right-to-remedy provision “does not prevent the General Assembly from defining a cause of action”).

Thus, although the Ohio Supreme Court might well construe the medical-malpractice statute of repose as applying only to undiscovered claims and conclude that only the one-year limitations period under Ohio Rev.Code § 2305.113(A) governs vested claims, this construction is not part of the holding in *Ruther*.

*Kennedy, supra*, 526 Fed.Appx. 450, 457, (6th Cir. 2013), (Judge White concurring.)

Judge White's concurring opinion recognized that *Ruther* must be viewed in the context of determining whether the Ohio Constitution's right-to-remedy provision is

violated when the statute of repose bars an action, even though an underlying claim has not yet vested. The *Kennedy* plurality opinion overlooked this distinction, as did the court of appeals below. This Court should reaffirm this important distinction to ensure the continued viability of R.C. 2305.113(C)-(D).

Judge Hood authored a second concurring opinion in *Kennedy*, in which he joined with the plurality handling of *Ruther*, although he added an important caveat:

I write separately to state my agreement with Judge Clay's conclusion that, reasoning from *Ruther v. Kaiser*, 134 Ohio St.3d 408, 983 N.E.2d 291 (2012), Ohio courts would conclude that Ohio's statute of repose could not permissibly bar Kennedy's claim because it had accrued or vested prior to the expiration of the four-year time frame established by the statute of repose. **If we are wrong about how Ohio courts would proceed, then we will learn that in time.** (Emphasis added)

*Kennedy*, 526 Fed.Appx. at 459, (Judge Hood, concurring)

Judge Hood's opinion suggests the need for this court to revisit *Ruther* and to enforce the straight-forward language of R.C. 2305.113(C).

#### **F. YORK V. HUTCHINS**

In *York v. Hutchins*, 2014-Ohio-988, 12<sup>th</sup> App. No. CA2013-09-173, ¶10, *appeal not allowed*, 139 Ohio St.3d 1484, 2014-Ohio-3195, the Twelfth District recently held that the statute of repose requires the filing of a claim within four years, or it will be forever barred:

Simply stated, regardless of the applicable statute of limitations, **“a person must file a medical claim no later than four years after the alleged act of malpractice occurs or the claim will be barred.”** citing, *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, ¶2. (Emphasis added)

The *York* decision is consistent with a plain reading of R.C. 2305.113. *York* is not inhibited by case specific circumstances that elsewhere have led to a somewhat murky

reading of *Ruther* as relates to the interaction between the vesting of a claim and R.C. 2305.113(C).

The *York* and *Ruther* decisions are clearly consistent with each other. The decision of the Eighth District below (as well as *Kennedy* and *Ander*) are inconsistent with both *York* and *Ruther*. The decision below, *Kennedy*, and *Ander* represent a very restrictive view of R.C. 2305.113(C), whereas *Ruther* and *York* are more expansive, and more in keeping with both the plain language of R.C. 2305.113(C) and the public policy underlying the statute.

**G. THE STATUTE OF REPOSE WAS SPECIFICALLY DESIGNED TO BAR VESTED RIGHTS UNDER CERTAIN CIRCUMSTANCES**

Applying the statute of repose to bar an action in a situation such as this one presents no constitutional issues or concerns. The Antoons' vested right to initiate a cause of action is no more being improperly extinguished by operation of the statute of repose than in a situation where a claim is barred for being filed outside the one-year statute of limitations of R.C. 2305.113(E), or under circumstances contemplated by R.C. 2305.113(D). In all of these scenarios, a vested claim is barred for being untimely. The concerns expressed in *Ruther* and *Kennedy*, and elsewhere, over the preemptive extinguishing of a vested right simply do not exist when a plaintiff is fully aware of his claim and/or action, but chooses not to comply with the statute of repose.

There is no question that the Antoons were capable of filing an action prior to January 8, 2012, because they filed their initial action well before that time. They also filed numerous *qui tam* federal actions arising from the same facts within the permitted four-year period. By not filing the present lawsuit within that same four-year period, the Antoons chose to let a vested right expire. The statute of repose did not extinguish

any right prior to the time that the Antoons were aware that it existed. Accordingly, the right to remedy concerns discussed in *Ruther* are inapplicable here.

#### **H. OTHER PROVISIONS OF R.C. 2305.113 ALSO EXTINGUISH VESTED RIGHTS**

R.C. 2305.113(D)(1), which is part of the medical malpractice statute of repose, provides:

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. (Emphasis added.)

Plainly, under circumstances where there is delayed discovery of an injury, a vested right can be extinguished by the statute. Thus, the holding below that the statute of repose can never extinguish a vested right is incorrect. In some instances, that is precisely the way that the statute is designed to work.

In circumstances covered by R.C. 2305.113(D)(1), the statute of repose expressly bars the commencement of an action more than one year after “the person discovers the injury resulting from that act or omission,” i.e., the claim becomes barred one year after it vests. In this situation, the vesting of a right necessarily predates the barring of the claim. R.C. 2305.113(D)(2) similarly bars causes of action more than one year after a person discovers or should have discovered that a foreign object was left in his or her body. Again, under these circumstances, a vested right is extinguished.

**I. ONLY THE INSTANT COMPLAINT IS RELEVANT FOR DETERMINING COMPLIANCE WITH THE STATUTE OF REPOSE**

Any argument by the Antoons to the effect that they brought this action when they initially filed their Complaint against appellants in 2010 should be rejected. Pursuant to Civ.R. 41(A)(1), once a plaintiff voluntarily dismisses all claims against a defendant the court is divested of jurisdiction over those claims. *State ex rel. Fifth Third Mortg. Co. v. Russo*, 129 Ohio St. 3d 250, 253, 2011-Ohio-3177 at ¶17, 951 N.E.2d 414. The notice of voluntary dismissal is self-executing and completely terminates the possibility of further action on the merits of the case upon its mere filing, without the necessity of court intervention. *Id.*, citing *Selker & Furber v. Brightman*, 138 Ohio App.3d 710, 714, 742 N.E.2d 203 (2000); *Payton v. Rehberg*, 119 Ohio App.3d 183, 191-192, 694 N.E.2d 1379 (1997).

“The malpractice victim must pursue his remedies in a timely fashion or abandon them at his peril.” *Waikem v. Cleveland Clinic Found.*, 5<sup>th</sup> App. No. 2011 CA 00234, 2012-Ohio-5620, ¶58, citing, *Powell v. Rion*, 2<sup>nd</sup> App. No. 24756, 2012-Ohio-2665, 972 N.E.2d 159.

In this case, the Antoons voluntarily dismissed their lawsuit without prejudice on June 3, 2011. This voluntary dismissal took place more than eight months before the statute of repose expired. The *qui tam* action that the Antoons claimed was a “refiling” of this action was filed on January 31, 2012, which was also indisputably outside of the medical malpractice statute of repose because it was more than four years after the alleged negligent treatment. *See Ex. “B” to Motion to Dismiss of December 30, 2013.*

The myriad of reasons why the *qui tam* action was not even conceivably a re-filing of the state court medical malpractice action are not directly implicated by the sole

proposition of law in this appeal, but are discussed extensively at pages 4-6 of the Merit Brief of Appellees/Defendants filed in the Eighth District. For example, the *qui tam* complaint included a section titled “previous lawsuits.” The state court medical malpractice action was not even referenced as a related “prior lawsuit,” much less as a re-filing of the same lawsuit. *Id.* Tellingly, another of Mr. Antoon’s *qui tam* lawsuits, *United States of America, ex rel. Antoon v. Cleveland Clinic Foundation*, Case No. 3:10-cv-045 was referenced in Case No. 3:12-cv-0027 as the only related “previous lawsuit.” *Id.*

The Antoons eventually sought leave to amend their federal *qui tam* action (more than a year after it was filed) to add "medical malpractice" causes of action, but leave to amend was denied. *See* Order of October 16, 2013, Case No, 3:12-cv-0027, Docket #87, attached as Ex. "C" to December 30, 2013 Motion to Dismiss, *see also* proposed Second Amended Complaint, February 13, 2013 Docket, #62, attached as Ex. "D" to Motion to Dismiss. Thus, there was never a medical malpractice action pending against these defendants in any federal action. Only the state court filings are relevant to the application of R.C. 2305.113.

**J. AN ACTION VOLUNTARILY DISMISSED UNDER CIV.R.41(A) IS TREATED AS IT WAS NEVER COMMENCED**

It is axiomatic that when an action has been voluntarily dismissed, Ohio law treats the previously filed action as if it had never been commenced. *See e.g., Zimmie v. Zimmie*, 11 Ohio St.2d 94, 95, 464 N.E.2d 142 (1984); *Wolk v. Paino*, 8th App. No. 93095, 2010-Ohio-1755, ¶21 ("Because a dismissal without prejudice relieves the court of jurisdiction over the matter, and **the action is treated as though it had never been commenced** \*\*\*.") (Emphasis added); *Chuparkoff v. Kapron*, 9th App. No.

24234, 2009-Ohio-5462 at ¶9 (finding that a voluntary dismissal under Civ.R. 41(A) deprives a trial court of jurisdiction and results in the action being treated as if it had never been filed).

In *Zimmie*, this Court affirmed the “axiomatic” principle that a case that is voluntarily dismissed and re-filed “commences” upon the re-filing. For purposes of determining commencement of the action the initial filing is not relevant. Because the medical malpractice statute of repose is concerned with the commencement date of a medical claim, only the date of the filing of this action, November 14, 2013, is relevant to the application of the statute of repose. Of course, even if the prior filing date could be used to satisfy the statute of repose the outcome would be the same because the Antoons failed to comply with Civ.R. 41(A)(1) by not re-filing their action within the one-year period allowed.

Simply “[a] dismissal without prejudice leaves the parties as if no action had been brought at all.” *Denham v. New Carlisle*, 86 Ohio St. 3d 594, 596, 716 N.E.2d 184, 186 (1999), citing *DeVille Photography, Inc. v. Bowers*, 169 Ohio St. 267, 272, 159 N.E.2d 443, 446 (1959). Accordingly, the initial action filed on June 1, 2010 is not relevant to the question of when this action was commenced.

#### **K. The Plain Language Of A Statute Is A Reviewing Court’s First Line Of Inquiry**

In *Bergman v. Monarch Const.*, 124 Ohio St. 3d 534, 539, 2010-Ohio-622, ¶16, 925 N.E.2d 116, this Court discussed the “basic rule of statutory construction” requiring that the word “shall” be construed in a mandatory sense:

A basic rule of statutory construction is that “shall” is “construed as mandatory unless there appears a clear and unequivocal legislative intent” otherwise. *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 56 O.O.2d 58, 271

N.E.2d 834, paragraph one of the syllabus; R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage")(Emphasis added).

The wording of R.C. 2305.113(C) is simply not ambiguous. Claims that are not filed within four years of the underlying act or omission are barred. This language is clear and easily understood. Applying this statute in the straight-forward manner that it was written does no disservice to any party.

In *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, at ¶18-19, 943 N.E.2d 522, this Court discussed several rules of statutory construction and related legal maxims that may prove useful to this appeal:

We must first look to the plain language of the statute itself to determine the legislative intent." *Hubbell [v. Xenai]*, 115 Ohio St.3d 77, 2007 Ohio 4839, 873 N.E.2d 878, P 11, citing *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 1997 Ohio 310, 676 N.E.2d 519. "We apply a statute as it is written when its meaning is unambiguous and definite." *Id.*, citing *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006 Ohio 954, 846 N.E.2d 478, P 52; see also *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 1996 Ohio 291, 660 N.E.2d 463.

"However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent." *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 96, 573 N.E.2d 77, citing *Meeks v. Papadopulos* (1980), 62 Ohio St.2d 187, 190, 16 O.O.3d 212, 404 N.E.2d 159. "The primary rule in statutory construction is to give effect to the legislature's intention." *Id.* at 97, citing *Carter v. Youngstown* (1946), 146 Ohio St. 203, 32 O.O.184, 65 N.E.2d 63, paragraph one of the syllabus.

It is a "well-settled rule of statutory construction" that a court is required to "first look at the words of the statute itself to determine legislative intent." *Havel v. Villa St. Joseph*, 131 Ohio St. 3d 235, 2012-Ohio-552, ¶28.

The primary rule in statutory construction is to give effect to the legislature's intention." *Summerville* 128 Ohio St.3d at 225, citing *Carter v. Youngstown*, 146 Ohio St. 203, 65 N.E.2d 63 (1946), syllabus at paragraph one.

*Ruther* went to considerable lengths to ascertain and to give effect to the legislature's intentions. For example, this Court noted that:

Thus, the General Assembly has the right to determine what causes of action the law will recognize and to alter the common law by abolishing the action, by defining the action, or by placing a time limit after which an injury is no longer a legal injury. For example, the General Assembly abolished the torts of breach of a promise to marry, alienation of affections, and criminal conversation. R.C. 2305.29; *Strock v. Pressnell*, 38 Ohio St.3d 207, 214, 527 N.E.2d 1235 (1988), and paragraph one of the syllabus (upholding the statute that abolished "amatory actions" as constitutional). The legislature has also redefined the common-law definition of employer intentional torts. R.C. 2745.01; *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066. It has also limited the ability to pursue negligence actions that are discovered six months after a decedent's death. R.C. 2117.06(C).

\*\*\*

Responding to these concerns, **the General Assembly made a policy decision to grant Ohio medical providers the right to be free from litigation based on alleged acts of medical negligence occurring outside a specified time period.** This decision is embodied in Ohio's four-year statute of repose for medical negligence, set forth in R.C. 2305.113(C). The statute establishes a period beyond which medical claims may not be brought even if the injury giving rise to the claim does not accrue because it is undiscovered until after the period has ended. (Emphasis added)

*Ruther* at ¶14, 21.

Notably, *Ruther* found that the medical malpractice statute of repose grants a "right to be free from litigation" not merely a right to raise the statute of repose as a defense at the appropriate juncture. The four year period runs from the date of the

alleged malpractice, not from the date of discovery. Thus, the statute of repose is particularly well-suited for Civ.R. 12 motion practice. Viewed in this light, the court of appeals' *sua sponte* determination that some of the issues raised in the Motion to Dismiss were premature is incompatible with *Ruther*. The decision failed to give due accord to the "policy decision to grant Ohio medical providers the right to be free from litigation based on alleged acts of medical negligence" after four years. *Id.* at ¶21.

#### **L. Related Statutes Must Be Interpreted "*In Pari Materia*"**

In *State v. Cook*, 128 Ohio St. 3d 120, 942 N.E.2d 357, 2010-Ohio-6305, at ¶45, this Court discussed the need to generally construe statutes concerning the same subject matter "*in pari materia*":

We have judicially recognized similar rules of statutory construction:

First, all statutes which relate to the same general subject matter must be read *in pari materia*. And, in reading such statutes *in pari materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes. The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections. All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously. This court in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict." (Citations omitted.) *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, 1994 Ohio 209, 643 N.E.2d 1129, quoting *Johnson's Mkts., Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 35, 567 N.E.2d 1018.

Ohio's medical malpractice statute of limitations and statute of repose are found in the same statute, R.C. 2305.113. Properly interpreted, these two provisions serve distinct but compatible functions. The statute of limitations provides a concrete time

limit of one-year for filing from the date of the discovery of the underlying act or omission. The statute of repose operates in concert with the statute of limitations, by providing that regardless of the discovery (or vesting) of a cause of action, no action may be brought more than four years from occurrence of the act or omission constituting the basis of the medical claim.

The statute of repose is a check, or safeguard, that limits how long the statute of limitations may be extended based on a patient's failure to discover his or her cause of action. Viewed in this context, the two statutes are entirely complementary and harmonious.

The court of appeals improperly determined that the medical malpractice statute of limitations and the statute of repose are an "either or" situation. That is, the court explicitly held that the statute of repose is only viable prior to vesting. Subsequent to vesting, per the court of appeals, timeliness is controlled by the statute of limitations. The result of this analysis is that the statute of repose ceases functioning as a safeguard. Pertinent to these facts, the court of appeals ultimately held that the statute of repose did not bar the filing of a medical action more than five and one-half years after the occurrence of the alleged negligent act.

Likewise, R.C. 1.47(B) is a rule of statutory construction that specifically directs courts to give effect to an entire statute. The only way to accomplish this goal with respect to R.C. 2305.113(C) and R.C. 2305.113(A) is to acknowledge the distinct but equally important functions of the statute of repose and statute of limitations.

#### **IV. CONCLUSION**

The court of appeals misinterpreted Ohio's medical malpractice statute of repose. The underlying complaint was properly dismissed as violative of the four-year limit of the

medical malpractice statute of repose (R.C. 2305.113(C)) and the one-year limit of the medical malpractice statute of limitations (R.C. 2305.113(A)). Thus, the decision of the court of appeals should be reversed and the judgment entry of dismissal of the trial court should be re-instated.

Respectfully submitted,

*/s/ Martin T. Galvin*

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**CERTIFICATE OF SERVICE**

A copy of the foregoing document was filed the Court's electronic filing system and sent by regular U.S. Mail on this 14<sup>th</sup> day of December, 2015 to the following:

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**APPENDIX**

*Antoon v. Cleveland Clinic Foundation*, 8<sup>th</sup> App. No. CA-14-101373, 2015-Ohio-421  
Journal Entry and Opinion .....APPX 001-011

*Antoon v. Cleveland Clinic Foundation*, Cuyahoga County Common Pleas No. CV-13-  
817237 Journal Entry.....APPX 012

Date-stamped copy of Notice of Appeal to the Ohio Supreme Court .....APPX 013-015

R.C. 2305.113 .....APPX 016-019

# Court of Appeals of Ohio

FEB X 5 2015

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101373

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**DAVID ANTOON, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**CLEVELAND CLINIC FOUNDATION, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-13-817237

**BEFORE:** Keough, J., Jones, P.J., and Stewart, J.

**RELEASED AND JOURNALIZED:** February 5, 2015



APPX 001

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FILED AND JOURNALIZED  
PER APP.R. 22(C)

FEB X 5 2015

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By W. P. M. Deputy

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES - COSTS TAXED

KATHLEEN ANN KEOUGH, J.:

{¶1} Plaintiffs-appellants, David and Linda Antoon (“the Antoons”), appeal the trial court’s decision dismissing their complaint pursuant to Civ.R. 12(B)(6). For the reasons that follow, we reverse and remand.

{¶2} On November 14, 2013, the Antoons filed the instant complaint against the defendants-appellees, the Cleveland Clinic Foundation, Jihad Kaouk, M.D., Raj Goel, M.D., and Michael Lee, M.D. (collectively “appellees”), alleging various causes of action arising from a surgical procedure that occurred on January 8, 2008. In response, the appellees moved to dismiss the complaint pursuant to Civ.R. 12(B)(6) arguing that the Antoons’ complaint failed because it was not commenced within the one-year statute of limitations for medical malpractice claims, including all the derivative and related claims raised, pursuant to R.C. 2305.113(A). The appellees further moved to dismiss the Antoons’ complaint because it was in violation of R.C. 2305.113(C), Ohio’s statute of repose, which requires that a medical claim be filed no more than four years after the alleged malpractice.

{¶3} The Antoons opposed the motion arguing that their complaint was filed within the relevant statute of limitations period because it was filed within 30 days after their federal complaint was dismissed, citing 28 U.S.C. 1367(d).

{¶4} The trial court agreed with the appellees and dismissed the complaint. In granting the appellees’ motion, the court concluded:

On June 1, 2010, plaintiff's case was originally filed in this court as CV-728174. The case was voluntarily dismissed without prejudice on June 3, 2011. The case was not refiled until the filing of this case on November 14, 2013. The case was filed outside the applicable statute of limitations and outside the one year allowed by the Ohio Savings statute, R.C. 2305.19. Further, this filing is also outside the statute of repose, R.C. 2305.113(c) which requires that a medical claim be filed no more than four years after the alleged malpractice. Plaintiff's position is that 28 USCS [Section] 1367 applies. However, the court finds [Section] 1367(d) would only apply to protect claims while pending in federal court. The request to amend the federal complaint to include medical malpractice and other claims was denied. Therefore, plaintiff's claims at issue were never pending in federal court and are not protected under 28 USCS [Section] 1367. Therefore, defendants' motion is granted.

{¶5} The Antoons appeal this decision, raising two assignments of error, which will be addressed together.

{¶6} In their first assignment of error, the Antoons contend that the trial court erred by granting appellees' motion to dismiss regarding the medical claims. In their second assignment of error, the Antoons contend that the trial court erred by granting the appellees' motion to dismiss with regard to the non-medical claims raised, by failing to consider the periods of limitation for all the different claims included in their complaint.

{¶7} A motion to dismiss a complaint for failure to state a claim upon which relief can be granted, pursuant to Civ.R. 12(B)(6), tests the sufficiency of a complaint. In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought.

*O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975); *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254, ¶ 14. The allegations of the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor. *Id.* Appellate review of a trial court's decision to dismiss a complaint pursuant to Civ.R. 12(B)(6) is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶8} In this case, the appellees moved to dismiss the Antoons' complaint contending that the complaint is fatally deficient because (1) it was not commenced within the one-year statute of limitations for medical malpractice as required pursuant to R.C. 2305.113(A); and (2) it was filed in violation of Ohio's statute of repose pursuant to R.C. 2305.113(C), which requires that a medical claim be filed no more than four years after the alleged malpractice.

{¶9} We first find that the trial court erred in dismissing the Antoons' complaint under the premise that the complaint was not filed within the relevant four-year statute of repose for malpractice claims.

{¶10} "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.

{¶11} In this case, it is alleged that the negligent act occurred on January 8, 2008, the day David Antoon underwent the surgical procedure. (Complaint, ¶ 53). Accordingly, any claim arising from the alleged negligent act needed to vest and a complaint needed to be filed within four years or by January 8, 2012.

In this case, it appears from the face of the complaint that a claim vested prior to January 8, 2012 and the Antoons previously filed an action against the defendants, which was dismissed without prejudice in 2011. This filing was within the four-year statute of repose. As such, the claim had vested, and the statute of repose no longer applies. The timeliness of the complaint is now controlled by the statute of limitations and any tolling provisions. *See Ander.*

{¶12} R.C. 2305.113 establishes a one-year statute of limitations for medical malpractice claims. The Ohio Supreme Court has explained that the statute of limitations begins to run “(a) when the patient discovers or, in the exercise of reasonable care and diligence should have discovered, the resulting

injury, or (b) when the physician-patient relationship for that condition terminates, whichever occurs later." *Frysinger v. Leech*, 32 Ohio St.3d 38, 512 N.E.2d 337 (1987), at paragraph one of the syllabus, citing *Oliver v. Kaiser Community Health Found.*, 5 Ohio St.3d 111, 449 N.E.2d 438 (1983).

{¶13} A complaint may be dismissed under Civ.R. 12(B)(6) for failing to comply with the applicable statute of limitations when the complaint on its face conclusively indicates that the action is time-barred. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11. However, "[t]he affirmative defense of statute of limitations is generally not properly raised in a Civ.R. 12(B)(6) motion, as it usually requires reference to materials outside the complaint." *Ryan v. Ambrosio*, 8th Dist. Cuyahoga No. 91036, 2008-Ohio-6646, ¶ 20, quoting *Ferry v. Shefchuk*, 11th Dist. Geauga No. 2002-G-2480, 2003-Ohio-2535, ¶ 10. "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.'" *Lisboa v. Tramer*, 8th Dist. Cuyahoga No. 97526, 2012-Ohio-1549, ¶ 13, quoting *Ferry* at ¶ 10.

{¶14} In this case, the trial court clearly considered materials outside the instant complaint when it relied on information contained in the Antoons' first complaint and the subsequent federal complaint. This information was not contained in the Antoons' instant complaint and "the court may not take judicial notice of court proceedings in another case, 'even though between the same

parties and even though the same judge presided.” *Wick v. Lorain Manor*, 9th Dist. Lorain No. 12CA010324, 2014-Ohio-4329, ¶ 10, quoting *Clayton v. Walker*, 9th Dist. Summit No. 26538, 2013-Ohio-2318, ¶ 11. Pursuant to Civ.R. 12(B), the trial court could have converted the motion to one for summary judgment, however there is no indication that happened in this case. Moreover, the documents attached to the appellees’ motion to dismiss were not proper Civ.R. 56(C) evidence for the trial court to consider.

{¶15} Under our de novo review of this appeal, we find that insufficient information was alleged in the complaint to warrant dismissal pursuant to Civ.R. 12(B)(6). The complaint does not allege when the relevant statute of limitations began to run. Specifically, there is no allegation when the Antoons discovered the injury or when the physician-patient relationship terminated. The complaint stated, “[o]n December 11, 2008, approximately twelve months after his surgery, Plaintiffs met with Kaouk. Once again, Kaouk told Antoon that he needed to be patient and that Kaouk had not ruled out recovery.” (Complaint, ¶ 105). This statement does not indicate whether this was the last time they met for this court to determine that the physician-patient relationship terminated.

{¶16} Furthermore, the complaint stated that “Antoon sent four more e-mails to Kaouk before severing all communications. His first e-mail, on January 8, 2009, requested that Kaouk draft a letter to the VA that documented Antoon’s

symptoms and issues that Antoon had been describing.” (Complaint, ¶ 111). Although paragraph 114 states that “Antoon’s last three e-mails requested Kaouk’s opinions about his surgical outcomes,” no date was provided when these emails were sent for this court to determine if this was when the physician-patient relationship terminated.

{¶17} To determine when the statute of limitations period began or expired, paragraph 12 of the complaint could provide the most guidance.

Plaintiff originally filed an action against these Defendants in Cuyahoga Common Pleas Court, Case No. CV 10 728174, which was dismissed without prejudice on June 13, 2011. Plaintiff then filed a cause of action in the Southern District of Ohio on January 31, 2012 within the one year savings period of R.C. 2305.19. That case was dismissed by the federal district court on October 16, 2013. Plaintiffs’ instant action is being filed within the 30-day period permitted under [28] U.S.C. 1367(d).

{¶18} However, insufficient information is provided in this paragraph to determine if in fact the statute of limitations expired prior to the Antoons filing of the instant complaint. For instance, if the statute of limitations expired prior to the time when the Antoons filed their federal complaint, then the 30-day period permitted under 28 U.S.C. 1367(d) would not revive their ability to refile their complaint in the trial court below. Our reading of 28 U.S.C. 1367(d) is that it only applies when the statute of limitations expires while the action that contains state causes of action is pending in federal court. Such determination cannot be made here.

{¶19} Construing the allegations in favor of the nonmoving party, which we must do under Civ.R. 12(B), the complaint on its face does not conclusively show that the Antoons' claims, both medical and non-medical, are time-barred. Therefore, the trial court erred in granting the appellees' Civ.R. 12(B)(6) motion and dismissing the complaint with prejudice. The assignments of error are sustained.

{¶20} Judgment reversed and remanded.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
KATHLEEN ANN KEOUGH, JUDGE

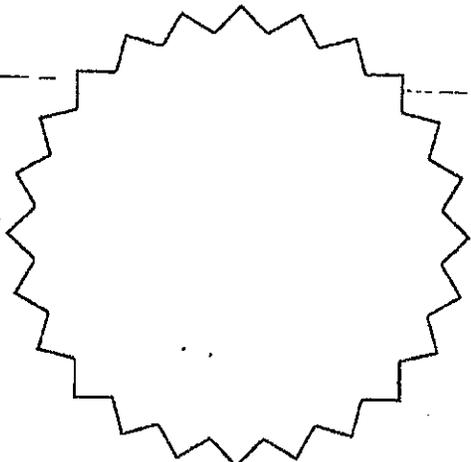
LARRY A. JONES, SR., P.J., and  
MELODY J. STEWART, J., CONCUR

The State of Ohio,  
Cuyahoga County.

} ss.

1, [redacted], Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal dated 2/5/15 CA 101373 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal dated 2/5/15 CA 101373 and that the same is correct transcript thereof.



In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 5th day of February A.D. 20 15  
By W. Park, Clerk of Courts  
Deputy Clerk



83845050

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

DAVID ANTOON-ET AL  
Plaintiff

Case No: CV-13-817237

Judge: JOHN J RUSSO

CLEVELAND CLINIC FOUNDATION-ET AL  
Defendant

**JOURNAL ENTRY**

89 DIS. W/ PREJ - FINAL

DEFENDANT(S) CLEVELAND CLINIC FOUNDATION(D1), JIHAD KAOUK(D2), RAJ GOEL(D3) AND MICHAEL LEE(D4) MOTION TO DISMISS OF DEFTS CLEVELAND CLINIC FOUNDATION, JIHAD KAOUK, M.D., RAJ GOEL, M.D., AND MICHAEL LEE, M.D. , FILED 12/30/2013, IS GRANTED. ON JUNE 1, 2010, PLAINTIFF'S CASE WAS ORIGINALLY FILED IN THIS COURT AS CV 728174. THE CASE WAS VOLUNTARILY DISMISSED WITHOUT PREJUDICE ON JUNE 3, 2011. THE CASE WAS NOT REFILED UNTIL THE FILING OF THIS CASE ON NOVEMBER 14, 2013. THE CASE WAS FILED OUTSIDE THE APPLICABLE STATUTE OF LIMITATIONS AND OUTSIDE THE ONE YEAR ALLOWED BY THE OHIO SAVINGS STATUTE, R.C. 2305.19. FURTHER, THIS FILING IS ALSO OUTSIDE THE STATUTE OF REPOSE, R.C. 2305.113(C) WHICH REQUIRES THAT A MEDICAL CLAIM BE FILED NO MORE THAN FOUR YEARS AFTER THE ALLEGED MALPRACTICE. PLAINTIFF'S POSITION IS THAT 28 USCS § 1367 APPLIES. HOWEVER, THE COURT FINDS § 1367(D) WOULD ONLY APPLY TO PROTECT CLAIMS WHILE PENDING IN FEDERAL COURT. THE REQUEST TO AMEND THE FEDERAL COMPLAINT TO INCLUDE MEDICAL MALPRACTICE AND OTHER CLAIMS WAS DENIED. THEREFORE, PLAINTIFF'S CLAIMS AT ISSUE WERE NEVER PENDING IN FEDERAL COURT AND ARE NOT PROTECTED UNDER 28 USCS §1367. THEREFORE, DEFENDANTS' MOTION IS GRANTED. COURT COST ASSESSED TO THE PLAINTIFF(S).

Judge Signature

04/14/2014

- 89  
04/14/2014

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Appellants, Cleveland Clinic Foundation, Jihad Kaouk, M.D., Raj Goel, M.D., and Michael Lee, M.D., hereby give notice of their appeal to the Supreme Court of Ohio from the Judgment of the Court of Appeals for the Eighth Appellate District, Cuyahoga, Ohio (Case No. CA-14-101373), journalized on February 5, 2015. This case presents questions of public and great general interest. A Memorandum in Support of Jurisdiction is being filed along with this Notice of Appeal.

A true and complete copy of the journal entry and opinion of the court of appeals from which this notice of appeal is taken is attached to the Memorandum in Support of Jurisdiction being filed contemporaneously.

Respectfully submitted,

*/s/ Martin T. Galvin*

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M.D., and Michael Lee, M.D.*

CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail on this 20<sup>th</sup> day of

March, 2015, to:

Dwight D. Brannon  
Kevin A. Bowman  
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*Attorney for Appellees*

/s/ Martin T. Galvin

MARTIN T. GALVIN (0063624)

2305.113 Time limitations for bringing medical, dental, ..., OH ST § 2305.113

KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Prior Version Held Unconstitutional by State ex rel. Ohio Academy of Trial Lawyers v. Sheward, Ohio, Aug. 16, 1999

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

Baldwin's Ohio Revised Code Annotated  
Title XXIII. Courts--Common Pleas  
Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)  
Limitations--Miscellaneous

R.C. § 2305.113

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

Effective: October 15, 2015

Currentness

(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 registered 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 plan of care, medical diagnosis, or treatment of a person;

(b) Claims that arise out of the plan of care, medical diagnosis, 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 plan of care, medical diagnosis, or treatment of any person and that are brought under section 3721.17 of the Revised Code;
  
- (d) Claims that arise out of skilled nursing care or personal care services provided in a home pursuant to the plan of care, medical diagnosis, or treatment.
  
- (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.

**2305.113 Time limitations for bringing medical, dental, ..., OH ST § 2305.113**

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(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 registered 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 is licensed as a physician assistant under 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.

(20) "Skilled nursing care" and "personal care services" have the same meanings as in section 3721.01 of the Revised Code.

**CREDIT(S)**

(2015 S 110, eff. 10-15-15; 2014 H 290, eff. 3-23-15; 2012 H 303, eff. 3-20-13; 2006 S 154, eff. 5-17-06; 2004 S 80, eff. 4-7-05; 2002 S 281, eff. 4-11-03)

**Notes of Decisions (85)**

R.C. § 2305.113, OH ST § 2305.113

Current through 2015 Files 1 to 31 of the 131st General Assembly (2015-2016) and 2015 State Issues 1 and 2.

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