

IN THE SUPREME COURT OF OHIO

DAVID ANTOON, ET AL., :
 :
 : **Appellees,** : **Case No. 2015-0467**
 :
 : **vs.** : **ON APPEAL FROM THE EIGHTH DISTRICT**
 : **COURT OF APPEALS, CASE No. CA-14-**
CLEVELAND CLINIC FOUNDATION, ET AL., : **101373**
 :
 : **Appellants.** :
 :

**MERIT BRIEF OF *AMICUS CURIAE* OHIO HOSPITAL ASSOCIATION,
OHIO STATE MEDICAL ASSOCIATION, AND OHIO OSTEOPATHIC
ASSOCIATION IN SUPPORT OF APPELLANTS**

Heather L. Stutz (0078111)
Counsel of Record
Christopher F. Haas (0079293)
Larry J. Obhof (0088823)
SQUIRE PATTON BOGGS (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215-6197
Telephone; (614) 365-2700
Facsimile: (614) 365-2499
Email: heather.stutz@squirepb.com,
christopher.haas@squirepb.com,
larry.obhof@squirepb.com

*Attorneys for Amicus Curiae Ohio Hospital
Association, Ohio State Medical Association,
and Ohio Osteopathic Association*

Sean McGlone (0075698)
OHIO HOSPITAL ASSOCIATION
155 E. Broad St., Suite 301
Columbus, Ohio 43215
Telephone: (614) 221-7614
Facsimile: (614) 917-2258
Email: sean.mcglone@ohiohospitals.org

*Attorney for Amicus Curiae Ohio Hospital
Association*

Martin T. Galvin (0063624)
William A. Meadows (0037243)
REMINER CO., L.P.A.
101 West Prospect Avenue, Suite 1400
Cleveland, Ohio 44115
(216) 687-1311; (216) 430-1841 –fax
Email: mgalvin@reminger.com
wmeadows@reminger.com

*Attorneys for Appellants Cleveland Clinic
Foundation, Jihad Kaouk, M.D., Raj Goel,
M.D., and Michael Lee, M.D.*

Bret C. Perry (0073488)
Jason A. Paskan (0085007)
BONEZZI SWITZER POLITO & HUPP CO. L.P.A.
1300 East 9th Street, Suite 1950
Cleveland, Ohio 44114
(216) 875-2056; (216) 875-1570 — fax
bperry@bsphlaw.com

*Counsel for Amicus Curiae The Academy
of Medicine of Cleveland & Northern Ohio*

Dwight D. Brannon (0021657)
Kevin A. Bowman (0068223)
Matthew A. Schultz (0080142)
BRANNON & ASSOCIATES
130 W. Second Street, Suite 900
Dayton, Ohio 45402
(937) 228-2306; (937) 228-8475 – fax
Email: dbrannon@branlaw.com
kbowman@branlaw.com
mschultz@branlaw.com

*Attorneys for Appellees
David and Linda Antoon*

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INTRODUCTION AND STATEMENT OF AMICI INTEREST

The Ohio Hospital Association, the Ohio State Medical Association, and the Ohio Osteopathic Association (collectively the “Amici”) each have a strong interest in the outcome of this case, which will directly affect their respective members and indeed the entire medical community in Ohio. The Eighth District Court of Appeals adopted a new and unfounded interpretation of R.C. 2305.113(C). This statute, on its face, requires all medical malpractice claims to be brought within four years of the date of the alleged malpractice. If affirmed, the Eighth District’s erroneous decision will significantly narrow the scope of R.C. 2305.113 and upset the careful balance the General Assembly has drawn between the various competing interests in medical malpractice litigation. The Eighth District’s misapplication of the law is inconsistent with the protections the General Assembly enacted for the purpose of ensuring stability and predictability in Ohio’s medical liability environment.

Ohio Hospital Association

The Ohio Hospital Association (“OHA”) is a private, non-profit trade association that represents 219 hospitals and 13 health systems throughout Ohio. It was founded in 1915 as the first state-level hospital association in the United States, and its mission is to collaborate with member hospitals and health systems to ensure a healthy Ohio. For 100 years, it has provided a forum for hospitals to come together to pursue health care policy and quality improvement opportunities in the best interest of hospitals and their communities.

Ohio State Medical Association

The Ohio State Medical Association (“OSMA”) is a statewide medical association representing 20,000 Ohio physicians, residents, fellows, medical students, and practice managers. The OSMA is affiliated with the American Medical Association at the national level and county medical societies at the local level, and is dedicated to advancing the practice of medicine for

physicians and their patients, advocating on behalf of Ohio physicians, and protecting the medical profession. The OSMA values the sanctity of the physician-patient relationship; the role of physicians as the leaders of the health care team; innovation that transforms health care delivery and improves the health of patients and the patient experience; access to high-quality, affordable health care; and the role of patients in improving their health.

Ohio Osteopathic Association

The Ohio Osteopathic Association (“OOA”) is a state society of the American Osteopathic Association, and advocates for approximately 4,600 osteopathic physicians in Ohio, 14 hospitals that are members of the Ohio Osteopathic Hospital Association, and the Ohio University Heritage College of Osteopathic Medicine. The OOA’s founding purposes include promoting the health of all Ohioans; cooperating with all public health agencies; maintaining high standards at all Ohio osteopathic institutions; encouraging research and investigation, especially that pertaining to the principles of the osteopathic school of medicine; and maintaining the highest standards of ethical conduct in all phases of osteopathic medicine and surgery.

The Amici’s Interest In This Case

The Amici have a strong interest in ensuring the continued certainty regarding potential litigation against their members for alleged medical negligence. In enacting R.C. 2305.113, the General Assembly established an intricate framework for the timeliness of medical malpractice claims that represents a carefully-considered compromise between the competing interests of medical providers and potential plaintiffs. R.C. 2305.113(C) is a key part of that framework.

By its plain terms, R.C. 2305.113(C) cuts off all medical malpractice claims (with certain limited exceptions not applicable here and not argued by Appellees) that are not commenced within four years of the alleged malpractice. This limitation provides a fixed, objective, and

clear timeframe that is applied without the need for extensive discovery regarding when a plaintiff knew or should have known of an alleged injury, and offers medical providers stability and certainty regarding the scope of their responsibilities necessary to investigate, account for, and/or defend against alleged malpractice.

The Eighth District Court of Appeals, however, held that R.C. 2305.113(C) bars only “claims that have not vested within four years of the negligent act.” *Antoon v. Cleveland Clinic Foundation*, 8th Dist. No. 101373, 2015-Ohio-421, ¶ 10. That holding ignores the plain language of the statute and undermines the goals it was enacted to achieve. If affirmed, the Eighth District’s decision will adversely affect members of each of the Amici, who will be faced with the possibility of litigation outside the timeframe established by the General Assembly and who will be subjected to costly and time-consuming discovery in cases that should be summarily dismissed as untimely. The Eighth District’s decision invites plaintiffs to pursue stale litigation that the statute of repose is intended to prohibit.

The Amici have consistently advocated for obtaining certainty and finality for their members, including serving as friends of this Court in *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, a case erroneously relied upon by the appellate court in this case. As the Amici previously argued in *Ruther*, the language of R.C. 2305.113(C) is perfectly clear and the application of the statute to bar the type of untimely claims at issue in this case is entirely consistent with the intent of the General Assembly and the applicable provisions of the Ohio Constitution. The appellate court’s limitation on R.C. 2305.113(C) simply has no basis in Ohio law or public policy. Accordingly, the Amici respectfully urge this Court to reverse the decision of the Eighth Appellate District.

STATEMENT OF FACTS

The Amici defer to the Appellants' statement of facts, and herein set forth only the key facts relevant to the issue in this appeal. On January 8, 2008, Mr. Antoon underwent prostatectomy surgery. On June 1, 2010, the Antoons filed a malpractice action against Appellants in the Cuyahoga County Court of Common Pleas, Case No. CV-10-728174. That action was voluntarily dismissed without prejudice on June 6, 2011.

On January 31, 2012, the Antoons filed a *qui tam* action in the Southern District of Ohio, Case No. 3:12-cv-00027. The Antoons filed an amended complaint in that case on May 8, 2012, again asserting a *qui tam* action. On February 14, 2013, the Antoons sought leave to file a Second Amended Complaint that would add various claims, including medical malpractice. The District Court dismissed the case and denied the Antoons' motion to file the Second Amended Complaint on October 16, 2013.

The Antoons then filed the instant case on November 13, 2013 in the Cuyahoga County Court of Common Pleas, Case No. CV-13-817-237. The trial court dismissed the action on April 14, 2014, holding that the case was (1) barred by the four-year statute of repose in R.C. 2305.113(C), and (2) filed outside the statute of limitations. The court of appeals reversed, holding that (1) the four-year statute of repose in R.C. 2305.113(C) did not apply because that statute only applies to claims that have not vested within the four-year limit, and Plaintiffs' had vested within that period, and (2) the statute of limitations issues could not be decided on a Rule 12(B)(6) motion to dismiss.

ARGUMENT

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.

The General Assembly has closely and continually focused on the laws governing the timeliness of medical malpractice claims, ultimately striking a balance between the competing interests of medical providers and potential plaintiffs. Those efforts resulted in R.C. 2305.113, which establishes a detailed framework that includes both statutes of limitations (which limit the time for a plaintiff to bring a lawsuit after a claim accrues) and a statute of repose (which prevents a claim from accruing). *See Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 112 (“[A] true statute of limitations ... limits the time in which a plaintiff may bring suit after the cause of action accrues, [while] a statute of repose ... potentially bars a plaintiff’s suit before the cause of action arises.”), quoting *Sedar v. Knowlton Constr. Co.*, 49 Ohio St. 3d 193, 195 (1990).

R.C. 2305.113(C) is a critical and unique component of that statutory framework. Unlike the other deadlines in R.C. 2305.113, subsection (C) runs from a fixed, objective date (the date of the alleged malpractice), which in many cases eliminates the need for costly discovery regarding the date the plaintiff discovered or should have discovered his or her alleged injury. And unlike the other provisions in R.C. 2305.113, subsection (C) imposes a four-year deadline both as a statute of limitations for claims that have vested and as a statute of repose for claims that have not vested.

But the Eighth District ignored the plain language of subsection (C) and erroneously held that the four-year limit in (C) “no longer applies” once a claim vests. *Antoon*, 2015-Ohio-421, ¶ 11. In reaching that conclusion, the appellate court relied entirely on *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, in which this Court upheld the constitutionality of R.C.

2305.113(C), and another Ohio decision purporting to follow *Ruther*. The appellate court’s reliance on those decisions is misplaced because neither addressed the issue in this case—whether (C) applies to a vested claim.

There is simply no support in the law or public policy for the appellate court’s decision, and if it is left standing, it will undermine the careful balance of competing interests embodied in R.C. 2305.113 by significantly narrowing the scope of cases to which the four-year limit in (C) applies. The Amici therefore respectfully urge the Court to reverse the decision below and hold that R.C. 2305.113(C) applies regardless of whether a claim has vested within the four years following the date of the alleged malpractice.

A. The Statutory Framework For Malpractice Actions

R.C. 2305.113 establishes a framework for the timeliness of bringing medical malpractice actions that includes a number of limitations, extensions, and exceptions. While each provision performs a unique function, the relationships between them reflect the special consideration the General Assembly gave to the entire framework and the intended role that each provision plays within that framework.

Subsection (A) states that malpractice claims must be brought within one year from when they accrue:

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.

R.C. 2305.113(A) (emphasis added). As this Court reaffirmed in *Ruther*, a claim “accrues” for purposes of this provision “when a patient discovers or in the exercise of reasonable care and diligence should have discovered the resulting injury.” *Ruther*, 2012-Ohio-5686, at ¶ 17.

Subsection (B) provides a 180-day extension to the one-year deadline in (A) for plaintiffs that give written notice of their intent to sue:

(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.

R.C. 2305.113(B) (emphasis added). Thus, under (A) and (B), a plaintiff can potentially have up to 1.5 years (1 year + 180 days) after a claim accrues to bring an action.

These accrual-based deadlines in (A) and (B) are subject to subsection (C), which establishes a four-year limit from the date of the alleged malpractice by which a claim must be brought or else be time-barred:

(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.

R.C. 2305.113(C) (emphasis added). While (C)(1) and (C)(2) both describe a four-year limit, the emphasized language reveals an important difference between these provisions. Section (C)(1) establishes a limit for when an action “shall be commenced,” while (C)(2) states that if a claim is not timely filed, “any action upon that claim is barred.” As discussed below, (C)(1) reflects a limitation on when a claim may be brought (i.e., a statute of limitations for vested claims), while (C)(2) reflects a limit on whether a claim can accrue at all (i.e., a statute of repose for non-vested claims).

The four-year limit in (C) is subject to subsection (D), which provides a one-year extension in only two circumstances. Under (D)(1), if a plaintiff discovers an injury during the fourth year after the alleged malpractice, he or she may bring an action within one year of discovering the injury. Under (D)(2), if a claim is based on a foreign object left in the body, the plaintiff may bring an action within one year of discovering the foreign object.¹ Neither of these extensions applies in this case.

The time limits described in (A) and (C)(1) are not mutually exclusive. Rather, both sections provide a time limit for when a vested malpractice action “shall be commenced”: section (A) states that actions “shall be commenced” within one year of the claim accruing, and (C)(1) states that no action “shall be commenced” more than four years after the alleged malpractice. As such, if a claim accrues within four years of the alleged malpractice, then the plaintiff must file a claim within one year of when the injury was discovered (subject to the 180-day extension in (B)), and no later than four years after the alleged malpractice (subject to the extensions in (D)). If, however, a claim does not accrue within four years of the alleged malpractice, then the claim never vests and it “is barred” under (C)(2).

Reading these provisions together results in a framework for the timeliness of medical malpractice claims that can be divided into three scenarios:

- (1) A claim that is brought in years 1-4 after the alleged malpractice: Because the plaintiff has brought the claim within four years of the alleged malpractice, the limits in (C) are not implicated. As such, the claim is timely under (A) if it was brought within one year from the date of discovery (subject to the 180-day extension in (B)).
- (2) A claim that is brought in year 5 after the alleged malpractice: The timeliness of the claim is governed by both (A) and (C).

¹ The remaining provisions of R.C. 2305.113 do not alter the above deadlines. Subsection (D)(3) states that a plaintiff seeking an extension under (D) has the burden of proving by clear and convincing evidence that (D)(1) or (D)(2) applies. The final provision of the statute, subsection (E), contains definitions.

- Under (A), the claim must be brought within one year from the date of discovery (subject to the 180-day extension in (B)).
- Because the claim was brought beyond the four-year limit in (C), the plaintiff must qualify for one of the exceptions in (D). (D)(1) applies only if the claim accrued during the fourth year after the alleged malpractice, and (D)(2) only applies to claims based on a foreign object left in the body.
- If the exceptions in (D) do not apply, then the claim is barred under (C)—either under (C)(1) because it vested and the plaintiff filed more than four years after the alleged malpractice, or under (C)(2) because the claim never vested before the fourth year expired, and is therefore prevented from ever vesting and is barred by the statute of repose.

(3) A claim that is brought more than 5 years after the alleged malpractice: The timeliness of the claim is again governed by both (A) and (C).

- Under (A), the claim must be brought within one year from the date of discovery (subject to the 180-day extension in (B)).
- Because the claim was brought beyond the four-year limit in (C), the plaintiff must qualify for one of the exceptions in (D). However, (D)(1) cannot apply because it only extends the filing deadline in (C) for a maximum of one year, to a total of 5 years from the date of the alleged malpractice. Thus, the plaintiff must qualify for the foreign-object exception in (D)(2). If the (D)(2) exception applies, both (D)(2) and (A) require that the claims be brought within one year from the discovery of the foreign object.
- If (D)(2) does not apply, then the claim is barred under (C)—either under (C)(1) because it vested and the plaintiff filed more than four years after the alleged malpractice, or under (C)(2) because the claim never vested and is barred by the statute of repose.

While claims in the second and third scenarios above are subject to the time limits in both (A) and (C), there is an important practical difference between how those two subsections are applied in litigation. Because the one-year limit in (A) runs from the accrual date, it is often necessary to engage in extensive discovery to determine when the plaintiff knew or should have known of the alleged injury. In contrast, the four-year limit in (C) runs from the date of the alleged malpractice, and courts can frequently determine based on the pleadings alone whether

the claim was filed within that four-year time limit.² Thus, while claims in the second and third scenarios above could potentially be untimely under both (A) and (C), resolving the deadline in (C) frequently will be less costly and time-consuming for the parties because it is often unnecessary to conduct discovery and can be accomplished via Rule 12(B)(6) rather than Rule 56.

As discussed further below, the certainty and objectivity provided by the four-year time limit in (C) is one of the primary benefits the General Assembly sought to provide through R.C. 2305.113(C). That benefit and the legislature’s clear intent as expressed in the plain language of the statute, however, are directly undermined by the Eighth District’s decision below, in which it incorrectly held that (C) “no longer applies” once a claim vests.

B. The Language And Structure Of R.C. 2305.113 Demonstrate That Vested Claims Are Subject To R.C. 2305.113(C).

In reaching its decision below, the Eighth District did not address the plain language of 2305.113(C), which is perfectly clear and does not set differing timelines for claims that have vested versus claims that have not vested. Nor did the Eighth District address the relationship between the four-year limit in R.C. 2305.113(C) and all of the other time limits provided in that statute. Simply put, nothing in R.C. 2305.113 supports the appellate court’s conclusion that subsection (C) does not apply to vested claims.

In determining the scope of R.C. 2305.113(C), the first step is to consider the plain language of the statute. “[W]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory

² The exception in (D)(1) requires discovery regarding the accrual date, but as described above this one-year exception can only apply to claims filed during the fifth year after the alleged malpractice. After the fifth year, if the claim does not involve a foreign object under (D)(2), then determining whether the claim was filed within the four-year limit in (C) turns solely on the date of the alleged malpractice.

interpretation.” *State v. Muncie*, 91 Ohio St. 3d 440, 447 (2001). Here, the language of subsection (C) is not ambiguous and cannot sustain the Eighth District’s holding.

Nothing in (C) limits the applicability of the four-year deadline to claims that have not vested. To the contrary, subsection (C) explicitly governs any action based on a medical, dental, optometric, or chiropractic claim: under (C)(1), “[n]o action upon a ... claim shall be commenced” more than four years after the alleged malpractice; and if a claim is not brought within four years, then under (C)(2) “any action upon that claim is barred.” By limiting subsection (C) to claims that have not vested, the Eighth District effectively engrafted limiting language onto the statute that the General Assembly did not enact.

Even if the language of subsection (C) were deemed ambiguous, the rules of statutory interpretation confirm that (C) applies regardless of whether a claim has vested. As noted above, there is a difference between subsections (C)(1) and (C)(2), and courts must give effect to both provisions. *State v. Taylor*, 138 Ohio St. 3d 194, 2014-Ohio-460, ¶ 23 (“This court and the rules of statutory construction have admonished those charged with discerning legislative intent to apply every word used in legislation.”). Whereas (C)(1) defines the time in which a claim “shall be commenced,” (C)(2) states that if a claim is not brought within four years, “any action upon that claim is barred.” Subsection (C)(2) thus clearly addresses non-vested claims and acts as a statute of repose to bar such claims after four years. What, then, is the function of (C)(1)? To address vested claims. If (C) does not apply to vested claims at all, as the Eighth District held, then (C)(1) would serve no purpose.

“The General Assembly is not presumed to do a useless thing, and when language is inserted in a statute, it is inserted to accomplish a definite purpose.” *Id.* The purpose here is clear—whereas (C)(2) addresses claims that have not vested, (C)(1) addresses claims that have

vested. Notably, the language in (C)(1) stating that a claim “shall be commenced” within four years of the alleged malpractice is also used in subsection (A), which states that claims “shall be commenced” within one year of when the claim accrues. Both provisions thus describe the circumstances in which vested claims shall or shall not be commenced, and function as statutes of limitations. This is the only interpretation that gives (C)(1) meaning.

This interpretation of (C)(1) is further confirmed when subsection (C) is read in conjunction with its exception in subsection (D)(1). *See State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St. 3d 395, 397 (2003) (“In construing the statute, our paramount concern is legislative intent, and words and phrases must be read in context.”). (D)(1)’s sole function is to provide an exception to the four-year limit in (C) for certain vested claims. As noted above, the (D)(1) exception to (C) provides a one-year extension for claims that accrue (i.e., vest) during the fourth year after the alleged malpractice. (D)(1) states that if the claim vests during the fourth year, a person “may commence an action” within one year of discovering the injury. The effect of (D)(1) is to modify the time in which an action on a particular category of vested claims may be “commenced” under (C)(1). Thus, both (D)(1) and (C)(1) act as statutes of limitations for vested claims.

If (C) does not apply to vested claims at all, as the Eighth District held, then there would be no reason for the exception in (D)(1), which by its terms extends the term in (C) only for claims that vested just before the four year limit. According to the Eighth District, these vested claims would be outside the scope of (C) anyway and subject only to the already-existing one-year limitation in (A). Such an interpretation renders the exception and extension in (D)(1) useless and is, therefore, wrong.

There is simply nothing in R.C. 2305.113 that supports the Eighth District’s conclusion that subsection (C) “no longer applies” after a claim vests. The plain language of (C) and the related provisions of R.C. 2305.113 all confirm that vested claims are subject to the four-year limit in (C). The Eighth District’s contrary ruling should be reversed.

C. *Ruther* Did Not Hold That R.C. 2305.113(C) Applies Only To Claims That Have Not Vested Within Four Years.

In holding that R.C. 2305.113(C) does not apply to claims that have vested, the Eighth District did not rely on the language of the statute. Instead, it relied on a misinterpretation of this Court’s decision in *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, and another Ohio appellate decision purporting to follow *Ruther*. However, *Ruther* simply did not address the question of whether R.C. 2305.113(C) applies to claims that have vested, and its reasoning does not in any way support the appellate court’s holding here.

Ruther addressed “an as-applied constitutional challenge to R.C. 2305.113(C)” where the plaintiff’s claims had not vested during the four-year period. *Ruther*, 2012-Ohio-5686, at ¶ 1 (emphasis added). The alleged malpractice in *Ruther* occurred between 1995 and 1998, but the plaintiff did not develop any injuries until many years later, ultimately filing suit in 2009. *Id.* at ¶¶ 4-5. The issue before the Court was whether it was constitutional to apply R.C. 2305.113(C) to bar a claim where the plaintiff was not aware of her injury until after the four-year period in R.C. 2305.113(C) had expired. The Court held that this application of the statute was not unconstitutional.

The *Ruther* Court began its analysis by stating that the right-to-remedy provision in Article I, Section 16 of the Ohio Constitution “applies only to existing, vested rights.” *Id.* at ¶ 13. The Court then stated that a malpractice claim is not “vested” for purposes of the right-to-remedy provision until it accrues (i.e., when the plaintiff knew or should have known of the

injury). *Id.* at ¶ 17. Based on these principles, the Court found that applying R.C. 2305.113(C) to bar a claim that has not accrued within four years is not unconstitutional because the claim never “vested,” and thus was not governed by the right-to-remedy provision in Article I, Section 16. *Id.* at ¶ 18 (holding that in such circumstances, “R.C. 2305.113(C) does not bar a vested cause of action, but prevents a cause of action from vesting”).

The Court did not purport to address every possible application of R.C. 2305.113(C). To the contrary, the Court made it clear that it was resolving only the constitutionality of the statute in the scenario before it, where the claim had not vested before being barred:

A plaintiff like Mrs. Ruther, whose cause of action for medical malpractice does not accrue until after the statute of repose has expired pursuant to R.C. 2305.113(C), is not deprived of a vested right. Because R.C. 2305.113(C) is a valid exercise of the General Assembly’s authority to limit a cause of action, Mrs. Ruther failed to present clear and convincing evidence that the statute is unconstitutional as applied to her claim.

Ruther, 2012-Ohio-5686, at ¶ 35; *see also id.* at ¶ 9 (“An as-applied constitutional challenge, such as Mrs. Ruther raises, alleges that the application of the statute in the particular context would be unconstitutional.”) (internal quotes and citations omitted). The Court did not address whether R.C. 2305.113(C) was applicable to vested claims, nor whether such an application would be constitutional.

In relying on *Ruther*, the court of appeals quoted the syllabus of the case, which states that, in that particular case, “R.C. 2305.113(C) does not extinguish a vested right and thus does not violate the Ohio Constitution, Article I, Section 16.” *See Antoon*, 2015-Ohio-421, at ¶ 10. The syllabus, however, must be understood in the context of the as-applied nature of the constitutional challenge. The issue in the instant case—whether R.C. 2305.113(C) ever applies to a vested claim—was simply not before the Court. As such, the appellate court erred in holding that *Ruther* resolved that issue.

The other case the court of appeals cited on this issue, *Ander v. Clark*, 10th Dist. No. 14AP-65, 2014-Ohio-2664, relied upon this same erroneous interpretation of *Ruther*. See *Antoon*, 2015-Ohio-421, at ¶ 10. The *Ander* court cited the syllabus from *Ruther* and then jumped to the erroneous conclusion that “[o]nce 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*, 2014-Ohio-2664, at ¶ 6. The *Ander* court did not cite any case for this proposition, and *Ruther* simply did not address this issue, as discussed above.

Furthermore, the *Ander* court did not actually apply the unsupported proposition relied on by the Eighth District here. The *Ander* court held that dismissal under Rule 12(B)(6) was not appropriate because the date of the alleged malpractice could not be determined on the face of the “rather sparse complaint.” *Id.* at ¶¶ 3, 8; see also *id.* at ¶ 10 (noting that “further discovery might show the claim to be time barred”). *Ander* thus offers no support for the lower court’s holding in this case, where the alleged malpractice unequivocally occurred more than four years before the case was filed.

The Sixth Circuit U.S. Court of Appeals has also incorrectly interpreted *Ruther*—although neither the *Ander* court nor the appellate court in this case relied on its decision. In *Kennedy v. U.S. Veterans Admin.*, 526 Fed.Appx. 450 (6th Cir. 2013), the court stated: “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.” *Kennedy*, 526 Fed.Appx. at 457 (emphasis added). The Sixth Circuit’s conclusion that R.C. 2305.113(C) cannot extinguish a vested claim is simply wrong. As discussed above, *Ruther* did not reach the issue of whether R.C. 2305.113(C) applies to

vested claims. And as discussed below, applying R.C. 2305.113(C) to extinguish vested claims does not violate the Ohio Constitution.

The majority in *Kennedy* assumed that because *Ruther* found that applying R.C. 2305.113(C) to non-vested claims was not unconstitutional, then applying the statute to vested claims must be unconstitutional. *See id.* at 459 (Hood, J., concurring) (“I write separately to state my agreement with Judge Clay’s conclusion that, reasoning from *Ruther* ... 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.”). This assumption is incorrect—applying R.C. 2305.113(C) to vested claims does not raise any constitutional concerns.³ The General Assembly clearly and carefully crafted (C) to comply with this Court’s prior rulings in that respect.

As the Court stated in *Ruther*, the right-to-remedy provision in Article I, Section 16 of the Ohio Constitution “applies only to existing, vested rights.” *Ruther*, 2012-Ohio-5686, at ¶ 13. Thus, if a claim is not vested, then the right-to remedy provision simply does not apply. But if a claim is vested, that does not mean the General Assembly cannot place any limits on the ability to bring an action on the claim. To the contrary, this Court has held that the General Assembly may impose such limits as long as the plaintiff has a “reasonable time” to bring a claim (meaning one year after discovery of the injury):

This court has held that a legislative enactment may lawfully shorten the period of time in which the remedy may be realized “as long as the claimant is still afforded

³ The courts’ error may reflect the fact that this issue was not briefed by the parties in either case. None of the appellate briefs in *Ander* addressed the issue of whether R.C. 2305.113(C) applies to vested claims. And one of the judges in *Kennedy* specifically objected that “[t]he majority rests its decision on a reading of the Ohio Supreme Court’s decision in *Ruther*, 134 Ohio St. 3d 408, 2012 Ohio 5686, 983 N.E.2d 291, without briefing from the parties.” *See id.* at 456 (White, J., concurring).

a reasonable time in which to enforce his right.” *Adams v. Sherk* (1983), 4 Ohio St. 3d 37, 39, 4 OBR 82, 84, 446 N.E. 2d 165, 167. A “reasonable time” in which to bring a medical malpractice claim was defined in *Adams* as “one year after the discovery of the malpractice.” *Id.* at 40, 4 OBR at 85, 446 N.E. 2d at 168.

Gaines v. Preterm-Cleveland, Inc., 33 Ohio St. 3d 54, 60 (1987).

Here, the General Assembly has afforded a plaintiff a “reasonable time” (one year) to bring a vested claim. Pursuant to subsection (C)(1), a plaintiff has four years after the alleged malpractice to bring a claim. If the plaintiff discovers the injury any time before the fourth year, he/she will have a year to bring a claim under (A), and (C) is not implicated. Under subsection (D)(1), a plaintiff who discovers an injury in the fourth year after the malpractice has an additional year to bring a claim, to avoid a situation where (C) would cut off a vested claim less than a year from discovery of the injury. And under (D)(2), a claim based on a foreign object left in the body can be brought within one year of the object being discovered. *Cf. Ruther*, 2012-Ohio-5686, at ¶ 27 (citing sections (D)(1) and (D)(2), and noting that “the General Assembly addressed certain constitutional concerns when enacting R.C. 2305.113(C) in 2003”). Thus, under no circumstance does R.C. 2305.113(C) afford a person less than one year to bring a vested claim after an injury is discovered. Under this Court’s prior rulings, one year is a “reasonable time” for purposes of the Ohio Constitution.

Kennedy therefore erred in its interpretation of *Ruther*—there are no constitutional concerns with applying R.C. 2305.113(C) to vested claims. The issue in this case is simply a matter of statutory interpretation, and for the reasons discussed above, the language of R.C. 2305.113 is clear that all claims—vested or not—are subject to (C).

D. The Appellate Court’s Decision, If Affirmed, Would Contradict The Important Policies Underlying R.C. 2305.113.

As written and enacted by the General Assembly, R.C. 2305.113 strikes a thoughtful balance between the rights of claimants and the need to provide certainty and finality to Ohio’s

medical providers. The Eighth District’s decision would disrupt that balance and should be reversed.

When the General Assembly enacted R.C. 2305.113(C), it set forth the reasons why the statute was necessary. Those reasons included: (1) the diminishing availability of relevant evidence and witnesses as time continues to pass from the date of the diagnosis, care, or treatment of a prospective claimant; (2) the “unacceptable burden to hospitals and health care practitioners” that would stem from maintenance of records and other documentation beyond the four-year statutory limit; and (3) the difficulties of applying evolving standards of care rather than “the standard of care relevant to the point in time when the relevant health care services were delivered.” Am.Sub.S.B. No. 281, § 3(A)(6)(b)-(e).

The General Assembly determined that Senate Bill 281 “strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners,” *id.*, § 3(A)(6)(a), and that it “precludes unfair and unconstitutional aspects of state litigation but does not affect timely medical malpractice actions brought to redress legitimate grievances.” *Id.*, § 3(A)(6)(e).

That careful legislative balance has helped protect Ohioans’ access to care. Prior to the legislature’s efforts, medical liability premiums in Ohio were “increasing nearly 30 percent year after year,” causing some doctors to eliminate high-risk procedures or to leave the state, jeopardizing the scope of Ohioans’ access to care.⁴ The state was on an unsustainable path. For example, the number of medical liability carriers competing in the Ohio insurance market had fallen from nearly thirty in 2000 to only five in 2003. In response, the General Assembly

⁴ Ohio State Medical Association, *Medical Liability and Tort Reform*, available at <https://www.osma.org/Advocacy/Medical-Liability-and-Tort-Reform> (last visited Nov. 17, 2015).

enacted Senate Bill 281 and other legislation designed to create more certainty and predictability for medical providers. Since then, the insurance market has become much more robust, with three times as many medical liability carriers today than in 2003. Medical malpractice liability insurance rates have fallen over the same time period, and Ohio's physicians have saved millions in premium dollars since the enactment of Senate Bill 281. Without these savings, many of these providers, especially those of high quality and/or specialization, would flock to more protective states, leaving Ohioans with less medical providers and less choice.

The balance the General Assembly struck in R.C. 2305.113(C) is working, but is threatened by the Eighth District's decision. The policy goals underlying R.C. 2305.113(C) are not limited to claims that do not vest within four years of the alleged malpractice. Regardless of whether or not a claim vested in that time frame, litigating a claim more than four years after the alleged malpractice presents the same difficulties in terms of obtaining relevant and reliable evidence, imposing an "unacceptable burden" on providers to maintain extensive documentation for an open-ended time frame, and applying evolving standards of care. Yet the Eighth District's holding is wholly inconsistent with those goals by depriving medical providers of the ability to challenge the timeliness of a vested claim under (C).

The appellate court's decision vividly illustrates the results of such a rule. After the court held that (C) was inapplicable to vested claims, it then held that the applicability of the one-year statute of limitations in (A) could not be resolved under Civil Rule 12(B)(6). *See Antoon*, 2015-Ohio-421, ¶¶ 15-19. Resolving the statute of limitations issues likely will require discovery into when the Antoons knew or should have known of their alleged injuries, and when the physician-patient relationship terminated. *Id.*

In contrast, the question of whether the Antoons’ complaint was filed within the four-year limit in (C) can likely be resolved on the pleadings alone or with minimal discovery. The instant case was filed five years after the alleged malpractice—clearly outside the time limit in R.C. 2305.113(C)—and the plaintiffs do not claim that the exceptions in R.C. 2305.113(D) apply. Instead, the Antoons argue that this case is timely because they previously filed actions against the Defendants in state and federal court that allegedly trigger the Ohio savings statute, R.C. 2305.19, and a federal savings statute, 28 U.S.C. § 1367(d). While the merits of those arguments are not before the Court, the key point here is that resolving such issues is much more efficient than determining when the Antoons’ claims accrued for purposes of applying the discovery-based statute of limitations in (A).

By holding that the four-year time limit in (C) “no longer applies” once a claim vests, the court of appeals has negated one of the key purposes of the statute and has effectively re-written the statute to achieve a result that the General Assembly did not intend and did not write. There is simply no basis for that decision in the law or policy of Ohio, and the Amici respectfully submit that the Court should reverse the lower court’s ruling and hold that R.C. 2305.113(C) applies regardless of whether or not a claim has vested.

CONCLUSION

For all the foregoing reasons, the OHA, OSMA, and OOA support the Appellants’ Proposition of Law and respectfully request that the Court enter appropriate relief in accordance with that Proposition, as stated in Appellants’ brief.

Respectfully submitted,

/s/Heather L. Stutz

Heather L. Stutz (0078111)

Counsel of Record

Christopher F. Haas (0079293)

Larry J. Obhof (0088823)

SQUIRE PATTON BOGGS (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215-6197
Telephone; (614) 365-2700
Facsimile: (614) 365-2499
Email: heather.stutz@squirepb.com,
christopher.haas@squirepb.com,
larry.obhof@squirepb.com

*Attorneys for Amicus Curiae Ohio Hospital
Association, Ohio State Medical Association, and
Ohio Osteopathic Association*

Sean McGlone (0075698)
Ohio Hospital Association
155 E. Broad St., Suite 301
Columbus, Ohio 43215
Telephone: (614) 221-7614
Facsimile: (614) 917-2258
Email: sean.mcglone@ohiohospitals.org

*Attorneys for Amicus Curiae Ohio Hospital
Association*

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2015, a copy of the foregoing was filed electronically with the Clerk of the Ohio Supreme Court, and that a copy of the foregoing was served upon the following by email:

Martin T. Galvin (0063624)
William A. Meadows (0037243)
REMINGER CO., L.P.A.
101 West Prospect Avenue, Suite 1400
Cleveland, Ohio 44115
(216) 687-1311; (216) 430-1841 –fax
Email: mgalvin@reminger.com
wmeadows@reminger.com

*Attorneys for Appellants Cleveland Clinic
Foundation, Jihad Kaouk, M.D., Raj Goel,
M.D., and Michael Lee, M.D.*

Dwight D. Brannon (0021657)
Kevin A. Bowman (0068223)
Matthew A. Schultz (0080142)
BRANNON & ASSOCIATES
130 W. Second Street, Suite 900
Dayton, Ohio 45402
(937) 228-2306; (937) 228-8475 – fax
Email: dbrannon@branlaw.com
kbowman@branlaw.com
mschultz@branlaw.com

*Attorneys for Appellees
David and Linda Antoon*

Bret C. Perry (0073488)
Jason A. Paskan (0085007)
BONEZZI SWITZER POLITO & HUPP Co. L.P.A.
1300 East 9th Street, Suite 1950
Cleveland, Ohio 44114
(216) 875-2056; (216) 875-1570 — fax
bperry@bsphlaw.com

*Counsel for Amicus Curiae The Academy
of Medicine of Cleveland & Northern Ohio*

/s/ Heather L. Stutz

Heather L. Stutz