Supreme Court of Ohio Clerk of Court - Filed February 02, 2016 - Case No. 2015-0467

IN THE SUPREME COURT OF OHIO

DAVID ANTOON, et al.	*	**CASE NO. 2015-0467**
Appellees,	*	**On Appeal from the Eighth District Court of Appeals Case No. 101373**
vs.	*	
THE CLEVELAND CLINIC FOUNDATION, et al.	*	
	*	
Appellants.		

MERIT BRIEF OF APPELLEES DAVID AND LINDA ANTOON

Dwight D. Brannon (0021657)
(Counsel of Record)
Kevin A. Bowman (0068223)
Matthew C. Schultz (0080142)
BRANNON & ASSOCIATES
130 W. Second St. Suite 900
Dayton, OH 45402
Telephone: (937) 228-2306
Facsimile: (937) 228-8475
E-Mail: dbrannon@branlaw.com
kbowman@branlaw.com
mschultz@branlaw.com
Counsel for Appellees David and Linda Antoon

Martin T. Galvin, Esq. (0063624)
(Counsel of Record)
William Meadows, Esq. (0037243)
Reminger Co., L.P.A.
101 West Prospect Avenue; Suite 1400
Cleveland, OH 44115
Telephone: (216) 687-1311
Facsimile: (216) 430-1841
E-Mail: mgalvin@reminger.com
wmeadows@reminger.com
Counsel for Appellants Cleveland Clinic Foundation; Jihad Kaouk, M.D.; Raj Goel, M.D.; and Michael Lee, M.D.

Paul Giorgianni (0064806)
(Counsel of Record)
Giorgianni Law LLC
1538 Arlington Avenue
Columbus, Ohio 43212-2710
Telephone: 614-205-5550
Facsimile: 614-481-8242
E-mail: Paul@GiorgianniLaw.com
Counsel for Amicus Curiae the
Ohio Association for Justice in Support
Ohio Plaintiffs-Appellees

Bret C. Perry (0073488)
(Counsel of Record)
Jason A. Paskan (0085007)
Bonezzi Switzer Polito & Hupp Co. L.P.A.
1300 East 9th Street, Suite 1950
Cleveland, Ohio 44114
Telephone: 216-875-2056
Facsimile: 216-875-1570
E-mail: BPerry@bsphlaw.com
Counsel for Amicus Curiae the
Academy of Medicine of Cleveland &
Northern Ohio in Support of
Defendants-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
E-mail:Heather.Stutz@SquirePB.com
Counsel for Amicus Curiae the Ohio
Hospital Association, Ohio State
Medical Association, And Ohio
Osteopathic Association in Support
Of Defendants-Appellants

Sean McGlone (0075698)
Ohio Hospital Association
155 E. Broad Street, Suite 301
Columbus, Ohio 43215
Telephone: 614-221-7614
Facsimile: 614-917-2258
E-mail: Sean.McGlone@OhioHospitals.org
Counsel for Amicus Curiae the Ohio
Hospital Association

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APPELLANT'S PROPOSITION OF LAW:

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.

STATEMENT OF THE FACTS

On November 19, 2007, David Antoon was diagnosed with prostate cancer. (Complaint, ¶ 13). At the time of his diagnosis, Antoon was only 59 years old. (*Id.*) He had served in the United States Air Force for 24 years when he retired with the rank of Colonel in 1990, and became a pilot with United Airlines. (*Id.*, ¶ 14-15) Antoon was later forced to retire from United, because he could not pass the required fitness tests due to his permanent injuries from his robotic prostatectomy. (*Id.*, ¶ 16).

After being diagnosed with prostate cancer, Col. Antoon began researching treatment options and the best health care providers. (*Id.*, ¶ 18). Antoon decided to seek treatment for his prostate cancer at the Cleveland Clinic, specifically with Dr. Jihad Kaouk. (*Id.*, 19) Kaouk is and was the Director of the Center for Robotic and Image Guided Surgery in the Clinic's Urology Department. (Complaint, ¶ 7, 37) Kaouk held the position of Director of this program even though he was not board certified. (*Id.*, 167)

Kaouk scheduled Antoon for surgery on January 8, 2008. (Complaint, ¶ 49) At the time, Kaouk verbally guaranteed to Antoon that only Kaouk would perform Antoon's surgery. (*Id.*, ¶ 50) Based on this guarantee, Antoon signed the informed consent form, on which he wrote "only Jihad Kaouk is authorized to perform my surgery." (*Id.*)

On January 8, 2008, Antoon arrived for his prostatectomy. (Complaint, ¶ 56) After Antoon was prepared for surgery, Dr. Raj Goel, at the time a fellow in the Clinic's Urology Department, entered the operating room, seeming overwhelmed and rushed, and called Kaouk. (*Id.*, ¶ 54) Antoon asked Goel if Kaouk would be there to perform this specialized procedure. (*Id.*, ¶ 55) Goel responded by telling Antoon that the Clinic "used state-of-the-art procedures." (*Id.*)

Goel tried to call Kaouk again. (*Id*., ¶ 56) When Antoon asked Goel why Kaouk was not present, Goel said that Kaouk was in another surgery and would arrive later. (*Id.*, ¶ 57). Antoon reminded Goel that only Kaouk could perform Antoon's surgery. (*Id*., ¶ 57) Goel did not respond and then directed the anesthesiologist to begin Antoon's anesthesia because they were running late. (*Id*.) Antoon never saw Kaouk before his surgery. (*Id.*, ¶ 58)

According to Antoon's medical records, anesthesia began at 12:55 p.m. (*Id.*, ¶ 59). The Operating Room Log states that the surgical team arrived at 12:58 p.m. and that the staff surgeon was available at that time. (*Id*.) However, the Audit Report did not mention or record Kaouk being present. (*Id*.) The Surgical Time Out document shows Goel as the only physician present, even though the National Patient Safety Standards require all participating surgeons to attend the time out. (*Id*., ¶ 60)

After the surgery, Kaouk called Mrs. Antoon and told her he had "trouble" with the surgery and "got stuck," but did not elaborate. (Complaint, ¶ 61) Despite these complications, no resident or surgeon met with the Antoons after the surgery. (*Id*., ¶ 62) Kaouk visited Col. Antoon the day before he was discharged, and told Antoon that he had bowel adhesions that had to be removed, and that Kaouk expected Antoon to fully recover. (*Id*., ¶ 64) On January 10, 2010, Antoon was discharged. (*Id.*, ¶ 65).

The last treatment Col. Antoon received from Kaouk and the Cleveland Clinic was on December 11, 2008. (*Id*., ¶ 105) During this period, it became apparent that the surgery had caused Col. Antoon to become impotent and incontinent. (*Id*., ¶ 76)

Antoon requested his medical records from the Clinic three different times, because each set of records had different documents missing. (Complaint, ¶ 126) Antoon's signed informed consent form was missing from all three record sets. (*Id*.) Antoon finally received a digital,

unsigned informed consent form on January 12, 2010 – almost an entire year after he first requested his records. (*Id*.)

Based on comparison of these three record sets, it appears that the third record set was altered. (Complaint, ¶ 127) There were multiple discrepancies and contradictions in the records. (*Id*.) Kaouk signed the Surgical Episode document 43 days after Antoon had surgery. (*Id*.) Additionally, a staff nurse wrote Kaouk's name on the Procedure Attestation form, even though Kaouk was required to sign the document himself because it was his personal attestation. (*Id*.) Further, the Operating Room Log shows Kaouk as "available" but not present for the surgery. (*Id*., ¶ 59) The Clinic has refused to provide Antoon with any documents that would prove Kaouk's presence during the surgery. (*Id*., ¶ 266)

STATEMENT OF THE CASE

Col. and Mrs. Antoon served CCF with an "180 Day Letter", pursuant to R.C. 2305.113(B), on December 9, 2009, less than one year after Col. Antoon's last treatment by Kaouk and CCF, on December 11, 2008. (See ¶ 43 of the Complaint in Cuyahoga County Common Pleas Case No. CV 10 728174, attached as Exhibit A to the Motion to Dismiss of Defendants Cleveland Clinic Foundation, Jihad Kaouk, M.D., Raj Goel, M.D., and Michael Lee, M.D., which was filed December 30, 2013) Col. and Mrs. Antoon first filed their claims in the Cuyahoga County Common Pleas Court as Case No. CV 10 728174, on June 6, 2010, less than 180 days after CCF received the letter. That case was dismissed without prejudice to refiling on June 13, 2011.

Within the one-year time period allowed by the Ohio Savings Statute, R.C. 2305.19, the Antoons, acting pro se, initiated a new qui tam action in the Federal District Court for the Southern District of Ohio, Case No. 3:12-cv-00027. On May 8, 2012, the Antoons filed an Amended Complaint in that case. After the Antoons obtained counsel, the qui tam action was reviewed by the United States Attorney General's office and properly served on the Clinic and doctors, the current Appellants. The Appellants moved to dismiss the Amended Complaint, accusing Col. and Mrs. Antoon of trying to "federalize" their medical malpractice claims. (See p. 14 of the Motion to Dismiss Amended Complaint from *U.S. ex rel. Antoon v. Cleveland Clinic Foundation*, S.D. Ohio Case No. 3:12-CV-00027, attached as Exhibit 1 to the Antoons' Response to Motion to Dismiss of Defendants)

On February 14, 2013, the Antoons, now acting through counsel, filed a motion for leave to file a proposed Second Amended Complaint that, while involving the same common facts, would expressly include claims for, among other causes of action, medical malpractice. With respect to the

Appellants in the case at bar, who were named in both the original Complaint and the First Amended Complaint, the Antoons' Second Amended Complaint would relate back to the date of the original filing under Fed.R.Civ.P. 15(B). Appellants, who were the defendants in the qui tam suit, filed motions to dismiss the case. Those motions, together with the Antoons' motion for leave, were resolved by the District Court in a decision dated October 16, 2013.

The Federal District Court dismissed Appellants' federal qui tam claim with prejudice and denied leave to file the Second Amended Complaint. *United States ex rel. Antoon v. Cleveland Clinic Foundation*, 978 F.Supp.2d 880 (S.D. Ohio 2013). The District Court declined to exercise supplemental jurisdiction over the Antoons' state-law malpractice claims. The Antoons appealed this decision to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the decision of the District Court in a decision entered June 11, 2015, in *United States ex rel. Antoon v. Cleveland Clinic Found.*, 788 F.3d 605 (6th Cir. 2015).

When a federal court denies leave to amend a complaint to assert a state-law claim, the claim is dismissed without prejudice to refiling under the tolling provisions of 28 U.S.C. 1367(d). See *Singleton v. Pittsburgh Bd. of Educ*., No. 2:11cv-1431, 2012 WL 4068381 (W.D. Pa. Aug. 24, 2012). The Antoons filed this case in the Cuyahoga County Common Pleas Court on November 14, 2013, within the thirty-day period allowed under Section 1367(d).

The Clinic and doctors filed a Motion to Dismiss. On April 14, 2014, the trial court issued its decision granting the motion to dismiss, which consisted of a single paragraph of type above the judge's signature. That decision reads, in its entirety:

> 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 CV728174. 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).

(Journal Entry, entered April 14, 2014.)

The Antoons appealed to the Eighth District Court of Appeals, which issued its decision reversing the decision of the trial court on February 5, 2015. *Antoon v. Cleveland Clinic Found*., 8th Dist. Cuyahoga No. 101373, 2015-Ohio-421. It is from that decision that the Clinic and doctors appeal.

ARGUMENT

I. The Appellants are asking the Court to overrule established precedent.

The Clinic and the Defendant Doctors are not only asking this Supreme Court to rule on an issue that is not part of this case; they are asking the Court to reverse its own decisions in the process. Appellants attempt to twist the Court's holding in *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, to mean something that was never intended. In the syllabus of *Ruther*, the Court held: "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." The Appellants would have the Court hold the precise opposite, that the statute of repose does extinguish a vested right. In addition, the Appellants would have the Court ignore the necessary corollary—that because the statute of repose extinguishes a vested right, it violates the right to remedy provision found in the Ohio Constitution, Article I, Section 16. Such a holding would require this Supreme Court to completely reverse a holding it issued only four years ago.

The portions of R.C. 2305.113 that comprise the medical malpractice statute of repose are subsections (C) and (D). They read:

> (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.

R.C. 2305.113.

This Court has held that "in Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 228, 2003-Ohio-5849, ¶ 48, 797 N.E.2d 1256, 1268. Absent all three of these elements, the doctrine of stare decisis requires a court to follow its previous decisions. "The doctrine of stare decisis is designed to provide continuity and predictability in our legal system. We adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by

which the citizenry can organize their affairs." *Galatis*, 2003-Ohio-5849, ¶ 43; *citing Rocky River v. State Emp. Relations Bd*., 43 Ohio St.3d 1, 4-5, 539 N.E.2d 103 (1989).

Ruther was decided six justices to one. Three of the justices concurring in the opinion are still on the Court. Justice Pfeifer is unlikely to change his opinion that the medical malpractice statute of repose represents part of the "[c]ontinued erosion of the venerable right of every citizen to a remedy in open court for injury done." *Ruther*, 2012-Ohio-5686, ¶ 45. Thus, in order for the Court to determine that the case was wrongly decided—and that the statute of repose *does* extinguish a vested right, but *does not* violate the right to remedy provision of the Ohio Constitution—at least one of those three justices would have to conclude that they were mistaken in joining the *Ruther* decision, and all three of the more recently elected justices would need to conclude that the *Ruther* decision was mistaken. Thus, it is unlikely that this Court would find that *Ruther* "was wrongly decided." Similarly, since it has been less than four years since *Ruther* was decided, it is highly unlikely that "changes in circumstances no longer justify continued adherence to the decision." The litigation landscape has not changed so greatly over the last three and one half years as to justify such a conclusion.

Nothing about the *Ruther* holding "defies practical workability." The holding is simple: the medical malpractice statute of repose does not extinguish vested claims. *Ruther*, 2012-Ohio-5686, ¶ 1. If the claim has vested within four years of the malpractice, the statute of repose has no effect on that claim. If the claim has not vested within four years of the malpractice, absent one of the exceptions in 2305.113(D), the claim is extinguished. This is neither complex nor unworkable. The Appellants simply do not like the holding, and thus attempt to make it look like some complex conundrum.

The operation of the holding is especially simple in this case. The Antoons filed their claims in June of 2010. Thus, the claims had vested by, at the latest, June of 2010—a year and a half before the four year repose period would have expired. Thus, because the claims vested before the four year period expired on January 8, 2012, the statute of repose has no effect on the Antoons' claims. Thus the *Ruther* holding—and its application to this case in particular—does not fit under the second element of the test applied in *Galatis*.

Lastly, abandoning the *Ruther* holding would create an undue hardship for the individuals who have relied on it. As the Ohio Association for Justice explains in its amicus brief, abandoning the *Ruther* holding would create a malpractice trap for plaintiffs' counsel. In such a situation, plaintiffs and their counsel might file their claims within the applicable statutes of limitations and repose, then later—after the four year repose period has passed—voluntarily dismiss their claims, relying on the savings statute to allow them to refile their claims within one year. Doubtless, there are plaintiffs in this position right now, given the time necessary to shepherd a medical malpractice case through the court system. If this Supreme Court does as Appellants ask, and reverses its holding on whether the statute of repose extinguishes vested claims, these plaintiffs will find themselves unable to refile their claims through no fault of their own.

It is important to note that the persons affected by such a reversal would not be the sort of plaintiffs contemplated by Appellants, who take no action to assert their claims. These plaintiffs would be persons like the Antoons, who had acted in a timely fashion to assert their claims, only to have the legal rug pulled out from under them by a complete and sudden reversal of the applicable law.

There is no justification for reversing the *Ruther* decision. Doing so would not only fly in the face of logic, but would, itself, create an unworkable legal landscape. "It is also a well-settled principle of statutory construction that where constitutional questions are raised, courts will liberally construe a statute to save it from constitutional infirmities." *State v. Sinito*, 43 Ohio St.2d 98, 101, 330 N.E.2d 896 (1975); citing *State ex rel. Prospect Hospital v. Ferguson*, 133 Ohio St. 325, 13 N.E.2d 723 (1938); *Wilson v. Kennedy*, 151 Ohio St. 485, 86 N.E.2d 722 (1949). The twisted interpretation of R.C. 2305.113(C) advocated by Appellants would actually create a constitutional infirmity in the statute. For this reason, Appellants' Proposition of Law should be rejected.

II. Savings statutes are designed to trump statutes of repose.

In *Hinkle v. Henderson*, 85 F.3d 298 (7th Cir. 1996), the Federal Court of Appeals examined a parallel problem of interpretation involving the Illinois statute of repose for medical malpractice, 735 Ill. Comp. Stat. 5/13-212(b), and the Illinois savings statute, 735 Ill. Comp. Stat. 5/13-217. *Hinkle*, 85 F.3d at 300-01. The *Hinkle* Court noted that the weight of authority in the United States clearly favors applying the savings statutes to claims otherwise barred by the statute of repose. As the *Hinkle* court noted, every court to consider the issue but one has held in favor of the right to refile. *See Hinkle, supra*, 85 F.3d at 301; *See v. Hartley*, 257 Kan. 813, 896 P.2d 1049 (1995); *Cronin v. Howe*, 906 S.W.2d 910 (Tenn. 1995); *Limer v. Lyman*, 241 Ill. App.3d 125, 608 N.E.2d 918, 181 Ill. Dec. 667 (1993); *Vesolowski v. Repay*, 520 N.E.2d 433 (Ind. 1988); *Wade v. Reynolds*, 34 Ohio App.3d 61, 517 N.E.2d 227 (1986). Only Georgia's courts have held to the contrary. *Wright v. Robinson*, 262 Ga. 844, 426 S.E.2d 870 (1993).

In trying to predict how the Illinois Supreme Court would rule on the issue of whether the expiration of the statute of repose would bar the refiling of a medical malpractice action under

the saving statute, the *Hinkle* court examined the purpose of the two statutory provisions. The medical malpractice statute of repose "embodies two essential and related purposes: [first,] to prevent indefinite potential liability for a particular act or omission *** and second, to afford defendants (and insurance companies) greater certainty in predicting potential liability." *Hinkle*, 85 F.3d at 302; see *Anderson v. Wagner*, 79 Ill. 2d 295, 307-08 (Ill. 1979). The purpose of the savings statute is to encourage and permit the disposition of litigation on the merits and prevent the failure of an action on technical grounds unrelated to the merits. *Hinkle*, 85 F.3d at 302, citing *DeClerck v. Simpson*, 143 Ill. 2d 489, 492, 577 N.E.2d 767, 160 Ill. Dec. 442 (1991). When a plaintiff refiles a case within one year and also within the applicable statutes of limitations and repose, there is no conflict between the statutes. However, when the statute of limitations or repose expired before the action was refiled, applying the saving statute would extend the time limits contained in those statutes for up to one year, thereby possibly frustrating the purpose of those statutes for that additional length of time.

The court concluded that applying the savings statute to a statute of repose created no greater frustration of purpose than applying it to a statute of limitations. The first purpose of the statute of repose, eliminating indefinite potential liability, is not frustrated by the application of the saving statute, because the addition of up to one year to the time limit set by the statute of repose still results in a finite period and does not "create the type of indefinite potential liability" that the statute of repose was designed to prevent. *Hinkle*, 85 F.3d at 303. The second purpose of the statute of repose is to afford defendants greater certainty through the knowledge that, after the time limit set in the statute has expired, they can no longer be sued for a particular act. The court observed that applying the savings statute to permit refiling frustrates this purpose only if the defendant was unaware of the original suit to begin with. "Where the defendant knows that

plaintiff has brought an action, usually from receiving service, he must be presumed to understand that a procedural defect in the action may cause a delay of up to one year pursuant to the savings statute." *Hinkle*, 85 F.3d at 303. Thus, neither of the purposes of the statute of repose would be frustrated by the application of the savings statute. *Hinkle*, 85 F.3d at 304.

Considering similar issues, the Supreme Court of Tennessee expressly overruled a Court of Appeals case that had earlier held that the Tennessee statute of repose barred refiling under its savings statute. See *Cronin v. Howe*, 906 S.W.2d 910, 914, n.3 (Tenn. 1995); overruling *Bruce v. Hamilton*, 894 S.W.2d 274, 276 (Tenn. App. 1993). The Tennessee Supreme Court held: "we conclude that where, as here, a medical malpractice action is timely filed, within both the statute of limitations and the statute of repose, a plaintiff who voluntarily non-suits the initial action may rely upon the savings statute and refile within one-year of the non-suit, even if the non-suit and the refiling occur beyond the three-year statute of repose. Our conclusion is consistent with the letter, spirit, and purpose of each of the statutes at issue, and with other state courts considering the issue." *Id*. at 914-15.

This same logic applies with equal force to the Ohio statutes at issue. Adopting the Proposition of Law asserted by the Appellants would make Ohio an outlier on this issue, in addition to frustrating the purpose of the savings statute. For this reason, Appellants' Proposition of Law should be rejected.

III. 28 U.S.C. 1367(d) preempts any time bar under state law.

The Court of Appeals decision reversed dismissal of the Antoon's claims, holding, in part, that the issue of whether 28 U.S.C. 1367(d) saved their claims required determination of factual issues not evident from the pleadings and, therefore, inappropriate for resolution upon a

Civil Rule 12(B) motion. The Defendants have not challenged the Court's interpretation of Section 1367(d). That holding, therefore, moots any further issues in this case.

The tolling provisions of Section 1367(d) apply to prevent any state-law time-bar from preventing the refiling of state-law claims in state court after a dismissal in federal court, allowing a federal judge to decline supplemental jurisdiction without severely prejudicing the plaintiff. The Supreme Court explained the operation of Section 1367(d) in *Jinks v. Richland County*, 538 U.S. 456, 123 S.Ct. 1667, 1672 (2003), in which the Court overruled a challenge to the constitutionality of Section 1367. The Court stated:

> Section 1367(d) is conducive to the administration of justice because it provides an alternative to the unsatisfactory options that federal judges faced when they decided whether to retain jurisdiction over supplemental state-law claims that might be time barred in state court. In the pre- § 1367(d) world, they had three basic choices: First, they could condition dismissal of the state-law claim on the defendant's waiver of any statute-of-limitations defense in state court. See, *e.g.*, *Duckworth v. Franzen*, 780 F.2d 645, 657 (C.A.7 1985); *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (C.A.D.C.1982). That waiver could be refused, however, in which case one of the remaining two choices would have to be pursued. Second, they could retain jurisdiction over the state-law claim even though it would more appropriately be heard in state court. See *Newman v. Burgin*, 930 F.2d 955, 963-964 (C.A.1 1991) (collecting cases). That would produce an obvious frustration of statutory policy. And third, they could dismiss the state-law claim but allow the plaintiff to reopen the federal case if the state court later held the claim to be time barred. See, *e.g.*, *Rheaume v. Texas Dept. of Public Safety*, 666 F.2d 925, 932 (C.A.5 1982). That was obviously inefficient. By providing a straightforward tolling rule in place of this regime, § 1367(d) unquestionably promotes fair and efficient operation of the federal courts and is therefore conducive to the administration of justice.

Id. at 462-63. The tolling period and additional thirty days granted under Section 1367(d), which is a federal statute, preempt any inconsistent state law. The principles of federal supremacy under the United States constitution mandate such a result. Applying the statute of repose in direct contravention of the right to refile under Section 1367(d) would wholly frustrate the purpose of the federal statute as set forth by the Supreme Court in *Jinks*.

Accordingly, the tolling period and additional thirty days granted under Section 1367(d), which is a federal statute, preempt any inconsistent Ohio law, whether such law is a statute of limitations or a statute of repose. See *Jinks*, 538 U.S. at 463-464; *see also Millsaps v. Thompson*, 259 F.3d 535, 538 (6th Cir. 2001) ("federal law preempts state law when the two actually conflict.") As the United States Supreme Court held unanimously in *Jinks*, "Section 1367(d) [provides] assurance that state-law claims asserted under § 1367(a) will not become time barred while pending in federal court." The Appellants' assertion of the statute of repose in this instance is an attempt to time-bar Appellants' claims despite the pendency of the federal court action, and is therefore contrary to Section 1367(d).

This Court need go no further than to hold that the statute of repose is subject to federal supremacy and preemption like any other state law. That holding, mandated by Article VI, Clause II of the United States Constitution, is wholly sufficient to resolve all issues in this case and affirm the decision of the Court of Appeals.

Appellants argue that the Antoons' medical malpractice claims were not pending before the Federal District Court. (Appellants' Brief, p. 18-19) However, this assertion directly contradicts the position that Appellants took before the Federal District Court. In their motion to dismiss the Antoons' Amended Complaint, Appellants accused Col. and Mrs. Antoon of attempting "federalization of medical malpractice" claims. (See p. 14 of the Motion to Dismiss Amended Complaint from *U.S. ex rel. Antoon v. Cleveland Clinic Foundation*, S.D. Ohio Case No. 3:12-CV-00027, attached as Exhibit 1 to the Antoons' Response to Motion to Dismiss of Defendants) Appellants noted that the Amended Complaint "suggests that the surgery did not meet the standard of care," and that the Antoons' claims that had been filed, then dismissed, in the Cuyahoga County Common Pleas Court were "based on the same allegations they make here [in the District Court]."

Even the Federal District Court recognized that the Antoons had asserted medical malpractice claims when it declined to exercise jurisdiction over those claims since it had dismissed the Antoons' claims based on federal law. *United States ex rel. Antoon v. Cleveland Clinic Found*., 978 F. Supp. 2d 880, 901, (S.D. Ohio 2013).

The Eighth District Court of Appeals concluded that there was not sufficient evidence in the record, based solely on the allegations in the Complaint, to determine whether 28 U.S.C. 1367(d) would apply to the Antoons' claims. *Antoon*, 2015-Ohio-421, ¶¶ 18-19. This is still the case, as consideration of this appeal remains limited to the facts asserted in the Complaint. Appellants' assertion that the Antoons' medical malpractice claims were not pending before the District Court when their qui tam claims were dismissed involves questions of fact which cannot be resolved as part of a Civil Rule 12(B) motion. Thus, the Court of Appeals properly reversed the decision of the trial court, and remanded the case.

IV. Adopting Appellants' Proposition of Law would make the statute of repose unconstitutional.

Appellants ask the Court to reverse itself on the issue of whether extinguishing vested rights through a statute of repose violates Ohioans' right to remedy under Article I, Section 16, of the Ohio Constitution, but fail to justify such a reversal. This Court's decision in *Ruther* demonstrates that a holding that R.C. 2305.113(C) does extinguish vested rights would necessitate a finding that the statute runs afoul of the right to remedy.

There is no question in this case that Col. Antoon's medical malpractice claim was vested before the expiration of the four-year period of repose. "[O]nly accrued causes of action are vested, substantive rights." *Ruther*, 2012-Ohio-5686, ¶ 29; citing *Gregory v. Flowers*, 32 Ohio St. 2d 48, 58, 290 N.E.2d 181 (1972). "[T]his court has recognized that a medical claim accrues upon the later of the termination of the doctor-patient relationship or the discovery of the injury."

Ruther, 2012-Ohio-5686, ¶ 25; citing *Frysinger v. Leech*, 32 Ohio St.3d 38, 512 N.E.2d 337 (1987), paragraph one of the syllabus. Col. Antoon discovered his injury during the period between the January 8, 2008 surgery and his last treatment by Dr. Kaouk, on December 11, 2008. Thus, his malpractice claim against Appellants vested, at the earliest, on December 11, 2008, but no later than the day it was filed in the Cuyahoga County Common Pleas Court, June 6, 2010. (Complaint, ¶¶ 12, 76, 105)

"[T]he right-to-remedy provision applies only to existing, vested rights…" *Ruther*, 2012-Ohio-5686, ¶ 13; citing *Groch v. Gen. Motors Corp*., 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 150, quoting *Sedar v. Knowlton Constr. Co*., 49 Ohio St.3d 193, 202, 551 N.E.2d 938 (1990). Thus, because Col. Antoon's malpractice claim was vested, it was protected by the right-to-remedy provision in Article I, Section 16, of the Ohio Constitution.

The syllabus of *Ruther* states that the reason R.C. 2305.113(C) does not violate the right-to-remedy provision is that it does not extinguish a vested right. "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*, 2012-Ohio-5686, ¶ 1 (emphasis added). This statement leads to the unavoidable conclusion that interpreting the statute of repose so as to extinguish a vested right would mean that it ran afoul of the right-to-remedy provision. If this were not true, then the entire discussion of when a medical malpractice claim vests in the *Ruther* decision would be pointless. The entire reason for determining whether a medical malpractice claim is vested is to determine whether the statute of repose can extinguish it without violating the Ohio Constitution.

Thus, if the Court adopts the Appellants' Proposition of Law, and concludes that R.C. 2305.113(C) operates to extinguish vested rights, then the Court must also conclude, in accordance

with the syllabus in *Ruther*, that the statute violates Article I, Section 16, of the Ohio Constitution. "It is also a well-settled principle of statutory construction that where constitutional questions are raised, courts will liberally construe a statute to save it from constitutional infirmities." *State v. Sinito*, 43 Ohio St.2d 98, 101, 330 N.E.2d 896 (1975); citing *State ex rel. Prospect Hospital v. Ferguson*, 133 Ohio St. 325, 13 N.E.2d 723 (1938); *Wilson v. Kennedy*, 151 Ohio St. 485, 86 N.E.2d 722 (1949). The construction of R.C. 2305.113(C) advocated by Appellants' Proposition of Law would result in the statute being "constitutionally infirm." Thus, it is not an acceptable interpretation of the statute, and must be rejected.

IV. Appellants are asking the Court for an advisory opinion.

Appellants the Cleveland Clinic Foundation, Jihad Kaouk, Raj Goel, and Michael Lee are asking this Supreme Court to rule on a legal issue that is not determinative of this case. "It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advise upon potential controversies." *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062, 1080 (1999); quoting *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371, 372 (1970). In addition, where a court can determine an appeal without addressing a constitutional issue, it will do so. *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 415, 96 N.E.2d 414, 415 (1951).

The Appellants base their argument that the Antoons' claims are barred by R.C. 2305.113 on the claim that the statute of repose must cut off vested rights. However, in this case, this discussion is completely academic, and does not have any effect on the Antoons' claims, because the Antoons complied with the statute of repose when their case was first filed, on June 1, 2010. In this case, the Appellants admit in their brief that Col. and Mrs. Antoon commenced their suit

well within the four year period required by R.C. 2305.113(C)(1) and (2) "because they filed their initial action well before that time." (Appellants' Brief, p.16.)

As is clear from the text of the statute, nothing in the statute requires a suit to be ***refiled*** within four years of the negligent act or omission. Because the Antoons filed their original suit on June 6, 2010, well within the four year period required in R.C. 2305.113(C)(1), they complied with the statute of repose. The Eighth District correctly noted that, because the Antoons had complied with the statute of repose, the only possible time limitation on their refiled action would be "the statute of limitations and any tolling provisions." *Antoon*, 2015-Ohio-421, ¶ 11.

It is not necessary to discuss whether the Antoons' claims were vested or not in order to come to this conclusion. R.C. 2305.113(C) only requires that an action be "commenced" within "four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim" "An action is commenced within the meaning of sections 2305.03 to 2305.22 and sections 1302.98 and 1304.35 of the Revised Code by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year." R.C. 2305.17. See also *Motorists Mut. Ins. Co. v. Huron Rd. Hosp*., 73 Ohio St.3d 391, 396, 653 N.E.2d 235, 239 (1995).

There is no dispute in this case that Col. and Mrs. Antoon filed a medical malpractice claim against the Appellants on June 10, 2010, and that service was obtained on Appellants within a year after the filing. (Complaint, ¶ 12) This was within four years of the date of the malpractice, January 8, 2008. There is nothing in the text of R.C. 2305.113(C) or (D) that would require them to refile their case within four years of the date of the malpractice.

Appellants argue that, because the Antoons dismissed their first case without prejudice, pursuant to Civ.R. 41(A), it cannot be considered for purposes of application of R.C. 2305.113(C) because Ohio law treats a previously dismissed action as if it had never been commenced. (Appellants' Brief, p. 19) However, this is not true with regard to application of the savings statute, and this argument runs directly contrary to the purpose of 28 U.S.C. 1367(d).

The very text of the savings statute contemplates an action that has been commenced, and then later fails other than on the merits. R.C. 2305.19(A) ("In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits …") Similarly, the very text of 28 U.S.C. 1367(d) contemplates a claim that has been filed and dismissed. ("The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.")

Both of these statutes can be used to defeat the time limit in R.C. 2305.113(A), the medical malpractice statute of limitations. *See, eg., Thompson v. Ohio State Univ. Hosps*., 10th Dist. Franklin No. 06AP-1117, 2007-Ohio-4668, ¶ 24 (Noting that the plaintiff had previously dismissed her medical malpractice claim without prejudice and refiled the claim after the statute of limitations had expired, relying on the savings statute). Why then, should these statutes not operate the same with regard to other subsections of the same statute? The Appellants ignore the fact that both of these statutes—R.C. 2305.19 and 28 U.S.C. 1367(d)—are designed to defeat time limitations such as that contained in R.C. 2305.113(C), and have always been applied in that way.

Because Col. and Mrs. Antoon complied with the four year time limit in R.C. 2305.113(C) by initially commencing their claims against the Cleveland Clinic and the Defendant Doctors well within the time limit, they are not barred from pursuing their present claims by the statute of repose.

CONCLUSION

The proposition of law presented by the Cleveland Clinic and its doctors would not change the outcome of this case, even if this Supreme Court were to adopt it. It would, however, result in the statute of repose being held unconstitutional. In addition, 28 U.S.C. 1367(d) takes precedence over the Ohio statute of repose, since—if given the interpretation advocated by Appellants—the Ohio statute would directly conflict with the Federal Statute. For all these reasons, Appellees David and Linda Antoon urge the Court to reject the Appellants' Proposition of Law.

Respectfully submitted,

/s/ Dwight D. Brannon
Dwight D. Brannon (0021657)
Attorneys for Plaintiff
BRANNON & ASSOCIATES
130 W. Second St. Suite 900
Dayton, OH 45402
Telephone: (937) 228-2306
Facsimile: (937) 228-8475
E-Mail: dbrannon@branlaw.com

CERTIFICATE OF SERVICE

I certify that a copy of this Brief was sent by ordinary U.S. mail to the following counsel of record, this 2nd day of February, 2016:

William Meadows, Esq.
Martin T. Galvin, Esq.
Reminger Co., L.P.A.
101 West Prospect Avenue; Suite 1400
Cleveland, OH 44115
Counsel for Appellants

Bret C. Perry, Esq.
Jason A. Paskan, Esq.
Bonezzi Switzer Polito & Hupp Co. L.P.A.
1300 East 9th St., Suite 1950
Cleveland, Ohio 44114
Counsel for Amicus Curiae the
Academy of Medicine of Cleveland &
Northern Ohio in Support of
Defendants-Appellants

Heather L. Stutz
Christopher F. Haas
Larry J. Obhof
Squire Patton Boggs (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215-6197
Counsel for Amicus Curiae the Ohio
Hospital Association, Ohio State
Medical Association, And Ohio
Osteopathic Association in Support
Of Defendants-Appellants

Sean McGlone
Ohio Hospital Association
155 E. Broad Street, Suite 301
Columbus, Ohio 43215
Counsel for Amicus Curiae the Ohio
Hospital Association

Paul Giorgianni
Giorgianni Law LLC
1538 Arlington Avenue
Columbus, Ohio 43212-2710
Counsel for Amicus Curiae the
Ohio Association for Justice
in Support of Plaintiffs-Appellees

/s/ Dwight D. Brannon
Dwight D. Brannon

Oh. Const. Art. I, § 16

Current through 2015 Ohio Issues 1 and 2

§ 16 Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

History

As amended September 3, 1912.

Page's Ohio Revised Code Annotated
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28 USCS § 1367

Current through PL 114-114, approved 12/28/15, with gaps of PL's 114-94, 114-95, and 114-113

United States Code Service - Titles 1 through 54 > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE > PART IV. JURISDICTION AND VENUE > CHAPTER 85. DISTRICT COURTS; JURISDICTION

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title [28 USCS § 1332], the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332 [28 USCS § 1332].

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

History

(Added Dec. 1, 1990,P.L. 101-650, Title III, § 310(a), 104 Stat. 5113.)

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