

**IN THE SUPREME COURT OF OHIO**

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DAVID ANTOON *ET AL.*,

Plaintiffs-Appellees,

v.

CLEVELAND CLINIC FOUNDATION

*ET AL.*,

Defendants-Appellants.

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Case No. 2015-0467

On Appeal from the Cuyahoga  
County Court of Appeals,  
Eighth Appellate District

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BRIEF OF *AMICUS CURIAE*  
THE OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF PLAINTIFFS-APPELLEES

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## **PROPOSITION OF LAW ACCEPTED FOR REVIEW**

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.

### **INTEREST OF *AMICUS CURIAE* THE OHIO ASSOCIATION FOR JUSTICE**

The Ohio Association for Justice is Ohio's largest victims-rights advocacy association, comprised of over 1,200 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The OAJ is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable.

## SUMMARY OF ARGUMENT

The question of statutory interpretation presented by this appeal can be stated in at least two ways:

- Whether R.C. 2305.113(C)(2) governs accrued, or “vested,” claims, and if so, whether R.C. 2305.113(C)(2) supersedes R.C. 2305.19 and 28 U.S.C. § 1367(d).
- Whether R.C. 2305.113(C)(2) bars a re-filed action upon a claim when the re-filed action is commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the claim, but (1) the original action was filed within that four-year period, and (2) the re-filed action is commenced within an applicable “saving” period, such as one year under R.C. 2305.19 or thirty days under 28 U.S.C. § 1367(d).

This Court should construe R.C. 2305.113(C)(2) as applying only to non-vested claims. If the Court instead construes R.C. 2305.113(C)(2) as applying to all claims, then the Court should hold that R.C. 2305.113(C)(2) does not trump R.C. 2305.19 or 28 U.S.C. § 1367(d). The Court should hold that R.C. 2305.113(C)(2) does not bar a re-filed action when the original action was filed within the four-year period of R.C. 2305.113(C)(2) and the re-filed action is commenced within an applicable “saving” period, such as one year under R.C. 2305.19 or thirty days under 28 U.S.C. § 1367(d).

If the Court rules in any of the ways described above, then the Court need not reach any constitutional issue. If this Court rejects all of the foregoing conclusions and construes R.C. 2305.113(C)(2) as purporting to apply to all medical

claims, then the Court should hold that R.C. 2305.113(C)(2), as applied to vested claims, is unconstitutional, either (1) for violating the right-to-remedy guarantee of the Ohio Constitution, Article I, Section 16, or (2) for creating a statutory system of limitations, repose, and claim-“saving” so uncertain as to be void for vagueness under the federal and state guarantees of due process and due course of law.

The Court should affirm the judgment of the court of appeals.

\* \* \*

The Antoons’ medical claims accrued, or “vested,” no earlier than December 8, 2008.

The Antoons filed their original complaint on June 1, 2010—within the four-year repose period of R.C. 2305.113(C)(2) and within the “one year plus 180 days” limitations period of R.C. 2305.113(A) & (B)(1).

The Antoons voluntarily dismissed the 2010 complaint without prejudice. They re-filed in U.S. District Court within the one-year “saving” period of R.C. 2305.19. That federal-court action was still pending on December 11, 2012, the fourth anniversary of the vesting of the Antoons’ medical claims.

The U.S. District Court dismissed the federal claims with prejudice and dismissed the state-law medical claims without prejudice. The Antoons re-filed again, commencing this action in the Cuyahoga County Court of Common Pleas,

on November 14, 2013, within the thirty-day “saving” period of 28 U.S.C. § 1367(d).

The primary question presented to this Court is whether this action is barred by the four-year statute of repose, R.C. 2305.113(C)(2). The Court should rule that it is not, and affirm the judgment of the court of appeals.

**Part I** below articulates the *de novo* standard of review applicable to all issues in this case.

**Part II** explains the four R.C. 2305.113 time bars governing medical, dental, optometric, and chiropractic claims:

- R.C. 2305.113(A), a one-year statute of limitations (one year from the vesting of the claim);
- R.C. 2305.113(C)(1)/(D)(1), a **five-year** statute of limitations (five years from the occurrence of the malpractice);
- R.C. 2305.113(C)(2), a **four-year statute of repose** (four years from the occurrence of the malpractice); and
- R.C. 2305.113(D)(2), a one-year statute of limitations applicable only to claims “involv[ing] a foreign object that is left in the body,” which does not apply to the Antoons’ claims.

Part II explains that both by process of elimination when reading R.C. 2305.113 as a whole, and for the sake of giving distinct meaning to R.C. 2305.113(C)(1) and R.C. 2305.113(C)(2), the Court should construe R.C. 2305.113(C)(2) as governing only **non**-vested claims—that is, claims that do not vest by the fourth anniversary of the malpractice.

**Part III** and **Part IV** apply these statutes to the Antoons’ claims—an analysis complicated by the fact that the Antoons invoked two different “saving” statutes. **Part III** explains that the Antoons’ claims are not barred by R.C. 2305.113(C)(1), because:

- the claims were “saved” by R.C. 2305.19 when the Antoons filed their federal-court complaint on January 31, 2012, within one year of having dismissed their original complaint without prejudice, and
- the claims were again “saved,” this time by 28 U.S.C. § 1367(d), when the Antoons filed the current complaint on November 14, 2013, within thirty days of the federal-court dismissal without prejudice.

**Part IV** explains the Antoons’ claims are not barred by R.C. 2305.113(C)(2), because:

- the Antoons’ original action in 2010 is “an action . . . commenced within four years after the occurrence” of malpractice within the meaning of R.C. 2305.113(C)(2), and
- to the extent this Court construes R.C. 2305.113(C)(2) as governing vested claims, it is a statute of limitations and therefore is subject to R.C. 2305.19 and is pre-empted by 28 U.S.C. § 1367(d).

Part IV also shows

- how the fact that R.C. 2305.113(C)(2) does not bar vested claims is consistent with the policies the statute seeks to promote, and
- how Defendants and their *amici* exaggerate the significance of R.C. 2305.113(C)(2) not applying to vested claims.

**Part V** argues that R.C. 2305.113(C), to the extent this Court construes it as purporting to bar vested claims (which includes the Antoons' claims), is unconstitutional as applied. This is so in two respects:

- because it would violate the right-to-remedy guarantee of the Ohio Constitution, and
- because it would create a statutory system of limitations, repose, and claim-“saving” so uncertain as to be void for vagueness under the federal and state guarantees of due process and due course of law.

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## STATEMENT OF FACTS

January 8, 2008 is the day Defendant Dr. Goel negligently performed surgery on Plaintiff Mr. Antoon. (Complaint ¶¶ 53-62.) December 11, 2008 is the day Mr. Antoon last treated with Defendants. (See Complaint ¶¶ 105-111.) A medical claim (as that term is defined in R.C. 2305.113(E)(3)) “accrues,” or “vests,” “upon the later of the termination of the doctor-patient relationship or the discovery of the injury.” *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, ¶ 25 (citing *Frysiner v. Leech*, 32 Ohio St.3d 38 (1987)). Therefore, for purposes of this appeal (which arises from a Civ.R. 12(B)(6) dismissal), the Antoons’ medical claims vested, at the earliest, on December 11, 2008, the day Mr. Antoon last treated with Defendants.

The Antoons filed their original complaint on June 1, 2010 in the Cuyahoga County Court of Common Pleas. (See Complaint ¶ 12.) That was within the four-year period of R.C. 2305.113(C)(2). (The 2010 complaint was not barred by R.C. 2305.113(A), the one-year limitations period, because the Antoons gave Defendants the “180-day notice” contemplated by R.C. 2305.113(B)(1).)

On June 13, 2011, the Antoons voluntarily dismissed the 2010 complaint without prejudice. (Complaint ¶ 12.)

Seven months later, on January 31, 2012, invoking R.C. 2305.19 (the so-called “Saving Statute”), the Antoons filed a complaint in the U.S. District Court

for the Southern District of Ohio. (Complaint ¶ 12.) That action was still pending on December 11, 2012, the fourth anniversary of the vesting of the Antoons' medical claims.

On October 16, 2013, the U.S. District Court dismissed the Antoons' federal claims with prejudice and dismissed the state-law medical claims without prejudice. (Complaint ¶ 12.) (The dismissal of the federal claims was affirmed in *United States ex rel. Antoon v. Cleveland Clinic Foundation*, 788 F.3d 605 (6th Cir. 2015).)

On November 14, 2013, twenty-eight days after the U.S. District Court's dismissal, the Antoons, invoking 28 U.S.C. § 1367(d)<sup>1</sup> (Complaint ¶ 12), filed their complaint in this action in the Cuyahoga County Court of Common Pleas.

On April 14, 2014, the court of common pleas dismissed the complaint under Civ.R. 12(B)(6), ruling

- that the claims were barred by R.C. 2305.113(A) because 28 U.S.C. § 1367(d) did not apply, and

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<sup>1</sup> 28 U.S.C. § 1367(d) provides, in full:

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.

- that the complaint was also barred by R.C. 2305.113(C).

On February 5, 2015, the Eighth District Court of Appeals reversed, ruling

- that the issue of whether 28 U.S.C. § 1367(d) applies (and thus the issue of whether any claims are barred by R.C. 2305.113(A)) calls into question facts not evident from the pleadings, 2015-Ohio-421 at ¶¶ 12-19, and
- that R.C. 2305.113(C) only prevents claims from vesting and does not bar vested claims, *id.* at ¶¶ 10-11.

On March 20, 2015, Defendants filed their notice of appeal and memorandum in support of jurisdiction in this Court. Defendants did not seek review of the court of appeals's decision regarding 28 U.S.C. § 1367 or R.C. 2305.113(A) (the one-year statute of limitations). Defendants sought review of only this proposition of law concerning R.C. 2305.113(C):

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.

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## ARGUMENT

### I. Standard of review.

The proposition of law accepted for review presents only questions of statutory and constitutional interpretation—questions of law that this Court reviews *de novo*.

### II. R.C. 2305.113(C)(1)/(D)(1) is a statute of limitations governing vested claims; R.C. 2305.113(C)(2) is a statute of repose governing non-vested claims.

#### A. Introduction.

The General Assembly, in R.C. 2305.113, has adopted four time bars that govern medical, dental, optometric, and chiropractic claims. These time bars are functions of three events in the life of any potential claim:

- **Occurrence of malpractice:** R.C. 2305.113(C)(1) and (C)(2) refer to “the occurrence of the act or omission constituting the alleged basis of the . . . claim.”
- **Vesting of claim:** R.C. 2305.113(A) refers to the “accru[al]” of the cause of action, or claim. “Accrual” is also known as “vesting.” *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, ¶ 17. Vesting occurs “upon the later of the termination of the doctor-patient relationship or the discovery of the injury.” *Id.* at ¶ 25 (citing *Frysinger v. Leech*, 32 Ohio St.3d 38 (1987)).
- **Commencement of the action asserting the claim:** All four of the R.C. 2305.113 time bars refer to the commencement of the action. “Commencement” means “filing a petition in the office of the clerk of the proper court.” R.C. 2305.17.

The four time bars in R.C. 2305.113 governing medical, dental, optometric, and chiropractic claims consist of three statutes of limitations and one statute of repose:

- R.C. 2305.113(A), a **one-year statute of limitations**, requires that vested claims (that is, claims that are known or should be known) be brought within one year of such knowledge.
- R.C. 2305.113(C)(1)/(D)(1), a **five-year statute of limitations**, requires that vested claims be brought by the fifth anniversary of the malpractice.
- R.C. 2305.113(C)(2), a **four-year statute of repose**, bars only non-vested (unknown) claims effective the fourth anniversary of the malpractice.
- R.C. 2305.113(D)(2) governs only claims “involv[ing] a foreign object that is left in the body.” It is a **one-year statute of limitations** requiring that such vested claims be brought within one year of becoming known. (The distinction between R.C. 2305.113(D)(2) and R.C. 2305.113(A) is that R.C. 2305.113(D)(2) governs only foreign-object claims and expressly supercedes both R.C. 2305.113(A) and (C).)

The text of R.C. 2305.113 is as follows:

- (A) Except as otherwise provided in this section, **an action** upon a medical, dental, optometric, or chiropractic claim **shall be commenced within one year after the cause of action accrued**.
- (B) (1) If prior to the expiration of the one-year period specified in division (A) of this section, a claimant who allegedly possesses a medical, dental, optometric, or chiropractic claim gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given.

.....

- (C) Except as to persons within the age of minority or of unsound mind as provided by section 2305.15 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.**

R.C. 2305.113 (emphasis added). R.C. 2305.113(C) and (D) were originally enacted effective April 11, 2003. S.B. 281, 149 Ohio Laws, Part II, 3791, 3799. They have not been amended.

The terms “statute of limitations” and “statute of repose” have never had precise meanings, but in modern usage they are generally understood to be distinct concepts. *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2182-87 (2014) (holding that the term “state statutes of limitations” in 42 U.S.C. § 9658, an environmental-protection statute, means only statutes of limitations and not statutes of repose).

The Court in *CTS* expressed that distinction as follows:

[S]tatutes of limitations . . . generally begin to run **after a cause of action accrues** and so always limit the time in which a civil action may be brought. A statute of repose, however, may preclude an alleged tortfeasor’s liability **before a plaintiff is entitled to sue, before an actionable harm ever occurs.**

*Id.* at 2187 (emphasis added) (quotation marks omitted). This Court has said the same thing, only categorically rather than with a qualifying “generally”:

A statute of repose does not deny a remedy for a vested cause of action but, rather, bars the action before it ever arises [vests].

*Groch v. Gen Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546 ¶ 142 (upholding R.C. 2305.10 product-liability statute of repose against constitutional challenges).

Which is to say that statutes of limitations are deadlines for bringing vested claims, and that statutes of repose are deadlines for vesting.

The Ohio Association for Justice agrees with *amici curiae* the Ohio Hospital Association *et al.* that R.C. 2305.113(C)(1) is a statute of limitations and that R.C. 2305.113(C)(2) is a statute of repose. (Brief of Ohio Hospital Association *et al.* 7-8, 11-12.) But the Ohio Hospital Association *et al.* contend that the R.C. 2305.113(C)(2) statute of repose governs all claims. As explained in Part II-D below, R.C. 2305.113(C)(2) governs only **non-vested** claims.

In the remainder of this Part II, each of the R.C. 2305.113 time bars is explained in turn, without consideration of the complicating factor of saving statutes—which is what this case is about. The effect of saving statutes is analyzed in Parts III and IV.

**B. R.C. 2305.113(A) is a one-year statute of limitations requiring that vested claims be brought within one year of vesting.**

The R.C. 2305.113(A) limitations period is one year from when the claim vests. R.C. 2305.113(A) provides:

Except as otherwise provided in this section, an action . . . shall be commenced **within one year after the cause of action accrued.**

R.C. 2305.113(A) (emphasis added).

R.C. 2305.113(A) governs all potential medical, dental, optometric, and chiropractic claims except claims “involv[ing] a foreign object that is left in the body,” R.C. 2305.113(D)(2). Foreign-object claims are governed by R.C.

2305.113(D)(2), which also provides a one-year limitations period but which expressly supersedes both R.C. 2305.113(A) and (C).

R.C. 2305.113(A) governs only the first three years after the malpractice occurs. As of the third anniversary of the malpractice, R.C. 2305.113(A) becomes irrelevant and redundant of R.C. 2305.113(C)(1)/(D)(1). And if a claim has not vested by the **fourth** anniversary of the malpractice, the claim becomes barred by R.C. 2305.113(C)(2), the statute of repose.

**C. R.C. 2305.113(C)(1)/(D)(1) is a statute of limitations requiring that vested claims be brought by the fifth anniversary of the malpractice.**

The limitations period of R.C. 2305.113(C)(1)/(D)(1) is five years from the malpractice. R.C. 2305.113(C)(1) provides:

**[E]xcept as provided in division (D) of this section, . . . [n]o action upon a . . . claim shall be commenced **more than four years after the occurrence** of the act or omission constituting the alleged basis of the . . . claim.**

R.C. 2305.113(C)(1) (emphasis added). R.C. 2305.113(D)(1) provides:

If a person . . . 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.

R.C. 2305.113(D)(1) (emphasis added).

The statute of repose, R.C. 2305.113(C)(2), bars non-vested claims effective the fourth anniversary of the malpractice. Thus, R.C. 2305.113(C)(1) matters only

when its companion R.C. 2305.113(D)(1) matters—which is when the claim vests during the fourth year following the malpractice. When the claim vests during the fourth year following the malpractice, according to (D)(1), the victim has one year from vesting in which to commence an action. So if the claim vests the day before the fourth anniversary of the malpractice, the victim has the whole fifth year in which to commence an action.

**D. R.C. 2305.113(C)(2) is a statute of repose that bars only non-vested claims, effective the fourth anniversary of the malpractice.**

R.C. 2305.113(C)(2) provides:

[E]xcept as provided in division (D) of this section, . . . [i]f **an action** upon . . . claim is not commenced **within four years after the occurrence** of the act or omission constituting the alleged basis of the . . . claim, then, **any action** upon that claim is barred.

R.C. 2305.113(C)(2) (emphasis added). In *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, this Court stated: “The medical-malpractice statute of repose found in R.C. 2305.113(C) does not extinguish a vested right . . .” *Id.* at syllabus. Which is to say that R.C. 2305.113(C)(2) extinguishes only non-vested claims—claims that did not vest within four years of the malpractice.

*Ruther* did not distinguish between Paragraph (C)(1) and Paragraph (C)(2) and instead referred only generally to Division (C). There was good reason for that: *Ruther* involved a non-vested claim, which undisputedly was barred by repose unless the Court ruled the statute of repose unconstitutional. *Ruther* addressed

constitutional challenges as applied to **non**-vested claims. The Antoons’ case now calls upon this Court to announce the meanings of Paragraph **(C)(1)** and Paragraph **(C)(2)** separately.

There are two related aspects of R.C. 2305.113(C) and (D) that are the keys to understanding this statute.

The first is to recognize that, as explained above, Paragraphs **(C)(1)** and **(D)(1)** constitute one logical unit. Because R.C. 2305.113 includes a one-year limitations period (R.C. 2305.113(A)) and a four-year repose period (R.C. 2305.113(C)(2)), R.C. 2305.113(C)(1)/(D)(1) is the controlling provision only when the claim vests during the fourth year following the malpractice.

The second key to understanding R.C. 2305.113 is to recognize that R.C. 2305.113(D)(1) refers only to “the four-year period specified in division (C)(1)” and **not** to the four-year period specified in division (C)(2). This means that R.C. 2305.113(D)(1)

- modifies **only** R.C. 2305.113(C)(1) (the two together constituting a five-year limitations period for vested claims), and
- does **not** modify R.C. 2305.113(C)(2), the statute of repose.

By process of elimination, R.C. 2305.113(C)(2) governs only non-vested claims:

- *Claims vesting during the first three years.* Because of the one-year limitations period of R.C. 2305.113(A), any claim vesting during the first three years following the malpractice must be

brought within one year of vesting—which necessarily is before the four-year repose period expires (thus rendering the repose period irrelevant).

- *Claims vesting during the fourth year.* Under R.C. 2305.113(C)(1)/(D)(1), any claim vesting during the fourth year following the malpractice must be brought within one year of vesting or else be barred by R.C. 2305.113(C)(1)/(D)(1) (and, nominally and redundantly, by R.C. 2305.113(A)). The four-year repose bar of R.C. 2305.113(C)(2) does not apply because it is expressly subject to Division (D).
- *Claims not vesting within four years.* The only category of claims left is claims that do not vest within the four-year repose period—non-vested claims. They are governed by R.C. 2305.113(C)(2).

In addition to being logically necessary, the conclusion that R.C.

2305.113(C)(2) governs only non-vested claims has the advantage of giving distinct meaning to R.C. 2305.113(C)(1) and (C)(2). “In enacting a statute, it is presumed that [t]he entire statute is intended to be effective.” R.C. 1.47(B). “It is a basic tenet of statutory construction that the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose.” *State v. Wilson*, 77 Ohio St.3d 334, 336 (1997) (quotation marks omitted). “In looking to the face of a statute or Act to determine legislative intent, significance and effect should be accorded to every word, phrase, sentence and part thereof, if possible.” *Id.* at 336-37. Courts “must give effect to every term in a statute and avoid a construction that would render any provision meaningless, inoperative, or superfluous.” *Rhodes v. City of New*

*Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, ¶ 23. One of the flaws of Defendants’ analysis is that it treats Paragraphs (C)(1) and (C)(2) as redundant of each other. (*E.g.*, Defendants’ Brief 5.) The better interpretation of the statute is that R.C. 2305.113(C)(1)/(D)(1) is a statute of limitations governing vested claims and that R.C. 2305.113(C)(2) is a statute of repose governing only non-vested claims.

Both by process of elimination when reading R.C. 2305.113 as a whole, and for the sake of giving distinct meaning to R.C. 2305.113(C)(1) and R.C. 2305.113(C)(2), the Court should construe R.C. 2305.113(C)(2) as governing only non-vested claims.

**E. R.C. 2305.113(D)(2) is a specialized, one-year statute of limitations requiring that vested, “foreign-object” claims be brought within one year of vesting.**

R.C. 2305.113(D)(2) provides:

If the alleged basis of a . . . 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.

R.C. 2305.113(C) begins with the qualifying phrase, “. . . except as provided in division (D) . . . .” Thus, “foreign object” claims always may be brought within one year of vesting and never are subject to the R.C. 2305.113(C)(2) repose bar.

### **III. R.C. 2305.113(C)(1) does not bar the Antoons' claims.**

The Antoons' claims are not barred by R.C. 2305.113(C)(1), because:

- the claims were “saved” by R.C. 2305.19 when the Antoons filed their federal-court complaint on January 31, 2012, within one year of having dismissed their original complaint without prejudice, and
- the claims were again “saved,” this time by 28 U.S.C. § 1367(d), when the Antoons filed the current complaint on November 14, 2013, within thirty days of the federal-court dismissal without prejudice.

#### **A. The Antoons' claims were “saved” by R.C. 2305.19 when the Antoons filed their federal-court complaint on January 31, 2012, within one year of having dismissed their original complaint without prejudice.**

Every limitations period in R.C. Chapter 2305 uses the mandatory “shall” and is expressed in terms of a time limit within which an action “**shall** be brought” or “**shall** be commenced.” (“Brought” and “commenced” are synonymous in this context. *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 203-Ohio-1507, ¶ 15. *See, e.g.*, R.C. 2305.10.) For example:

- R.C. 2305.06 provides that an action upon a written contract “shall” be brought by a defined date.
- R.C. 2305.09 provides that certain tort actions “shall” be brought by a defined date.
- R.C. 2305.11(A) provides that actions for libel, slander, and non-medical malpractice “shall” be commenced by a defined date.
- And R.C. 2305.113(A) provides that medical claims “shall” be commenced by a defined date (one year from vesting).

Similarly, R.C. 2305.113(C)(1) provides that “[n]o action . . . shall be commenced” after a defined date.

R.C. 2305.19, the so-called “saving statute,” provides (among other things) that a plaintiff who voluntarily dismisses an action “may commence a new action within one year.” All of the statutes of limitations use the mandatory “shall.” None of the statutes of limitations say that they are subject to being trumped by R.C. 2305.19. Yet, all the statutes of limitations are subject to being trumped by R.C. 2305.19. *Frysiner v. Leach*, 32 Ohio St.3d 38, 43 (1987) (holding that R.C. 2305.19 is a “legislative protection from the limitations bar”). This Court has stated that “[t]he savings statute is neither a statute of limitations nor a tolling statute extending the statute of limitations.” *Allen v. McBride*, 105 Ohio St.3d 21, 2004-Ohio-7112, ¶ 26 (quotation marks omitted). *Accord Reese v. Ohio State University Hospitals*, 6 Ohio St.3d 162, 163 (1983) (stating that “the savings statute[] is not a statute of limitations”). R.C. 2305.19 trumps all of these statutes of limitations. There is no reason to treat R.C. 2305.113(C)(1) differently.

Here, the Antoons’ medical claims vested no earlier than December 11, 2008. The Antoons filed their original complaint on June 1, 2010,

- within the “one year plus 180 days” limitations period of R.C. 2305.113(B)(1),
- within the five-year limitations period of R.C. 2305.113(C)(1)/(D)(1), and

- within the four-year repose period of R.C. 2305.113(C)(2).

On June 13, 2011, the Antoons voluntarily dismissed the 2010 complaint without prejudice. Seven months later, on January 31, 2012, the Antoons filed a complaint in federal court. By filing the federal-court complaint within one year of the dismissal, the claims were “saved” under R.C. 2305.19.

**B. The Antoons’ claims were again “saved,” this time by 28 U.S.C. § 1367(d), when the Antoons filed the current complaint on November 14, 2013, within thirty days of the federal-court dismissal without prejudice.**

The federal supplemental-subject-matter-jurisdiction statute, 28 U.S.C. § 1367, contains its own “saving statute,” with a “saving” period of thirty days following dismissal. Section 1367(d) provides:

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.

28 U.S.C. § 1367(d) (emphasis added).

Under the Supremacy Clause of the federal Constitution, any state-law limitations provision is pre-empted by Section 1367(d). *See Jinks v. Richland Cty.*, 538 U.S. 456, 461-65 (2003). Thus, Section 1367(d) pre-empts R.C. 2305.113(C)(1), and R.C. 2305.113(C)(1) cannot bar the Antoons’ claims in this action.

#### IV. R.C. 2305.113(C)(2) does not bar the Antoons' claims.

**A. The Antoons' original action in 2010 is “an action . . . commenced within four years after the occurrence” of malpractice within the meaning of R.C. 2305.113(C)(2).**

R.C. 2305.113(C)(2), provides:

If **an action** upon a . . . claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the . . . claim, then, **any action** upon that claim is barred.

R.C. 2305.113(C)(2) (emphasis added). R.C. 2305.113(C)(2) does not bar the Antoons' claims, because the Antoons **did** commence “an action” within four years of the malpractice—their original action, filed June 1, 2010. Defendants and their *amici* wrongly contend that both the phrase “an action” and the phrase “any action” in this statute must refer to the pending action.

The phrase “an action” must include a victim's first action and cannot include any refiled action. Unlike R.C. 2305.113(A), R.C. 2305.113(C)(1)/(D)(1), and apparently every other statute of limitations in the Ohio Revised Code, R.C. 2305.113(C)(2) does not refer to just one action or claim. Statutes of limitations refer to only one action and do so in the form of an unconditional declaration—generally, “An action shall be commenced within *n* years after the cause of action accrued.” R.C. 2305.113(C)(2), in contrast, is a conditional (“if...then...”) rule, referring to “an action” in the antecedent and “any action” in the consequent. The antecedent is “**an action upon . . . a claim**” **not** being commenced within four years

of the malpractice. There are only two possible outcomes under this conditional rule:

- If the antecedent condition is satisfied—that is, if **no action** is commenced within four years—then the consequent is established: **any** such action is barred.
- If the antecedent condition is **not** satisfied—that is, if “an action” **is** commenced within four years—then the consequent is not established: there is no bar.

Here, the antecedent condition is **not** satisfied. “An action” **was** commenced within four years. Therefore, the bar of R.C. 2305.113(C)(2) does not apply.

Defendants and their *amici*<sup>2</sup> ask the Court to interpret the statute as if it were written thusly:

If **an action** upon a . . . claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the . . . claim, then, ~~any~~ that action ~~upon that claim~~ is barred.

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<sup>2</sup> Defendants’ *amici* the Ohio Hospital Association *et al.* agree with the OAJ that R.C. 2305.113(C)(1) is a statute of limitations and that R.C. 2305.113(C)(2) is a statute of repose. (Brief of Ohio Hospital Association *et al.* 7-8, 11-12.) But the Ohio Hospital Association *et al.* contend that R.C. 2305.113(C)(2) governs **all** claims, not just non-vested claims. One of the headings in their brief argues: “The language and structure of R.C. 2305.113 demonstrate that vested claims are subject to R.C. 2305.113(C).” (Brief of Ohio Hospital Association *et al.* 10.) But theirs is an argument of opportunity. In *Ruther*, the same three *amici* argued the exact opposite, saying: “This Court should apply the *Groch* vested rights rule in this case, and find that R.C. 2305.113(C) . . . does not impair a vested right.” Brief of Amici Curiae, Ohio Hospital Association, . . . Ohio State Medical Association, . . . Ohio Osteopathic Association . . . , in S. Ct. No. 2011-0899, p. 5, ¶ 2 (Dec. 12, 2011).

or thusly:

If **an action** upon a . . . claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the . . . claim, then, ~~any action upon~~ that claim is barred.

Of course, this Court may not rewrite the statute. The Court must interpret the statute as written. The phrase “an action” must include a victim’s first action and cannot include any refiled action. Here, the Antoons’ original action in 2010 is “an action . . . commenced within four years after the occurrence” within the meaning of R.C. 2305.113(C)(2). Therefore, R.C. 2305.113(C)(2) does not bar their claims.

**B. R.C. 2305.113(C)(2), to the extent this Court construes it as governing vested claims, would be a statute of limitations and therefore subject to R.C. 2305.19 and pre-empted by 28 U.S.C. § 1367(d).**

Reading R.C. 2305.113(C)(2) *in pari materia* with Ohio’s statutes of repose suggests that R.C. 2305.113(C)(2), to the extent this Court construes it as governing vested claims, is a statute of limitations, not a statute of repose. And to the extent R.C. 2305.113(C)(2) is a statute of limitations, it is subject to R.C. 2305.19 and pre-empted by 28 U.S.C. § 1367(d).

**1. R.C. 2305.113(C)(2), to the extent this Court construes it as governing vested claims, would be a statute of limitations and not a statute of repose.**

Statutes of limitations place an “expiration date” on **vested** claims, and statutes of repose prevent claims from ever vesting:

A statute of repose does not deny a remedy for a vested cause of action but, rather, bars the action before it ever arises [vests].

*Groch*, 117 Ohio St.3d 192, 2008-Ohio-546 at ¶ 142. Thus, generally:

- with respect to limitations periods,
  - the limitations period begins to run when a claim vests (that is, when it becomes actionable in court), and
  - expiration of a the limitations period bars action upon the vested claim; and
- with respect to repose periods,
  - the repose period begins to run when the tortious act or omission occurs, and
  - the expiration of the repose period, by legislative fiat, prevents claims from ever vesting.

So statutes of limitations usually are expressed in terms of a period of time after a claim vests by which **an action must be commenced**. *E.g.*, R.C. 2305.11 (“[A]n action for malpractice other than an action upon a medical . . . claim . . . shall be commenced within one year after the cause of action accrued . . .”); R.C. 2305.04; R.C. 2305.06; R.C. 2305.07; R.C. 2305.09; R.C. 2305.091; R.C. 2305.10(A); R.C. 2305.111(B), (C); R.C. 2305.112; R.C. 2305.115(A); R.C. 2305.12; R.C. 2305.13; R.C. 2305.14. By definition, a non-vested claim cannot be commenced. Thus, one of the defining traits of statutes of limitations (to the extent they are distinguished from statutes of repose) is that statutes of limitations extinguish vested claims.

Statutes of repose usually are expressed in terms of a period of time after a tortious act or omission by which **a claim must accrue, or vest**, lest it be lost. *E.g.*, R.C. 2305.131(A)(1) (“[N]o cause of action to recover damages for bodily injury . . . that arises out of a defective and unsafe condition of an improvement to real property . . . **shall accrue** . . . later than ten years from the date of substantial completion of such improvement” (emphasis added)); R.C. 2305.10(C)(1); R.C. 2125.02(D)(2). In other words, one of the defining traits of statutes of repose is that they govern only non-vested claims.

R.C. 2305.113(C)(2), is worded differently from most statutes of repose and differently from all three of Ohio’s other civil-action statutes of repose (R.C. 2125.02(D)(2), R.C. 2305.10(C)(1), and R.C. 2305.131(A)(1)). Instead of being expressed in terms of a period of time by which a claim must accrue (vest) or else be lost, R.C. 2305.113(C)(2) is expressed in terms of a period of time by which an action must be **commenced**: “If an action . . . is not commenced within four years after the occurrence . . . .” Which raises the question: Is R.C. 2305.113(C)(2), to the extent it governs vested claims, as Defendants contend, a statute of limitations rather than a statute of repose?

At the outset, let us acknowledge that *Ruther* establishes that as applied to **non-vested** claims, R.C. 2305.113(C)(2) is a constitutional statute of repose that bars action upon claims that did not vest within four years of the malpractice. But

to the extent R.C. 2305.113(C)(2) also bars **vested** claims, it acts as a statute of limitations, because it places an “expiration date” on **vested** claims—a date by which a victim must commence an action.

One might object to this analysis on the ground that the General Assembly surely would not create such a hybrid statute. Such objection would give the General Assembly too much credit. There are indications in the Revised Code’s other repose statutes that the General Assembly has inartfully, if not ineptly, drafted its repose statutes.

*First:* R.C. 2305.10(C) and R.C. 2125.02(D)(2)(a), the twin statutes of repose for product-liability claims, use the traditional “no cause of action shall accrue” language:

- R.C. 2305.10(C)(1) provides that “**no cause of action** based on a product liability claim **shall accrue** against the manufacturer or supplier of a product later than ten years from the date that the product was delivered . . . .” (Emphasis added.)
- R.C. 2125.02(D)(2) similarly provides that “**no cause of action** for wrongful death involving a product liability claim **shall accrue** against the manufacturer or supplier of a product later than ten years from the date that the product was delivered . . . .” (Emphasis added.)

The **limitations** period for such claims is two years from the date of injury or loss:

[A]n action based on a product liability claim . . . **shall be brought** within two years after the cause of action **accrues [vests]**. . . . [A] cause of action accrues [vests] under this division when the injury or loss to person or property occurs.

R.C. 2305.10(A) (emphasis added). Thus, a claim that vests by an injury being discovered in the ninth year after a product is delivered may be commenced within two years of the injury. This is so irrespective of whether the ten-year repose period expires in the interim, because the statute of repose does not apply. This statute of repose does not apply, because this statute of repose expressly does only one thing: prevent claims from vesting. Despite the necessity of this conclusion, the General Assembly included the following redundancy in R.C. 2305.10(C):

If the cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section but less than two years prior to the expiration of that period, an action based on the product liability claim may be commenced within two years after the cause of action accrues.

R.C. 2305.10(C)(4). And the General Assembly included the same redundancy in the wrongful-death statute of repose:

If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section but less than two years prior to the expiration of that period, a civil action for wrongful death involving a product liability claim may be commenced within two years after the decedent's death.

R.C. 2125.02(D)(2)(d). The context of these redundancies indicates that the General Assembly included them out of confusion and not for the sake of clarity. (This Court generously characterized R.C. 2305.10(C)(4) as being “consistent with R.C. 2305.10(A).” *Groch* ¶ 195.)

*Second:* R.C. 2305.131, the ten-year statute of repose for specified premises liability actions, begins with a qualifying phrase purporting to make this statute of repose trump the applicable statute of limitations:

**Notwithstanding an otherwise applicable period of limitations specified in this chapter** or in section 2125.02 of the Revised Code . . . , **no cause of action** to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property . . . **shall accrue [vest]** against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property **later than ten years from the date of substantial completion of such improvement.**

R.C. 2305.131(A)(1) (emphasis added). This qualifying phrase is superfluous.

Limitations periods begin to run when a cause of action vests. R.C.

2305.131(A)(1) prevents causes of action from vesting. Thus, this statute of repose could never conflict with a statute of limitations. Here, too, the context indicates that the General Assembly included this superfluity out of confusion.

*Third:* The General Assembly’s lack of dexterity with statutes of repose is also suggested by the near absence of the term “statute of repose” in the Revised Code. The Revised Code uses the word “repose” to refer to a statute of repose only three times:

- R.C. 1312.08(A), part of the residential building code, refers to statutes of repose only in the abstract: “All applicable statutes of limitation or repose are tolled from the time the owner sends a notice of defect to a contractor . . . .”

- R.C. 2117.06(G), concerning claims against a decedent’s estate, merely references “periods prior to repose in section 2125.02 or Chapter 2305. of the Revised Code.”
- R.C. 2305.131 is titled, “Ten-year statute of repose for certain premises liability actions.” But the text of that statute does not contain the word “repose.”

R.C. 2305.113 does not use the word “repose.” (The uncodified portion of the legislation enacting R.C. 2305.113 does refer to “a statute of repose,” “the statute of repose,” and “statutes of repose.” S.B. 281, § 3(A)(6)(a), (c), (f), (C)(1), 149 Ohio Laws, Part II, at 3850-51.<sup>3</sup>)

Reading R.C. 2305.113(C)(2) *in pari materia* with Ohio’s statutes of repose indicates that R.C. 2305.113(C)(2), to the extent this Court construes it as governing vested claims, is a statute of limitations and not a statute of repose.

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<sup>3</sup> The brief of Defendants’ *amicus* the Academy of Medicine points out that “[i]n promulgating R.C. 2305.113(C), the Ohio General Assembly relied on the Supreme Court of Delaware’s decision in *Dunn v. St. Francis Hospital, Inc.*, 401 A.2d 77 (Del. 1979). An uncodified sentence in S.B. 281 states that in *Dunn*, “the Delaware Supreme Court found the Delaware three-year statute of repose constitutional as not violative of the Delaware Constitution’s open courts provision.” S.B. 281, § 3(A)(6)(f), 149 Ohio Laws, Part II, at 3851. The point the General Assembly made by this sentence is that because the *Dunn* court upheld a three-year repose period, the Supreme Court of Ohio should, if asked, uphold S.B. 281’s four-year repose period. But in *Dunn* the plaintiff discovered the malpractice seven years after the malpractice—five years **after** the two-year repose period had expired. *Id.* at 78. Thus, the General Assembly’s citation of *Dunn* sheds no light on the question of whether the General Assembly wished R.C. 2305.113(C) to bar vested claims.

**2. To the extent R.C. 2305.113(C)(2) is a statute of limitations governing vested claims, it would be subject to R.C. 2305.19 and pre-empted by 28 U.S.C. § 1367(d).**

R.C. 2305.19 trumps all statutes of limitations. *See Frysinger v. Leach*, 32 Ohio St.3d 38, 43 (1987) (holding that R.C. 2305.19 is a “legislative protection from the limitations bar”); *see* Part III-A above (arguing that R.C. 2305.19 trumps R.C. 2305.113(C)(1)). To the extent R.C. 2305.113(C)(2) is a statute of limitations, it, too, is subject to R.C. 2305.19.

The federal supplemental-subject-matter-jurisdiction saving statute, 28 U.S.C. § 1367(d), protects claims from any “period of limitations.” Under the Supremacy Clause, any state-law limitations provision pre-empted by Section 1367(d). *See Jinks v. Richland Cty.*, 538 U.S. 456, 461-65 (2003). Thus, to the extent R.C. 2305.113(C)(2) is a statute of limitations on vested claims, it is pre-empted by 28 U.S.C. § 1367(d).

**C. The fact that R.C. 2305.113(C)(2) does not bar vested claims is consistent with the policies the statute seeks to promote.**

The three policies R.C. 2305.113(C)(2) seeks to promote were expressed by the General Assembly in an uncodified section of S.B. 281:

The General Assembly finds:

.....

- (b) Over time, the availability of relevant evidence pertaining to an incident and the availability of witnesses knowledgeable

ble with respect to the diagnosis, care, or treatment of a prospective claimant becomes problematic.

- (c) The maintenance of records and other documentation related to the delivery of medical services, for a period of time in excess of the time period presented in the statute of repose, presents an unacceptable burden to hospitals and health care practitioners.
- (d) Over time, the standards of care pertaining to various health care services may change dramatically due to advances being made in health care, science, and technology, thereby making it difficult for expert witnesses and triers of fact to discern the standard of care relevant to the point in time when the relevant health care services were delivered.

S.B. 281, § 3(A)(6), 149 Ohio Laws, Part II, at 3850. In § 3(C)(1) of S.B. 281, the General Assembly

respectfully requests the Ohio Supreme Court . . . to reconsider its holding on statutes of repose in Sedar v. Knowlton Constr. Co. (1990), 49 Ohio St.3d 193, . . . .

*Id.* at 3851-52. In *Sedar*, the Court had upheld against constitutional challenges R.C. 2305.131, the statute of repose covering architects and builders, but the Court noted that the medical-claim statute of repose, former R.C. 2305.11(B), “has been held unconstitutional on various grounds and as applied to various factual circumstances.” *Sedar*, 49 Ohio St.3d at 197, n. 3. (*Sedar* by then had been expressly overruled by *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 1994-Ohio-322, paragraph two of the syllabus. But it was effectively rehabilitated by *Groch v. Gen Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶¶ 136, 153.)

It is evident from the context that the General Assembly adopted the uncodified § 3(A)(6) and § 3(C) because it was concerned about this Court ruling the repose statute facially unconstitutional, leaving medical practitioners with no repose statute at all. There is no hint that the General Assembly wishes this repose statute to behave any differently from any other Ohio repose statute or any differently from repose statutes generally—namely, preventing claims from vesting but not affecting vested claims.

The policies the General Assembly articulated in S.B. 281, § 3(A)(6), are compromised little if R.C. 2305.113(C)(2) does not apply to vested claims:

- “[T]he availability of relevant evidence”: If the victim commences an action within the repose period, the defendants learn of the claim within the repose period and can collect and preserve relevant evidence.
- “[T]he availability of witnesses”: In any type of legal action, every day that passes before trial increases the risk of a witness being unavailable. Relatively speaking, the delay incident to a victim’s invoking a saving statute is small.
- “The maintenance of records and other documentation”: The burden of maintaining relevant documentation after a victim commences an action within the repose periods is *de minimis*.
- “[T]he standards of care pertaining to various health care services may change dramatically due to advances being made in health care, science, and technology, thereby making it difficult for expert witnesses and triers of fact to discern the standard of care relevant to the point in time when the relevant health care services were delivered”: The General Assembly was right to be concerned about claims vesting (that is, being discovered) many years after the malpractice and about the standard of care chang-

ing in the interim. But the delay incident to a victim's invoking a saving statute is short and would not implicate this policy concern.

R.C. 2305.113(C)(2) unconditionally assures potential defendants that they will be sued for their malpractice, if at all, within four years of the malpractice. That is the primary purpose of the statute. The fact that a defendant might be burdened with delay in the form of voluntary dismissals and re-filings implicates the underlying policy concerns little.

**D. Defendants and their *amici* exaggerate the significance of R.C. 2305.113(C)(2) not applying to vested claims.**

1. Defendants contend that if this Court does not adopt their analysis, then

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

(Defendants' Brief, p. 7, ¶ 2.) The analysis in Part II-D above demonstrates how much nonsense that statement is. R.C. 2305.113(C)(2) unconditionally bars all claims (except foreign-object claims) that do not vest within four years of the malpractice. Every claim that vests within those four years must be brought within one year (or one year plus 180 days). The only category of cases whose fate hangs in the balance in this appeal are the cases in which the victim files an action within both the four-year repose period and the one-year limitations period and then utilizes a saving statute to re-file more than four years after the malpractice. That

is not likely to be a large number of cases. And regardless of the number, as explained in Part IV-C above, such re-filing has little prejudicial impact on defendants.

2. Defendants contend that if this Court does not adopt their analysis, then medical providers will be deprived of certainty regarding when medical claims expire. (Defendants' Brief, p. 9, ¶ 3.) That contention is false. Medical providers know with 100 percent certainty that all claims (except foreign-object claims) are barred if not brought within five years of the act or omission. It is true that medical providers have no certainty of when their cases will go to trial. And because victims can use saving statutes to extend the life of claims brought in an action commenced within both the repose period and the limitations period, the existence of saving statutes adds to the uncertainty of when a case will go to trial. But the certainty regarding when claims initially will be brought will not be affected by any ruling in this case.

3. The prospect of trials being delayed due to dismissal and re-filing is mitigated by (1) The "double dismissal" rule of Civ.R. 41(A)(1), *see generally State ex rel. Dillard Dept. Stores v. Ryan*, 122 Ohio St.3d 241, 2009-Ohio-2683, ¶ 13, and (2) the rule that R.C. 2305.19 "can be used only once to refile a case," *Thomas v. Freeman*, 79 Ohio St.3d 221, 227, 1997-Ohio-395. Thus, the life of a vested claim

cannot be extended indefinitely merely because the initial action was commenced within the repose and limitations periods.

In this particular case, the rules that define “due course of law” allow for the Antoons to pursue a re-filed action that was commenced after the repose period expired. But this case is an extreme case in that the Antoons invoked two “saving” statutes. But even so, the delay is not that extreme: the Antoons commenced this re-filed action on November 14, 2013, only thirteen months after the repose period expired.

4. Defendants’ *amicus* the Academy of Medicine of Cleveland & Northern Ohio does more than exaggerate the significance of R.C. 2305.113(C)(2) not applying to vested claims. It erroneously contends that the court of appeals judgment renders R.C. 2305.113(C) superfluous:

If the Eighth District’s holding is to serve as the new standard rule regarding the applicability R.C. 2305.113(C) [*sic*], the statute of repose will **never effectively preclude any cause of action** from being brought because a right to remedy is “vested” once a plaintiff becomes aware of his or her potential cause of action, thereby limiting the timeliness of the filing to a statute of limitation analysis only. The effect of this interpretation severely restricts and diminishes the statute of repose to the point of rendering the subsection meaningless.

(Brief of the Academy of Medicine of Cleveland & Northern Ohio 4-5 (emphasis added).) That contention is erroneous because the statutes of limitations (R.C. 2305.113(A) and R.C. 2305.113(C)(1)/(D)(1)) bar only vested claims that are not

brought within one year of vesting. R.C. 2305.113(C)(2) unconditionally bars all claims (except foreign-object claims) that do not vest within four years of the malpractice.

5. Defendants' *amici* contend that the court of appeals judgment "subjects what should be a simple procedural question to a Civ. R. 56(F) motion, additional discovery, the time and costs associated therewith, and the prolonged uncertainty that litigation brings." (Brief of the Academy of Medicine of Cleveland & Northern Ohio, p. 13, ¶ 1. *Accord* Brief of Ohio Hospital Association *et al.*, p. 3, ¶¶ 1-2.) That contention is false. Medical claims that vest within **three** years of the malpractice do not implicate the four-year period of R.C. 2305.113(C), because R.C. 2305.113(A) bars claims not asserted within one year of vesting. Medical claims that do not vest within **four** years are barred by R.C. 2305.113(C). It is only claims that vest **during the fourth year** after the malpractice that can potentially involve both litigation over the vesting date and the four-year repose period. And all of that potential for litigation will exist under R.C. 2305.113(C)(1)/(D)(1), because a claim that vests during the fourth year may be brought during the fifth year. Thus, this Court's construing R.C. 2305.113(C) as barring only claims that did not vest within four years cannot cause any additional litigation over when a claim vested.

**V. R.C. 2305.113(C), to the extent this Court construes it as purporting to bar vested claims, would be unconstitutional as applied.**

**A. Introduction.**

This Part V is moot if this Court holds, without resort to constitutional analysis, that neither R.C. 2305.113(C)(1) nor (C)(2) bars the Antoons' claims.

Part IV above explained that the text of R.C. 2305.113(C)(2) is that R.C. 2305.113(C)(2) only prevents claims from vesting and does not bar vested claims. This Part V assumes that the Court rejects that analysis and interprets the text of R.C. 2305.113(C)(1) and/or (C)(2) as purporting to bar any action that *itself* was not commenced within four years of the malpractice—even if, by virtue of “saving” statutes, the action is otherwise timely.

“[T]he constitutionality of any specific statute of repose should turn on the particular features of the statute at issue, and . . . such a statute should be evaluated narrowly within its specific context.” *Groch v. Gen Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶ 138. To the extent R.C. 2305.113(C) purports to bar vested claims, it is unconstitutional as applied to vested claims in two respects:

- So interpreted, it would violate the right-to-remedy guarantee of the Ohio Constitution, Article I, Section 16.
- So interpreted, it would create a statutory system of limitations and repose so uncertain as to be void for vagueness under the federal and state guarantees of due process and due course of law.

**B. R.C. 2305.113(C), to the extent this Court construes it as purporting to bar vested claims, would be unconstitutional as applied, because it would violate the right-to-remedy guarantee of the Ohio Constitution.**

**1. The right-to-remedy guarantee protects the Antoons' claims because those claims vested before the repose period expired.**

The right-to-remedy guarantee of the Ohio Constitution guarantees that “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.” Ohio Constitution, Article I, Section 16 (emphasis added). The right-to-remedy guarantee protects “vested rights.” *Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, at ¶ 13. Medical claims vest when the victim discovers or should have discovered the injury:

We have clearly stated that it is when a patient discovers or in the exercise of reasonable care and diligence should have discovered the resulting injury that a cause of action for medical malpractice accrues, or, in other words, vests.

*Ruther* ¶ 17.

As of December 11, 2008, Plaintiffs had medical claims that were vested and therefore protected by the right-to-remedy constitutional guarantee. Because of this constitutional protection, the Antoons became entitled to have their claims adjudicated “by due course of law” and not extinguished by the arbitrary repose period of R.C. 2305.113(C).

In *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, this Court upheld against constitutional challenges the product-liability statute of repose, R.C. 2305.10(C). The Court distinguished the Grochs' **non**-vested claims from **vested** claims, which are protected by the right-to-remedy guarantee:

[T]hose cases [ruling former medical malpractice statutes of repose unconstitutional] are distinguishable because the medical malpractice statute of repose interpreted in them took away an **existing, actionable negligence claim** before the injured person discovered the injury (when the injury had already occurred) or gave the injured person too little time to file suit, **and therefore denied the injured party's right to a remedy for those reasons.**

*Groch* ¶ 153 (emphasis added). The Antoons' claims are vested, and so the Antoons are entitled to litigate their claims under the statutes and rules that define "due course of law."<sup>4</sup>

This Court in *Ruther*, upholding R.C. 2305.113(C) as applied to **non**-vested claims, explained that the General Assembly has the power generally to determine what injuries and claims are recognized (including the power to abolish claims), to

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<sup>4</sup> This analysis is consistent with the analysis espoused by the Ohio Hospital Association *et al.* in *Ruther*. In *Ruther*, those same three *amici* argued: "This Court should apply the *Groch* vested rights rule in this case, and find that R.C. 2305.113(C) does not violate Section 16, Article I because it does not impair a vested right." Brief of Amici Curiae, Ohio Hospital Association, . . . Ohio State Medical Association, . . . Ohio Osteopathic Association *et al.*, in S. Ct. No. 2011-0899, p. 5, ¶ 2 (Dec. 12, 2011).

determine what remedies are available, to define claims, and to create statutes of limitations and statutes of repose:

We have previously stated that the right-to-remedy provision applies only to existing, vested rights and that the legislature determines what injuries are recognized and what remedies are available. [¶] Thus, the General Assembly has the right to determine what causes of action the law will recognize and to alter the common law by abolishing the action, by defining the action, or by placing a time limit after which an injury is no longer a legal injury. [¶] The question remains whether R.C. 2305.113(C) is a valid exercise of the General Assembly's authority to define or limit a cause of action.

*Ruther* ¶¶ 13-15. And in *Ruther* this Court held that R.C. 2305.113(C) is a valid exercise of the General Assembly's authority as applied to non-vested claims. So it is fair to ask: If the right-to-remedy constitutional guarantee does not preclude the General Assembly from extinguishing vested claims via a **statute of limitations**, how is it that the right-to-remedy constitutional guarantee precludes the General Assembly from extinguishing vested claims via a **statute of repose**?

The answer lies in the differing nature of a limitations bar versus a repose bar. Repose statutes are more constitutionally suspect than limitations statutes because repose statutes operate beyond victims' control, while limitations statutes call for action by victims who have vested claims upon which to act. In *Groch* this Court stated:

A statute of repose does not deny a remedy for a vested cause of action but, rather, bars the action before it ever arises.

*Id.* at ¶ 142. The primary purpose of statutes of limitations is to require and regulate prompt action by the victim after the victim becomes aware of a claim; statutes of repose, in contrast, arbitrarily bar a claim based upon factors outside the victim's control:

Although there is substantial overlap between the policies of the two types of statute, each has a distinct purpose and each is targeted at a different actor. Statutes of limitations require plaintiffs to pursue diligent prosecution of known claims. . . . Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons. But the rationale has a different emphasis. Statutes of repose effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time.

One central distinction between statutes of limitations and statutes of repose underscores their differing purposes. Statutes of limitations, but not statutes of repose, are subject to equitable tolling, a doctrine that pauses the running of, or "tolls," a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action. Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control.

*CTS*, 134 S.Ct. at 2183 (quotation marks and citations omitted).

Thus, generally, statutes of repose truly define a claim by providing that no claim shall vest after some amount of time. Statutes of limitations, in contrast, operate upon vested, or actionable, claims. And in Ohio, vested claims are protected by the right-to-remedy guarantee. Which means that victims with vested claims, and their counsel, may rely upon the myriad statutes and other rules that

define the “due course of law” by which vested claims are adjudicated. Those rules include:

- the statutes of limitations applicable to vested medical claims (R.C. 2305.113(A) and R.C. 2305.113(C)(1)),
- R.C. 2305.19 (the Saving Statute),
- any pre-emptive federal laws, including 28 U.S.C. § 1367(d), and
- the Ohio Rules of Civil Procedure and other rules of court.

This is not to say that the General Assembly could not repeal the statutes of limitations and R.C. 2305.19 and leave the statute of repose as the only statutory time bar. The General Assembly may do so. But what the General Assembly cannot do—and what Defendants seek to do in this case—is extinguish a vested claim arbitrarily and contrary to rules that define the “due course of law”—specifically, R.C. 2305.19 and 28 U.S.C. § 1367(d).

**2. The cases cited by Defendants and their *amici* did not involve vested claims.**

Defendants and their *amici* cite four cases in which courts upheld medical-claim statutes of repose against constitutional challenges. But in every one of those cases, the plaintiffs discovered their injuries **after** the repose period had expired, and thus

- the potential claims were barred before they vested, and

- the plaintiffs were unable to do what the Antoons did: commence an action within both the repose period and the limitations period.

In *Dunn v. St. Francis Hospital, Inc.*, 401 A.2d 77 (Del. 1979), the plaintiff discovered the malpractice seven years after the malpractice—five years after the two-year repose period had expired. *Id.* at 78

In *Aicher v. Wisconsin Patients Compensation Fund*, 613 N.W.2d 849 (Wis. 2000), “Aicher’s cause of action accrued when she discovered her injury, after she had reached her tenth birthday [a]t which point, the statutes of repose . . . had run and combined to extinguish her cause of action.” *Id.* at ¶ 83.

In *Golden v. Johnson v. Mem. Hosp., Inc.*, 785 A.2d 234 (Conn. App. 2001), the plaintiff discovered the malpractice eleven years after the malpractice—eight years after the three-year repose period had expired. *Id.* at 236-37.

In *York v. Hutchins*, 12 Dist. No. CA2013-09-173, 2014-Ohio-988, the malpractice occurred on June 11, 2003, *id.* at ¶ 2. The plaintiffs discovered the malpractice in 2012, *id.* at ¶ 4—five years after the four-year repose period had expired.

These cases are consistent with *Ruther* and provide no guidance for this case, which involves **vested** claims upon which the Antoons commenced an action within the repose period.

**C. R.C. 2305.113(C), to the extent this Court construes it as purporting to bar vested claims, would be unconstitutional as applied, because it would create a statutory system of limitations, repose, and claim-“saving” so uncertain as to be void for vagueness under the federal and state guarantees of due process and due course of law.**

Vague statutes violate the federal and Ohio constitutional guarantees of due process of law and due course of law, respectively. A statute is unconstitutionally vague when it is so vague that either (1) a person of ordinary intelligence cannot understand how to comply with it, or (2) it invites arbitrary or discriminatory enforcement:

When a statute is challenged under the due-process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement.

*Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 42 (quotation marks and citations omitted). This “void for vagueness” doctrine is applied with heightened scrutiny when the challenged statute “interfere[es] with the exercise of constitutionally protected rights.” *Id.* R.C. 2305.113(C) is subject to such heightened scrutiny because it purports to bar victims’ constitutionally protected right to justice for tortious injury—the state constitutional right “for an injury done him . . . , to due course of law,” Ohio Constitution, Article I, Section 16, and the federal constitutional right “to petition the Government for a redress of grievances,” U.S. Constitution, First Amendment.

As explained in Part IV-B above, there is nothing in the Ohio Revised Code from which a person of ordinary intelligence can conclude that R.C. 2305.113(C)(2) renders R.C. 2305.19 ineffective. R.C. 2305.19 trumps multiple limitations statutes that are worded nearly identically to R.C. 2305.113(C)(2). A person of ordinary intelligence would think that R.C. 2305.19 and 28 U.S.C. § 1367(d) “save” claims and trump R.C. 2305.113(C)(2) just as those statutes trump similarly worded statutes.

Moreover, a person of ordinary intelligence would read the *Ruther* syllabus—“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 (emphasis added)—and conclude that a victim’s vested claim is not subject to being barred by R.C. 2305.113(C). Indeed, persons of **extraordinary** intelligence and legal training have reached that conclusion. *Ander v. Clark*, 10th Dist. No. 14AP-65, 2014-Ohio-2664; *Kennedy v. United States*, 526 Fed. Appx. 450 (6th Cir. 2013).

R.C. 2305.113(C)(2), read *in pari materia* with R.C. Chapter R.C. 2305 generally (in particular the Saving Statute, R.C. 2305.19) does not “provide[] sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence,” *Columbia Gas* ¶ 42. Nor is R.C. 2305.113(C)(2) “specific enough to prevent official arbitrariness” from judges compelled to apply it. Indeed, there is

no apparent basis upon which this Court could rule that R.C. 2305.113(C) renders R.C. 2305.19 ineffective.

Adopting Defendants' proposition of law would create a trap for the unwary analogous to the notorious "malpractice trap" in the former version of Ohio's Saving Statute. Prior to a 2004 amendment, R.C. 2305.19 applied only when the earlier action was dismissed **after** the limitations period had expired. If the action were dismissed before the limitations period expired, the R.C. 2305.19 would not apply, and the plaintiff remained in jeopardy under the statute of limitations. The 2004 amendment, still in effect, eliminated the trap. A plaintiff now "may commence a new action within one year . . . or within the period of the original applicable statute of limitations, whichever occurs later." *See Cristino v. Bureau of Workers' Comp.*, 10th Dist. No. 12AP-60, 2012-Ohio-4420, ¶ 25, n. 4; *Wright v. Proctor-Donald*, 5th Dist. No. 2012-CA-00154, 2013-Ohio-1973, ¶¶ 9-11; *Capitalsource Bank FBO Aeon Fin., LLC v. Donshirs Development Corp.*, 8th Dist. No. 99032, 2013-Ohio-1563, ¶ 20.

Defendants' proposition of law would create a similar trap and ensnare the Antoons in this case and others in years to come. Victims who commence an action within both the repose period and the limitations periods and then think they can rely on the apparent meaning of R.C. 2305.19, 28 U.S.C. § 1367(d), or any other saving statute, will be told that their re-filed claims, filed after the four-

repose period expired, are now time-barred. Defendants try to obscure this trap for which they advocate by claiming that the Antoons “cho[se] not to comply with the statute of repose” and “chose to let a vested right expire.” (Defendants Brief, p. 16, ¶¶ 3, 4.) The record instead suggests that the Antoons relied upon the rules that define “due course of law”—specifically, R.C. 2305.19, 28 U.S.C. § 1367(d), and *Ruther*.

Thus, **even if** this Court construes R.C. 2305.113(C)(2) as purporting to bar re-filed actions even when (1) the original action was filed within both the repose period and the limitations period, and (2) the re-filed action was “saved” by R.C. 2305.19 and/or 28 U.S.C. § 1367(d), and **even if** this Court holds that R.C. 2305.113(C)(2), standing alone, does not violate the right-to-remedy guarantee as applied to vested claims, this Court should hold that R.C. 2305.113(C)(2) is void for vagueness as applied to vested claims.

## CONCLUSION

The Court should reject Defendants’ proposition of law and affirm the judgment of the court of appeals.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

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