ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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

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INTRODUCTION

The issue in this case is, on its face, quite simple. Revised Code 2305.113(C)(1) states that "[n]o action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission..." The Plaintiffs in this case allege the act or omission occurred on January 8, 2008 but commenced the instant action on November 13, 2013—well over four years later. The Defendants therefore seek to dismiss the Complaint as untimely under R.C. 2305.113(C).

To avoid the straightforward application of R.C. 2305.113(C), the Plaintiffs and their amicus, the Ohio Association for Justice (the "OAJ") raise an assortment of arguments that would significantly alter the statutory framework that the General Assembly has enacted for medical malpractice claims. Many of the arguments they raise, such as the possible impact of various savings statutes, are not before this Court and serve only to obscure the two issues that this Court must actually decide, which are: (1) does R.C. 2305.113(C) apply to claims that have vested, and (2) would the application of R.C. 2305.113(C) to vested claims be unconstitutional?

The Ohio Hospital Association, The Ohio State Medical Association, and The Ohio Osteopathic Association (collectively "the Amici") respectfully submit that the answers to these questions are clear. On the first issue, the Amici explained in their opening brief that R.C. 2305.113(C)—specifically, subsection (C)(1)—applies to vested claims, and even the OAJ concedes that is correct. And on the second issue, the Amici previously explained that applying R.C. 2305.113(C) to vested claims is not unconstitutional because plaintiffs have a "reasonable time" to bring their claims, which is all the Ohio Constitution requires. Plaintiffs and the OAJ both failed to address this governing standard.

Accordingly, for the reasons set forth in their opening brief, the Amici respectfully submit that the Court should reverse the decision below and hold that R.C. 2305.113(C) applies

to vested claims. The Amici submit this Reply Brief to clarify the scope of the issues before the Court and also to respond to the OAJ's suggestion that the Amici's position in this case is inconsistent with their arguments as amici in the *Ruther* appeal. As discussed below, the Amici's position in both cases is absolutely consistent—and correct.

ARGUMENT

A. R.C. 2305.113(C)(1) Applies To Vested Claims.

The crux of the Eighth District's decision is its holding that R.C. 2305.113(C) "no longer applies" once a claim has vested. *Antoon v. Cleveland Clinic Foundation*, 8th Dist. No. 101373, 2015-Ohio-421, ¶ 11. That holding is the issue that this Court accepted for review, and on that issue there is agreement on both sides that R.C. 2305.113(C) does, in fact, apply to vested claims. This issue has become muddied, however, due to confusion about the analysis in the Eighth District's decision and various arguments raised by Plaintiffs and the OAJ.

The root of the appellate court's error is its failure to recognize that there are two subsections to R.C. 2305.113(C) that have different functions. As the Amici explained in their opening brief, subsection (C)(1) is a four-year statute of limitations for vested claims that runs from the date of the alleged malpractice, while subsection (C)(2) is a statute of repose that bars claims that do not vest within four years of the alleged malpractice. *See* Amici Merit Brief at 7. This interpretation is not only compelled by the unambiguous language of the statute, it is the only interpretation that gives each subsection a distinct meaning. *Id.* at 10-13; *see State v. Taylor*, 138 Ohio St. 3d 194, 2014-Ohio-460, ¶ 23 ("[W]hen language is inserted in a statute, it is inserted to accomplish a definite purpose.").

The Eighth District, however, did not distinguish between subsections (C)(1) and (C)(2), and deemed the entire subsection (C) to be a four-year statute of repose that did not apply to vested claims. *See Antoon*, 2015-Ohio-421, at ¶¶ 8-11. Neither Plaintiffs nor their amicus

present any argument that supports the appellate court's holding on this issue. Plaintiffs, for their part, simply perpetuate the appellate court's error by treating (C) as a single provision throughout their brief without distinguishing between the different functions of (C)(1) and (C)(2). *See, e.g.*, Appellees' Brief at 12, 17-22. The OAJ, on the other hand, explicitly concedes that subsection (C)(1) applies to vested claims: "R.C. 2305.113(C)(1)/(D)(1) is a statute of limitations governing vested claims ..." OAJ Brief at 9.

Despite this direct contradiction of the appellate courts' reasoning, Plaintiffs and the OAJ raise an assortment of arguments in an attempt to defend the outcome below. Their arguments, however, have no merit and are frequently premised on issues that are not before this Court.

R.C. 2305.113(C)(1) Is Not Limited To Claims That Vest In The Fourth Year After The Alleged Malpractice

After conceding that R.C. 2305.113(C)(1) applies to vested claims, the OAJ attempts to minimize its scope. It argues that "R.C. 2305.113(C)(1) matters only when ... the claim vests during the fourth year following the malpractice." *See* OAJ Brief at 14-15. The plain language of the statute contains no such restriction—(C)(1) broadly states that "No action ... shall be commenced more than four years after the occurrence of the act or omission [emphasis added]." This provision is not limited to claims that vest in the fourth year after the alleged malpractice.

Rather, the four-year[1] statute of limitation in (C)(1) exists alongside the one-year statute of limitation in R.C. 2305.113(A) and is applicable to all malpractice claims. Whereas the four-year limit in (C)(1) runs from the date of the alleged malpractice, the one-year limit in (A) runs

[1] The OAJ incorrectly asserts that subsections (C)(1) and (D)(1) create a "five-year statute of limitations." OAJ Brief at 10. The additional year provided in (D)(1) applies *only* if the claim is discovered during the fourth year after the alleged malpractice. If it is discovered during the first three years, there is no extension, and thus the four-year statute of limitation in (C)(1) applies.

from the date the cause of action accrues. A plaintiff must therefore comply with both time limits. *See* Amici Merit Brief at 8.

The Application Of The Savings Statutes Is Not Before The Court

Plaintiffs and the OAJ argue that—even though R.C. 2305.113(C)(1) applies to vested claims—Plaintiffs satisfied that four-year limit by application of two different savings statutes: R.C. 2305.19 and 28 U.S.C. § 1367(d). Appellees' Brief at 12-17, 21; OAJ Brief at 19-21. The possible application of the savings statutes to R.C. 2305.113(C)(1)—including whether they apply at all to that statute, or how they would apply on the specific facts and procedural posture of this case—are not before this Court. Indeed, because the appellate court found that R.C. 2305.113(C) was inapplicable to vested claims, it did not reach the issue of how the savings statutes would apply to the time limits in 2305.113(C).

The savings statutes do, however, illustrate the ramifications of this appeal. The Eighth District determined that the savings statute issues could not be resolved on a motion to dismiss. In doing so, the court considered the application of the savings statutes to the one-year statute of limitation in R.C. 2305.113(A), which runs from the later of the date the plaintiff discovers the injury or the date the physician-patient relationship terminates. *See Antoon*, 2015-Ohio-421, at ¶¶ 12, 17-18. The court stated that the federal savings statute would not apply "if the statute of limitations expired prior to the time when the Antoons filed their federal complaint." *Id.* at ¶¶ 15-16, 18. But it held that this question could not be answered in the current procedural posture because the pleadings did not establish when the Antoons' physician-patient relationship terminated. *Id.*

If, however, the court had held that Plaintiffs' claims were subject to the four-year statute of limitations in (C)(1), there would be no such difficulty. The four-year limit in (C)(1) runs from the date of the alleged malpractice—which Plaintiffs allege was January 8, 2008. Thus,

assuming the federal savings statutes applies at all to R.C. 2305.113(C)(1), its application in this case would not raise the evidentiary issues associated with its application to the one-year limit in subsection (A) and could presumably be resolved through a motion to dismiss.

R.C. 2305.113(C)(2) Governs Non-Vested Claims And Is Not At Issue

As the Amici explained in their opening brief, subsection (C)(2) is a statute of repose that bars claims that have not vested within four years of the alleged malpractice. Amici Merit Brief at 7, 11-12. Subsection (C)(2) was the provision at issue in *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, which held that applying the statute of repose to bar claims that have not vested does not violate the Ohio Constitution.

The OAJ raises arguments regarding R.C. 2305.113(C)(2) that are simply not relevant to the application of (C)(1) in this case. The OAJ argues, for example, that the four-year statute of repose in (C)(2) is satisfied so long as "an action" (including a prior, dismissed action) is commenced within four years of the alleged malpractice. *See* OAJ Brief at 22-24; *cf.* Appellees' Brief at 19-20. But (C)(2) governs claims that have not vested. The applicable provision here, (C)(1), is worded differently and states that "no action ... shall be commenced more than four years after the occurrence of the act or omission [emphasis added]." Whether or not Plaintiffs previously filed an action, their current action is subject to the absolute limitation in (C)(1).

The OAJ also mischaracterizes the Amici's position on (C)(2), stating: "the Ohio Hospital Association et al. contend that R.C. 2305.113(C)(2) governs all claims, not just non-vested claims." OAJ Brief at 23 n. 2. That is not correct. The Amici have never expressed that (C)(2) alone applies to both vested and non-vested claims—in the *Ruther* case or here. In fact, in their opening brief, the Amici were perfectly clear on the scope of (C)(1) versus (C)(2): "whereas (C)(2) addresses claims that have not vested, (C)(1) addresses claims that have vested." Amici Merit Brief at 11. The OAJ goes on to accuse the Amici of taking a contrary position as

an amicus in *Ruther*. OAJ Brief at 23 n. 2. The Amici did no such thing. *Ruther* involved a non-vested claim, and the Amici accordingly argued in that case that applying the statute of repose—which is contained in (C)(2)—to bar a claim before it vests is not unconstitutional. The Court agreed. The application of (C)(2), however, is not relevant here because Plaintiffs' claims vested within four years of the alleged malpractice. Rather, the relevant provision here is (C)(1), and neither the Court's holding in *Ruther* nor the Amici's arguments as amicus in that case addressed the application of R.C. 2305.113(C) or (C)(1) to vested claims.

B. Applying R.C. 2305.113(C) To Vested Claims Is Not Unconstitutional.

In their opening brief, the Amici explained that applying R.C. 2305.113(C) to vested claims is not unconstitutional because it affords plaintiffs a "reasonable time" to bring a claim, which is what the Ohio Constitution requires. Amici Merit Brief at 16-17. Neither Plaintiffs nor the OAJ offered any meaningful response on this issue.

Plaintiffs rely on faulty logic and a misreading of *Ruther*. In *Ruther*, the Court held that applying R.C. 2305.113(C) to claims that are not vested is not unconstitutional. Plaintiffs argue that the inverse of this must also be true—that applying R.C. 2305.113(C) to claims that are vested must be unconstitutional. Appellees' Brief at 18 ("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 .... 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."). This assertion, made without any supporting authority, is illogical and incorrect as a matter of Ohio law. Indeed, the General Assembly clearly has the power to extinguish a vested claim because that is the function of a statute of limitations. *See Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 112 ("[A] true statute of limitations … limits the time in which a plaintiff may bring suit after the cause of action accrues….").

The OAJ at least acknowledges that the General Assembly can extinguish vested claims. *See* OAJ Brief at 41-43. But beyond that, the OAJ fails to address the arguments and authorities in the Amici's brief. For example, the OAJ asserts that extinguishing a vested claim is problematic if it is arbitrary and based on factors outside the plaintiffs' control. *Id.* But the OAJ ignores this Court's holding that the General Assembly may extinguish a vested claim as long as the plaintiff has a "reasonable time" to bring the claim:

> [A] legislative enactment may lawfully shorten the period of time in which the remedy may be realized "as long as the claimant is still afforded a reasonable time in which to enforce his right." A "reasonable time" in which to bring a medical malpractice claim was defined in *Adams* as "one year after the discovery of the malpractice."

Gaines v. Preterm-Cleveland, Inc., 33 Ohio St. 3d 54, 60 (1987) (citation omitted). Tellingly, the OAJ addresses several cases in its brief but specifically omits any discussion of *Gaines*. Nor does the OAJ dispute that a plaintiff will always have at least one year to bring a claim after discovering an injury under R.C. 2305.113, up to the point at which the claim is barred by the statute of repose in (C)(2), which *Ruther* held was constitutional. *See* Amici Merit Brief at 17.

The OAJ instead argues that applying R.C. 2305.113(C) to vested claims would result in an unconstitutionally vague statute. *See* OAJ Brief at 45-48. According to the OAJ, R.C. 2305.113(C) is unconstitutionally vague because Plaintiffs thought their claims were timely and courts have issued differing opinions on the applicability of R.C. 2305.113(C) to vested claims. *Id.* If statutes could be rendered unconstitutionally vague due to the confusion of parties and differing legal opinions, then every statute that comes before this Court for interpretation would likely fail the test. The language of R.C. 2305.113(C) is perfectly clear, and there is nothing vague—much less unconstitutionally vague—about applying the statute to vested claims.

CONCLUSION

The appellate court erred in holding that R.C. 2305.113(C) "no longer applies" once a claim vests. That ruling incorrectly deprives malpractice defendants of the ability to challenge the timeliness of vested claims under the four-year statute of limitations in R.C. 2305.113(C)(1). Accordingly, the Amici respectfully request that the Court enter appropriate relief in accordance with the Appellants' Proposition of Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 22, 2016, a copy of the foregoing was filed with the Clerk of the Ohio Supreme Court, and that a copy of the foregoing was served upon the following by mail and email:

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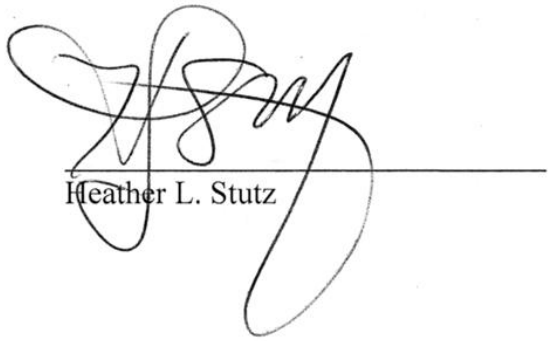

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