

IN THE SUPREME COURT OF OHIO

DAVID ANTOON, ET AL.	:	
	:	
Appellees,	:	Case No. 2015-0467
	:	
v.	:	On Appeal from Eighth District
	:	Court of Appeals Case No. CA-
CLEVELAND CLINIC FOUNDATION, ET	:	14-101373
AL.	:	
	:	
Appellants.	:	
	:	

**REPLY BRIEF OF AMICUS CURIAE THE ACADEMY OF MEDICINE OF CLEVELAND
& NORTHERN OHIO IN SUPPORT OF APPELLANTS CLEVELAND CLINIC
FOUNDATION, JIHAD KAOUK, M.D., RAJ GOEL, M.D., AND MICHAEL LEE, M.D.**

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
(216) 875-2056; (216) 875-1570 – fax
Email: bperry@bsphlaw.com
jpaskan@bsphlaw.com

DWIGHT D. BRANNON (0021657)
KEVIN A. BOWMAN (0068223)
MATTHEW A. SCHULTZ (0080142)
BRANNON & ASSOCIATES
130 W. Second Street, Suite 900
Dayton, Ohio 45402
(937) 228-2306; (937) 228-8475 – fax
Email: dbrannon@branlaw.com
kbowman@branlaw.com
mschultz@branlaw.com

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

*Attorneys for Appellees
David and Linda Antoon*

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

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

HEATHER L. STUTZ (0078111)
CHRISTOPHER F. HAAS (0079293)
LARRY J. OBHOFF (0088823)
SQUIRE PATTON BOGGS LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2700; (614) 365-2499 – fax
Email: heather.stutz@squirepb.com

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

PAUL GIORGIANNI (0064806)
GIORGIANNI LAW LLC
1538 Arlington Avenue
Columbus, Ohio 43212
(614) 205-5550; (614) 481-8242 – fax
Email: paul@giorgiannilaw.com

*Attorney for Amicus Curiae The Ohio
Association for Justice*

SEAN MCGLONE (0075698)
OHIO HOSPITAL ASSOCIATION
155 East Broad Street, Suite 301
Columbus, Ohio 43215
(614) 221-7614; (614) 917-2258 – fax
Email: sean.mcglone@ohiohospitals.org

*Attorney for Amicus Curiae Ohio Hospital
Association*

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I. REPLY IN SUPPORT OF APPELLANTS' PROPOSITION OF LAW

A. Introduction

R.C. 2305.113(C) was passed for the express purpose of protecting physicians and other medical practitioners from stale lawsuits, expressly precluding lawsuits from being commenced more than four (4) years after the alleged act of negligence. As this Court has previously held, “the statute of repose exists to give medical providers certainty with respect to the time within which a claim can be brought and after which they may be free from litigation.” *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶19.

Rather than the convoluted interpretation proposed by Appellees and their amicus support, The Academy of Medicine of Cleveland & Northern Ohio propose that the statute of repose be applied as written and suggest that the plain meaning of the statute be used to bar Appellees causes of action because they were not commenced within four-years of the date of the alleged negligence. See R.C. 2305.113(C). Applying R.C. 2305.113(C) as written would give full force and effect to the plain language of the entire statute and would be consistent with the intent of the General Assembly, i.e. to prohibit medical malpractice causes of action from commencing more than four-years after the date of the alleged negligent act whereas Appellees' analysis requires interpretation despite the unambiguous language of R.C. 2305.113(C).

B. Appellees did not commence their cause of action within four-years of the alleged medical malpractice

R.C. 2305.113(C) is plainly worded and unequivocal in its terms. The statute states:

(1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.

(2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.

R.C. 2305.113(C)(1)-(2).

In pertinent part, Civ. R. 3(A) provides that “[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant ***.” Accordingly, in order to commence a cause of action, a complaint must be filed with the court. See Civ. R. 3(A); see also R.C. 2305.17.

Under a plain reading of the R.C. 2305.113(C), the filing of a medical malpractice action, more than four-years after the occurrence of the act or omission which forms the basis of the alleged negligence, is prohibited because “**No action**

***** shall be commenced more than four years after the occurrence**” otherwise it is time barred. *Id.*, emphasis added. There is no language in R.C. 2305.113(C) that restricts its application to **only** those instances where an injured party has not yet realized that he or she may have been injured by an act of medical negligence, nor is there a limitation placed by the statute to apply only to original filings of a case. Furthermore, there is no distinction made between vested and non-vested claims in R.C. 2305.113(C) or (D). *Id.*

In fact, this Court provided, in pertinent part:

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

Ruther, ¶21, emphasis added.

From this passage, this Court recognized that the statute created a general rule that medical malpractice cases would be subject to the four-year statute of repose and could not be brought beyond that period, while specifically noting that R.C. 2305.113(C) would operate to time bar claims that had yet to accrue. *Ruther*, at ¶21.

In order to apply R.C. 2305.113(C) as suggested by Appellees and their

amicus support, this Court would be required to usurp the power of the General Assembly to add limiting language to the plainly written statute of repose; Appellees' request is in stark violation of the separation of powers embedded in the Ohio Constitution. See *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶¶39-44. Specifically, Appellees' amicus support would have this Court interpret R.C. 2305.113(C) to include the accrual language contained in R.C. 2305.113(A) to the remainder of the time bar provisions. Applying R.C. 2305.113(C) as expressly written not only complies with maxims of Ohio law, but also preserves the intent of the General Assembly to set definite deadlines for the commencement of medical malpractice causes of action.

The analysis of Appellees and their amicus support ignore the fact that this Court has previously concluded that “[a] dismissal without prejudice leaves the parties as if no action had been brought at all.” *Denham v. City of New Carlisle*, 86 Ohio St. 3d 594, 596, 716 N.E.2d 184 (1999). Accordingly, when Appellees voluntarily dismissed their original complaint pursuant to Civ. R. 41(A), the parties were left in a position as if no complaint had been brought at all, and therefore, there was no commencement of a medical claim. Additionally, the dismissal of the original complaint required Appellees to commence a new lawsuit, in compliance with R.C. 2305.113(C) or 2305.19, whichever period was longer, if they were interested in establishing the Appellants' alleged negligence that occurred on

January 8, 2008. (See Appellees' Brief at p. 5). See also R.C. 2305.19.

The pertinent dates for this Court's analysis of the statute of repose to the instant matter are (1) January 8, 2008, the date of the alleged negligence, and (2) November 14, 2013 when Appellees sought to reinstitute their claims in state court. (T.d.). When this case was refiled in state court, even assuming that the Motion for Leave to File a Second Amended Complaint to add the medical malpractice claims to the *qui tam* action was granted at the time of filing on February 14, 2013, Appellees' cause of action was commenced more than four-years after the date of the alleged malpractice, contrary to the plain language of R.C. 2305.113(C).¹ (T.d.).

In accordance with the express and unambiguous language of R.C. 2305.113(C), Appellees' cause of action is time barred and the trial court appropriately dismissed the same.

C. Appellees and their amicus support are inviting this Court to infringe on the powers of the General Assembly

Appellees and their amicus support are concerned about the purported malpractice trap that R.C. 2305.113(C) creates if the statute is applied as written. (See Appellees' Brief at p. 11). However, it must be noted that the General Assembly specifically addressed a similar issue created by R.C. 2305.19 in

¹ The result is the same if this Court uses December 11, 2008, i.e. the last day of treatment, because February 14, 2013 and November 14, 2013 are each beyond four-years from the date of the termination of medical treatment.

wrongful death cases in 2010, but chose not to make changes to R.C. 2305.113(C). See R.C. 2305.19 and SB 106, §1, 128th General Assembly. Regardless, it is for the General Assembly to amend statutory provisions when application departs from intention; changing the express language of statutory provisions not the function of this Court. See *State v. Bodyke, supra*; see also Section 1, Article II of the Ohio Constitution and Section 1, Article IV of the Ohio Constitution.

D. The savings statutes are irrelevant for purposes of analyzing the Proposition of Law at issue herein

Appellees' discussion of the savings statute and tolling provisions are outside the scope of the Proposition of Law accepted by this Court for appellate review and therefore, is immaterial to the analysis of R.C. 2305.113(C). Notwithstanding, it must be noted that Appellees voluntarily dismissed their claim on June 13, 2011 and moved to include a medical malpractice cause of action with the *qui tam* action on February 14, 2013; leave to file the medical malpractice claim was not granted before the District Court dismissed Appellees' *qui tam* action and the medical malpractice claim was not instituted until November 14, 2013. (See T.d. April 14, 2014). Regardless of the date that this Court uses for its analysis, if any, on its face, R.C. 2305.19 is inapplicable to the instant matter and

does not affect the application of R.C. 2305.113(C).²

E. R.C. 2305.113(C) is constitutional as applied by the trial court

Finally, R.C. 2305.113(C) is not unconstitutional as written despite Appellees' representations to the contrary. In *Ruther*, this Court noted that "R.C. 2305.113(C) has a strong presumption of constitutionality." *Ruther*, ¶ 9. In this case, applying the statute as written does not interfere with Appellees' right to remedy because it explicitly provides that medical malpractice causes of action must be commenced within four-years from the date of the alleged negligence and that did not occur. Further, although not at issue in the present appeal, Appellees right to remedy was limited by the savings statute which allows for the refiling of claims, after the statute of limitations has expired, within one year of the dismissal otherwise than on the merits; the statute of limitations provisions limiting the time frame for which claims can be brought, is constitutional as noted by this Court. See *Ruther*, at ¶12.

The statute of repose did not extinguish a vested right in *Ruther*; however, the statute of repose worked to preclude the lawsuit by the time the plaintiff was aware of his cause of action. *Id.* In the instant appeal, Mr. Antoon was obviously aware of the existence of a potential cause of action against Appellants well prior

² Similarly, 28 U.S.C. 1367(d) does not apply because the medical malpractice claim was not part of the *qui tam* action that was dismissed by the District Court and affirmed by the Sixth Circuit.

to the running of the statute of repose, but Mr. Antoon failed to file this lawsuit within the four-year period provided under R.C. 2305.113(C).³ In this case, and in any other medical malpractice case filed later than four-years after the occurrence of the purported malpractice, the statute of repose does not arbitrarily extinguish a vested right, but rather the plaintiffs' failure to act in a timely manner is what stamps out their claim.

Notably, Appellees' amicus support suggests that R.C. 2305.113(C)(1) is a statute of limitations that extinguishes any and all medical claims after four-years. (See Brief of Ohio Association for Justice at p. 13). However, interpreting this statute to impart a four-year statute of limitations would render R.C. 2305.113(C) constitutional and time bar Appellees' claims as it would not interfere with Appellees' right to remedy afforded under the Ohio Constitution. See *Ruther*, at ¶12. Simply put, regardless of whether Appellees' claim vested it is untimely under R.C. 2305.113(C)(1) or (C)(2) and the trial court correctly dismissed the same. (T.d.)

Appellees had not commenced their claim within the four-year period permitted under R.C. 2305.113(C) because the voluntary dismissal of the original suit put the parties in the same position as if the first complaint was never filed. *Denham, supra*. Appellees failure to commence their action within four-years of

³ Appellees also did not refile their medical malpractice cause of action within the one-year period provided by the savings statute, R.C. 2305.19.

the alleged malpractice renders their respective causes of action time barred pursuant to the express provisions of R.C. 2305.113(C). Accordingly, the trial court appropriately dismissed Appellees' Complaint under R.C. 2305.113(C), notwithstanding Appellees non-compliance with R.C. 2305.19 as set forth above.

II. CONCLUSION

The Eighth District Court of Appeals incorrectly limited the applicability of R.C. 2305.113(C) and has allowed Appellees to commence a medical malpractice cause of action more than four-years after the date of Appellants' alleged negligence. Interpreting R.C. 2305.113(C) to permit such an untimely filing is contrary to the plain and unambiguous language of R.C. 2305.113(C) and the stated purpose of the General Assembly in enacting the statute.

For these reasons, amicus curiae Academy of Medicine of Cleveland & Northern Ohio requests that this Court reverse the holding of the Eighth District Court of Appeals and reinstate the trial court's decision to dismiss this matter under R.C. 2305.113(C).

Respectfully submitted,

/s/ *Bret C. Perry*

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

(216) 875-2056; (216) 875-1570 – fax

bperry@bsphlaw.com

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

CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail on this 22nd
day of February, 2016, to:

Dwight D. Brannon
Kevin A. Bowman
Matthew A. Schultz
Brannon & Associates
130 W. Second Street, Suite 900
Dayton, Ohio 45402

Attorney for Appellees

Martin T. Galvin
William A. Meadows
Reminger Co., L.P.A.
101 West Prospect Avenue, Suite 1400
Cleveland, Ohio 44115

Attorneys for Appellants

Paul Giorgianni
Giorgianni Law LLC
1538 Arlington Avenue
Columbus, Ohio 43212

*Attorney for Amicus Curiae The Ohio
Association for Justice*

Sean McGlone
Ohio Hospital Association
155 East Broad Street, Suite 301
Columbus, Ohio 43215

*Attorney for Amicus Curiae Ohio
Hospital Association*

Heather L. Stutz
Christopher F. Haas
Larry J. Obhoff
Squire Patton Boggs LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215

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

/s/ *Bret C. Perry*
BRET C. PERRY (0073488)(Counsel of Record)
JASON A. PASKAN (0085007)