Supreme Court of Ohio Clerk of Court - Filed February 22, 2016 - Case No. 2015-0467

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANTS' CLEVELAND CLINIC FOUNDATION, JIHAD KAOUK, M.D., RAJ GOEL, M.D., AND MICHAEL LEE, M.D.

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I. OVERVIEW

A. The Antoons and their amicus implicitly recognize that applying R.C. 2305.113(C) as written will result in the dismissal of their claims.

In their Merit Briefs the Antoons and their *amicus* essentially agree that the Ohio medical malpractice statute of repose, as worded, precludes both vested and non-vested medical claims. They also each recognize that R.C. 2305.113(D) was designed specifically to (under some circumstances) bar vested claims. Yet, in what appears to be an attempt to avoid the plain import of the language of the controlling statutes the Antoons and their *amicus* raise several novel arguments that, if adopted, would allow this Court to hold that the lawsuit filed below almost six years after the medical treatment at issue was timely.

For example, appellees' *amicus* contends that all or part of R.C. 2305.113(C) is a statute of limitations, not a statute of repose as heretofore commonly believed. The Antoons, on the other hand, refer to R.C. 2305.113(C)-(D) as "the medical malpractice statute of repose." *Amicus*, The Ohio Association for Justice, also suggests (at p. 27) that the General Assembly "inartfully, if not ineptly, drafted its repose statutes." *Amicus* demeaned the Legislature in the above manner as part of its argument for the stated purpose of establishing that R.C. 2305.113(C) is a "hybrid statute" (part statute of limitations and part statute of repose). *Amicus* also stated that assuming that the General Assembly would not create such a "hybrid statute" would "give [it] too much credit." *Id.*

Appellees also contend that to the extent that the medical malpractice statute of repose bars vested claims, it is unconstitutional as violative of the right to remedy

guarantee of the Ohio Constitution, as well as void for vagueness under either a federal or state due process analysis. *See e.g.*, Merit Brief of Appellees, p. 22; Merit Brief of Ohio Association for Justice, p. 5.

B. Appellants have never taken the position that Ruther should be reversed, revisited, or modified.

The Antoons repeatedly mischaracterize appellants' position as advocating that *Ruther v. Kaiser*, 134 Ohio St.3d 409, 2012-Ohio-5686, be reversed. In fact, this is by far the major argument of the Antoons' Merit brief, which even includes a long discussion of the rule of *stare decisis*. The principal problem with this assertion is that it exactly the opposite of what appellants (and their *amici*) argued in the Merit Briefs, as well during the jurisdictional phase of this appeal.

Appellants believe that *Ruther* was correctly decided, but that the opinion below (as well as other opinions released since *Ruther*) have misconstrued and improperly restricted *Ruther*. No fair reading of the briefing to date could possibly support any other conclusion. A quick review of a small portion of the discussion of *Ruther* in Appellants' Merit Brief dispels any notion that appellants seek reversal:

> Properly construed, *Ruther* stands for the decidedly different proposition that "even if" a cause of action takes four years or more to vest, i.e., for the plaintiff to understand that he or she may have been injured by negligent medical treatment, the cause of action is barred. But, *Ruther* does not support the additional proposition that the vesting of a cause of action prior to the expiration of a four-year period nullifies the statute of repose.
>
> The court of appeals essentially replaced the words "*even if*" from *Ruther* with the words "*only if*." This is a significant distinction. The end result is that R.C. 2305.113(C) has been modified to apply "only" to those claims where a cause of action does not vest within four years, rather than

> applying to those claims, as well as to all other malpractice claims not filed within four years of the act or omission underlying the claim.
>
> ***Ruther* did not limit the application of the statute of repose to only medical malpractice actions with facts identical to that case. Yet, that was precisely the determination below.** In this respect, the "policy decision" made by the General Assembly, as detailed in *Ruther*, has been ignored. **The holding below turned the *Ruther* case on its head**, taking it from a decision affirming the constitutionality and viability of the statute of repose to one that severely restricts its application.

See, Merit Brief of Appellants, p. 7, 9.

Ruther held that "[t]he statute establishes a period beyond which medical claims may not be brought <u>*even if*</u> the injury giving rise to the claim does not accrue because it is undiscovered until after the period has ended." (Emphasis added) *Ruther v. Kaiser,* at ¶21. The crux of appellants' argument to this Court is, and has always been, that the words "even if" should not be replaced with "only if," as happened below and in *Ander v. Clark*, 10th App. No. 14AP-65, 2014-Ohio-2664.

Appellants' position in this respect is identical to that of Judge White in her concurring opinion in *Kennedy v. U.S. Veterans' Admin.*, 526 Fed.Appx. 450 (6th Cir. 2013), wherein she stated:

> "[t]he statement that "the medical-malpractice statute of repose ... does not extinguish a vested right" **does not mean that it applies only to rights that have not vested**. Rather, it means that because the claim that is extinguished has not accrued, and thus has not vested to give the plaintiff a substantive right in a cause of action, there can be no violation of the Ohio right-to-remedy provision."
>
> This is especially so because *Ruther* set forth a more narrow view of the right-to-remedy provision than the view that formed the basis for the *Hardy* decision, and **the entire thrust of the *Ruther* opinion is that the medical-malpractice statute of repose is constitutional**. *See*

> 983 N.E.2d at 294–95 (reasoning that the statute of repose "has a strong presumption of constitutionality" and that the right-to-remedy provision "does not prevent the General Assembly from defining a cause of action").
>
> Thus, although the Ohio Supreme Court might well construe the medical-malpractice statute of repose as applying only to undiscovered claims and conclude that only the one-year limitations period under Ohio Rev.Code § 2305.113(A) governs vested claims, **this construction is not part of the holding in *Ruther***. (Emphasis added)

Kennedy, *supra*, 526 Fed.Appx. 450, 457, (6th Cir. 2013), (J. White concurring.)

Appellants have consistently advocated that *Ruther* held 1) that the Ohio Constitution's right-to-remedy provision is not violated when the statute of repose bars an action, even though an underlying claim has not yet vested, but 2) this should not be construed as a determination that the statute of repose can never bar a vested claim. Appellants do not seek reversal of *Ruther*. Appellees' repeated unfounded suggestion to the contrary is merely a distraction.

II. LAW AND ARGUMENT

<u>Proposition of Law No. 1</u>

> 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.

A. The suggestions that the statute of repose is not a statute of repose is unpersuasive. Similarly, asking this Court to assume that the General Assembly was inept and confused when it drafted that statute of repose is inconsistent with rules of statutory construction.

Appellees (and particularly *amicus* The Ohio Association of Justice) recognize that portions of the medical malpractice statute of repose clearly bar vested actions,

such as where a patient learns that a foreign object was left in his or her body but still does not file suit, or where a cause of action accrues during the fourth year after treatment, but a lawsuit is not filed within one year of accrual. Appellees and their *amici* have several creative explanations for these inconvenient truths that substantively undermine their ultimate position, including that:

1. The Legislature did not understand the statute(s) it enacted and/or the Legislature was "inept" and/or "inartful" and/or "confused." Thus, based on purported confusion or sloppiness, the actual text of the statute can be ignored where convenient. *See e.g.*, Merit Brief of The Ohio Association for Justice at p. 27-28 ("The context of these redundancies indicate that the General Assembly included them out of confusion and not for the sake of clarity.") Appellants believe that such criticism such of the authors of R.C. 2305.113(C) is an implicit validation of the correctness of appellants' position.
2. All or parts of Ohio's medical malpractice statute of repose are not actually a statute of repose at all. Rather these provisions are statute of limitations. And as such they are pre-empted by the savings statute and/or federal tolling statutes. It is appellants' position that the statute should be applied as written and that appellees' self-serving categorizations are largely irrelevant.
3. To the extent that the medical malpractice statute of repose does bar vested claims, it is unconstitutional, notwithstanding *Ruther's* determination that the statute of repose passed constitutional muster. Specifically, the statute of repose if applied consistently with Proposition

of Law No. 1 would violate Ohio's right to remedy guarantees and the due process clauses of the Ohio and United States constitutions. Again, appellants believe that this argument, now being made for the first time, is an acknowledgment that the statute as written is consistent with appellants' sole proposition of law.

Replete in the text and the legislative history of R.C. 2305.113(C)-(D) is the concept that the statute of repose requires an objective analysis of the timeliness of a medical malpractice lawsuit. A lawsuit is either filed within four years of the treatment at issue or it is time barred. No other considerations are germane. This Court discussed these underlying public policy concerns extensively in *Ruther*, as addressed extensively in appellants' Merit Brief.

The approach advocated by the Antoons and their *amicus* (as well as by the Eighth District) takes this purely objective statute and injects concepts of vesting and accrual, which are inherently subjective. The Antoons' position is that the medical malpractice statue of repose applies only to non-vested claims. If this Court adopts this position, then any analysis of the application of the statute to a given set of facts will necessarily start with the question of whether a claim is vested or unvested. This involves time consuming determinations of not merely when treatment was provided, but when a patient knew or should have known that a cause of action existed. If a claim is vested then, per the Antoons and their *amicus*, the statute of repose is inapplicable. This interpretation renders R.C. 2305.113(C)(1) illusory.

B. 28 U.S.C. 1367(d) has no application to these facts. The court of appeals did not find otherwise.

The Antoons ignore the record when they argue that they filed a medical malpractice action in federal court, Southern District of Ohio, which somehow tolled both the statute of repose and the savings statute. No medical malpractice action was ever filed in federal court. The lawsuit that is alleged to have invoked the savings statute was a *pro se*, wildly disjointed, conspiratorial, *qui tam* action that was not even arguably a medical malpractice action or a re-filing under Ohio's savings statute. The Antoons recognized as much (after once again becoming represented) and sought leave to file a second amended complaint to include a medical malpractice claim. This was an obvious attempt to belatedly invoke the savings statute in the hope that the court would find that the amended complaint related back to the original filing.[1] Yet, the motion for leave was denied.

The second amended complaint was never pending in the Southern District of Ohio, or anywhere else. Accordingly, 28 U.S.C. 1367(d) is inapplicable. The trial court reached this exact same conclusion:

> Plaintiff's position is that 28 USCS 1367 applies. However, the court finds 1367(d) would only apply to protect claims while pending in federal court. The request to amend the federal complaint to include medical malpractice and other claims was denied. Therefore, plaintiff's claims at issue were never pending in federal court and are not protected under 28 USCS 1367.
>
> Trial Court Order, April 14, 2014, *Antoon v. Cleveland Clinic Found.*, Cuy. Cty. Common Pleas No. 817237.

Contrary to the Antoons' argument in their Merit Brief (at p. 14-15), appellants have not failed to challenge any court of appeals' ruling vis-à-vis 28 U.S.C. 1367(d). *See*

[1] Notably, the First Amended Complaint was filed *pro se* by Colonel Antoon on behalf of himself and Mrs. Antoon. He had no ability to file any suit on his wife's behalf, as he is not an attorney. Thus, even if the savings statute applied, it would not save Mrs. Antoon's consortium claim.

also, Merit Brief of Ohio Association for Justice, p. 8. There was no ruling on this issue by the court of appeals, so is there nothing to challenge. The court of appeals stated the following on this issue:

> However, insufficient information is provided in this paragraph to determine if in fact the statute of limitations expired prior to the Antoons filing of the instant complaint. For instance, if the statute of limitations expired prior to the time when the Antoons filed their federal complaint, then the 30–day period permitted under 28 U.S.C. 1367(d) would not revive their ability to refile their complaint in the trial court below. Our reading of 28 U.S.C. 1367(d) is that it only applies when the statute of limitations expires while the action that contains state causes of action is pending in federal court. Such determination cannot be made here. (Emphasis added)

Antoon v. Cleveland Clinic Found., 8th App. No. 101373, 2015-Ohio-421, ¶10.

Appellants absolutely do not agree that 28 U.S.C. 1367(d) has any application to these facts, or that it tolled the savings statute, or that it pre-empts the statute of repose. 28 U.S.C. 1367(d) only applies "while the claim is pending." No medical malpractice claim was ever pending in the Southern District. The court of appeals' limited discussion of this issue actually supports appellants' position that a claim must be "pending" for 28 U.S.C. 1367(d) to even potentially apply.

The mere fact that appellant Cleveland Clinic Foundation ("CCF") argued in a tangentially related federal *qui tam* action that leave to amend should be denied because the Antoons were seeking to federalize state law malpractice claims and to abuse Ohio's savings statute is obviously not a concession that such a claim was ever pending. The Antoons' arguments to the contrary distort the record. Notably, the Antoons and their *amicus* provide no other support for the contention that a medical malpractice claim was ever pending in federal court, other than a mischaracterization of CCF's briefing.

The Antoons (at Merit Brief, p. 6) cite *Singleton v. Bd. of Educ.*, Case No. 2:11-cv-1431, 2012 WL 4068381 (W.D. PA, August 24, 2012), for the proposition that "when a federal court denies leave to amend a complaint to assert a state-law claim, the claim is dismissed without prejudice to the re-filing of the tolling provisions of 42 USC 1367(d)." The statement of law is not found in the actual opinion. *Singleton* dealt not with leave to amend to "assert" a state law claim, but leave to amend to plead sufficient facts to support an already plead state law claim. This is a critical distinction.

The magistrate in *Singleton* recommended that an already plead claim (a state law breach of duty of fair representation claim against a labor union) be dismissed without prejudice to re-filing in state court. The distinction between this case and *Singleton* is that the claim in *Singleton* had already been timely plead, as opposed to not plead at all.

There was no dispute in *Singleton* that a claim had already been plead, prior to the dismissal without prejudice. The disagreement was over whether this claim had been *adequately* plead. The leave to amend was not being sought to add new claims, but rather to permit existing claims to be flushed out with appropriate factual assertions.

Malpractice claims were never asserted by the Antoons in the complaint of record in federal court. The Antoons sought leave to add new claims, not to more appropriately plead existing claims. *Singleton* does not remotely stand for the proposition that a state court should treat a cause of action never filed in federal court as if it actually had been filed, so long as request for leave to amend to add the cause of action was made prior to the dismissal. Indeed, appellants know of no court that has ever held that §1367(d) applies in such circumstances.

It is also false that the district court "dismissed state law medical claims without prejudice." *See,* Complaint, ¶12; Merit Brief of Ohio Association for Justice, p. 7. The

district court ruled only that it "declines to exercise supplemental jurisdiction over any remaining claims in the Amended Complaint." *See,* Motion to Dismiss, 12/30/13, Ex."C".

C. R.C. 2305.113 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 and applies regardless of whether a cause of action has vested prior to the filing of a lawsuit.

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

> (C) Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply:
>
> > (1) **No action** upon a medical, dental, optometric, or chiropractic claim **shall be commenced more than four years after the occurrence** of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.
> >
> > (2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.
>
> (D)(1) If a person making a medical claim, dental claim, optometric claim, or chiropractic claim, in the exercise of reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within three years after the occurrence of the act or omission, but, in the exercise of reasonable care and diligence, discovers the injury resulting from that act or omission before the expiration of the four-year period specified in division (C)(1) of this section, the person may commence an action upon the claim not later than one year after the person discovers the injury resulting from that act or omission.
>
> > (2) If the alleged basis of a medical claim, dental claim, optometric claim, or chiropractic claim is the occurrence of an act or omission that involves a foreign object that is left in the body of the person making the claim, the person may commence an action upon the claim not later than one year after the person discovered the foreign object or not later than one year after the person, with reasonable care and diligence, should have discovered the foreign object.

The statute's language requires that all medical claims "shall" be filed within four years of the act or omission constituting the alleged negligence (subsection (1)) and

further that any action not commenced within four years "is barred" (subsection (2)). There are no other relevant conditions or caveats. Either an action is filed within the four-year window or it is barred. Construing this statute in the limited sense of only applying where a cause of action is not discovered for four years from the underlying negligent act or omission is inconsistent with its plain meaning.

The Ohio Association for Justice (at p. 22-23) makes the interesting, though flawed, argument that because the verbiage in subsection (C)(2) provides that "an action" must be filed within four years or else "any action" is time barred, that the Legislature contemplated that an initial filing would satisfy the "an action" requirement. Thereafter, it is surmised that "any" subsequent action could be filed outside the four year statute of repose period, so long as the filing complied with the savings statute, with 28 U.S.C. 1367(d), or with some other tolling mechanism.

This reasoning ignores the mandatory language of subsection (C)(1) that states "**[n]o action** upon a medical *** claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical *** claim." Thus, the interpretation of subsection (C)(2) advanced by the *amicus* cannot possibly be correct because it squarely conflicts with the mandatory, unconditional language of subsection (C)(1) that immediately precedes (C)(2). Appellees deal with this inconsistency by labelling R.C. 2305.113(C) a "hybrid statute," which they seem to believe does away with the requirement that the two subsections be construed *in pari materia*.

As maintained by appellants in their Merit Brief, statutes must be in interpreted *in pari materia* with other sections of the same statute, as well as with related statutes. "All provisions of the Revised Code bearing upon the same subject matter should be

construed harmoniously. This court in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict." *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 372, 1994-Ohio-209, 643 N.E.2d 1129, quoting *Johnson's Mkts., Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35, 567 N.E.2d 1018 (1991).

Likewise, R.C. 1.47(B) is a rule of statutory construction that specifically directs courts to give effect to an entire statute. The interpretation of subsection (C)(2) urged by the Ohio Association for Justice fails to give effect or accord to subsection (C)(1) and its directive that "no action" shall be commenced more than four years after the date of the alleged negligent act or omission.

Further, if the Legislature had intended to create an exception for the filing of some actions outside the four year limitation period, or to limit the statute of repose to non-accrued actions, it would have been easy enough for them to accomplish that objective. There is nothing in the legislative history cited by appellees, or any other party, that remotely supports such a notion. In fact, most of the foreign case law cited by appellees and their *amicus* significantly predates the passage of amended R.C. 2305.113. All of the concerns cited, including creating purported "malpractice traps", were well known to the Legislature when the statute was written. Any concern about such "pitfalls" can easily be addressed by making the application of the statute of repose notwithstanding the savings statute unambiguous.

There was no trap or pitfall in this case. The Antoons chose not to timely re-file in state court, but to instead pursue multiple unrelated *qui tam* actions and administrative complaints during the time they could have been addressing their claims.

D. Applying R.C. 2305.113(C) as written does not render it unconstitutional. Nor would doing so be inconsistent with this Court's holding in Ruther.

It is somewhat ironic that the Antoons start out their Brief suggesting that appellants seek reversal of *Ruther*, but conclude by asserting that if R.C. 2305.113 is applied as written it would become unconstitutional, notwithstanding the holding in *Ruther* to the contrary. The suggestion that R.C. 2305.113(C) is violative of the right to remedy provisions of the Ohio Constitution is misguided. No fair reading of *Ruther* supports the notion that Ohio's medical malpractice statute of repose is only constitutional to the extent that it is narrowly applied to only non-vested claims. Indeed, appellants concede that R.C. 2305.113(D)(1)&(2) each bar certain claims one year **after** they have vested.

Because this detail is inconvenient to appellees' strained interpretation of R.C. 2305.113(C), they (and their *amicus*) focus on framing R.C. 2305.113(D) and R.C. 2305.113(C)(1) as statutes of limitations, even though there is no evidence that the Legislature intended such a distinction.

More importantly, there is no reason to believe that such a distinction, if accepted, would make any difference in the outcome of this appeal. Subsections (D)(1)&(2) are limited exceptions to the strict four-year limitations contained in subsections (C)(1)&(2) and apply only to the discovery of a cause of action in the fourth year after treatment (provided that earlier discovery was not possible) and the discovery of a foreign object left in the body of a person making a medical claim. Together, they serve an important purpose. Reclassifying subsection (D) as a statute of limitations does not alter the plain meaning of subsection (C). Nor does reclassifying subsection

(C)(1) as a statute of limitations impede its directive that "no action" be commenced more than four years after the alleged negligent act or omission.

As noted by appellees (*see e.g.,* Brief of The Ohio Association for Justice, p. 27) other Ohio statutes of repose are worded very differently than R.C. 2305.113. For example, R.C. 2305.10(C) and R.C. 2125.02(D)(2) (both product liability statutes), each state that "no cause of action *** shall accrue" more than ten years from delivery of the product by a supplier.

R.C. 2305.113(C)(1)&(2), on the other hand, state that "no action upon a medical *** claim shall be commenced more than four years after the occurrence ***" and "if an action upon a medical *** claim is not commenced within four years after the occurrence *** any action upon **that claim is barred**" respectively. These critical differences are instructive.

R.C. 2305.113(C) prohibits commencement/bars claims more than four years after the underlying occurrence, regardless of the prior accrual of the claim. Unlike other sections of the Revised Code, no distinction is made between accrued and non-accrued claims. Essentially, appellees are asking this Court to read language from R.C. 2305.10 and R.C. 2125.02 into R.C. 2305.113(C), despite the Legislature's conscious decision to construct the respective statutes differently.

E. Ohio's savings statute does not trump the medical malpractice statute of repose.

R.C. 2305.19 (Ohio's savings statute) provides:

> A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or

> the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

Thus, the savings statute expressly contemplates the "commencement of a new action." Such a "commencement" of a "new action" is precisely what is barred respectively by R.C. 2305.113(C)(1)&(2). Subsection(C)(1) states that "no action *** shall be commenced more than four years after" the underlying alleged negligent act or omission. Similarly, subsection (C)(2) states that if "an action *** is not commenced within four years after" the alleged underlying negligent act or omission, then "any action upon that claim is time barred."

R.C. 2305.113(A) (Ohio's medical malpractice statute of limitations) does not contain similar prohibitive language regarding the commencement of "any action" after the expiration of the one year statute of limitations, stating rather "[e]xcept 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."

Viewed in this light it is obvious why the appellees seek to re-classify the statute of repose as a statute of limitations - although questioning the competence of the General Assembly was probably not the most effective methodology. Regardless, what is critical is the actual language (i.e., plain meaning) of the statute being construed, not arbitrary categorizations.

Relevant to determining whether a re-filed lawsuit must comply with the statute of repose is whether the initially filed action survives voluntary dismissal. Appellants and their *amici* demonstrated conclusively that it does not. Appellees and their *amicus* essentially failed to engage this line of argument.

Simply "[a] dismissal without prejudice leaves the parties as if no action had been brought at all." *Denham v. New Carlisle*, 86 Ohio St. 3d 594, 596, 716 N.E.2d 184, 186 (1999), citing *DeVille Photography, Inc. v. Bowers*, 169 Ohio St. 267, 272, 159 N.E.2d 443, 446 (1959). It is axiomatic that when an action has been voluntary dismissed, Ohio law treats the previously filed action as if it had never been commenced. *See* e.g., *Zimmie v. Zimmie*, 11 Ohio St.2d 94, 95, 464 N.E.2d 142 (1984); *Wolk v. Paino*, 8th App. No. 93095, 2010-Ohio-1755, ¶21 ("Because a dismissal without prejudice relieves the court of jurisdiction over the matter, and **the action is treated as though it had never been commenced** ***.") (Emphasis added); *Chuparkoff v. Kapron*, 9th App. No. 24234, 2009-Ohio-5462, ¶9 (finding that a voluntary dismissal under Civ.R. 41(A) deprives a trial court of jurisdiction and results in the action being treated as if it had never been filed). Accordingly, the initial action filed on June 1, 2010 is not relevant to the question of when this action was commenced.

F. The public policy pronouncements of S.B. 281 are threatened by the court of appeals' opinion.

As this Court noted in *Ruther* "[r]esponding to these concerns [of requiring medical providers to defend against stale claims], 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." *Ruther* at ¶21. (Emphasis added.) These are obviously different considerations from those related to the one-year medical malpractice statute of limitations.

Appellees and their *amicus* suggest that R.C. 2305.113(C) should be construed with the thought in mind that it is enough that medical providers be free of most litigation after four years, but that exceptions should be made for savings statutes, for

tolling statutes, and for other procedural mechanisms. (*See e.g.*, Ohio Association for Justice Merit Brief, p. 34-36.) Appellees also contend that the length of time that this lawsuit was filed after the prostatectomy procedure at issue (nearly six years) is really not so bad, and could be worse, citing to *Ruther's* disapproval of forcing medical providers to defend claims that occurred "10, 20, or 50 years before." *Id.* at ¶20.

It is unreasonable to interpret *Ruther's* example of claims "10, 20, or 50" years old as supporting exceptions to the statute of repose for claims that are more than four, but less than ten years old. The language in the statute prohibits claims not commenced within four years of the alleged underlying negligent act or omission. The period could have been set at five or six years but was not. The statute should be applied as written, not as it might have been written.

IV. CONCLUSION

A fundamental flaw in appellees' arguments on the proper interpretation of R.C. 2305.113 is that they assume that there can never be any overlap between the reach of the medical malpractice statute of limitations and the medical malpractice statute of repose. It is not the function of the courts to re-write statutes solely in order to remove perceived "redundancies." R.C. 2305.113(C)(1)&(2) perform different, but related functions. The same is true of R.C. 2305.113(D). Each can easily be interpreted as consistent with the others, as well as with the statute of limitations found at R.C. 2305.113(A).

The court of appeals' decision below is inconsistent with the plain meaning of R.C. 2305.113(C), as well as with *Ruther*. For those reasons, the Eighth District's February 5, 2015 Opinion should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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