IN THE SUPREME COURT OF OHIO

National Collegiate Athletic Association, et al.,	:	
	:	
Defendants-Appellants,	:	**Case No. 2017-0098**
	:	
v.	:	**On Appeal from the Eighth**
	:	**District Court of Appeals,**
Steven Schmitz, et al.,	:	**Cuyahoga County**
	:	**Case No. CA-15-103525**
Plaintiffs-Appellees.	:	

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STATEMENT OF AMICUS INTEREST

The Ohio Association of Civil Trial Attorneys ("OACTA") is comprised of attorneys, corporate executives and claims professionals devoted to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. For more than fifty years, OACTA's mission has been to provide a forum where dedicated professionals can work together to promote and improve the administration of justice in Ohio. OACTA supports laws and policies that promote predictability, stability, and consistency in Ohio's civil justice system.

OACTA has an interest in this case because the Eighth District's expansive application of the discovery rule may have major implications for Ohio businesses and communities. Not only does the Eighth District's decision widely open the courthouse doors to anyone who has ever been injured playing a sport in high school or college, its reach also extends to any injury that worsens with time – regardless of whether the injury was sustained playing a sport, on the job, in an automobile accident, or by some other means. As such, the Eighth District's decision injects uncertainty into the framework established by the Ohio General Assembly regarding statutes of limitations and their application to personal injury lawsuits and expands the discovery rule beyond the scope of its justification.

For the reasons stated more fully below, OACTA urges the Court to reverse the decision of the Eighth District Court of Appeals and instruct Ohio's lower courts on proper application of the discovery rule.

STATEMENT OF THE CASE AND FACTS

OACTA defers to the Statement of the Case and Statement of Facts as set forth in the Merit Brief of Appellants.

ARGUMENT

Proposition of Law No. 1: A diagnosis for the long-term effects of an injury a plaintiff already knew about does not revive a time-barred claim.[1]

A. Plaintiffs' negligence claim is barred by the applicable two-year statute of limitations

Based on the facts as alleged in the Amended Complaint, Plaintiff's negligence claim should be barred as a matter of law because it was not timely filed under the applicable two-year statute of limitations. *See* R.C. 2305.10.

As alleged, Steven Schmitz ("Schmitz") experienced brain injuries while playing college football for four years at Notre Dame in the 1970s. Am. Complt. ¶¶ 62-64. While he was at Notre Dame, "[o]n many occasions * * * he experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place." Am. Complt. ¶ 64. Thus, no later than the close of Schmitz's college football career, he was aware that he had suffered head injuries from playing football. Am. Complt. ¶¶ 60-67. Over time, Schmitz's injury worsened, resulting in cognitive decline, dementia, and ultimately a diagnosis of Chronic Traumatic Encephalopathy ("CTE"). CTE is "brain degeneration likely caused by repeated head traumas"[2] and "has been found in the brains of people who played contact sports, such as football, as well as others."[3] In October of 2012, more than three decades after playing football at Notre Dame, this lawsuit was filed against Notre Dame and the National Collegiate Athletic Association.

Under the applicable statute of limitations, Schmitz had two years from the date of the injury to bring a personal injury action. R.C. 2305.10; *Doe v. Archdiocese of Cincinnati*, 109

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[1] OACTA agrees with Notre Dame's position on Proposition of Law No. II but does not separately address it herein.

[2] *Chronic traumatic encephalopathy*, Mayo Clinic, Apr., 20, 2016, http://www.mayoclinic.org/diseases-conditions/chronic-traumatic-'encephalopathy/basics/definition/con-20113581 (last visited Jan. 18, 2017).

[3] *Id.*

Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 21. Schmitz's college football career ended in the 1970s. Thus, under traditional application of the statute of limitations, Schmitz lost the ability to bring this suit decades ago.

The Eighth District, however, allowed Plaintiffs' claims to move forward by erroneously applying the "discovery rule," which is a limited exception to the statute of limitations.

B. The limitations period should not have been tolled under the discovery rule

Typically, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed. *Flagstar Bank v. Airline Union's Mortg. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, at ¶ 13. Under the discovery rule, a statute of limitations clock starts when a litigant knows, or with reasonable diligence should know, that the litigant has been injured by the conduct of the defendant. *Id.* at ¶ 14 (citation omitted). "The discovery rule is applied 'in situations where the wrongful act does not immediately result in injury or damage,' and, therefore, strict application of the general rule can lead to an unjust result." *Jones v. Hughey*, 153 Ohio App.3d 314, 2003-Ohio-3184, 794 N.E.2d 79, ¶ 25, citing *Harris v. Liston*, 86 Ohio St.3d 203, 205-206, 1999-Ohio-159, 714 N.E.2d 377.

Generally, courts exercise caution in applying the discovery rule, finding that "the discovery rule has been given narrow application and applied in only limited situations." *Hartman v. Schachner*, 6th Dist. Lucas No. L-04-1335, 2005-Ohio-7000, ¶ 37; *State ex rel. Hunter v. City of Alliance*, 5th Dist. Stark No. 2001CA00101, 2002-Ohio-1130. Furthermore, application of the "discovery rule must be specifically tailored to the particular context to which it is applied." *Browning v. Burt*, 66 Ohio St.3d 544, 559, 1993-Ohio-178, 613 N.E.2d 993. Thus, it is appropriate for courts to make limited use of the discovery rule and, whenever possible, apply it in light of "context."

This Court first adopted a discovery rule that tolled the applicable (one-year) statute of limitations in a medical malpractice case where a patient learned that a surgeon had negligently left foreign objects in his body during a surgery that occurred more than a year before the patient "discovered" the foreign objects. *Melnyk v. Cleveland Clinic*, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972).

More than ten years later, this Court first applied a discovery rule to negligence claims subject to R.C. 2305.10's two-year statute of limitations. *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 88, 447 N.E.2d 727, 731 (1983). *O'Stricker* involved a negligence claim for personal injury caused by asbestos exposure. In its analysis, the Court noted that the applicable statute of limitations had been amended as of June 12, 1980 to include a statutory discovery rule.[4] But, O'Stricker brought his claim prior to the effective date of the amendment that tolled the statute of limitations. In addition to relying on cases from other jurisdictions, the Court "in the interest of uniform treatment of all asbestos-related bodily injury claims" applied the discovery rule as adopted by the General Assembly so that some asbestos claimants were not subject to a shorter limitations period than others. Ultimately, the Court "formulate[d] the following 'discovery rule' of accrual for bodily injury actions under R.C. 2305.10":

> When an injury does not manifest itself immediately, the cause of action arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured, whichever date occurs first.

Id. at 90.

[4] As amended in 1980, the applicable statute of limitations stated: "For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first." *O'Stricker* at 86.

Since *O'Stricker*, this Court has applied the discovery rule to toll the statute of limitations in other toxic substance cases where the two-year statute of limitations expired before the plaintiff's injury manifested. *See, e.g., Liddell v. SCA Services of Ohio, Inc.*, 70 Ohio St.3d 6, 19, 1994-Ohio-328, 635 N.E.2d 1233 (applying discovery rule in context of exposure to toxic chlorine gas where injury did not manifest itself immediately); *Norgard v. Brush- Wellman, Inc.*, 95 Ohio St.3d 165, 2002-Ohio-2007, 766 N.E.2d 977 (applying discovery rule to beryllium exposure). But, this Court has never held – as did the Eighth District below – that that the two-year statute of limitations for bodily injury claims should be tolled ***where an injury has manifested*** and the plaintiff is aware of its cause, or with reasonable diligence should have been aware of the cause, yet fails to assert the claim for decades.

Other appellate districts have repeatedly held that an individual is not required to be aware of the full extent of the injury for the statute of limitations to be triggered. *Hartman v. Schachner*, 6th Dist. Lucas No. L-04-1335, 2005-Ohio-7000, at ¶ 19; *see also Pingue v. Pingue*, 5th Dist. Delaware No. 03-CA-E-12070, 2004-Ohio-4173, ¶ 20 ("[I]f a discovery rule is applicable, the cause accrues when the plaintiff discovers her legal injury, even if she does not know the total extent of the injury."); *Doane v. Givaudan Flavors Corp.*, 184 Ohio App.3d 26, 2009-Ohio-4989, 919 N.E.2d 290, ¶ 14 ("The discovery rule tolls the statute of limitations only until the plaintiff has an 'indication' of the defendant's wrongful conduct.") (citations omitted).

Similarly, a formal medical diagnosis is not needed to trigger the two-year statute of limitations. *See, e.g., Gibson v. Park Poultry, Inc.*, 5th Dist. Stark No. 2006CA00296, 2007-Ohio-4248; *Charter One Bank v. Hamburger*, 6th Dist. Lucas No. L-01-1332, 2002-Ohio-74. In *Gibson*, a chicken-growing facility was built near plaintiff's property in 1991. Shortly thereafter, plaintiff experienced ongoing sickness, pulmonary and respiratory problems. *Id*. at ¶ 36-37. She

filed suit in 2005 alleging that her diagnoses of upper airways cough syndrome and reactive airways disease were caused by the chicken facility, but that this causation was not known until she was diagnosed with these conditions in 2006 (after the filing of the lawsuit). *Id*. at ¶ 32. Plaintiff argued that the discovery rule applied because she did not know the cause of her medical conditions until she was diagnosed. The trial court dismissed the negligence claim as time-barred and the court of appeals affirmed, finding that the plaintiff did not exercise reasonable diligence "to ascertain whether there was causation between her bodily injuries and the Defendant's conduct at any time prior to the filing of" her lawsuit. *Id*. at ¶ 39. If the Eighth District's decision is allowed to stand, run-of-the-mill tort cases like *Gibson* are more likely to be brought seeking application of the discovery rule to toll the statute of limitations.

Although OACTA does not take a position on the exact date on which Schmitz's statute of limitations began to run, based on allegations in the Amended Complaint, with reasonable diligence the statute of limitations would have been triggered prior to his CTE diagnosis in 2012. This is because Schmitz experienced head trauma and injuries playing football in the 1970s and, with reasonable diligence, should have known before 2012 that college football caused such injury. Am. Complt. ¶¶ 70-97. In their Amended Complaint, Plaintiffs allege that in 2010 the NCAA publicly issued a policy requiring its members to implement concussion management plans. Am. Complt. ¶¶ 108-112. Plaintiffs also list several publications and industry-wide changes in the game of football that documented the aggregated effects of repeated head injuries decades before they brought the instant lawsuit. Am. Complt. ¶¶ 70-97.

Because Schmitz seeks damages for an injury that manifested in the 1970s, the limitation period began as soon as Schmitz knew, or with reasonable diligence should have known, that his

head injuries were caused by playing football at Notre Dame. *Hartman*, 2005-Ohio-7000, at ¶ 19; *Pingue*, 2004-Ohio-4173, at ¶ 20; *Gibson*, 2007-Ohio-4248, at ¶ 39.

C. The Eighth District improperly expanded the scope of the discovery rule to cover any known injury that presents worse symptoms after the statute of limitations has run

The Eighth District's application of the discovery rule to newly discovered effects of previously known injuries is improper and marks a departure from the practice of other Ohio courts.

The Eighth District erroneously relies chiefly on *Liddell*, 70 Ohio St.3d 6, 1994-Ohio-328, 635 N.E.2d 1233, to support its conclusion that the discovery rule applies to previously known injuries. *Schmitz v. NCAA*, 8th Dist. Cuyahoga No. 103525, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 28. But, *Liddell* is not determinative and is distinguishable on at least two important grounds: (1) Liddell's claim involved cancer, a distinct injury from his previous scratchy throat and watery eyes; and (2) Liddell brought suit within eight years of first being exposed to the toxic gas and the initial injuries it caused – not decades after being exposed. In *Liddell*, a police officer experienced a scratchy throat, burning and watering of eyes, and frequent sinus infections shortly after being exposed to a toxic gas. Over seven years later, he contracted cancer caused by exposure to the toxic gas. This Court found that the statute of limitations was tolled as to Liddell's claim that he contracted cancer from the exposure. *Id.*at 13-14. Liddell's cancer was a separate and distinct injury arising from his exposure to toxic chemicals; it was not a worsening of his scratchy throat, burning eyes, or sinus infections. In contrast, Plaintiffs injuries are a worsening of a known injury: brain trauma. The case sub judice is distinct from *Liddell* because Liddell had a separate, newly discovered injury.

The Eighth District mischaracterized Plaintiffs' factual allegations when it determined that the CTE diagnosis was a new injury, rather than a worsening or aggravation of the

previously known brain trauma experienced by Schmitz in connection with playing football at Notre Dame, which led to its application of the discovery rule.

Then, the Eighth District misapplied the standard required for application of the discovery rule. In cases where the discovery rule applies, the statute of limitations begins to run either (1) "upon the date on which the plaintiff is informed by competent medical authority that he has been injured," or (2) "upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured, whichever date occurs first." *Schmitz v. NCAA*, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 36 (8th Dist.) (citing *O'Stricker*, 4 Ohio St.3d at 90, 447 N.E.2d 727.) The Plaintiffs themselves cited numerous publications in their amended Complaint that highlight the aggregated effects of repeated brain injuries, which were available upon reasonable diligence, decades before this lawsuit was filed. Am. Complt. ¶¶70-97.

Rather than consider whether Plaintiff could become aware of these publications upon reasonable diligence, the Eight Circuit states only: "While the complaint details published studies originating in the late 1920s and continuing well into the present, which expressly linked concussive and subconcussive impacts experienced in contact sports with serious neurological impairments and diseases, such as CTE, ***the complaint alleges that Schmitz never knew any of this information***." *Schmitz*, 2016-Ohio-8041 at ¶ 38 (emphasis added). Thus even though Schmitz knew he experienced concussive symptoms and, with reasonable diligence, could know that those symptoms lead to CTE, the Eighth Circuit applied the discovery rule to Plaintiffs' case allowing him to bring suit over three decades since he experienced injury.

The Eighth District developed a new standard: the clock starts when a plaintiff discovers the ultimate culmination of aggravated effects of a prior, known injury. Under the Eighth District's decision, lower courts have been given free rein to disregard the "upon reasonable

diligence requirement." A litigant whose prior injuries worsen over time has an open-ended time period to bring claims. Hence, litigants now have every incentive to characterize injuries as new and separate from previously known injuries simply to bypass statutes of limitation through the discovery rule.

Liddell is also distinguishable from the instant case on the basis of the passage of time before the lawsuit was filed. *Liddell* filed his lawsuit less than eight years after the initial injury and wrongful conduct occurred. While eight years is a long time, it is significantly shorter than 40 years, which is the time that passed between when Schmitz alleges he was injured/the wrongful conduct occurred and he brought this lawsuit. Plainly, waiting 40 years undermines the very purpose and sound public policy reasons underlying statutes of limitations.

The *Lidell* court recognized the importance of statutes of limitations. "Statutes of limitations seek to prescribe a reasonable period of time in which an injured party may assert a claim, after which the statute forecloses the claim and provides repose for the potential defendant." *Liddell*, 70 Ohio St.3d at 10. "Historically, plaintiffs have regarded statutes of limitations as irksome procedural barriers that obstruct otherwise valid claims." *Id*. But they are not. As this Court has repeatedly recognized, "[s]ound policy arguments exist * * * for the application of statutes of limitations." *Id.*

Statutes of limitation "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Hounshell v. Am. States Ins. Co.*, 67 Ohio St. 2d 427, 430-31, 424 N.E.2d 311, 313 (1981), citing *Order of R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S. Ct. 582, 586 (1944) (internal quotations omitted). Strict adherence to the limitations periods "is the best guarantee of evenhanded administration of the law." *Mohasco*

Corp. v. Silver, 447 U.S. 807, 826, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980). Without statutes of limitation, defendants would be subject to suits where ameliorative evidence is next to impossible to procure. Thus, despite the fact that a plaintiff may sometimes be precluded from recovering on an otherwise valid claim, sound public policy favors the adherence to a limitations period within which claims must be brought. Given the strong public policy reasons supporting adherence to limitations periods, exceptions – such as the discovery rule – should be narrowly construed.

The discovery rule for personal injury claims subject to R.C. 2305.10 should be narrowly construed and should not be applied to cases where the plaintiff knew of the injury for years (or, worse, decades) and only brought suit after experiencing worsened effects of the injury. Doing so injects uncertainty into the framework established by the Ohio General Assembly regarding statutes of limitations and their application to personal injury lawsuits. A statute of limitations "inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson v. Ry. Express Agency, Inc*., 421 U.S. 454, 463-64, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975). These value judgments should remain within the purview of the General Assembly.

The Court should reject he Eighth District's expansion of a common law rule that limits the applicability of statutes passed by the General Assembly aimed at capturing the balance of interests among plaintiffs and defendants. Statutes of limitation "are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152, 80 L. Ed. 2d 196, 104 S. Ct. 1723 (1984).

CONCLUSION

OACTA urges the Court to reverse the decision of the Eighth District and hold that Plaintiffs' claims are barred because they were not timely filed.

Respectfully submitted,

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