Supreme Court of Ohio Clerk of Court - Filed August 26, 2022 - Case No. 2022-0407

THE SUPREME COURT OF OHIO

CASE NOS. 2022-0407 and 2022-0424

On Appeal from the Tenth Appellate District
Franklin County, Ohio

Court of Appeals Case No. 21AP-74 08CV1385

MACHELLE EVERHART
Plaintiff-Appellee

v.

COSHOCTON COUNTY MEMORIAL HOSPITAL, et al.
Defendant-Appellants

MERIT BRIEF OF APPELLANT JOSEPH J. MENDIOLA, M.D. (ORAL ARGUMENT REQUESTED)

David I. Shroyer, Esq. (0024099)
Shroyer & Abraham Co. LPA
536 S. High Street
Columbus, Ohio 43215
T: (614) 228-6453
F: (614) 228-7122
dshroyer@csajustice.com
Attorney for Plaintiff

David H. Krause (0070577)
Thomas N. Spyker (0098075)
Melvin Davis (0079224)
REMINGER CO., L.P.A.
200 Civic Center Drive, Suite 800
Columbus, OH 43215
Phone: (614) 228-1311
Fax: (614) 232-2410
Email: dkrause@reminger.com
tspyker@reminger.com
mdavis@reminger.com

Theodore M. Munsell, Esq.
Karen Cadieux, Esq.
CARPENTER, LIPPS & LELAND, LLP
280 Plaza, Suite 1300
280 N. High Street
Columbus, Ohio 43215
Attorney for Defendants,
Linda Magress, M.D. and
Coshocton Radiologists, Inc.

David L. Lester (0021914)
Collins, Roche, Utley & Garner, LLC
875 Westpoint Parkway, Suite 500
Cleveland, Ohio 44145
Direct Dial: 440-438-3612
Office Tel: 216-916-7730
Fax: 216-916-7725
Email: dlester@cruglaw.com
Attorney for Defendant
Coshocton County Memorial
Hospital and Medical Services of
Coshocton, Inc.

Frederick A. Sewards, Esq.
POLING LAW
300 E. Broad Street, Suite 350
Columbus, Ohio 43215
Attorney for Defendant
Mohamed Hamza, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES…….……………………………………………………...3

COMBINED STATEMENT OF THE FACTS AND OF THE CASE ………………………6

I. Underlying facts giving rise to Plaintiff Machelle Everhart's claims and the proceedings before the Trial Court. ……………………………………………………………………………7

A. December 21, 2003: Todd Everhart is treated at Coshocton Memorial Hospital after an automobile accident………………………………………………………………7
B. August 11, 2006: Unbeknownst to Dr. Mendiola, Mr. Everhart is diagnosed with lung cancer. ……………………………………………………………………………8
C. January 25, 2008: Ms. Everhart files medical negligence claims against Dr. Mendiola and other medical providers ……………………………………………………………..8
D. During the pendency of Ms. Everhart's medical negligence claim, this Court decides *Anton v. Cleveland Clinic Foundation*, holding that the Statute of Repose is "clear, unambiguous, and means what it says.………..……………………………………..8
E. The Trial Court grants Dr. Mendiola's Motion for Judgment on the Pleadings and certifies its decision for appeal ..…………………………………………………………9

II. Relevant Appellate Court proceedings before the Tenth District Court of Appeals.…………10

A. Ms. Everhart appeals the Trial Court's Decision to the Tenth District Court of Appeals as other appellate districts decide the Statute of Repose applies to Wrongful Death Action…………………………………………..10
B. The Tenth District breaks with the Third, Fifth, and Eleventh Districts, and becomes the first appellate court to hold the Statute of Repose does not apply to Wrongful Death Claims. ……………………………...…………………………………………..11

ARGUMENTS IN SUPPORT OF THE PROPOSITION OF LAW AND CERTIFIED CONFLICT QUESTION ………………………………………………..………………….11

I. This Court's prior decisions related to the Statute of Repose inform the conclusion that it applies to Wrongful Death Claims……………………………………………………….………11

A. *Ruther v. Kaiser*: The General Assembly consciously granted medical providers a right to be free from litigation after four years……………………………………………..12
B. *Antoon v. Cleveland Clinic Found*: The Statute of Repose "means what it says" and should not be read with an intent to circumvent the four-year time limit…...…………13
C. *Wilson v. Durrani*: There are no exceptions to the Statute of Repose but those expressly stated within the Statute……………………………………………………………14
D. Following the guiding principles outlined by this Court, the Third, Fifth, and Eleventh Districts correctly found that the Statute of Repose applies to Wrongful Death Actions……………………………………………………………………………..16

II. The Statute of Repose applies to Wrongful Death Actions by its plain language……………16

A. A Wrongful Death Action is a medical claim and subject to the Statute of Repose.……17
B. The Statute of Repose applies to all actions involving a medical claim……………………………………………………………………………...18

III. Canons of statutory construction further confirm that the General Assembly did not intend for Wrongful Death Actions to be exempt from the Statute of Repose. ………………………...18

A. The Statute of Repose does not provide an exception for Wrongful Death Actions…….18

IV. The well-documented policy considerations confirm the Statute of Repose was intended to apply to Wrongful Death Actions. ………………………………………….………………...19

A. The General Assembly's codified legislative indent demonstrates it intended the Statute of Repose to apply to Wrongful Death Actions……………………………………….19
B. The General Assembly's treatment of damage limitations—passed in the same legislation as the Statute of Repose illustrates an intent to apply the Statute of Repose to Wrongful Death Actions…………………………………………………………………….21

V. The Tenth District's analysis of the interplay between the Statute of Repose and Wrongful Death Actions is flawed because it relies on precedent decided before the current version of the Statute of Repose was enacted. ……………………………………………………………….22

A. The cases relied on by the Tenth District were decided before the current language of the Statute of Repose was enacted. …………………………………………………….....22
B. District Court Decisions analyzing the current version of the Statute of Repose correctly interpret the interplay between the new language and Wrongful Death Actions………..23

VI. The Tenth District's "plain meaning" analysis is flawed because it focuses only on the Wrongful Death Statute. ……………………………………………………………..….....25

VII. The Tenth District's use of the rules of statutory construction is flawed…………………...26

A. R.C. § 2126.02(D)(2)'s incorporation of a Statute of Repose for products liability claims has no bearing on the application of the Statute of Repose to Wrongful Death Actions..26
B. The non-exhaustive list of derivative claims provided by R.C. § 2305.113(E)(7) has no bearing on the Statute of Repose…………………………………………………...28
C. Ohio's statute of repose for certain premise liability actions provides further evidence the Statute of Repose applies to Wrongful Death Actions………………………………..…29
D. The time limitations contained in R.C. § 2125.02 do not bar application of the Statute of Repose………………………………………………………………………………....29

CONCLUSION…………...……………………..…………………………….................31

APPENDIX ……………………………………………………………………………..32

CERTIFICATE OF SERVICE………………………………………………………..33

TABLE OF AUTHORITIES

Cases

Antoon v. Cleveland Clinic Found.,
148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974 .... 8, 11, 12, 13, 14, 16

California Pub. Emps.' Retirement Sys. v. ANZ Secs., Inc.,
655 Fed. Appx. 13, 137 S.Ct. 2024,2045, 198 L.Ed.2d 584 (2017) 14

Chalmers v. HCR ManorCare Inc.,
6th Dist. Lucas No. L-16-1143, 2017-Ohio-5678, 93 23

City of Cleveland v. State,
128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370 25

Columbia Gas Transm. Corp. v. Levin.,
117 Ohio St.3d 122, 2008-Ohio-511 16

CTS Corp. v. Whaleburger,
134 S.Ct. 2175, 2182 (2014).. 29

Cunningham v. Children's Hosp..,
10th Dist. Franklin No. 05AP-69, 2005-Ohio-4284 24

Davis v. Mercy St. Vincent Med. Ctr.,
2022-Ohio-1266, 190 N.E.3d 77 (6th Dist) 10

Everhart v. Coshocton Cnty. Mem. Hosp.„
202-Ohio-629, 186 N.E.3d 232 (10th Dist.) 21-22, 25-29

Fletcher v. Univ. Hosps. of Cleveland,
172 Ohio App.3d 153, 2007-Ohio-2778, 873 N.E.2d 365 (8th Dist.) 23

Gibson v. Soin,
2d Dist. Montgomery No. 29154, 2022-Ohio-1113 24

Groch v. GMC,
117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377 17

Hardy v. Vermeulen,
32 Ohio St.3d 45, 512 N.E.2d 626 (1987) 21

Jacobson v. Kaforey,,
149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203 21

Karr v. Sixt,
146 Ohio St. 527, 67 N.E.2d 331 (1946) 26

Klema v. St. Elizabeth's Hosp.,
170 Ohio St. 519, 521-22, 166 N.E.2d 756 (1960) 21-23

Koler v. St. Joseph Hosp.,
69 Ohio St.2d 477, 479 432 N.E.2d 821 (1982) 21-23

Leckrone v. Kimes Convalescent Ctr.,
2021-Ohio-556, 168 N.E.3d 565 (4th Dist) 24

Levin v. Hardwig
9th Dist. Lorain C.A. No. 2744, 1978 Ohio App. LEXIS 8183 (Dec. 13, 1978) 16, 17, 24

Martin v. Taylor,
2021-Ohio-4614, 2021 Ohio App. LEXIS 4538 .... 10, 16

McKay v. Ohio State Univ. Med. Ctr.,
Ct. of Cl. No. 2013-00120, 2013 Ohio Misc. LEXIS 211 (Apr. 22, 2013) 23

Mercer v. Keane,
2021-Ohio-1576 .... 10, 15

O'Malley v. Forum Health,
11th Dist. Trumbull No. 2012-T-0090, 2013-Ohio-2621 24

Parsons v. Mansfield Gen. Hosp.,
5th Dist. Richland No. CA-2661, 1989 Ohio App. LEXIS 2162 (May 18, 1989) 24

Ruther v. Kaiser,
134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291 .... 11, 12, 13, 19, 21

Saafir v. Cleveland Metro Gen. Hosp.,
8th Dist. Cuyahoga No. 61475, 1992 Ohio App. LEXIS 6292 (Dec. 10, 1992) 24

Schmidt v. Koval,
7th Dist. Mahoning, 2002-Ohio-1558 24

Sharp v. Munda
1st. Dist. Hamilton Nos. C-890227, C0890228, 190 Ohio App. LEXIS 2471 (June 20, 1990) 24

Simpson v. Sarat Kuchipudi,
3d Dist. Allen No. 1-05-50, 2006-Ohio-5163 24

Smith v. Wyandot Mem. Hosp.,

2018-Ohio-2441, 114 N.E.3d 1224 (3d Dist.) 9, 16, 30

State ex rel. Burrows v. Indus. Comm.,
78 Ohio St.3d 78, 81, 1997-Ohio-310, 676 N.E.2d 519 28

Tabatha N.S. v. Zimmerman.,
6th Dist. Lucas No. L-06-1252, 2008-Ohio-1639 24

Thompson v. Wing.,
70 Ohio St.3d 176, 1994-Ohio-358, 637 N.E.2d 917 (1994) 21

Wick v. Lorain Manor Inc..,
9th Dist. Lorain No. 12CA010324, 2014-Ohio-4329 23

Wilson v. Durrani,
2020-Ohio-6827 ..... 6, 11

Wilson v. Mercy Health,
11th Dist. Trumbull No. 2021-T-0004, 2021-Ohio-2470 22

Yonkings v. Wilkinson,
86 Ohio St.3d 225, 228, 1999-Ohio-98, 714 N.E.2d 394 20

Statutes

R.C. § 2305.10 10
R.C. § 2305.111 ..... 21, 18
R.C. § 2305.113 ..... 1, 9, 11, 17
R.C. § 2323.43 15
R.C. § 2125.02 ..... 1, 19
R.C. § 2743.43 18

Other

Black's Law Dictionary 791 (10th Ed.2014) 11
Civil Rule 10 ..... 22, 17
Civil Rule 12 2
Evidence Rule 601 ..... 18, 18

INTRODUCTION

The question before this Court can be described in rather simple terms: does "any action" mean *any action*? If the plain meaning of the Medical Claim Statute of Repose controls—as the last twelve years of this Court's jurisprudence instruct it should—the answer is equally simple: Yes, any action does mean *any action*.

This case involves the interplay between the four-year statute of repose for all medical claims provided by R.C. § 2305.113(C) (referred to hereafter as the "Statute of Repose") and wrongful death actions predicated on medical negligence, as brought under R.C. § 2125.02 (hereafter "Wrongful Death Action"). The Statute of Repose provides that "no action" upon a "medical claim" shall be commenced more than four years after the occurrence of the underlying omission providing the basis for the medical claim and that "any action" upon such a medical claim is barred. Over the last twelve years, this Court has repeatedly resolved scope and meaning issues involving the Statute of Repose by applying the plain language enacted by the General Assembly.

Indeed, in 2016, this Court bluntly stated that the Statute of Repose "means what it says." The Third, Fifth, and Eleventh Districts applied this Court's simple guidance, finding that the Statute of Repose (which by its black-and-white text bars "any action" upon a medical claim after four years) applies to Wrongful Death Actions. And this outcome makes sense—of course, a Wrongful Death Action falls under the intentionally broad umbrella opened by the General Assembly when it enacted the language "any action."

Notwithstanding the plain meaning, this Court's relevant rulings, and the conclusions reached by its sister districts, the Tenth District has taken another path, finding that "any action" does not include Wrongful Death Actions. Or in other words, "any action" does not really mean

any action. Parsing through this contrarian analysis leads to an inevitable conclusion—consciously or not, the Tenth District read the Statute of Repose with an intent to circumvent the time limitations—not to give force and effect the General Assembly's enactment. As such, it now turns to this Court to once again provide guidance on plain meaning and clarify that "any action" does in fact, mean any action.

COMBINED STATEMENT OF FACTS AND OF THE CASE

I. Underlying facts giving rise to Plaintiff Machelle Everhart's claims and the proceedings before the Trial Court.[1]

A. December 21, 2003: Todd Everhart is treated at Coshocton Memorial Hospital after an automobile accident.

On December 21, 2003, Todd Everhart ("Decedent") was transported to the Emergency Room at Coshocton Memorial Hospital after an auto accident. (T.R. 213, Second Amended Complaint, ¶ 20). Other medical providers treated Decedent and, in the process, obtained chest x-rays. (*Id.*). These providers evaluated the x-rays and did not note any irregularities. (*Id.*). That evening, the on-duty radiologist, Appellant Dr. Joseph J. Mendiola, reviewed the x-rays and noted an opacity that may have represented a lung contusion. (*Id.*).

Dr. Mendiola's only alleged involvement was his December 21, 2003, secondary review of the chest x-rays. (*See generally*, T.R. 213, Second Amended Complaint). The Complaint does not allege Dr. Mendiola otherwise treated or interacted with the Decedent. (He did not).

[1] This case is before the Court on appeal from a Motion for Judgment on the Pleadings pursuant to Civil Rule 12(C). As such, this recitation of facts is based solely on material considered by the Trial Court (here, just the pleadings). Accordingly, in the event of remand, nothing here should be read as an admission by Dr. Mendiola, or a waiver of his rights to present additional or alternative facts to the Trial Court at later procedural stages.

B. August 11, 2006: Unbeknownst to Dr. Mendiola, Mr. Everhart is diagnosed with lung cancer.

Two years, seven months, and twenty-one days after Dr. Mendiola reviewed the x-ray, Decedent was diagnosed with advanced stage lung cancer. (T.R. 213, Second Amended Complaint, ¶ 24). Mr. Everhart succumbed to the disease on October 28, 2006. (*Id*., ¶ 28).

C. January 25, 2008: Ms. Everhart files medical negligence claims against Dr. Mendiola and other medical providers.

Four years and thirty-five days after Dr. Mendiola reviewed the x-ray, Ms. Everhart filed a lawsuit naming him as a defendant, generally alleging that he committed medical malpractice related to his secondary review of the x-ray on December 21, 2003. (*See* T.R. 3, Complaint).

On October 23, 2008, Ms. Everhart filed her First Amended Complaint, adding additional parties. (*See* T.R. 105, Entry Granting Leave). The First Amended Complaint did not alter the allegations against Dr. Mendiola. (*See generally*, T.R. 103, First Amended Complaint). On August 10, 2009, pursuant to a Trial Court Order granting leave, Ms. Everhart again filed an amended complaint adding additional parties. (*See* T.R. 213, Second Amended Complaint). Again, the amendments did not alter the allegations against Dr. Mendiola. (*Id.*).

D. During the pendency of Ms. Everhart's medical negligence claim, this Court decides *Anton v. Cleveland Clinic Foundation*, holding that the Statute of Repose is "clear, unambiguous, and means what it says."

On October 25, 2016, this Court issued a significant decision clarifying the scope of the Statute of Repose.[2] *See generally Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974. Particularly, this Court held that the Statute of Repose is "clear, unambiguous, and means what it says. If a lawsuit bringing a medical … claim is not commenced

[2] The seven-year gap between Ms. Everhart's Second Amended Complaint and this next relevant point was consumed by a number of matters not relevant to this Court's analysis of these issues including a prolonged bankruptcy stay and a separate appellate issue going up to the Tenth District.

within four years after the occurrence of the act or omission constituting the basis for the claim, then *any action* on that claim is barred." *Id*. at ¶ 26 (emphasis added).

Based on the foregoing, Dr. Mendiola (and other Defendants) sought leave to file a dispositive motion pursuant to Civil Rule 12(C), arguing that Plaintiff's medical claims were time barred under the Statute of Repose. (*See* T.R. # 662 Motion for Leave). On August 27, 2020, after a period of inactivity due to a party bankruptcy, the Trial Court granted Dr. Mendiola and other Defendants leave to file dispositive motions based on the Statute of Repose. (*See* T.R. 744, Decision and Entry).

E. The Trial Court grants Dr. Mendiola's Motion for Judgment on the Pleadings and certifies its decision for appeal.

On September 4, 2020, Dr. Mendiola filed his Motion for Judgment on the Pleadings, arguing that claims against him were barred by the Statute of Repose. (*See* T.R. 754, Dr. Mendiola's Motion for Judgment on the Pleadings).

On January 26, 2021, the Trial Court granted Dr. Mendiola's Motion, leaving the other dispositive motions undecided. (*See* T.R. 793, Decision and Entry Granting Dr. Mendiola's MJOP). In its decision, the Trial Court thoroughly analyzed the recent Statute of Repose jurisprudence of this Court. (*Id*. at p. 1-8). Then, the Trial Court turned to the Third District's decision in *Smith v. Wyandot Mem. Hosp*., which held the Statute of Repose applied to Wrongful Death Actions. (*Id*. at p. 9 (citing 2018-Ohio-2441 ¶¶ 12-26)). Based on the instructive language provided by this Court and the conclusion reached in *Smith*, the Trial Court concluded that the Statute of Repose applied to Wrongful Death Actions. (*Id*. at p. 10).

II. Relevant Appellate Court proceedings before the Tenth District Court of Appeals.

The Trial Court's Order only addressed Dr. Mendiola's dispositive motion, leaving those filed by other Defendants pending. (*Id*.). Instead of addressing the other dispositive motions, the

Trial Court certified its judgment granting Dr. Mendiola's Motion pursuant to Civ.R. 54(B). (*Id*.). Subsequently, Ms. Everhart timely filed her notice of appeal to the Tenth District Court of Appeals. (*See* T.R. 801, Notice of Appeal). Thereafter, the Trial Court stayed further action on the balance of the dispositive motions pending the outcome of this appellate process. (*See* T.R. 805, Order to Stay).

A. Ms. Everhart appeals the Trial Court's Decision to the Tenth District Court of Appeals as other appellate districts decide the Statute of Repose applies to Wrongful Death Action.

The Statute of Repose's application to a Wrongful Death Action was briefed before the Tenth District. (*See generally*, C.A.R. 32, Ms. Everhart's Brief; C.A.R. 49, Dr. Mendiola's Brief.). During the pendency of the Tenth District appeal, two relevant decisions were issued on the pending topic.

On November 22, 2021, Dr. Mendiola filed a Notice of Supplemental Authority citing a Fifth District Court of Appeals holding that the Statute of Repose applies to Wrongful Death Actions. (*See* C.A.R. 64, Notice of Supplemental Authority (citing *See generally Mercer v. Keane,* 2021-Ohio-1576)). On January 4, 2022, Dr. Mendiola filed a Second Notice of Supplemental Authority after the Eleventh District reached the same conclusion. (*See* C.A.R. 67, Notice of Supplemental Authority (citing *Martin v. Taylor*, 2021-Ohio-4614, 2021 Ohio App. LEXIS 4538.).

B. The Tenth District breaks with the Third, Fifth, and Eleventh Districts and becomes the first appellate court to hold the Statute of Repose does not apply to Wrongful Death Claims.[3]

On March 3, 2022, the Tenth District Court of Appeals reversed the Trial Court's decision

[3] About a month later the Sixth District would join the Tenth District in reaching this conclusion under similar legal analysis. *See generally Davis v. Mercy St. Vincent Med. Ctr.*, 2022-Ohio-1266, 190 N.E.3d 77 (6th Dist.).

granting Dr. Mendiola's MJOP. (*See* C.A.R. 68, Decision Reversing and Remanding). On March 11, 2022, Dr. Mendiola filed a Motion to Certify a Conflict. (*See* C.A.R. 71, Motion to Certify). On April 14, 2022, the Tenth District certified the Conflict. (*See* C.A.R. 86, Decision Certifying Conflict). On April 21, 2022, Dr. Mendiola filed his Notice of the Tenth District's Certified Conflict in this Court. (*See* Dr. Mendiola's Notice of Certified Conflict, filed April 21, 2022, in Case No. 22-0424).

ARGUMENTS IN SUPPORT OF THE PROPOSITION OF LAW AND CERTIFIED CONFLICT QUESTION[4]

> **Proposition of Law:** Except as otherwise expressly provided therein, the Medical Claim Statute of Repose provided by R.C. § 2305.113(C), applies to wrongful death actions brought under R.C. § 2125.01 and bars any action that is not commenced within four years of the act or omission that is the alleged basis of a medical claim.
>
> **Certified Conflict Question:** Does the statute of repose for medical claims, set forth under R.C. 2305.113(C), apply to statutory wrongful death claims?

I. This Court's prior decisions related to the Statute of Repose inform the conclusion that it applies to Wrongful Death Claims.

Litigants have repeatedly asked courts in Ohio to narrow the plain, unambiguous four-year time limit to bring medical claims provided by the Statute of Repose. On three prior occasions, those requests have reached this Court. Each time, this Court has refused to erode the language consciously enacted by the General Assembly. *See generally Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291; *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974; *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448. Instead, at each opportunity, this Court has reinforced that the plain language of the

[4] The Certified Conflict and Proposition of Law present the same issue and are thus jointly analyzed.

statute controls. *Id*. Or as this Court succinctly summarized in 2016, the Statute of Repose "means what it says." *Antoon*, 2016-Ohio-7432 at ¶ 26.

Now, this Court must again weigh in on the plain meaning of the Statute of Repose, this time clarifying that "any action" means *any action*. And although this specific issue is novel, this Court's recent Statute of Repose jurisprudence provides a well paved road to resolving the question. Thus, before turning to the construction at hand, it is helpful to review this Court's three prior Statute of Repose cases, and take note of three important guiding principles, applicable throughout the analysis to be completed here.

A. *Ruther v. Kaiser:* The General Assembly consciously granted medical providers a right to be free from litigation after four years.

In *Ruther*, this Court found the Statute of Repose constitutional in an as applied challenge. *See generally Ruther*, 2012-Ohio-5686. In finding constitutionality, this Court explained that the Statute of Repose is not some arbitrary procedural hurdle. *Id*. Rather, this Court recognized that the General Assembly made a conscious policy decision to grant a right to medical providers—the right to be free from litigation after four years. *Id*. at ¶ 20. And this right was designed to be a bookend to a plaintiffs' right to bring a claim:

> Just as a plaintiff is entitled to a meaningful time and opportunity to pursue a claim, ***a defendant is entitled to a reasonable time after which he or she can be assured that a defense will not have to be mounted for actions occurring years before***.
>
> Forcing medical providers to defend against medical claims that occurred 10, 20, or 50 years before presents a host of litigation concerns, including the risk that evidence is unavailable through the death or unknown whereabouts of witnesses, the possibility that pertinent documents were not retained, the likelihood that evidence would be untrustworthy due to faded memories, the potential that technology may have changed to create a different and more stringent standard of care not applicable to the earlier time, the risk that the medical providers' financial circumstances may have changed—i.e., that practitioners have retired and no longer carry

> liability insurance, the possibility that a practitioner's insurer has become insolvent, and the risk that the institutional medical provider may have closed.[5]

Id. at ¶¶ 20-21 (emphasis added).

And thus, the first relevant guiding principle is *Ruther's* analysis that the General Assembly consciously granted a right to medical providers in enacting the Statute of Repose as a wholly permissible bookend to a plaintiffs' right to seek remedy. *See id*. *Ruther*'s guidance instructs that this consciously enacted right should be given its full force under the law, as intended by the General Assembly when it applied the Statute of Repose to "any action."

B. *Antoon v. Cleveland Clinic Found.*: The Statute of Repose "means what it says" and should not be read with an intent to circumvent the four-year time limit.

Four years after *Ruther*, the Statute of Repose returned to this Court on the issue of whether it applied to vested claims. *See generally Antoon,* 2016-Ohio-7432. *Antoon* reversed an Eighth District ruling which found that once a claim had vested, the Statute of Repose could no longer operate as a bar to litigation. *Id*. In reversing, this Court found the Eighth District had relied on an "impermissibly narrow reading of *Ruther*." *Id*. at ¶ 26.

Consequently, the rule provided by *Antoon* removed any idea of a narrow reading of the Statute of Repose:

> And we find that the plain language of the statute is clear, unambiguous and means what it says. If a lawsuit bringing a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action on that claim is barred.

Id. at ¶ 22.

---

[5] Many of the practical concerns expressed by this Court have been presented in this very case. The Trial Court record evidences at least one example, the aforementioned Defendant-bankruptcy and accompanying stay. (*See* T.R. 805, Order Entering Bankruptcy Stay).

In addition to the "means what it says" language, this Court made an equally important point, admonishing Ohio courts who may be tempted by future narrow readings of this and other statutes of repose:

> [T]his court and the United States Supreme Court agree that ***statutes of repose are to be read as enacted and not with an intent to circumvent legislatively imposed time limitations***. While mindful of Ohioans' constitutional right to a remedy, we undertake our review cognizant that ***a statute of repose is not an unjust and discreditable defense but rather, a law designed to secure fairness to all parties.***

Antoon, 2016-Ohio-7432, ¶ 19 (emphasis added).

Accordingly, *Antoon* provides the second guiding principle here: Courts should not seek out ways to circumvent the language of the Statute of Repose. *Id*. ("it is not the province of the courts to make exceptions to meet cases not provided for by the legislature…") (internal quotation omitted). Yet that is exactly what the Tenth District did here. And to uphold the Tenth District's legal conclusion would judicially legislate an exception where none exists, reversing *Antoon*'s conclusion to find that the Statute of Repose no longer means what it says and "any action" does not in fact mean *any action*.

C. *Wilson v. Durrani:* There are no exceptions to the Statute of Repose but those expressly stated within the Statute.

This Court has already expressly rejected attempts to create exceptions where none are provided by the plain language of the Statute of Repose. Four years after *Antoon*, and the Statute of Repose again came before this Court on whether the saving statute created an exception to the four-year time limit to commence an action. *See generally Wilson v.* 2020-Ohio-6827. And this Court rejected that proposition finding the saving statute under R.C. § 2305.19(A) did not provide an exception to the Statute of Repose. *Id*.

Instead, this Court found that any exception to the Statute of Repose must be by way of an affirmative "indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances." *Id*. at ¶ 29 (*quoting California Pub. Emps.' Retirement Sys. v. ANZ Secs., Inc.,* 655 Fed. Appx. 13, 137 S.Ct. 2042, 2045, 198 L.Ed.2d 584 (2017)). And in analyzing the Statute of Repose, this Court found only two indications from the General Assembly of circumstances where the Statute of Repose did not apply:

> R.C. 2305.113(C) is a true statute of repose that, except as expressly stated in R.C. 2305.113(C) and (D), clearly and unambiguously precludes the commencement of a medical claim more than four years after the occurrence of the alleged act or omission that forms the basis of the claim.
>
> Expiration of the statute of repose precludes the commencement, pursuant to the saving statute, of a claim that has previously failed otherwise than on the merits in a prior action. Had the General Assembly intended the saving statute to provide an extension of the medical statute of repose, it would have expressly said so in R.C. 2305.113(C), as it did in the R.C. 2305.10(C), the statute of repose that governs product-liability claims.

Id. at ¶ 38.

As such, *Wilson's* analysis that an exception to the Statute of Repose must come by way of a particular indication from the General Assembly is the third guiding principle relevant to the instant analysis. And every relevant indication points to the General Assembly intending the Statute of Repose to apply to *any action*, including Wrongful Death Actions.

D. Following the guiding principles outlined by this Court, the Third, Fifth, and Eleventh Districts correctly found that the Statute of Repose applies to Wrongful Death Actions.

Prior to the Tenth District's decision at issue here, the Third, Fifth, and Eleventh Districts relied on the decisions and legal principles above to find that the Statute of Repose applies to Wrongful Death Actions:

- **The Third District Court of Appeals:** "For the above reasons, we hold that Ohio's medical-claim statute of repose applies to wrongful death actions under R.C. Chapter 2125, which assert medical claims." *Smith v. Wyandot Mem. Hosp.*, 2018-Ohio-2441, 114 N.E.3d 1224, ¶ 27 (3d Dist.).

- **The Fifth District Court of Appeals:** "Simply stated, a person must file a medical claim no later than four years after the alleged act of malpractice occurs or the claim will be barred." *Mercer v. Keane*, 2021-Ohio-1576, 172 N.E.3d 1101, ¶ 40 (5th Dist.) (internal quotation omitted).

- **The Eleventh District Court of Appeals:** "As set forth above, R.C. 2305.113(C) provides, with exceptions not relevant here, that an action on a medical claim must be commenced within four years after the occurrence of the breach of the standard of care, or the claim is barred." *Martin v. Taylor*, 11th Dist. Lake No. 2021-L-046, 2021-Ohio-4614, ¶ 39.

Guided by the plain language of the Statute of Repose, and this Court's guiding principles, these courts reached the correct answer on whether the Statute of Repose applies to Wrongful Death Actions. As outlined below, the Tenth District's analysis reaching the opposite conclusion is flawed.

II. The Statute of Repose applies to Wrongful Death Actions by its plain language.

This Court has twice held that the language used in the Statute of Repose is clear and unambiguous. *See Wilson*, 2020-Ohio-6827, ¶ 24; *Antoon*, 2016-Ohio-7432, ¶ 22. That language provides:

> (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, <u>any action</u> upon that claim is barred***.

R.C. § 2305.113(C) (emphasis added). Where a statute has an unambiguous meaning, a court must apply the statute as written by giving the words effect based on their definition and common usage. *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 18.

Here, both "medical claim" and "any action" have a plain, discernable meaning, which this Court should give effect to.

A. A Wrongful Death Action is a medical claim and subject to the Statute of Repose.

Going a step deeper into the plain meaning analysis, a Wrongful Death Action, *predicated on medical malpractice*, is a medical claim as codified plain language of R.C. § 2305.113(E):

> "Medical claim" means **any claim** that is asserted in any civil action against a physician, ***, and **that arises out of the medical diagnosis, care, or treatment** of any person.

R.C. 2305.113(E)(3) (emphasis added). The words used in defining a "medical claim" are clear and unambiguous. As such, this Court must look only to those words and apply them to give effect to their definitions and common usage. *See Levin*, 2008-Ohio-546 at ¶ 18.

And "claim" means "[a]n interest or remedy recognized at law." Black's Law Dictionary 791 (10th Ed.2014). Certainly, a Wrongful Death Action is a "claim" as it is a statutory remedy recognized at law. See R.C. § 2125.02 *et seq*. Thus, when the General Assembly enacted R.C. § 2305.113(E)(3)—to broadly define a medical claim as "any claim"—it intended Wrongful Death Actions (and all other claims) to fall within the scope of the enactment. To conclude, otherwise impermissibly robs the language of its plain meaning. *See Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 212 ("It is not this court's role to establish legislative policies or to second guess the General Assembly's policy choices").

B. The Statute of Repose applies to all actions involving a medical claim.

Next, this Court must determine if "any action" truly means *any action*, which would

include a Wrongful Death Action. If the General Assembly's words are to be given any effect, the inescapable answer is yes. To find otherwise would destroy the plain meaning of "any action" – assign that term a lesser meaning than its plain language definition – and impermissibly impose a restriction of the wording enacted by the legislature. *See Grouch*, 2008-Ohio-546 at ¶ 212.

III. Canons of statutory construction further confirm that the General Assembly did not intend for Wrongful Death Actions to be exempt from the Statute of Repose.

A. The Statute of Repose does not provide an exception for Wrongful Death Actions.

In *Wilson,* this Court held the Statute of Repose "is a true statute of repose that, except as expressly stated in R.C. 2305.113(C) and (D)." *Wilson*, 2020-Ohio-6827, ¶ 38.

In *Wilson*, this Court further explained that "[i]n light of the purpose of a statute of repose—to create a bar on a defendant's temporal liability—exceptions to a statute of repose require a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances, as when the statute of repose itself contains an express exception." *Wilson*, 2021-Ohio-6827, ¶ 29 (internal quotation omitted).

As discussed further below, there are no indications from the General Assembly that the Statute of Repose was intended to be anything other than a complete bar to all actions involving medical claims, including Wrongful Death Actions.

IV. The well-documented policy considerations confirm the Statute of Repose was intended to apply to Wrongful Death Actions.

A. The General Assembly's codified legislative intent demonstrates it intended the Statute of Repose to apply to Wrongful Death Actions.

In 2003, the General Assembly re-codified the Statute of Repose after ensuing litigation over its constitutionality. *See* S.B. 281, 2002 Ohio Laws File 250, Section 3(A)(1)-(3). In enacting

the current version of the Statute of Repose, the General Assembly was cognizant of prior constitutional challenges and thus was explicit in its purpose:

> (A) The General Assembly finds:
>
> (1) Medical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio.
>
> (2) The number of medical malpractice claims resulting in payments to plaintiffs has remained relatively constant. However, the average award to plaintiffs has risen dramatically. Payments to plaintiffs at or exceeding one million dollars have doubled in the past three years.
>
> ***
>
> (6)(a) That a statute of repose on medical, dental, optometric, and chiropractic claims strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners;
>
> (b) Over time, the availability of relevant evidence pertaining to an incident and the availability of witnesses knowledgeable 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.

See Section 3(A)(1)-(3) & (6)(a)-(f) of S.B. 281, effective April 3, 2003 (emphasis added).[6]

Naturally, each of these policy considerations is magnified exponentially when the medical claim at issue involves a death. Thus, to find the General Assembly did not intend for the Statute of Repose to apply to Wrongful Death Actions, one would have to accept the following:

- The General Assembly was concerned about jury verdicts over a million dollars and medical malpractice insurers leaving the Ohio market—*but those concerns stopped at actions involving death.*
- The General Assembly wanted to give medical providers "certainty with respect to the time limit" within which a medical malpractice claim could be brought—*unless the action involved a death.*
- Evidentiary issues including availability of witnesses and the maintenance of records becomes problematic over extended periods of time—*except in matters involving a death.*
- Standards of care change over time making it difficult for expert witnesses and triers of fact to discern the relevant standard of care—*in all cases other than those involving a death.*

This would be an absurd result in light of the stated legislative intent. And it is a bedrock canon of interpretation that statues should be interpreted to avoid such absurd results. *Yonkings v. Wilkinson*, 86 Ohio St.3d 225, 228, 1999-Ohio-98, 714 N.E.2d 394.

B. The General Assembly's treatment of damage limitations—passed in the same legislation as the Statute of Repose illustrates an intent to apply the Statute of Repose to Wrongful Death Actions.

In addition to re-codifying the Statute of Repose, S.B. 281 enacted several other reforms, including revisions to R.C. § 2323.43 to provide limits on the recovery on compensatory damages for non-economic loss. *See* S.B. 281, effective April 3, 2003. Tellingly, the General Assembly

---

This version of the Statute of Repose was upheld as constitutional when it was inevitably challenged. *Ruther*, 2012-Ohio-5686, ¶ 19.

provided an express exemption to the damage limitations for medical claims involving Wrongful Death Actions brought pursuant to Chapter 2125. *Id*.; *see also*, R.C. § 2323.43(G).

Yet, *in the exact same bill*, when enacting a Statute of Repose for Medical Claims, the General Assembly did not provide any such exemption. *See* S.B. 281, effective April 3, 2003. This demonstrates the General Assembly knew how to enact language from *Wilson*. Further, the Final Report from the Legislative Commission is instructive.[7] (*See* Final Legislative Report, Appx. At pp. 24-45).

The report confirms the General Assembly was amending the Statute to add two exceptions to the four-year repose period, as provided by R.C. § 2305.113(C) and (D). (*See* Appx. at p. 21). Compare this to the Report's treatment of the Nonapplicability Section regarding damage limitations, which expressly states: "The provisions also do not apply to wrongful death actions brought pursuant to R.C. Chapter 2125." (*Id*. at p. 11).

V. The Tenth District's analysis of the interplay between the Statute of Repose and Wrongful Death Actions is flawed because it relies on precedent decided before the current version of the Statute of Repose was enacted.

In its ruling below, the Tenth District relied heavily on several prior decisions of this Court, which had determined Wrongful Death Actions were wholly independent claims and thus could not be medical claims nor derivative claims. *See Everhart v. Coshocton Cnty. Mem. Hosp.*, 2020-Ohio-629 at ¶¶15; 25; 38; 39; 44 (citing *Klema v. St. Elizabeth's Hosp*., 170 Ohio St. 519, 521-22, 166 N.E.2d 765 (1960); *Koler v. St. Joseph Hosp*., 69 Ohio St.2d 477, 479, 432 N.E.2d 821 (1982); and *Thompson v. Wing*, 70 Ohio St.3d 176, 1994-Ohio-358, 637 N.E.2d 917 (1994)).

[7] This Court is not bound by these reports, "but may refer to them when we find them helpful and objective." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 30.

A. The cases relied on by the Tenth District were decided before the current language of the Statute of Repose was enacted.

But critically, each of these decisions was issued well before the current version of the Statute of Repose was enacted. And as this Court recognized in *Ruther*, the enactment of this version of the Statute of Repose merits a review of the Court's prior Statute of Repose jurisprudence, decided under the former statutes. *See Ruther*, 2012-Ohio-5686 at ¶¶ 22; 27 (overruling *Hardy v. Vermeulen*, 32 Ohio St.3d 45, 512 N.E.2d 626 (1987).

Initially, the Tenth District cites to 1960's *Klema* and 1982's *Koler,* which held the medical claim statute of limitations did not apply to Wrongful Death Actions. *Everhart*, 2020-Ohio-692 at ¶¶ 38; 44. In analyzing those cases, the Tenth District concluded that "absent clear legislative action, a wrongful death claim is only governed by the wrongful death statute. The same logic applies to the statute of repose." *Id*. at ¶ 44. The reliance of *Klema* and *Koler* here is flawed because those cases were decided under a drastically different statute.

For example, the later decided *Koler* relied heavily on the *then* definition of a "medical claim" which under the former R.C. § 2305.11 limited "medical claims" to "medical malpractice." *See Koler* 69 Ohio St.2d 477, 480. As this Court noted, at the time the term "medical malpractice" was so narrowly defined that even loss of consortium claims were excluded. *Id*. at 482 (Celebrezze, C. J., concurring). But of course, the current version intentionally enacted a much broader definition of a "medical claim" re-defining that term as "any claim asserted in any civil action against a physician *** arising out of the medical diagnosis, care, or treatment of any person." R.C. § 2305.111(E)(3). In light of the new language, the analysis in *Klema* and *Koler* is not relevant here.

B. District Court Decisions analyzing the current version of the Statute of Repose correctly interpret the interplay between the new language and Wrongful Death Actions.

None of the decisions certified as conflicting with the Tenth District's analysis under *Kelma* and *Koler* directly address those cases. Several courts, however, have taken up the issue in analogous contexts. Recently, the Eleventh District rejected a reliance on *Koler* to separate medical injury claims. *Wilson v. Mercy Health*, 11th Dist. Trumbull No. 2021-T-0004, 2021-Ohio-2470, ¶¶ 22-34. In *Wilson*, an affidavit of merit case under Civ.R. 10(D), the court found *Koler* did not control because it relied on now defunct statutory language and the present definition controlled—and included Wrongful Death Actions within the scope of medical claims.[8] *Wilson v. Mercy Health*, 11th Dist. Trumbull No. 2021-T-0004, 2021-Ohio-2470, ¶¶ 22-34. That court noted the Wrongful Death Action clearly "arose out of the medical diagnosis, care, or treatment of any person" and were therefore "medical claims" as defined by the current definition of a medical claim under R.C. § 2305.111(E)(3). *Id*. at ¶ 33.

The Eleventh District is not the only Court to reach this conclusion in the affidavit of merit context. *See Chalmers v. HCR ManorCare, Inc*., 6th Dist. Lucas No. L-16-1143, 2017-Ohio-5678, ¶ 42-48, 93 N.E.3d 1237; *Fletcher v. Univ. Hosps. of Cleveland*, 172 Ohio App.3d 153, 2007-Ohio-2778, 873 N.E.2d 365, ¶ 8 (8th Dist.), rev'd on other grounds, 120 Ohio St. 3d 167, 2008-Ohio-5379, 897 N.E.2d 147; *McKay v. Ohio State Univ. Med. Ctr*., Ct. of Cl. No. 2013-00120, 2013 Ohio Misc. LEXIS 211, at *3 (Apr. 22, 2013); *Wick v. Lorain Manor Inc*., 9th Dist. Lorain No. 12CA010324, 2014-Ohio-4329, ¶ 18. Thus clearly, the courts analyzing the interplay of these

[8] Civ.R. 10(D) expressly incorporates the current definition of "medical claim" under R.C. § 2305.113(E).

statutes after the enactment of the new definition have rejected the conclusions reached on *Klema* and *Koler* based on what the relevant statutory language now reflects.

Courts have further explained the role of the current definition of "medical claims" in the context of Evid.R. 601(E)(5), and its Revised Code equivalent, R.C. § 2743.43, which both set the minimum competency requirements for a medical expert to testify as to liability in actions involving a medical claim—as defined by R.C. § 2305.111(E)(3). All but one of Ohio's appellate districts have applied one or both of these requirements to Wrongful Death Actions (the Twelfth District has not decided the issue). Several districts applied these definitional requirements *before* the current, more expansive definition (of course these issues have not been re-ligated under the more expansive definition):

1. *Sharp v. Munda*, 1st Dist. Hamilton Nos. C-890227, C-890228, 1990 Ohio App. LEXIS 2471, at *4 (June 20, 1990) (medical liability expert must be competent under Evid.R. 601) (decided under prior version of statute).

2. *Gibson v. Soin*, 2d Dist. Montgomery No. 29154, 2022-Ohio-1113, ¶ 23 (medical expert in wrongful death claim must comply with Evid.R. 601(B)(5)).

3. *Simpson v. Sarat Kuchipudi*, 3d Dist. Allen No. 1-05-50, 2006-Ohio-5163, ¶ 14 (medical expert in wrongful death action must meet competency requirements of Evid.R. 601 and R.C. § 2743.43.)

4. *Leckrone v. Kimes Convalescent Ctr.*, 2021-Ohio-556, 168 N.E.3d 565, ¶ 15 (4th Dist.) (expert completing affidavit of merit in wrongful death action must be competent under Evid.R. 601).

5. *Parsons v. Mansfield Gen. Hosp.*, 5th Dist. Richland No. CA-2661, 1989 Ohio App. LEXIS 2162, at *6 (May 18, 1989) (medical expert in wrongful death action must comply with Evid.R. 601(B)(5) and R.C. § 2743.43). (decided under prior version of statute).

6. *Tabatha N. S. v. Zimmerman*, 6th Dist. Lucas No. L-06-1252, 2008-Ohio-1639, ¶ 33 (medical expert in wrongful death suit must be competent under both Evid. R. 601 and R.C. § 2743.43.)

7. *Schmidt v. Koval*, 7th Dist. Mahoning, 2002-Ohio-1558) (medical expert in wrongful death suit must be competent under Evid. R. 601). (decided under prior version of statute).

8. *Saafir v. Cleveland Metro. Gen. Hosp.*, 8th Dist. Cuyahoga NO. 61475, 1992 Ohio App. LEXIS 6292, at *17 (Dec. 10, 1992) (medical expert witness in wrongful death action must

comply with Evid.R. 601(B)(5) and R.C. § 2743.43). (decided under prior version of statute).

9. *Levin v. Hardwig*, 9th Dist. Lorain C.A. No. 2744, 1978 Ohio App. LEXIS 8183, at *6 (Dec. 13, 1978) (medical expert witness in wrongful death action required to comply with R.C. § 2743.43). (decided under prior version of statute).

10. *Cunningham v. Children's Hosp*., 10th Dist. Franklin No. 05AP-69, 2005-Ohio-4284, ¶ 18 (medical expert in wrongful death action must comply with Evid.R. 601).

11. *O'Malley v. Forum Health*, 11th Dist. Trumbull No. 2012-T-0090, 2013-Ohio-2621, ¶ 19 (medical expert in wrongful death action must comply with Evid.R. 601 and R.C. § 2743.43).

Thus, the overwhelming authority among Ohio's district courts find the current definition of medical claims inclusive of Wrongful Death Actions, and reject the approach taken by the Tenth District below.

VI. The Tenth District's "plain meaning" analysis is flawed because it focuses only on the Wrongful Death Statute.

As an initial matter, the Tenth District's analysis resolves the issues of this case by simply finding the Wrongful Death Statute is unambiguous and does not provide a statute of repose for wrongful death arising out of a medical claim. *See Everhart*, 2022-Ohio-692 at ¶¶ 20-21. The Tenth District's approach misses the mark for two reasons.

First, the Tenth District's analysis relies heavily on the existence of the products liability statute of repose provided by R.C. 2125.02(D)(2). At its core, this is *an expressio* unius argument, not an analysis of the plain language. As discussed below, the *expressio unius* argument fails when moving beyond the plain meaning. But as a threshold matter, it has no place in a plain meaning analysis.

Second, the Tenth District relies on the Wrongful Death Statute operating in a vacuum to reach its conclusion, forgoing the plain meaning analysis of the Statute of Repose, outlined above. *See Everhart*, 2022-Ohio-692 at ¶¶ 20-21. ("R.C. 2125.02(D)(2) makes no reference to any other statute that might inform this analysis"). This ignores the well-settled principle that the General

Assembly does not enact legislation in a vacuum, but rather with an understanding of the interplay between statutes. *See City of Cleveland v. State*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370, ¶ 17.

And thus, the Tenth District's conclusion misses the mark: "[u]pon review, R.C. 2125.02 does not provide a statute of repose for a wrongful death arising out of a medical claim." A complete review necessarily includes an analysis of what is provided by the Statute of Repose, a plain, unambiguous four-year bar to any action arising out of a medical claim.

VII. The Tenth District's use of the rules of statutory construction is flawed.

After resolving the issues in this case on the plain meaning of the Wrongful Death Statute, the Tenth District analyzed various points, applying select canons of statutory construction, to resolve ambiguity finding the Statute of Repose does not apply to Wrongful Death Actions. *Everhart*, 2022-Ohio-692 at ¶¶ 22-30. However, each point of analysis is flawed, as fully outlined below.

A. R.C. § 2125.02(D)(2)'s incorporation of a statute of repose for products liability claims has no bearing on the application of the Statute of Repose to Wrongful Death Actions.

First, employing the canon of *expressio unius est exclusion alterius*, the Tenth District concludes that because the Wrongful Death statute expressly includes a statute of repose for products liability claims, the General Assembly intended to exclude all other statutes of repose. *Everhart*, 2022-Ohio-692 at ¶¶22-25. This analysis relies on a mistakenly narrow review of the products liability statute of repose.

As useful background, Ohio has had some form of a wrongful death statute on its books since 1851. *See Karr v. Sixt*, 146 Ohio St. 527, 67 N.E.2d 331 (1946), paragraph one of the syllabus, (citing 13 Ohio Jurisprudence, 384, Section 33). The current Statute of Repose became

effective on January 10, 2003. Comparatively, the products liability statute of repose became effective on January 6, 2005.

The Tenth District's mistake here is failing to appreciate that the product liability statute of repose was not enacted as an original part of Chapter 2125 (and thus, the General Assembly did not consciously neglect to enact every other statute of repose when it enacted that Chapter). Instead, the products liability statute of repose was enacted as part of an omnibus legislative package completely reforming product claims in Ohio. This bill was enacted in 2005—well after the current Medical Claim Statute of Repose went into effect. *See* 2003 Ohio SB 80, enacted January 6, 2005.

The Act at issue amended forty-two sections of the Revised Code, including R.C. § 2125.02. This massive legislation introduced codified products claims and largely overrode the entire common law related to products claims. In short, it was messy. But the Act plainly did not intend to narrow the scope of the Statute of Repose enacted before it. The intent of the Act, as it pertains to statutes of repose, is clear enough from its legislative synopsis:

> AN ACT to amend section … 2125.02 … to establish a statute of repose for certain product liability claims and claims based on unsafe conditions of real property improvements and to make other changes related to product liability claims…

2003 Ohio SB 80, *Synopsis*. There was no intent to legislate which wrongful death claims could have statutes of repose. The General Assembly enacted a new statute of repose in an omnibus package focused solely on products liability reform— nothing about this process was designed to legislate which statutes of repose apply to Wrongful Death Actions. And nothing in the omnibus products liability reform counters or negates the well-evidenced intent of the General Assembly when it enacted the Medical Claim Statute of Repose. Simply put, nothing in the products liability statute of repose has bearing here.

B. The non-exhaustive list of derivative claims provided by R.C. § 2305.113(E)(7) has no bearing on the Statute of Repose.

Next, the Tenth District again turns to *expressio unius*, concluding that because a Wrongful Death Action is not listed in R.C. § 2305.113(E)(7)'s *non-exhaustive* list of derivative claims. This analysis is hard to follow, but two errors stand out.

First, a Wrongful Death Action is not derivative of a medical malpractice claim, it is its own action—a point the Tenth District itself makes. *See Everhart*, 2022-Ohio-629 at ¶ 26. Thus, the non-exhaustive list of derivative claims—and the Wrongful Death Action's inclusion or exclusion from it—has no bearing here. Rather, the correct analysis is whether the Wrongful Death Action constitutes a medical claim under R.C. § 2305.113(E)(3). And as outlined above, it does. (*See* Infra at Section II).

Yet even more confusing, is the application of *expressio unius est exclusion alterius* to a list the General Assembly has affirmatively stated is non-exhaustive:

> "Derivative claims for relief" **<u>include, but are not limited to</u>**, claims of a parent, guardian, custodian, or spouse of an individual who was the subject of any medical diagnosis, care, or treatment, dental diagnosis, care, or treatment, dental operation, optometric diagnosis, care, or treatment, or chiropractic diagnosis, care, or treatment, that arise from that diagnosis, care, treatment, or operation, and that seek the recovery of damages…

R.C. § 2305.113(E)(7) (emphasis added).

The plain, ordinary meaning of the phrase "include, but are not limited to" is non-exhaustive by its very definition. This plain language controls. *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 1997-Ohio-310, 676 N.E.2d 519. The plain language used here—specifically the phrase "*but are not limited to*"—is determinative of the legislature's intent to not place any specific limit on the scope of derivative claims under R.C. § 2305.113(E)(7).

C. Ohio's statute of repose for certain premise liability actions provides further evidence the Statute of Repose applies to Wrongful Death Actions.

Next, the Tenth District uses the premise liability statute of repose provided by R.C. § 2305.131(A) to make an illustrative point that the Statue of Repose does not apply to Wrongful Death Actions. *Everhart*, 2022-Ohio-629 ¶ 27-30. The Tenth District reasons that because the General Assembly lists actions (including wrongful death) to which the premise liability statute of repose applies, its failure to specifically list wrongful death in the Medical Claim Statute of Repose is evidence of its intent. *Id*.

The Tenth District misses the easier explanation here. The Medical Claim Statute of Repose has no need to specifically list wrongful death, or any other specific cause of action, because it expressly applies to *any* action. R.C. § 2305.113(C). Further, it should be noted that the Tenth District's acknowledgment of the premise liability statute of repose, and its applicability to Wrongful Death Actions, defeats that court's earlier analysis that the self-contained language of the Wrongful Death Statute is dispositive on plain meaning, in and of itself. *See Everhart*, 2022-Ohio-629 at ¶ 20. If the premise liability statute can provide a complete bar to certain actions, surely the Statute of Repose can provide a similar bar to any actions based on medical claims.

D. The time limitations contained in R.C. § 2125.02 do not bar application of the Statute of Repose.

Next, the Tenth District reasons that the time limitations contained in R.C. § 2125.02 are the exclusive time limitations applicable to Wrongful Death Actions. *Everhart*, 2022-Ohio-629 at ¶ 29. This ignores the different functions served by a statute of limitations versus one of repose.

In *Antoon*, the Ohio Supreme Court explained this difference:

> A statute of limitations establishes 'a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered).' Black's Law Dictionary 1636 (10th Ed.2014). A statute of repose bars 'any suit that is brought after a

> specified time since the defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury. Id. at 1637."

Antoon, 2016-Ohio-7432, ¶ 11, (citing *CTS Corp. v. Whaleburger*, 134 S.Ct. 2175, 2182 (2014)).

The *Wilson* court further expanded on this concept:

> Statutes of limitations and statutes of repose target different actors. Statutes of limitations emphasize plaintiffs' duty to diligently prosecute known claims. Statutes of repose, on the other hand, emphasize defendants' entitlement to be free from liability after a legislatively determined time. Id. at 9. In light of those differences, statutory schemes commonly pair a shorter statute of limitations with a longer statute of repose.

Wilson, 2020-Ohio-6827 (internal citations omitted).

In *Smith*, the Third District analyzed this argument, rejecting it. In rejecting this argument, that court provided this well-reasoned analysis:

> [A]ny argument asserting that Ohio's medical-claim statute of repose does not apply to wrongful-death actions because wrongful-death actions and medical-malpractice actions are separate causes of action is erroneous. Stated another way, a statute of limitations governs the time in which a plaintiff may assert a cause of action. A cause of action is based on a plaintiff's injury. Conversely, a statute of repose focuses on a defendant's alleged acts and governs the time in which a defendant may be held accountable for his or her alleged negligent acts. Based on that distinction, any separate-causes-of-action argument necessarily fails. Accordingly, because statutes of repose and limitation are fundamentally different, any reasoning based on the interplay of two statute of limitations is not persuasive.

Smith, 2018-Ohio-2441, 114 N.E.3d 1224, ¶ 26. As such, the simple existence of time limitations provided by R.C. § 2125.02 does not preclude the application of the Statute of Repose.

CONCLUSION

For the foregoing reasons, this Court should do what it has done three prior times over the last twelve years, and give meaning and effect to plain, unambiguous words the General Assembly

selected when enacting the Statute or Repose. In doing so, the Court must conclude that the Statue of Repose applies to any action, including Wrongful Death Actions.

Respectfully Submitted,

/s/ David H. Krause

David H. Krause (0070577)
Thomas N. Spyker (0098075)
Melvin Davis (0079224)
REMINGER CO., L.P.A.
200 Civic Center Drive, Suite 800
Columbus, OH 43215
Phone: (614) 228-1311
Fax: (614) 232-2410
Email: dkrause@reminger.com
tspyker@reminger.com
mdavis@reminger.com

CERTIFICATE OF SERVICE

On Friday, August 26, 2022, a true and accurate copy of the foregoing was served on all parties of record via the Court's E-filing system and by email.

Respectfully Submitted,

/s/ David H. Krause
David H. Krause (0070577)

APPENDIX

Opinion and Decision, *Everhart v. Coshocton Cnty. Mem. Hosp.*, 2020-Ohio-629	(Appx. Pages 1-15)
Legislative Services Commission Final Analysis on S.B. 281, 124th General Assembly	(Appx. Pages 16-35)

Everhart v. Coshocton Cnty. Mem. Hosp.

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

March 3, 2022, Decided

No. 21AP-74

Reporter

2022-Ohio-629 *; 186 N.E.3d 232 **; 2022 Ohio App. LEXIS 548 ***; 2022 WL 624841

Machelle Everhart, Individually and as Administrator of the Estate of Todd Everhart, Deceased, Plaintiff-Appellant, v. Coshocton County Memorial Hospital et al., Defendants-Appellees.

Subsequent History: Discretionary appeal allowed by *Everhart v. Coshocton Cnty. Mem'l Hosp., 167 Ohio St. 3d 1442, 2022-Ohio-2162, 2022 Ohio LEXIS 1308 (Ohio, June 29, 2022)*

Certification granted by *Everhart v. Coshocton Cnty. Mem'l Hosp., 167 Ohio St. 3d 1441, 2022-Ohio-2162, 2022 Ohio LEXIS 1318 (Ohio, June 29, 2022)*

Prior History: [***1] APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 08CV-1385).

Everhart v. Coshocton County Mem. Hosp., 2013-Ohio-2210, 2013 Ohio App. LEXIS 2128 (Ohio Ct. App., Franklin County, May 30, 2013)

Disposition: Judgment reversed; cause remanded.

Case Summary

Overview

HOLDINGS: [1]-In medical malpractice case, the trial court erred in finding that the appellant was barred from pursuing her wrongful death claim because the General Assembly declined to include a statute of repose arising from a medical claim in *R.C. 2125.02* or state that a wrongful death claim was encompassed in *R.C. 2305.113(C)*'s statute of repose. Further, the interpretation of the statute of repose by the Courts of Appeals not only ignores the General Assembly's limited statute of repose in the wrongful death context, but it was in contravention of the plain language of *R.C. 2125.01*; [2]-Appellant's motion for leave to file a third amended complaint was moot because the reviewing court found appellant's argument no longer presents a live, justiciable controversy as the statute of repose does not preclude appellant from proceeding with a wrongful death claim.

Outcome

Judgment reversed and remanded.

Counsel: Colley, Shroyer & Abraham Co. LPA, David I. Shroyer, for appellant. Argued: David I. Shroyer.

Reminger Co., L.P.A., David H. Krause, and Thomas N. Spyker, for appellee Joseph J. Mendiola, M.D. Argued: Thomas N. Spyker.

Poling Law, Frederick A. Sewards, and Patrick F. Smith, for appellee Mohamed Hamza, M.D.

Poling Law, Brant Poling, and Zachary R. Hoover, for appellees Coshocton County Memorial Hospital and Medical Services of Coshocton, Inc.

Judges: MENTEL, J. KLATT and DORRIAN, JJ., concur.

Opinion by: MENTEL

Opinion

[**234] (ACCELERATED CALENDAR)

DECISION

MENTEL, J.

[*P1] Plaintiff-appellant, Machelle Everhart, individually and as the administrator of the estate of Todd Everhart, deceased, appeals from the January 26, 2021 decision of the Franklin County Court of Common Pleas granting the motion of defendant-appellee, Joseph J. Mendiola, M.D., for judgment on the pleadings based on the four-year statute of repose set forth in *R.C. 2305.113(C)*.

[*P2] For the reasons that follow, we reverse.

I. FACTS AND PROCEDURAL HISTORY

[*P3] The underlying facts of this case were discussed extensively in *Everhart v. Coshocton Cty. Mem. Hosp., 10th Dist. No. 12AP-75, 2013-Ohio-2210* ("*Everhart I*"). Briefly, appellant is a widow and administrator [***2] for the estate of her late husband, Todd Everhart. On December 21, 2003, Mr. Everhart was in an automobile accident and transported to the emergency room at Coshocton County Memorial Hospital ("Coshocton Hospital"). According to appellant, Drs. Rajendra Patel and Mohamed Hamza treated Mr. Everhart. Chest x-rays were ordered on Mr. Everhart at that time. Mr. Everhart was later transported by Life Flight from Coshocton Hospital to The Ohio State University Emergency Department ("Ohio State"). At Ohio State, new x-rays were taken of Mr. Everhart. Appellant alleged the chest x-rays showed opacity in the lung that required additional follow-up treatment to rule out malignancy. Mr. Everhart recovered from the injuries sustained [**235] in the automobile accident and was discharged from the hospital.

[*P4] On August 11, 2006, nearly three years after the automobile accident, Mr. Everhart presented at Coshocton Hospital. Mr. Everhart obtained a CT scan, which revealed masses on the right lung that were later diagnosed as advanced stage lung cancer. Mr. Everhart passed away on October 28, 2006.

[*P5] On January 25, 2008, appellant filed the initial complaint alleging causes of action for medical malpractice[1] and [***3] wrongful death against Coshocton Hospital and several physicians. Appellant argued Coshocton Hospital and physicians deviated from the standard of medical care by failing to send, receive, or act on Mr. Everhart's x-ray films and radiology report as to the lung opacity. On October 2, 2008, Dr. Hamza filed a motion for summary judgment arguing that there was no physician-patient relationship with Mr. Everhart and, therefore, Dr. Hamza did not owe him a duty of care.[2] Appellant requested additional time to conduct discovery before responding to the motion. Appellant ultimately filed a memorandum in opposition with an affidavit by Dr. Harlan D. Meyer. Dr. Meyer stated that Dr. Hamza had a duty to review reports that are distributed to him, regardless of whether he saw the patient. On April 21, 2010, the trial court granted Dr. Hamza's motion for summary judgment. Appellant filed a motion for reconsideration of the trial court's decision on August 25, 2011. On January 3, 2012, the trial court denied appellant's motion for reconsideration but issued a nunc pro tunc entry as to the April 21, 2010 decision and entry granting summary judgment with *Civ.R. 54(B)* certification.

[*P6] On May 30, 2013, this court [***4] reversed the trial court's decision finding it erred granting summary judgment in favor of Dr. Hamza and remanded the case for further proceedings as there was a genuine issue of material fact whether Dr. Hamza received the x-rays and read the radiology report and, therefore, whether a physician-patient relationship existed between the parties. *Everhart I at ¶ 1*.

[*P7] In September 2017, appellees sought leave to file motions for judgment on the pleadings based on the Supreme Court of Ohio's decision in *Antoon v. Cleveland Clinic Found., 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974*. Appellees argued that appellant's claims were precluded by the four-year statute of repose under *R.C. 2305.113(C)*. Appellant opposed the motions for leave contending that the statute of repose argument was waived as the defense was not asserted in the appellees' answers. Appellees proceeded to request leave to amend their answers in order to add statute of repose as an affirmative defense. On November 30, 2017, the trial court stayed the case based on Coshocton Hospital initiating bankruptcy proceedings. The case was reinstated on April 3, 2019. (May 16, 2019 Nunc Pro Tunc Entry.)

[*P8] The trial court granted appellees' motions for leave to file amended answers and motions for leave to file motions for judgment [***5] on the pleadings on August 25 and August 27, 2020, respectively. On September 4, 2020, Dr. Mendiola filed a motion for judgment on the pleadings arguing [**236] that appellant's wrongful death cause of action was a medical claim and, therefore, barred by the four-year statute of repose set forth in *R.C. 2305.113(C)*. A memorandum in opposition was filed on September 16, 2020. A reply was filed on September 23, 2020.

[*P9] On September 15, 2020, appellant filed a motion for leave to file a third amended complaint. The motion was opposed by Coshocton Hospital and Dr. Mendiola on September 21 and September 23, 2020, respectively. A reply brief was filed on September 28,

---

[1] Appellant contends she sent multiple 180-day letters to appellees pursuant to ***R.C. 2305.113(B)(1)***.

[2] On October 23, 2008, appellant filed an amended complaint. Appellant later filed a motion for leave to file a second amended complaint, which was granted by the trial court. On August 10, 2009, appellant filed a second amended complaint.

2020. The trial court denied appellant's motion for leave to amend on December 11, 2020. On January 26, 2021, the trial court granted Dr. Mendiola's motion for judgment on the pleadings finding that appellant's wrongful death claim was a medical claim under *R.C. 2305.113(E)* and, thus, barred by the statute of repose.[3]

[*P10] Appellant filed a timely appeal.

II. ASSIGNMENTS OF ERROR

[*P11] Appellant assigned the following as trial court error:

> [1.] The trial court erred when it applied the statute of repose for medical claims to a statutory wrongful death claim.
>
> [2.] The trial court [***6] erred by denying Everhart leave to file a Third Amended Complaint.

III. LEGAL ANALYSIS

A. Appellant's First Assignment of Error

[*P12] In appellant's first assignment of error, she argues the trial court erred when it applied the statute of repose for medical claims to a statutory wrongful death claim.[4]

1. Standard of Review

[*P13] A motion for judgment on the pleadings under *Civ.R. 12(C)* "has been characterized as a belated *Civ.R. 12(B)(6)* motion for failure to state a claim upon which relief can be granted." *Easter v. Complete Gen. Constr. Co., 10th Dist. No. 06AP-763, 2007-Ohio-1297, ¶ 8*, citing *Whaley v. Franklin Cty. Bd. of Commrs., 92 Ohio St.3d 574, 581, 2001-Ohio-1287, 752 N.E.2d 267 (2001)*. As set forth in *Civ.R. 12(C)*, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The moving party is entitled to judgment on the pleadings when, after construing all the material assertions in the complaint as true and considering all reasonable inferences in favor of the nonmoving party, the moving party is entitled to judgment as a matter of law. *Welther v. Plageman, 10th Dist. No. 19AP-774, 2021-Ohio-713, ¶ 6*, citing *Zheleznv v. Olesh, 10th Dist. No. 12AP-681, 2013-Ohio-4337, ¶ 8*. "A motion for judgment on the pleadings is specifically intended for resolving questions of law." *Easter at ¶ 9*, citing *Friends of Ferguson v. Ohio Elections Comm., 117 Ohio App.3d 332, 334, 690 N.E.2d 601 (10th Dist.1997)*. Appellate review of a motion for judgment on the pleadings under *Civ.R. 12(C)* is de novo. *Kamnikar v. Fiorita, 10th Dist. No. 16AP-736, 2017-Ohio-5605, ¶ 35*.

[**237] 2. Wrongful [***7] Death Statute, *R.C. 2125.01*.

[*P14] Ohio first enacted a wrongful death statute in 1851. *Karr v. Sixt, 146 Ohio St. 527, 67 N.E.2d 331 (1946), paragraph one of the syllabus*, citing 13 Ohio Jurisprudence, 384, Section 33. Prior to its enactment, there was no such statutory basis for the cause of action under Ohio law. *Id.* Currently, a cause of action for wrongful death is governed by *R.C. 2125*. Pursuant to *R.C. 2125.01*, a wrongful death claim occurs:

> When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent [***8] unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the

---

[3] On August 25, 2021, this court issued a memorandum decision finding that the trial court's January 26, 2021 decision and trial court's denial of leave to file a third amended complaint constituted a final, appealable order. (Aug. 25, 2021 Memo Decision.)

[4] At the onset of this decision, we make special note of the well-reasoned analysis by Judge Woods in *Giannobile, et al. v. Riverside Radiology Interventional Assoc., Inc., et al.*, Franklin C.P. No. 15CV-1854 (May 4, 2018).

owner or lessee constitute gross negligence.

When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

[*P15] Since the inception of the wrongful death statute, the Supreme Court of Ohio has recognized that wrongful death is a separate and unique claim writing "an action for wrongful death, creates a new cause or right of action distinct and apart from the right of action which the injured person might have had and upon the existence of which such new right is conditioned." _Karr at paragraph one of the syllabus_. The United States Supreme Court in _St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 658, 35 S. Ct. 704, 59 L. Ed. 1160 (1915)_, later quoted in _Klema v. St. Elizabeth's Hosp., 170 Ohio St. 519, 521-22, 166 N.E.2d 765 (1960)_, observed the established differences between a medical negligence and wrongful [***9] death claim writing:

"Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong."

Klema at 521, quoting _Iron Mountain at 658_.

[*P16] There is no doubt that wrongful death is a separate and unique cause of action from other claims.

[**238] **3. Medical Malpractice and Statute of Repose under *R.C. 2305.113(C)***

[*P17] Conversely, the cause of action for medical malpractice is derived from common law. _Koler v. St. Joseph Hosp., 69 Ohio St.2d 477, 479, 432 N.E.2d 821 (1982)_. The General Assembly enacted *R.C. 2305.113* to establish "[l]imitation[s] of actions for medical malpractice." *R.C. 2305.113(C)* imposes a four-year statute of repose[5] for "medical claims,"[6] stating:

(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. [***10]

(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.

[*P18] The Supreme Court of Ohio has explained the legislative purpose of enacting a statute of repose for medical malpractice claims under *R.C. 2305.113(C)*, writing:

"Many policy reasons support this legislation. Just as a plaintiff is entitled to a meaningful time and opportunity to pursue a claim, a defendant is entitled to a reasonable time after which he or she can be assured that a defense will not have to be mounted for actions occurring years before. The statute of repose exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation.

Forcing medical providers to defend against medical claims that occurred 10, 20, or 50 years before presents a host of litigation concerns, including the risk that evidence is unavailable through the death or unknown whereabouts of witnesses, the possibility that pertinent documents [***11] were not retained, the likelihood that evidence would be untrustworthy due to faded memories, the potential that technology may have changed to create a different and more stringent standard of care not applicable to the earlier time, the risk that the medical providers' financial circumstances may have changed—i.e., that

[5] ***R.C. 2305.113(C)*** includes exceptions in cases for "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."

[6] A "medical claim," as defined under ***R.C. 2305.113(E)(3)***, is "any claim that is asserted in any civil action against a physician, podiatrist, hospital * * * and that arises out of the medical diagnosis, care, or treatment of any person."

practitioners have retired and no longer carry liability insurance, the possibility that a practitioner's insurer has become insolvent, and the risk that the institutional medical provider may have closed.

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."

Antoon. 2016-Ohio-7432. at ¶ 18. 148 Ohio St. 3d 483. 71 N.E.3d 974, quoting *Ruther v. Kaiser. 134 Ohio St.3d 408. 2012-Ohio-5686. ¶ 19-21. 983 N.E.2d 291*.

[*P19] As noted in *Antoon*, the Supreme Court of Ohio limited its analysis, however, to the application of the statute of repose to medical malpractice cases. The question [**239] becomes whether Ohio's medical malpractice statute of repose, *R.C. 2305.113(C)*, applies to a wrongful death action under *R.C. 2125.02*.

[*P20] As a cause of action for wrongful death is statutory in nature, we begin our analysis with the text of the wrongful death statute, *R.C. 2125.02*. The central focus in statutory [***12] interpretation is ascertaining and giving effect to the legislature's intent in enacting the statute. *Gabbard v. Madison Local School Dist. Bd. of Edn., Ohio St. , 2021-Ohio-2067, ¶ 13*, citing *State ex rel. Steele v. Morrissey. 103 Ohio St.3d 355. 2004-Ohio-4960. ¶ 21. 815 N.E.2d 1107*. "To discern that intent, we first consider the statutory language, reading all words and phrases in context and in accordance with the rules of grammar and common usage. We give effect to the words the General Assembly has chosen, and we may neither add to nor delete from the statutory language." (Citation omitted.) *Gabbard at ¶ 13*, citing *Columbia Gas Transm. Corp. v. Levin. 117 Ohio St.3d 122. 2008-Ohio-511. ¶ 19. 882 N.E.2d 400*. When the meaning is unambiguous and definite, we must apply the statute as written. *Portage Cty. Bd. of Commrs. v. Akron. 109 Ohio St.3d 106. 2006-Ohio-954. ¶ 52*, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn., 74 Ohio St.3d 543. 545. 1996-Ohio-291. 660 N.E.2d 463 (1996)*. "[I]f the General Assembly could have used a particular word in a statute but did not, we will not add that word by judicial fiat." *Hulsmeyer v. Hospice of Southwest Ohio, Inc.. 142 Ohio St.3d 236. 2014-Ohio-5511. ¶ 26. 29 N.E.3d 903*, citing *In re Application of Columbus S. Power Co.. 138 Ohio St.3d 448. 2014-Ohio-462. ¶ 26*. If the statutory language is clear, this court applies the language as written and need not require consideration of statutory tools of interpretation or consideration of public policy. *Gabbard at ¶ 13*, citing *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.. 128 Ohio St.3d 492. 2011-Ohio-1603. ¶ 23-24. 26. 946 N.E.2d 748*. "An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words." *Portage Cty. at ¶ 52*, citing *State ex rel. Burrows v. Indus. Comm.. 78 Ohio St.3d 78. 81. 1997-Ohio-310. 676 N.E.2d 519 (1997)*.

[*P21] Upon review, *R.C. 2125.02* does not provide a statute of repose for a wrongful death arising out of a medical claim. The only statute of repose included in *R.C. 2125.02* is in the [***13] products liability context, which states "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 to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product." *R.C. 2125.02(D)(2)*. This court sees nothing ambiguous in the language of *R.C. 2125.02(D)(2)*. Moreover, *R.C. 2125.02(D)(2)* makes no reference to another statute that might inform the analysis. As there is no statute of repose for wrongful death claims originating out of a medical claim provided in *R.C. 2125.02*, or statute incorporated by reference, we conclude the General Assembly did not intend to create one in this context.

[*P22] Arguendo, even if the statutory language was ambiguous,[7] we [**240] reach the same conclusion, i.e., that a wrongful death claim derived from a medical claim is not barred by the four-year statute of repose under *R.C. 2305.113(C)*. We first consider *R.C. 2125.02(D)(2)* as guided by the canon of statutory construction expressio unius est exclusio alterius, the expression of one or more items of a class implies that

[7] When "'the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation.'" *Turner v. Hooks. 152 Ohio St.3d 559. 2018-Ohio-556. ¶ 12. 99 N.E.3d 354*, quoting *Cline v. Ohio Bur. of Motor Vehicles. 61 Ohio St.3d 93. 96. 573 N.E.2d 77 (1991)*. However, "[w]hen the language of a statute is ambiguous, we resort to the rules of construction to discern its meaning." *Turner at ¶ 10*. (writing "where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent").

those not included [***14] are excluded.[8] State v. Droste, 83 Ohio St.3d 36, 39, 1998-Ohio-182, 697 N.E.2d 620 (1998), citing Thomas v. Freeman, 79 Ohio St.3d 221, 224-25, 1997-Ohio-395, 680 N.E.2d 997 (1997). "'The General Assembly is presumed to have known that its designation of a remedy would be construed to exclude other remedies, consistent with the statutory construction maxim of expressio unius est exclusio alterius.'" New Albany Park Condo. Assn. v. Lifestyle Communities, Ltd., 195 Ohio App.3d 459, 2011-Ohio-2806, ¶ 23, 960 N.E.2d 992 (10th Dist.), quoting Hoops v. United Tel. Co. of Ohio, 50 Ohio St.3d 97, 101, 553 N.E.2d 252 (1990). However, "'the canon expressio unius est exclusio alterius does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.'" New Albany at ¶ 23, quoting Barnhart v. Peabody Coal Co., 537 U.S. 149, 168, 123 S. Ct. 748, 154 L. Ed. 2d 653 (2003), citing United States v. Vonn, 535 U.S. 55, 65, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002); Summerville v. Forest Park, 128 Ohio St.3d 221, 2010-Ohio-6280, ¶ 35, 943 N.E.2d 522.

[*P23] Here, R.C. 2125.02(D)(2) singularly addresses wrongful death involving products liability. The General Assembly is aware that wrongful death claims may arise in a variety of other circumstances and decided to only provide a statute of repose in the products liability context. Accordingly, the most reasonable reading of R.C. 2125.02 is that the General Assembly intended to exclude other types of causes of action, such as medical claims, unless otherwise incorporated by reference in another statute.

[*P24] Appellees argue the four-year statute of repose for a medical malpractice claim precludes a wrongful death cause [***15] of action if it arises from a medical claim. Appellees rely on another statutory canon, "in pari materia, which means 'upon the same matter or subject.'" Thomas, 79 Ohio St.3d 225, quoting *Black's Law Dictionary* 791 (6th Ed.1990). Appellees contend that as the wrongful death and medical malpractice statute deal with the same underlying claim they should be read as if they were one statute. We disagree.

[*P25] *R.C. 2305.113* concerns "[l]imitation of actions for medical malpractice; statute of repose." There is not a single reference to wrongful death in *R.C. 2305.113*. While *R.C. 2305.113(E)* does define "medical claims," we are not persuaded that wrongful death is encompassed under the statute simply because they [**241] share the same underlying type of negligence. It is well-established that wrongful death and medical malpractice are separate and unique causes of action even when the case is derived from a medical claim. *See* Koler at 484 (Celebreeze, J., concurring) ("Medical malpractice is separate and distinct from wrongful death. These are distinct wrongs."). *R.C. 2305.113(E)* lists a series of derivative claims for relief for purposes of its definition of medical claim. *R.C. 2305.113(E)(7)* states:

> "Derivative claims for relief" include, but are not limited to, claims of a parent, guardian, custodian, or spouse [***16] of an individual who was the subject of any medical diagnosis, care, or treatment, dental diagnosis, care, or treatment, dental operation, optometric diagnosis, care, or treatment, or chiropractic diagnosis, care, or treatment, that arise from that diagnosis, care, treatment, or operation, and that seek the recovery of damages for any of the following:
>
> (a) Loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, or any other intangible loss that was sustained by the parent, guardian, custodian, or spouse;
>
> (b) Expenditures of the parent, guardian, custodian, or spouse for medical, dental, optometric, or chiropractic care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations provided to the individual who was the subject of the medical diagnosis, care, or treatment, the dental diagnosis, care, or treatment, the dental operation, the optometric diagnosis, care, or treatment, or the chiropractic diagnosis, care, or treatment.

[*P26] Here, the causes of action identified as "derivative claims for relief" do not include wrongful death. Again, the statutory [***17] canon expressio unius est exclusio alterius informs our analysis that the inclusion of these causes of action implicitly excludes others. While the General Assembly's inclusion of the phrase "but are not limited to" leaves open the

[8] Black's Law Dictionary defines expressio unius est exclusio alterius as "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. * * * For example, the rule that 'each citizen is entitled to vote' implies that noncitizens are not entitled to vote." *Black's Law Dictionary* 701 (10th Ed.2014).

possibility a cause of action for wrongful death falls under this category, a wrongful death claim is not a derivative claim of medical malpractice, but a separate, independent cause of action. "Because a wrongful death action is an independent cause of action, the right to bring the action cannot depend on the existence of a separate cause of action held by the injured person immediately before his or her death. *To conclude otherwise would convert the wrongful death action from an independent cause of action to a derivative action, one dependent on a separate cause of action.*" (Emphasis added.) Thompson v. Wing, 70 Ohio St.3d 176, 1994-Ohio-358, 637 N.E.2d 917 (1994).

[*P27] The General Assembly has demonstrated that it is capable of enacting a statute of repose that addresses wrongful death claims in other contexts. In 1963, the General Assembly first enacted *R.C. 2305.131* creating a statute of repose for claims derived from unsafe conditions of real property improvement. *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc., 157 Ohio St.3d 164, 2019-Ohio-2851, ¶ 10, 133 N.E.3d 482*. *R.C. 2305.131* recognized that architects and builders are exposed to liability for [***18] extended periods of time based on the permanency of buildings. *Id.* In 2005, the General Assembly enacted the current iteration of *R.C. 2305.131*, which reads:

> [N]o 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 [**242] condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of 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 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).

[*P28] As set forth in *R.C. 2305.131*, a claim for wrongful death that arises out of a defective or unsafe condition of an improvement to real property is precluded if it is not filed within ten years from the date of substantial completion of such improvement. The medical malpractice statute of repose, *R.C. 2305.113*, unlike *R.C. 2305.131*, makes [***19] no mention of whether wrongful death derived from medical claims is covered under the four-year statute of repose. Accordingly, when comparing the language of *R.C. 2305.113* and *2305.131*, it is clear the General Assembly intended to exclude wrongful death claims from the statute of repose for medical malpractice. Finally, the plain language of Ohio's borrowing statute, *R.C. 2305.03*, is also informative as to this issue. The statute addresses defenses based on time limitations, which would include a statute of repose for medical claims. *R.C. 2305.03(A)* states:

> Except as provided in division (B) of this section and *unless a different limitation is prescribed by statute*, a civil action may be commenced only within the period prescribed in *sections 2305.04 to 2305.22 of the Revised Code*. If interposed by proper plea by a party to an action mentioned in any of those sections, lapse of time shall be a bar to the action.

(Emphasis added.)

[*P29] As noted in *Giannobile, et al. v. Riverside Radiology Interventional Assoc., Inc., et al.*, Franklin C.P. No. 15CV-1854 (May 4, 2018), *R.C. 2125.02* certainly qualifies as a statute imposing a different time limitation. As the wrongful death statute has its own time limitations, it would be excluded from *R.C. 2305.03*. Given these facts, we conclude that the General Assembly did [***20] not intend to create a statute of repose for wrongful death arising out of a medical claim. Simply put, if the legislature had intended a statute of repose in this context, it would have said so either expressly in *R.C. 2125.02*, as was the case in the products liability context, or expressly included wrongful death in the medical malpractice statute of repose, *R.C. 2305.113*, as it did in *R.C. 2305.131* for claims derived from unsafe conditions of real property improvement.

[*P30] Distinguishing the statute of repose for medical malpractice from the wrongful death statute conforms with many other statutory and procedural requirements that differentiate the two causes of action. Of note, a wrongful death claim is governed by *R.C. Chapter 2125* and a medical malpractice action is set forth at common law. *Ruther at ¶ 29*; *Koler at 479*. In bringing a wrongful death claim, *Civ.R. 25(E)* requires counsel to provide for the court a suggestion of death on the record. A wrongful death action must be brought by an administrator, executor, or personal representative of the decedent's estate while a medical negligence claim

is generally brought by the injured party. *Peters v. Columbus Steel Castings Co., 115 Ohio St.3d 134, 2007-Ohio-4787, ¶ 10, 873 N.E.2d 1258*; [**243] *R.C. 2125.02(A)*.[9] A wrongful death action seeks damages for injuries by the surviving next of kin after the decedent's death as compared to a medical [***21] negligence claim that seeks damages sustained by the injured party after the injury. *R.C. 2125.02(A)(1)*. A wrongful death claim can only be brought after death and is pled as a separate cause of action from medical negligence. *Mansour v. Woo, 8th Dist. No. 2011-A-0038, 2012-Ohio-1883, ¶ 35*, citing *Karr*. There are also statutory limits of compensatory damages representing noneconomic loss for medical malpractice damages, which do not apply to wrongful death claims. *See R.C. 2323.43(G)* and *(3)* ("This section does not apply to any of the following * * * [w]rongful death actions brought pursuant to Chapter 2125. of the Revised Code."). Finally, the statute of limitations for a medical malpractice action is one year after the cause of action accrued, while a wrongful death claim must be brought within two years after the decedent's death. *R.C. 2305.113*; *R.C. 2125.02(D)*. The distinction in the statute of limitations applies even when the wrongful death cause of action arises out of a "medical claim." *Koler*. Pursuant to *R.C. 2305.113*, the statute of limitations for medical malpractice may be extended by the 180- day letter while *R.C. 2125.02* includes no such provision. Given the many differences between the two claims, not exhaustively provided in this decision, there is no reason to believe the General Assembly did not intend to do the same [***22] with the statute of repose.

[*P31] Appellees rely on several cases from the Supreme Court of Ohio that conclude *R.C. 2305.113* imposes a true statute of repose for medical malpractice claims. Appellees state these cases should be applied in this instance as the wrongful death cause of action arises out of a medical claim. A brief analysis of these cases is instructive.

[*P32] In *Ruther, 2012-Ohio-5686*, a widow brought a medical malpractice action against defendants for failure to evaluate an abnormal laboratory result regarding high liver enzymes. The Supreme Court took the case for the proposition that *R.C. 2305.113(C)* does not violate the open courts provision, *Section 16, Article I, of the Ohio Constitution*. In *Ruther*, the Supreme Court found that *R.C. 2305.113(C)* was a valid exercise of the General Assembly's authority to limit a cause of action and constituted a "true statute of repose." *Id. at ¶ 18*. Similarly, the Supreme Court in *Antoon* found the statute was constitutional, writing "the plain language of [*R.C. 2305.113(C)*] is clear, unambiguous, and means what it says. If a lawsuit bringing a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action on that claim is barred." *Antoon at ¶ 23*. Recently, the Supreme Court [***23] addressed *R.C. 2305.113(C)* in *Wilson v. Durrani, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448*. In *Wilson*, the Supreme Court considered whether Ohio's savings statute applies to a refiled medical claim after the applicable one-year statute of limitations had expired if the four-year statute of repose for medical claims had also lapsed. The Supreme Court in *Wilson* wrote that while the statutes of limitation and repose share common objectives, "they [**244] operate differently and have distinct applications." *Wilson at ¶ 8*, citing *Antoon at ¶ 11*, citing *CTS Corp. v. Waldburger, 573 U.S. 1, 7, 134 S. Ct. 2175, 189 L. Ed. 2d 62 (2014)*. The *Wilson* court examined the two terms, writing:

> A statute of limitations establishes "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1707 (11th Ed.2019). A statute of limitations operates on the remedy, not on the existence of the cause of action itself. *Mominee v. Scherbarth, 28 Ohio St.3d 270, 290, 28 Ohio B. 346, 503 N.E.2d 717, fn. 17* (Douglas, J., concurring). A statute of repose, on the other hand, bars "any suit that is brought after a specified time since the defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* at 1707. A statute of repose bars the claim—the right of action—itself. *Treese v. Delaware, 95 Ohio App.3d 536, 545, 642 N.E.2d 1147 (10th Dist.)*. The United States Supreme Court has likened the bar imposed by [***24] a statute of repose to a discharge in bankruptcy—as providing "a fresh start" and "embod[ying] the idea that at some point a defendant should be able to put past events behind him." *CTS Corp. at 9*.
>
> Statutes of limitations and statutes of repose target

[9] "[A] civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent." *R.C. 2125.02(A)*.

> different actors. *Id. at 8*. Statutes of limitations emphasize plaintiffs' duty to diligently prosecute known claims. *Id.*, citing *Black's Law Dictionary* 1546 (9th Ed.2009). Statutes of repose, on the other hand, emphasize defendants' entitlement to be free from liability after a legislatively determined time. *Id. at 9*. In light of those differences, statutory schemes commonly pair a shorter statute of limitations with a longer statute of repose. *California Pub. Emps.' Retirement Sys. v. ANZ Securities, Inc., U.S. , 137 S.Ct. 2042, 2049, 198 L.Ed.2d 584 (2017)*. When the discovery rule—that is, the rule that the statute of limitations runs from the discovery of injury—governs the running of a statute of limitations, the "discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability." *Id. at , 137 S.Ct. at 2050*.

Id. at ¶ 9-10.

[*P33] The Supreme Court in *Wilson* ultimately found *R.C. 2305.113(C)* "provid[es] an absolute temporal limit on a defendant's potential liability," and a plaintiff may not [***25] "take advantage of Ohio's saving statute to refile a medical claim after the applicable one-year statute of limitations has expired if the four-year statute of repose for medical claims has also expired." *Wilson at ¶ 1, 37*. While it is evident that *Ruther*, *Antoon*, and *Wilson* offer a well-supported body of case law that a medical malpractice claim is barred after the four-year statute of repose has expired, the Supreme Court has never expanded such a preclusion to Ohio's wrongful death statute, *R.C. 2125.02*. While the rationale provided by the General Assembly for creating a statute of repose for medical malpractice claims could apply to wrongful death, that does not mean the legislature, in fact, created one in this context. Accordingly, we find these cases distinct as none of them address whether a wrongful death case is a medical claim for purposes of barring a claim under the medical malpractice four-year statute of repose.

4. Other Ohio Appellate Districts

[*P34] Appellees argue three Ohio appellate courts have found Ohio's medical [**245] malpractice statute of repose precludes a wrongful death action if the case is derived from a medical claim. *See Smith v. Wyandot Mem. Hosp., 3d Dist. No. 16-17-07, 2018-Ohio-2441, 114 N.E.3d 1224*; *Fletcher v. Univ. Hosps. of Cleveland, 8th Dist. No. 88573, 2007-Ohio-2778, 172 Ohio App. 3d 153, 873 N.E.2d 365*, rev'd on other grounds, *120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147*; *Mercer v. Keane, 5th Dist. No. 20CA0013, 2021-Ohio-1576, 172 N.E.3d 1101*. We will discuss each case in turn.

[*P35] In *Fletcher* [***26], the Eighth District Court of Appeals considered whether an affidavit of merit must be filed with a wrongful death action under *R.C. 2125*. The *Fletcher* court concluded the alleged injury was based on a medical claim and an affidavit of merit was required to establish the adequacy of the complaint for purposes of *Civ.R. 10(D)(2)*.[10] *Fletcher*, however, did not consider the language in the wrongful death statute, *R.C. 2125.02(D)*, or address the medical malpractice statute of repose under *R.C. 2305.113(C)*. Furthermore, in *Civ.R. 10(D)(2)*, unlike *R.C. 2125.02*, the General Assembly specifically identified the term "medical claim" as defined in *R.C. 2305.113(C)*. "[A] complaint that contains a medical claim * * * as defined in *R.C. 2305.113*, shall be accompanied by one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability." *Civ.R. 10(D)(2)*. This harmonizes with the intent of *Civ.R. 10(D)(2)*, which ensures that a party's complaint meets basic sufficiency standards. Accordingly, we find *Fletcher* distinct from the issue at hand as to whether the statute of repose under *R.C. 2305.113* encompasses a cause of action for wrongful death that arises from a medical claim.

[*P36] In *Smith*, the Third District Court of Appeals affirmed the trial court's decision to dismiss [***27] the estate's complaint for wrongful death concluding the action was based on a medical claim and, therefore, outside the medical malpractice statute of repose, *R.C. 2305.113*. The *Smith* court begins its analysis by citing well-established Ohio law that statutory interpretation requires examining the statute's plain language. *Id. at ¶ 17*, quoting *Antoon at ¶ 20*, citing *State ex rel. Burrows at 81* ("'To determine legislative intent, we must first examine the plain language of the statute.'"). The *Smith*

---

[10] The Eighth District Court of Appeals reached a similar result in *Chromik v. Kaiser Permanente, 8th Dist. No. 89088, 2007-Ohio-5856*, finding that the trial court did not err in dismissing the complaint setting forth survivorship and wrongful death claims as it did not comport with ***Civ.R. 10(D)(2)*** by failing to file an affidavit of merit. For the reasons set forth in our analysis of *Fletcher*, we find that the express procedural requirements of ***Civ.R. 10(D)(2)*** that ensure the sufficiency of the complaint are distinct from whether the statute of repose set forth in ***R.C. 2305.113(C)*** apply to a wrongful death claim.

court, erroneously in our view, then proceeds to examine the medical malpractice statute, *R.C. 2305.113(C)*, instead of the wrongful death statute, *R.C. 2125.02*. The *Smith* court fails to include any discussion as to the statute of repose provided in *R.C. 2125.02(D)(2)*, but instead mistakenly applies the medical malpractice statute, and analysis in *Antoon*, to the wrongful death statute writing:

> The Supreme Court of Ohio stated that Ohio's medical-claim statute of repose clearly and unambiguously bars "*any* action" bringing a medical claim commenced more than four years after the occurrence of the act or omission constituting the basis for the claim. (Emphasis sic.) *[Antoon] at ¶ 23*. Because *any action* bringing a medical claim is barred [**246] by Ohio's medical-claim statute of repose if it is not timely commenced, we conclude [***28] that wrongful-death actions fall within the scope of "any action" and are subject to the time restraints of the statute of repose.

(Emphasis sic.) *Smith at ¶ 22*.

[*P37] Upon review, the phrase "any action" in *Antoon*, subsequently adopted in *Wilson*, refers to medical malpractice and derivative claims under *R.C. 2305.113*. This is clear from the proposition of law in *Antoon*, which reads: "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." *Id. at ¶ 10*. Moreover, the Supreme Court in *Fletcher*, when considering the case on an unrelated proposition of law, expressly stated "Fletcher did not cross-appeal the appellate court's ruling that her wrongful-death claim requires an affidavit [as it was a "medical claim"], so that issue is not before us." *Fletcher, 120 Ohio St.3d 167, 2008- Ohio 5379, 897 N.E.2d 147 at fn. 2*. As such, *Smith*'s application of the medical malpractice statute of repose to wrongful death claims based on Supreme Court precedent conflicts with the proposition of law accepted in *Antoon* and plain language of *Fletcher*.

[*P38] Moreover, [***29] *Smith*'s holding ignores the well-established case law that wrongful death and medical malpractice are separate and unique claims. The Supreme Court of Ohio has consistently found medical malpractice and wrongful death are distinct causes of action. The most developed example of this distinction is regarding statute of limitations. *See Klema, 170 Ohio St. 519*. In *Klema*, the Supreme Court considered whether the medical malpractice or the wrongful death statute of limitations applied to a cause of action for wrongful death when the case involves a medical claim. The Supreme Court in *Klema* found that the medical malpractice statute of limitations did not apply to wrongful death claims stating "[t]he action being a statutory one relating to a specific type of cause, *i.e.*, wrongful death, the phrase, 'except as otherwise provided by law,' can only relate to other provisions relating to death. And the only other provisions relating to death actions are those contained in the wrongful death statute itself." *Id. at 524*. The Supreme Court in *Klema* concluded that the malpractice statute of limitations, set out in a separate provision of the Ohio Revised Code, did not apply to a wrongful death claim. *Id.*

[*P39] In *Koler, 69 Ohio St.2d 477*, the Supreme Court [***30] considered whether a one-year statute of limitations for medical malpractice should control over the two-year statute of limitations for wrongful death claims because the case involved a complaint against a hospital and, therefore, was a medical claim. The defendants in *Koler* argued the changes to the statutory language demonstrated the General Assembly's intent to include wrongful death claims within the meaning of malpractice. *Id. at 480*. The Supreme Court disagreed reaffirming the holding in *Klema* concluding that the two claims are distinct causes of action even when arising from a "medical claim." *Id. at 480-81*. """[N]o part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same [**247] action is not a double recovery for a single wrong but a single recovery for a double wrong.""" *Koler at 823*, quoting *Klema at 521*, quoting *Iron Mountain, 237 U.S. 658*. The holding in *Koler* remains good law and has been consistently applied by Ohio appellate courts. *See Fletcher, 2007-Ohio-2778, at ¶ 8, 172 Ohio App. 3d 153, 873 N.E.2d 365*, citing *Koler* ("We are well aware that *R.C. 2305.113* does [***31] not supply the statute of limitations for a wrongful death claim."); *Evans v. S. Ohio Med. Ctr., 103 Ohio App.3d 250, 659 N.E.2d 326 (4th Dist.1995)* ("As a result, even when a plaintiff fails to file a negligence action or a malpractice action within the applicable statute of limitations, the wrongful death claim is not time-barred as long as it is filed within two years after the decedent's death."); *Heck v. Thiem*

Corp., 7th Dist. No. 93-C-55, 1994 Ohio App. LEXIS 5603 (1994) ("Ohio has ruled that a wrongful death claim is a new and separate cause of action unaffected by an underlying tort action which may have otherwise been barred."); Brosse v. Cumming, 20 Ohio App.3d 260, 20 Ohio B. 322, 485 N.E.2d 803 (8th Dist.1984), paragraph two of the syllabus ("Since R.C. 2305.11(A) (medical malpractice) and R.C. 2125.01 and 2125.02 (wrongful death) provide for distinct and independent causes of action, the fact that the right of action of the injured person was barred pursuant to R.C. 2305.11(A) before he died does not constitute a bar to the right of action of his administratrix to bring an action for wrongful death, the only limitation being that the action for wrongful death must be commenced within two years after the decedent's death.").

[*P40] Similarly, federal courts have also cited *Klema* and *Koler* for the proposition that, under Ohio law, the statute of limitations for wrongful death and medical malpractice are distinct even when the case involves a "medical claim." De La Torre v. Corr. Corp. of Am., 2017 U.S. Dist. LEXIS 210999 (N.D.Ohio 2017) (writing [***32] "when reviewing the timeliness of a wrongful death action, the Ohio Supreme Court held that the expiration of the statute of limitations period for a medical malpractice action does not mean that a wrongful death action is necessarily untimely"); Daniel v. United States, 977 F.Supp.2d 777, 782 (N.D.Ohio 2013) ("Whatever confusion there may be regarding the relative meanings of the terms 'medical claim' and 'malpractice,' it was clear to the *Koler* court that a malpractice action could not be a wrongful death action."). At the very least, these cases stand for the proposition that there is no basis to assume the definition of "medical claim" under *R.C. 2305.113(C)* should be applied under R.C. 2125.02.

[*P41] In *Daniel*, the United States District Court for the Northern District of Ohio concluded the statute of repose in *R.C. 2305.113(C)* did not apply to a wrongful death action based, in part, on the Supreme Court of Ohio's case law in *Klema* and *Koler*. As stated in *Daniel*:

> The current wrongful death statute reads: "Except as provided in division (D)(2) of this section, a civil action for wrongful death shall be commenced within two years after the decedent's death." Ohio Rev. Code § 2125.02(D)(1). Section (D)(2) of the wrongful death statutes only deals with "wrongful deaths involving products liability." That is the sole category of exceptions [***33] to the two-year wrongful death statute of limitations the Ohio legislature has seen fit to include. Following the reasoning in *Klema* and *Koler*, the Court finds that the "medical claim" statute of repose, set forth in another division of the code and not in the wrongful death division, does not apply to plaintiff's wrongful death claim.

Id. at 782-83.

[*P42] In *Smith*, the Third District disagreed with the analysis in *Daniel* finding [**248] that a statute of repose and statute of limitations have different applications.[11] *Smith* based its analysis on the different motivations between the statute of limitations and statute of repose.

[*P43] The Smith court's argument misses the mark. Daniel did not equate statute of repose and statute of limitations but analogized that when addressing a similar argument regarding whether a medical malpractice time limitation should apply to a wrongful death claim, outstanding Supreme Court precedent has recognized that the two causes of action are unique. The statute of limitations analysis in *Daniel* provides an instructive example of how simply considering all "medical claims" in the same manner, despite wrongful death and medical negligence having separate statutes, is the incorrect [***34] approach. While there is no doubt that the statute of limitations and statute of repose address different motivations and actors, the central argument of *Daniel* is correct, that a reviewing court should not apply a definition of "medical claims" addressing medical malpractice actions when considering a wrongful death case unless there is a statutory basis for such an interpretation.

[*P44] As noted in *Daniel*, in addition to the plain language of R.C. 2125.02, the analysis in Koler demonstrates that the General Assembly was cognizant that the Klema court had refused to apply the medical malpractice statute to the wrongful death claim yet did not change R.C. 2125.02. In those cases, the Supreme Court indicated that absent clear legislative action, a wrongful death claim is only governed by the wrongful death statute. The same logic applies to the statute of repose. The legislature is aware that the *Klema* and

[11] The *Smith* court wrote "similar to the issue presented in Daniel v. United States, [the appellant] argues that Ohio's medical-claim statute of repose does not apply to wrongful-death actions because a wrongful death action is subject to its own statute of limitations under R.C. 2125.02(D)(1)." Id. at ¶ 23.

Koler courts have concluded that wrongful death and medical malpractice claims are separate, unique causes of action. Understanding this precedent, the General Assembly created a statute of repose for wrongful death claims arising out of products liability but declined to create such a time limitation for a wrongful [***35] death action derived from medical claims under R.C. 2125.02. "The fact that a statutory wrongful death claim is completely independent and distinct from the underlying claims of a decedent suggests that limitations of the underlying claim, such as statutes of limitations and statutes of repose, do not apply in a wrongful death action." *Giannobile*, Franklin C.P. No. 15CV-1854, at 10. If the General Assembly intended *R.C. 2305.113* to control all medical claims, a wrongful death cause of action based on medical claims would have been subject to the one-year statute of limitations as set forth in *R.C. 2305.113(A)*. As wrongful death and medical malpractice are separate causes of action, time limitations intended for medical malpractice, i.e., the statute of limitations and statute of repose, should not be applied to a wrongful death claim.[12]

[*P45] [**249] Finally, the Fifth District Court of Appeals has recently considered whether the statute of repose in *R.C. 2305.113(C)* applies to a wrongful death claim arising out of the same events that led to the medical malpractice action. *See* Mercer, 2021-Ohio-1576. A brief review of the case is illustrative.

[*P46] In 2012, Mr. Mercer presented for an MRI of the lumbar spine due to lower back pain. In 2015, Mr. Mercer [***36] had a subsequent MRI, which discovered an undiagnosed sacral mass later found consistent with sacral chordoma. Mr. Mercer, his wife, and minor child filed a medical malpractice and loss of consortium action in 2016. On February 29, 2020, Mr. Mercer passed away and a suggestion of death was listed as metastatic chordoma to the pelvis and sacrum. In May 2020, Mrs. Mercer, as executor of the estate of Mr. Mercer, filed a motion to order substitution of proper parties and amend the complaint which was granted by the trial court. The amended complaint converted the medical malpractice action to a survivorship claim, removed the loss of consortium claim, and added a wrongful death claim pursuant to R.C. 2125.01 and 2125.02. The amended complaint was filed seven years after the alleged act that was the basis of the claim. The defendants in the case filed a motion for partial summary judgment arguing that the wrongful death action was filed beyond the four-year statute of repose under *R.C. 2305.113(C)*. The trial court agreed and granted the motion finding the four-year statute of repose barred the filing of the wrongful death action. The Fifth District Court of Appeals affirmed the trial court decision on the same basis. The [***37] *Mercer* court, "acknowledge[d] the result of this appeal is harsh and perhaps unintended by the General Assembly when it crafted the medical claim statute of repose, especially considering the advances in medical care allowing people to live longer with a diagnosis of cancer or other life-threatening malady." *Id. at ¶ 41*.

[*P47] The Fifth District in *Mercer* relied, in part, on the analysis in *Wilson*, which examined the two exceptions in *R.C. 2305.113(C)* that toll the statute of repose: (1) when there is a person within the age of minority or of unsound mind as provided in R.C. 2305.16 or (2) those claims that accrue in the last year of the statute of repose period and those that are based upon a foreign object left in a person's body. Mercer at ¶ 33, citing *Wilson at ¶ 29*. The *Mercer* court concluded that because these exceptions were provided in *R.C. 2305.113*, "[i]t was clear to the Court that the General Assembly knew how to make an exception to the statute of repose when it intended to do so, and as to the medical claim statute of repose, it chose not to make the exception." *Id. at ¶ 34*. *Mercer* also based its analysis of the wrongful death claim under the medical malpractice statute, writing "'*R.C. 2305.113(C)* "means what it says.

[12] During the circulation of this decision, appellees filed a notice of supplemental authority in Martin v. Taylor, 11th Dist. No. 2021-L-046, 2021-Ohio-4614. In *Martin*, the plaintiff argued that the application of the statute of repose unconstitutionally denied a remedy for his wrongful death claim under *Article I, Section 16 of the Ohio Constitution*. The Eleventh District Court of Appeals upheld the constitutionality of the statute of repose set forth in *R.C. 2305.113(E)(3)* as to wrongful death claims writing, "[a]s [decedent's] death occurred more than four years after the alleged acts/omissions underlying the claim, the statute of repose prevented the cause of action from vesting, and the statute as applied to this claim does not unconstitutionally violate the right to a remedy." *Martin at ¶ 41*. As the constitutionality argument was not raised by appellant in this case, we decline to address it in this opinion. The plaintiff in *Martin* also argued that because the statute of limitations for medical claims and wrongful death claims are set forth in different statutory sections, the wrongful death claim does not constitute a "medical claim" to which the statute of repose is applicable. The *Martin* court disagreed, finding the plaintiff's wrongful death claim constituted a "medical claim" as defined under *R.C. 2305.113(E)(3)*, and, therefore, was barred under the four-year statute of repose. This is the same analysis raised in *Smith*. For the reasons set forth in the body of this decision, we disagree with the *Martin* court's analysis.

If a lawsuit bringing a medical * * * claim is not commenced within [***38] four years after the occurrence of the act or omission constituting the basis for the claim, then any action upon that claim is barred.""" *Id. at ¶ 35*, quoting *Wilson at [**250] ¶ 25*, quoting *Antoon at ¶ 23*. Similar to our analysis of *Smith, Mercer*, erroneously in our view, looks at the statute of repose for medical malpractice instead of the plain language of the wrongful death statute of repose under *R.C. 2125.02(D)(2)*. Regarding the *Mercer* court's analysis of the tolling exceptions in *R.C. 2305.113*, *Mercer* fails to consider that the medical malpractice statute of repose was not created for wrongful death claims. As there is no reference in *R.C. 2305.113* to wrongful death claims, looking at the exceptions to the tolling provision of the statute does not inform the analysis on this issue.

[*P48] Moreover, the General Assembly made its intentions clear in the language employed in *R.C. 2125.02* and *2305.113*. As an example, the general products liability statute of repose is controlled by *R.C. 2305.10(C)*. The statute includes a ten-year statute of repose for those claims. As set forth previously, the wrongful death statute, *R.C. 2125.02*, includes a ten-year statute of repose for wrongful death originating out of a product liability claim. The General Assembly made clear in *R.C. 2305.10* that *R.C. 2125.02* controls when addressing wrongful death cases in [***39] the products liability context.[13] If there was a dispute over whether the statute of repose was implicated in a wrongful death case involving a products liability claim, a reviewing court would look at *R.C. 2125.02*, not *R.C. 2305.10(C)*. Here, the General Assembly declined to include a statute of repose arising from a medical claim in *R.C. 2125.02* or state that a wrongful death claim was encompassed in *R.C. 2305.113(C)*'s statute of repose.

[*P49] Finally, the *Mercer* court's application of the medical malpractice statute of repose conflicts with the plain language of *R.C. 2125.01*, which states:

> When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued * * * shall be liable to an action for damages, notwithstanding the death of the person injured * * *.

[*P50] [**251] In *Mercer*, the plaintiffs timely commenced the medical malpractice action against the defendants and were litigating the malpractice action at the time of Mr. Mercer's death. [***41] Mrs. Mercer was permitted under *R.C. 2125.01* to assert claims of damages due to the alleged wrongful death. Prior to the decedent's passing, there is no way for her to have brought the wrongful death cause of action as the claim was not ripe. *Klema, 170 Ohio St. at 521*, quoting *Iron Mountain at 658*; *see also Mansour at ¶ 35*, citing *Karr* (writing that a wrongful death action is an independent claim for relief, independent of that held by a decedent

---

[13] The Editor's Notes in *R.C. 2305.10(C)* repeatedly acknowledge the wrongful death statute of repose, *R.C. 2125.02(D)(2)*, stating:

> In enacting division *(D)(2) of section 2125.02* and *division (C) of section 2305.10 of the Revised Code* in this act, it is the intent of the General Assembly to do all of the following:
>
> (1) To declare that the ten-year statute of repose prescribed by *division (D)(2) of section 2125.02* and *division (C) of section 2305.10 of the Revised Code*, as enacted by this act, are specific provisions intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by *section 2305.09 of the Revised Code*, the general two-year statutes of limitations prescribed by *sections 2125.02* and *2305.10 of the Revised Code*, and other general statutes of limitations prescribed by the Revised Code;
>
> (2) To declare that, subject to the two-year exceptions prescribed in *division (D)(2)(d) of section 2125.02* and in division *(C)(4) of section 2305.10 of the Revised Code*, the ten-year statutes of repose shall serve as a limitation upon the commencement of a civil action in accordance with an otherwise applicable statute of limitations prescribed by the Revised Code;
>
> * * *
>
> (8) To declare [***40] that division *(D)(2) of section 2125.02* and *division (C) of section 2305.10 of the Revised Code*, as enacted by this act, strike a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers and to declare that the ten-year statutes of repose prescribed in those sections are rational periods of repose intended to preclude the problems of stale litigation but not to affect civil actions against those in actual control and possession of a product at the time that the product causes an injury to real or personal property, bodily injury, or wrongful death[.]

immediately prior to death").[14] The *Mercer* court's interpretation, which barred the wrongful death claim under the four-year statute of repose conflicts with R.C. 2151.01. Such a preclusion when the Mercer plaintiffs were actively litigating the case was not the type of prejudice *R.C. 2305.113* was enacted to prevent. *Giannobile*, Franklin C.P. No. 15CV-1854, at 13. Accordingly, the interpretation of the statute of repose by the Third and Fifth District Courts of Appeals not only ignores the General Assembly's limited statute of repose in the wrongful death context, but it is in contravention of the plain language of R.C. 2125.01.

[*P51] In the case sub judice, Mr. Everhart died on October 28, 2006. Appellant brought her wrongful death claim on January 25, 2008. As the medical malpractice statute of repose, set forth in *R.C. 2305.113(C)*, does not apply in this case, the trial court erred in finding appellant was barred from pursuing her wrongful death claim.

[*P52] Appellant's sole assignment of error is sustained.

B. Everhart's Second Assignment of Error

[*P53] In appellant's second assignment of error, she argues that the trial court erred in denying her motion for leave to file a third amended complaint. Appellant argued that leave should be granted so that she may supplement the record to establish the timeline of events that the statute of repose was not implicated. It is well-established law that a reviewing court will generally not address issues that are deemed moot. Croce v. Ohio State Univ., 10th Dist. No. 20AP-14, 2021-Ohio-2242, ¶ 16. "'The doctrine of mootness is rooted in the "case" or "controversy" language of Section 2, Article III of the United States Constitution and in the general notion of judicial [***43] restraint.'" Bradley v. Ohio Dept. of Job & Family Servs., 10th Dist. No. 10AP-567, 2011-Ohio-1388, ¶ 11, quoting James A. Keller, Inc. v. Flaherty, 74 Ohio App.3d 788, 791, 600 N.E.2d 736 (10th Dist.1991). A case is considered moot if "they are or have become fictitious, colorable, hypothetical, academic or dead. The distinguishing characteristic of such issues is that they involve no actual genuine, live controversy, the decision of which can definitely affect existing legal relations." (Internal quotations and citations omitted.) Doran v. Heartland Bank, 10th Dist. No. 16AP-586, 2018-Ohio-1811, ¶ 12, 112 N.E.3d 355. It is not the function of a reviewing [**252] court to address purely academic or abstract questions. Id. at ¶ 13, citing James A. Keller, Inc. at 791. If an appeal is considered moot, the case must be dismissed because it no longer presents a justiciable controversy. Grove City v. Clark, 10th Dist. No. 01AP-1369, 2002-Ohio-4549, ¶ 11.

[*P54] After careful review of the evidence, we find appellant's argument no longer presents a live, justiciable controversy as the statute of repose does not preclude appellant from proceeding with a wrongful death claim. Accordingly, appellant's motion for leave to file a third amended complaint is therefore moot.[15]

IV. CONCLUSION

[*P55] Having sustained appellant's first assignment of error and found appellant's second assignment of error moot, we reverse and remand this case to the Franklin County Court of Common Pleas for further proceedings consistent with law and this decision.

---

[14] *See also* Thompson v. Wing, 70 Ohio St.3d 176, 183, 1994-Ohio-358, 637 N.E.2d 917 (1994):

> [T]he wrongful death action does not even arise until the death of the injured person. It follows, therefore, that the injured person cannot defeat the beneficiaries right to have a wrongful death action brought on [***42] their behalf because the action has not yet arisen during the injured person's lifetime. Injured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves.

[15] We note that appellees have provided Pollock v. Britt, 8th Dist. No. 110489, 2021-Ohio-3820, 179 N.E.3d 786, as supplemental authority in this case. In *Pollock*, the Eighth District Court of Appeals affirmed the trial court's decision to grant a motion for summary judgment that a dental malpractice claim was barred under the four-year statute of repose pursuant to *R.C. 2305.113(C)*. While consistent with outstanding Supreme Court of Ohio case law extensively discussed in this decision, Pollock is distinct from the instant case as it does not address the application of a statute of repose to the wrongful death statute. The *Pollock* court also addressed an argument presented in appellant's second assignment of error that ongoing negligent acts or omission by the defendant avoided the application of the statute of repose. Because we are sustaining appellant's first assignment of error, and therefore deeming the second assignment of error moot, we decline to address the *Pollock* court's analysis on this issue.

*Judgment reversed; [***44] cause remanded.*

KLATT and DORRIAN, JJ., concur.

End of Document

Final Analysis

Aida S. Montano *Legislative Service Commission*

Am. Sub. S.B. 281

124th General Assembly
(As Passed by the General Assembly)

Sens. **Goodman, Coughlin, Randy Gardner, Nein, Wachtmann, Mead, Hottinger, Harris, Spada, Armbruster, Austria, Amstutz, Mumper, Robert Gardner**

Reps. **Cates, Calvert, Grendell, Schmidt, Raga, Niehaus, Evans, Hoops, Faber, Olman, Aslanides, Collier, Hollister, Carey, Flowers, Lendrum, Wolpert, Gilb, Reidelbach, Latta, Carmichael, Jolivette, Williams, G. Smith, Schneider, Clancy, Husted, Setzer, Schaffer, White, Peterson**

Effective Date: *

ACT SUMMARY

- Enacts additional exceptions to the statute of repose for an action upon a medical, dental, optometric, or chiropractic claim.
- Enacts procedures in civil actions upon a medical, dental, optometric, or chiropractic claim in which a court must determine, upon a defendant's motion, whether or not there is a reasonable good faith basis upon which the particular claim is asserted against that defendant and must award the defendant certain court costs and attorneys' fees if no reasonable good faith basis is found.
- Limits the compensatory damages for noneconomic loss that may be awarded in medical, dental, optometric, and chiropractic claims as follows:

  (1) Generally, the greater of $250,000 or an amount equal to three times the plaintiff's economic loss, to a maximum of $350,000 for each plaintiff or a maximum of $500,000 for each occurrence;

---

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.*

(2) If the noneconomic losses are for permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or for permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities, $500,000 for each plaintiff or $1 million for each occurrence.

- Provides that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of those limits.
- States that the act's provisions on the recovery of and limits on damages must be applied in a jury trial only after the jury has made its factual findings and determination as to the damages.
- Requires a plaintiff's attorney whose contingency fees exceed the applicable amount of the limits on damages to make an application in the probate court for approval of the fees.
- Expands the scope of the law granting civil immunity to health care professionals who volunteer their services to include advanced practice nurses and emergency medical technicians.
- Regulates the award of future damages exceeding $50,000 in medical, dental, optometric, and chiropractic actions, including, but not limited to, the use of periodic payments plans.
- Permits defendants in civil actions upon medical, dental, optometric, and chiropractic claims to introduce evidence of the plaintiff's receipt of collateral benefits, except if the source of the benefits has a mandatory self-effectuating federal right of subrogation or a contractual or statutory right of subrogation.
- Revises the law governing arbitration agreements between a patient and a physician or hospital, by, among other things, expanding its scope to govern arbitration agreements with other healthcare providers and shortening the time for withdrawal from an arbitration agreement.
- Provides that the license and practice requirements for expert witnesses in medical claims under continuing law are not to be construed to limit

the trial court's power to allow the testimony of any other expert witness that is relevant to the medical claim.

- Requires every clerk of a court of common pleas to send to the Department of Insurance an annual report containing specified information relating to each civil action upon a medical, dental, optometric, or chiropractic claim that was filed or is pending in the court and requires the court to collect an additional filing fee of $5 to pay the costs of making the reports.

- Creates the Ohio Medical Malpractice Commission consisting of nine members, to study the effects of the act, investigate the problems and issues surrounding medical malpractice, and submit a report to the General Assembly not later than two years after the act's effective date.

- Requires the Superintendent of Insurance to study the feasibility of a Patient Compensation Fund to cover medical malpractice claims, including the financial responsibility limits for providers covered in the act and the Fund, the identification of the methods of funding excluding any tax on consumers, and the Fund's operation, administration, and participation requirements and to submit a preliminary report by March 3, 2003, and a final report by May 1, 2003.

- Includes in uncodified language statements of the General Assembly's findings in relation to medical malpractice insurance and medical malpractice awards, and of its intent, based upon these findings, in enacting the act.

TABLE OF CONTENTS

Commencement of medical, dental, optometric, and chiropractic claims 4
  Definitions 4
  Statute of limitations 5
  Statute of repose 5
  Conforming changes 6
Reasonable good faith basis for medical, dental, optometric, or chiropractic claims 7
  Good faith motion 7
  Award to defendant 8
Limitation on noneconomic damages in medical, dental, optometric, and chiropractic civil actions 8

APPX. 000018

Limits ... 8
Procedure ... 9
Attorney's contingency fee ... 10
Definitions ... 10
Nonapplicability ... 11
Civil immunity of volunteer health care professionals ... 11
Future damages in medical, dental, optometric, and chiropractic civil actions ... 11
Motion, hearing, and court determination ... 12
Periodic payments plan ... 13
Other provisions ... 14
Collateral benefits ... 15
Arbitration of medical disputes ... 16
Expert testimony ... 17
Reporting of malpractice actions ... 17
Miscellaneous ... 18

UNCODIFIED PROVISIONS

Saving clauses; Intent ... 18
Ohio Medical Malpractice Commission ... 19
Feasibility of Patient Compensation Fund ... 20
Applicability ... 21

CONTENT AND OPERATION

Commencement of medical, dental, optometric, and chiropractic claims

R.C. Chapter 2305. contains statutes of limitations on civil actions. Claimants are required to commence a civil action within the periods set by statutes of limitations.

Former R.C. 2305.11 set limitations upon the commencement of a number of actions, including, but not limited to, libel, false imprisonment, unlawful abortion, and medical, dental, optometric, and chiropractic claims. The act repeals the provisions in former R.C. 2305.11 relating to the commencement of medical, dental, optometric, and chiropractic actions and enacts R.C. 2305.113 to regulate the commencement of these actions. The act also repeals related definitions formerly in R.C. 2305.11 and enacts these definitions in R.C. 2305.113.

Definitions

A "medical claim," as used in both prior R.C. 2305.11 and enacted R.C. 2305.113, is any claim asserted in a civil action against any person in a listed

APPX. 000019

category of health care practitioners, arising out of the medical diagnosis, care, or treatment of any person. The act includes more categories of health care practitioners under R.C. 2305.113 than were in former R.C. 2305.11. Under preexisting law, unchanged by the act, a "medical claim" includes claims against physicians, podiatrists, hospitals, homes, or residential facilities, or employees or agents of physicians, podiatrists, hospitals, homes, or residential facilities, or against registered nurses or physical therapists. The act defines a "medical claim" to also include claims against licensed practical nurses, advanced practice nurses, physician assistants, emergency medical technicians-basic, emergency medical technicians-intermediate, or emergency medical technicians-paramedic. An "advanced practice nurse," as defined by the act, means any certified nurse practitioner, clinical nurse specialist, or certified registered nurse anesthetist, or a certified nurse-midwife certified by the Board of Nursing under R.C. 4723.41. "Licensed practical nurse" means any person who is licensed to practice nursing as a licensed practical nurse by the State Board of Nursing pursuant to R.C. Chapter 4723. "Physician assistant" means any person who holds a valid certificate of registration or temporary certificate of registration issued pursuant to R.C. Chapter 4730. "Emergency medical technician-basic," "emergency medical technician-intermediate," and "emergency medical technician-paramedic" means any person who is certified under R.C. Chapter 4765. as that type of emergency medical technician. (R.C. 2305.113(E)(3), (16), (17), (18), and (19).)

Statute of limitations

As in former R.C. 2305.11, the act generally requires an action upon a medical, dental, optometric, or chiropractic claim to be commenced within one year after the cause of action accrued (R.C. 2305.113(A)).

Former R.C. 2305.11 allowed, and enacted R.C. 2305.113 allows, a claimant who is considering bringing an action upon a medical, dental, optometric, or chiropractic claim, if that claimant has given written notice to the person who is the subject of the claim prior to the expiration of the one-year statute of limitations stating that the claimant is considering bringing an action upon the claim, to commence the action at any time within 180 days after the notice is given. The act further prohibits an insurance company from considering the existence or nonexistence of such a written notice in setting the liability insurance premium rates that the company may charge the company's insured person who was so notified. (R.C. 2305.11(B)(1) and 2305.113(B).)

Statute of repose

The act precludes an action upon a medical, dental, optometric, or chiropractic claim from being commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the claim,

except as to persons within the age of minority or of unsound mind (existing law) or as provided below (added by act). If an action is not commenced within that four-year period, then, any action upon that claim is barred. (R.C. 2305.113(C).) The act adds the following exceptions to this statute of repose (R.C. 2305.113(D)):

(1) If a person making a medical, dental, optometric, 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 that four-year period, 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, dental, optometric, 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.

A person who commences an action upon a medical, dental, optometric, or chiropractic claim under the circumstances described above in paragraph (1) or (2) has the affirmative burden of proving, by clear and convincing evidence, that the person, with reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within the three-year period described in paragraph (1) or within the one-year period described in paragraph (2), whichever is applicable.

Conforming changes

The act amends R.C. 1751.67, 2117.06, and 2305.15 to reflect the act's movement, by repeal and reenactment, of provisions on medical, dental, optometric, and chiropractic claims from R.C. 2305.11 to R.C. 2305.113.

R.C. 2117.06, pertaining to creditors' claims against estates, states that its provisions are not to be construed to reduce the time periods allowed under specified sections of the Revised Code for the commencement of specified civil actions, including the time periods set by R.C. 2305.11. The act adds a reference to R.C. 2305.113 in the list of sections referenced by R.C. 2117.06. R.C. 2305.15, pertaining to civil actions against prisoners, provides that the time of a person's imprisonment is not counted as part of the time periods allowed under listed sections of the Revised Code for the commencement of specified civil actions, including the time periods set by R.C. 2305.11. The act adds a reference to R.C.

2305.113 in the list of sections referenced by R.C. 2305.15. (R.C. 2117.06(G) and 2305.15(B).)

Reasonable good faith basis for medical, dental, optometric, or chiropractic claims

Good faith motion

The act provides that upon the motion of any defendant in a civil action based upon a medical claim, dental claim, optometric claim, or chiropractic claim, the court must conduct a hearing regarding the existence or nonexistence of a reasonable good faith basis upon which the particular claim is asserted against the moving defendant. The defendant must file the motion not earlier than the close of discovery in the action and not later than 30 days after the court or jury renders any verdict or award in the action. After the motion is filed, the plaintiff has not less than 14 days to respond to the motion. Upon good cause shown by the plaintiff, the court must grant an extension of the time for the plaintiff to respond as necessary to obtain evidence demonstrating the existence of a reasonable good faith basis for the claim. (R.C. 2323.42(A).)

At the request of any party to the good faith motion described in the preceding paragraph, the court must order the motion to be heard at an oral hearing and must consider all evidence and arguments submitted by the parties. In determining whether a plaintiff has a reasonable good faith basis upon which to assert the claim in question against the moving defendant, the court must take into consideration, in addition to the facts of the underlying claim, whether the plaintiff did any of the following (R.C. 2323.42(B)):

(1) Obtained a reasonably timely review of the merits of the particular claim by a qualified medical, dental, optometric, or chiropractic expert, as appropriate;

(2) Reasonably relied upon the results of that review in supporting the assertion of the particular claim;

(3) Had an opportunity to conduct a pre-suit investigation or was afforded by the defendant full and timely discovery during litigation;

(4) Reasonably relied upon evidence discovered during the course of litigation in support of the assertion of the claim;

(5) Took appropriate and reasonable steps to timely dismiss any defendant on behalf of whom it was alleged or determined that no reasonable good faith basis existed for continued assertion of the claim.

Prior to filing a good faith motion, any defendant that intends to file that type of motion must serve a "Notice of Demand for Dismissal and Intention to File a Good Faith Motion." If, within 14 days of service of that notice, the plaintiff dismisses the defendant from the action, the defendant after the dismissal is precluded from filing a good faith motion as to any attorneys' fees and other costs subsequent to the dismissal. (R.C. 2323.42(D).)

Award to defendant

Under the act, if the court determines that there was no reasonable good faith basis upon which the plaintiff asserted the claim in question against the moving defendant or that, at some point during the litigation, the plaintiff lacked a good faith basis for continuing to assert that claim, the court must award all of the following in favor of the moving defendant (R.C. 2323.42(C)):

(1) All court costs incurred by the moving defendant;

(2) Reasonable attorneys' fees incurred by the moving defendant in defense of the claim after the time that the court determines that no reasonable good faith basis existed upon which to assert or continue to assert the claim;

(3) Reasonable attorneys' fees incurred in support of the good faith motion.

Limitation on noneconomic damages in medical, dental, optometric, and chiropractic civil actions

Limits

R.C. 2323.43, as enacted by the act, limits the damages that may be awarded in a civil action upon a medical, dental, optometric, or chiropractic claim for compensatory damages for injury, death, or loss to person or property represent damages for noneconomic loss. Such compensatory damages generally cannot exceed the greater of $250,000 or an amount equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of $350,000 for each plaintiff or a maximum of $500,000 for each occurrence. However, if the noneconomic losses of the plaintiff are for permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or for permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities, then the amount recoverable for noneconomic loss cannot exceed $500,000 for each plaintiff or $1 million for each occurrence. In contrast, the act prohibits any limitation on the award of compensatory damages that represent the economic loss

of the person who is awarded the damages in the civil action. (R.C. 2323.43(A)(1), (2), and (3).)

Procedure

If a trial is conducted in the civil action upon a medical, dental, optometric, or chiropractic claim and a plaintiff prevails with respect to that claim, the court in a nonjury trial must make findings of fact, and the jury in a jury trial must return a general verdict accompanied by answers to interrogatories, that must specify all of the following (R.C. 2323.43(B)):

(1) The total compensatory damages recoverable by the plaintiff;

(2) The portion of the total compensatory damages that represents damages for economic loss;

(3) The portion of the total compensatory damages that represents damages for noneconomic loss.

After the trier of fact complies with the above requirements, the court must enter a judgment in favor of the plaintiff for compensatory damages for economic loss in the amount determined pursuant to clause (2), above, and a judgment in favor of the plaintiff for compensatory damages for noneconomic loss subject to the act's provision that a court of common pleas has no jurisdiction to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits set forth in the act.

The act provides that in no event may a judgment for compensatory damages for noneconomic loss exceed the maximum recoverable amount that represents damages for noneconomic loss as provided in the act. The act states that its provisions on the recovery of and limits on damages must be applied in a jury trial only after the jury has made its factual findings and determination as to the damages. (R.C. 2323.43(C)(1) and (D)(1).)

Prior to the trial in the civil action, any party may seek summary judgment with respect to the nature of the alleged injury or loss to person or property, seeking a determination of the damages with the applicable limits. If the trier of fact is a jury, the court must not instruct the jury with respect to the limit on compensatory damages for noneconomic loss, and neither counsel for any party nor a witness may inform the jury or potential jurors of that limit. (R.C. 2323.43(C)(2) and (D)(2).)

The act further provides that any excess amount of compensatory damages for noneconomic loss that is greater than the applicable amount of the limits cannot be reallocated to any other tortfeasor beyond the amount of compensatory

APPX. 000024

damages that that tortfeasor would otherwise be responsible for under the laws of Ohio (R.C. 2323.43(E)).

Attorney's contingency fee

The act provides that, if pursuant to a contingency fee agreement between an attorney and a plaintiff in a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim the amount of the attorney's fees exceeds the applicable amount of the limits on compensatory damages for noneconomic loss as provided in the act, the attorney must make an application in the probate court of the county in which the civil action was commenced or in which the settlement was entered. The application must contain a statement of facts, including the amount to be allocated to the settlement of the claim, the amount of the settlement or judgment that represents the compensatory damages for economic loss and noneconomic loss, the relevant provision in the contingency fee agreement, and the dollar amount of the attorney's fees under the contingency fee agreement. The application must include the proposed distribution of the amount of the judgment or settlement.

The attorney must give written notice of the hearing and a copy of the application to all interested persons who have not waived notice of the hearing. Notwithstanding the waivers and consents of the interested persons, the probate court retains jurisdiction over the settlement, allocation, and distribution of the claim. The application must state the arrangements, if any, that have been made with respect to the attorney's fees. The attorney's fees are subject to the approval of the probate court. (R.C. 2323.43(F).)

Definitions

For purposes of the act's provisions on the recovery of damages in a civil action upon a medical, dental, optometric, or chiropractic claim, an "economic loss" means any of the following types of pecuniary harm:

(1) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is the subject of the civil action;

(2) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations, resulting from injury, death, or loss to person or property, that is the subject of the civil action;

(3) Any other expenditures incurred as a result of an injury, death, or loss to person or property that is the subject of the civil action, other than attorney's fees incurred in connection with the action.

A "noneconomic loss" means any nonpecuniary harm resulting from an injury, death, or loss to person or property that is the subject of the civil action, including, but not limited to: pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; disfigurement; mental anguish; and any other intangible loss. (R.C. 2323.43(H)(1) and (3).)

Nonapplicability

The above described provisions of the act do not apply to civil actions upon medical, dental, optometric, or chiropractic claims that are either: (1) brought against the state in the Court of Claims, including, but not limited to, actions in which a state university or college is a defendant, or (2) brought against political subdivisions of this state, if the action is commenced under or subject to R.C. Chapter 2744. (which regulates the liability of political subdivisions in tort actions). The provisions also do not apply to wrongful death actions brought pursuant to R.C. Chapter 2125. (R.C. 2323.43(G).)

Civil immunity of volunteer health care professionals

Continuing law provides immunity in tort and other civil actions to many health care professionals who volunteer their services. For purposes of this law, "health care professional" means any of the following who provide medical, dental, or other health-related diagnosis, care, or treatment: physicians, registered and licensed practical nurses, physician assistants, dentists and dental hygienists, physical therapists, chiropractors, optometrists, podiatrists, dietitians, and pharmacists. The act expands this definition to include advanced practice nurses licensed under R.C. Chapter 4723., and emergency medical technicians-basic, emergency medical technicians-intermediate, and emergency medical technicians-paramedic certified under R.C. Chapter 4765. (R.C. 2305.234(A)(4)(b) and (k).)

Future damages in medical, dental, optometric, and chiropractic civil actions

Former R.C. 2323.57, which is repealed by the act, regulated the award of future damages in excess of $200,000 in a medical, dental, optometric, or chiropractic action. The act enacts R.C. 2323.55 to govern the award of *future damages* in these actions.[1] The act's provisions apply to future damages in excess of $50,000.

---

[1] *As in prior law, the act defines "future damages" as any damages resulting from an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim and that will accrue after the verdict or determination of liability is rendered by the trier of fact. The act specifies that "future damages" includes both economic and noneconomic loss. (R.C. 2323.55(A)(2).)*

Motion, hearing, and court determination

Provisions in R.C. 2323.57 that are repealed and similar provisions enacted in R.C. 2323.55 require a trier of fact to return a general verdict upon the motion of the plaintiff or defendant in an action in which a plaintiff makes a good faith claim for future damages in excess of the statutory minimum. If that verdict is in favor of the plaintiff, the trier of fact must return answers to interrogatories or findings of fact that specify both the *past damages* and the future damages recoverable by the plaintiff.[2] (R.C. 2323.55(B).)

Formerly, R.C. 2323.57 permitted a plaintiff or defendant to file a motion with the court, at any time after the verdict or determination in favor of the plaintiff but prior to the entry of judgment, requesting the court to order future damages determined to be in excess of $200,000 to be paid in periodic payments rather than a lump sum. If timely filed, the court was required to order that future damages in excess of $200,000 be used to fund a series of periodic payments.

The act permits a plaintiff or defendant to file a motion with the court within this same time period, when recoverable future damages exceed $50,000. The motion seeks a determination as to whether all or any part of the future damages recoverable by the plaintiff should be received as a series of periodic payments. If timely filed, the court is required to set a date for a hearing on the subject of the periodic payment of future damages and to provide notice of the date of the hearing to the parties involved and their counsel of record. At the hearing, the court is required to allow the parties involved to present relevant evidence. In determining whether all or any part of recoverable future damages should be received by the plaintiff in a series of periodic payments rather than in a lump sum, the court must consider all of the following factors: the purposes for which those portions of the future damages are awarded; the business or occupational experience of the plaintiff; the plaintiff's age; the physical and mental condition of the plaintiff; whether the plaintiff, or the parent, guardian, or custodian of the plaintiff, is able to competently manage the future damages; and any other circumstance that relates to whether the injury sustained by the plaintiff would be better compensated by the payment of the future damages in a lump sum or as a series of periodic payments. After this hearing and prior to the entry of judgment, the court is required to determine, in its discretion, whether to order all

---

[2]*As in prior law, the act defines "past damages" as any damages that result from an injury, death, or loss to person or property that is a subject of a civil action upon a medical, dental, optometric, or chiropractic claim and that have accrued by the time that the verdict or determination of liability is rendered by the trier of fact. The act specifies that "past damages" include both economic loss and noneconomic loss. (R.C. 2323.55(A)(5).)*

or any part of the future damages in excess of $50,000 to be paid in a series of periodic payments. (R.C. 2323.55(C) and (D).)

While prior law, in determining the amount of future damages, required the trier of fact to specify the portions of the future damages that represent noneconomic loss and each of three types of economic loss, the act does not require the trier of fact to differentiate between types of future damages. Former law provided that no plaintiff who is the subject of an approved periodic payments plan may receive less than $200,000, plus the plaintiff's cost of litigation, including attorney's fees, in a lump sum payment. Unlike former law, the act does not address the inclusion of the cost of litigation in a periodic payments plan.

Periodic payments plan

Both former R.C. 2323.57 and enacted R.C. 2323.55 require a plaintiff to submit a periodic payments plan to the court, either alone or jointly with the defendant. The time for filing a periodic payments plan, however, varies between prior law and the act. Prior law required periodic payments plans to be filed within 20 days after the motion requesting the payment of future damages in a series of periodic payments is filed with the court. The act requires the periodic payments plans to be filed within 20 days after the court's determination in favor of paying future damages in a series of periodic payments.

If a joint periodic payments plan is not filed, both prior law and the act permit a defendant to submit its own plan within the same time given the plaintiff. Further, a defendant who has not submitted a plan either alone or jointly with the plaintiff may submit written comments to the court about the plaintiff's plan within ten days after the plaintiff files the plan; if a defendant submits a separate plan, the plaintiff may submit written comments on that plan to the court within ten days after its filing. All periodic payments plans, both formerly and under the act, may include, but are not limited to, a provision for a trust or an annuity. (R.C. 2323.55(E), (F), and (H).)

Both prior law and the act allow the court to modify, approve, or reject any submitted periodic payments plan. However, the act requires the court to require interest on the judgment in accordance with R.C. 1343.03 (the Commercial Transactions Law). The act also specifies that the court is not required to ensure that payments under the periodic payments plan are equal in amount or that the total amount paid each year under the periodic payments plan is equal in amount to the total amount paid in other years under the plan. The periodic payments plan may provide for irregular or varied payments, or graduated payments over the duration of the plan.

As in former law, the act requires the court to include in any approved periodic payments plan adequate security to insure that the plaintiff will receive all of the periodic payments. If the approved periodic payments plan includes a provision for an annuity, both former law and the act require the defendant to purchase the annuity from either:

(1) An insurance company that the A.M. Best Company, in its most recently published rating guide of life insurance companies, has rated A or better and has rated XII or higher as to financial size or strength;

(2) An insurance company that the Superintendent of Insurance, under rules adopted pursuant to the Administrative Procedure Act, determines is licensed to do business in this state, is stable, and issues annuities that are both safe and desirable. In making this determination, the Superintendent is to consider a company's financial condition, general standing, operating results, profitability, leverage, liquidity, amount and soundness of reinsurance, adequacy of reserves, and management. The Superintendent may also consider ratings, grades, and classifications of any nationally recognized rating services of insurance companies and any other factors relevant to the making of such determinations.

The act gives the court discretion, if an approved periodic payments plan provides payments over a period of five years or more, to include a provision in the plan that gives the court continuing jurisdiction over the plan, including jurisdiction to review and modify the plan. Prior law did not explicitly permit the court to retain jurisdiction. (R.C. 2323.55(G).)

Other provisions

Prior law provided rules governing the payment of future damages when a plaintiff dies prior to the receipt of all payments under a periodic payments plan. The act also contains provisions on this topic, but there are differences from prior law.

Prior law provided that liability for the future economic loss representing expenditures for medical care or treatment, rehabilitation service, or other care, treatment, services, products, or accommodations resulting from injury, death or loss to person or property, as well as future noneconomic loss, that is not due at the time of the plaintiff's death, ceases at the time of death. All other liability payments continue, and the payments are paid to the plaintiff's heirs as scheduled in and otherwise in accordance with the approved periodic payments plan, or, if the plan does not contain a relevant provision, as determined by the court. (Repealed R.C. 2323.57(F).)

The act provides that if a plaintiff dies prior to the receipt of all future damages, the liability for the unpaid portion of those damages that is not yet due at the time of the plaintiff's death continue, but the payments are paid to the plaintiff's heirs as scheduled in and otherwise in accordance with the approved periodic payments plan. If the plan does not contain a relevant provision, the court is to determine how payments are to be made. (R.C. 2323.55(I).)

Both prior law and the act state that nothing precludes a plaintiff and a defendant from mutually agreeing to a settlement of the action. Also, neither prior law nor the act increases the time for filing any motion or notice of appeal or taking any other action relative to the civil action, alters the amount of any verdict or determination of damages by the trier of fact, or alters the liability of any party to pay or satisfy the verdict or determination. These provisions do not apply to tort actions brought against political subdivisions and commenced or subject to R.C. Chapter 2744. (Political Subdivision Sovereign Immunity Law), or to tort actions brought against the state in the Court of Claims. (R.C. 2323.55(J) and (K).)

Collateral benefits

The act repeals R.C. 2305.27, which contained language on collateral recovery and subrogation in connection with awards on medical claims. The act enacts R.C. 2323.41 to govern collateral recovery and subrogation in connection with civil actions upon medical, dental, optometric, and chiropractic claims.

Prior law provided that an award of damages in a medical claim is not to be reduced by insurance proceeds, payments, or other benefits paid under any insurance policy or contract paid for by the plaintiff, the plaintiff's employer, or both, but is to be reduced by any other collateral recovery for medical and hospital care, custodial care or rehabilitation services, and loss of earned income. It also provided that a collateral source of indemnity is not to be subrogated to the claimant against a physician, podiatrist, or hospital, unless otherwise expressly provided by statute. (Repealed R.C. 2305.27.)

The act permits a defendant to introduce evidence of any amount payable as a benefit to the plaintiff as a result of damages that result from an injury, death, or loss to person or property that is the subject of the claim, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation.

If a defendant introduces evidence of a plaintiff's right to receive collateral benefits, the plaintiff may introduce evidence of any amount the plaintiff has paid or contributed to secure any benefits which the defendant has introduced into evidence. A source of collateral benefits, of which evidence is introduced by the

defendant, is prohibited from recovering any amount against the plaintiff and may not be subrogated to the plaintiff's rights against a defendant. (R.C. 2323.41.)

Arbitration of medical disputes

Former R.C. 2711.22 provided that a written contract between a patient and a hospital or physician to use binding arbitration to settle any dispute or controversy arising out of the diagnosis, treatment, or care rendered, whether entered into prior to or subsequent to the diagnosis, treatment, or care, was valid, irrevocable, and enforceable, except upon such grounds as existed at law or in equity for the revocation of any contract.

The act expands the scope of this section to include written contracts entered into with other groups of healthcare providers. For purposes of the act's arbitration provisions, "healthcare provider" includes podiatrists, dentists, licensed practical nurses, registered nurses, advanced practice nurses, chiropractors, optometrists, physician assistants, emergency medical technicians, and physical therapists, as well as physicians as in former law, as those professions are defined in R.C. 2305.113. The contract agreeing to binding arbitration must be entered into prior to the diagnosis, treatment, or care of the patient. The contract is valid, irrevocable, and enforceable once the contract is signed by all parties, and remains valid, irrevocable, and enforceable until or unless the patient or the patient's legal representative rescinds the contract by written notice within 30 days of the signing of the contract. A guardian or other legal representative of the patient may give written notice of the rescission if the patient is incapacitated or a minor. (R.C. 2711.22.)

To be valid and enforceable, former R.C. 2711.23 required an arbitration agreement involving hospital or medical care, diagnosis, or treatment, that was entered into prior to rendering such care, diagnosis, or treatment, to provide that the medical or hospital care, diagnosis, or treatment will be provided whether or not the patient signs the agreement to arbitrate. Among other requirements unchanged by the act, the agreement also was required to provide that the patient, or in the event of the patient's death or incapacity, the patient's spouse, or the personal representative of the patient's estate, had the right to withdraw from the arbitration agreement by providing written notification to the physician or hospital within 60 days after the patient's discharge from a hospital or the termination of a physician-patient relationship for the condition involved.

The act expands the scope of the application of this section to include arbitration agreements involving medical, dental, chiropractic, and optometric claims entered into prior to a patient receiving any care, diagnosis, or treatment. The act shortens the time for withdrawal from an arbitration agreement, providing that the right to withdraw from an agreement must be exercised by a patient, the

patient's spouse, or the representative of the patient's estate, by providing written notification to the healthcare provider or hospital within 30 days after the patient's signing of the agreement. As in former law, the filing of a claim within the period provided for withdrawal, 30 days under the act, is deemed to be a withdrawal from the agreement. (R.C. 2711.23(A), (B), and (I).)

The act's provisions amending the persons subject to the law on arbitration agreements and the maximum time for withdrawal from arbitration agreements are reflected in the act's amendments to R.C. 2323.24, which regulates the standard form for an arbitration agreement. The references in the form to physicians and hospitals are changed to "healthcare providers."

Expert testimony

Continuing law provides that no person is deemed competent to give expert testimony on liability issues in a medical claim unless the person is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the State Medical Board or by the licensing authority of any state and such person devotes ¾ of the person's professional time to its active clinical practice or to its instruction in an accredited university. The act provides that that provision is not to be construed to limit the power of the trial court to allow the testimony of any other expert witness that is relevant to the medical claim involved. (R.C. 2743.43(A) and (C).)

Reporting of malpractice actions

The act requires that before the 15th day of January of each year, every clerk of a court of common pleas in Ohio must send to the Department of Insurance an annual report containing all of the following information relating to each civil action upon a medical, dental, optometric, or chiropractic claim that was filed or is pending in that court of common pleas:

(1) The style and number of the case;

(2) The date of the filing of the case;

(3) Whether or not there has been a trial and the dates of the trial if there was a trial;

(4) The current status of the case;

(5) Whether or not the parties have agreed on a settlement of the case;

(6) Whether or not a judgment has been rendered, the nature of the judgment, including the amounts of compensatory damages that represent economic and noneconomic loss, and the date of entry of the judgment;

(7) If a judgment has been rendered, whether or not a notice of appeal of the judgment has been filed or whether the time for filing an appeal has expired.

If a report that relates to a specific civil action includes the information described in (6) and (7), above, with respect to that action or if the parties have agreed on a settlement, the succeeding annual report that the clerk of the court sends to the Department of Insurance no longer may include all of the above information with respect to that action.

For the purpose of paying the costs of implementing the reporting requirements, the court of common pleas must collect the sum of $5 as additional filing fees in each civil action upon a medical, dental, optometric, or chiropractic claim that is filed in the court. (R.C. 2303.23.)

Miscellaneous

The act amends various sections of the Revised Code to reflect the movement of the definitions of "hospital," "physician," "medical claim," "podiatrist," "dentist," "dental claim," "derivative claims for relief," "registered nurse," "chiropractic claim," "chiropractor," "optometric claim," "optometrist," "physical therapist," "home," and "residential facility" from R.C. 2305.11 to R.C. 2305.113.[3] References to the definitions found in former R.C. 2305.11 are amended to refer to R.C. 2305.113. The definitions of "medical claim," "dental claim," "optometric claim," "chiropractic claim," "advanced practice nurse," "licensed practical nurse," "physician assistant," and "emergency medical technician-basic," "emergency medical technician-intermediate," and "emergency medical technician-paramedic" in R.C. 2305.113 are also referenced in the other sections enacted by the act, R.C. 2303.23, 2323.41, 2323.42, 2323.43, and 2323.55 of the Revised Code and in other sections amended by the act.

UNCODIFIED PROVISIONS

Saving clauses; Intent

Uncodified language in the act provides a saving clause. The act states that if any item of law that constitutes the whole or part of a section of law contained in the act, or if any application of any item of law that constitutes the whole or part

---

[3] *R.C. 1751.67, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21 to 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 3929.71, and 5111.018.*

of a section of law contained in the act, is held invalid, the invalidity does not affect other items of law or applications that can be given effect without the invalid item of law or application. The items of law in the act, and their applications, are declared to be independent and severable. A similar saving clause, declaring the items of law and their applications to be independent and severable, is also provided in uncodified language for provisions in the act, or their applications, that are preempted by federal law. (Sections 7 and 8.)

Uncodified language in the act provides statements of the General Assembly's findings in relation to medical malpractice insurance, and of its intent, based upon these findings, in enacting the act.

The General Assembly states, in part, that medical malpractice awards to plaintiffs have increased dramatically. Medical malpractice insurers have left the Ohio market as they faced losses, largely as a consequence of the increased awards. Health care practitioners are having a difficult time finding affordable medical malpractice insurance, and some of them, including a large number of specialists, have been forced out of practice. The State of Ohio has a rational and legitimate interest in stabilizing health care costs by limiting awards of compensatory damages for noneconomic loss in medical malpractice actions. The overall cost of health care to the consumer has been driven up by the fact that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients. The General Assembly states that limits on damages have been upheld by other state supreme courts (citing cases from California, Indiana, and Alaska). The General Assembly further states that the act addresses aspects of the statute of repose the application of which was found by the Ohio Supreme Court to be unconstitutional.

In consideration of its findings, the General Assembly provides statements of its intent to stem the exodus of medical malpractice insurers from the Ohio market and to increase the availability of medical malpractice insurance to hospitals and health care practitioners, thus ensuring the availability of quality health care for Ohio citizens. The General Assembly provides statements of its intent to address its concerns with past holdings of the Ohio Supreme Court on collateral source benefits, statutes of repose, and caps on damage awards. Further, the General Assembly states that it is its intent that as a matter of policy, the limits on compensatory damages for noneconomic loss are applied after a jury's determination of the factual question of damages. (Section 3.)

Ohio Medical Malpractice Commission

The act creates the Ohio Medical Malpractice Commission consisting of nine members appointed as follows: (1) three appointed by President of the Senate, (2) three appointed by the Speaker of the House of Representatives, (3)

one appointed by the minority leader of the Senate and one appointed by the minority leader of the House of Representatives, and (4) one who is the Director of the Department of Insurance or the Director's designee. Of the six members appointed by the Senate President and the House Speaker, one must represent the Ohio State Bar Association, one must represent the Ohio State Medical Association, and one must represent the insurance companies in Ohio, and all of them must have expertise in medical malpractice insurance issues.

The Commission must do all of the following: (1) study the effects of the act, (2) investigate the problems posed by, and the issues surrounding, medical malpractice, and (3) submit a report of its findings to the General Assembly not later than two years after the act's effective date.

Any vacancy in the membership of the Commission must be filled in the same manner in which the original appointment was made. The members of the Commission, by majority vote, must elect a chairperson from among themselves. The Department of Insurance must provide any technical, professional, and clerical employees that are necessary for the Commission to perform its duties. (Section 4.)

Feasibility of Patient Compensation Fund

In recognition of the statewide concern over the rising cost of medical malpractice insurance and the difficulty that health care practitioners have in locating affordable medical malpractice insurance, the act requires the Superintendent of Insurance to study the feasibility of a Patient Compensation Fund to cover medical malpractice claims, including, but not limited to the following:

(1) The financial responsibility limits for providers that are covered in Am. Sub. Senate Bill 281 of the 124th General Assembly, and the Patient Compensation Fund;

(2) The identification of methods of funding, excluding any tax on consumers;

(3) The operation and administration of such a fund;

(4) The participation requirements.

The Superintendent must submit a copy of a preliminary report by March 3, 2003, with a final report by May 1, 2003, to the Governor, the Speaker of the Ohio House of Representatives, the President of the Ohio Senate, and the chairpersons of the committees of the General Assembly with jurisdiction over issues relating to

medical malpractice liability. The final report must include the Superintendent's recommendations for implementing the Patient's Compensation Fund.

The Superintendent must make recommendations for the operation of a Patient's Compensation Fund designed to assist health care practitioners in satisfying medical malpractice awards above designated amounts. The propose of the study is to consider the feasibility of the Fund satisfying that portion of the awards for damages for noneconomic loss under R.C. 2323.43(A)(2) resulting from medical malpractice claims against hospitals, physicians, and other health care practitioners in excess of $350,000 to a maximum of $500,000. The recommendations must also provide for the satisfaction of the awards for damages for noneconomic loss under R.C. 2323.43(A)(3) resulting from medical malpractice claims against hospitals, physicians, and other health care practitioners in excess of $500,000 to a maximum of $1 million. The Superintendent's recommendations must include sources of revenue for the Fund and a mechanism for making, and the assessment of, claims against the Fund. (Section 5.)

Applicability

The act provides that the sections of the Revised Code, as amended or enacted by this act, apply to civil actions upon a medical, dental, optometric, or chiropractic claim in which the act or omission that constitutes the alleged basis of the claim occurs on or after the act's effective date (Section 6).

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	06-18-02	p.	1916
Reported, S. Insurance, Commerce and Labor	11-21-02	p.	2156
Passed Senate (22-9)	11-21-02	pp.	2162-2168
Reported, H. Civil and Commercial Law	12-02-02	p.	2128
Passed House (65-32)	12-03-02	pp.	2140-2145
Senate refused concurrence with House amendments (0-31)	12-04-02	pp.	2205-2206
House agreed to Conference Committee Report (61-34)	12-06-02	pp.	2283-2293
Senate agreed to Conference Committee Report (22-9)	12-10-02	pp.	2342-2351

02-SB281.124.doc/ejs