IN THE SUPREME COURT OF OHIO

MACHELLE EVERHART, INDIV. AND ADMIN. E/O TODD EVERHART	)	**Case Nos. 2022-0407 and 2022-0424**
Plaintiff-Appellee	)	**On Appeal from the Franklin County Court of Appeals, Tenth Appellate District**
v.	)	**Court of Appeals Case No. 21AP74**
COSHOCTON COUNTY MEMORIAL HOSPITAL, et al.,	)	
Defendants-Appellants	)	

REPLY BRIEF OF APPELLANTS COSHOCTON COUNTY MEMORIAL HOSPITAL AND MOHAMED HAMZA, M.D.

Brant Poling (0063378)
bpoling@poling-law.com
Zachary R. Hoover (0097672)
zhoover@poling-law.com
Poling
300 East Broad Street, Ste. 350
Columbus, OH 43215
614-737-2900 / 614-737-2929 (fax)
Counsel for Defendant-Appellant Coshocton County Memorial Hospital

Frederick A. Sewards (0046647)
fsewards@poling-law.com
Patrick F. Smith (0024997)
psmith@poling-law.com
Poling
300 E. Broad St., Ste. 350
Columbus, Ohio 43215
614-737-2900 / 614-737-2929 (fax)
Counsel for Defendant-Appellant Mohamed Hamza, M.D.

David H. Krause (0070577)
Dkrause@reminger.com
Thomas N. Spyker (0098075)
tspyker@reminger.com
Reminger
200 Civic Center Dr., Ste. 800

David L. Lester (0021914)
dlester@cruglaw.com
Collins, Roche, Utley & Garner
875 Westpoint Parkway, #500
Cleveland, Ohio 44145
(440) 438-3612
(216) 916-7725
Co-Counsel for Defendants-Appellants Coshocton County Memorial Hospital and Mohamed Hamza, M.D.

David Shroyer (0024099)
dshroyer@csajustice.com
Colley Shroyer & Abraham Co., LPA
536 South High Street
Columbus, Ohio 43215
614-228-6453 / 614-228-7122 (fax)
Counsel for Plaintiff-Appellee

Thomas A. Prislipsky (0067623)
tprislipsky@reminger.com
Reminger Co., LPA
11 Federal Plaza Central, Suite 1200
Youngstown, Ohio 44503
330-744-1311

Columbus, Ohio 43215-4227
614-228-1311 / 614-232-2410 (fax)
Counsel for Defendant-Appellant Joseph Mendiola, M.D.

Holly Marie Wilson (0074291)
hwilson@reminger.com
Brianna Marie Prislipsky (0101170)
bprislipsky@reminger.com
Reminger Co., LPA
101 West Prospect Ave., Suite 1400
Cleveland, Ohio 44115
216-687-1311
Counsel for Amicus Curiae Thomas Keane M.D.

Lauren S. Kuley (0089764)
lauren.kuley@squirepb.com
G. Luke Burton (0098146)
luke.burton@squirepb.com
Squire Patton Boggs (US) LLP
201 E. 4th Street, Suite 1900
Cincinnati, Ohio 45202
513-361-1200 / 513-361-1201
Counsel for Amici Curiae Ohio Hospital Association, Ohio State Medical Association, and Ohio Osteopathic Association
Calder Mellino (0093347)
calder@mellinolaw.com
The Mellino Law Firm LLC
19704 Center Ridge Road
Rocky River, Ohio 44116
440-333-3800

Sean McGlone (0075698)
sean.mcglone@ohiohospitals.org
Ohio Hospital Association
155 E. Broad Street, Suite 301
Columbus, Ohio 43215
614-221-7614 / 614-917-2258
Counsel for Amicus Curiae Ohio Hospital Association

Louis E. Grube (0091337)
leg@pwfc.com
Paul W. Flowers (0046625)
pwf@pwfco.com
Melissa A. Ghrist (0096882)
mag@pwfco.com
Flowers & Grube
Terminal Tower, 40th Floor
50 Public Square
Cleveland, Ohio 44113
216-344-9393
Counsel for Amicus Curiae Ohio Association for Justice

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A. The Medical Claim Statute of Repose Applies to "any claim" arising out of medical treatment.

In contending that there is an unstated exception to the medical claim statute of repose for wrongful death actions, plaintiff and her *amicus curiae*, Ohio Association for Justice ("OAJ"), disregard both the clear language of the statute and the General Assembly's stated intent in enacting it. The statute defines "medical claim" as meaning "any claim that is asserted in any civil action" against a physician, hospital, and others, "that arises out of the medical diagnosis, care, or treatment of any person." R.C. 2305.113(E)(3). "Medical claim" broadly includes "derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person," and defines "derivative claims" to include "without limitation," claims of parents, guardians, and spouses "that arise from [the patient's] diagnosis, care, treatment, or operation…." R.C. 2305.113(E)(7).

Based on a plain reading of R.C. 2305.113, it is beyond reasonable dispute that a medical-based wrongful death claim is a "medical claim" subject to the statute of repose. The operative section, R.C. 2305.113(C) states:

> (1) No action upon a medical … claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical … claim.
>
> (2) If an action upon a medical … claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical … claim, then, any action upon that claim is barred.

In enacting the medical claim statute of repose, the General Assembly intended to eliminate the "unacceptable burden to hospitals and healthcare practitioners" of maintaining records indefinitely and potentially having to defend stale claims for which evidence and knowledgeable witnesses may be unavailable. The General Assembly therefore found that the statute of repose "strikes a rational balance between the rights of prospective claimants and the rights of hospitals and healthcare practitioners." S.B. 281, 2002 Ohio Laws File 250 Section 3(A)(6)(B), cited in

Smith v. Wyandot Memorial Hosp., 3rd Dist. Wyandot No. 16-17-07, 2018-Ohio-2441, ¶ 21. The medical claim statute of repose should be construed broadly, to further the General Assembly's intent. Indeed, as the OAJ concedes (Brief, at 9), "Clear and unambiguous statutory language must be applied as the Legislative Assembly wrote it." And as the OAJ further concedes Brief, at 13), the policy decisions underlying the statute of repose are the legislature's prerogative. *Wilson v Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 37, quoting *Groch v. General Motors Corp*., 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").

There is no doubt that plaintiff alleges a "medical claim" here. She specifically alleges, in both her malpractice and wrongful death claims, that the defendants' medical care "fell below the accepted standard of care, skill and diligence" for medical providers in Ohio. (R. 213, Second Amended Complaint, ¶ 30, 46). This is exactly what a "medical claim" alleges. Plaintiff and OAJ studiously avoid the definition of "medical claim" because they have no way around it, except to harp incessantly on the wrongful death statute.

It is no answer to say, as plaintiff and OAJ repeatedly do, that malpractice and wrongful death claims are separate claims that have multiple distinctions. This is not in dispute, and has been a non-issue since this Court decided *Klema v. St. Elizabeth's Hosp.,* 170 Ohio St. 519, 166 N.E.2d 765 (1960), over 60 years ago. It also does not matter, as nothing prevents *both* from being "medical claims." *Martin v. Taylor*, 11th Dist. Lake No. 2021-L-046, 2021-Ohio-4614, ¶ 46 ("Although the wrongful death claim is subject to a different statute of limitations, it does not follow it is not a 'medical claim' for purposes of the statute of repose.").

Nor, contrary to OAJ's contention, did *Koler v. St. Joseph Hosp.*, 69 Ohio St.2d 477, 432 N.E.2d 821 (1982), decide the issue in plaintiff's favor. *Koler* simply re-affirmed this Court's

holding in *Klema* that the wrongful death statute of limitations applies to a malpractice-based wrongful death claim.

B. A wrongful death action is a "medical claim" for purposes of Civ. R. 10(D)

Plaintiff's discussion of the Affidavit of Merit requirement in Civ. R. 10(D) misses the mark. Civ. R. 10(D)(2)(a) provides in pertinent part:

> Except as provided in division (D)(2)(b) of this rule [pertaining to extensions of time], a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic 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.

Plaintiff then tries to distinguish *Wilson v. Mercy Health*, 11th Dist. Trumbull No. 2021-T-0004, 2021-Ohio-2470, which held that the Affidavit of Merit requirement *does* apply to a wrongful death complaint, by claiming that "Civ. R. 10(D) specifically references R.C. 2305.113."

But this does not help plaintiff at all. Civ. R. 10(D) requires that an Affidavit of Merit be attached to any Complaint that contains a medical claim "as defined in R.C. 2305.113." The question is whether a wrongful death Complaint based on malpractice is a "medical claim" for purposes of the Affidavit of Merit requirement. Ohio courts have held repeatedly that wrongful death Complaints based on medical negligence *are* subject to the Affidavit of Merit requirement, despite the absence of any reference to Civ. R. 10(D) in the wrongful death statute. This is because a wrongful death lawsuit based on medical care alleges a "medical claim."

In addition to *Wilson v. Mercy Health*, see *Fletcher v. Univ. Hospitals of Cleveland*, 172 Ohio App. 3d 153, 2007-Ohio-2778, 873 N.E.2d 365, ¶ 8 (8th Dist.), reversed on other grounds, 120 Ohio St. 3d 167, 2008-Ohio-5379, 897 N.E.2d 147 ("[w]e are well aware that R.C. 2305.113 does not supply the statute of limitations for a wrongful death claim. [Citations omitted.] However, that fact does not preclude a claim for wrongful death from being a 'medical claim' as

defined in R.C. 2305.113."); *Chromik v. Kaiser Permanente,* 8th Dist. Cuyahoga No. 89088, 2007-Ohio-5856, ¶ 14 ("In the instant case, Chromik's complaint sets forth a survivorship claim and a wrongful death claim against the defendants. Because they are medical claims asserted against the defendants, Chromik was required to comply with Civ. R. 10(D) and attach an affidavit of merit for each defendant."); *Wick v. Lorain Manor, Inc.*, 9th Dist. Lorain No. 12CA010324, 2014-Ohio-4329, ¶ 18 ("regardless of whether Wick's claims against the Lorain Manor Defendants are for medical malpractice or wrongful death, the claims all arise out of the facility's care and treatment of Josephine while she was a resident of the skilled nursing facility."); *Flynn v. Cleveland Clinic Health Sys*, 8th Dist. Cuyahoga No. 105720, 2018-Ohio-585, ¶ 4 (malpractice-based wrongful death claim is a "medical claim").

It makes no sense to contend that a wrongful death claim is a "medical claim" as defined in R.C. 2305.113 for purposes of Civ. R. 10(D), but not a "medical claim" under the same statute for purposes of the statute of repose. Plaintiff cannot have it both ways.

C. A wrongful death claim is a "medical claim" for purposes of Evid. R. 601(B)(5)

Nor does Evid. R. 601B(5), which sets forth a rule of competence for expert testimony "on the issue of liability in any medical claim, as defined in R.C. 2305.113," help plaintiff. The rule of expert competence on any "medical claim" applies to wrongful death claims equally as to malpractice claims. See, *Leckrone v. Kimes Convalescence Center,* 4th Dist. Athens No. 20CA02, 2021-Ohio-556 (nurse was not competent under former Evid. R. 601(D) to testify about causation in a wrongful death action based on medical care); *Chalmers v. HCR ManorCare, Inc.*, 6th Dist. Lucas No. L-16-1143, 2017-Ohio-5678, ¶ 44 (nurse not competent under former Evid. R. 601(D) to provide expert testimony in wrongful death case); *McKay v. Ohio State Univ. Med. Center*, Court of Claims No. 2013-00120, 2013 WL10734517 (same).

The application of expert competency requirements for a "medical claim" to wrongful death actions strongly refutes plaintiff's position.

D. There is no wrongful death exception to the medical claim statute of repose

Plaintiff and OAJ assert that the text of the wrongful death statute does not allow for application of the medical claim statute of repose, but that is not the question. The question is whether the medical claim statute of repose allows for a wrongful death exception. This is because the more specific statute is the medical claim statute of repose, which is tailored to address medical claims, not a general statute of limitations, which applies all claims. As this Court explained in *State v. Pribble*, 158 Ohio St. 3d 490, 2019-Ohio-4808, 145 N.E.3d 259, ¶ 13:

> {¶ 13} "It is a well-settled principle of statutory construction that when an irreconcilable conflict exists between two statutes that address the same subject matter, one general and the other special, the special provision prevails as an exception to the general statute." *State v. Conyers*, 87 Ohio St.3d 246, 248, 719 N.E.2d 535 (1999). R.C. 1.51, the statutory version of this general/specific canon, recognizes that optimally, conflicting statutes should be construed "so that effect is given to both" but provides that "[i]f the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." The rationale behind the general/specific canon is that "'the particular provision is established upon a nearer and more exact view of the subject than the general, of which it may be regarded as a correction.' Or think of it this way: the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." Scalia& Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012), quoting Jeremy Bentham, *General View of a Complete Code of Laws*, reprinted in 3 *The Works of Jeremy Bentham* 210 (John Bowring Ed.1843).

The wrongful death statute of limitations and the medical claim statute of repose do not conflict and easily exist together. But if the statutes did conflict, the statute of repose is the more specific statute, and was enacted long after the wrongful death statute. It is therefore an exception to the more general statute of limitations.

Plaintiff is reading the wrongful death statute in a vacuum, and disregarding the history of both the wrongful death statute and the medical claim statute of repose. Wrongful death is a strictly statutory cause of action, which did not exist at common law. *Klema v. St. Elizabeth's Hosp. of Youngstown*, 170 Ohio St. 519, 524, 166 N.E.2d 765, 769 (1960). Ohio's wrongful death statute dates to 1851, when it was enacted with its own two-year statute of limitations. *Klema*, 170 Ohio St. at 522, 166 N.E.2d at 768. Subsequent versions of the wrongful death statute have almost always included a statute of limitations. *Klema*, 170 Ohio St. at 522-524, 166 N.E.2d at 768-770.

The medical claim statute of repose took effect on January 10, 2003, and the product liability statute of repose took effect on April 7, 2005, as part of massive tort reform known as Senate Bill 80. Since the product liability statute of repose did not exist until long after the wrongful death statute, the General Assembly could not have intended to nullify non-existent statutes of repose when it enacted the wrongful death statute 170 years ago. Moreover, when the product liability statute of repose took effect in 2005, the medical claim statute of repose, which applies to "any claim" in "any court" arising from medical services, *already existed*. Hence, there was no need to address the medical claim statute of repose in the wrongful death statute. The absence of a reference to the medical claim statute of repose in the wrongful death statute – *silence*, stands in stark contrast to the General Assembly's clear statement of intent in enacting the medical claim statute of repose. Stated intent trumps silence.

E. The canon of expressio unius est exclusion alterius does not apply.

Plaintiff and the Tenth District contend that the canon of *expressio unius est exclusion alterius* applies, and that the General Assembly's failure to include a reference to the medical claim statute of repose in the wrongful death statute, as it did for the product liability statute of repose, means that it did not intend the medical claim statute to apply to wrongful death claims. But this intent cannot be inferred when one considers the *context* of the Senate Bill 80 legislation, which

amended more than 40 sections of the Revised Code and codified product liability law. Indeed, the General Assembly's stated intent was not to codify all wrongful death statutes of repose, but rather "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.

The existence of the wrongful death statute's own statute of limitations does not preclude application of the separate medical claim statute of repose. This is because statutes of limitation and repose serve different purposes:

> {¶ 10} 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…. In light of those differences, statutory schemes commonly pair a shorter statute of limitations with a longer statute of repose…. 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."

Wilson v. Durrani, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, ¶ 10.

The Third District's analysis in *Smith v. Wyandot Memorial Hosp.*, 3rd Dist. Wyandot No. 16-17-07, 2018-Ohio-24411, ¶ 26, is directly on point:

> {¶ 26} Moreover, based on the different motivations of a statute of limitations and a statute of repose, any argument asserting that Ohio's medical-claim statute of repose does not apply to wrongful-death actions because wrongful-death *1233 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.

Thus, the medical claim statute of repose and the wrongful death statute of limitations are compatible, and present no conflict. If there was a conflict, then the more specific statute of repose would govern.

F. Conclusion

For the foregoing reasons and the reasons that CCMH and Dr. Hamza previously set forth, this Court should hold that a wrongful death claim that arises out of the medical diagnosis, care, or treatment of any person is a "medical claim" under R.C. 2305.113(E)(3), to which the statute of repose in R.C. 2305.113(C) applies. This Court should then reverse the judgment of the Court of Appeals, reinstate the trial court's judgment on the pleadings for Dr. Mendiola, and direct the trial court to grant the pending Motions for Judgment on the Pleadings of CCMH and Dr. Hamza.

RESPECTFULLY SUBMITTED,

/s/ David L. Lester
DAVID L. LESTER 0021914
dlester@cruglaw.com
Collins, Roche, Utley & Garner, LLC
875 Westpoint Parkway, Suite 500
Cleveland, Ohio 44145
440-438-3612 / 216-916-7730 (fax)
Attorney for Defendants-Appellants Coshocton County Memorial Hospital and Mohamed Hamza, M.D.

/s/ Brant E. Poling
BRANT E. POLING 0063378
ZACHARY R. HOOVER 0097672
bpoling@poling-law.com
zhoover@poling-law.com
Poling
300 E. Broad St., Ste. 350
Columbus, Ohio 43215
614-737-2900 / 614-737-2929 (fax)
Attorneys for Defendant-Appellant Coshocton County Memorial Hospital

/s/ Frederick A. Sewards
FREDERICK A. SEWARDS 0046647
PATRICK F. SMITH 0024997
fsewards@poling-law.com
psmith@poling-law.com
Poling
300 E. Broad St., Ste. 350
Columbus, Ohio 43215
614-737-2900 / 614-737-2929 (fax)
Attorneys for Defendant-Appellant Mohamed Hamza, M.D.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on October 14, 2022, the foregoing Reply Brief was sent by email to the following:

David Shroyer, Esq.
dshroyer@csajustice.com
Counsel for Plaintiff-Appellee

David Krause, Esq.
Thomas Spyker, Esq.
Dkrause@reminger.com
tspyker@reminger.com
Counsel for Defendant-Appellant Joseph Mendiola, M.D.

Thomas A. Prislipsky, Esq.
Holly Marie Wilson, Esq.
Brianna Marie Prislipsky, Esq.
tprislipsky@reminger.com
hwilson@reminger.com
bprislipsky@reminger.com
Counsel for Amicus Curiae Thomas Keane, M.D.

Lauren S. Kuley, Esq.
G. Luke Burton, Esq.
lauren.kuley@squirepb.com
luke.burton@squirepb.com
Counsel for Amici Curiae Ohio Hospital Association, Ohio State Medical Association and Ohio Osteopathic Association

Sean McGone, Esq.
sean.mcglone@ohiohospital.org
Counsel for Amicus Curiae Ohio Hospital Association

Calder Mellino, Esq.
Louis E. Grube, Esq.
Paul W. Flowers, Esq.
Melissa A. Ghrist, Esq.
calder@mellinolaw.com
leg@pwfc.com
pwf@pwfc.com
mag@pwfco.com
Counsel for Amicus Curiae Ohio Association for Justice

/s/ David L. Lester
David L. Lester (0021914)