

Case Nos. 2022-0407 and 2022-0424

IN THE SUPREME COURT OF OHIO

On Appeal from the Franklin County Court of Appeals
Tenth Appellate District
Court of Appeals Case No. 21AP-74

MACHELLE EVERHART, Individually and as Administrator
of the Estate of **TODD EVERHART**, Deceased

Plaintiff-Appellee

vs.

COSHOCTON COUNTY MEMORIAL HOSPITAL, et al.,

Defendants-Appellants

**MERIT BRIEF OF PLAINTIFF – APPELLEE MACHELLE EVERHART,
INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE
OF TODD EVERHART, DECEASED**

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

David H. Krause (0070577)
Thomas N. Spyker (0098075)
Reminger Co., L.P.A.
200 Civic Center Drive, Ste. 800
Columbus, Ohio 43215
T: (614) 228-1311
F: (614) 232-2410
dkrause@reminger.com
tspyker@reminger.com
Counsel for Defendant-Appellant
Joseph J. Mendiola, M.D.

Brant E. Poling (0046647)
Zachary R. Hoover (0097672)
Poling Law
300 E. Broad Street, Suite 350
Columbus, Ohio 43215
T (614) 737-2900
F (614) 737-2929
bpoling@poling-law.com
zhoover@poling-law.com
*Counsel for Defendants-Appellants
Coshocton County Memorial Hospital and
Medical Services of Coshocton, Inc.*

Frederick A. Sowards (0046647)
Patrick F. Smith (0024997)
Poling Law
300 E. Broad Street, Suite 350
Columbus, Ohio 43215
T (614) 737-2900
F (614) 737-2929
fsowards@poling-law.com
psmith@poling-law.com
*Counsel for Defendant-Appellant
Mohamed Hamza, M.D.*

David L. Lester (0021914)
Collins, Roche, Utley & Garner, LLC
875 Westpoint Parkway, Suite 500
Cleveland, Ohio 44145
T (216) 916-7730
F (216) 916-7725
dlester@cruglaw.com
*Counsel for Defendants-Appellants
Coshocton County Memorial Hospital and
Medical Services of Coshocton, Inc.*

Lauren S. Kuley (0089764)
G. Luke Burton (0098146)
Squire Patton Boggs (US) LLP
201 E. 4th Street, Suite 1900
Cincinnati, Ohio 45202
T (513) 361-1200
F (513) 361-1201
Lauren.kuley@squirepb.com
Luke.burton@squirepb.com
*Counsel for Amici Curiae Ohio Hospital
Association, Ohio State Medical Association,
and Ohio Osteopathic Association*

Theodore M. Munsell (0022055)
Karen Cadiuex (0079240)
Carpenter, Lipps & Leland, LLP
280 Plaza, Suite 1300
280 N. High Street
Columbus, Ohio 43215
T (614) 365-4100
F (614) 365-9145
munsell@carpenterlipps.com
cadiuex@carpenterlipps.com
*Counsel for Defendants-Appellants Linda
Magness,
M.D. and Coshocton Radiologists, Inc.*

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

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

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

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STATEMENT OF FACTS

This case involves a discretionary appeal from a decision from the Tenth District Court of Appeals which reversed the trial court's decision granting a motion for judgment on the pleadings filed on behalf of Appellant Joseph J. Mendiola, M.D. in a medical negligence and wrongful death case based on the care Todd Everhart received at Coshocton County Memorial Hospital.

By way of background, Appellant Machelles Everhart is the widow of Todd Everhart, who died of lung cancer on October 28, 2006. (R. 213, Second Amended Complaint, ¶¶ 1, 28) On December 21, 2003, Mr. Everhart was brought to the emergency room at Coshocton County Memorial Hospital after he was seriously injured in a motor vehicle accident. (R. 213, Second Amended Complaint, ¶ 19) Dr. Patel evaluated Mr. Everhart in the emergency room, and x-rays were taken of his chest. (R. 213, Second Amended Complaint, ¶¶ 19, 20) Dr. Patel did not note anything remarkable about the chest x-rays, which later were read by the radiologist on duty that night, Joseph Mendiola, M.D. (R. 213, Second Amended Complaint, ¶ 20) Dr. Mendiola's impression of the x-ray noted an "opacity in the lateral aspect of the right upper lobe which may represent a lung contusion." (R. 213, Second Amended Complaint, ¶ 20)

Dr. Mendiola failed to fill out a required "discrepancy report" which would have alerted the emergency room physician of the concerning potentially cancerous finding. Coshocton County Memorial Hospital assigned Dr. Hamza to be Todd Everhart's physician while he was at the hospital. Dr. Hamza was supposed to be given the x-ray report. However, he testified that he never received it from Coshocton County Memorial Hospital. Coshocton County Memorial Hospital had a duty to provide the report to Dr. Hamza and asserts it was delivered by usual means. Whether Dr Hamza actually received the report with the suspicious finding is disputed.

As events played out in this case, however, no one other than Dr. Mendiola ever knew about the potentially cancerous opacity on the film, no one ever contacted Todd Everhart about the abnormal reading, and Todd Everhart never received follow-up attention for the lung opacity that appeared on the x-ray. Mr. Everhart recovered from the injuries he suffered in the automobile accident for which he was treated at Coshocton County Memorial Hospital. However, on August 11, 2006, Todd Everhart was diagnosed with advanced stage lung cancer and succumbed to the disease just two months later, on October 28, 2006. (R. 213, Second Amended Complaint, ¶¶ 24, 28) Plaintiff's expert, Dr. Richard Freeman, has testified that the opacity apparent on the 2003 chest x-ray was lung cancer and was curable. Had Todd Everhart received treatment for his lung cancer in 2003, he would have survived. (R. 213, Second Amended Complaint, ¶¶ 26, 27)

This appeal follows a decision and final judgment granting judgment on the pleadings in favor of Defendant-Appellee Joseph Mendiola, M.D. (hereinafter "Dr. Mendiola"). Plaintiff-Appellant Mabelle Everhart, Administrator of the Estate of Todd Everhart, filed this action based on Todd's wrongful death from lung cancer as a result of the failure to timely diagnose his condition.

Todd Everhart died on October 28, 2006. The failure to diagnosis occurred on December 21, 2003. Todd's cancer was discovered on August 11, 2006. On July 30, 2007, counsel for Mabelle Everhart served 180-day letters, thereby extending her survivorship statute of limitations to January 26, 2008. Thereafter, on January 25, 2008, Everhart timely filed this action based on Todd's wrongful death from lung cancer as a result of the failure to timely diagnose his condition. Her complaint named as Defendants Dr. Mendiola, Coshocton County Memorial

Hospital, Lucy Freedy, M.D.¹, Rajendra Patel, M.D.², Mohamed Hamza, M.D., Linda Magress, M.D., and a number of John Doe Defendants asserting claims for medical negligence and wrongful death, as well as a respondeat superior claim against the hospital. (R. 3, Complaint)

On October 23, 2008, the trial court granted Everhart leave to amend her complaint to add the individual Defendants' medical practices, New Century Physicians, Inc. and Medical Services of Coshocton, Inc., as additional Defendants. (R. 105, Entry Granting Leave to Amend)

On August 10, 2009, with leave of court, Everhart filed a Second Amended Complaint to add Coshocton Radiology, Inc., Dr. Magness' medical practice, as an additional Defendant. (R. 213, Second Amended Complaint)

This is not the first time this case has been before the Tenth District Court of Appeals. On February 1, 2012, Everhart appealed the trial court's decision granting summary judgment in favor of Dr. Hamza. (R. 455, Notice of Appeal) This Court reversed the decision granting summary judgment in favor of Dr. Hamza and remanded the case to the trial court for further proceedings. (R. 461, Judgment Entry) The Court held that because there was a genuine issue of material fact as to whether Dr. Hamza received the X-rays and read the radiology report, there was also a genuine issue of material fact as to whether a physician patient relationship existed, which in turn gave rise to a duty. (R. 460, Decision) *Everhart v. Coshocton County Memorial Hospital*, 10th Dist. No. 12AP-75, 2013-Ohio-2210, ¶1.

In 2016, the Ohio Supreme Court decided *Antoon v. Cleveland Clinic Foundation*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, holding that R.C. 2305.113(C) is a "true

¹ On July 26, 2010, Everhart voluntarily dismissed her claims against Dr. Freedy. (R. 330, Notice of Dismissal)

² On January 29, 2010, Everhart voluntarily dismissed her claims against Dr. Patel. (R. 276, Notice of Dismissal)

statute of repose that applies to both vested and nonvested claims” and requires any medical negligence claim to be brought within four years of the occurrence of the act or omission that caused the plaintiff’s injury. *Id.* at ¶ 1. The *Antoon* decision prompted Defendants to file motions seeking leave to file motions for judgment on the pleadings asking the trial court to dismiss the case on the basis that Everhart’s claims were barred by the statute of repose. (R. 660, Hamza Motion for Leave; R. 662, Mendiola Motion for Leave; R. 667, Coshocton Hospital Motion for Leave; R. 671, Magness Motion for Leave) Everhart filed her memorandum in opposition to the motions filed by Defendants Dr. Mendiola and Dr. Hamza on September 6, 2017, arguing that Defendants waived the affirmative defense by not asserting it in their answers. (R. 664, Memorandum Contra) Memorandums in opposition to the motions for leave filed on behalf of Defendants Coshocton County Memorial Hospital and Dr. Magness were filed on September 22, 2017 and October 5, 2017. (R. 673, Memo Contra; R. 677, Memo Contra)

Prompted by Everhart’s response to their motions seeking leave to file motions for judgment on the pleadings, Defendants sought leave to amend their answers to add the statute of repose affirmative defense which had not previously been asserted. (R. 675, Hamza Motion for Leave; R. 678, Coshocton Hospital Motion for Leave) Everhart opposed Defendants’ motions arguing that they were untimely. (R. 679, Memo Contra) Soon thereafter, Coshocton County Memorial Hospital initiated bankruptcy proceedings, and, on November 30, 2017, the trial court ordered that the case be stayed until the resolution of the bankruptcy case. (R. 682, Order to Stay) The case was not reinstated until May 16, 2019 when the trial court issued a nunc pro tunc entry reactivating the case to April 3, 2019. (R. 729, Nunc Pro Tunc Entry)

On August 25, 2020, the trial court granted Defendants’ motions for leave to file their amended answers. (R. 743, Decision and Entry) The trial court granted Defendants’ motions for

leave to file motions for judgment on the pleadings on August 27, 2020. (R. 744, Decision and Entry)

On September 4, 2020, twelve years after the case was filed, Dr. Mendiola filed a brief motion for judgment on the pleadings, arguing that the wrongful death claim against him is barred by R.C. 2305.113(C), the four-year statute of repose governing medical claims. He also argued that Everhart's medical negligence claim is barred by the statute of limitations. (R. 754, Mendiola Motion for Judgment on the Pleadings) Dr. Mendiola joined in the motion for judgment on the pleadings that was filed on behalf of Coshocton County Memorial Hospital on September 2, 2020. (R. 746, Coshocton Motion for Judgment on the Pleadings)³

On September 15, 2020, Everhart filed a motion for leave to file a third amended complaint. (R. 756, Motion for Leave) Everhart filed a memorandum in opposition to Defendants' motions for judgment on the pleadings on September 16, 2020, arguing that her claims were timely brought, and the statute of repose does not apply to wrongful death claims. (R. 757, Memorandum in Opposition) Dr. Mendiola filed his reply on September 23, 2020. (R. 763, Reply)

Defendants Coshocton County Memorial Hospital and Dr. Mendiola also opposed Everhart's motion for leave to file the third amended complaint, filing their memorandums in opposition on September 21 and September 23, 2020. (R.758, Coshocton Hospital Memo Contra; R. 760, Mendiola Memo Contra) Everhart filed her reply on September 28, 2020. (R. 767, Reply) Thereafter, on December 11, 2020, the trial court denied Everhart's motion for leave to file the third amended complaint. (R. 777, Decision and Entry)

³ All the Defendants filed motions for judgment on the pleadings, however, the trial court ruled only on the motion for judgment on the pleadings filed on behalf of Dr. Mendiola.

On January 26, 2021, the trial court granted Dr. Mendiola's motion for judgment on the pleadings concluding that Everhart's wrongful death claim is a medical claim and, therefore, her claims against Dr. Mendiola are barred by R.C. 2305.113(C). Accordingly, the trial court dismissed all claims brought against Dr. Mendiola. The Decision and Entry granting Dr. Mendiola's motion included the language "There is no just cause for delay." (R. 793, Decision and Entry, p. 14) On January 26, 2021, the trial court filed a Notice of Final Appealable Order. (R. 795, Notice)

On February 23, 2021, Everhart timely filed her Notice of Appeal from the decision and final judgment dated January 26, 2021 which granted Dr. Mendiola's motion for judgment on the pleadings. (R. 801, Notice of Appeal) Upon careful consideration of the relevant law, on March 3, 2022, the Tenth District Court of Appeals reversed the trial court's decision concluding that R.C. 2305.113(C), the statute of repose governing medical claim, does not apply to a wrongful death claim and that the trial court had "erred in finding [Machelle Everhart] was barred from pursuing her wrongful death claim." *Everhart v. Coshocton Cnty. Mem. Hosp.*, 2022-Ohio-629, 186 N.E.3d 232, ¶ 51.

On March 11, 2022, Dr. Mendiola, Coshocton Memorial Hospital and Mohamed Hamza, M.D. filed motions asking the court of appeals to certify a conflict between the Tenth District's decision and decisions from the Third District, Fifth District, and Eleventh District. (App. R. 71, 72, 73, Motions to Certify Conflict) On April 14, 2022, the Tenth District granted the motions to certify the conflict. (App. R. 86, Decision Certifying Conflict) Thereafter, on April 18th and 21st, Appellants filed their notices appealing the Tenth District's decision. (App. R. 90, 93, Notices of Appeal)

On June 29, 2022, this Court granted jurisdiction to hear the appeals filed on behalf of Appellant Dr. Mendiola and Appellants Coshocton County Memorial Hospital and Dr. Hamza in *Machelle Everhart, Individually and as Administrator of the Estate of Todd Everhart, Deceased v. Coshocton County Memorial Hospital, et al.*, Case No. 2022-0407. The Court also determined that a conflict exists between the Tenth District’s decision and decisions from other appellate districts considering the issue and accepted the conflict certified by the Tenth District for review in *Machelle Everhart, Individually and as Administrator of the Estate of Todd Everhart, Deceased v. Coshocton County Memorial Hospital, et al.*, Case No. 2022-0424. The Court ordered that the two cases be consolidated for briefing.

**ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW
AND CERTIFIED CONFLICT QUESTION**

Appellant’s Proposition of Law: Except as otherwise expressly provided therein, the Medical Claim Statute of Repose provided in 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 the medical claim. (Appellant Joseph J. Mendiola, M.D.)

Appellants’ Proposition of Law: Except as otherwise specifically provided therein, the Ohio Medical Claim Statute of Repose, R.C. 2305.113(C), applies to any wrongful death action that is commenced more than four years after the occurrence of an act or omission that is the alleged basis of a medical claim. (Appellants Coshocton County Memorial Hospital and Mohamed Hamza, M.D.)

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?”

This appeal involves the application of the medical claim statute of repose to a statutory wrongful death action. The Tenth District was the first court to properly analyze the wrongful death statute to determine that the statute of repose in R.C. 2305.113(C) does not apply to a wrongful death action based on medical negligence. Prior to this decision, appellate courts deciding this issue ignored the wrongful death statute, focusing solely on the language in R.C.

2305.113(C) and cases applying the statute of repose in other contexts. In this case, the Tenth District got it right, basing its ruling on a plain reading of the language in the wrongful death statute. Courts have begun to follow the Tenth District's lead, rejecting the analysis followed by other appellate courts which in essence found that the language in R.C. 2305.113(C) trumped the wrongful death statute. *See, Wood v. Lynch*, 10th Dist. No. 20AP289, 2022-Ohio-1381; *Davis v. Mercy St. Vincent Medical Center*, 6th Dist. Lucas No. L-21-1095, 2022-Ohio-1266; *Ewing v. UC Health*, 1st Dist. Hamilton No. C-210390, 2022-Ohio-2560. The outcome of this particular case was not driven by a misapplication of the law but, rather, a careful reading of it.

A. A Wrongful Death Action Is Governed Exclusively By Chapter 2125.

A wrongful death action is separate and distinct from a medical negligence action and is governed by the provisions of Chapter 2125 rather than the common law. In *Keaton v. Ribbeck*, 58 Ohio St. 2d 443, 446, 391 N.E.2d 307 (1979), this Court found that "the wrongful death statute 'is an innovation to the principles of the common law and affords the only civil remedy to compensate others for death resulting from injuries.'" *Id.*, quoting *Karr v. Sixt*, 146 Ohio St. 527, 532, 67 N.E.2d 331 (1946) (criticized on other grounds by the Court in *Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St. 3d 244, 249, 617 N.E.2d 1052 (1993)).

The enactment of the wrongful death statute created "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 v. Sixt*, 146 Ohio St. 527, 67 N.E.2d 331 (1946), paragraph one of the syllabus. The statute "affords the only civil remedy to compensate others for death resulting from injuries." *Karr* at paragraph two of the syllabus. This Court considered the distinction between the two causes of action in *Klema v. St. Elizabeth's Hosp.*, 170 Ohio St. 519, 166 N.E.2d 765 (1960).

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, 170 Ohio St. at 521, quoting *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U.S. 648, 658, 59 L. Ed. 1160, 35 S. Ct. 704 (1915), citing, e.g., *Mahoning Valley Ry. Co. v. Van Alstine, Admr.*, 77 Ohio St. 395, 83 N.E. 601 (1908).

Koler v. St. Joseph Hospital, 69 Ohio St.2d 477, 478, 432 N.E.2d 821 (1982), like *Klema*, held that the one-year statute of limitations for a medical malpractice claim did not apply to a wrongful death claim, relying on the differences in the two types of actions previously discussed in *Klema*. Despite the fact that *Klema* and *Koler* were decided prior to the enactment of the current version of R.C. 2305.113, the distinction between claims brought based on medical negligence and wrongful death actions has not changed. The one-year statute of limitations for bringing a medical claim still does not apply to a wrongful death action irrespective of the nature of the claim.

In 1994, this Court once again recognized that a wrongful death action is a separate action. *Thompson v. Wing*, 70 Ohio St.3d 176, N.E.2d 917 (1994). In *Thompson*, the Court reasoned:

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.

Moreover, the wrongful death action does not even arise until the death of the injured person.

Id. at 183.

1. *Koler* and *Klema* are still good law.

Wilson v. Mercy Health, 11th Dist. Trumbull No. 2021-T-0004, 2021-Ohio-2470, does not suggest a departure from *Klema* or *Koler*. In *Wilson*, the plaintiff relied on *Koler* to argue that Civ. R. 10(D)(2)(a), which requires that an affidavit of merit be filed in support of a medical claim, does not apply to a wrongful death claim. While the Eleventh District noted that *Koler* was decided under the former version of R.C. 2305.113, the court focused on the specific language found in Civ. R. 10(D)(2)(a). *Wilson* at ¶ 34. Civ. R. 10(D)(2)(a) specifically references R.C. 2305.113 while R.C. Chapter 2125 does not. The rule provides in relevant part that “[e]xcept as provided in division (D)(2)(b) of this rule, 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)(a) (emphasis added). *Wilson* does not suggest that the distinction drawn by *Koler* no longer exists or require the Court to apply R.C. 2305.113 in the context of a statutory wrongful death claim when the wrongful death statute does not refer to R.C. 2305.113.

In *Koler*, the Court rejected the notion that later amendments to R.C. 2305.11, the version of the statute in effect when *Klema* was decided, superseded the holding in *Klema* and required the application of the one-year statute of limitations to a wrongful death claim. *Koler*, 69 Ohio St.2d at 480-481. The amendments considered the definition of “medical claim” which was broadened to encompass “any claim asserted in any civil action arising out of the diagnosis, care

or treatment of any person.” *Id.* at 480, quoting 136 Ohio Laws 2811. Nevertheless, the Court held that R.C. 2125.02 was controlling and the wrongful death claim was subject to the two-year statute of limitations. *Id.* at 480. This Court’s holding in *Koler* remains good law. *Everhart* at ¶ 39, citing Ohio appellate court decisions applying *Koler*. The same is true for *Klema* upon which it is based.

2. Where statutes and rules incorporate the definition of “medical claim” from R.C. 2305.113, the statutes and rules specifically mention R.C. 2305.113.

Not only does Civ. R. 10(D)(2)(a) include a specific reference to R.C. 2305.113, but Evid. R. 601(B)(5)⁴ and its statutory equivalent, R.C. 2743.43, incorporate this reference as well. Specifically, Evid. R. 601 provides the general evidentiary rule governing competency and, as to physicians and other medical care providers, states in relevant part: “[a] person giving expert testimony on the issue of liability in any medical claim, *as defined in R.C. 2305.113*, asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician * * *” Evid. R. 601(B)(5). R.C. 2743.43 also includes a specific reference to R.C. 2305.113: “[n]o person shall be deemed competent to give expert testimony on the liability issues in a medical claim, *as defined in section 2305.113* of the Revised Code, unless: * * *” R.C. 2743.43(A).

The specific references to R.C. 2305.113 found in Civ. R. 10(D)(2)(a), Evid. R. 601(B)(5), and R.C. 2743.43 distinguish the cases interpreting these provisions from cases brought under the wrongful death statute where R.C. 2305.113 is not mentioned. Any extrapolation of a general rule that R.C. 2305.113 and the statute of repose found in R.C.

⁴ In his Merit Brief, Dr. Mendiola cites to Evid. R. 601(E)(5). The correct rule is Evid. R. 601(B)(5).

2305.113(C) also apply to a wrongful death action would require the Court to ignore the language in the wrongful death statute.

B. Wrongful Death Actions Are Separate And Distinct From Medical Negligence Actions.

A wrongful death action is separate and distinct from a medical negligence action and is governed by the provisions of Chapter 2125 rather than the common law. The significant differences between the two causes of action outweigh their similarities.

- A wrongful death claim must be brought by the administrator or executor of the estate while a medical negligence claim is brought by the injured party.
- A wrongful death action only seeks damages for injuries incurred by the surviving next of kin that occur after the decedent's death while medical negligence claims are brought for injuries sustained by the injured party before death.
- A wrongful death claim cannot be brought until after the death while a medical negligence claim can be brought after an injury.
- A wrongful death claim is pled as a separate count from a medical negligence claim.
- The statute of limitations for a wrongful death claim cannot be extended by filing a 180-day letter while the statute of limitations for a medical negligence claim can be extended by a 180-day letter.
- The statute of limitations for a wrongful death claim is 2 years while the statute of limitations for a medical negligence claim is 1 year.
- The damages recoverable in a wrongful death action are different than those recoverable in a medical negligence action and are not subject to damage caps.
- A wrongful death claim has different elements by requiring a connection between the act and the death, often a disputed issue, while a medical negligence claim only requires evidence of some injury.

A wrongful death claim is a unique claim controlled by its own set of rules established by the General Assembly.

C. The Text Of The Wrongful Death Statute Does Not Allow For The Application Of The Statute Of Repose From R.C. 2305.113(C).

The wrongful death statute has its own statute of limitations which states: “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.” R.C. 2125.02(D)(1). Division (D)(2) further provides that in the case of a products liability claim, no action may be brought more than ten years after the date the product was delivered to its first purchaser, establishing a ten-year statute of repose for a wrongful death claim based on a product liability claim. R.C. 2125.02(D)(2). The wrongful death statute provides no other time limitations upon an individual’s right to maintain a statutory wrongful death action regardless of the basis of the decedent’s underlying claim.

The stated exception in R.C. 2125.02(D)(2) leaves no room for additional exceptions which are not so stated. “Under the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded.” *State v. Droste*, 83 Ohio St.3d 6, 9, 1998-Ohio-182, 697 N.E.2d 620, citing *Thomas v. Freeman*, 79 Ohio St.3d 221, 224-225, 680 N.E.2d 997, 1000 (1997) (additional citations omitted). Had the General Assembly intended for there to be a statute of repose on a person’s right to maintain a wrongful death action based on a medical claim or any other type of claim, the General Assembly would have included such a provision in Chapter 2125 as it did with product liability claims. In *Everhart*, the Tenth District considered this analysis only *after* if had already determined that the plain language in R.C. 2125.02 does not incorporate the statute of repose from R.C. 2305.113(C).

This is precisely the analysis followed by the Ohio Supreme Court in *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, where the Court concluded “[h]ad 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.” *Wilson* at ¶ 38.

The text of R.C. 2305.03 addresses defenses based upon time limitations, including the statute of repose on medical claims. Specifically, the statute provides: “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. . .” R.C. 2305.03(A) (emphasis added). Since the wrongful death statute has its own limitation period, it is excluded from the application of R.C. 2305.03.

The statute of limitations in R.C. 2305.113(A) does not apply to a wrongful death claim which is governed by its own statute of limitations, even if the claim is based on medical negligence and otherwise would be properly characterized as a “medical claim.” *See, Klema v. St. Elizabeth’s Hosp., supra*. If the General Assembly intended R.C. 2305.113 to govern all medical claims, wrongful death claims based on medical negligence would have been excluded from the wrongful death statute and those claims would also be subject to the one-year statute of limitations in R.C. 2305.113(A). The plain language in R.C. 2305.113 and R.C. 2125.02 requires a different result.

D. This Court’s Prior Decisions Addressing The Medical Claim Statute Of Repose Do Not Require The Extension Of The Statute Of Repose To A Wrongful Death Claim.

Appellant Dr. Mendiola focuses on the application of what it terms “guiding principles” to argue that the Court’s prior decisions addressing the statute of repose require that the Court also apply the statute of repose in the context of a wrongful death claim. The only “guiding principle” should be to apply the language in the wrongful death statute as written. The statute of

repose set forth in R.C. 2305.113(C) was the subject of this Court’s decision in *Wilson v. Durrani, supra*. In *Wilson*, the Court held that a plaintiff may not “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.” *Id.* at ¶ 1. *Wilson* did not involve a wrongful death claim, and this Court has not yet addressed whether the statute of repose applies to claims brought under Ohio’s wrongful death statute, R.C. Chapter 2125. However, *Wilson* is significant for purposes of this appeal because the Court decided *Wilson* by applying “the plain and unambiguous language of the statute of repose.” *Wilson* at ¶ 1. That is precisely what the Tenth District did in this case when it looked to the language in the wrongful death statute to determine whether to apply the medical claim statute of repose.

The Honorable Judge Klatt was on the panel that decided *Wilson*, concurring in the majority opinion in that 5-2 decision. Notably, he was also on the Tenth District panel that decided this case and unanimously held that the statute of repose does not apply to a claim brought under the wrongful death statute.

In this case, the Tenth District considered precedent from this Court addressing the statute of repose in other contexts in arriving at its conclusion but found those cases distinct in that they did not 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.” *Everhart* at ¶ 33.

E. The Analysis Of A Wrongful Death Claim Should Focus On The Wrongful Death Statute.

The Tenth District correctly decided this case by looking at the plain language in the wrongful death statute. The only statute of repose included in the wrongful death statute is the 10-year statute of repose applicable to products liability claims. R.C. 2125.02(D)(2). The

wrongful death statute does not include a statute of repose for wrongful death actions based on medical claims or reference the statute of repose in R.C. 2305.113(C). Had the General Assembly intended R.C. 2305.113(C) to apply, it would have said so.

Appellants have latched onto the phrase that the statute of repose “means what it says,” a conclusion this Court reached in *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974. The same reasoning should hold true for the wrongful death statute. *Antoon* involved a medical negligence claim brought under Ohio’s common law. The only statute at issue in *Antoon* was the statute of repose. The Court was not required to address a statutory claim such as the one brought in this case which is based on the wrongful death statute, and not the common law, and which provides its own statute of limitations and statute of repose.

The Tenth District specifically found the wrongful death statute to be *unambiguous*. *Everhart* at ¶ 21. Its application of the rules of statutory construction simply underscored its conclusion that the medical statute of repose does not apply to a wrongful death action.

CONCLUSION

The Tenth District correctly applied precedent from this Court, as well as the applicable statute and civil rules, to the unique facts in this case. Accordingly, the Court should affirm the decision of the Tenth District Court of Appeals and remand this case for further proceedings consistent with it.

Respectfully submitted,

/s/ David I. Shroyer

David I. Shroyer

Supreme Court No. 0024099

Counsel for Plaintiff-Appellee

Colley Shroyer & Abraham Co., LPA

536 South High Street

Columbus, Ohio 43215

T: (614) 228-6453

F: (614) 228-7122

Email: dshroyer@csajustice.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email this 23rd day of September, 2022, in accordance with S.Ct.Prac.R. 3.11(C)(1) on the following at the email addresses noted below:

Brant E. Poling (0046647)
Zachary R. Hoover (0097672)
Poling Law
300 E. Broad Street, Suite 350
Columbus, Ohio 43215
T (614) 737-2900
F (614) 737-2929
bpoling@poling-law.com
zhoover@poling-law.com
*Counsel for Defendants-Appellants
Coshocton County Memorial Hospital and
Medical Services of Coshocton, Inc.*

Frederick A. Sowards (0046647)
Patrick F. Smith (0024997)
Poling Law
300 E. Broad Street, Suite 350
Columbus, Ohio 43215
T (614) 737-2900
F (614) 737-2929
fsowards@poling-law.com
psmith@poling-law.com
*Counsel for Defendant-Appellant
Mohamed Hamza, M.D.*

David L. Lester (0021914)
Collins, Roche, Utley & Garner, LLC
875 Westpoint Parkway, Suite 500
Cleveland, Ohio 44145
T (216) 916-7730
F (216) 916-7725
dlester@cruglaw.com
*Counsel for Defendants-Appellants
Coshocton County Memorial Hospital and
Medical Services of Coshocton, Inc.*

Lauren S. Kuley (0089764)
G. Luke Burton (0098146)
Squire Patton Boggs (US) LLP
201 E. 4th Street, Suite 1900
Cincinnati, Ohio 45202
T (513) 361-1200
F (513) 361-1201
Lauren.kuley@squirepb.com
Luke.burton@squirepb.com
*Counsel for Amici Curiae Ohio Hospital
Association, Ohio State Medical Association,
and Ohio Osteopathic Association*

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

Theodore M. Munsell (0022055)
Karen Cadiuex (0079240)
Carpenter, Lipps & Leland, LLP
280 Plaza, Suite 1300
280 N. High Street
Columbus, Ohio 43215
T (614) 365-4100
F (614) 365-9145
munsell@carpenterlipps.com
cadiuex@carpenterlipps.com
*Counsel for Defendants-Appellants Linda
Magness,
M.D. and Coshocton Radiologists, Inc.*

David H. Krause, Esq.
Thomas M. Spyker, Esq.
Reminger Co., L.P.A.
200 Civic Center Drive, Suite 800
Columbus, Ohio 43215
dkrause@reminger.com
tspyker@reminger.com
*Counsel for Defendant-Appellant
Joseph J. Mendiola, M.D.*

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

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

/s/ David I. Shroyer

David I. Shroyer
Counsel for Plaintiff-Appellee