[Cite as *LaMusga v. Summit Square Rehab., L.L.C.*, 2015-Ohio-5305.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JUDITH LAMUSGA, ESQUIRE	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 26641
	:	
v.	:	Trial Court Case No. 2014-CV-408
	:	
SUMMIT SQUARE REHAB, LLC, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 18th day of December, 2015.

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WELBAUM, J.

{¶ 1} In this case, Plaintiff-Appellant, Judith LaMusga, Esquire, as Administrator of the Estate of Dant'e L. Price, Deceased ("LaMusga"), appeals from a trial court judgment dismissing Counts I, II, and IV of her Complaint and Count IV of her Amended Complaint, and from a motion denying reconsideration of the judgment of dismissal. The dismissal was entered in favor of the following Defendants-Appellees: Summit Square Rehab, L.L.C. ("Summit"); Wallick Companies, L.L.C., dba Wallick Communities; Wallick-Hendy Properties; Wallick Properties; Wallick Properties Midwest, L.L.C., dba CJ McLin Apartments; Wallick-Hendy Development Co., L.L.C., dba CJ McLin Senior Apartments; Wallick Asset Management, L.L.C. (collectively "Wallick Companies"); Ranger Security, L.L.C.; Ivan Burke; Christina Burke (collectively, "Ranger"); Justin Wissinger; and

Christopher Tarbert.[1]

{¶ 2} We conclude that the trial court did not err in holding that the survivorship claims of the Estate of Dant'e Price are barred by the statute of limitations. The Estate's claims for Assault and Battery, False Imprisonment, and Intentional Infliction of Emotional Distress were not timely filed, and the tolling provisions in R.C. 2305.16 that preserve parental loss of consortium claims of the decedent's minor child do not apply to the Estate's survivorship claims. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} For purposes of our discussion, we will assume that the allegations in the Complaint and Amended Complaint are true. On January 21, 2014, LaMusga filed a complaint against Summit, the Wallick Companies, Ranger, Wissinger, and Tarbert, based on the death of Dant'e Price, who was shot and killed in the parking lot of Summit Square Apartments in Dayton, Ohio, on March 1, 2012. According to the Complaint, Price drove to Summit Square Apartments on that date to visit his girlfriend and minor son. While Price was attempting to park his car, he was confronted by Tarbert and Wissinger, who were employed by Ranger and were working as security guards at the apartment complex.

{¶ 4} Tarbert and Wissinger surrounded Price's vehicle with their guns raised and ordered him to exit the vehicle. Although Price offered to leave and asked them to lower

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[1] During the pendency of this appeal, the claims against Summit and the Wallick Companies were settled, and those parties have been voluntarily dismissed from the action. As a result, the only remaining defendants are the Ranger defendants, Wissinger, and Tarbert. As will be explained in the main text, the Dayton Metropolitan Housing Authority, while a defendant in the case below, is not part of this appeal.

their guns, they refused to do so. Price then said he would remain in his vehicle until officers from the City of Dayton Police Department arrived.

{¶ 5} However, Tarbert and Wissinger continued to shout orders and point their guns at the car. Price then attempted to drive away because he feared for his life. The officers subsequently approached the vehicle and shot at or into it approximately 17 times. Price died after being hit by at least three of these shots.

{¶ 6} The Complaint contained seven counts. The first four were labeled "survivorship claims," and included: Assault and Battery (Count I); False Imprisonment (Count II); Improper Hiring, Training, Retention, and Supervision (Count III); and Intentional and Reckless Infliction of Emotional Distress (Count IV). Count V was based on Wrongful Death; Count VI requested punitive damages and attorney fees in connection with Counts I-VI; and Count VII was based on vicarious and statutory liability. The prayer for relief asked for joint and several judgments against the Defendants for compensatory and punitive damages in an amount exceeding $25,000, reasonable attorney fees and costs, and pre-judgment and post-judgment interest.

{¶ 7} On February 20, 2014, Ranger filed a Civ.R. 12(B)(6) motion to dismiss, contending that the claims for Assault and Battery and False Imprisonment were barred by the statute of limitations. Ranger also included the statute of limitations as an affirmative defense in its answer, which was filed the same day. On February 24, 2014, Tarbert filed an answer to the Complaint, raising the statute of limitations as an affirmative defense.

{¶ 8} Subsequently, on February 28, 2014, LaMusga filed an Amended Complaint, adding the following Defendants: Dayton Metropolitan Housing Authority dba Greater

Dayton Premier Management ("DMHA") and Tactical Solutions Group ("TSG"). The amended complaint also added additional counts, including a "survivorship claim," which alleged, among other things, that DMHA and TSG, as well as the other Defendants, knew or should have known that guards employed by Ranger had a reputation or history of acting unlawfully or violently towards residents, invitees, and others on the premises of private residences, Summit Square, and other properties subsidized by federal funds (Count VIII). With specific reference to TSG, the amended complaint alleged that Ivan and Christina Burke were the sole officers and members, and that TSG had negligently, recklessly, and wantonly trained and certified Wissinger and Tarbert in the use of firearms and had provided firearms to them.

{¶ 9} The Amended Complaint also added the following counts: Intentional Infliction of Serious Emotional Distress (Count IX); Wrongful Death (Count X); punitive damages (Count XI); and vicarious and statutory liability (Count XII). Again, punitive damages and attorney fees were requested in connection with all claims, and the prayer for relief requested a joint and several judgment of compensatory and punitive damages in amounts exceeding $25,000, reasonable attorney fees and costs, and pre-judgment and post-judgment interest.

{¶ 10} On March 11, 2014, Summit filed a Civ.R. 12(C) motion for judgment on the pleadings with respect to Counts I, II, and IV of the Complaint and Count IX of the Amended Complaint, based on the statute of limitations. The Wallick Companies then filed a Civ.R. 12(B)(6) motion to dismiss Counts I, II, and IV of the Complaint and Count IX of the Amended Complaint, also based on the statute of limitations.

{¶ 11} On March 27, 2014, DMHA filed an answer and cross-claims against

several Defendants, including TSG, Ranger, Wissinger, Tarbert, and two of the Wallick Companies (Wallick-Hendy Development, L.L.C. dba CJ McLin Senior Apartments and Wallick Asset Management, L.L.C.). The cross-claims were based on contribution and/or indemnification. All the pertinent defendants filed answers to DMHA's cross-claims. Subsequently, on May 12, 2014, Wissinger also filed a Civ.R. 12(C) motion for partial judgment on the pleadings, asserting that Counts I, II, and IV of the Complaint and Count IX of the Amended Complaint were barred by the statute of limitations.

{¶ 12} The trial court granted the motions for dismissal and/or partial judgment on the pleadings on June 28, 2014, and ordered Counts I, II, IV, and IX dismissed with prejudice. First, the court held that the benefit of the tolling provisions in R.C. 2305.16, which apply to a potential loss of consortium claim of Price's minor son, would not extend the time for filing the Estate's claims for Assault and Battery and False Imprisonment (Counts I and II), which were required to be brought within one year of the injury. The court also held that the claims for Intentional Infliction of Emotional Distress and Intentional Infliction of Serious Emotional Distress (Counts IV and IX) were grounded in the alleged offensive physical contact on March 1, 2012, and the one-year statute of limitations should apply to those claims as well.

{¶ 13} The trial court did not include a Civ.R. 54(B) certification with its decision. Subsequently, in July 2014, LaMusga voluntarily dismissed TSG, without prejudice, and DMHA also dismissed its cross-claim against TSG. On July 17, 2014, DMHA filed a Civ.R.12(C) motion for judgment on the pleadings, asserting, as others had, that the statute of limitations barred Counts I, II, IV, and IX.

{¶ 14} On July 24, 2014, LaMusga filed a motion for reconsideration, asking the

trial court to reconsider its decision dismissing Counts I, II, IV, and IX. The court overruled this motion on January 31, 2015, and added a Civ.R. 54(B) certification. However, a Civ.R. 58(B) notice was not issued until March 5, 2015. On January 31, 2015, the court also granted the motion for judgment on the pleadings that DMHA had filed. However, this decision, which was filed separately, did not contain a Civ.R. 54(B) certification.

{¶ 15} On April 3, 2015, LaMusga appealed from the June 28, 2014 order dismissing Counts I, II, IV, and IX, and from the January 31, 2015 order overruling the motion for reconsideration.

II. Discussion of Preliminary Matters

{¶ 16} On appeal, LaMusga has raised two assignments of error. The first contends that the trial court erred in failing to consider the minor child's legal and equitable interests in the survival claims, which trigger the tolling provisions in R.C. 2305.16. The second alleges that the minor's joint and inseparable tort claim for loss of parental consortium, also triggers the tolling provisions in R.C. 2305.16 for purposes of the Estate's survivorship claims.

{¶ 17} In responding to the assignments of error, Ranger has asked us to dismiss the appeal because the January 31, 2015 order was not a final appealable order. Wissinger has also raised an issue concerning whether the appeal was timely filed. LaMusga responded to these arguments in her reply brief, and we will consider these matters first, because they may affect our ability to hear the appeal.

A. Issues Pertaining to Final Appealable Order Status

{¶ 18} "When determining whether a judgment or order is final and appealable, an appellate court engages in a two-step analysis. First, the court must [ordinarily] determine if the order is final within the requirements of R.C. 2505.02. Second, if the order satisfies R.C. 2505.02, the court must determine whether Civ.R. 54(B) applies and, if so, whether the order contains a certification that there is no just reason for delay." *Hope Academy Broadway Campus v. White Hat Mgt., L.L.C*., 2013-Ohio-5036, 4 N.E.3d 1087, ¶ 7 (10th Dist.), citing *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am*., 44 Ohio St.3d 17, 21, 540 N.E.2d 266 (1989). "Civ.R. 54(B) does not alter the requirement that an order must be final before it is appealable." *Id.* (Other citation omitted.)

{¶ 19} R.C. 2505.02(B) outlines various types of final orders that may be reviewed. The order that applies is discussed in R.C. 2505.02(B)(1), which provides that:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment * * *.

{¶ 20} In *Miller v. First Internatl. Fid. & Trust Bldg., Ltd*., 113 Ohio St.3d 474, 2007-Ohio-2457, 866 N.E.2d 1059, the Supreme Court of Ohio stressed that:

> To be final, however, "an order must also determine an action and prevent a judgment." *Chef Italiano Corp. v. Kent State Univ*. (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64, citing *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St.3d 378, 528 N.E.2d 195, syllabus; R.C. 2505.02(B)(1). "For an order to determine the action and prevent a

> judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *Hamilton Cty. Bd. Of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 153, 545 N.E.2d 1260. *See State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911, ¶ 20.

Miller at ¶ 6.

{¶ 21} The Supreme Court of Ohio has specifically said that "[a] survival action brought to recover for a decedent's own injuries before his or her death is independent from a wrongful-death action seeking damages for the injuries that the decedent's beneficiaries suffer as a result of the death, even though the same nominal party prosecutes both actions." *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, paragraph one of the syllabus. In view of this authority, it would be difficult to conclude that the survivorship and the wrongful death claims are not separate and distinct for purposes of R.C. 2505.02(B)(1).

{¶ 22} As a result, the survivorship and wrongful death claims are separate and distinct for purposes of R.C. 2505.02(B)(1). However, the court's decision would only have determined the action and prevented a judgment on the survivorship claims with respect to Wissinger and Tarbert.

{¶ 23} Specifically, one theory of recovery that was designated as a "survivorship" claim survived the trial court decision. That theory of recovery is contained in Count III of the Complaint and in Count VIII of the Amended Complaint, which both allege improper hiring, training, retention, and supervision of Tarbert, and Wissinger by all Defendants.

This theory is not based simply on derivative liability, but is grounded in these parties' own alleged negligence, recklessness, or wanton activity after learning of prior incompetent performance and improper conduct of Tarbert and Wissinger. *See* Doc. #1, ¶ 22-26; Doc. #45, ¶ 45-51.

{¶ 24} Under established law, these alleged acts would provide a basis for recovery against Ranger. *See Beavers v. Knapp,* 175 Ohio App.3d 758, 2008-Ohio-2023, 889 N.E.2d 181, ¶ 34-58 (10th Dist.) (discussing theories of recovery against employers under the common law and R.C. 2315.21). *See also Chapa v. Genpak, L.L.C.*, 10th Dist. Franklin No. 12AP-466, 2014-Ohio-897, ¶ 111 (noting that "[t]he existence of an employer-employee relationship imposes a duty upon the employer to prevent foreseeable injury to others by exercising reasonable care to refrain from employing an incompetent employee.")

{¶ 25} Accordingly, the judgment would have determined the survivorship claims only against Tarbert and Wissinger, not the Ranger defendants or possibly other defendants. Nonetheless, the requirements of Civ.R. 54(B) must still be met in connection with the appeal of the dismissal of the claims against Tarbert and Wissinger. *Chef Italiano,* 44 Ohio St.3d 86, 541 N.E.2d 64, at syllabus.

{¶ 26} In *Chef Italiano*, the Supreme Court of Ohio held that a summary judgment decision was not final because it had resolved only two of four claims against a party. The resolved claims were for specific performance and to quiet title. *Id*. at 86. The unresolved claims involved breach of contract and breach of fiduciary duty. *Id.* Although the trial court order contained a Civ.R. 54(B) determination, the Supreme Court of Ohio concluded that the order was not a final order for purposes of Civ.R. 54(B)

because it did not prevent the plaintiff from obtaining judgment against the defendants who had received partial summary judgment. *Id.* at 87-89.

{¶ 27} As a response to *Chef Italiano*, Civ.R. 54(B) was amended, effective July 1, 1992. The 1992 Staff Notes to the rule state that:

> "The amendment to Civ.R. 54(B) is intended to complement an amendment to App.R. 4 also effective July 1, 1992. The purpose of both amendments is to clarify the applicability of Civ.R. 54(B) to a judgment on less than all of the claims arising out of the same transaction as well as separate transactions and to the immediate appealability of that judgment. A question as to the applicability of Civ.R. 54(B) to multiple claims arising out of the same transaction and the appealability of a Civ.R. 54(B) judgment to those claims and appealability was raised by the decision of the Supreme Court in *Chef Italiano Corp. v. Kent State University (1989),* 44 Ohio St.3d 86, 541 N.E.2d 64. The rule is amended to expressly state that it does apply to multiple claims that arise out of the same or separate transactions."

Walker v. Firelands Community Hosp., 6th Dist. Erie No. E-06-023, 2006-Ohio-2930, ¶ 16, quoting 1992 Staff Notes to Civ.R. 54(B).

{¶ 28} The Supreme Court of Ohio subsequently discussed the 1992 amendments in *State ex rel. Wright v. Ohio Adult Parole Auth.*, 75 Ohio St.3d 82, 661 N.E.2d 728 (1996). In *Wright*, the court noted that:

> Civ.R. 54(B) is based on Fed.R.Civ.P. 54(b), *see* Staff Notes to Civ.R. 54(B) – therefore, we look for guidance to authorities interpreting the federal rule. If claims are factually separate and independent, multiple

> claims are clearly present. 10 Wright, Miller & Kane, Federal Practice and Procedure (2 Ed.1983) 63, Section 2657. Two legal theories that require proof of substantially different facts are considered separate claims for purposes of Civ.R. 54(B). *See N.A.A.C.P. v. Am. Family Mut. Ins. Co*. (C.A.7, 1992), 978 F.2d 287, 292. Civ.R. 54(B) was amended, effective July 1, 1992, to expressly state that it does apply to multiple claims that arise out of the same transaction, as well as separate transactions (just as Fed.R.Civ.P. 54[b] has been construed to apply). *See* Staff Note to July 1, 1992 Amendment to Civ.R. 54(B).

Id. at 86.

{¶ 29} The *Wright* court then considered whether a final appealable order existed for purposes of Civ.R. 54(B) by evaluating whether the claims were based on substantially different facts and whether "distinctly separate legal theories" were implicated. *Id.* at 87. In light of the decision in *Wright*, the Sixth District Court of Appeals adopted the following standard:

> Based on the 1996 *Wright* case, we hold that an order that disposes of fewer than all of the claims in an action, and contains a Civ.R. 54(B) determination that there is no just reason for delay, is appealable if the claim or claims disposed of are entirely disposed of and either of the following applies. First, are the disposed of claim(s) factually separate and independent from the remaining claim(s)? An example would be claims that are based on different transactions or occurrences such as one claim for slander and another for negligence because of an automobile accident.

> Second, if the claims are not factually separate and independent, do the legal theories presented in the disposed of claim(s) require proof of substantially different facts and/or provide for different relief from the remaining claim(s)?

Walker, 6th Dist. Erie No. E-06-023, 2006-Ohio-2930, at ¶ 23. *Accord Third Fed. S. & L. v. Krych*, 8th Dist. Cuyahoga No. 99762, 2013-Ohio-4483, ¶ 8.

{¶ 30} Courts have also held that "[w]here claims arise from the same alleged conduct, they are inextricably intertwined and not appealable despite Civ.R. 54(B) certification." *Internatl. Managed Care Strategies v. Franciscan Health Partnership*, 1st Dist. Hamilton No. C-010634, 2002-Ohio-4801, ¶ 9, fn. 5, citing *Ollick v. Rice*, 16 Ohio App.3d 448, 452, 476 N.E.2d 1062 (8th Dist.1984). *Accord Pesta v. City of Parma*, 8th Dist. Cuyahoga No. 92363, 2009-Ohio-3060, ¶ 13; *Schwab v. Foland*, 5th Dist. Tuscarawas No. 2007 AP 11 0073, 2008-Ohio-4061, ¶ 20; *Ohio Millworks, Inc. v. Frank Paxton Lumber Co.*, 2d Dist. Montgomery No. 14255, 1994 WL 313068, *6 (June 29, 1994). *See also Krych* at ¶ 8 (dismissing appeal because claims were interrelated.)

{¶ 31} This holding is based on the fact that "[t]he term 'claim,' as used in the context of Civ.R. 54(B), refers to a set of facts that give rise to legal rights, not to the various legal theories of recovery that may be based upon those facts." *Cooper State Bank v. Columbus Graphics Comm.*, 10th Dist. Franklin No. 11AP-1069, 2012-Ohio-3337, ¶ 10, citing *Aldrete v. Foxboro Co.*, 49 Ohio App.3d 81, 82, 550 N.E.2d 208 (8th Dist.1988). "Unless a separate and distinct recovery is possible on each claim asserted, multiple claims do not exist." *Id*.

{¶ 32} In the case before us, the dismissed claims were based on the same set of

facts as the wrongful death claims, i.e., the facts surrounding the shooting and death of Dant'e Price. However, the remedies in wrongful death and survivorship actions are distinct, because punitive damages are not recoverable in wrongful death actions. *Beavers*, 175 Ohio App.3d 758, 2008-Ohio-2023, 889 N.E.2d 181, at ¶ 16, citing *Rubeck v. Huffman*, 54 Ohio St.2d 20, 23, 374 N.E.2d 411 (1978). In contrast, punitive damages may be recovered in survivorship actions. *Id.*

{¶ 33} In a similar situation, the Third District Court of Appeals concluded that an appeal of the dismissal of medical negligence claims on statute of limitations grounds was a final appealable order, even though the plaintiff's wrongful death claim was still pending. *See Burden v. Lucchese*, 173 Ohio App.3d 210, 2007-Ohio-4497, 877 N.E.2d 1026, ¶ 11, fn. 3 (3d Dist.).

{¶ 34} Accordingly, we conclude that with respect to Tarbert and Wissinger, the judgment is a final appealable order.[2]

B. Timely Filing of Appeal

{¶ 35} In his brief, Wissinger has challenged our jurisdiction by contending that LaMusga failed to file a timely notice of appeal. The original decision on the motions to dismiss was rendered on June 28, 2014, but it lacked a Civ.R. 54(B) designation and was not a final appealable order. After LaMusga filed a motion for reconsideration, the court issued another decision on January 31, 2015, denying reconsideration and adding Civ.R.

[2] As an aside, we note that Tarbert did not file a motion to dismiss the claims against him. However, because the court dismissed the pertinent counts of the Complaint and Amended Complaint with prejudice, the claims against Tarbert would have been included.

54(B) language. The court then filed a Civ.R. 58(B) notice on March 5, 2015, and LaMusga's notice of appeal was filed on April 3, 2015.

{¶ 36} Wissinger contends that the notice of appeal should have been filed within 30 days of January 31, 2015, because the trial court's order on that date indicated that service of the order had been made on all parties, including counsel for LaMusga. In addition, the order stated that:

> This document is electronically filed by using the Clerk of Courts e-Filing System. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants * * *.

Doc, #157, Order and Entry Overruling Plaintiff's Motion to Reconsider, p. 7.

{¶ 37} According to Wissinger, this notice satisfied the purpose of Civ.R. 58(B), which is to assure that parties are notified of a judgment that may be appealed. Wissinger argues that Civ.R. 58(B) does not require the clerk to issue a separate docket entry, and that the order issued on March 5, 2015 was superfluous.

{¶ 38} We previously rejected a similar argument regarding electronic notification in *Lone Star Equities, Inc. v. Dimitrouleas*, 2015-Ohio-2294, 34 N.E.3d 936 (2d Dist.). In this regard, we stated that:

> * * * Dimitrouleas contends in his brief that we lack jurisdiction to hear this appeal. His argument is based on Appellants' failure to appeal from the trial court's December 19, 2013 summary judgment decision, which included a Civ.R. 54(B) certification. We previously overruled Dimitrouleas' motion to dismiss, which was based on the same argument. *See Lone Star Equities, Inc. v. Dimitrouleas*, 2d Dist. Montgomery No.

26321 (Nov. 24, 2014). Dimitrouleas has asked us to revisit the issue

In the case before us, the trial court first inserted Civ.R. 54(B) language in its December 19, 2013 entry. The court then attempted to modify the order more than a month later, by filing an order striking the final appealable order language. Our prior decision concluded that the December 19, 2013 order was final, and that the trial court lacked jurisdiction to modify it. *Id.* at pp. 3-4. However, we also concluded that the appeal was timely because the entry lacked the required endorsement from the trial court directing the clerk to serve the parties with the judgment. *Id.* at p. 6.

In addition, the record failed to reflect that the clerk had served the parties and had entered a notation on the docket. *Id.* at p. 6. We therefore, held that service was not complete and that the appeal time never began to run. *Id.* We also rejected Dimitrouleas' argument that the clerk had served the parties by email based on a notification that was automatically generated by the court's autonotification system. *Id.* In this regard, we stressed that the clerk failed to make a notation on the docket regarding service on any party. *Id.*

As was noted, Dimitrouleas has asked us to revisit this issue, contending that the purpose of directing the clerk to make a notation of service on the docket is to provide evidence of service. Dimitrouleas contends that there is no dispute that actual service was completed within the three-day period in Civ.R. 58(B), and argues that this case is like *State*

> *ex rel. Hughes v. Celeste,* 67 Ohio St.3d 429, 619 N.E.2d 412 (1993), in which the Supreme Court of Ohio held that actual notice sufficed to start the Ohio governor's appeal time due to the fact that a copy of a judgment had been delivered to the Ohio attorney general, who was counsel for the governor. *Id.* at 431, 619 N.E.2d 412. The court reached this conclusion, even though the clerk failed to serve notice of the judgment. *Id.* at 429, 619 N.E.2d 412.
>
> After we denied Dimitrouleas' motion to dismiss, the Supreme Court of Ohio overruled *Hughes*, and held that "[t]he 30-day time period to file a notice of appeal begins upon service of notice of the judgment and notation of service on the docket by the clerk of courts regardless of actual knowledge of the judgment by the parties." *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 141 Ohio St.3d 542, 2015-Ohio-241, 26 N.E.3d 806, syllabus. In view of this decision by the Supreme Court of Ohio, there would be no basis upon which to reconsider our prior decision, and we decline to do so.

Dimitrouleas at ¶ 22-26.

{¶ 39} We see no reason to depart from our prior opinion on this subject. Wissinger has not addressed our prior opinion, but contends that *Gator Milford* is distinguishable because the court's entry in that case merely indicated that copies of the entry had been sent to counsel. In contrast, the entry in the case before us states that the entry had been filed through the e-Filing system, and that the clerk would post a record in the "Notifications" tab of counsel. However, we twice previously rejected an argument

about the sufficiency of automatic electronic notification, based on the fact that the clerk did not make a notation on the docket regarding service. *Dimitrouleas* at ¶ 22-26. This is consistent with Civ.R. 58(B), which requires the clerk to "note the service in the appearance docket." That did not occur in the case before us until March 5, 2015. *See* Doc. #163.

{¶ 40} Electronic filing is relatively new in Ohio courts, and is not universal. In view of the jurisdictional nature of timely filing of notices of appeal, the best course is to continue with the established use of a Civ.R. 58(B) notation on the appearance docket. This serves as a uniform, fair, and certain method of determining the time limits for appeals. Accordingly, we conclude that the notice of appeal in this case was timely filed, and will consider the merits of the appeal.

III. Tolling Provisions in R.C. 2305.16

{¶ 41} LaMusga's First Assignment of Error states that:

> The Trial Court Erred When It Granted Defendants-Appellees' Motions to Dismiss and Failed to Consider the Minor's Legal and Equitable Interests in the Survival Claims, Which Trigger the Tolling Provisions of R.C. 2305.16.

{¶ 42} Under this assignment of error, LaMusga contends that the trial court erred in holding that the decedent, Price, and/or his estate, are the real party in interest for purposes of the survivorship claims against the Defendants. LaMusga argues, instead, that Price's claims descended immediately to his descendants – in this case, Price's minor son, who is the real party in interest, and the Estate, therefore, should have

received the benefit of the tolling provisions in R.C. 2305.16.

{¶ 43} As was noted, the claims for Assault and Battery, False Imprisonment, and Intentional Infliction of Emotional Distress (survivorship claims) were dismissed because they were not filed within one year after Price's death. The trial court applied the following statutes of limitation, respectively: R.C. 2305.111(B); R.C. 2305.11(A); and R.C. 2305.09(D). Regarding the latter statute, which normally has a four-year limitations period, the trial court concluded, pursuant to *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 536, 629 N.E.2d 402 (1994), that the true nature of the acts giving rise to the emotional distress claims was the offensive physical contact that took place on March 1, 2012. As a result, the court applied the one-year limitations period in R.C. 2305.11(A) and R.C. 2305.111(B) to the emotional distress claims.[3]

{¶ 44} The motions in the trial court were filed and granted pursuant to Civ.R. 12(B)(6) and Civ.R. 12(C). "Civ.R. 12(C) permits consideration of the complaint and answer, but a Civ.R. 12(B)(6) motion must be judged on the face of the complaint alone." (Citation omitted.) *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 664 N.E.2d 931 (1996).[4]

{¶ 45} "In order to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a

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[3] *Doe* was superseded on other grounds by enactment of R.C. 2305.111(C) in 2006. *See Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, ¶ 15-25. We also note that LaMusga has not challenged the trial court's conclusion that the offensive physical contact was the true basis of the emotional distress claim.

[4] We have previously discouraged the procedure of raising the statute of limitations through Civ.R. 12(B)(6), as it is an affirmative defense under Civ.R. 8(C). *Thomas v. Progressive Cas. Ins. Co.*, 2011-Ohio-6712, 969 N.E.2d 1284, ¶ 35 and fn.1 (2d Dist.), citing *State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 579 N.E.2d 702 (1991). However, since the motion was also brought under Civ.R. 12(C), any error in this regard would be harmless, unless material issues of fact exist. In the case before us, there is no dispute about the facts pertinent to the grounds for dismissal of the claims.

claim upon which relief can be granted, after all factual allegations are presumed true and all reasonable inferences are made in favor of the nonmoving party, it must appear beyond doubt from the complaint that the relator/plaintiff can prove no set of facts warranting relief." (Citation omitted.) *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 14, 661 N.E.2d 170 (1996). Decisions granting Civ.R. 12(B)(6) motions to dismiss are reviewed using a de novo standard. (Citation omitted.) *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. "*De novo* review requires that we review the trial court's decision independently and without deference to it." (Emphasis sic.) (Citation omitted.) *Brewer v. Cleveland Bd. of Edn*., 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997).

{¶ 46} "Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. * * * Thus, Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law." (Citations omitted.) *Pontious*, 75 Ohio St.3d at 570. Trial court decisions on Civ.R. 12(C) motions are also reviewed de novo. (Citation omitted.) *Rayess v. Educational Comm. for Foreign Med. Graduates*, 134 Ohio St.3d 509, 2012-Ohio-5676, 983 N.E.2d 1267, ¶ 18.

{¶ 47} In evaluating the trial court's decision, we initially note that no one disputes that Price died intestate and that the sole heir of his estate was his son, who was a minor at the time the complaint was filed. There is also no dispute that the Complaint was not filed within a year of Price's death. As a result, the dismissed claims were barred unless

an exception or tolling provision applies. *See, e.g., Weaver v. Edwin Shaw Hosp*., 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079 (noting "the general rule regarding statutes of limitation: 'in the absence of a saving clause, the statute runs against all persons, whether under disability, or not.' "). *Id.* at ¶ 14, quoting *Powell v. Koehler*, 52 Ohio St. 103, 118, 39 N.E. 195 (1894).

{¶ 48} The contested tolling provision in this case is found in R.C. 2305.16, which provides that:

> Unless otherwise provided in sections 1302.98, 1304.35, and 2305.04 to 2305.14 of the Revised Code, if a person entitled to bring any action mentioned in those sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed. When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all.

{¶ 49} As was noted, LaMusga argues that when Price died, his survival claims immediately passed to his minor son, not to Price's estate, and that the son's minority status applied to the survival claims.

{¶ 50} In *Thompson v. Wing*, 70 Ohio St.3d 176, 637 N.E.2d 917 (1994), the Supreme Court of Ohio stated that:

> [W]hen a person is injured by the tortious conduct of another and the person later dies from the injury, two claims arise. The first is a claim for malpractice or personal injury, enforced either by the injured person herself

> or by her representative in a survival action. The second is a wrongful death claim, enforced by the decedent's personal representative on behalf of the decedent's beneficiaries.

Id. at 179. *Accord Peters*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, at paragraph one of the syllabus.

{¶ 51} *Thompson* involved a situation in which the decedent had recovered a judgment before her death against medical providers who had failed to timely diagnose her cancer. *Id*. at 177. After she died of cancer, her personal representative filed a wrongful death action against the same parties. *Id.* at 178. On appeal, the Supreme Court of Ohio held that the wrongful death action was not precluded by the prior lawsuit, because it was an independent action. In this regard, the court observed that:

> 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. It follows, therefore, that the injured person cannot defeat the beneficiaries' right to have a wrongful death action brought on 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.

Thompson at 183.

{¶ 52} In *Peters*, the Supreme Court of Ohio reiterated the distinction between the respective interests, stating that:

> Thus, when an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent* as a result of the death. Although they are pursued by the same nominal party, we have long recognized the separate nature of these claims in Ohio.

(Emphasis sic.) *Peters*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, at ¶ 11.

{¶ 53} LaMusga does not challenge the separate nature of these interests; her position is that the real party in interest is Price's minor son, and that his status tolls the statute of limitations on Price's survivorship claims. We cannot accept that general proposition, however, because it is a factually-driven coincidence. Specifically, in the case before us, the sole heir to the estate just happens to be a minor child. The facts could have been very different, however. Price apparently died intestate, leaving his minor son as the sole heir, but he could just as easily have had a will naming an adult as an additional heir or as sole heir. He could also have died intestate with multiple heirs, some of whom were over the age of minority, and some who were not. In those situations, the court would have to either apply no tolling provision, or choose between heirs for purposes of tolling. We reject such an arbitrary application of the law.

{¶ 54} In various situations, courts have held that the estate's legal representative

stands in the shoes of the decedent. *See, e.g.*, *Kelley v. Ferraro*, 188 Ohio App.3d 734, 2010-Ohio-2771, 936 N.E.2d 986, ¶ 55 (8th Dist.) ("Ohio law is clear that the legal representative of a decedent stands in the shoes of that decedent with respect to his financial and commercial rights and obligations and that a partner's legal interest in the partnership continues through his estate after his death"); *Cole v. Ottawa Home & Sav. Assn.*, 18 Ohio St.2d 1, 9, 246 N.E.2d 542 (1969) (executor stands in decedent's shoes and asserts decedent's rights under contracts that existed prior to death); *Surber v. Woodruff*, 10 Ohio Misc.2d 1, 4, 460 N.E.2d 1164 (C.P.1983), citing *Baker v. McKnight*, 4 Ohio St.3d 125, 447 N.E.2d 104 (1983) (personal representative "may compromise claims against the estate, as the representative stands in the shoes of the decedent"); *Santa v. Ohio Dept. of Human Serv.*, 136 Ohio App.3d 190, 195, 736 N.E.2d 86 (8th Dist.2000) (" 'An executor may ordinarily prosecute in his representative capacity any cause which his decedent could have instituted. The executor of an estate, as a legal representative, settles the decedent's affairs and "stands in [the decedent's] shoes" as far as entitlement to benefits is concerned.' ") (Citations and emphasis omitted.). *Accord Harrod v. Travelers Property Cas*., 10th Dist. Franklin No. 02AP-1181, 2003-Ohio-7229, ¶ 29.

{¶ 55} The survival claims made by the personal representative are on behalf of the estate. *Perry v. Eagle-Picher Industries, Inc.*, 52 Ohio St.3d 168, 169-70, 556 N.E.2d 484 (1990); *Yardley v. W. Ohio Conference of the United Methodist Church, Inc*., 138 Ohio App.3d 872, 876, 742 N.E.2d 723 (10th Dist.2000). After the executor or administrator recovers assets, the assets are then distributed to the heirs that are entitled to the assets by law. *See, e.g.*, R.C. 2113.53; *Campbell v. Johnson*, 83 Ohio App. 225,

231, 79 N.E.2d 147 (2d Dist.1948) ("The executor has charge of the entire estate and is responsible for the settlement of the entire estate, including collection of assets, payment of funeral expenses, costs of last illness, payment of debts, sale of real property, if necessary to pay debts, and to distribute the residue of the estate * * * "); *Yardley* at 876 ("award in the survival action will go to the estate and because [the decedent] died intestate, such monies will pass pursuant to R.C. 2105.06.") *See also McBride v. Vance*, 73 Ohio St. 258, 76 N.E. 938 (1906), syllabus (holding that "[t]he personal property of a deceased person does not vest in his heirs, but is in abeyance until administration is granted, and is then vested in the administrator by relation from the time of death, and no right of action on a promissory note belonging to a deceased person is shown by a party in an action on the note by proof of possession and that he is the sole heir of the decedent.")

{¶ 56} Thus, we see no indication that the survivorship claim passes immediately by law to the heirs for tolling purposes. Instead, the personal representative stands in the decedent's shoes, makes any recovery, and then distributes the assets of the estate to any heirs or beneficiaries who are entitled to the assets.

{¶ 57} Accordingly, we reject LaMusga's contention that the tolling provisions of R.C. 2305.16 apply to the Estate's survivorship claims.

{¶ 58} As a final matter, LaMusga contends that penalizing Price's minor son due to any delay in appointing an administrator (which was required due to the son's minority), violates due process and equal protection. We disagree. As an initial matter, we note that LaMusga has failed to specifically address the application of either doctrine as it may apply to this case.

{¶ 59} "The Ohio due process or due course of law provisions require that all courts be open to every person who is injured. Section 16, Article I, Ohio Constitution." *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 275, 503 N.E.2d 717 (1986). R.C. 2305.16 protects a minor's interest in his or her own claims by tolling the statute of limitations during the minor's disability. In the case before us, no statute prevented assertion of the claims of Price's minor son, nor did any statute prevent the timely assertion of the Estate's survivorship claims. We understand LaMusga's position that the claims of the minor son and the estate are the same. However, we have already rejected that proposition.

{¶ 60} In *Wrinkle v. Trabert*, 174 Ohio St. 233, 188 N.E.2d 587 (1963), the plaintiff's personal injury claim against an estate was filed within the statute of limitations, but the parties discovered after the limitations period had expired that the administrator had not been properly appointed. *Id.* at 234-235. The Supreme Court of Ohio affirmed the dismissal of the plaintiff's claim, and refused to allow the later issuance of letters of appointment to relate back and salvage the lawsuit. In this regard, the court observed that:

> Customarily, there is a delay between death and the appointment of an administrator, and during this period rights ofttimes accrue which might well be lost to the estate if someone, even one without authority, could not act to protect such rights and have such acts subsequently validated by the proper appointment of an administrator. Thus, "relation back" is necessary to protect estates and aid administrators in the fulfillment of their duties of administration.
>
> On the other hand, one who has a claim against an estate which has

> been relieved from administration has it within his power to preserve such claim by instigating the appointment of an administrator to whom he can present such claim. See Section 2113.06, Revised Code. If such a party fails through lack of diligence to procure such appointment within time to properly urge his claim, or, as in the present cause, he starts such procedure but fails to see that it is consummated, the law should not come to his aid.

Id. at 236.

{¶ 61} Although *Wrinkle* involves a somewhat different situation, the reasoning applies to the case before us. R.C. 2113.15 contains a process similar to the one used for appointing an administrator to present claims. Specifically, R.C. 2113.15 provides that:

> When there is delay in granting letters testamentary or of administration, the probate court may appoint a special administrator to collect and preserve the effects of the deceased and grant the special administrator any other authority that the court considers appropriate.

{¶ 62} For example, in *Yardley*, a creditor was appointed as a special administrator for purposes of pursuing wrongful death and survival claims on behalf of the decedent. *Yardley*, 138 Ohio App.3d at 874, 742 N.E.2d 723. If a delay was anticipated in having an administrator timely appointed for Price's estate, R.C. 2113.15 provided an available remedy. Furthermore, when an executor or administrator is appointed, the powers of the special administrator cease, and "the executor or administrator may be admitted to prosecute any suit begun by the special administrator * * *." R.C. 2113.16. As a result,

Price's minor son was not deprived of due process.

{¶ 63} With respect to equal protection, " '[l]egislation must apply alike to all persons within a class, and reasonable grounds must exist for making a distinction between those within and those without a designated class. * * *' " *Schwan v. Riverside Methodist Hosp.*, 6 Ohio St.3d 300, 302, 452 N.E.2d 1337 (1983), quoting *Porter v. Oberlin*, 1 Ohio St.2d 143, 205 N.E.2d 363 (1965), paragraph two of the syllabus. "Equal protection of the laws requires the existence of reasonable grounds for making a distinction between those within and those outside a designated class." (Citations omitted). *Id.*

{¶ 64} LaMusga has not suggested any pertinent legislative distinctions between persons within a class, and we see none that apply. As an example, in *Schwan*, R.C. 2305.11(B) created a distinction between minors who were younger than 10 years of age and those who were older than 10, but were still minors. *Id.* at 302. The court found this distinction irrational. *Id.* at 302-303. As was noted previously, LaMusga's argument is not that any statute has created a distinction; her argument is that it would be unfair to preclude the survivorship claim due to the delay in appointing an administrator. However, as we said, that issue could have been resolved by appointment of a special administrator under R.C. 2113.15. Accordingly, LaMusga's equal protection argument is without merit.

{¶ 65} Based on the preceding discussion, the First Assignment of Error is overruled.

IV. Alleged "Joint and Inseparable" Claim for Loss of Parental Consortium

{¶ 66} LaMusga's Second Assignment of Error states that:

> The Trial Court Erred When It Failed to Consider or Recognize the Minor's "Joint and Inseparable" Tort Claim for Loss of Parental Consortium, Which Also Triggers the Tolling Provisions of R.C. 2305.16.

{¶ 67} Under this assignment of error, LaMusga contends that the trial court erred in failing to recognize that the minor child's independent claim for loss of parental consortium was joint and inseparable from his father's survivorship claims. LaMusga contends that because the minor child asserted his own independent claim for loss of consortium, the tolling provisions in R.C. 2305.16 should apply to his father's survivorship claims as well.

{¶ 68} As an initial matter, we note that it is questionable whether LaMusga is correct in stating that Price's minor child asserted a claim for loss of parental consortium in the Complaint and Amended Complaint. *See* Appellant's Reply Brief, p. 7. The Complaint and Amended Complaint were brought by "Judith LaMusga, Esquire, as Administrator of the Estate of Dant'e Price, Deceased, and as Personal Representative of the Beneficially Entitled Next of Kin of Said Decedent." Complaint, Doc. #1, p. 1; Amended Complaint, Doc. #45, p. 1.

{¶ 69} Paragraph one of the Complaint indicates that LaMusga was appointed administrator of the Estate of Price, and that she brought the action on behalf of the Estate and as personal representative of the beneficially entitled next of kin of the decedent. This statement appears to apply to the wrongful death beneficiaries.

{¶ 70} Civ.17 states that:

> Whenever a minor or incompetent person has a representative, such

> as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person

{¶ 71} LaMusga did not attach a copy of the entry appointing her as an administrator in the probate court, and her complaint does not indicate that she was appointed as guardian or fiduciary personally for Price's minor son. In fact, the minor child is not even specifically referenced; the reference is to LaMusga's role as personal representative of the beneficially entitled next of kin, who are not identified.

{¶ 72} In a prior proceeding involving the Estate of Dant'e Price, we noted that the minor child's mother "is the sole legal guardian of the sole legatee of the decedent's estate." *In the Matter of the Estate of Price*, 2d Dist. Montgomery No. 25791, 2014-Ohio-537, ¶ 14. The case also indicates there are other wrongful death beneficiaries, including the decedent's mother and father. *Id.* at ¶ 3. Consequently, it is not clear that LaMusga is entitled to bring claims on behalf of the minor child. Assuming for the sake of argument that she had such authority, we will consider the substance of the argument.

{¶ 73} In the trial court, LaMusga relied on *Fehrenbach v. O'Malley*, 113 Ohio St.3d 18, 2007-Ohio-971, 862 N.E.2d 489, which held that "because a parent's claim for loss of consortium against a third party for injuries to the parent's minor child is an interest that is 'joint and inseparable' from the child's own claim for purposes of R.C. 2305.16, the

parent's claim may be tolled during the child's disability." *Id.* at ¶ 22.

{¶ 74} However, the trial court noted that loss of consortium claims are distinct and individual claims controlled by the claimholder, even though they are derivative of the original personal injury claim. The trial court also distinguished *Fehrenbach* because it was based on a distinct set of facts, rather than the facts that are involved in the case before us.

{¶ 75} Prior to 1993, minors were not permitted to assert a cause of action for parental consortium. *See Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244, 617 N.E.2d 1052 (1993), paragraph two of the syllabus, overruling *High v. Howard*, 64 Ohio St.3d 82, 592 N.E.2d 818 (1992), which had previously rejected such an action. In *Gallimore*, the court changed course, and adopted the reasoning in Justice Resnick's dissent in *High*. *Gallimore* at 255.

{¶ 76} In *High*, Justice Resnick discussed and rejected several objections of the majority opinion to recognizing the parental consortium claim, including fraud, issues about the possibility of a double recovery, and the potential difficulty of placing a dollar value on parental love and affection. *High* at 90-94 (Resnick, J., dissenting). Justice Resnick then stated that:

> The only realistic concern expressed by the majority is the problematic area regarding multiple suits. Yet, the Sixth District Court of Appeals, in *Farley* [*v. Progressive Cas. Ins. Co*., Sixth Dist. Lucas No. L-90-323, 1992 WL 32111 (Feb. 21, 1992),] considered this question and reached a very coherent, sensible solution – one that I recommend this court adopt. That court framed and answered the issue as follows:

> " * * * R.C. 2305.16 tolls the statute of limitations for minors until they reach the age of majority. Thus, a minor would potentially have many years after the parent's injury to bring a cause of action for loss of parental consortium. This would impede settlement of the injured parent's claim and the spouse of the injured parent's loss of consortium claim, since a tortfeasor, or his insurance company, would be most likely to resist settling a portion of the damages arising from one injury without settling all of them. Further, if a case were not settled, the injured parent and spouse could file their lawsuit within two years from the date of injury and a separate lawsuit could potentially be filed by each child many years later.
>
> "This problem has been dealt with in other jurisdictions by requiring joinder of all minors' consortium claims with the injured parent's claim whenever feasible. *See, e.g.*, *Hibpshman* [*v. Prudhoe Bay Supply, Inc*., 734 P.2d 991, 997 (Alaska 1987),] * * *. We believe that this is a sensible solution to the problem and hold that a child's loss of parental consortium claim must be joined with the injured parent's claim whenever feasible."

(Citations omitted.) *High*, 64 Ohio St.3d at 94-95, 592 N.E.2d 818 (Resnick, J., dissenting).

{¶ 77} *Gallimore* also recognized a parental right to "recover damages, in a derivative action against a third-party tortfeasor who intentionally or negligently causes physical injury to the parent's minor child, for loss of filial consortium." *Gallimore*, 67 Ohio St.3d at 244, 617 N.E.2d 1052, paragraph one of the syllabus. For purposes of both types of consortium, the court indicated that consortium "includes services, society,

companionship, comfort, love and solace." *Id.* at paragraphs one and two of the syllabus.

{¶ 78} Subsequently, in *Coleman v. Sandoz Pharmaceuticals Corp*., 74 Ohio St.3d 492, 660 N.E.2d 424 (1996), the Supreme Court of Ohio addressed a certified question concerning whether a minor's "loss of parental consortium claim is outside of the statute of limitations because it was not joined with [her mother's] case, or whether such requirement does not apply in this case because it was not feasible." *Id.* at 493.

{¶ 79} After citing part of Justice Resnick's dissenting opinion in *High,* which discussed the idea of joining the minor's claim when feasible, the court concluded that nothing in the record indicated that joinder of the minor's cause of action was not just and feasible. *Id*. at 494. In addition, the court stated that "[m]oreover, since the statute of limitations for [the minor's] *independent* cause of action for loss of parental consortium is majority plus four years (see R.C. 2305.09), there is no statute-of-limitations problem." (Emphasis sic.). *Id.*

{¶ 80} Subsequently, in *Fehrenbach*, the parents of a minor child who had contracted bacterial meningitis filed a medical malpractice claim against various doctors about five years after the claim accrued. *Fehrenbach*, 113 Ohio St.3d 18, 2007-Ohio-971, 862 N.E.2d 489, at ¶ 2-3. The court of appeals reversed a trial court's grant of partial summary judgment on the statute of limitations, and on further appeal, the Supreme Court of Ohio affirmed the court of appeals.

{¶ 81} In discussing the issue, the Supreme Court of Ohio first considered the nature of a parent's loss of consortium claim. In this regard, the court quoted *Coleman's* discussion of joinder, including its comments on the independent nature of the claim. *Id.*

at ¶ 8-9. The court then stated that:

> The independent nature of the loss-of-consortium claim is based on control and ownership of the claim. In determining whether a husband's waiver of his claim terminated a wife's loss-of-consortium claim, we held, "The right is her separate and personal right arising from the damages she sustains as a result of the tortfeasor's conduct. The right of the wife to maintain an action for loss of consortium occasioned by her husband's injury is a cause of action which belongs to her and which does not belong to her husband." *Bowen v. Kil–Kare, Inc*. (1992), 63 Ohio St.3d 84, 92, 585 N.E.2d 384. Because the loss-of-consortium claim belongs not to the person suffering a physical injury but to another, it is independent, and while the claim may be "separate" in the sense that it is a distinct and individual claim, it is a derivative action, arising from the same occurrence that produced the alleged injury to the other familial party.

Fehrenbach at ¶ 11.

{¶ 82} The court also noted that this understanding of the nature of the claim comported with Civ.R. 19.1(A)(3), which requires compulsory joinder of claims of personal injury to a minor and claims of a parent or guardian of the minor for loss of consortium. Id. at ¶ 12-16.

{¶ 83} In this regard, Civ.R. 19.1 states, in pertinent part, that:

> A person who is subject to service of process shall be joined as a party in the action, except as provided in subdivision (B) of this rule, if the person has an interest in or a claim arising out of the following situations:

* * *

(3) Personal injury or property damage to a minor and a claim of the parent or guardian of the minor for loss of consortium or expenses or property damage if caused by the same wrongful act * * *.

{¶ 84} The court stated that:

Thus, under the Civil Rules, if a minor filed a complaint seeking damages for injury and the parents have a loss-of-consortium claim, the parents' claim must be filed at the same time as the filing of the child's complaint. Our case law requires that if a parent has a claim for injury and the minor child has a claim for loss of consortium, the minor child's complaint must be filed at the same time as the filing of the parents' complaint. *Coleman*, 74 Ohio St.3d at 494, 660 N.E.2d 424. Requiring joinder in these cases promotes judicial economy and limits the possibility of conflicting outcomes.[5]

"Rule 19.1 extends the Rule 19 philosophy by requiring a person with a separate claim to join his claim with that of another person even though under substantive law there may be two independent claims which might be pursued separately."

"Current [i.e., pre-Rule] practice allows plaintiffs, at their option, to separately pursue these claims. When these claims are separately prosecuted defendant is required to defend twice. Much evidence must be

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[5] This is an overstatement of the holding in *Coleman*, which only requires joinder "*whenever feasible*." (Emphasis sic.) *Coleman*, 74 Ohio St.3d at 494, 660 N.E.2d 424.

> repeated and there is useless expenditure of, inter alia., court time. Furthermore, since the claims are related, difficult questions of collateral estoppel and res adjudicata often arise. Frequently, the results are inconsistent and not compatible. Consequently, Rule 19.1 is designed to obviate these problems and to serve the interests of society and of the parties by requiring disposition of the related claims in one action."
>
> This reasoning is especially apropos when applied to the facts of this case. Requiring the Fehrenbachs to litigate their loss-of-consortium claim within one year of their injury and allowing Tara many years to bring her claim subjects the defendants to multiple lawsuits and potentially conflicting and inconsistent results. By allowing the statute of limitations on the parent's claim to be tolled during the child's infancy, piecemeal litigation and its inherent problems can be avoided.

Fehrenbach, 113 Ohio St.3d 18, 2007-Ohio-971, 862 N.E.2d 489, at ¶ 17-20, quoting from 1970 Staff Notes to Civ.R. 19.1.

{¶ 85} The Supreme Court of Ohio further concluded, *under the circumstances of the case*, that for purposes of the tolling provision in R.C. 2305.16, the interests of the parents were joint and inseparable from their daughter's claim. In this regard, the court stated that:

> The final question to be reviewed is the application of the word "interests" in R.C. 2305.16 ("When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all"). When a statute does not define or modify a word, we will apply the term in

> its normal customary meaning. *Chari v. Vore* (2001), 91 Ohio St.3d 323, 327, 744 N.E.2d 763. "Interest" means "[a] legal share in something." Black's Law Dictionary (8th Ed.2004) 828. The Fehrenbachs have a legal share in Tara's claim. The Fehrenbachs' damages and Tara's physical injury both derive from the same alleged facts and wrongful acts of defendants. While the Fehrenbachs' claim remains independent and separate in the sense that they alone control it, their claim is "joint and inseparable" from Tara's claim because the Fehrenbachs cannot recover damages from defendants if defendants are found not to be liable for Tara's injury.
>
> *Considering the strong policy reflected in the Civil Rules* and our precedent in favor of joinder and limiting piecemeal litigation, combined with the plain meaning of the word "interests" as found in the statute, we answer the certified question in the affirmative. We hold that because a parent's claim for loss of consortium against a third party for injuries to the parent's minor child is an interest that is "joint and inseparable" from the child's own claim for purposes of R.C. 2305.16, the parent's claim may be tolled during the child's disability.

(Emphasis added.) *Fehrenbach* at ¶ 21-22.

{¶ 86} Notably, Civ.R. 19.1(A) does not require joinder of consortium claims of minors for injury to their parents, and compulsory joinder is not required under either the rule or case law. Instead, joinder is only required "whenever feasible." *Coleman*, 74 Ohio St.3d at 494, 660 N.E.2d 424.

{¶ 87} As a result, this case is distinguishable from *Fehrenbach*. The same considerations do not apply here, and we conclude that *Fehrenbach* is limited to the situation discussed in that case. If compulsory joinder were required by Civ.R. 19.1, our conclusion might be different, based on some of the language in *Fehrenbach*. However, the Supreme Court of Ohio has clearly stressed that in situations involving minors (and not involving compulsory joinder), the consortium action is an independent claim and joinder is only required "whenever feasible." *Coleman* at 494.

{¶ 88} We previously noted that it is questionable whether LaMusga had authority to file parental consortium claims on behalf of the minor child. However, even if LaMusga had authority, the Complaint and Amended Complaint do not contain any allegations with respect to the survivorship claims of the minor child. Instead, the parts of the Complaint and Amended Complaint mentioned in LaMusga's brief refer only to the decedent's suffering and loss of enjoyment of life until his death. *See* Complaint, Doc. #1, p. 1, ¶ 13 and 29; Amended Complaint, Doc. #45, p. 1, ¶ 55.

{¶ 89} We do note that ¶ 55 of the Amended Complaint states that the acts of the Defendants caused Price's estate, minor son, and "other beneficially entitled next of kin to suffer the losses described in the initial complaint." However, this cannot be read as an assertion of the minor son's separate cause of action for loss of parental consortium, because he is classified with the "other beneficially entitled next of kin" – a clear reference to the wrongful death claims. Specifically, R.C. 2125.02(A)(1) provides that:

> Except as provided in this division, 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

{¶ 90} Accordingly, even if the statute of limitations for Price's survivorship claims could be tolled by his minor son's disability (a concept we have already rejected), the complaints do not contain a cause of action based on the son's parental loss of consortium. Since no claim was alleged, there is nothing upon which tolling could be based.

{¶ 91} In light of the preceding discussion, the Second Assignment of Error is overruled.

V. Conclusion

{¶ 92} All of LaMusga's assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

FAIN, J., concurs.

HALL, J., concurring.

{¶ 93} I agree but write separately to highlight what I believe is a critical aspect of the holdings of *Coleman v. Sandoz Pharmaceuticals Corp.*, and *Fehrenbach v. O'Malley*. *Coleman* suggests that a minor's parental-consortium claim be joined with the parent's injury claim when feasible. *Fehrenbach* allows parents with a loss of a minor child's

consortium claim to have the benefit of the tolling statute applicable to the child's claim, and to wait until the child reaches majority, tolling ends, and the child then files his or her own injury claim. These cases actually are consistent in principle—a derivative consortium claim should be brought with the primary claim. It is the primary cause of action that is the determining factor. "A loss of consortium claim is a derivative cause of action dependant upon the existence of a primary cause of action." *Miller v. City of Xenia*, 2d Dist. Greene No. 2001 CA 82, 2002 WL 441386, *3 (March 22, 2002), citing *Messmore v. Monarch Machine Tool Co.*, 11 Ohio App.3d 67, 463 N.E.2d 108 (9th Dist.1983).[6] Both *Coleman* and *Fehrenbach* endorse the same common sense: the derivative claim should follow along with the primary cause of action.

{¶ 94} I further agree that the loss of parental consortium claim was not pled and was not joined.

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[6] That is not to say that a derivative cause of action is not independent—it is independent. Indeed, if there is a technical legal defense to the primary claim, such as a separate release or separate statute of limitation that has expired for the primary claim, there still may be a recovery for the derivative claim, but it still must be proven that the defendant committed an otherwise-cognizable tort upon the principal from whom the claim derives. *Bowen v. Kil–Kare, Inc*., 63 Ohio St.3d 84, 92–93, 585 N.E.2d 384 (1992).

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