[Cite as *Smith v. Wyandot Mem. Hosp.*, 2015-Ohio-1080.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

SHAWN A. SMITH, ET AL.,

PLAINTIFFS-APPELLANTS, **CASE NO. 16-14-07**

v.

WYANDOT MEMORIAL HOSPITAL, ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Wyandot County Common Pleas Court
Trial Court No. 13-CV-0029

Judgment Affirmed

Date of Decision: March 23, 2015

APPEARANCES:

Egan P. Kilbane **for Appellants**

Donald J. Moracz and Taylor C. Knight **for Appellees, Young C. Choy, M.D. and Findlay Radiology Assoc.**

PRESTON, J.

{¶1} Plaintiffs-appellants, Shawn A. Smith ("Shawn"), Kyra V. Smith ("Kyra"), Raven Smith ("Raven"), Sebastian Smith ("Sebastian"), and Victor Smith ("Victor") (collectively "plaintiffs"), appeal the judgment of the Wyandot County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Findlay Radiology Associates, Inc. ("Findlay Radiology") and Young C. Choy, M.D. ("Dr. Choy") (collectively "defendants").[1] For the reasons that follow, we affirm.

{¶2} This case stems from allegations that Dr. Choy and his employer, Findlay Radiology, failed to diagnose and properly treat Shawn's papillary renal cell carcinoma, which is a type of kidney cancer. Dr. Choy interpreted a renal ultrasound on August 18, 2004, a CT scan of Shawn's abdomen and pelvis on September 9, 2004, and a bone scan on October 24, 2004.[2] (Doc. No. 1); (Doc. No. 44, Ex. A). Based on Dr. Choy's interpretation of the studies, Shawn's urologist, Dr. Roberto Concepcion, advised Shawn that he did not have cancer,

[1] Plaintiffs' complaint against the other named defendants—Wyandot Memorial Hospital, Wyandot Health Foundation, Inc., Robert L. Barrett, M.D., Peter J. Schuler, M.D., Inc., Peter J. Schuler, M.D., Roberto S. Concepcion, M.D., Smith Clinic, The Frederick C. Smith Clinic, Inc., Durell V. Trago, Jr., M.D., Thomas C. Thornton, M.D., Inc., and Thomas C. Thornton, M.D.—in this case were dismissed. (Doc. Nos. 23, 26, 29, 32, 34, 38).

[2] Plaintiffs' complaint and brief refers only to the August 18, 2004 and September 9, 2004 studies interpreted by Dr. Choy. (*See* Doc. No. 1); (Appellant's Brief at 2). However, in "Defendant's Answers to Plaintiffs' First Set of Interrogatories and Request for Production of Documents," Dr. Choy averred that he also interpreted the bone scan on October 24, 2004. (Doc. No. 44, Ex. A).

rather a benign cyst, and that no further follow-up was necessary. (Doc. No. 49). Shawn was diagnosed with papillary renal cell carcinoma in October 2011. (*Id.*).

{¶3} On March 29, 2013, plaintiffs filed a complaint. (Doc. No. 1). In the complaint, Shawn alleged medical negligence against defendants and Kyra, Raven, Sebastian, and Victor alleged loss of consortium against defendants. (*Id.*).

{¶4} On April 14, 2013, Findlay Radiology and Dr. Choy, along with Robert L. Barrett, M.D. ("Dr. Barrett"), filed their answer, followed by an amended answer on May 2, 2013. (Doc. Nos. 14, 22). On June 19, 2013, Dr. Barrett filed a motion to dismiss the case against him, and the trial court granted his motion on July 8, 2013. (Doc. Nos. 27, 29).

{¶5} On March 27, 2014, Dr. Choy and Findlay Radiology filed a motion for summary judgment. (Doc. No. 44). On June 24, 2014, plaintiffs filed a memorandum in opposition to Dr. Choy and Findlay Radiology's motion for summary judgment. (Doc. No. 49). On July 2, 2014, Dr. Choy and Findlay Radiology filed a reply in support of their motion for summary judgment. (Doc. No. 52).

{¶6} On August 6, 2014, the trial court granted Dr. Choy and Findlay Radiology's motion for summary judgment. (Doc. No. 53).

{¶7} Plaintiffs filed their notice of appeal on August 28, 2014. (Doc. No. 54). On September 24, 2014, plaintiffs filed a motion requesting the trial court

modify its August 6, 2014 judgment entry after this court dismissed their appeal due to ambiguity in the trial court's judgment entry. (Doc. No. 57). The trial court modified its judgment entry on September 30, 2014. (Doc. No. 58). Plaintiffs filed their notice of appeal on October 8, 2014. (Doc. No. 59). They raise one assignment of error for our review.

Assignment of Error

> **The trial court erred in failing to find R.C. 2305.113(C) violates the Equal Protection provisions of the Ohio and U.S. Constitutions.**

{¶8} In their assignment of error, plaintiffs argue that R.C. 2305.113(C) is unconstitutional as it was applied to them. Specifically, plaintiffs argue that R.C. 2305.113(C) creates an irrational and arbitrary distinction between plaintiffs who suffer from negligent misdiagnosis and those who suffer from retained foreign objects.

{¶9} We review a decision to grant summary judgment de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390 (2000). Summary judgment is proper where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. Civ.R. 56(C); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219 (1994).

R.C. 2305.113(C), Ohio's statute of repose, provides:

> (C) Except * * * as provided in division (D) of this section, both of the following apply:
>
> (1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.
>
> (2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.

"Simply stated, regardless of the applicable statute of limitations, 'a person must file a medical claim no later than four years after the alleged act of malpractice occurs or the claim will be barred.'" *York v. Hutchins*, 12th Dist. Butler No. CA2013-09-173, 2014-Ohio-988, ¶ 10, quoting *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, ¶ 2 ("The statute establishes a period beyond which medical claims may not be brought even if the injury giving rise to the claim does not accrue because it is undiscovered until after the period has ended."). R.C. 2305.113(D)(1) and (2) provide limited exceptions to the

four-year limitation "for malpractice discovered during the fourth year after treatment and for malpractice that leaves a foreign object in a patient's body." *Ruther* at ¶ 2. Under those exceptions, plaintiffs have an additional year following the discovery of their injury to file a claim. *Id.*

{¶10} Plaintiffs' claims are based on allegations that Dr. Choy and Findlay Radiology, through vicarious liability, negligently interpreted Shawn's 2004 imaging studies; however, plaintiffs did not file their complaint until March 2013. Plaintiffs' complaint is well outside the four-year statute of repose as found in R.C. 2305.113(C). *See York* at ¶ 11. Neither limited exception found in R.C. 2305.113(D)(1) or (2) applies.

{¶11} Nonetheless, plaintiffs argue that the application of R.C. 2305.113(C) to them violates the equal protection provisions of the Ohio and United States Constitutions. Specifically, plaintiffs argue that R.C. 2305.113(C) creates an irrational and arbitrary distinction between similarly situated individuals within the same class—namely, between patients who suffer from retained foreign objects and those who suffer from medical misdiagnosis.

{¶12} "The federal and Ohio equal-protection provisions are 'functionally equivalent and are to be analyzed identically.'" *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, ¶ 17. "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

provides, 'No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.'" *Id.* at ¶ 16, quoting the Fourteenth Amendment to the U.S. Constitution. "Ohio's Equal Protection Clause, Section 2, Article I of the Ohio Constitution, states, 'All political power is inherent in the people. Government is instituted for their equal protection and benefit * * *.'" *Id.*, quoting Ohio Constitution, Article I, Section 2.

{¶13} "Courts apply varying levels of scrutiny to equal-protection challenges depending on the rights at issue and the purportedly discriminatory classifications created by the law." *Id.* at ¶ 18. Because the parties do not dispute that this case does not involve a fundamental right or suspect classification, rational-basis review applies. "The rational-basis test involves a two-step analysis. We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational." *Id.* at ¶ 19, quoting *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, ¶ 9, citing *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.*, 73 Ohio St.3d 260, 267 (1995).

{¶14} "'[S]tatutes are presumed to be constitutional and * * * courts have a duty to liberally construe statutes in order to save them from constitutional infirmities.'" *Id.* at ¶ 20, quoting *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, ¶ 11, citing *Desenco, Inc. v. Akron*, 84

Ohio St.3d 535, 538 (1999). "The party challenging the constitutionality of a statute 'bears the burden to negate every conceivable basis that might support the legislation.'" *Id.*, quoting *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 91, citing *Lyons v. Limbach*, 40 Ohio St.3d 92, 94 (1988).

{¶15} "'Ohio courts grant substantial deference to the legislature when conducting an equal-protection rational-basis review.'" *Id.* at ¶ 32, quoting *State v. Williams*, 126 Ohio St.3d 65, 2010-Ohio-2453, ¶ 40, citing *State v. Williams*, 88 Ohio St.3d 513, 531 (2000). "'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" *Id.*, quoting *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 58 (1999), quoting *Fed. Communications Comm. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). "Furthermore, 'courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because "it is not made with mathematical nicety or because in practice it results in some inequality."'" *Id.*, quoting *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter* at 58, quoting *Heller v. Doe*, 509 U.S. 312, 321 (1993), quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). "[O]ur role is not to cross-check the General Assembly's findings to ensure that we would agree with

its conclusions." *Id.*, quoting *Eppley*, at ¶ 17, citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 58.

{¶16} We disagree with plaintiffs' argument that R.C. 2305.113 violates the equal protection provisions of the Ohio and United States Constitutions because retained-foreign-object plaintiffs and medical-misdiagnosis plaintiffs are not similarly situated individuals within the same class. The distinction between a medical-malpractice action brought by a retained-foreign-body plaintiff and a negligent-misdiagnosis plaintiff is not new. For instance, the Supreme Court of Ohio addressed the difference between a retained-foreign-body plaintiff and a negligent-misdiagnosis plaintiff in *Melnyk v. Cleveland Clinic* in carving out the "discovery exception" to the statute of repose for retained-foreign-body plaintiffs.[3] 32 Ohio St.2d 198, 201 (1972). In that case, the Supreme Court of Ohio recognized that plaintiffs who suffer from retained foreign bodies present an entirely different type of medical-malpractice case than that of a plaintiff who suffers from a negligent misdiagnosis because the discovery of a foreign body in a patient is "negligence as a matter of law, and the proof thereof is generally unsusceptible to speculation or error." *Id.* at 200. Moreover, retained-foreign-body plaintiffs do not face the same challenges that negligent-misdiagnosis plaintiffs do, including changing standards of care over

[3] The "discovery exception" for retained-foreign-body plaintiffs has been codified in the statute. *See* R.C. 2305.113(D)(2).

time and the diminished availability of evidence and witnesses over time. Therefore, retained-foreign-object plaintiffs and medical-misdiagnosis plaintiffs are not similarly situated individuals within the same class. As such, we need not analyze the constitutionally of R.C. 2305.13.

{¶17} Thus, the trial court did not err in granting summary judgment in favor of Dr. Choy and Findlay Radiology[4] because there is no genuine issue of material fact since plaintiffs filed their claim well outside the four-year statute of repose.

{¶18} Plaintiffs' assignment of error is overruled.

{¶19} Having found no error prejudicial to the appellants herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J. and SHAW, J., concur.

/jlr

[4] Because plaintiffs did not timely file their claim against Dr. Choy, their imputed action against Findlay Radiology is also untenable. *See Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, ¶ 23.