IN THE SUPREME COURT OF OHIO

ABUBAKAR ATIQ DURRANI, M.D., ET AL.	:	**Case No. 2019-1560**
Appellants,	:	**ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS, CASE NO. C 180194**
vs.	:	
MIKE SAND, ET AL.,	:	
Appellees.	:	
ABUBAKAR ATIQ DURRANI, M.D., ET AL.	:	**Case No. 2019-1560**
Appellants,	:	**ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS, CASE NO. C 180196**
vs.	:	
ROBERT WILSON,	:	
Appellee.	:	

MERIT BRIEF OF *AMICI CURIAE* OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, AND OHIO OSTEOPATHIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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I. INTRODUCTION

Determining the proper time limits for lawsuits always requires a careful balance between the interests of litigants and the broader civil-justice system. Community interests in the certainty, finality, and reliability of disputes weigh against individual interests in the adjudication of a specific claim. In the medical-malpractice context at issue here, over time standards of treatment evolve, memories fade, witnesses move, and records age. Delayed litigation shifts these burdens to doctors, hospitals, payors, employers, and ultimately patients in the form of higher costs and diminished access.

These competing line-drawing considerations raise a classic jurisprudential question: Who decides? In Ohio, the answer is clear. The legislature took on that task in 2003. Balancing the policy concerns on each side, the General Assembly imposed a four-year statute of repose independent of the two-year statute of limitations and its savings clause. And this Court has recognized—as recently as 2016—that the courts' role is to enforce, not reassess, the legislature's decisions about those competing policy interests.

The statute at issue created a framework for the timeliness of medical-malpractice claims. The legislation "strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners" and "precludes unfair and unconstitutional aspects of state litigation." Am.Sub.S.B. No. 281 (124th Gen. Assembly) §§ 3(A)(6)(a), (e).

That framework, codified at R.C. 2305.113, contains two key components that resolve the tension between the underlying policy interests. First, subsections (A) and (B) establish a statute of limitations that is *plaintiff*-focused and requires claims to be filed within two years from the date an injury is discovered. Second, subsections (C) and (D) establish a statute of repose (the "Repose Statute") that is *defendant*-focused and prohibits claims from being filed more than four years after the alleged malpractice occurred. The objective, four-year limit in the

Repose Statute provides certainty and finality to healthcare providers regarding the time when they will be "free from the fear of litigation." *Antoon v. Cleveland Clinic Foundation*, 148 Ohio St.3d 483, 2016-Ohio-7432, ¶ 22.

In three[1] specific circumstances, the General Assembly recognized an exception to the bright-line repose rule: (1) claims brought by persons under the age of minority or of unsound mind; (2) claims in which the injury is discovered in the fourth year after the alleged malpractice; and (3) claims based on a foreign object left in the body. For those particular situations, the General Assembly incorporated exceptions directly into the Repose Statute to allow plaintiffs additional time to file claims. *See* R.C. 2305.113(C)–(D).

The General Assembly did not include any other exceptions to the Repose Statute. It certainly did not leave room for a judicially created exception in the situation presented here: a plaintiff files in one forum, litigates for years, grows dissatisfied with the case's prospects, takes a voluntary dismissal, and then re-files the action beyond the statute of repose in a new forum perceived to be more hospitable. That is a case barred by the Repose Statute's central rule and purpose, not allowed by one of its express exceptions. And the type of gamesmanship seen here triggers the core concerns the General Assembly articulated regarding the burdens of delayed litigation.

In its decision below, the court overlooked that textual specification in favor of "policy considerations." These policy interests, the court concluded, justified adding a fourth exception

[1] Appellants' jurisdictional brief refers to there being "two" statutory exceptions to the repose limit (e.g., p. 6). For clarity, Amici note that both Appellants and Amici are referring to the same exceptions—the difference is simply whether R.C. 2305.113(D) is counted as one exception with two sub-parts or two separate exceptions. Regardless of how the exceptions are counted, the principle is the same: the General Assembly's inclusion of express statutory exceptions forecloses additional, implied exceptions.

to the Repose Statute to incorporate Ohio's "Savings Statute," R.C. 2305.19. That decision rests on two fundamental errors that carry significant consequences for the courts and the healthcare industry.

First, the lower court concluded that "legislative intent is indeterminate." *Wilson v. Durrani*, Hamilton Nos. C-180196, C-180194, 2019-Ohio-3880, ¶ 30. But the lower court only reached that conclusion by disregarding basic canons of statutory construction:

- The decision treated the Savings Statute as an *implicit* exception to the Repose Statute, despite the legislature's *express* inclusion of other exceptions in that statute. *Contra State ex rel. Ohio Presbyterian Retirement Services, Inc. v. Indus. Commission of Ohio*, 151 Ohio St.3d 92, 2017-Ohio-7577, ¶ 28 (applying the "expressio unius" canon to preclude unwritten exceptions alongside express provisions).

- The decision ignored that the General Assembly incorporated an exception for the Savings Statute into *other* statutes of repose, but *not* the medical-malpractice Repose Statute at issue here. *Contra New Riegel Local Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.*, 157 Ohio St. 3d 164, 2019-Ohio-2851, ¶ 29 (applying the canon against surplusage to avoid "construing a statute in a way that would render a portion of the statute meaningless or inoperative").

- And the decision gave precedence to the *general* Savings Statute, which addresses extensions of the statute of limitations, over the *specific* Repose Statute, which addresses medical-malpractice claims and establishes a repose period independent of the statute of limitations. *Contra* R.C. 1.51 (codifying the specific-governs-the-general canon: "the special or local provision prevails as an exception to the general provision").

Properly construed, the statutory text, structure, and history make clear that the General Assembly did not enact an exception for the Savings Statute in the Repose Statute.

Second, after untethering its analysis from the statutory text, the lower court conducted its own assessment of "policy considerations" and concluded they favored creating a new exception to the Repose Statute. *Wilson*, 2019-Ohio-3880, ¶¶ 30–31. The legislature, however, already evaluated the relevant policy considerations when it enacted a Repose Statute that did not contain an exception for the Savings Statute. Moreover, the lower court's policy analysis was incorrect and incomplete. It failed to recognize the impact of its holding on medical-malpractice

litigation and coverage, ignoring the precise concerns regarding the burdens of delayed litigation that the General Assembly cited in the first place.

If the decision below stands, other litigants will no doubt advance similar policy-based reasoning in hopes of grafting further court-created exceptions and limitations onto the actual text of Ohio's Repose Statute. Such a result would flatly contradict this Court's instruction that "statutes of repose are to be read as enacted," and that a court's role "is not to express agreement or disagreement with the public policy that led to its enactment." *Antoon*, 2016-Ohio-7432, ¶¶ 19, 33. The Amici therefore respectfully ask the Court to reverse the decision below and hold that the Repose Statute does not include an unwritten exception for claims that are voluntarily dismissed and re-filed pursuant to the Savings Statute.

II. STATEMENT OF AMICI'S INTEREST

The Amici here—the Ohio Hospital Association, the Ohio State Medical Association, and the Ohio Osteopathic Association—represent thousands of health care providers and health systems across Ohio. They rely on Ohio's balanced statutory framework for stability and certainty in dealing with medical-malpractice litigation and its impact on access to quality care in Ohio. The decision below, however, creates *in*stability and *un*certainty by eroding the Repose Statute and elevating judicial "policy considerations" over legislative enactments.

Ohio Hospital Association

Established in 1915, the Ohio Hospital Association represents 236 hospitals and 14 health systems throughout Ohio that employ 255,000 Ohioans and contribute $31.4 billion to Ohio's economy along with $6.4 billion in net community benefit. OHA is the nation's first state hospital association and is recognized nationally for our patient safety and health care quality initiatives and environmental sustainability programs. Guided by a mission to collaborate with

member hospitals and health systems to ensure a healthy Ohio, the work of OHA centers on three strategic initiatives: advocacy, economic sustainability, and patient safety and quality.

Ohio State Medical Association

The Ohio State Medical Association is a statewide medical association representing 10,000 Ohio physicians, residents, fellows, medical students, and practice managers. The OSMA is affiliated with the American Medical Association at the national level and county medical societies at the local level. It is dedicated to advancing the practice of medicine for physicians and their patients, advocating on behalf of Ohio physicians, and protecting the medical profession. The OSMA values the sanctity of the physician-patient relationship, the role of physicians as the leaders of health care teams, innovation that transforms health care delivery and improves the health of patients and the patient experience, access to high-quality and affordable health care, and the role of patients in improving their health.

Ohio Osteopathic Association

The Ohio Osteopathic Association advocates for approximately 6,000 osteopathic physicians, historically osteopathic hospitals, 1,000 osteopathic medical students, and the Ohio University Heritage College of Osteopathic Medicine. OOA is a state society of the American Osteopathic Association. Its founding purposes include promoting the health of all Ohioans, cooperating with all public health agencies, maintaining high standards at all Ohio osteopathic institutions, encouraging research and investigation—especially pertaining to the principles of the osteopathic school of medicine, and maintaining the highest standards of ethical conduct in all phases of osteopathic medicine and surgery.

III. STATEMENT OF THE CASE AND FACTS

Amici hereby incorporate Appellants' statement of the case and facts.

IV. ARGUMENT IN SUPPORT OF APPELLANTS' PROPOSITION OF LAW

Appellants' Proposition of Law: The reversal saving statute, R.C. 2305.19, does not allow actions to survive beyond expiration of the statute of repose unless expressly incorporated in the statute of repose.

This appeal concerns a question with far-reaching implications for the healthcare industry: does the medical-malpractice statute of repose in R.C. 2305.113 include an implied, unwritten exception for claims that are voluntarily dismissed and then re-filed under the Savings Statute in R.C. 2305.19? The language of the Repose Statute provides the answer and forecloses such an exception. Moreover, even if the Repose Statute were ambiguous, which it is not, policy considerations that the legislature considered weigh *against* courts creating a new exception for the Savings Statute. Accordingly, the Court should adopt Appellants' proposition of law and reverse the lower court's contrary decision, which it reviews de novo. *New Riegel*, 2019-Ohio-2851, ¶ 8.

A. The Language Of The Repose Statute Forecloses An Implied, Unwritten Exception For The Savings Statute.

The Repose Statute plainly includes no explicit exception for the Savings Statute. Its four-year bar on newly-filed litigation therefore applies to bar this suit. The Plaintiff, however, relies on the corresponding lack of a reference in the Savings Statute to Repose Statute. Based on this, the court below concluded that the "legislative intent is indeterminate" and moved past the statutory text and structure. *Wilson*, 2019-Ohio-3880, ¶ 30. A proper analysis of the language of the relevant statutes and history, however, resolves the issue. The General Assembly clearly did *not* enact (or intend to allow) a Repose Statute that included an exception for the Savings Statute.

1. The Repose Statute Forecloses A Savings Statute Exception By Incorporating Three Other Express Exceptions.

The Repose Statute provides an objective, four-year deadline for plaintiffs to bring claims after the alleged malpractice occurred. R.C. 2305.113(C)–(D). As this Court held in *Antoon*, the

purpose and effect of the Repose Statute is to put at rest a defendant's liability after four years regardless of whether a claim was arguably filed within the statute of limitations. *Antoon*, 2016-Ohio-7432, ¶ 35.

The Repose Statute does not include an exception for the Savings Statute. Rather, it includes three other express exceptions to the bright-line four-year limit:

- "(C) Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code,"
- "except as provided in division (D) of this section"
    - Under (D)(1), if a plaintiff discovers an injury in the fourth year after the alleged malpractice, she may sue within one year of discovering the injury.
    - Under (D)(2), if a claim is based on a foreign object left in the body, the plaintiff may bring an action within one year of discovering the foreign object.[2]

The General Assembly's language thus creates three specific exceptions to the four-year limit: (1) tolling for persons within the age of minority or of unsound mind, as provided in R.C. 2305.16, (2) a one-year extension where a plaintiff discovers an injury in the fourth year after the alleged malpractice, as provided in division (D)(1) of the Repose Statute, and (3) tolling for claims based on a foreign object left in the body, as provided in division (D)(2) of the Repose Statute.

These three exceptions share a common theme: they address situations where the plaintiff was uniquely disadvantaged from bringing a timely claim *in the first instance*. These are, moreover, the only three situations for which the General Assembly determined the policy justifications were sufficiently weighty to warrant an exception to the four-year deadline.

[2] A plaintiff seeking an extension under (D) has the burden of proving by clear and convincing evidence that (D)(1) or (D)(2) applies. R.C. 2305.113(D)(3).

"[U]nder the statutory-construction maxim expressio unius est exclusio alterius," the fact that the General Assembly expressly included these three exceptions and omitted an exception for the Savings Statute "indicates that the omission … was intentional." *Ohio Presbyterian Retirement Servs.*, 151 Ohio St.3d 92, ¶ 28 (statutory language authorizing specific disability payments rendered omission of payments in other circumstances "intentional"). As this Court stated in *Antoon*, "statutes of repose are to be read as enacted," and the Repose Statute simply does not include an exception for the Savings Statute. 2016-Ohio-7432, ¶ 19; *see also New Riegel*, 2019-Ohio-2851, ¶ 27 (construction statute of repose applied to contract claims because "[h]ad the General Assembly intended [it] to apply only to tort claims, it could have specified those statutes of limitations").

As Amici explained in their jurisdictional brief, *Wade v. Reynolds* represents the proper application of the *expressio unius* canon. 34 Ohio App.3d 61, 517 N.E.2d 227 (10th Dist. 1986). That decision correctly inferred that the legislature's reference to a specific exception in the statute of repose precluded recognizing additional exceptions. Appellees' opposition brief (at 12) notes that *Wade* reached the same outcome as the court below, but overlooks the court's reasoning. It also overlooks the critical difference between the current version of the repose statute and the prior version addressed in *Wade*. The prior version specifically identified tolling statutes that did *not* extend the repose period and the Savings Statute was not among them. *Wade* recognized this and concluded that the Savings Statute applied. 34 Ohio App. 3d at 61. After the legislature's amendment of the Repose Statute in 2003, however, we face the reverse situation. The current version specifically identifies the tolling statutes that *do* extend the repose period.

The Savings Statute is not among them. Applying *Wade's* own *expressio unius* reasoning, the Savings Statute does not apply.[3]

2. The Products Liability Statute Confirms That The General Assembly Intentionally Omitted A Savings Statute Exception From The Repose Statute.

The juxtaposition of the products-liability and medical-malpractice statutes of repose confirms that the Savings Statute does not apply here. These statutes were amended only two years apart—in 2003 and 2005—as part of broader tort reform measures in Ohio. *See* Am.Sub.S.B. No. 281 (124th Gen. Assembly) (medical malpractice); Am.Sub.S.B. No. 80 (125th Gen. Assembly) (products liability).

Both include findings regarding the policies underlying the statutes of repose: burdens imposed by delayed litigation, need for closure regarding potential liability, and controlling insurance costs. *See* Am.Sub.S.B. No. 281 at § 3(A)(6); Am.Sub.S.B. No. 80 at § 3(A)(5)(a), (c).

The General Assembly nevertheless enacted two different provisions whose language treated the Repose and Savings Statutes differently. Whereas the repose limit for medical-malpractice claims is four years, the limit for products-liability claims is ten years. Furthermore, and particularly relevant to this case, the General Assembly explicitly incorporated an exception for the Savings Statute into the products liability statute—but not the medical-malpractice statute:

[3] The Southern District of Ohio's decision in *Atwood*—which the lower court relied on to the exclusion of this Court's reasoning in *Antoon* and *Ruther*—likewise failed to recognize that *Wade* supplied the interpretive background against which the General Assembly legislated in 2003. *See Atwood v. UC Health*, No. 1:16cv593, 2018 U.S. Dist. Lexis 139495, at *21 (S.D. Ohio Aug. 17, 2018).

Products: "Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section ***or in section 2305.19 of the Revised Code***, no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered …." [R.C. 2305.10(C)(1) (emphasis added)]	**Malpractice:** "Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply: …." [R.C. 2305.113(C)]

Clearly, the General Assembly knew how to incorporate the Saving Statute into a statute of repose. It did so for products-liability claims, but not for medical-malpractice claims. Moreover, if Plaintiffs were correct and the Saving Statute already applied (without mention) to the medical-malpractice statute, the legislature had no need to mention it in the products-liability statute. Basic principles of statutory interpretation require the courts to give effect to the unique language in the products-liability statute. *New Riegel,* 2019-Ohio-2851, ¶ 29 ("We assume that the General Assembly does not use words or enact statutory provisions unnecessarily, and we avoid construing a statute in a way that would render a portion of the statute meaningless or inoperative."). To interpret the medical-malpractice statute as incorporating an *unwritten* exception for the Savings Statute, as the lower court did here, renders the *explicit* exception in the products-liability statute superfluous.

The history of the products-liability bill reinforces this conclusion. The General Assembly addressed three limitations periods: products liability, construction, and medical malpractice. Originally, none mentioned the Savings Statute. *See* S.B. No. 80 (125th Gen. Assembly). In revising the bill, however, the legislature added the explicit exception for the Savings Statute to the products-liability statute of repose, but *not* to the construction or medical-malpractice statutes of repose, despite adding other amendments to the medical-malpractice

statute of repose. *See* Am.Sub.S.B. No. 80. The differences make the effect of the General Assembly's draftsmanship clear: a Savings Statute exception exists for one but not the other two.

3. Allegedly "Indeterminate" Legislative Intent Does Not License Judicial Policymaking.

Notwithstanding this text and history, the court below concluded that the Savings Statute itself renders the "legislative intent … indeterminate." *Wilson*, 2019-Ohio-3880, ¶ 30. In particular, the lower court and Appellees focused on two portions of the Savings Statute to the exclusion of other important provisions.

First, Appellees point to general language that the Savings Statute applies to "any action." *See* Opp. at 7. But more specific, later-in-time language precludes a wooden, literalistic reading of this generic phrase to apply to any and all filings. The more specific reference to the medical-malpractice repose statute and its limited exceptions in R.C. 2305.113(C) applies in lieu of any general default application of the Savings Statute across the entire Code. *See MacDonald v. Cleveland Income Tax Bd. of Review*, 151 Ohio St. 3d 114, 2017-Ohio-7798, ¶ 27 ("[W]hen there is a conflict between a general provision and a more specific provision in a statute, the specific provision controls."); *see also* R.C. 1.51 ("[T]he special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.").

This is especially true when, as here, the legislature enacted the more specific Repose Statute *after* the earlier, general Savings Statute (which dates back to the General Code). *See Stutzman v. Madison Cty. Bd. of Elections*, 93 Ohio St. 3d 511, 517, 2001-Ohio-1624 (where statutes conflict, "the statute later in date of enactment, prevails"); R.C. 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."). On the question relevant here—whether the Repose or Savings

Statutes more directly address medical-malpractice actions filed after more than four years, the Repose Statute clearly provides the General Assembly's latest and most specific pronouncement.

Second, the lower court noted that R.C. 2305.19(C) excludes certain probate actions from the Savings Statute, and that the legislature could have included the Repose Statute in that list of exclusions. *See Wilson*, 2019-Ohio-3880, ¶¶ 20, 29. But this again ignores a crucial question of timing. The Repose Statute was enacted in 2003 and specifically addressed the timing limits for medical-malpractice actions, as discussed above. The Savings Statute was amended in 2009 to specifically address the timing limits for *probate* actions. The General Assembly further *limited* the Savings Statute by excluding 6 probate-related provisions from its scope. That narrowing of the Savings Statute in the trust-and-estates context could hardly be understood to *expand* its reach to cover medical-malpractice actions. No basis exists to infer that the 2009 General Assembly silently overhauled the law for medical-malpractice claims or addressed the overarching scope of the Savings Statute.

Third, the lower court and Appellees have overlooked language in the Savings Statute that confirms its applicability to statutes of limitations—not statutes of repose. Specifically, the Savings Statute states that, where it applies, it allows a plaintiff to re-file the claims "*within one year* after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits *or within the period of the original applicable statute of limitations, whichever occurs later*." This language only refers to filing beyond a statute of limitations. The General Assembly did not refer to filing beyond a statute of repose, nor did it use more general language such as a filing beyond "the time in which an action must be commenced."

In their jurisdictional brief, Appellees assert that the reference to "statute of limitations" in the Savings Statute includes the Repose Statute because "[t]he legislature only uses the term

'limitations.' 'Repose' is a term injected into the discussion by the courts." Opp. at 13.[4] That is incorrect. The General Assembly has, in other statutes, explicitly distinguished between statutes of limitation and statutes of repose. *See, e.g.*, R.C. 1312.08 ("All applicable statutes of limitation or repose are tolled …."), 2305.131 ("Ten-year statute of repose for certain premises liability actions."), 2117.06(G) ("periods of limitation or periods prior to repose"). The General Assembly's decision to refer only to a "statute of limitations" in the Savings Statute cannot be read to sweep in statutes of repose as well—at least not without making a hash of the other instances when it has distinguished the two.[5] *See* above at 10 (noting limitations language in products-liability statute would be superfluous under Appellees' reading); *New Riegel*, 2019-Ohio-2851, ¶ 29 ("We assume that the General Assembly does not use words or enact statutory provisions unnecessarily ….").

The General Assembly's differentiation between statutes of limitations and repose is consistent with their underlying purposes. A statute of limitations is *plaintiff*-focused and based on the belief that "plaintiffs should litigate their claims as swiftly as possible." *See Antoon*, 2016-Ohio-7432, ¶¶ 11–12. Applying the Savings Statute to extend a statute of limitations when the plaintiff has timely brought a prior action is consistent with that purpose. In contrast, a statute of repose is *defendant*-focused and "exists to give medical providers certainty with respect to the

[4] Appellees also suggest that Amici's textual arguments were somehow forfeited below. *See id*. But noting that the Savings Statute only refers to statutes of limitations is not a freestanding argument that can be forfeited. The entire proceedings have focused on the interaction between the Repose Statute, the Savings Statute, and surrounding provisions. This is merely one of many compelling textual indications that the repose provision bars the tactical refiling of lawsuits outside the limitations period.

[5] The legislature again distinguished between the two in 2004 when it specified that a particular filing could be made beyond a "statute of limitations," replacing the earlier reference to "the time limit for the commencement of such action." *See* H.B. 161 (125th General Assembly).

time within which a claim can be brought and a time after which they may be free from the fear of litigation." *Id.* ¶ 22. A plaintiff's attempt to use the Savings Statute to dismiss and re-file claims for a strategic advantage contradicts the purpose of a statute of repose.[6] Certainly nothing in the Savings Statute renders the General Assembly's work so clear as to be "indeterminate." As this Court stated in *Antoon*, "the plain language of the statute is clear, unambiguous, and means what it says." 2016-Ohio-7432, ¶ 23. No statutory ambiguity licensed the court below to re-write the Repose Statute based on its own understanding of the best policy outcomes.

B. The "Policy Considerations" Identified By The Legislature Weigh Against A New Exception.

The lower court ultimately rested its decision to create an exception for the Savings Statute on "policy considerations." *Wilson*, 2019-Ohio-3880, ¶¶ 30–32. Even assuming the court's consideration of policy was warranted, its analysis was incorrect and incomplete. The risk of error inherent in such policy-balancing illustrates the dangers of departing from the legislature's written words in favor of a court's unwritten policy priorities.

The opinion below stated that the Repose Statute serves two policy goals: (1) eliminating indefinite potential liability and (2) giving defendants greater certainty and predictability. *Id.* ¶ 30. Even assuming the "reasons support[ing] this legislation" are limited to two (in reality, the list is significantly longer[7]), the court misapplied them both.

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[6] It is hardly clear that a voluntary dismissal, taken for obviously tactical reasons, should be deemed to be a "fail[ure] otherwise than upon the merits" as required to trigger the savings statute in the first place.

[7] This Court has recognized that "[m]any policy reasons support this legislation." *Ruther v. Kaiser*, 134 Ohio St. 3d 408, 2012-Ohio-5686, ¶¶ 19–20 (noting concerns about loss of evidence; unavailability of witnesses; and changes in standards of care, providers' financial circumstances, and insurance coverage). Many of these same concerns were before the General Assembly when it enacted R.C. 2305.113. *See* Am.Sub.S.B. No. 281 § 3(A)(6)(e) (explaining legislative intent to "preclud[e] unfair and unconstitutional aspects of state litigation"). The statute of repose is meant to "increase the availability of medical malpractice insurance to Ohio's hospitals, physicians, and

With respect to indefinite liability, the lower court stated that "the [savings] statute is compatible with the first goal of the statute of repose—at most, extending the statute of repose by one year." *Id.* ¶ 31. But nothing suggests that the legislature worried solely about *unlimited* delay; it determined that (barring express exceptions that do not apply here) *four years* was the appropriate length of time that "strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners." Am.Sub.S.B. No. 281 § 3(A)(6)(a). The Savings Statute, were it to apply, would contravene the purpose of the Repose Statute to end malpractice exposure after four years.

The extended timeframe enabled by the lower court, moreover, is not merely a single year beyond the four-year repose period. It would permit a new suit to be filed a year after a voluntary dismissal irrespective of when that dismissal occurred. The suit could proceed even if a plaintiff sued in the fourth year, litigated the case for several more years, and then (perhaps, as here, in response to perceived unfavorable trial prospects) voluntarily dismissed the case and re-filed a year later in a different forum. The disruption and extension of the defendant's potential liability could be extensive: a subsequent suit could come several years after the Repose Statute expired—an outcome inconsistent with eliminating indefinite liability.

As to the second policy goal of "certainty and predictability," the lower court's opinion stated these "are only affected where the defendant is unaware that the first action was filed." *Wilson*, 2019-Ohio-3880, ¶ 31. Not so. Anyone who has ever dealt with inchoate legal exposure understands that risks may be known, yet still uncertain and unpredictable—particularly the

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other health care practitioners, thus ensuring the availability of quality health care for the citizens of this state." *Id.* § 3(A)–(B). The lower court's analysis ignored these additional policy considerations. The lower court's approach plainly could cause the opposite effects: higher premiums, increased costs, fewer physicians, and reduced access.

longer the cloud of legal exposure extends from the initial event. Such concerns were clearly before the General Assembly when it enacted the package of tort-reform legislation that contained the Repose Statute. *See* Am.Sub.S.B. No. 281 § 3(A)(6)(b), (d) (noting that witnesses may move or retire, and that standards may evolve beyond "the standard of care relevant to the point in time when the relevant health care services were delivered"). Those concerns apply regardless of whether a defendant is aware of prior litigation. The General Assembly accordingly made the policy judgment that a four-year cut-off to file claims was appropriate.

The court below also ignored other policy considerations that weigh *against* the exception it created. The General Assembly expressly stated that it intended the Repose Statute to "preclude[ ] unfair … aspects of state litigation." Am.Sub.S.B. No. 281 § 3(A)(6)(e). Yet here, it was only after plaintiffs' counsel lost several cases at trial in Butler County that they voluntarily dismissed their clients' claims and then re-filed the claims in Hamilton County. No procedural defect stymied the prior litigation; the move to a more favorable forum was simply tactical.

This posture flips the normal equities on their head: rather than barring litigation based on a procedural technicality that operates to benefit defendants, here the *plaintiffs* are the ones seeking to exploit a technicality to pursue a stale lawsuit the law otherwise would bar. The "liberal construction" plaintiffs attempt to give this "remedial statute," therefore, cannot rely on a preference for avoiding decisions based "upon mere technicalities of procedure." *Wilson*, 2019-Ohio-3880, ¶ 21 (quoting *Cero Realty Corp. v. Am. Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 85, 167 N.E.2d 774 (1960)).

The errors in the policy analysis below also reflect a more fundamental problem—the fact that the court second-guessed the General Assembly's policy decisions at all. This Court's

"role in reviewing a statute is not to express agreement or disagreement with the public policy that led to its enactment." *Antoon*, 2016-Ohio-7432, ¶ 33. The words and structure of R.C. 2305.113 are the best indication of how Ohio "strike[s] a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners." Am.Sub.S.B. No. 281 §§ 3(A)(6)(a), 3(C)(1) (further requesting that "the Ohio Supreme Court … uphold this intent in the courts of Ohio"). Here, the Court should restore the Repose Statute as enacted and reject the exception that the lower court created for the Savings Statute.

V. CONCLUSION

Amici OHA, OSMA, and OOA respectfully urge the Court to adopt Appellants' Proposition of Law and reverse the Court of Appeals' decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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