IN THE SUPREME COURT OF OHIO

CASE NO. 2021-1352

RICHARD ELLIOT,
Plaintiff-Appellee,

-vs-

ABUBAKAR ATIQ DURRANI, M.D.,
Defendant-Appellant.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS, HAMILTON COUNTY, CASE NO. C1800555

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEE

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AMICUS CURIAE'S **STATEMENT OF INTEREST**

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals may secure fair compensation by holding wrongdoers accountable. The OAJ comprises approximately one thousand five hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and to promote public confidence in the legal system.

The OAJ submits this brief out of concern that Defendant-Appellant, Abubakar Atiq Durrani, M.D ("Durrani"), has asked for an interpretation of the absent-defendant tolling statute, R.C. 2305.15(A), that would erect purposeless barriers to medical malpractice claims contrary to the express intent of the General Assembly. Lining up predictably behind Defendant Durrani, Amici Curiae Ohio Hospital Association, Ohio State Medical Association, and Ohio Osteopathic Association have offered a similarly burdensome view of the statute. But the needless procedural red tape that the Defendant and Amici seek to benefit from finds no basis in the text of the tolling statute or the statute of repose for medical claims, R.C. 2305.113(C). In the interest of furthering a view of these enactments that respects the words chosen by this state's legislative authority, the OAJ offers the following argument and urges this Court to reject Defendant Durrani's Proposition of Law and hold that R.C. 2305.15(A) tolls the medical claim statute of repose.

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STATEMENT OF THE CASE AND FACTS

The OAJ adopts by reference the background statements furnished in the Merit Brief of Plaintiff-Appellee, Richard Elliot ("Elliot").

ARGUMENT

On February 16, 2022, this Court agreed to review the following Proposition of Law:

> **PROPOSITION OF LAW: THE ABSENT DEFENDANT STATUTE, R.C. 2305.15, DOES NOT TOLL THE MEDICAL CLAIM STATUTE OF REPOSE IN R.C. 2305.113(C), (D).**

2/16/2022 Case Announcements, 2022-Ohio-445. For the following reasons, this Court should reject this erroneous view of the law and affirm the First Judicial District's decision.

I. THE PLAIN TEXT OF THE STATUTES

The absent-defendant tolling statute, R.C. 2305.15(A), provides:

> When a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals self, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues if the person departs from the state, absconds, or conceals self, the time of the person's absence or concealment shall not be computed as any part of a period within which the action must be brought. (Emphasis added.)

R.C. 2305.15(A).

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Rather obviously, the medical statute of repose at issue in this appeal, R.C. 2305.113(C), is one of the sections falling within the range of "sections 2305.04 to 2305.14" specifically referenced in the tolling statute. Just like the absent-defendant provision, the statute of repose for medical claims is framed in terms of commencement:

> 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:
>
> (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. (Emphasis added.)

R.C. 2305.113(C).

The purpose of a statute of repose is "to secure the peace of society, and protect the individual from being prosecuted upon stale claims," and such provisions "are to be construed in the spirit of their enactment." *Townsend v. Eichelberger*, 51 Ohio St. 213, 216, 38 N.E. 207 (1894); *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 17. This Court has given force to the plain meaning of the statute of repose for medical claims:

> [W]e find that the plain language of the statute is clear, unambiguous, and means what it says. If a lawsuit bringing a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action on that claim is barred.

Antoon, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 23.

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Contrary to Defendant Durrani's urging, the order in which this Court analyzes the statutes is irrelevant. *Durrani Brief, pp. 6-7.* The plain text of the tolling statute and the medical statute of repose shows that these provisions do not conflict and that they work together neatly. R.C. 2305.15, the absent-defendant statute, specifically tolls the "period of limitation for the commencement of the action" and the "period within which the action must be brought." This Court recognized in *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448 that the phrase "period of limitation" includes

"not only the statute of limitations but also the statute of repose." *Wilson* at ¶ 35, citing *Hinkle v. Henderson*, 85 F.3d 298 (7th Cir.1996). R.C. 2305.113(C), the statute of repose for medical claims, works to prevent stale action from being "commenced." After four years have passed from the act of medical malfeasance, "[n]o action upon a medical, dental, optometric, or chiropractic claim shall be commenced." *R.C. 2305.113(C)(1)*. If the medical claim "is not commenced" in that four-year window, "then, any action upon that claim is barred." *R.C. 2305.113(C)(2)*. The absent-defendant statute's tolling of "the commencement of the action" fits perfectly within the plain text of the statute of repose.

Accordingly, this Court should reject Durrani's Proposition of Law, and the provisions of the Revised Code should be read together in context to permit operation of the tolling statute to the statute of repose. *R.C. 1.42*.

II. STATUTORY RULES OF CONSTRUCTION

The arguments that have been asserted by Durrani and his amici range well outside of the ordinary plain-text analysis that this Court typically employs when considering "clear, unambiguous" provisions like the absent-defendant tolling statute and the statute of repose. *Antoon*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 23. A few of these arguments should be addressed to reorient the discussion away from typical mistakes made in interpreting statutes.

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A. Reading the Statute of Repose in Isolation

Defendant Durrani again engages in a common gambit: he claims that the statute of repose does not explicitly incorporate some other generally applicable statute, in this case the absent-defendant tolling provision. *Durrani Brief, pp. 13-14*. He therefore concludes that the generally applicable statute must not apply. *Id.* In support of this theory, the Defendant argues that a statute of repose falls within a special subset of

statutes—"a different legislative creature"—so that such a provision "is inflexible and generally not subject to tolling except as clearly expressed in the statute." *Id., p. 12.*

To support his point, the Defendant hangs his hat on this Court's opinion in *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448. *See, e.g., Durrani Brief, pp. 1.* He maintains that this Court held in *Wilson* that no exceptions to the medical claim statute of repose apply except for those specifically identified in R.C. 2305.113. *Id., pp. 1, 9-11, 13-14.* But a careful reading of this Court's analysis in *Wilson* demonstrates that the narrow rule the Defendant espouses is overly simplistic.

In *Wilson*, this Court cited *California Pub. Emps. Retirement Sys. v. ANZ Securities, Inc.,* 137 S.Ct. 2042, 198 L.Ed.2d 584 (2017) ("*CalPERS*") for the principle that exceptions to statutes of repose must be specifically articulated by the legislature. *Wilson* at ¶ 29. This Court then identified as an example the scenario of when the exception is noted in the repose statute itself: "[E]xceptions to a statute of repose require 'a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances,' as when the statute of repose itself contains an express exception." *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 29, quoting *CalPERS* at 2050.

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However, the U.S. Supreme Court in *CalPERS*, 137 S.Ct. 2042, 198 L.Ed.2d 584, did not hold that a statute of repose is subject to only those exceptions that are found within the isolated repose provision. Recognizing that there is some nuance to legislation, the Supreme Court observed:

> [I]f the statute of repose itself contains an express exception, this demonstrates the requisite intent to alter the operation of the statutory period. See 1 C. Corman, Limitation of

> Actions § 1.1, pp. 4–5 (1991) (Corman); see, *e.g.*, 29 U.S.C. § 1113 (establishing a 6–year statute of repose, but stipulating that, in case of fraud, the 6–year period runs from the plaintiff's discovery of the violation). In contrast, where the legislature enacts a general tolling rule in a different part of the code—*e.g.*, a rule that suspends time limits until the plaintiff reaches the age of majority—courts must analyze the nature and relation of the legislative purpose of each provision to determine which controls.

CalPERS at 2050. The Court called this a "statute-specific" analysis. *Id.* The valuable takeaway from *CalPERS* is that the Ohio General Assembly could have created an exception or other statutory mechanism that operates notwithstanding the statute of repose for medical claims without putting the pertinent language *within* the statute of repose.

Furthermore, in reaching its holding in *Wilson*, this Court gave significant "import" to the R.C. 2305.10(C) statute of repose for product-liability claims, but reliance on this provision has no place in the analysis regarding the absent-defendant tolling section. *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 30. This Court in *Wilson* looked to the product-liability statute of repose's explicit reference to the R.C. 2305.19 saving statute at issue in that instance to justify the conclusion that the medical malpractice repose restriction would have had to do the same:

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> Not only does the General Assembly's incorporation of the saving statute in the product-liability statute, R.C. 2305.10(C), demonstrate that the General Assembly knew how to create an exception to a statute of repose for application of the saving statute when it intended to do so, but it also demonstrates the General Assembly's understanding that without an express indication to the contrary, the saving statute would not override the statutes of repose.

Id. at ¶ 31. Unlike the saving statute, however, the absent-defendant tolling provision has not been specifically included as an exception in any provision of Ohio's Revised

Code. *Elliot v. Durrani*, 178 N.E.3d 977, 2021-Ohio-3055, ¶ 41 (1st Dist.). If this Court's reasoning in *Wilson* as it considered the saving statute extended to the absent-defendant tolling provision, R.C. 2305.15 would be rendered completely meaningless.

Defendant Durrani's invocation of Justice Melody Stewart's dissenting opinion in *Wilson* is also unavailing. *Durrani Brief, pp. 10-11.* Defendant points to a single paragraph that explains why the saving statute is not an exception to the medical statute of repose like the three listed in R.C. 2305.113(C) and concludes that "[t]he dissent thus recognized that where the General Assembly intends to create a tolling exception to a statute of repose, it writes that exception into the statute." *Durrani Brief, p. 10.* But Justice Stewart wrote no such thing. Although her opinion identified a distinction between the operation of a saving statute compared to a tolling provision, the dissent did not even hint that the repose statute excludes all tolling provisions not specifically incorporated into R.C. 2305.113(C).

It is true that the medical statute of repose and the absent-defendant provision do not cross-reference each other. But if the General Assembly wanted the absent-defendant statute to toll the "commencement of the action" *including* the medical claims subject to R.C. 2305.113, why couldn't this all-purpose language be used for the same effect? The basic rhetorical problem with the Defendant's argument is that it would prevent the General Assembly from using broad language to make generally applicable laws. And if it were the rule that statutory provisions had to incorporate each other to operate concurrently in the same sphere, the Revised Code would become inexorably choked with such language.

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B. Turning to Ambiguity to Invoke the Rules of Construction

This Court should not reach Defendant Durrani's canons-of-construction

arguments because the text of both the medical statute of repose and the absent-defendant tolling provision are clear and unambiguous.

> Ambiguity, in the sense used in our opinions on statutory interpretation, means that a statutory provision is "capable of bearing more than one meaning." *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16. Without "an initial finding" of ambiguity, "inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate." *Id.*; *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486, 28 N.E.3d 81, ¶ 10. We "do not have the authority" to dig deeper than the plain meaning of an unambiguous statute "under the guise of either statutory interpretation or liberal construction." *Morgan v. Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 626 N.E.2d 939 (1994). If we were to brazenly ignore the unambiguous language of a statute, or if we found a statute to be ambiguous only after delving deeply into the history and background of the law's enactment, we would invade the role of the legislature: to write the laws.

Jacobson v. Kaforey, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8.

Moving past this foundational issue, this Court should remain un-swayed by the canons of construction used by Defendant Durrani. *Durrani Brief, pp. 14-18.* First, Defendant Durrani appeals to the doctrine of *expressio unius est exclusion alterius*. *Durrani Brief, pp. 15-16.* The argument goes that by including in the statute of repose an exception for "persons within the age of minority or of unsound mind" and two specific exceptions in R.C. 2305.113(D) unique to medical claims, the General Assembly intentionally excluded all other exemptions. *Id.* It should be obvious that this doctrine is unhelpful because the tolling statute is its own provision entirely. *R.C. 2305.15.* This is the wrong rabbit hole to chase down, for the *in pari materia* rule would be the applicable canon of construction:

> The *in pari materia* rule of construction may be used in interpreting statutes where some doubt or ambiguity exists.

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> *State Farm Mut. Auto. Ins. Co. v. Webb* (1990), 54 Ohio St.3d 61, 63-64, 562 N.E.2d 132, 134; *State ex rel. Celebrezze v. Allen Cty. Bd. of Commrs.* (1987), 32 Ohio St.3d 24, 27-28, 512 N.E.2d 332, 335. All statutes relating to the same general subject matter must be read *in pari materia*, and in construing these statutes *in pari materia*, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes. *United Tel. Co. v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, 1131. (Emphasis added.)

State ex rel. Herman v. Klopfleisch, 72 Ohio St.3d 581, 585, 651 N.E.2d 995 (1995). If this Court finds that some textual ambiguity must be resolved, it is imperative that the tolling statute in R.C. 2305.15 should be given "proper force and effect" along with the statute of repose for medical claims. *Id.*

Next, Defendant Durrani claims that if the tolling statute in R.C. 2305.15 is applied to the statute of repose, then the exceptions specifically enumerated in R.C. 2305.113 would be superfluous. *Durrani Brief, pp. 16-17.* However, if the tolling statute applied only to provisions that specifically incorporate it, the absent-defendant rule itself would be superfluous because no section of the Revised Code includes it as an exception. *Elliot*, 178 N.E.3d 977, 2021-Ohio-3055, at ¶ 41 (1st Dist.).

Lastly, Defendant Durrani argues that the absent-defendant statute and the R.C. 2305.16 tolling provision for minors and those "of unsound mind" are nearly identical, so by explicitly incorporating R.C. 2305.16 as an exception to the repose period, the statute of repose necessarily excluded the absent-defendant section. *Durrani Brief, pp. 17-18.* But as the First District explained, the General Assembly incorporated R.C. 2305.16 as an exception to the medical statute of repose specifically in reaction to this Court's decision in *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 503 N.E.2d 717 (1986), which rendered the repose statute unconstitutional as applied to minors:

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> As originally enacted, the medical statute of repose applied "to all persons regardless of legal disability and notwithstanding 2305.16." However, the year following the court's decision in *Mominee*, the General Assembly amended the medical statute of repose to include tolling for persons "within the age of minority, of unsound mind, or imprisoned, as provided by R.C. 2305.16."

Elliot, 178 N.E.3d 977, 2021-Ohio-3055, at ¶ 34, fn. 6. This historical context shows that the General Assembly's decision to include R.C. 2305.16 as an exception to the repose period had nothing to do with the absence of other tolling provision from the repose statute's text.

C. Invoking Irrelevant Policy Arguments

Finally, Defendant Durrani and his amici turn to public policy that should have no bearing on this Court's interpretation of the statutes' plain text. *Durrani Brief, pp. 18-24.* They maintain that applying the tolling provision to the repose statute would be confusing because the four-year limitation period begins to run "after the occurrence of the act or omission" while the tolling is triggered only when a "cause of action accrues." *Durrani Brief., pp. 19-21.* Defendant Durrani also complains that if the absent-defendant rule can toll the statute of repose, medical providers would be subject to greater liability and discovery into their vacation schedules. *Id., pp. 21-24.* But whether the General Assembly's decisions inconvenience the Defendant and his amici is irrelevant. As this Court has recognized, " '[i]t is not this court's role to establish legislative policies or to second guess the General Assembly's policy choices.' " *Wilson*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, at ¶ 37, quoting *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 212. When considering a statute, a court must " 'ascertain and give effect to the legislature's intent,' as expressed in the plain meaning of the statutory language." *State v. Pountney*, 152

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Ohio St.3d 474, 2018-Ohio-22, 97 N.E.3d 478, ¶ 20, quoting *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9; *see also State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 12, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus (" 'The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.' "). The General Assembly's consequences are for it to choose.

And if any policy concerns are appropriate for consideration here, this Court should be guided by the "fundamental tenant" that cases should be decided on their merits instead of extinguished on technical grounds. *DeHart v. Aetna Life Ins. Co.,* 69 Ohio St.2d 189, 192, 431 N.E.2d 644 (1982); *Natl. Mut. Ins. Co. v. Papenhagen,* 30 Ohio St.3d 14, 15, 505 N.E.2d 980 (1987).

CONCLUSION

For all the foregoing reasons, this Court should reject Defendant Durrani's Proposition of Law and affirm the First Judicial District.

Respectfully Submitted,

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I certify that a copy of the foregoing **Amicus Brief** has been served by e-mail on June 7, 2022, upon:

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