IN THE SUPREME COURT OF OHIO

Kathleen McCarthy, et al., Appellants v. Peter K. Lee, MD, et al., Appellees	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 21 AP 426

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS KATHLEEN MCCARTHY, ET AL.

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I. Public or Great General Interest

Key Issue on Appeal: In a personal injury case, is a child's loss of parental consortium claim defeated by a valid defense to the parent's claim against the tortfeasor?

This court answered that question (related to loss of *spousal* consortium) in *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 92, 585 N.E.2d 384 (1992):

> 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. ***
>
> We have also observed, on a previous occasion, that a wife's loss of consortium claim is not necessarily defeated by a valid defense to her husband's claim against the tortfeasor. See *Dean v. Angelas* (1970), 24 Ohio St.2d 99, 53 O.O.2d 282, 264 N.E.2d 911. (92)

There is no reason why a loss of parental consortium should be treated any differently than a loss of spousal consortium.

This case is of public interest because several courts of appeals are simply not following – indeed are ignoring – *Bowen v. Kil-Kare, Inc.*, as occurred in this case. In the court below, the Tenth District Court of Appeals said the *opposite* of *Bowen*: "Generally, a derivative claim is dependent on the existence of the primary claim." And "a derivative claim such as a loss of consortium claim generally cannot exist without an underlying principal claim."

Those statements are directly contrary to *Bowen v. Kil-Kare, Inc.* When the appellate courts are ignoring this court's precedents, it is time for an affirmation, change, or clarification of the subject legal principle. Specifically, this court should state whether a child's loss of consortium claim is barred if the injured parent's claim is barred by the medical claim statute of repose.

II. Statement of the Case and Facts

Facts

Kathleen McCarthy (age 54) is a resident of Dublin, Ohio and is married (Brett) with three minor children (Reagan, Brendan, and Jacqueline). Kathleen was diagnosed with colon cancer in April 2017. Leading up to that, she had twice consulted defendant Peter Lee, MD (a colon and rectal surgeon). First, in October 2010, Ms. McCarthy consulted Dr. Lee for rectal bleeding and other symptoms concerning for the possibility of cancer. A colonoscopy was performed in February 2011 and Kathleen was diagnosed with hemorrhoids. No polyps or cancer lesions were found at that time.

Kathleen presented again to Dr. Lee on April 15, 2015 with a four-month history of worsening bleeding (in both frequency and intensity), changes in bowel habits, and other symptoms concerning for colon cancer. Under these circumstances, the standard of care is first to rule out the most severe potential diagnoses; in this case, that would entail another colonoscopy (since it had been over four years since the last one and Kathleen now had new and significant worsening of her symptoms). However, Ms. McCarthy was assured by Dr. Lee that the cause of her symptoms was hemorrhoids.[1] But this time no colonoscopy was performed or even recommended to rule out cancer. In fact, Dr. Lee did not even *mention* cancer as a possibility or a colonoscopy to rule it out.

Also, instead of performing a bowel-prepared *flexible* sigmoidoscopy, Dr.

[1] The presence of hemorrhoids does not exclude the possibility of colon cancer. Hemorrhoids are generally benign and non-life threatening, whereas colon cancer must be diagnosed early. The standard of care is first to rule out the most severe potential diagnoses.

Lee performed an unprepped *rigid* sigmoidoscopy[2] to 15 cm. A rigid sigmoidoscope is approximately 25 cm long and can visualize about 20 cm of the rectum and sigmoid colon. A *flexible* sigmoidoscope is about 60 cm in length and therefore can examine a much greater extent of the colon. However, either type of sigmoidoscopy requires proper bowel preparation, which normally occurs the evening before and morning of the procedure. In this case, Ms. McCarthy was not instructed to prepare for any type of endoscopy. Notably, Dr. Lee's note states, "Rigid sigmoidoscopy to 15 cm shows some formed stool proximally…." As it turned out (two years later), Ms. McCarthy's lesion was 18 cm from the anal verge; thus, the tumor should have been visible with a properly prepared bowel, even using a rigid sigmoidoscope. But since Kathleen was not instructed on bowel prep, the lesion could not be visualized.

Dr. Lee advised Ms. McCarthy that her symptoms were caused by hemorrhoids, and that these could be treated with dietary measures and / or office procedures. A follow-up office visit was made, but Ms. McCarthy did not wish to have a surgical procedure for her hemorrhoids and therefore cancelled the follow-up appointment.

Between April 2015 and April 2017, Ms. McCarthy continued to have rectal bleeding and other symptoms, but had been assured by Dr. Lee (at the 4/15/15 office visit) that this was due to hemorrhoids. This resulted in a two-

[2] A flexible sigmoidoscope is much longer and is a superior diagnostic tool to the short, rigid sigmoidoscope. In other words, if the clinician is going to perform an endoscopic examination, the flexible sigmoidoscopy is the standard of care. Also, if the bowel is not properly prepared, lesions are more difficult to visualize from other debris. Thus, if either type of sigmoidoscopy is done, the bowel must be prepared (usually with dietary restrictions, a laxative and/or an enema or two), beginning a day in advance and the morning of the procedure. Had a proper flexible or rigid sigmoidoscopy been utilized by Dr. Lee in 2015, the cancer lesion would have been identified at that time.

year delay in diagnosing Ms. McCarthy's cancer, during which the cancer advanced from Stage 2 (with a five-year survival rate > 70-85%) to Stage 3 or 4 (carrying a five-year survival rate of < 20%).

When Ms. McCarthy was diagnosed with colon cancer in April 2017, she recalled that she had specifically consulted Dr. Lee (a colon and rectal surgeon) in April 2015 for these same symptoms. In April 2015, she was told by Dr. Lee that her symptoms were caused by a benign condition (hemorrhoids), and she relied on his expertise. Therefore, Ms. McCarthy sought counsel to determine whether Dr. Lee met the standard of care in April 2015 when she consulted him for the same symptoms she had in 2016 and 2017.

Procedural History

Ms. McCarthy commenced a civil action on October 5, 2018 (before the expiration of the one-year statute of limitations, extended 180 days under RC 2305.113(B)).[3] That case was dismissed voluntarily without prejudice on January 22, 2019 without filing an affidavit of merit. Despite the looming statute of repose on April 15, 2019, Kathleen's attorney at that time assumed Kathleen had one year from the dismissal under RC 2305.19 (the saving statute) (i.e., until January 22, 2020) to refile her case, and so advised her.

The case was refiled on January 21, 2020 by a second lawyer, who also did not file an affidavit of merit with the refiled complaint.[4] However, the court granted an extension until October 2, 2020 to file the affidavit of merit. In September 2020, Kathleen retained Beausay & Nichols Law Firm, and we filed an affidavit of merit on Oct 1, 2020.

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[3] Case number 18 CV 4803 (Franklin County Court of Common Pleas).

[4] Case number 20 CV 554 (likewise in Franklin County Court of Common Pleas).

On December 23, 2020, the Supreme Court decided *Wilson v. Durrani*, 164 Ohio St.3d 419, 173 N.E.3d 448, 2020-Ohio-6827, which held that the saving statute (RC 2305.19) cannot be used to extend the statute of repose (RC 2305.113(C)), even if the initial case was timely filed within the SOR.

After the *Wilson v. Durrani* decision, defendants filed a motion for judgment on the pleadings under Civ. Rule 12(C), which was granted. Since the negligent conduct occurred in April 2015, the four-year statute of repose intervened in April 2019, and Ms. McCarthy's case was dismissed under RC 2305.113(C) and *Wilson v. Durrani*.

The McCarthy children's loss of consortium claims.

The loss of consortium claims of the McCarthy minor children were not included in the first two complaints. However, the medical claim statute of repose does not apply to minors. (See RC 2305.113(C) ("Except as to persons within the age of minority …")). Thus, the case at bar was filed on behalf of the McCarthy children (Reagan, Brendan, and Jacqueline) on April 28, 2021. Defendants filed a motion to dismiss under Rule 12(B)(6) on the basis that derivative claims cannot proceed if the host claim[5] is barred by the statute of repose. On July 29, 2021, the trial court granted the 12(B)(6) motion and dismissed the case. Plaintiffs appealed from that decision.

On appeal to the Tenth District, the court affirmed the lower court's dismissal. It held:

> Generally, a derivative claim is dependent on the existence of the primary claim. (¶6) … As previously noted, a derivative claim such as a loss of consortium claim generally cannot exist without an

[5] We will refer to the claim of the *injured party* as the primary, principal, or "host" claim.

> underlying principal claim. … Without a primary claim, there can be no derivative loss of consortium claim. (¶9)

These statements fly right in the face of *Bowen v. Kil-Kare, Inc.* This court should do something about that.

III. Argument in support of proposition of law

The Statute of Repose (RC 2305.113(C)) does not apply to minors.

First, RC 2305.113(C) (the statute of repose) does not apply to the claims of minors. The statute of repose begins: "(C) Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code …" In addition, the McCarthy children's claims for loss of parental consortium are legally separate and independent claims, even though they "arise out of" the injury to their mother. (See discussion below re independent nature of consortium claims).

Proposition of Law: A claim for loss of parental consortium is not defeated by a valid defense to the principal claim.

The issue is whether a claim for loss of parental consortium can proceed if the principal or "host" claim is barred by the statute of repose. The general rule is: A loss of consortium claim is not defeated by a valid defense to the principal claim. The only exception to the general rule is if the host claim is not a recognized cause of action under Ohio law; in that situation, the derivative claim must also fail. For example, if the host claim is barred by the doctrine of *immunity*, the derivative claim must also fail. If the host claim is barred by the *open and obvious doctrine*, any derivative claim fails as well. But if the host claim *is* a recognized claim (here, a claim for medical malpractice), but is barred due to some procedural or statutory technicality (here, the

medical claim statute of repose), the derivative claim may proceed.

Bowen v. Kil-Kare, Inc. (1992)

Any analysis of this legal issue must start with *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 585 N.E.2d 384 (1992). Bowen was injured in a crash while participating in an auto race at Kil-Kare Raceway in Xenia. He allegedly signed a pre-race "Release and Waiver of Liability and Indemnity Agreement." There was a dispute as to whether the Waiver was enforceable, but as for the loss of consortium claim of Bowen's wife, the Supreme Court held:

> In the case at bar, we find that the Exhibit A release does not defeat Brenda Bowen's claim against appellees for loss of consortium even if her husband properly executed the release and even if the release bars him from recovering against appellees. Brenda's claim is a separate and independent claim against appellees for the damages she sustained as a result of appellees' conduct, and it is not a claim that her husband could effectively release. (92)

The court emphasized the independent nature of consortium claims:

> An action for loss of consortium occasioned by a spouse's injury is a separate and distinct cause of action that cannot be defeated by a contractual release of liability which has not been signed by the spouse who is entitled to maintain the action. (92)

Claims for loss of consortium are independent claims and specifically do *not* depend on the existence of the principal claim. This was emphasized in *Bowen*:

> We have also observed, on a previous occasion, that a wife's loss of consortium claim is not necessarily defeated by a valid defense to her husband's claim against the tortfeasor. See *Dean v. Angelas* (1970), 24 Ohio St.2d 99, 53 O.O.2d 282, 264 N.E.2d 911.
>
> Our review of the foregoing authorities demonstrates that Ohio has long recognized, and properly so, an *independent* right of the wife to be compensated for her loss of consortium. 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. (Emphasis added) (92)

The court did recognize that the host claim must be "a cause of action recognized in Ohio":

> In so holding, we recognize that a claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having committed a *legally cognizable tort* upon the spouse who suffers bodily injury. For instance, in *Schiltz v. Meyer* (1971), 32 Ohio App.2d 221, 61 O.O.2d 247, 289 N.E.2d 587, paragraph one of the syllabus, the court held that where a cause of action for personal injury by one spouse is **not a cause of action recognized in Ohio**, an action for loss of consortium by the other spouse premised upon the injurious occurrence is, likewise, barred. Our holding today does not affect that determination. (Emphasis added) (92-93)

Bowen was cited with approval in *Fehrenbach v. O'Malley*, 113 Ohio St.3d 18, 2007-Ohio-971, ¶11:

> 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. (¶11)

Dean v. Angelas (1970)

Similarly, if the injured spouse's claim (the host claim) is barred by the statute of limitations, the consortium claim may nevertheless proceed. See *Dean v. Angelas*, 24 Ohio St.2d 99, 264 N.E.2d 911 (1970). The rule of law should be no different if the host claim is barred by the statute of repose (as

opposed to the statute of limitations). The Ohio Supreme Court has not decided that specific issue, but the situation in *Dean v. Angelas* is nearly identical.

Ms. McCarthy's claim against Dr. Lee was dismissed based on the medical claim statute of repose (RC 2305.113(C)) and *Wilson v. Durrani,* 164 Ohio St.3d 419, 173 N.E.3d 448, 2020-Ohio-6827; i.e., the claim was time barred. Insofar as the legal principle runs, the situation is nearly identical to the situation in *Dean v. Angelas*. Under these circumstances, Reagan, Brendan, and Jacqueline have separate and distinct causes of action for loss of parental consortium that may proceed against defendants on the merits.

Critique of lower court decision.

In the case at bar, the Tenth District tried to justify its decision as follows:

> As relevant here, a statute of limitations operates on the remedy – not on the cause of action. A statute of repose bars the cause of action itself. As explained by the Supreme Court of Ohio:
>
> > A statute of limitations operates on the remedy, not on the existence of the cause of action itself. *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 290, fn. 17 (Douglas, J., concurring). A statute of repose, on the other hand, bars "any suit that is brought after a specified time since the defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury." Black's Law Dictionary at 1707. A statute of repose bars the claim – the right of action – itself. *Treese v. Delaware*, 95 Ohio App.3d 536, 545, (10th Dist.).
>
> *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, ¶9. In the context of appellants' argument, this distinction is significant. (Decision, ¶8).

What is the difference between a cause of action being barred by a statute of repose vs. being barred by a pre-race Release/Waiver? Why would a court even

try to distinguish them?

The origin of the notion that statutes of limitations affect the *remedy*, whereas statutes of repose affect the *claim itself* is a footnote in a concurring opinion in *Mominee v. Scherbarth*, 28 Ohio St.3d 270 (1986). There Justice Douglas said:

> Some confusion arises as to terminology between a statute of limitations and one of repose. This confusion necessarily affects the ultimate result herein. A true statute of limitations works on the remedy rather than the right and governs the time within which a legal proceeding must be instituted after a cause of action accrues (is discovered). A statute of repose is not a true statute of limitations, but rather is an absolute bar to a cause of action ever arising. R.C. 2305.11(B) is a statute of repose. (28 Ohio St.3d at 290, fn. 17).

This explanation was repeated in *Wilson v. Durrani:*

> A statute of limitations establishes "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." Black's Law Dictionary 1707 (11th Ed.2019). A statute of limitations operates on the remedy, not on the existence of the cause of action itself. *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 290, 28 Ohio B. 346, 503 N.E.2d 717, fn. 17 (Douglas, J., concurring). A statute of repose, on the other hand, bars "any suit that is brought after a specified time since the defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury." Black's Law Dictionary at 1707. A statute of repose bars the claim – the right of action – itself. *Treese v. Delaware*, 95 Ohio App.3d 536, 545, 642 N.E.2d 1147 (10th Dist.). (¶9)

By whomsoever uttered, this is arrant nonsense. There is no difference between a claim that has "expired" and one that can no longer be filed. If one follows the lower court's reasoning, what happens to a claim that *does* accrue within the four-year statute of repose? Does it exist then cease to exist on the expiration of the SOR? Kathleen McCarthy's cancer did not cease to exist on April 15, 2019; only her ability to assert a claim against Dr. Lee ended on April

15, 2019.

A medical claim statute of limitations limits the time in which to file a civil action; a medical claim statute of repose limits the time in which to file a civil action. They are both time bars utilizing different criteria. Both affect the *remedy* available if one is injured by a healthcare provider. There simply is no need or reason to distinguish the statutes in the manner described by Justice Douglas in *Mominee*.

The lower court also said, "As previously noted, a derivative claim such as a loss of consortium claim generally cannot exist without an underlying principal claim."

But what about *Bowen*? *Bowen* says the exact opposite:

> [A] wife's loss of consortium claim is not necessarily defeated by a valid defense to her husband's claim against the tortfeasor…. 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*, 63 Ohio St.3d at 92.

The lower court also said:

> When the principal claim fails due to expiration of the statute of limitation, the plaintiff is without a remedy but the claim remains. … In contrast, where the principal claim fails due to a statute of repose, the claim itself is barred. Essentially, the statute of repose eliminates the cause of action. Without a primary claim, there can be no derivative loss of consortium claim. (at ¶9).

This is 180 degrees the opposite of *Bowen*. In *Bowen*, did not the Release and Waiver "eliminate the cause of action"? And without the primary claim in *Bowen*, the court still allowed the loss of consortium claim to proceed. We repeat, the courts of appeals are ignoring *Bowen*, and we think this court should do something about it.

It is more than a little aggravating that our entire appeal was based on *Bowen* and *Angelas*, and the Tenth District then says, "Appellants primarily rely on *Wells v. Michaels,* 10th Dist. No. 05AP-1353, 2006-Ohio-5871." (¶7). It is as if the Tenth District personnel did not read our brief and did not listen to our arguments, where *Bowen* and *Dean v. Angelas* were emphasized from beginning to end. Yet the *only* mention of *Bowen* in the lower court decision is a passing reference, not to any part of the majority opinion, but to a sentence from a solo *dissent*. It is not an exaggeration to say that the Tenth District gave far greater weight to its own and other appellate cases than to the two Supreme Court precedents known to it and brought to the fore by Ms. McCarthy.

Ohio's Medical Statute of Repose

Ohio's medical claim statute of repose is similar in some ways to the medical claim statute of limitations, and different in other ways. The differences are the trigger date (date of negligence vs. discovery of claim), and the limitation period (four years from date of negligence vs. one year from date of discovery). The trigger date for the statute of limitations is "the discovery rule" (i.e., when the injured plaintiff *discovers* the cause of injury and identity of the party who caused it);[6] whereas the trigger date for the medical statute of repose is the date of negligence. Also, in a medical claim, the statute of limitations is one year (from the date of discovery), whereas the statute of repose is four years (from the date of negligence). Same principle (the case must be filed before a date certain); different trigger date and length of time. Now why would a court

[6] "The discovery rule entails a two-pronged test – i.e., actual knowledge not just that one has been injured but also that the injury was caused by the conduct of the defendant. A statute of limitations does not begin to run until both prongs have been satisfied." *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co*., 128 Ohio St.3d 529, 947 N.E.2d 672, 2011-Ohio-1961, ¶14 (2011).

allow the assertion of an independent derivative claim in one (SOL) but not the other (SOR)?

IV. Conclusion

For all of these reasons, plaintiffs-appellants request that this court accept jurisdiction and allow for full briefing. If the court will not revisit *Bowen* and *Angelas*, the lower courts will continue ignoring them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 13, 2022, a copy of this Memorandum in Support of Jurisdiction was sent by e-mail to counsel for Appellees.

/s/ T. Jeffrey Beausay
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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kathleen McCarthy et al.,	:	
Plaintiffs-Appellants,	:	
		No. 21AP-426
v.	:	(C.P.C. No. 21CV-2643)
Peter K. Lee, M.D. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 28, 2022

On brief: *Beausay & Nichols Law Firm, T. Jeffrey Beausay,* and *Sara C. Nichols,* for appellants. **Argued:** *T. Jeffrey Beausay.*

On brief: *FisherBroyles, LLP, Robert B. Graziano,* and *Michael R. Traven,* for appellees. **Argued:** *Michael R. Traven.*

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiffs-appellants, Kathleen and Brett McCarthy, on behalf of their three minor children, appeal a judgment of the Franklin County Court of Common Pleas granting a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim filed by defendants-appellees, Peter K. Lee, M.D., and OhioHealth Physician Group, Inc. This case presents the question of whether derivative loss of consortium claims based on an underlying medical negligence claim can proceed against defendants where judgment has been granted in the defendants' favor on the underlying medical negligence claim due to the medical claim statute of repose, R.C. 2305.113(C). Because we answer that question in the negative, we affirm.

Facts and Relevant Procedural History

{¶ 2} Appellants filed a complaint against appellees alleging loss of parental consortium. Appellants alleged that appellee, Dr. Lee, was negligent in his treatment of Kathleen McCarthy, mother of the three children on whose behalf this action was brought. Appellants alleged that Dr. Lee negligently failed to discover mother's cancer and that the delayed diagnosis resulted in harm to appellants. Appellants sought damages for non-economic losses associated with the delayed diagnosis of their mother's cancer, including but not limited to, increased care burden, loss of parental consortium and emotional distress. Appellants further alleged that appellee, OhioHealth Physician Group, was liable under the doctrine of respondeat superior and/or the doctrine of agency by estoppel for the negligent acts and omissions of appellee, Dr. Lee.

{¶ 3} In response to appellants' complaint, appellees filed a motion to dismiss for failure to state a claim pursuant to Civ.R. 12(B)(6). Appellees argued that appellants failed to state a claim because their loss of consortium claims are derivative of their mother's underlying medical claim and that judgment was previously granted in favor of the appellees on mother's medical negligence claim based upon the statute of repose—R.C. 2305.113(C). *McCarthy v. Lee*, Franklin C.P. No. 20CV-554.[1] Appellees contended that because judgment was granted in appellees' favor on mother's underlying medical claim, appellants' derivative loss of consortium claims must be dismissed as a matter of law. The trial court agreed and granted appellee's Civ.R. 12(B)(6) motion. Appellants appeal, assigning the following errors:

> [I.] The trial court erred in granting defendants' Rule 12(B)(6) motion to dismiss.

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[1] In *McCarthy v. Lee*, Franklin C.P. No. 20CV-554, the appellants asserted three claims: (1) medical negligence; (2) wrongful death; and (3) Brett McCarthy's loss of consortium claim. Appellants' children were not parties in this case. On appeal of this decision, the appellants only assigned as error the trial court's grant of judgment on the pleadings on appellant's wrongful death claim. In a decision released March 29, 2022, the Tenth District Court of Appeals sustained appellants' sole assignment of error and reversed the trial court's grant of judgment on appellants' wrongful death claim. *McCarthy v. Lee*, 10th Dist. No. 21AP-105, 2022-Ohio-1033, citing *Everhart v. Coshocton Cty. Mem. Hosp.*, 10th Dist. No. 21AP-74, 2022-Ohio-629. However, based on the Supreme Court of Ohio's decision in *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, this court noted that the trial court did not err when it entered judgment on the pleadings on mother's medical negligence claim and Brett McCarthy's loss of consortium claim based upon the medical claim statute of repose. *McCarthy* at ¶ 30-31.

> [II.] In the context of a Rule 12(B)(6), the trial court abused its discretion in permitting a reply in support of the original motion that made new arguments and cited new cases without giving the respondent an opportunity to address them.

{¶ 4} Appellant's first assignment of error challenges the trial court's grant of appellees' motion to dismiss pursuant to Civ.R. 12(B)(6). We review a judgment granting a Civ.R. 12(B)(6) motion to dismiss under a de novo standard of review. *Ettayem v. Land of Ararat Invest. Group, Inc.*, 10th Dist. No. 17AP-93, 2017-Ohio-8835, ¶ 19, citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362. The standard for determining whether to grant a Civ.R. 12(B)(6) motion is straightforward:

> In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. Furthermore, "in construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. We reiterated this view in *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144, and further noted that "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *Id.* at 145.

Cincinnati v. Beretta U.S.A. Corp., 95 Ohio St.3d 416, 2002-Ohio-2480, at ¶ 5.

{¶ 5} Appellants' first assignment of error presents the question of whether a loss of consortium claim based upon alleged medical negligence can proceed against a defendant where judgment has been granted in the defendant's favor on the underlying medical claim. To answer this question, we begin by examining the nature of a loss of consortium claim.

{¶ 6} The parties do not dispute that loss of consortium claims are derivative claims. Generally, a derivative claim is dependent on the existence of the primary claim. As this court explained in *Keller v. Foster Wheel Energy Corp.*, 163 Ohio App.3d 325, 2005-Ohio-4821, ¶ 19 (10th Dist.):

> Generally, a loss of consortium claim is a derivative claim dependent upon the existence of a primary claim, and it can be

> maintained only so long as the primary claim continues. * * * Because a derivative claim cannot afford greater relief than that relief permitted under a primary claim, a derivative claim fails when the primary claim fails. Therefore, when the trial court dismissed appellant's negligence claim, it necessarily had to dismiss his loss of consortium claim as well.

Id.; *Terakedis v. Lin Family Ltd. Partnership*, 10th Dist. No. 04AP-1172, 2005-Ohio-3985, ¶ 4, fn. 2. ("Because her husband's primary, negligence claim failed, her derivative loss of consortium claim would also fail, as a matter of law."); *Miller v. Xenia*, 2d Dist. No. 2001 CA 82, 2002 Ohio App. LEXIS 1315, at *9 (Mar. 22, 2002) ("Because the Court finds that the primary cause of action, intentional infliction of emotional distress, fails to survive the Motion for Summary Judgment, the derivative cause of action, loss of consortium, fails as a matter of law.").

{¶ 7} Although appellants acknowledge this general rule, they argue that a derivative claim fails only where the primary claim fails on the merits. For example, they contend that if the primary claim fails due to the expiration of the statute of limitations, which they characterize as a failure on procedural grounds, the derivative claim may proceed on its own. Appellants primarily rely on *Wells v. Michaels*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871 for this proposition. In *Wells*, this court held that the plaintiff could proceed with a loss of consortium claim even though the trial court granted summary judgment in the defendant's favor on the underlying negligence claim due to the expiration of the two-year statute of limitations. However, because a loss of consortium claim is governed by a four-year statute of limitations set forth in R.C. 2305.09, the court in *Wells* permitted the plaintiff to proceed with a loss of consortium claim. *Id.* at ¶ 17, citing *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 96 (1992) (Wright, J., concurring in part and dissenting in part) (a defense to the underlying action generally constitutes a defense to the loss of consortium claim, except "in the narrow circumstance where the underlying tort claim is barred by a statute of limitations that is shorter than the statute of limitations for a loss-of-consortium claim"). Appellants argue that the same rationale should apply where an underlying medical claim fails due to the statute of repose. We disagree.

{¶ 8} Contrary to appellants' suggestion, there are important differences between a statute of limitations and a statute of repose. As relevant here, a statute of limitations

operates on the remedy—not on the cause of action. A statute of repose bars the cause of action itself. As explained by the Supreme Court of Ohio:

> A statute of limitations operates on the remedy, not on the existence of the cause of action itself. *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 290, fn. 17 (Douglas, J., concurring). A statute of repose, on the other hand, bars "any suit that is brought after a specified time since the defendant acted * * * even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* at 1707. A statute of repose bars the claim—the right of action—itself. *Treese v. Delaware*, 95 Ohio App.3d 536, 545, (10th Dist.).

Wilson v. Durrani, 164 Ohio St.3d 419, 2020-Ohio-6827, ¶ 9. In the context of appellants' argument, this distinction is significant.

{¶ 9} As previously noted, a derivative claim such as a loss of consortium claim generally cannot exist without an underlying principal claim. When the principal claim fails due to expiration of the statute of limitations, the plaintiff is without a remedy but the claim remains. Consequently, there is still a primary claim from which a loss of consortium claim can derive, and the loss of consortium claim can proceed if it is brought within the four-year statute of limitations set forth in R.C. 2305.09. *Wells* is consistent with this principal. In contrast, where the principal claim fails due to a statute of repose, the claim itself is barred. *Treese v. Delaware*, 95 Ohio App.3d 536, 545 (10th Dist.1994); *Wilson* at ¶ 9. Essentially, the statute of repose eliminates the cause of action. Without a primary claim, there can be no derivative loss of consortium claim. Permitting a derivative loss of consortium claim where the underlying claim from which it is derived no longer exists would be inconsistent with this basic principal. Moreover, allowing a plaintiff to proceed with a loss of consortium claim derived from a medical claim that is barred by the statute of repose would defeat the purpose of the statute of repose. The medical claim statute of repose " 'exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from fear of litigation.' " *Id.* at ¶ 16, quoting *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, at ¶ 19.

{¶ 10} Although not binding authority on this court, we agree with the reasoning expressed in *Hanock v. GM LLC (In re GM LLC Ignition Switch Litig.)*, S.D.N.Y. No. 14-MD-2543, 2021 U.S. Dist. LEXIS 72096 (Apr. 14, 2021). Applying Ohio law, the court in

Hanock held that where a mother's claims are barred by the products liability statute of repose, her children's derivative loss of consortium claims are also barred.

> Plaintiffs' primary alternative argument is that even if Ms. Hancock's product liability claims are barred by the statute of repose, their loss-of-consortium claims are not because the two sets of claims are "separate and independent." Pls.' Mem. 5. That is plainly incorrect. Yes, Ohio law treats loss-of-consortium claims as "independent and separate" — but only "in the sense that" the plaintiff who brings such a claim "alone control[s] it." *Fehrenbach v. O'Malley*, 113 Ohio St. 3d 18, 2007-Ohio-971, 862 N.E.2d 489, 492 (Ohio 2007). The law is equally clear that such claims are "derivative" of the claims of the party with the underlying injury, *Lucio v. Edw. C. Levy Co.*, No. 15-CV-613, 2017 U.S. Dist. LEXIS 71397, 2017 WL 1928058, at *11 (N.D. Ohio May 10, 2017), the result being that a plaintiff alleging loss of consortium "cannot recover damages from [a defendant] if [the defendant is] found not to be liable for [the underlying claimant's] injury," *Fehrenbach*, 862 N.E.2d at 492; *see Kenney v. Ables*, 2016- Ohio 2714, 63 N.E.3d 788, 792 (Ohio Ct. App. 2016) ("Because Appellee is not liable to [the primary appellant] for injuries . . . there is no legally cognizable tort against Appellee; therefore, [the derivative appellant] has no derivative claim to loss of consortium."). Thus, where, as here, the statute of repose bars the underlying claim (i.e., Ms. Hancock's), it also bars any related loss-of-consortium claims (i.e., Plaintiffs'). *See, e.g., Lucio*, 2017 U.S. Dist. LEXIS 71397, 2017 WL 1928058, at *11.

Hanock at LEXIS *148-49.

{¶ 11} We also reject appellants' argument that because the medical claim statute of repose does not apply to a minor's medical claim, they should be permitted to proceed with their derivative loss of consortium claims. Appellants' argument ignores the difference between a principal claim and a derivative claim. Appellants did not assert a principal medical claim in this case. They asserted a derivative claim based upon their mother's underlying medical claim. The fact that the medical claim statute of repose would not bar a principal medical claim brought by a minor is of no consequence here.

{¶ 12} For the foregoing reasons, we overrule appellant's first assignment of error.

{¶ 13} In their second assignment of error, appellants assert that the trial court abused its discretion by permitting appellees to file a reply memorandum in support of their motion to dismiss that improperly contained "new arguments and cited new cases without

giving the respondent an opportunity to address them." Appellants failed to support this assignment of error with any argument in their brief. Because appellants failed to identify in the record the error on which this assignment of error is based and failed to argue this assignment of error separately in their brief as required by App.R. 16(A), we overrule the second assignment of error. App.R. 12(A)(2); *In re P.A.*, 10th Dist. No. 17AP-728, 2018-Ohio-2314, ¶ 16 ("An appellant has the duty to construct the arguments necessary to support the assignments of error; an appellate court will not construct those arguments for the appellant."); *In re J.P.*, 10th Dist. No. 18AP-834, 2019-Ohio-1619, ¶ 19-20.

{¶ 14} Having overruled appellants' two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

JAMISON and NELSON, JJ., concur.

NELSON, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 6(C).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kathleen McCarthy et al.,	:	
Plaintiffs-Appellants,	:	
		No. 21AP-426
v.	:	(C.P.C. No. 21CV-2643)
Peter K. Lee, M.D. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on April 28, 2022, appellants' assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Any outstanding appellate court costs shall be paid by appellees.

KLATT, JAMISON & NELSON, JJ.

/S/JUDGE
By: Judge William A. Klatt

Nelson, J., retired of the Tenth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 6(C)

Tenth District Court of Appeals

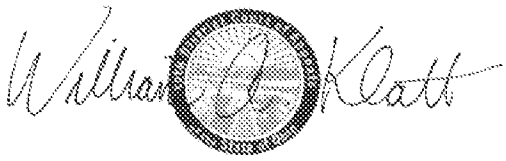
Date: 04-28-2022

Case Title: KATHLEEN MCCARTHY ET AL -VS- PETER K LEE MD ET AL

Case Number: 21AP000426

Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge William A. Klatt