IN THE SUPREME COURT OF OHIO

MACHELLE EVERHART, INDIV. AND ADMIN. E/O TODD EVERHART	)	**Case Nos. 2022-0407 and 2022-0424**
Plaintiff-Appellee	)	**On Appeal from the Franklin County Court of Appeals, Tenth Appellate District**
v.	)	**Court of Appeals Case No. 21AP74**
COSHOCTON COUNTY MEMORIAL HOSPITAL, et al.,	)	
Defendants-Appellants	)	

MERIT BRIEF OF APPELLANTS COSHOCTON COUNTY MEMORIAL HOSPITAL AND MOHAMED HAMZA, M.D.

Brant Poling (0063378)
bpoling@poling-law.com
Zachary R. Hoover (0097672)
zhoover@poling-law.com
Poling
300 East Broad Street, Ste. 350
Columbus, OH 43215
614-737-2900 / 614-737-2929 (fax)
Counsel for Defendant-Appellant Coshocton County Memorial Hospital

David L. Lester (0021914)
dlester@cruglaw.com
Collins, Roche, Utley & Garner
875 Westpoint Parkway, #500
Cleveland, Ohio 44145
(440) 438-3612
(216) 916-7725
Co-Counsel for Defendants-Appellants Coshocton County Memorial Hospital and Mohamed Hamza, M.D.

Frederick A. Sewards (0046647)
fsewards@poling-law.com
Patrick F. Smith (0024997)
psmith@poling-law.com
Poling
300 E. Broad St., Ste. 350
Columbus, Ohio 43215
614-737-2900 / 614-737-2929 (fax)
Counsel for Defendant-Appellant Mohamed Hamza, M.D.

David Shroyer (0024099)
dshroyer@csajustice.com
Colley Shroyer & Abraham Co., LPA
536 South High Street
Columbus, Ohio 43215
614-228-6453 / 614-228-7122 (fax)
Counsel for Plaintiff-Appellee

David H. Krause (0070577)
Dkrause@reminger.com
Thomas N. Spyker (0098075)
tspyker@reminger.com
Reminger
200 Civic Center Dr., Ste. 800
Columbus, Ohio 43215-4227
614-228-1311 / 614-232-2410 (fax)
Counsel for Defendant-Appellant Joseph Mendiola, M.D.

Table of Contents

Table of Authorities

CASES

STATUTES

SENATE BILLS

Statement of Facts

This medical malpractice case arises out of medical care that Todd Everhart received during a single emergency room visit at Coshocton County Memorial Hospital ("CCMH") on December 21, 2003 – almost 20 years ago. Mr. Everhart had been involved in an automobile accident and was brought to the emergency room at CCMH, where he was seen by Defendant Dr. Rajendra Patel. He received emergency treatment and chest X-rays (read by Defendant Dr. Joseph Mendiola) and was transferred by Life Flight to the emergency department at OSU. (R. 213, Second Amended Complaint, ¶ 19-23). None of these Defendants ever saw Mr. Everhart again for medical treatment related to the care provided on December 21, 2003.

Dr. Hamza never saw Mr. Everhart at all. He was simply a backup physician assigned for Mr. Everhart to follow up with after the emergency room visit, but Mr. Everhart never followed up with him. (R. 306, Dr. Hamza depo filed 3/1/10, pp. 10-11). Dr. Hamza would have been assigned as Mr. Everhart's attending physician if he had been admitted to CCMH, but Mr. Everhart was never admitted to CCMH so that never happened. (*Id.* at p. 32). Plaintiff's implausible theory against Dr. Hamza is that he received a copy of the X-ray report as the follow-up physician (despite lack of evidence that Dr. Hamza ever received, saw, or knew about the X-ray report), and was required to contact the patient (who never came to him) to follow up on it.

Mr. Everhart was diagnosed with lung cancer in August 2006 and died on October 28, 2006. (*Id*. at ¶ 24-28). Plaintiff is his widow and Administrator. She filed this action on January 25, 2008, alleging medical malpractice in failing to diagnose the lung cancer in December 2003 when X-rays had revealed an area of "increased opacity" in his right lung. Plaintiff brought survival and wrongful death claims, both arising out of the alleged medical malpractice. (R. 3, Complaint).

Thereafter, the case proceeded slowly due to a physician-patient relationship issue between one defendant and the plaintiff, the hospital's bankruptcy proceeding, summary judgment practice, a motion for reconsideration, and a trip to the Tenth District Court of Appeals for determination of an issue not pertinent to this appeal.[1]

The case was remanded to the trial court in 2013. In September 2020, the Defendants filed motions for judgment on the pleadings, based on the four-year statute of repose for medical claims and the decision of this Court in *Antoon v. Cleveland Clinic Foundation*, 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E.2d 974. (R. 748, CCMH; R. 754, Mendiola; R. 768, Hamza). Dr. Mendiola successfully argued in his motion (R. 754) that Plaintiff's wrongful death claim is a medical claim under R.C. 2305.113(E) and is thus barred by the four-year statute of repose in R.C. 2305.113(C). The Court further found "no just reason for delay." (R. 793, 1/26/21 Decision granting Mendiola Motion for Judgment on the Pleadings).

The case proceeded to the Tenth District Court of Appeals, where the Court considered the single issue of the applicability of the statute of repose to a wrongful death claim based on medical negligence.[2] On March 3, 2022, the Court of Appeals reversed the trial court, holding that the statute of repose did not apply to a wrongful death action based on medical negligence. The Court entered judgment on March 7, 2022.

On March 11, 2022, the defendants moved to certify the Court of Appeals' ruling as conflicting with the decisions of the Third, Fifth, and Eleventh Districts in *Smith v. Wyandot Mem. Hosp.*, 2018-Ohio-2241, 114 N.E.3d 1224, (3d Dist.) ¶ 11; *Mercer v. Keane*, 2021-Ohio-

---

[1] See *Everhart v. Coshocton County Memorial Hosp.*, 10th Dist. Franklin No. 12AP75, 2013-Ohio-2210.

[2] The court of appeals ruled moot an assignment of error by the plaintiff-appellant that the trial court erred in refusing leave to file a third amended complaint.

1576, 172 N.E.3d 1101 (5th Dist.), at ¶ 10; and *Martin v. Taylor*, 11th Dist. Lake No. 2021-L-046, 2021-Ohio-4614, at ¶ 1. The Court of Appeals granted the motions to certify conflict on April 14, 2022, and certified the following question to this Court:

> **Does the statute of repose for medical claims, set forth under R.C. 2305.113(C), apply to statutory wrongful death claims?**

This Court accepted the certified conflict by Entry filed on June 29, 2022, in Case. No. 2022-0424.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

> **Proposition of Law: Except as otherwise specifically provided therein, the Ohio Medical Claim Statute of Repose, R.C. 2305.113(C), applies to any wrongful death action that is commenced more than four years after the occurrence of an act or omission that is the alleged basis of a medical claim.**

Since the foregoing Proposition of Law raises the same issue as the certified question, just stated differently, they are addressed together.

A. The General Assembly adopted a broad medical claim statute of repose in order to limit stale medical claims.

Over the years, Ohio courts and the General Assembly have grappled with numerous challenges that affect health care, including competing agendas and interests from various groups and organizations. Among the difficulties faced by the law are the problems inherent with keeping health care financially viable, encouraging physicians and hospitals to provide the best possible medical care in this state, protecting medical care consumers, and ensuring that competent providers do not leave Ohio for friendlier legal climates in other states. In attempting to meet these and other challenges, in 2003 the General Assembly enacted a four-year statute of repose for medical claims, R.C. 2305.113. The General Assembly expressed the legislative intent behind the statute as follows:

(A) The General Assembly finds:

(1) Medical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio.

(2) The number of medical malpractice claims resulting in payments to plaintiffs has remained relatively constant. However, the average award to plaintiffs has risen dramatically. Payments to plaintiffs at or exceeding one million dollars have doubled in the past three years.

(3) This state has a rational and legitimate state interest in stabilizing the cost of health care delivery by limiting the amount of compensatory damages representing noneconomic loss awards in medical malpractice actions. The overall cost of health care to the consumer has been driven up by the fact that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients….

(6)(a) That a statute of repose on medical, dental, optometric, and chiropractic claims strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners.

(b) Over time, the availability of relevant evidence pertaining to an incident and the availability of witnesses knowledgeable with respect to the diagnosis, care, or treatment of a prospective claimant becomes problematic.

(c) The maintenance of records and other documentation related to the delivery of medical services, for a period of time in excess of the time period presented in the statute of repose, presents an unacceptable burden to hospitals and health care practitioners.

(d) Over time, the standards of care pertaining to various health care services may change dramatically due to advances being made in health care, science and technology, thereby making it difficult for expert witnesses and triers of fact to discern the standard of care relevant to the point in time when the relevant health care services were delivered.

(e) This legislation precludes unfair and unconstitutional aspects of state [sic, stale] litigation but does not affect timely medical malpractice actions brought to redress legitimate grievances.

. . .

(B) In consideration of these findings, the General Assembly declares its intent to accomplish all of the following by the enactment of this act:

> (1) To stem the exodus of medical malpractice insurers from the Ohio market;
>
> (2) To increase the availability of medical malpractice insurance to Ohio's hospitals, physicians, and other health care practitioners, thus ensuring the availability of quality health care for the citizens of this state;
>
> (3) To continue to hold negligent health care providers accountable for their actions;
>
> (4) To preserve the right of patients to seek legal recourse for medical malpractice.

S.B. 281, 2002 Ohio Laws File 250 Section 3(A)(6)(B), cited in *Smith v. Wyandot Memorial Hosp.*, 3d Dist. Wyandot No. 16-17-07, 2018-Ohio-2441, ¶ 21.

This case brings into sharp focus the General Assembly's wisdom in enacting the medical claim statute of repose. For some of the Defendants, 2022 marks their *fourteenth year* of defending an action that involved only cursory, emergency room contact with the patient in 2003 – almost 20 years ago.[3] The problems inherent in defending a lawsuit that arises from a brief encounter with a patient so long ago are readily apparent and are precisely the situation to which the statute of repose is directed.

The General Assembly enacted R.C. 2305.113(C) as part of comprehensive tort reform in Ohio, to add a four-year statute of repose for medical claims:

> (C) 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.

---

[3] As noted above, Dr. Hamza had no contact with Mr. Everhart at all.

> (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.

The term "medical claim" is defined by R.C. 2305.113(E)(3) (emphasis added):

> (3) **"Medical claim" means any claim that is asserted in any civil action against a physician,** podiatrist**, hospital**, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home or residential facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and **that arises out of the medical diagnosis, care, or treatment of any person**. "Medical claim" includes the following:
>
> (a) Derivative claims for relief that arise from the medical diagnosis, care or treatment of a person; . . .
>
> (c) Claims that arise out of the medical diagnosis, care, or treatment of any person or claims that arise out of the plan of care prepared for a resident of a home and to which both types of claims either of the following applies: …
>
> (i) The claim results from acts or omissions in providing medical care.

Thus, a "medical claim" broadly includes "any claim" against a physician or hospital "that arises out of the medical diagnosis, care, or treatment of any person."

B. This Court has upheld the medical claim statute of repose.

This Court has held that R.C. 2305.113(C) is constitutionally valid and an appropriate exercise of this state's legislative power. In *Ruther v. Kaiser*, 134 Ohio St. 3d 408, 2012-Ohio-5686, 983 N.E.2d 291, this Court considered a constitutional challenge to the statute in a case that involved the death of a patient more than ten years after the alleged malpractice by a treating physician. In determining that R.C. 2305.113(C) did not extinguish a vested right and was constitutionally proper, this Court noted the legislative policy considerations that provided the foundation for the statute:

> Many policy reasons support this legislation. Just as a plaintiff is entitled to a meaningful time and opportunity to pursue a claim, a defendant is entitled to a reasonable time after which he or she can be assured that a defense will not have to be mounted for actions occurring years before. The 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 the fear of litigation.
>
> Forcing medical providers to defend against medical claims that occurred 10, 20, or 50 years before presents a host of litigation concerns, including the risk that evidence is unavailable through the death or unknown whereabouts of witnesses, the possibility that pertinent documents were not retained, the likelihood that evidence would be untrustworthy due to faded memories, the potential that technology may have changed to create a different and more stringent standard of care not applicable to the earlier time, the risk that the medical providers' financial circumstances may have changed—i.e., that practitioners have retired and no longer carry liability insurance, the possibility that a practitioner's insurer has become insolvent, and the risk that the institutional medical provider may have closed.
>
> Responding to these concerns, the General Assembly made a policy decision to grant Ohio medical providers the right to be free from litigation based on alleged acts of medical negligence occurring outside a specified time period. This decision is embodied in Ohio's four-year statute of repose for medical negligence, set forth in R.C. 2305.113(C). The statute establishes a period beyond which medical claims may not be brought even if the injury giving rise to the claim does not accrue because it is undiscovered until after the period has ended.

Ruther v. Kaiser, *supra*, 134 Ohio St. 3d at 412-413. These concerns apply equally to injury and wrongful death claims.

This Court's decision in *Antoon v. Cleveland Clinic Found.*, 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E.3d 974, is dispositive here. In *Antoon*, this Court held that all medical claims must be filed within four years of the underlying malpractice, or they are barred. This Court then upheld the trial court's dismissal of medical claims filed against the hospital and physician defendants almost five years after the underlying malpractice. *Antoon* made it clear that any action based upon a medical claim is barred by R.C. 2305.113(C) if the action is not filed within

four years of the alleged malpractice, even if this period ends before the plaintiff has suffered a resulting injury.

The general rule is that "judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express*, 511 U.S. 298, 312-313 (1994). Hence, *Antoon* was the law of Ohio even when the statute of repose here expired on December 21, 2007 – four years after the alleged malpractice.

In Ohio, the task of a court in interpreting a statute "is to ascertain and give effect to the legislature's intent in enacting the statute." *Antoon v. Cleveland Clinic Foundation*, 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E.2d 974, ¶ 20, quoting *Brooks v. Ohio State Univ.*, 111 Ohio App. 3d 342, 676 N.E.2d 162 (10th Dist. 1996). In applying this principle, the better-reasoned courts have determined that the intent of the General Assembly in enacting R.C. 2305.113(C) was to include malpractice-based wrongful death actions within its operation. Indeed, this intent is expressed in the plain language of the statute: “No action upon a medical … claim shall be commenced more than four years after the [malpractice],” and “If an action upon a medical … claim is not commenced within four years after” the malpractice, then “any action upon that claim is barred.” R.C. 2305.113(C)(1) and (2). These Courts recognize that given the legislature’s intent to address the economic and social pressures created by medical malpractice litigation, it makes no sense that the legislature implicitly intended to carve out an unexpressed exception to the statute of repose for wrongful death cases. It is illogical to conclude that the General Assembly intended to thwart its own purpose by allowing a significant number of medical malpractice cases, usually the most serious in terms of damages, to escape the operation

of the statute and its expressed objectives. This is particularly so in that the statute has its own self-contained exceptions, none of which is for wrongful death claims.

C. A wrongful death claim based on medical care is a "medical claim" under R.C. 2305.113 for purposes of the Affidavit of merit requirement in Civ. R. 10(D).

The analysis should commence with recognition that a cause of action for wrongful death that is based upon negligence in providing medical care is, by the definition contained in R.C. 2305.113(E)(3), a medical claim. In *Wilson v. Mercy Health,* 11th Dist. Trumbull No. 2021T-0004, 2021-Ohio-2470, the Court considered whether a wrongful death claim is a "medical claim" under R.C. 2305.113 – the same statute at issue here – for purposes of requiring an Affidavit of Merit under Ohio Civ. R. 10(D)(2). The Court reviewed the definition of "medical claim" in R.C. 2305.113(E)(3), held that a wrongful death claim ***is*** a "medical claim," and provided the following observation:

> In this case, Ms. Wilson's civil claims are asserted against a hospital and a physician. Ms. Wilson's complaint asserts that the appellees failed to diagnose and treat the child's meconium aspiration. Thus, it is readily apparent to this court that Ms. Wilson's claims "arise[ ] out of the medical diagnosis, care, or treatment of any person," and are, therefore, "medical claims" as defined by R.C. 2305.113 and subject to the Civ. R. 10(D) requirements.

Wilson v. Mercy Health, supra, at ¶ 33. A patient's "medical claim" does not cease to be a "medical claim" because they die, and a statute allows their Estate to bring the claim for the benefit of the patient's heirs. A wrongful death claim can be based on any tort (such as battery negligence, or product liability), but the decedent's death simply adds a new Plaintiff – the Estate. It does not change the fundamental nature of the claim in any way.

Likewise, in *Fletcher v. Univ. Hospitals of Cleveland,* 172 Ohio App. 3d 153, 2007-Ohio-2778, 873 N.E.2d 365, reversed on other grounds, 120 Ohio St. 3d 167, 2008-Ohio-5379, 897 N.E.2d 147, the court of appeals rejected an argument that a wrongful death action derived

from medical care was not a "medical claim" that required an Affidavit of Merit pursuant to Civ. R. 10(D). In reaching its determination, the Court stated that "[w]e are well aware that R.C. 2305.113 does not supply the statute of limitations for a wrongful death claim. [Citations omitted.] However, that fact does not preclude a claim for wrongful death from being a 'medical claim' as defined in R.C. 2305.113." *Id.* at 172 Ohio App. 3d 156-157.

See also *Chromik v. Kaiser Permanente,* 8th Dist. Cuyahoga No. 89088, 2007-Ohio-5856 ("In the instant case, Chromik's complaint sets forth a survivorship claim and a wrongful death claim against the defendants. Because they are medical claims asserted against the defendants, Chromik was required to comply with Civ. R. 10(D) and attach an affidavit of merit for each defendant.") *Id.* at ¶ 14.; *Wick v. Lorain Manor, Inc*., 9th Dist. Lorain No. 12CA010324, 2014-Ohio-4329, 2014 WL 4824685, ¶ 18 ("regardless of whether Wick's claims against the Lorain Manor Defendants are for medical malpractice or wrongful death, the claims all arise out of the facility's care and treatment of Josephine while she was a resident of the skilled nursing facility."); *Flynn v. Cleveland Clinic Health Sys*, 8th Dist. Cuyahoga No. 105720, 2018-Ohio-585, 2018 WL 898876, ¶ 4 (malpractice-based wrongful death claim is a "medical claim").

A wrongful death claim cannot both be a "medical claim" under R.C. 2305.113(E)(3) for purposes of an Affidavit of Merit, and not a "medical claim" under the same definition for purposes of the statute of repose.

D. The better-reasoned cases hold that a wrongful death claim is a "medical claim" for purposes of the statute of repose.

The case law on whether the statute of repose for medical claims applies to wrongful death actions is presently divided. The Third, Fifth, and Eleventh Districts have held that the statute of repose does apply. See, *Smith v. Wyandot Memorial Hosp.*, 3d Dist. Wyandot No. 16-17-07, 2018-Ohio-2441; *Mercer v. Keane,* 5th Dist. Coshocton No. 20CA0013, 2021-Ohio-1576;

Martin v. Taylor, 11th Dist. Lake No. 2021-L-046, 2021-Ohio-4614. The First, Sixth, and Tenth Districts (including here) have held that it does not apply. See, *Davis v. Mercy St. Vincent Medical Center*, 6th Dist. Lucas No. L-21-1095, 2022-Ohio-1266; *Maxwell v. Lombardi*, 10th Dist. Franklin No. 21AP-556, 2022-Ohio-1686; *Ewing v. UC Health*, 1st Dist. Hamilton C-210390, 2022-Ohio-2560.

The Third District addressed the issue in *Smith v. Wyandot Memorial Hosp.*, 3d Dist. Wyandot No. 16-17-07, 2018-Ohio-2441. There, as here, a patient died as a result of an alleged failure to diagnose cancer, and the plaintiff sued well beyond the four-year period of the statute of repose. The plaintiff advanced much the same argument that the Tenth District embraced here – that since wrongful death and medical malpractice cases are separate causes of action, the statute of repose applies only to the latter.

In a lengthy opinion, the Third District recognized that well-established rules of statutory construction call for examining the plain language of the statute and giving effect to the legislature's intent. Applying the decision in *Antoon v. Cleveland Clinic Foundation, supra*, the Court held that construction of the statute of repose mandated its application to wrongful death claims derived from medical negligence. The Court, citing to *Antoon*, stated:

> Applying the rules of statutory interpretation, the Supreme Court of Ohio has concluded that Ohio's medical-claim statute of repose "applies to a cause of action that ha[s] vested for an act or omission allegedly constituting medical malpractice that took place more than four years earlier." *Id.* at ¶ 1. The court further concluded that "the plain language of the statute is clear, unambiguous, and means what it says." *Id.* at ¶ 23. That is, "[i]f a lawsuit bringing a medical * * * 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." (Emphasis added.) *Id.*

Smith at ¶ 18.

The Court also discussed the legislative intent behind the statute of repose and the principle that "the Supreme Court of Ohio and the United States Supreme Court agree that statutes of repose are to be read as enacted and not with an intent to circumvent legislatively imposed time limitations." *Id.* at ¶ 22, quoting *Antoon, supra,* at ¶ 19. The Third District unequivocally held that R.C. 2305.113(C) applies to wrongful death actions that are based upon negligent medical acts or omissions:

> For those reasons, we conclude that wrongful-death actions based on medical claims are barred by Ohio's medical-claim statute of repose for an act or omission allegedly constituting medical malpractice that took place more than four years earlier. The Supreme Court of Ohio stated that Ohio's medical-claim statute of repose clearly and unambiguously bars "*any* action" bringing a medical claim commenced more than four years after the occurrence of the act or omission constituting the basis for the claim. (Emphasis sic.) *Id.* at ¶ 23. Because *any action* bringing a medical claim is barred by Ohio's medical-claim statute of repose if it is not timely commenced, we conclude that wrongful-death actions fall within the scope of "any action" and are subject to the time restraints of the statute of repose.

Smith, ¶ 22.[4] See also *Wilson v. Durrani,* 164 Ohio St. 3d 419, 2020-Ohio-6827, 173 N.E.2d 448, ¶ 29, where this Court held that Ohio's savings statute was not an exception to the medical claim statute of repose: "Unless one of the stated exceptions applies, R.C. 2305.113(C) clearly and unambiguously prohibits the commencement of any action upon a medical claim more than four years after the act or omission upon which the claim is based." The term "any action upon a medical claim" unambiguously encompasses personal injury, survival, and wrongful death actions.

The Fifth District Court of Appeals reached the same conclusion in *Mercer v. Keane,* 5th Dist. Coshocton No. 20CA0013, 2021-Ohio-1576, which involved a malpractice action that was

---

[4] This court rejected a discretionary appeal of the *Smith* case. *Smith v. Wyandot Memorial Hospital,* 153 Ohio St. 3d 1505, 2018-Ohio-4285, 109 N.E. 3d 1260.

amended to include a wrongful death claim following the demise of the patient more than seven years after the treatment in question. After the trial court sustained a motion for judgment on the pleadings, the case landed in the Fifth District on the issue of whether the wrongful death action was a medical claim that was barred by R.C. 2305.113(C).

At the outset, the Court recognized that a wrongful death claim is an independent cause of action, created by statute. Nevertheless, the Court relied upon *Antoon* and *Wilson, supra,* and determined that the statute of repose "means what it says." If a plaintiff files a medical claim more than four years after the occurrence of the alleged act or omission that forms the basis of the claim, the claim is barred by the statute of repose:

> {¶38} No party disputes, and we agree, the medical malpractice action was timely filed as to the statute of repose. When the Estate filed the amended complaint, however, the amended complaint superseded the original complaint and raised a new and independent cause of action for wrongful death pursuant to R.C. 2125.01 and 2125.02. We are guided by the Court's finding in *Wilson* that a voluntary dismissal without prejudice leaves the parties as if no action had been brought at all. The initial filing of a medical claim does not indefinitely suspend the running of the statute of repose, even if there was a dismissal without prejudice. We find based on *Wilson* and *Antoon*, while the wrongful death action is based on the same alleged act or omission as raised in the timely filed medical malpractice action, the wrongful death action is a new and independent action subject to the medical claim statute of repose.

"Simply stated, 'a person must file a medical claim no later than four years after the alleged act of malpractice occurs or the claim will be barred.'" *Martin* at ¶ 40.

A third Ohio appellate case to determine that the statute of repose applies to wrongful death claims is *Martin v. Taylor,* 11th Dist. Lake No. 2021-L-046, 2021-Ohio-4614. *Martin* involved medical malpractice claims that were based on malpractice that occurred more than four years before the plaintiff sued. The suit was dismissed and re-filed. The second suit was filed within the statute of limitations as extended by the one-year saving statute (R.C. 2305.19)

but was filed beyond the four-year statute of repose period. The plaintiff contended that since the statutes of limitation for medical claims and wrongful death claims are contained in different statutory sections, a wrongful death claim is not a "medical claim" to which the medical claim statute of repose would apply. The Court rejected this argument, finding that the plain language of the statute of repose includes wrongful death claims:

> There is no dispute that Martin's wrongful death claim is based upon the "medical diagnosis, care or treatment" of Nancy. Although the wrongful death claim is subject to a different statute of limitations, it does not follow that [it] is not a "medical claim" for purposes of the statute of repose. Moreover, this court has specifically held that wrongful death claims may constitute medical claims under RC 2305.113(E)(3). *Wilson v. Mercy Health,* 11th Dist. Trumbull No. 2021-T-004, 2021-Ohio-2470 ¶ 23-34. Accordingly, Martin's fourth assigned error lacks merit.

Martin at ¶ 46. The Court also held that the statute of repose did not unconstitutionally deny the plaintiff a remedy.

See also, *Shell v. Mt. Carmel Health System,* No. 11CVA05-5838, 2011 Ohio Misc. LEXIS 1988 (C.P. Franklin Co. August 9, 2011) and *Stephens v. Spahn,* No. CVA 2017-0112 (C.P. Madison Co. December 11, 2018), both of which held that R.C. 2305.113(C) applies to wrongful death claims that are based on medical malpractice. [5]

E. The Tenth District's reasons for its decision do not withstand scrutiny.

The Tenth District offered several reasons why the medical statute of repose does not apply to wrongful death actions, none of which withstand scrutiny. The Court first pointed out that a wrongful death claim is a separate cause of action from the patient's claim for injuries from malpractice, quoting *Klema v. St. Elizabeth's Hosp.*, 170 Ohio St. 519, 521-522, 166 N.E.2d 765 (1960):

---

[5] Copies of the *Shell* and *Stephens* decisions are included in the Appendix of this memorandum, at APPX_28 (*Shell*) and APPX_35 (*Stephens*)..

> Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong.

The Court then wrongly concluded that since the medical statute of repose is not set forth within the wrongful death statute it must not apply to a wrongful death claim. The Court failed to recognize that a malpractice claim and wrongful death claim can *both* be "medical claims," just as a consortium claim of an injured patient's spouse is a separate claim but still a "medical claim." Indeed, the Tenth District's conclusion disregards the definition of "medical claim" set forth in R.C. 2305.113(E)(3), which provides:

> (3) "Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes the following:
>
> (a) Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person;
>
> (b) Derivative claims for relief that arise from the plan of care prepared for a resident of a home;
>
> (c) Claims that arise out of the medical diagnosis, care, or treatment of any person or claims that arise out of the plan of care prepared for a resident of a home and to which both types of claims either of the following applies:
>
> (i) The claim results from acts or omissions in providing medical care.

(ii) The claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.

(d) Claims that arise out of the plan of care, medical diagnosis, or treatment of any person and that are brought under section 3721.17 of the Revised Code;

(e) Claims that arise out of skilled nursing care or personal care services provided in a home pursuant to the plan of care, medical diagnosis, or treatment.

Thus, a "medical claim" is "***any*** claim that is asserted in ***any*** civil action" against a physician, hospital, or other medical provider, "that arises out of the medical diagnosis, care, or treatment of any person." The definition could not be broader, and certainly encompasses all of Plaintiff's allegations here. Plaintiff's malpractice claim states (R. 213, Second Amended Complaint) (emphasis added):

> 30. Defendants Dr. Patel, **Dr. Hamza**, employees and agents of New Century **and Coshocton**, and John Doe Physicians 1-5 **fell below the accepted standard of care, skill and diligence for physicians practicing in Ohio or other similar communities in the care and treatment of Decedent.** Defendants' failure to meet the accepted standard of care, skill and diligence include, but are not limited to: failure to adequately communicate the medical records and x-rays taken at Coshocton County Memorial Hospital to OSU Medical Center or Decedent's family physician.

Similarly, Plaintiff's wrongful death claim alleges (*Id.*):

> 46. Defendant **Coshocton County Memorial Hospital**, New Century Physicians. Inc., Medical Services of Coshocton, Inc., Coshocton Radiology, Inc., and their employees and agents, Dr. Patel. **Dr. Hamza**, Dr. Mendiola, and Dr. Magness, and Defendants Dr. Freedy, and John Doe Employees Number 1-10, John Doc Physicians 1-5, and John Doe Corporations Number 1-3 **fell below the accepted standard of care, skill and diligence for residents, nurses and other personnel providing care to Decedent.**
>
> 47. As a direct and proximate result of Defendants' failure to adhere to the accepted standards of care, skill and diligence, Decedent died wrongfully.

These are claims made in a civil action, against doctors and hospitals, that arise "out of the medical diagnosis, care, or treatment of any person." There is no exception in the statute for wrongful death claims. All of Plaintiff's claims therefore fall squarely within the definition of "medical claim," and necessarily are subject to the four-year statute of repose.

In *Everhart*, the Tenth District acknowledged that the "central focus in statutory interpretation is ascertaining and giving effect to the legislature's intent in enacting the statute." *Everhart* at ¶ 20, citing *Gabbard v. Madison Local School Dist. Bd. of Edn.*, 165 Ohio St.3d 390, 2021-Ohio-2067, 179 N.E.3d 1169, ¶ 13. The Court further acknowledged that "if the statutory language is clear, this court applies the language as written and need not require consideration of statutory tools of interpretation or consideration of public policy." (*Id.*). The Court then did *exactly the opposite*, by disregarding the legislature's stated intent and the clear definition of "medical claim." Indeed, there is nothing unclear or ambiguous about "any claim that is asserted in any civil action against a physician [or] hospital…that arises out of the medical diagnosis, care, or treatment of any person." That certainly encompasses a wrongful death claim.

The Tenth District again missed the mark in its attempt to contrast the language of R.C. 2305.131, which sets forth a statute of repose for improvements to real property, with the medical claim statute of repose set forth in R.C. 2305.113. *Everhart* at ¶ 27-29. The Court pointed out that the real property statute of repose in R.C. 2305.131 specifically mentions claims for wrongful death, while the medical claim statute of repose does not. The Court then concluded that "when comparing the language of R.C. 2305.113 and 2305.131, it is clear the General Assembly intended to exclude wrongful death claims from the statute of repose for medical malpractice." But not only is this far from clear, the opposite conclusion is in fact clear. The Court is once again disregarding R.C. 2305.113(E)(3), which defines "medical claim" as

meaning "any claim that is asserted in any civil action against" a physician or hospital (among others) "that arises out of the medical diagnosis, care, or treatment of any person." "Any claim" certainly includes a wrongful death claim. Hence, any reference to wrongful death claims would have been unnecessary and redundant. Had the General Assembly intended to exclude wrongful death claims from the definition of "medical claim," it certainly could have done so. The lack of any such exception speaks volumes about the General Assembly's intent.

In addition, the Tenth District placed undue reliance on this Court's over 60-year-old decision in *Klema v. St. Elizabeth's Hosp.*, 170 Ohio St. 519, 166 N.E.2d 765 (1960), which held that the two-year wrongful death statute of limitations applies to a wrongful death claim based on medical malpractice, rather than the one-year medical malpractice statute. The wrongful death statute set forth a two-year statute of limitations, "except as otherwise provided by law." The *Klema* Court concluded that the medical malpractice statute did not apply, stating, "The action being a statutory one relating to a specific type of cause, *i.e.*, wrongful death, the phrase, 'except as otherwise provided by law,' can only relate to other provisions relating to death. And the only other provisions relating to death actions are those contained in the wrongful death statute itself." *Klema*, 170 Ohio St. at 524. Thus, this Court decided in *Klema* that the more specific wrongful death statute, rather than the less specific medical malpractice statute, applied. Notably, *Klema* pre-dates R.C. 2305.113, never used or considered the term "medical claim," and did not address whether a wrongful death claim based on medical care meets the definition of "medical claim," which did not yet even exist. Nor was a statute of repose at issue.

There may not have been another statute governing the time to bring wrongful death actions when *Klema* was decided, but there is today. It is 2305.113(C), which sets forth a four-year statute of repose to bring any "medical claim," which the General Assembly defined to

include "any" claim related to medical treatment. There is nothing ambiguous about "any" – it means "all" or "every." *Cales v. Armstrong World Inds., Inc.*, 4th Dist. Scioto No. 02CA2851, 2003-Ohio-1776, ¶ 17; *Motor Cargo, Inc. v. Board of Twp. Trustees*, 67 Ohio L. Abs. 315, 320, 117 N.E.2d 224 (Comm. Pleas 1953) ("any" is equivalent and has the force of "every" and "all"). *Accord, State v. Westling*, 145 Wash. 2d 607, 40 P.3d 669, 671 (2002) ("any" means "every" and "all"); *State ex rel. Porter v. Ferrell*, 959 P.2d 576, 578 (Ok. 1998) ("any" is equivalent and has the force of "every" and "all"); *Central Monitoring Service, Inc. v. Zakinski*, 553 N.W.2d 513, 517 (S.D.1996) ("any" means "all" or "every"); *Harward v. Virginia*, 229 Va. 363, 330 S.E.2d 89, 91 (1985) ("any" includes "all");

This is 2022, and we are almost twenty years past the Senate Bill 80 tort reform that took effect in 2005. There are now multiple statutes of repose and limitations located throughout the Revised Code. One of these statutes is R.C. 2305.113 – the medical claim statute of repose. The General Assembly elected to place this statute in Chapter 2305 of the Revised Code, pertaining to time limits for bringing various claims, which is exactly where it belongs. That way, it can be applied consistently with its broad definition of "medical claim" – to "***any*** claim that is asserted in ***any*** civil action" against a physician, hospital, or other medical provider, "that arises out of the medical diagnosis, care, or treatment of any person." Had the General Assembly placed this provision in the wrongful death statute, it would only have applied to death claims. By placing the statute of repose in Chapter 2305 – which was its prerogative – the General Assembly furthered its determination that "a statute of repose on medical, dental, optometric, and chiropractic claims strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners." That some courts have been dissatisfied with

the General Assembly's chosen location for the statute of repose is not a basis to disregard either the language of the statute or the General Assembly's stated intent in enacting it.

The distinction between a statutory wrongful death action and a common-law malpractice action may have been pertinent to the *Klema* Court in deciding between wrongful death and malpractice *statutes of limitation*, but the distinction is not pertinent here. This is because the definition of "medical claim" in R.C. 2305.113(E)(3) broadly includes "any claim" related to providing medical care, and the statute of repose applies to a "medical claim." The statute of limitations analysis in *Klema* was completely different.

Indeed, in *Ewing v. UC Health*, 1st Dist. Hamilton C-210390, 2022-Ohio-2560, the Court acknowledged that wrongful death claims "seem to fit" the definition of "medical claim" (emphasis added):

> {¶24} ***We recognize that, when looking to the plain language of R.C. 2305.113(E)(3) and the broad definition of medical claim, a wrongful-death claim which is related to the medical diagnosis, care or treatment of the decedent seems to fit into the definition of a medical claim***, depending on the underlying allegations. Notably, the definition of a medical claim is not limited to only those claims brought by the person receiving treatment. See R.C. 2305.113(E)(3). A medical claim is any claim against any of the listed persons that arises out of the medical diagnosis, care, or treatment of any person. Id. The Ohio Supreme Court has found this language to be plain and unambiguous and advised that we must give full meaning to all the express statutory language. *Estate of Stevic v. Bio-Med. Application of Ohio, Inc.*, 121 Ohio St.3d 488, 2009-Ohio-1525, 905 N.E.2d 635, ¶ 16, 18.
>
> {¶25} In fact, we note the 2018 enactment of R.C. 2323.451, which implies that a wrongful-death claim could constitute a medical claim for the purpose of requiring an affidavit of merit. R.C. 2323.451 discusses the requirement of Civ.R. 10(D) that an affidavit of merit be filed with any complaint that asserts a medical claim and provides an extension of time for plaintiffs to add new medical claims or new defendants after the complaint is filed and after discovery is conducted if certain conditions are met. See R.C. 2323.451. The provision relevant to our purposes here, R.C. 2323.451(E), provides:

> Subject to division (F) of this section, after expiration of the one-hundred-eighty-day period described in division (D)(2) of this section, the plaintiff shall not join any additional medical claim or defendant to the action unless the medical claim is for wrongful death, and the period of limitation for the claim under R.C. 2125.02 of the Revised Code has not expired.
> (Emphasis added.)
>
> {¶26} We also note that R.C. 2323.43, the statute which relates solely to medical claims and provides damage limitations for medical claims, specifically provides an exemption from those limitations for wrongful-death actions. See R.C. 2323.43(G)(3). Both statutes seem to indicate that a wrongful-death claim could meet the definition of a "medical claim." However, as already noted above, we cannot look solely to the language of R.C. 2305.113 when deciding the issue before us due to the nature of this claim.

The Court then went astray by focusing on the absence of a statement in the medical claim statute of repose that it applies "notwithstanding" the wrongful death statute. But since the statute of repose already applies to "any claim" relating to providing medical care, such a statement would have been unnecessary surplus. A wrongful death claim is just a "medical claim" brought for the benefit of the patient's Estate, rather than for the patient. Both claims arise "out of the medical diagnosis, care, or treatment of any person," and therefore fall squarely within the definition of "medical claim."

Conclusion

For the foregoing reasons, this Court should hold that a wrongful death claim that arises out of the medical diagnosis, care, or treatment of any person is a "medical claim" under R.C. 2305.113(E)(3), to which the statute of repose in R.C. 2305.113(C) applies. This Court should then reverse the judgment of the Court of Appeals, reinstate the trial court's judgment on the

pleadings for Dr. Mendiola, and direct the trial court to grant the pending Motions for Judgment on the Pleadings of CCMH and Dr. Hamza.

RESPECTFULLY SUBMITTED,

/s/ Brant E. Poling
BRANT E. POLING 0063378
ZACHARY R. HOOVER 0097672
bpoling@poling-law.com
zhoover@poling-law.com
Poling
300 E. Broad St., Ste. 350
Columbus, Ohio 43215
614-737-2900 / 614-737-2929 (fax)
Attorneys for Defendant-Appellant Coshocton County Memorial Hospital

/s/ Frederick A. Sewards
FREDERICK A. SEWARDS 0046647
PATRICK F. SMITH 0024997
fsewards@poling-law.com
psmith@poling-law.com
Poling
300 E. Broad St., Ste. 350
Columbus, Ohio 43215
614-737-2900 / 614-737-2929 (fax)
Attorneys for Defendant-Appellant Mohamed Hamza, M.D.

/s/ David L. Lester
DAVID L. LESTER 0021914
dlester@cruglaw.com
Collins, Roche, Utley & Garner, LLC
875 Westpoint Parkway, Suite 500
Cleveland, Ohio 44145
440-438-3612 / 216-916-7730 (fax)
Co-Counsel for Defendants-Appellants Coshocton County Memorial Hospital and Mohamed Hamza, M.D.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that August 26, 2022, the foregoing was sent via email to the following:

David Shroyer, Esq.
Colley Shroyer & Abraham Co., LPA
536 South High Street
Columbus, Ohio 43215
dshroyer@csajustice.com
Counsel for Plaintiff-Appellee

David Krause, Esq.
Thomas Spyker, Esq.
Reminger Co., L.P.A.
200 Civic Center Dr., Suite 800
Columbus, OH 43215
Dkrause@reminger.com
tspyker@reminger.com
Counsel for Defendant-Appellant Joseph Mendiola, M.D.

/s/ David L. Lester
David L. Lester (0021914)

Appendix

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Machelle Everhart, Individually and as Administrator of the Estate of Todd Everhart, Deceased,	:	
Plaintiff-Appellant,	:	
v.	:	No. 21AP-74 (C.P.C. No. 08CV-1385)
Coshocton County Memorial Hospital et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 3, 2022, that sustained appellant's first assignment of error and found the second assignment of error moot, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed and the case is remanded for proceedings consistent with the decision of this court. Any outstanding appellate court costs are assessed equally between appellees.

MENTEL, KLATT & DORRIAN, JJ.

/S/JUDGE

Tenth District Court of Appeals

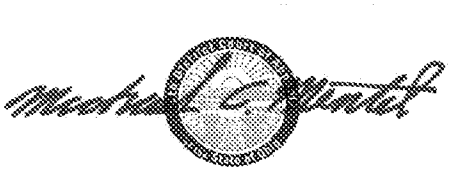
Date: 03-07-2022

Case Title: MACHELLE EVERHART -VS- COSHOCTON COUNTY MEMORIAL HOSPITAL

Case Number: 21AP000074

Type: JEJ - JUDGMENT ENTRY

It Is So Ordered



/s/Judge Michael C. Mentel

[Cite as *Everhart v. Coshocton Cty. Mem. Hosp.*, 2022-Ohio-629.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Machelle Everhart, Individually and as Administrator of the Estate of Todd Everhart, Deceased,	:	
Plaintiff-Appellant,	:	
		No. 21AP-74
v.	:	(C.P.C. No. 08CV-1385)
Coshocton County Memorial Hospital et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 3, 2022

On brief: *Colley, Shroyer & Abraham Co. LPA, David I. Shroyer,* for appellant. **Argued:** *David I. Shroyer.*

On brief: *Reminger Co., L.P.A., David H. Krause,* and *Thomas N. Spyker,* for appellee Joseph J. Mendiola, M.D. **Argued**: *Thomas N. Spyker.*

On brief: *Poling Law, Frederick A. Sewards,* and *Patrick F. Smith,* for appellee Mohamed Hamza, M.D.

On brief: *Poling Law, Brant Poling,* and *Zachary R. Hoover,* for appellees Coshocton County Memorial Hospital and Medical Services of Coshocton, Inc.

APPEAL from the Franklin County Court of Common Pleas

MENTEL, J.

{¶ 1} Plaintiff-appellant, Machelle Everhart, individually and as the administrator of the estate of Todd Everhart, deceased, appeals from the January 26, 2021 decision of the Franklin County Court of Common Pleas granting the motion of defendant-appellee,

Joseph J. Mendiola, M.D., for judgment on the pleadings based on the four-year statute of repose set forth in R.C. 2305.113(C).

{¶ 2} For the reasons that follow, we reverse.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} The underlying facts of this case were discussed extensively in *Everhart v. Coshocton Cty. Mem. Hosp.*, 10th Dist. No. 12AP-75, 2013-Ohio-2210 ("*Everhart I*"). Briefly, appellant is a widow and administrator for the estate of her late husband, Todd Everhart. On December 21, 2003, Mr. Everhart was in an automobile accident and transported to the emergency room at Coshocton County Memorial Hospital ("Coshocton Hospital"). According to appellant, Drs. Rajendra Patel and Mohamed Hamza treated Mr. Everhart. Chest x-rays were ordered on Mr. Everhart at that time. Mr. Everhart was later transported by Life Flight from Coshocton Hospital to The Ohio State University Emergency Department ("Ohio State"). At Ohio State, new x-rays were taken of Mr. Everhart. Appellant alleged the chest x-rays showed opacity in the lung that required additional follow-up treatment to rule out malignancy. Mr. Everhart recovered from the injuries sustained in the automobile accident and was discharged from the hospital.

{¶ 4} On August 11, 2006, nearly three years after the automobile accident, Mr. Everhart presented at Coshocton Hospital. Mr. Everhart obtained a CT scan, which revealed masses on the right lung that were later diagnosed as advanced stage lung cancer. Mr. Everhart passed away on October 28, 2006.

{¶ 5} On January 25, 2008, appellant filed the initial complaint alleging causes of action for medical malpractice[1] and wrongful death against Coshocton Hospital and several physicians. Appellant argued Coshocton Hospital and physicians deviated from the standard of medical care by failing to send, receive, or act on Mr. Everhart's x-ray films and radiology report as to the lung opacity. On October 2, 2008, Dr. Hamza filed a motion for summary judgment arguing that there was no physician-patient relationship with Mr. Everhart and, therefore, Dr. Hamza did not owe him a duty of care.[2] Appellant requested additional time to conduct discovery before responding to the motion. Appellant

[1] Appellant contends she sent multiple 180-day letters to appellees pursuant to R.C. 2305.113(B)(1).
[2] On October 23, 2008, appellant filed an amended complaint. Appellant later filed a motion for leave to file a second amended complaint, which was granted by the trial court. On August 10, 2009, appellant filed a second amended complaint.

ultimately filed a memorandum in opposition with an affidavit by Dr. Harlan D. Meyer. Dr. Meyer stated that Dr. Hamza had a duty to review reports that are distributed to him, regardless of whether he saw the patient. On April 21, 2010, the trial court granted Dr. Hamza's motion for summary judgment. Appellant filed a motion for reconsideration of the trial court's decision on August 25, 2011. On January 3, 2012, the trial court denied appellant's motion for reconsideration but issued a nunc pro tunc entry as to the April 21, 2010 decision and entry granting summary judgment with Civ.R. 54(B) certification.

{¶ 6} On May 30, 2013, this court reversed the trial court's decision finding it erred granting summary judgment in favor of Dr. Hamza and remanded the case for further proceedings as there was a genuine issue of material fact whether Dr. Hamza received the x-rays and read the radiology report and, therefore, whether a physician-patient relationship existed between the parties. *Everhart I* at ¶ 1.

{¶ 7} In September 2017, appellees sought leave to file motions for judgment on the pleadings based on the Supreme Court of Ohio's decision in *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432. Appellees argued that appellant's claims were precluded by the four-year statute of repose under R.C. 2305.113(C). Appellant opposed the motions for leave contending that the statute of repose argument was waived as the defense was not asserted in the appellees' answers. Appellees proceeded to request leave to amend their answers in order to add statute of repose as an affirmative defense. On November 30, 2017, the trial court stayed the case based on Coshocton Hospital initiating bankruptcy proceedings. The case was reinstated on April 3, 2019. (May 16, 2019 Nunc Pro Tunc Entry.)

{¶ 8} The trial court granted appellees' motions for leave to file amended answers and motions for leave to file motions for judgment on the pleadings on August 25 and August 27, 2020, respectively. On September 4, 2020, Dr. Mendiola filed a motion for judgment on the pleadings arguing that appellant's wrongful death cause of action was a medical claim and, therefore, barred by the four-year statute of repose set forth in R.C. 2305.113(C). A memorandum in opposition was filed on September 16, 2020. A reply was filed on September 23, 2020.

{¶ 9} On September 15, 2020, appellant filed a motion for leave to file a third amended complaint. The motion was opposed by Coshocton Hospital and Dr. Mendiola on

September 21 and September 23, 2020, respectively. A reply brief was filed on September 28, 2020. The trial court denied appellant's motion for leave to amend on December 11, 2020. On January 26, 2021, the trial court granted Dr. Mendiola's motion for judgment on the pleadings finding that appellant's wrongful death claim was a medical claim under R.C. 2305.113(E) and, thus, barred by the statute of repose.[3]

{¶ 10} Appellant filed a timely appeal.

II. ASSIGNMENTS OF ERROR

{¶ 11} Appellant assigned the following as trial court error:

> [1.] The trial court erred when it applied the statute of repose for medical claims to a statutory wrongful death claim.
>
> [2.] The trial court erred by denying Everhart leave to file a Third Amended Complaint.

III. LEGAL ANALYSIS

A. Appellant's First Assignment of Error

{¶ 12} In appellant's first assignment of error, she argues the trial court erred when it applied the statute of repose for medical claims to a statutory wrongful death claim.[4]

1. Standard of Review

{¶ 13} A motion for judgment on the pleadings under Civ.R. 12(C) "has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted." *Easter v. Complete Gen. Constr. Co.*, 10th Dist. No. 06AP-763, 2007-Ohio-1297, ¶ 8, citing *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581 (2001). As set forth in Civ.R. 12(C), "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The moving party is entitled to judgment on the pleadings when, after construing all the material assertions in the complaint as true and considering all reasonable inferences in favor of the nonmoving party, the moving party is entitled to judgment as a matter of law. *Welther v. Plageman*, 10th Dist. No. 19AP-774, 2021-Ohio-713, ¶ 6, citing *Zhelezny v. Olesh*, 10th Dist.

---

[3] On August 25, 2021, this court issued a memorandum decision finding that the trial court's January 26, 2021 decision and trial court's denial of leave to file a third amended complaint constituted a final, appealable order. (Aug. 25, 2021 Memo Decision.)

[4] At the onset of this decision, we make special note of the well-reasoned analysis by Judge Woods in *Giannobile, et al. v. Riverside Radiology Interventional Assoc., Inc., et al.*, Franklin C.P. No. 15CV-1854 (May 4, 2018).

No. 12AP-681, 2013-Ohio-4337, ¶ 8. "A motion for judgment on the pleadings is specifically intended for resolving questions of law." *Easter* at ¶ 9, citing *Friends of Ferguson v. Ohio Elections Comm.*, 117 Ohio App.3d 332, 334 (10th Dist.1997). Appellate review of a motion for judgment on the pleadings under Civ.R. 12(C) is de novo. *Kamnikar v. Fiorita*, 10th Dist. No. 16AP-736, 2017-Ohio-5605, ¶ 35.

2. Wrongful Death Statute, R.C. 2125.01.

{¶ 14} Ohio first enacted a wrongful death statute in 1851. *Karr v. Sixt*, 146 Ohio St. 527 (1946), paragraph one of the syllabus, citing 13 Ohio Jurisprudence, 384, Section 33. Prior to its enactment, there was no such statutory basis for the cause of action under Ohio law. *Id*. Currently, a cause of action for wrongful death is governed by R.C. 2125. Pursuant to R.C. 2125.01, a wrongful death claim occurs:

> When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the owner or lessee constitute gross negligence.
>
> When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

{¶ 15} Since the inception of the wrongful death statute, the Supreme Court of Ohio has recognized that wrongful death is a separate and unique claim writing "an action for

wrongful death, creates a new cause or right of action distinct and apart from the right of action which the injured person might have had and upon the existence of which such new right is conditioned." *Karr* at paragraph one of the syllabus. The United States Supreme Court in *St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 658 (1915), later quoted in *Klema v. St. Elizabeth's Hosp.*, 170 Ohio St. 519, 521-22 (1960), observed the established differences between a medical negligence and wrongful death claim writing:

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong."

Klema at 521, quoting *Iron Mountain* at 658.

{¶ 16} There is no doubt that wrongful death is a separate and unique cause of action from other claims.

3. Medical Malpractice and Statute of Repose under R.C. 2305.113(C)

{¶ 17} Conversely, the cause of action for medical malpractice is derived from common law. *Koler v. St. Joseph Hosp.*, 69 Ohio St.2d 477, 479 (1982). The General Assembly enacted R.C. 2305.113 to establish "[l]imitation[s] of actions for medical malpractice." R.C. 2305.113(C) imposes a four-year statute of repose[5] for "medical claims,"[6] stating:

> (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

[5] R.C. 2305.113(C) includes exceptions in cases for "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."
[6] A "medical claim," as defined under R.C. 2305.113(E)(3), is "any claim that is asserted in any civil action against a physician, podiatrist, hospital * * * and that arises out of the medical diagnosis, care, or treatment of any person."

> of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.

{¶ 18} The Supreme Court of Ohio has explained the legislative purpose of enacting a statute of repose for medical malpractice claims under R.C. 2305.113(C), writing:

> "Many policy reasons support this legislation. Just as a plaintiff is entitled to a meaningful time and opportunity to pursue a claim, a defendant is entitled to a reasonable time after which he or she can be assured that a defense will not have to be mounted for actions occurring years before. The 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 the fear of litigation.
>
> Forcing medical providers to defend against medical claims that occurred 10, 20, or 50 years before presents a host of litigation concerns, including the risk that evidence is unavailable through the death or unknown whereabouts of witnesses, the possibility that pertinent documents were not retained, the likelihood that evidence would be untrustworthy due to faded memories, the potential that technology may have changed to create a different and more stringent standard of care not applicable to the earlier time, the risk that the medical providers' financial circumstances may have changed—i.e., that practitioners have retired and no longer carry liability insurance, the possibility that a practitioner's insurer has become insolvent, and the risk that the institutional medical provider may have closed.
>
> Responding to these concerns, the General Assembly made a policy decision to grant Ohio medical providers the right to be free from litigation based on alleged acts of medical negligence occurring outside a specified time period."

Antoon, 2016-Ohio-7432, at ¶18, quoting *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, ¶ 19-21.

{¶ 19} As noted in *Antoon*, the Supreme Court of Ohio limited its analysis, however, to the application of the statute of repose to medical malpractice cases. The question becomes whether Ohio's medical malpractice statute of repose, R.C. 2305.113(C), applies to a wrongful death action under R.C. 2125.02.

{¶ 20} As a cause of action for wrongful death is statutory in nature, we begin our analysis with the text of the wrongful death statute, R.C. 2125.02. The central focus in

statutory interpretation is ascertaining and giving effect to the legislature's intent in enacting the statute. *Gabbard v. Madison Local School Dist. Bd. of Edn.*, __Ohio St.__, 2021-Ohio-2067, ¶ 13, citing *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 21. "To discern that intent, we first consider the statutory language, reading all words and phrases in context and in accordance with the rules of grammar and common usage. We give effect to the words the General Assembly has chosen, and we may neither add to nor delete from the statutory language." (Citation omitted.) *Gabbard* at ¶ 13, citing *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶ 19. When the meaning is unambiguous and definite, we must apply the statute as written. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 52, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545 (1996). "[I]f the General Assembly could have used a particular word in a statute but did not, we will not add that word by judicial fiat." *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, ¶ 26, citing *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 26. If the statutory language is clear, this court applies the language as written and need not require consideration of statutory tools of interpretation or consideration of public policy. *Gabbard* at ¶ 13, citing *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 128 Ohio St.3d 492, 2011-Ohio-1603, ¶ 23-24, 26. "An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words." *Portage Cty.* at ¶ 52, citing *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81 (1997).

{¶ 21} Upon review, R.C. 2125.02 does not provide a statute of repose for a wrongful death arising out of a medical claim. The only statute of repose included in R.C. 2125.02 is in the products liability context, which states "no cause of action for wrongful death involving 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 to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product." R.C. 2125.02(D)(2). This court sees nothing ambiguous in the language of R.C. 2125.02(D)(2). Moreover, R.C. 2125.02(D)(2) makes no reference to another statute that might inform the analysis. As there is no statute of repose for wrongful death

claims originating out of a medical claim provided in R.C. 2125.02, or statute incorporated by reference, we conclude the General Assembly did not intend to create one in this context.

{¶ 22} Arguendo, even if the statutory language was ambiguous,[7] we reach the same conclusion, i.e., that a wrongful death claim derived from a medical claim is not barred by the four-year statute of repose under R.C. 2305.113(C). We first consider R.C. 2125.02(D)(2) as guided by the canon of statutory construction expressio unius est exclusio alterius, the expression of one or more items of a class implies that those not included are excluded.[8] *State v. Droste*, 83 Ohio St.3d 36, 39 (1998), citing *Thomas v. Freeman*, 79 Ohio St.3d 221, 224-25 (1997). " 'The General Assembly is presumed to have known that its designation of a remedy would be construed to exclude other remedies, consistent with the statutory construction maxim of expressio unius est exclusio alterius.' " *New Albany Park Condo. Assn. v. Lifestyle Communities, Ltd.*, 195 Ohio App.3d 459, 2011-Ohio-2806, ¶ 23 (10th Dist.), quoting *Hoops v. United Tel. Co. of Ohio*, 50 Ohio St.3d 97, 101 (1990). However, " 'the canon expressio unius est exclusio alterius does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.' " *New Albany* at ¶ 23, quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003), citing *United States v. Vonn*, 535 U.S. 55, 65 (2002); *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, ¶ 35.

{¶ 23} Here, R.C. 2125.02(D)(2) singularly addresses wrongful death involving products liability. The General Assembly is aware that wrongful death claims may arise in a variety of other circumstances and decided to only provide a statute of repose in the products liability context. Accordingly, the most reasonable reading of R.C. 2125.02 is that the General Assembly intended to exclude other types of causes of action, such as medical claims, unless otherwise incorporated by reference in another statute.

---

[7] When " 'the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation.' " *Turner v. Hooks*, 152 Ohio St.3d 559, 2018-Ohio-556, ¶ 12, quoting *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96 (1991). However, "[w]hen the language of a statute is ambiguous, we resort to the rules of construction to discern its meaning." *Turner* at ¶ 10. (writing "where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent").

[8] Black's Law Dictionary defines expressio unius est exclusio alterius as "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. * * * For example, the rule that 'each citizen is entitled to vote' implies that noncitizens are not entitled to vote." *Black's Law Dictionary* 701 (10th Ed.2014).

{¶ 24} Appellees argue the four-year statute of repose for a medical malpractice claim precludes a wrongful death cause of action if it arises from a medical claim. Appellees rely on another statutory canon, "in pari materia, which means 'upon the same matter or subject.' " *Thomas*, 79 Ohio St.3d 225, quoting *Black's Law Dictionary* 791 (6th Ed.1990). Appellees contend that as the wrongful death and medical malpractice statute deal with the same underlying claim they should be read as if they were one statute. We disagree.

{¶ 25} R.C. 2305.113 concerns "[l]imitation of actions for medical malpractice; statute of repose." There is not a single reference to wrongful death in R.C. 2305.113. While R.C. 2305.113(E) does define "medical claims," we are not persuaded that wrongful death is encompassed under the statute simply because they share the same underlying type of negligence. It is well-established that wrongful death and medical malpractice are separate and unique causes of action even when the case is derived from a medical claim. *See Koler* at 484 (Celebreeze, J., concurring) ("Medical malpractice is separate and distinct from wrongful death. These are distinct wrongs."). R.C. 2305.113(E) lists a series of derivative claims for relief for purposes of its definition of medical claim. R.C. 2305.113(E)(7) states:

> "Derivative claims for relief" include, but are not limited to, claims of a parent, guardian, custodian, or spouse of an individual who was the subject of any medical diagnosis, care, or treatment, dental diagnosis, care, or treatment, dental operation, optometric diagnosis, care, or treatment, or chiropractic diagnosis, care, or treatment, that arise from that diagnosis, care, treatment, or operation, and that seek the recovery of damages for any of the following:
>
> (a) Loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, or any other intangible loss that was sustained by the parent, guardian, custodian, or spouse;
>
> (b) Expenditures of the parent, guardian, custodian, or spouse for medical, dental, optometric, or chiropractic care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations provided to the individual who was the subject of the medical diagnosis, care, or treatment, the dental diagnosis, care, or treatment, the dental operation, the optometric diagnosis, care, or treatment, or the chiropractic diagnosis, care, or treatment.

{¶ 26} Here, the causes of action identified as "derivative claims for relief" do not include wrongful death. Again, the statutory canon expressio unius est exclusio alterius informs our analysis that the inclusion of these causes of action implicitly excludes others. While the General Assembly's inclusion of the phrase "but are not limited to" leaves open the possibility a cause of action for wrongful death falls under this category, a wrongful death claim is not a derivative claim of medical malpractice, but a separate, independent cause of action. "Because a wrongful death action is an independent cause of action, the right to bring the action cannot depend on the existence of a separate cause of action held by the injured person immediately before his or her death. *To conclude otherwise would convert the wrongful death action from an independent cause of action to a derivative action, one dependent on a separate cause of action*." (Emphasis added.) *Thompson v. Wing*, 70 Ohio St.3d 176 (1994).

{¶ 27} The General Assembly has demonstrated that it is capable of enacting a statute of repose that addresses wrongful death claims in other contexts. In 1963, the General Assembly first enacted R.C. 2305.131 creating a statute of repose for claims derived from unsafe conditions of real property improvement. *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, ¶ 10. R.C. 2305.131 recognized that architects and builders are exposed to liability for extended periods of time based on the permanency of buildings. *Id*. In 2005, the General Assembly enacted the current iteration of R.C. 2305.131, which reads:

> [N]o cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.

R.C. 2305.131(A).

{¶ 28} As set forth in R.C. 2305.131, a claim for wrongful death that arises out of a defective or unsafe condition of an improvement to real property is precluded if it is not filed within ten years from the date of substantial completion of such improvement. The medical malpractice statute of repose, R.C. 2305.113, unlike R.C. 2305.131, makes no mention of whether wrongful death derived from medical claims is covered under the four-year statute of repose. Accordingly, when comparing the language of R.C. 2305.113 and 2305.131, it is clear the General Assembly intended to exclude wrongful death claims from the statute of repose for medical malpractice. Finally, the plain language of Ohio's borrowing statute, R.C. 2305.03, is also informative as to this issue. The statute addresses defenses based on time limitations, which would include a statute of repose for medical claims. R.C. 2305.03(A) states:

> Except as provided in division (B) of this section and *unless a different limitation is prescribed by statute*, a civil action may be commenced only within the period prescribed in sections 2305.04 to 2305.22 of the Revised Code. If interposed by proper plea by a party to an action mentioned in any of those sections, lapse of time shall be a bar to the action.

(Emphasis added.)

{¶ 29} As noted in *Giannobile, et al. v. Riverside Radiology Interventional Assoc., Inc., et al.*, Franklin C.P. No. 15CV-1854 (May 4, 2018), R.C. 2125.02 certainly qualifies as a statute imposing a different time limitation. As the wrongful death statute has its own time limitations, it would be excluded from R.C. 2305.03. Given these facts, we conclude that the General Assembly did not intend to create a statute of repose for wrongful death arising out of a medical claim. Simply put, if the legislature had intended a statute of repose in this context, it would have said so either expressly in R.C. 2125.02, as was the case in the products liability context, or expressly included wrongful death in the medical malpractice statute of repose, R.C. 2305.113, as it did in R.C. 2305.131 for claims derived from unsafe conditions of real property improvement.

{¶ 30} Distinguishing the statute of repose for medical malpractice from the wrongful death statute conforms with many other statutory and procedural requirements that differentiate the two causes of action. Of note, a wrongful death claim is governed by R.C. Chapter 2125 and a medical malpractice action is set forth at common law. *Ruther* at ¶ 29; *Koler* at 479. In bringing a wrongful death claim, Civ.R. 25(E) requires counsel to

provide for the court a suggestion of death on the record. A wrongful death action must be brought by an administrator, executor, or personal representative of the decedent's estate while a medical negligence claim is generally brought by the injured party. *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, ¶ 10; R.C. 2125.02(A).[9] A wrongful death action seeks damages for injuries by the surviving next of kin after the decedent's death as compared to a medical negligence claim that seeks damages sustained by the injured party after the injury. R.C. 2125.02(A)(1). A wrongful death claim can only be brought after death and is pled as a separate cause of action from medical negligence. *Mansour v. Woo*, 8th Dist. No. 2011-A-0038, 2012-Ohio-1883, ¶ 35, citing *Karr*. There are also statutory limits of compensatory damages representing noneconomic loss for medical malpractice damages, which do not apply to wrongful death claims. *See* R.C. 2323.43(G) and (3) ("This section does not apply to any of the following * * * [w]rongful death actions brought pursuant to Chapter 2125. of the Revised Code."). Finally, the statute of limitations for a medical malpractice action is one year after the cause of action accrued, while a wrongful death claim must be brought within two years after the decedent's death. R.C. 2305.113; R.C. 2125.02(D). The distinction in the statute of limitations applies even when the wrongful death cause of action arises out of a "medical claim." *Koler*. Pursuant to R.C. 2305.113, the statute of limitations for medical malpractice may be extended by the 180-day letter while R.C. 2125.02 includes no such provision. Given the many differences between the two claims, not exhaustively provided in this decision, there is no reason to believe the General Assembly did not intend to do the same with the statute of repose.

{¶ 31} Appellees rely on several cases from the Supreme Court of Ohio that conclude R.C. 2305.113 imposes a true statute of repose for medical malpractice claims. Appellees state these cases should be applied in this instance as the wrongful death cause of action arises out of a medical claim. A brief analysis of these cases is instructive.

{¶ 32} In *Ruther*, 2012-Ohio-5686, a widow brought a medical malpractice action against defendants for failure to evaluate an abnormal laboratory result regarding high liver enzymes. The Supreme Court took the case for the proposition that R.C. 2305.113(C) does

[9] "[A] civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent." R.C. 2125.02(A).

not violate the open courts provision, Section 16, Article I, of the Ohio Constitution. In *Ruther*, the Supreme Court found that R.C. 2305.113(C) was a valid exercise of the General Assembly's authority to limit a cause of action and constituted a "true statute of repose." *Id*. at ¶ 18. Similarly, the Supreme Court in *Antoon* found the statute was constitutional, writing "the plain language of [R.C. 2305.113(C)] 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* at ¶ 23. Recently, the Supreme Court addressed R.C. 2305.113(C) in *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827. In *Wilson*, the Supreme Court considered whether Ohio's savings statute applies to a refiled medical claim after the applicable one-year statute of limitations had expired if the four-year statute of repose for medical claims had also lapsed. The Supreme Court in *Wilson* wrote that while the statutes of limitation and repose share common objectives, "they operate differently and have distinct applications." *Wilson* at ¶ 8, citing *Antoon* at ¶ 11, citing *CTS Corp. v. Waldburger*, 573 U.S. 1, 7 (2014). The *Wilson* court examined the two terms, writing:

> 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.). The United States Supreme Court has likened the bar imposed by a statute of repose to a discharge in bankruptcy—as providing "a fresh start" and "embod[ying] the idea that at some point a defendant should be able to put past events behind him." *CTS Corp*. at 9.
>
> Statutes of limitations and statutes of repose target different actors. *Id*. at 8. Statutes of limitations emphasize plaintiffs' duty to diligently prosecute known claims. *Id*., citing *Black's Law Dictionary* 1546 (9th Ed.2009). Statutes of repose, on the

> other hand, emphasize defendants' entitlement to be free from liability after a legislatively determined time. *Id*. at 9. In light of those differences, statutory schemes commonly pair a shorter statute of limitations with a longer statute of repose. *California Pub. Emps.' Retirement Sys. v. ANZ Securities, Inc.*, __U.S.__, 137 S.Ct. 2042, 2049, 198 L.Ed.2d 584 (2017). When the discovery rule—that is, the rule that the statute of limitations runs from the discovery of injury—governs the running of a statute of limitations, the "discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability." *Id*. at__, 137 S.Ct. at 2050.

Id. at ¶ 9-10.

{¶ 33} The Supreme Court in *Wilson* ultimately found R.C. 2503.113(C) "provid[es] an absolute temporal limit on a defendant's potential liability," and a plaintiff may not "take advantage of Ohio's saving statute to refile a medical claim after the applicable one-year statute of limitations has expired if the four-year statute of repose for medical claims has also expired." *Wilson* at ¶ 1, 37. While it is evident that *Ruther*, *Antoon*, and *Wilson* offer a well-supported body of case law that a medical malpractice claim is barred after the four-year statute of repose has expired, the Supreme Court has never expanded such a preclusion to Ohio's wrongful death statute, R.C. 2125.02. While the rationale provided by the General Assembly for creating a statute of repose for medical malpractice claims could apply to wrongful death, that does not mean the legislature, in fact, created one in this context. Accordingly, we find these cases distinct as none of them address whether a wrongful death case is a medical claim for purposes of barring a claim under the medical malpractice four-year statute of repose.

4. Other Ohio Appellate Districts

{¶ 34} Appellees argue three Ohio appellate courts have found Ohio's medical malpractice statute of repose precludes a wrongful death action if the case is derived from a medical claim. *See Smith v. Wyandot Mem. Hosp*., 3d Dist. No. 16-17-07, 2018-Ohio-2441; *Fletcher v. Univ. Hosps. of Cleveland*, 8th Dist. No. 88573, 2007-Ohio-2778, *rev'd on other grounds*, 120 Ohio St.3d 167, 2008-Ohio-5379*; Mercer v. Keane*, 5th Dist. No. 20CA0013, 2021-Ohio-1576. We will discuss each case in turn.

{¶ 35} In *Fletcher*, the Eighth District Court of Appeals considered whether an affidavit of merit must be filed with a wrongful death action under R.C. 2125. The *Fletcher*

court concluded the alleged injury was based on a medical claim and an affidavit of merit was required to establish the adequacy of the complaint for purposes of Civ.R. 10(D)(2).[10] *Fletcher*, however, did not consider the language in the wrongful death statute, R.C. 2125.02(D), or address the medical malpractice statute of repose under R.C. 2305.113(C). Furthermore, in Civ.R. 10(D)(2), unlike R.C. 2125.02, the General Assembly specifically identified the term "medical claim" as defined in R.C. 2305.113(C). "[A] complaint that contains a medical claim * * * as defined in R.C. 2305.113, shall be accompanied by one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability." Civ.R. 10(D)(2). This harmonizes with the intent of Civ.R. 10(D)(2), which ensures that a party's complaint meets basic sufficiency standards. Accordingly, we find *Fletcher* distinct from the issue at hand as to whether the statute of repose under R.C. 2305.113 encompasses a cause of action for wrongful death that arises from a medical claim.

{¶ 36} In *Smith*, the Third District Court of Appeals affirmed the trial court's decision to dismiss the estate's complaint for wrongful death concluding the action was based on a medical claim and, therefore, outside the medical malpractice statute of repose, R.C. 2305.113. The *Smith* court begins its analysis by citing well-established Ohio law that statutory interpretation requires examining the statute's plain language. *Id.* at ¶ 17, quoting *Antoon* at ¶ 20, citing *State ex rel. Burrows* at 81 (" 'To determine legislative intent, we must first examine the plain language of the statute.' "). The *Smith* court, erroneously in our view, then proceeds to examine the medical malpractice statute, R.C. 2305.113(C), instead of the wrongful death statute, R.C. 2125.02. The *Smith* court fails to include any discussion as to the statute of repose provided in R.C. 2125.02(D)(2), but instead mistakenly applies the medical malpractice statute, and analysis in *Antoon*, to the wrongful death statute writing:

> The Supreme Court of Ohio stated that Ohio's medical-claim statute of repose clearly and unambiguously bars "*any* action" bringing a medical claim commenced more than four years

[10] The Eighth District Court of Appeals reached a similar result in *Chromik v. Kaiser Permanente*, 8th Dist. No. 89088, 2007-Ohio-5856, finding that the trial court did not err in dismissing the complaint setting forth survivorship and wrongful death claims as it did not comport with Civ.R. 10(D)(2) by failing to file an affidavit of merit. For the reasons set forth in our analysis of *Fletcher*, we find that the express procedural requirements of Civ.R. 10(D)(2) that ensure the sufficiency of the complaint are distinct from whether the statute of repose set forth in R.C. 2305.113(C) apply to a wrongful death claim.

> after the occurrence of the act or omission constituting the basis for the claim. (Emphasis sic.) [*Antoon*] at ¶ 23. Because *any action* bringing a medical claim is barred by Ohio's medical-claim statute of repose if it is not timely commenced, we conclude that wrongful-death actions fall within the scope of "any action" and are subject to the time restraints of the statute of repose.

(Emphasis sic.) *Smith* at ¶ 22.

{¶ 37} Upon review, the phrase "any action" in *Antoon*, subsequently adopted in *Wilson*, refers to medical malpractice and derivative claims under R.C. 2305.113. This is clear from the proposition of law in *Antoon*, which reads: "Ohio's medical malpractice statute of repose applies whenever the occurrence of the act or omission constituting the alleged medical malpractice takes place more than four years prior to when the lawsuit is filed. This statute of repose applies regardless of whether a cause of action has vested prior to the filing of a lawsuit." *Id*. at ¶ 10. Moreover, the Supreme Court in *Fletcher*, when considering the case on an unrelated proposition of law, expressly stated "Fletcher did not cross-appeal the appellate court's ruling that her wrongful-death claim requires an affidavit [as it was a "medical claim"], so that issue is not before us." *Fletcher*, 120 Ohio St.3d 167 at fn. 2. As such, *Smith*'s application of the medical malpractice statute of repose to wrongful death claims based on Supreme Court precedent conflicts with the proposition of law accepted in *Antoon* and plain language of *Fletcher*.

{¶ 38} Moreover, *Smith*'s holding ignores the well-established case law that wrongful death and medical malpractice are separate and unique claims. The Supreme Court of Ohio has consistently found medical malpractice and wrongful death are distinct causes of action. The most developed example of this distinction is regarding statute of limitations. *See Klema*, 170 Ohio St. 519. In *Klema*, the Supreme Court considered whether the medical malpractice or the wrongful death statute of limitations applied to a cause of action for wrongful death when the case involves a medical claim. The Supreme Court in *Klema* found that the medical malpractice statute of limitations did not apply to wrongful death claims stating "[t]he action being a statutory one relating to a specific type of cause, *i.e.*, wrongful death, the phrase, 'except as otherwise provided by law,' can only relate to other provisions relating to death. And the only other provisions relating to death actions are those contained in the wrongful death statute itself." *Id*. at 524. The Supreme Court in

Klema concluded that the malpractice statute of limitations, set out in a separate provision of the Ohio Revised Code, did not apply to a wrongful death claim. *Id*.

{¶ 39} In *Koler*, 69 Ohio St.2d 477, the Supreme Court considered whether a one-year statute of limitations for medical malpractice should control over the two-year statute of limitations for wrongful death claims because the case involved a complaint against a hospital and, therefore, was a medical claim. The defendants in *Koler* argued the changes to the statutory language demonstrated the General Assembly's intent to include wrongful death claims within the meaning of malpractice. *Id*. at 480. The Supreme Court disagreed reaffirming the holding in *Klema* concluding that the two claims are distinct causes of action even when arising from a "medical claim." *Id*. at 480-81. " ' "[N]o part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong." ' " *Koler* at 823, quoting *Klema* at 521, quoting *Iron Mountain*, 237 U.S. 658. The holding in *Koler* remains good law and has been consistently applied by Ohio appellate courts. *See Fletcher*, 2007-Ohio-2778, at ¶ 8, citing *Koler* ("We are well aware that R.C. 2305.113 does not supply the statute of limitations for a wrongful death claim."); *Evans v. S. Ohio Med. Ctr.*, 103 Ohio App.3d 250 (4th Dist.1995) ("As a result, even when a plaintiff fails to file a negligence action or a malpractice action within the applicable statute of limitations, the wrongful death claim is not time-barred as long as it is filed within two years after the decedent's death."); *Heck v. Thiem Corp*., 7th Dist. No. 93-C-55, 1994 Ohio App. LEXIS 5603 (1994) ("Ohio has ruled that a wrongful death claim is a new and separate cause of action unaffected by an underlying tort action which may have otherwise been barred."); *Brosse v. Cumming*, 20 Ohio App.3d 260 (8th Dist.1984), paragraph two of the syllabus ("Since R.C. 2305.11(A) (medical malpractice) and R.C. 2125.01 and 2125.02 (wrongful death) provide for distinct and independent causes of action, the fact that the right of action of the injured person was barred pursuant to R.C. 2305.11(A) before he died does not constitute a bar to the right of action of his administratrix to bring an action for wrongful death, the only limitation being

that the action for wrongful death must be commenced within two years after the decedent's death.").

{¶ 40} Similarly, federal courts have also cited *Klema* and *Koler* for the proposition that, under Ohio law, the statute of limitations for wrongful death and medical malpractice are distinct even when the case involves a "medical claim." *De La Torre v. Corr. Corp. of Am.*, 2017 U.S. Dist. LEXIS 210999 (N.D.Ohio 2017) (writing "when reviewing the timeliness of a wrongful death action, the Ohio Supreme Court held that the expiration of the statute of limitations period for a medical malpractice action does not mean that a wrongful death action is necessarily untimely"); *Daniel v. United States*, 977 F.Supp.2d 777, 782 (N.D.Ohio 2013) ("Whatever confusion there may be regarding the relative meanings of the terms 'medical claim' and 'malpractice,' it was clear to the *Koler* court that a malpractice action could not be a wrongful death action."). At the very least, these cases stand for the proposition that there is no basis to assume the definition of "medical claim" under R.C. 2305.113(C) should be applied under R.C. 2125.02.

{¶ 41} In *Daniel*, the United States District Court for the Northern District of Ohio concluded the statute of repose in R.C. 2305.113(C) did not apply to a wrongful death action based, in part, on the Supreme Court of Ohio's case law in *Klema* and *Koler*. As stated in *Daniel*:

> The current wrongful death statute reads: "Except as provided in division (D)(2) of this section, a civil action for wrongful death shall be commenced within two years after the decedent's death." Ohio Rev. Code § 2125.02(D)(1). Section (D)(2) of the wrongful death statutes only deals with "wrongful deaths involving products liability." That is the sole category of exceptions to the two-year wrongful death statute of limitations the Ohio legislature has seen fit to include. Following the reasoning in *Klema* and *Koler*, the Court finds that the "medical claim" statute of repose, set forth in another division of the code and not in the wrongful death division, does not apply to plaintiff's wrongful death claim.

Id. at 782-83.

{¶ 42} In *Smith*, the Third District disagreed with the analysis in *Daniel* finding that a statute of repose and statute of limitations have different applications.[11] *Smith* based its analysis on the different motivations between the statute of limitations and statute of repose.

{¶ 43} The *Smith* court's argument misses the mark. *Daniel* did not equate statute of repose and statute of limitations but analogized that when addressing a similar argument regarding whether a medical malpractice time limitation should apply to a wrongful death claim, outstanding Supreme Court precedent has recognized that the two causes of action are unique. The statute of limitations analysis in *Daniel* provides an instructive example of how simply considering all "medical claims" in the same manner, despite wrongful death and medical negligence having separate statutes, is the incorrect approach. While there is no doubt that the statute of limitations and statute of repose address different motivations and actors, the central argument of *Daniel* is correct, that a reviewing court should not apply a definition of "medical claims" addressing medical malpractice actions when considering a wrongful death case unless there is a statutory basis for such an interpretation.

{¶ 44} As noted in *Daniel*, in addition to the plain language of R.C. 2125.02, the analysis in *Koler* demonstrates that the General Assembly was cognizant that the *Klema* court had refused to apply the medical malpractice statute to the wrongful death claim yet did not change R.C. 2125.02. In those cases, the Supreme Court indicated that absent clear legislative action, a wrongful death claim is only governed by the wrongful death statute. The same logic applies to the statute of repose. The legislature is aware that the *Klema* and *Koler* courts have concluded that wrongful death and medical malpractice claims are separate, unique causes of action. Understanding this precedent, the General Assembly created a statute of repose for wrongful death claims arising out of products liability but declined to create such a time limitation for a wrongful death action derived from medical claims under R.C. 2125.02. "The fact that a statutory wrongful death claim is completely independent and distinct from the underlying claims of a decedent suggests that limitations of the underlying claim, such as statutes of limitations and statutes of repose, do not apply

[11] The *Smith* court wrote "similar to the issue presented in *Daniel v. United States*, [the appellant] argues that Ohio's medical-claim statute of repose does not apply to wrongful-death actions because a wrongful death action is subject to its own statute of limitations under R.C. 2125.02(D)(1)." *Id.* at ¶ 23.

in a wrongful death action." *Giannobile*, Franklin C.P. No. 15CV-1854, at 10. If the General Assembly intended R.C. 2305.113 to control all medical claims, a wrongful death cause of action based on medical claims would have been subject to the one-year statute of limitations as set forth in R.C. 2305.113(A). As wrongful death and medical malpractice are separate causes of action, time limitations intended for medical malpractice, i.e., the statute of limitations and statute of repose, should not be applied to a wrongful death claim.[12]

{¶ 45} Finally, the Fifth District Court of Appeals has recently considered whether the statute of repose in R.C. 2305.113(C) applies to a wrongful death claim arising out of the same events that led to the medical malpractice action. *See Mercer*, 2021-Ohio-1576. A brief review of the case is illustrative.

{¶ 46} In 2012, Mr. Mercer presented for an MRI of the lumbar spine due to lower back pain. In 2015, Mr. Mercer had a subsequent MRI, which discovered an undiagnosed sacral mass later found consistent with sacral chordoma. Mr. Mercer, his wife, and minor child filed a medical malpractice and loss of consortium action in 2016. On February 29, 2020, Mr. Mercer passed away and a suggestion of death was listed as metastatic chordoma to the pelvis and sacrum. In May 2020, Mrs. Mercer, as executor of the estate of Mr. Mercer, filed a motion to order substitution of proper parties and amend the complaint which was granted by the trial court. The amended complaint converted the medical malpractice action to a survivorship claim, removed the loss of consortium claim, and added a wrongful death claim pursuant to R.C. 2125.01 and 2125.02. The amended complaint was filed seven years after the alleged act that was the basis of the claim. The defendants in the case filed a motion for partial summary judgment arguing that the

[12] During the circulation of this decision, appellees filed a notice of supplemental authority in *Martin v. Taylor*, 11th Dist. No. 2021-L-046, 2021-Ohio-4614. In *Martin*, the plaintiff argued that the application of the statute of repose unconstitutionally denied a remedy for his wrongful death claim under Article I, Section 16 of the Ohio Constitution. The Eleventh District Court of Appeals upheld the constitutionality of the statute of repose set forth in R.C. 2305.113(E)(3) as to wrongful death claims writing, "[a]s [decedent's] death occurred more than four years after the alleged acts/omissions underlying the claim, the statute of repose prevented the cause of action from vesting, and the statute as applied to this claim does not unconstitutionally violate the right to a remedy." *Martin* at ¶ 41. As the constitutionality argument was not raised by appellant in this case, we decline to address it in this opinion. The plaintiff in *Martin* also argued that because the statute of limitations for medical claims and wrongful death claims are set forth in different statutory sections, the wrongful death claim does not constitute a "medical claim" to which the statute of repose is applicable. The *Martin* court disagreed, finding the plaintiff's wrongful death claim constituted a "medical claim" as defined under R.C. 2305.113(E)(3), and, therefore, was barred under the four-year statute of repose. This is the same analysis raised in *Smith*. For the reasons set forth in the body of this decision, we disagree with the *Martin* court's analysis.

wrongful death action was filed beyond the four-year statute of repose under R.C. 2305.113(C). The trial court agreed and granted the motion finding the four-year statute of repose barred the filing of the wrongful death action. The Fifth District Court of Appeals affirmed the trial court decision on the same basis. The *Mercer* court, "acknowledge[d] the result of this appeal is harsh and perhaps unintended by the General Assembly when it crafted the medical claim statute of repose, especially considering the advances in medical care allowing people to live longer with a diagnosis of cancer or other life-threatening malady." *Id*. at ¶ 41.

{¶ 47} The Fifth District in *Mercer* relied, in part, on the analysis in *Wilson*, which examined the two exceptions in R.C. 2305.113(C) that toll the statute of repose: (1) when there is a person within the age of minority or of unsound mind as provided in R.C. 2305.16 or (2) those claims that accrue in the last year of the statute of repose period and those that are based upon a foreign object left in a person's body. *Mercer* at ¶ 33, citing *Wilson* at ¶ 29. The *Mercer* court concluded that because these exceptions were provided in R.C. 2305.113, "[i]t was clear to the Court that the General Assembly knew how to make an exception to the statute of repose when it intended to do so, and as to the medical claim statute of repose, it chose not to make the exception." *Id*. at ¶ 34. *Mercer* also based its analysis of the wrongful death claim under the medical malpractice statute, writing " 'R.C. 2305.113(C) "means what it says. If a lawsuit bringing a medical * * * claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action upon that claim is barred." ' " *Id*. at ¶ 35, quoting *Wilson* at ¶ 25, quoting *Antoon* at ¶ 23. Similar to our analysis of *Smith*, *Mercer*, erroneously in our view, looks at the statute of repose for medical malpractice instead of the plain language of the wrongful death statute of repose under R.C. 2125.02(D)(2). Regarding the *Mercer* court's analysis of the tolling exceptions in R.C. 2305.113, *Mercer* fails to consider that the medical malpractice statute of repose was not created for wrongful death claims. As there is no reference in R.C. 2305.113 to wrongful death claims, looking at the exceptions to the tolling provision of the statute does not inform the analysis on this issue.

{¶ 48} Moreover, the General Assembly made its intentions clear in the language employed in R.C. 2125.02 and 2305.113. As an example, the general products liability statute of repose is controlled by R.C. 2305.10(C). The statute includes a ten-year statute

of repose for those claims. As set forth previously, the wrongful death statute, R.C. 2125.02, includes a ten-year statute of repose for wrongful death originating out of a product liability claim. The General Assembly made clear in R.C. 2305.10 that R.C. 2125.02 controls when addressing wrongful death cases in the products liability context.[13] If there was a dispute over whether the statute of repose was implicated in a wrongful death case involving a products liability claim, a reviewing court would look at R.C. 2125.02, not R.C. 2305.10(C). Here, the General Assembly declined to include a statute of repose arising from a medical claim in R.C. 2125.02 or state that a wrongful death claim was encompassed in R.C. 2305.113(C)'s statute of repose.

{¶ 49} Finally, the *Mercer* court's application of the medical malpractice statute of repose conflicts with the plain language of R.C. 2125.01, which states:

> When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not

[13] The Editor's Notes in R.C. 2305.10(C) repeatedly acknowledge the wrongful death statute of repose, R.C. 2125.02(D)(2), stating:

> In enacting division (D)(2) of section 2125.02 and division (C) of section 2305.10 of the Revised Code in this act, it is the intent of the General Assembly to do all of the following:
>
> (1) To declare that the ten-year statute of repose prescribed by division (D)(2) of section 2125.02 and division (C) of section 2305.10 of the Revised Code, as enacted by this act, are specific provisions intended to promote a greater interest than the interest underlying the general four-year statute of limitations prescribed by section 2305.09 of the Revised Code, the general two-year statutes of limitations prescribed by sections 2125.02 and 2305.10 of the Revised Code, and other general statutes of limitations prescribed by the Revised Code;
>
> (2) To declare that, subject to the two-year exceptions prescribed in division (D)(2)(d) of section 2125.02 and in division (C)(4) of section 2305.10 of the Revised Code, the ten-year statutes of repose shall serve as a limitation upon the commencement of a civil action in accordance with an otherwise applicable statute of limitations prescribed by the Revised Code;
>
> * * *
>
> (8) To declare that division (D)(2) of section 2125.02 and division (C) of section 2305.10 of the Revised Code, as enacted by this act, strike a rational balance between the rights of prospective claimants and the rights of product manufacturers and suppliers and to declare that the ten-year statutes of repose prescribed in those sections are rational periods of repose intended to preclude the problems of stale litigation but not to affect civil actions against those in actual control and possession of a product at the time that the product causes an injury to real or personal property, bodily injury, or wrongful death[.]

> ensued * * * shall be liable to an action for damages, notwithstanding the death of the person injured * * *.

{¶ 50} In *Mercer*, the plaintiffs timely commenced the medical malpractice action against the defendants and were litigating the malpractice action at the time of Mr. Mercer's death. Mrs. Mercer was permitted under R.C. 2125.01 to assert claims of damages due to the alleged wrongful death. Prior to the decedent's passing, there is no way for her to have brought the wrongful death cause of action as the claim was not ripe. *Klema*, 170 Ohio St. at 521, quoting *Iron Mountain* at 658; *see also Mansour* at ¶ 35, citing *Karr* (writing that a wrongful death action is an independent claim for relief, independent of that held by a decedent immediately prior to death").[14] The *Mercer* court's interpretation, which barred the wrongful death claim under the four-year statute of repose conflicts with R.C. 2151.01. Such a preclusion when the *Mercer* plaintiffs were actively litigating the case was not the type of prejudice R.C. 2305.113 was enacted to prevent. *Giannobile*, Franklin C.P. No. 15CV-1854, at 13. Accordingly, the interpretation of the statute of repose by the Third and Fifth District Courts of Appeals not only ignores the General Assembly's limited statute of repose in the wrongful death context, but it is in contravention of the plain language of R.C. 2125.01.

{¶ 51} In the case sub judice, Mr. Everhart died on October 28, 2006. Appellant brought her wrongful death claim on January 25, 2008. As the medical malpractice statute of repose, set forth in R.C. 2305.113(C), does not apply in this case, the trial court erred in finding appellant was barred from pursuing her wrongful death claim.

{¶ 52} Appellant's sole assignment of error is sustained.

B. Everhart's Second Assignment of Error

{¶ 53} In appellant's second assignment of error, she argues that the trial court erred in denying her motion for leave to file a third amended complaint. Appellant argued that leave should be granted so that she may supplement the record to establish the timeline of events that the statute of repose was not implicated. It is well-established law that a

---

[14] *See also Thompson v. Wing*, 70 Ohio St.3d 176, 183 (1994):

> [T]he wrongful death action does not even arise until the death of the injured person. It follows, therefore, that the injured person cannot defeat the beneficiaries right to have a wrongful death action brought on their behalf because the action has not yet arisen during the injured person's lifetime. Injured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves.

reviewing court will generally not address issues that are deemed moot. *Croce v. Ohio State Univ.*, 10th Dist. No. 20AP-14, 2021-Ohio-2242, ¶ 16. " 'The doctrine of mootness is rooted in the "case" or "controversy" language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint.' " *Bradley v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 10AP-567, 2011-Ohio-1388, ¶ 11, quoting *James A. Keller, Inc. v. Flaherty*, 74 Ohio App.3d 788, 791 (10th Dist.1991). A case is considered moot if "they are or have become fictitious, colorable, hypothetical, academic or dead. The distinguishing characteristic of such issues is that they involve no actual genuine, live controversy, the decision of which can definitely affect existing legal relations." (Internal quotations and citations omitted.) *Doran v. Heartland Bank*, 10th Dist. No. 16AP-586, 2018-Ohio-1811, ¶ 12. It is not the function of a reviewing court to address purely academic or abstract questions. *Id.* at ¶ 13, citing *James A. Keller, Inc.* at 791. If an appeal is considered moot, the case must be dismissed because it no longer presents a justiciable controversy. *Grove City v. Clark*, 10th Dist. No. 01AP-1369, 2002-Ohio-4549, ¶ 11.

{¶ 54} After careful review of the evidence, we find appellant's argument no longer presents a live, justiciable controversy as the statute of repose does not preclude appellant from proceeding with a wrongful death claim. Accordingly, appellant's motion for leave to file a third amended complaint is therefore moot.[15]

IV. CONCLUSION

{¶ 55} Having sustained appellant's first assignment of error and found appellant's second assignment of error moot, we reverse and remand this case to the Franklin County Court of Common Pleas for further proceedings consistent with law and this decision.

Judgment reversed; cause remanded.

KLATT and DORRIAN, JJ., concur.

———————————

[15] We note that appellees have provided *Pollack v. Britt*, 8th Dist. No. 110489, 2021-Ohio-3820, as supplemental authority in this case. In *Pollock*, the Eighth District Court of Appeals affirmed the trial court's decision to grant a motion for summary judgment that a dental malpractice claim was barred under the four-year statute of repose pursuant to R.C. 2305.113(C). While consistent with outstanding Supreme Court of Ohio case law extensively discussed in this decision, *Pollack* is distinct from the instant case as it does not address the application of a statute of repose to the wrongful death statute. The *Pollack* court also addressed an argument presented in appellant's second assignment of error that ongoing negligent acts or omission by the defendant avoided the application of the statute of repose. Because we are sustaining appellant's first assignment of error, and therefore deeming the second assignment of error moot, we decline to address the *Pollack* court's analysis on this issue.

E1229 - G70

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

MARTIN D. SHELL, Administrator of the Estate of Clair L. Shell, Deceased,	:	
Plaintiff,	:	
vs.	:	Case No. 11CVA05-5838
MOUNT CARMEL HEALTH SYSTEMS, et al.,	:	Judge Cain
Defendants.	:	

DECISION GRANTING DEFENDANTS', WILLIAM J. FANNING, M.D. AND CARDIOTHORACIC SURGEONS, INC., MOTION TO DISMISS, FILED JUNE 13, 2011

Rendered this 9th day of August 2011.

CAIN, J.

This matter is before this Court on Defendants', William J. Fanning, M.D. and Cardiothoracic Surgeons, Inc. (hereinafter "Defendants"), Motion to Dismiss, filed June 13, 2011. Plaintiff filed his Memorandum Contra on June 15, 2011. Defendants filed their Reply Memorandum on June 30, 2011. This motion is now ripe for decision.

The present action arises out of a medical procedure. Plaintiff is the administrator of the estate of Clair L. Shell (hereinafter "Ms. Shell"). It is alleged that on September 21, 2005 Ms. Shell was admitted to Defendant, Mount Carmel Health Systems (hereinafter "Mount Carmel"), for the purpose of undergoing a surgical lung resection. *See* Plaintiff's First Amended Complaint at ¶5. This surgery was performed by Defendant, William J. Fanning, M.D. (hereinafter "Dr. Fanning").[1] Id. at ¶8. It is alleged by Plaintiff that Dr. Fanning negligently failed to prescribe

[1] Dr. Fanning is an employee of Defendant, Cardiothoracic Surgeons, Inc.

EV

heparin to Ms. Shell after the surgery. Id. at ¶¶36-40. Plaintiff further alleges that as a result of this failure, Ms. Shell died on September 28, 2005 of a pulmonary embolus. Id. at ¶¶9, 36-40.

This case originally started as two cases. The first was filed on March 13, 2007 and was solely against Mount Carmel. Through discovery in that case, Plaintiff discovered that Dr. Fanning may have failed to prescribe heparin to Ms. Shell. Plaintiff then filed a separate action against Defendants on January 29, 2010. This action was not for medical malpractice, but solely for wrongful death. Both of these cases were eventually dismissed without prejudice. Plaintiff then filed the present action on May 10, 2011, which consolidated the claims made by Plaintiff in his previous two cases. In his Complaint, Plaintiff makes claims against Mount Carmel for survivorship, wrongful death, alteration of medical records and failure to safeguard medical records. As to Defendants, Plaintiff makes claims for wrongful death and alteration of medical records. Defendants now move the Court to dismiss Plaintiff's claim for wrongful death as against them.

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of a complaint. Ass'n. for the Defense of the Washington Local School Dist. v. Kiger (1989), 42 Ohio St.3d 116, 117. "In considering a motion to dismiss under Civ. R. 12(B)(6), the court looks only to the complaint, or, in a proper case, the copy of a written instrument upon which a claim is predicated, to determine whether the allegations are legally sufficient to state a claim." Springfield Fireworks, Inc. v. Ohio Dept. of Commerce, Franklin App. No. 03AP-330, 2003 Ohio 6940, ¶12, citing Slife v.

Kundtz Properties (1974), 40 Ohio App.2d 179, 185-186. When deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must presume the truth of all factual allegations of the Complaint and must draw all reasonable inferences in favor of the non-moving party. Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 192.

Under the Ohio Civil Rules, a plaintiff need not prove his case at the pleading stage. York v. Ohio State Highway Patrol (1991), 60 Ohio St.3d 143, 144. Rather, the Ohio Civil Rules require only that a Complaint contain "a short and plain statement of the claim showing that the party is entitled to relief" and "a demand for judgment for the relief to which the party claims to be entitled." Civ. R. 8(A). "Thus, to survive a motion to dismiss for failure to state a claim upon which relief can be granted, a pleader is ordinarily not required to allege in the complaint every fact he or she intends to prove; such facts may not be available until after discovery." State ex rel. Hanson v. Guernsey Cty. Bd. of Cmmrs. (1992), 65 Ohio St.3d 545, 549, citing York, 60 Ohio St.3d at 144-145. For a court to dismiss a complaint for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." O'Brien v. Univ. Community Tenants Union (1975), 42 Ohio St.2d 242, 245, citing Conley v. Gibson (1975), 355 U.S. 41, 45. "Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow a plaintiff to recover, the court may not grant a defendant's motion to dismiss." York, 49 Ohio St. 2d at 145.

In their motion, Defendants argue that Plaintiff's wrongful death claim against them is barred by the statute of repose for medical claims. The statute of repose for medical claims can be found in R.C. 2305.113(C), which states:

> 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.

Defendants argue that Ms. Shell passed away on September 28, 2005 and Plaintiff did not file his initial lawsuit against them until January 29, 2010, well over four years later. Since this is so, Defendants argue that Plaintiff's wrongful death claim is barred as against them. In rebuttal, Plaintiff argues that R.C. 2305.113(C) does not apply to wrongful death claims, but only applies to medical malpractice claims. It is with these two conflicting interpretations of R.C. 2305.113(C) in mind that the Court must now make its decision.

The question for the Court is: Can Plaintiff's wrongful death claim against Defendants be considered a medical claim and therefore subject to the statute of repose found in R.C. 2305.113(C)? While there is very little case law as to this question, the ultimate answer is yes. In their Reply Memorandum, Defendants cite to a case out of the Ohio Eighth District Court of Appeals by the name of

Fletcher v. Univ. Hosps. of Cleveland (8th, 2007), 172 Ohio App. 3d 153. In its decision, the Eighth District held:

> Appellant argues that a wrongful death action is not a "medical claim." Civ. R. 10(D)(2) specifically refers to a medical claim "as defined by section 2305.113 of the Revised Code." Therefore, we must look to this statute for guidance as to the meaning of this term.
>
> R.C. 2305.113(E)(3) defines a medical claim as follows:
>
> (3) "Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes the following:
>
> (a) Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person;
>
> (b) Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies:
>
> (i) The claim results from acts or omissions in providing medical care.
>
> (ii) The claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.
>
> (c) Claims that arise out of the medical diagnosis, care, or treatment of any person and that are brought under section 3721.17 of the Revised Code.
>
> The wrongful death claim asserted by appellant was a medical claim as defined by R.C. 2305.113. It was a claim against a physician and a hospital that arose out of the medical diagnosis, care or treatment of the decedent, and the claim resulted from alleged acts or omissions in providing medical care. We are well aware that R.C. 2305.113 does not supply the statute of limitations

> for a wrongful death claim. See *Koler v. St. Joseph Hosp.* (1982), 69 Ohio St.2d 477, 432 N.E.2d 821; *Evans v. Southern Ohio Med. Center* (1995), 103 Ohio App.3d 250, 659 N.E.2d 326; *Brosse v. Cumming* (1984), 20 Ohio App. 3d 260, 20 Ohio B. 322, 485 N.E.2d 803. However, that fact does not preclude a claim for wrongful death from being a "medical claim" as defined in R.C. 2305.113. The common pleas court in this case correctly determined that appellant's complaint presented a medical claim as to which she was required to supply an affidavit of merit pursuant to Civ. R. 10(D)(2), and that appellant failed to include an affidavit with her complaint. Pursuant to Civ. R. 10(D)(2)(c), the affidavit is required to "establish the adequacy of the complaint."

Id. at pgs. 156-157. This Court is aware that the above case did not deal with a wrongful death claim in relation to the statute of repose. The Court, however, agrees with the logic behind the Eighth District's decision. As such, the Court will apply said logic to this case.

When looking at Plaintiff's wrongful death claim against Defendants, the Court must not only rule that it is a medical claim; it must also rule that it is barred by the statute of repose. It is undisputed that Dr. Fanning is a physician. Further, it is undisputed that Plaintiff's wrongful death claim against Defendants arises from medical care provided to Ms. Shell by Defendants. These two things clearly make Plaintiff's wrongful death claim a medical claim. Since this is so, it is subject to the four year statute of repose found in R.C. 2305.113(C). As stated earlier, Ms. Shell passed away on September 28, 2005. Plaintiff did not file his initial wrongful death action against Defendants until January 29, 2010. This is well over four years after the passing of Ms. Shell. Since this is so, Plaintiff's wrongful death claim against Defendants is barred by the statute of repose. Defendants' motion must be granted.

After review and consideration, the Court finds Defendants', William J. Fanning, M.D. and Cardiothoracic Surgeons, Inc., motion to be well-taken, and is hereby GRANTED. Counsel for Defendants, William J. Fanning, M.D. and Cardiothoracic Surgeons, Inc., shall prepare, circulate and submit a judgment entry reflecting this decision to the Court within five days of the filing of this decision in accordance with Loc. R. 25.01.

IT IS SO ORDERED.

David E. Cain, Judge

Copies to:

Walter J. Wolske. Jr.
Geoffrey C. Mitchell
Counsel for Plaintiff

Gerald J. Todaro
Counsel for Defendants, William J. Fanning, M.D. and Cardiothoracic Surgeons, Inc.

Theodore M. Munsell
Counsel for Defendant, Mount Carmel Health Systems

IN THE COURT OF COMMON PLEAS, MADISON COUNTY, OHIO

Christina Stephens, Administratrix of the Estate of Alton Owens, deceased,

Plaintiff(s),

vs.

Mitchell Spahn, M.D., et al.,

Defendant(s).

Case No: CVA 20170112

DECISION AND ENTRY

Plaintiff's filed a medical malpractice claim on August 3, 2016. The medical malpractice claim is based on issues involving the delivery of Alton Owens on August 6, 2011. On August 10, 2016, Alton Owens died. The death of Alton Owens resulted in the Plaintiffs filing an Amended Complaint for Medical Malpractice and Wrongful Death on December 7, 2016. On February 9, 2017, the case was transferred from Franklin County Common Pleas Court to Madison County Common Pleas Court for lack of venue. The case was not certified to Madison County until May 30, 2017.

On October 26, 2018, the Defendant Madison County Hospital filed a Motion for Judgment on the Pleadings. The Defendant Madison County Hospital asserts that the Plaintiff's wrongful death claim is based on medical negligence and because it was based on medical negligence, it had to be filed within four years of the occurrence citing to Ohio Revised Code §2305.113(C).

Plaintiff asserts that Alton Owens, the decedent, was delivered on August 6, 2011, and the Plaintiff is asserting medical negligence on the part of the Defendants during the delivery which caused injuries to Alton Owens and subsequently is alleged to have resulted in Alton Owen's death. The Defendant, Madison County Hospital, is asserting that the deadline to file a wrongful death complaint based on medical negligence is August 6, 2015. However, Ohio Revised Code §2125.02(D)(1) requires the commencement of a wrongful death complaint within two years of the date of death.

On November 5, 2018, the Plaintiff filed a response. The Plaintiff's response acknowledges that Ohio Revised Code §2305.113(C) is a statute of repose, however, the Plaintiff asserts that they are excepted under Ohio Revised Code §2305.113(C) because Alton Owens was a minor therefore the statute of repose does not apply.

On November 8, 2018, the Defendant filed a reply to the Plaintiff's response asserting that the claim for wrongful death belongs not to Alton Owens but rather belongs to the Administratrix of the estate, Christina Stevens, filed on behalf of the next of kin.

On November 19, 2018, the Plaintiff filed a final reply to the Defendant's response citing to Civ.R. 15(C) suggesting that the time relates back to the filing of the original Complaint. Relevant to this argument is the original medical malpractice Complaint which was filed on August 3, 2016. Shortly thereafter, Alton Owens passed away resulting in the Amended Complaint filed December 7, 2016. The Court notes that any relation back treating the Complaint as having been filed on August 3, 2016, would still result in the Complaint being filed four years and three hundred sixty-two days after Alton Owens' delivery.

Defendants, in support of their Motion to Dismiss the Wrongful Death Claim rely heavily on Kyra V. Smith, Admin., v. Wyandot Memorial Hospital, et al., 2018-Ohio-2441 and Antoon

v. Cleveland Clinic Foundation, 148 Ohio St.3d 483 (2016). Additionally, the Defendants cite to Peters v. Columbus Steel Castings, 115 Ohio St.3d 134 (2007), in support of their argument as to who the party is in this case.

The Plaintiff relies heavily on Weaver v. Edwin Shaw Hospital, 104 Ohio St.3d 390 (2004).

At issue in the matter before the Court, are two statutes that would appear to be at odds with each other. Ohio's wrongful death statute, §2125.01, which under §2125.02(A)(1) contains a two-year statute of limitations from the time that death occurs, and Ohio's medical malpractice statute of repose under §2305.113(C) which states the following:

> (C) 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.

It is undisputed in the case before the Court that the wrongful death claim relates back to the delivery of Alton Owens which gave rise to both the medical negligence complaints and then subsequently, with the resulting death of Alton Owens, the wrongful death claim.

In Ruther v. Kaiser, 134 Ohio St.3d 408, 2012-Ohio-5686, the Ohio Supreme Court held that §2305.113(C) is "a true statute of repose". ¶18 The Ohio Supreme Court explained that a 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 the fear of litigation." Id. at

¶19. "...if the General Assembly cannot legislate a statute of repose, medical providers are left with the possibility of unlimited liability indefinitely." Id. at ¶29.

In Antoon v. Cleveland Clinic Foundation, 148 Ohio St.3d 483, (2016), the Ohio Supreme Court again affirmed that O.R.C. §2305.113(C) is a statute of repose:

> "...because the time for bringing a suit under the section begins running from the occurrence of the act or omission constituting the alleged basis of the claim. And we 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." Id. at 488.

The Antoon court drew distinctions between statutes of limitations and statutes of repose:

> "The differences between statutes of repose and statutes of limitations have been recognized for nearly 40 years. *Id.* at 2186 (citing *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2182, 189 L.Ed.2d 62 (2014). 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* 1636 (10th Ed.2014). A statute of repose *487 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." *Id.* at 1637.

The Defendants rely on Kyra V. Smith, Admin., v. Wyandot Memorial Hospital, et al., 2018-Ohio-2441. Smith is a Third District case which involved a medical malpractice case that subsequently turned into a wrongful death case similar to the case before this Court. The notable difference between the Smith case and the case before this Court is the decedent in Smith was an adult husband while the decedent in the case before this Court is a minor child. The Smith court identified the relevant issue: "We must determine whether Ohio's medical claims statute of repose applies to a wrongful death action under Revised Code Chapter 2125." Id. Indeed, that is the issue before this Court. It is undisputed that the first filing of any sort in this case occurred more than four years after the delivery of Alton Owens.

The Smith court identified that there is a split in authority on this issue:

> "Citing to Daniel v. United States, 977 Fed.Supp.2d 777, 780 (N.D. Ohio 2013), the federal district court concluded that Ohio's statute of repose does not apply to wrongful-death actions. Id. at 781. In so doing, the Daniel court came to a different conclusion than the 8th District Court of Appeals in Fletcher v. Univ. Hospitals of Cleveland, 172 Ohio App.3d 153, (2007). The Smith court concluded that Ohio's medical claims statute of repose applies to wrongful death actions under Ohio Revised Code chapter 2125.
>
> We disagree with the court's reasoning. It is well-settled that "[s]tatutes of repose and statutes of limitation have distinct applications." Antoon, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, at ¶ 11, citing CTS Corp. v. Waldburger, —— U.S. ——, 134 S.Ct. 2175, 2182, 189 L.Ed.2d 62 (2014). See also York v. Hutchins, 12th Dist. Butler No. CA2013-09-173, 2014-Ohio-988, 2014 WL 1356699, ¶ 10 (discussing the applicability of Ohio's statute of repose to medical claims 'regardless of the applicable statute of limitations'). Indeed, as we noted above, a statute of limitations relates to a plaintiff's ability to pursue a claim, while a statute of repose affords defendants certainty of "a time after which they may be free from the fear of litigation." Ruther, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, at ¶ 19.
>
> Moreover, based on the different motivations of a statute of limitations and a statute of repose, any argument asserting that Ohio's medical-claim statute of repose does not apply to wrongful-death actions because wrongful-death actions and medical-malpractice actions are separate causes of action is erroneous. Stated another way, a statute of limitations governs the time in which a plaintiff may assert a cause of action. A cause of action is based on a plaintiff's injury. Conversely, a statute of repose focuses on a defendant's alleged acts and governs the time in which a defendant may be held accountable for his or her alleged negligent acts. Based on that distinction, any separate-causes-of-action argument necessarily fails. Accordingly, because statutes of repose and limitation are fundamentally different, any reasoning based on the interplay of two statute of limitations is not persuasive. Thus we decline to follow Daniel."

This Court finds the reasoning of the Smith court to be persuasive. However, the Plaintiff correctly points out that the decedent in this case, Alton Owens, was a minor at the time of his passing and therefore the Plaintiff asserts that the exceptions cited in Revised Code §2305.113(C) apply in the statute of repose. The Defendants argue that in a wrongful death claim the decedent, Alton Owens, is not the party to the case, but rather in this case, Christina Stevens, the Administratrix of the estate, is the party on behalf of the next of kin.

Defendants cite to the Ohio Supreme Court case of Peters v. Columbus Steel Castings, 115 Ohio St.3d 134 (2007), in support of their argument. Peters involved different facts wherein an employee's wife, who was the administrator of her husband's estate brought a wrongful death and survivorship action against the company that her husband was working for when he fell from a catwalk causing his death. The husband had entered into an arbitration agreement with his employer promising to resolve any injury disputes through arbitration. The company filed motions with the court seeking dismissal of all of the cases including the wrongful death actions. The court ultimately concluded that the survival claims were claims for injuries to the husband for which he had entered into a contract to resolve through mediation or arbitration. However, the court concluded that the wrongful death actions were different:

> "We reiterated in Thompson that the Ohio wrongful-death statute follows the minority position: "[T]he injured person cannot defeat the beneficiaries' right to have a wrongful death action brought on their behalf because the action has not yet arisen during the injured person's lifetime. Injured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves."

Id. at 183, 637 N.E.2d 917.

The Peters court went on to state:

> "Given the statutory language and our precedents, it is clear that survival claims and wrongful-death claims are distinct claims that belong to separate individuals, even though they are generally brought by the same nominal party (the personal representative of the estate). While we have allowed collateral estoppel to apply to such claims, given the deep similarity between the two and the privity between a decedent and his or her beneficiaries, there is no mistaking the independent nature of these actions."

Id. at 137.

The Peters court concluded:

> "However, Peters could not restrict his beneficiaries to arbitration of their wrongful-death claims, because he held no right to those claims; they accrued independently to his

beneficiaries for the injuries they personally suffered as a result of the death. See Thompson, 70 Ohio St.3d at 182–183, 637 N.E.2d 917."

Peters makes clear that the decedent in this case, Alton Owens, is not the party in the wrongful death action. Therefore, Christina Stevens is considered to be the party in the wrongful death action. Because Alton Owens is not the party in the wrongful death action, the exception to Ohio's medical statute of repose does not apply to this case.

The Court acknowledges the impossible situation this placed Ms. Stevens and Alton in because compliance with the statute of repose would have been a mathematical impossibility in a wrongful death claim given that Alton Owens passed away more than four years after the occurrence, that is, the labor and delivery. Nonetheless, the Antoon decision makes it clear that injuries may occur long after the statute of repose has passed without affecting the application of the statute of repose.

Therefore, it is the judgment of the Court that the Defendant's Motion to Dismiss the Plaintiff's Wrongful Death Claim is hereby Granted.

There is no just cause for delay.

It Is So Ordered.

ENTER: December 10, 2018

Eamon P. Costello, Judge

cc: John Laparl, Jr.
Gregory B. Foliano
Frederick A. Swards
Court Administrator