THE SUPREME COURT OF OHIO

CASE NOS. 2022-0407 and 2022-0424

On Appeal from the Tenth Appellate District
Franklin County, Ohio

Court of Appeals Case No. 21AP-74 08CV1385

MACHELLE EVERHART
Plaintiff-Appellee

v.

COSHOCTON COUNTY MEMORIAL HOSPITAL, et al.
Defendant-Appellants

MERIT BRIEF OF AMICUS CURIAE THOMAS KEANE, M.D.

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I. INTRODUCTION

The questions before this Court are very simple ones: does a statute which applies to *any* claim arising out of the medical care, treatment, or diagnosis of an individual apply to wrongful death actions arising out of the medical care, treatment, or diagnosis of an individual? Furthermore, when a claim is designated as a medical claim, is it subject to the medical claim statute of repose, which provides that *no action upon a medical claim* may be brought more than four years after the underlying medical care and treatment? Though the plain language of the medical claim statute, R.C. 2305.113, contains no exceptions or qualifications which would exempt wrongful death actions from this broad definition, Plaintiff has asked this Court to answer both of those questions in the negative, and thus rule that an action which meets the statutory definition of a medical claim nonetheless does not give rise to a medical claim.

The General Assembly has determined that any claim arising out of the medical care, treatment, or diagnosis of an individual, that is pled against a hospital, physician, or other healthcare provider, should not survive into perpetuity. To enforce this determination, the General Assembly enacted R.C. 2305.113(C), the medical claim statute of repose, which states that "any action" upon a medical claim may not be brought more than four years after the underlying act or omission giving rise to the plaintiff's claims, and that any medical claim brought more than four years after the underlying act or omission is time-barred.

There are numerous considerations behind the General Assembly's enactment of the medical claim statute of repose. Medical claims, more so than other types of claims, are vulnerable to change over time. Medical records, which are often voluminous, may not be maintained in the years following the medical care. See, OAC 3701-83-11 (establishing six-year retention requirement for Medicaid-related medical records). Fast-evolving technology and medical practice may shift the standard of care. In the case of the plaintiff or decedent, subsequent health

developments or even death can frustrate the parties' ability to determine liability or causation through medical examination.

By enacting the medical claim statute of repose, the General Assembly has struck a rational balance between the rights of plaintiffs to litigate their claims, and the rights of defendants to be free of the specter of litigation if an action against them is not filed within four years of the underlying medical care and treatment, regardless of when the claim otherwise accrues.[1]

Now, this Court is being asked to decide whether the medical claim statute of repose can be applied to wrongful death actions which are premised upon medical claims. In order to reach that issue, however, this Court must first determine the threshold issue of whether a wrongful death action, when it is premised upon a medical claim, constitutes a medical claim under R.C. 2305.113(E)(3), which defines a medical claim as *any* claim arising out of the medical care, treatment, or diagnosis of an individual. Defendants, and Dr. Keane, ask that this Court answer that question in the affirmative.

In the course of litigation, there is very little to distinguish a typical medical claim from a wrongful death action premised upon a medical claim. The case begins when the plaintiff – either the patient who received the care or, in a wrongful death action, the representative of the decedent's estate – files their complaint, alleging that the defendants were negligent in their medical care, treatment, or diagnosis of the plaintiff or decedent. Regardless of whether the case involves a wrongful death or not, the plaintiff files an affidavit of merit along with their complaint, pursuant to Civ.R. 10(D)(2), which requires such an affidavit for "a complaint that contains a medical claim *** as defined in R.C. 2305.113." The affidavit of merit is a statement from an expert healthcare

[1] R.C. 2305.113(C) does incorporate exceptions for tolling the statute of repose based upon delayed discovery, infancy, and disability, though none of those exceptions are at issue in this appeal.

provider attesting that they have reviewed the applicable medical records and determined to a reasonable medical degree of certainty that the defendants breached the standard of care and proximately caused hard to the plaintiff or decedent.

The parties then engage in discovery. The plaintiff or decedent's medical records are requested and reviewed by expert witnesses, who are either physicians, nurses, or other healthcare providers with knowledge of the applicable standard of care or alleged causation mechanism. At the close of discovery, the parties exchange expert reports, with the competency of their experts to be determined by Evid. R. 601(E)(5), or R.C. 2743.43, which both set forth the rules of competency for medical claims under R.C. 2305.113(E)(3). At trial, liability is premised upon the plaintiff's ability to prove a breach of the applicable medical standard of care, which proximately resulted in the death or injury alleged by the plaintiff, all by way of expert medical testimony. The burden of proof for the plaintiff remains the same for all claims arising out of the medical care, treatment, or diagnosis of an individual regardless of whether that claim is brought under R.C. 2125.02 or not.

In order to adopt Plaintiff's position, this Court would necessarily need to recognize one of two propositions: either a wrongful death action can *never* be a medical claim, in which case Civ.R. 10(D)(2), Evid.R. 601(E)(5), R.C. 2743.43, or R.C. 2305.113(C) do not apply to it, or a wrongful death action *can* give rise to a medical claim, but the statute of repose, which places an absolute time bar on "any action" upon a medical claim, somehow does not apply to it. To date, there is no court in Ohio which has taken the former position, as it relates to either Civ.R. 10(D)(2), Evid.R. 601(E)(5), or R.C. 2743.43.

In the alternative, this Court can adopt the Defendants' position, which relies only on the plain language of the medical claim statute as written. If a medical claim is *any* claim which arises out of the medical care, treatment, and diagnosis of an individual, then this Court's task is simple:

when a wrongful death action arises from an allegation that a healthcare provider provided negligent medical care, that action is premised upon a medical claim. And under the medical claim statute of repose, should a wrongful death action be asserted more than four years after the underlying medical care and treatment, such claims are time-barred.

II. STATEMENT OF AMICUS INTEREST

Dr. Keane is the eponymous defendant of certified conflict case, *Mercer v. Keane*, 2021-Ohio-1576, 172 N.E.3d 1101 (5th Dist.), decided May 4, 2021. In that decision, the Fifth District Court of Appeals reached two significant holdings: 1) that the plaintiff's wrongful death action, added by way of an amended complaint, was a new and independent action separate from the plaintiff's timely-filed survivorship claim, and 2) the plaintiff's wrongful death action, which was premised upon the same acts of alleged medical negligence as the plaintiff's wrongful death action, was a medical claim and was thus time-barred under the medical claim statute of repose.

While the above opinion led to the dismissal of that plaintiff's wrongful death claim against Dr. Keane, her survivorship claim remains and is being litigated to this day. Dr. Keane therefore has a compelling interest in ensuring that the medical claim statute of repose is properly applied in accordance with the General Assembly's intent, and consistent with the Fifth District Court of Appeals' ruling, both to protect his interests in that matter and to defend the Fifth District Court of Appeals' holding in his favor.

III. STATEMENT OF FACTS AND CASE HISTORY

In December 2003, decedent Todd Everhart was transported to the Coshocton County Memorial Hospital following an automobile accident. *Everhart v. Coshocton Cty. Mem. Hosp.*, 2022-Ohio-629, 186 N.E.3d 232, ¶ 3 (10th Dist.) X-rays were taken of Mr. Everhart's chest in order to determine whether an internal injury had occurred. *Id*. Due to the severity of Mr.

Everhart's condition, he was never formally admitted to Coshocton Hospital and was instead transported via Life Flight to the Ohio State University Medical Center. *Id*.

The morning after the accident, a radiologist at Coshocton Hospital, Dr. Joseph Mendiola, reviewed the x-rays and took note of an opacity in Mr. Everhart's lung, which he described as a possible lung contusion. *Id*. Further x-rays were taken at the OSU Medical Center, which Plaintiff claims show opacities on Mr. Everhart's lung. *Id*.

In August 2006, Mr. Everhart again presented to Coshocton Hospital, where a chest CT was taken after he reported nausea, cough, and abdominal pain. Mr. Everhart was diagnosed with advanced stage lung cancer, and he passed away in October 2006. *Id*. at ¶ 4.

On January 25, 2008, more than four years after Mr. Everhart initially presented at Coshocton Hospital after his automobile accident, Plaintiff, Mr. Everhart's widow, instituted a wrongful death and survivorship action against Coshocton Hospital and the physicians who treated Mr. Everhart. *Id*. at ¶ 5. Specifically, Plaintiff contends that Defendants failed to properly recognize Mr. Everhart's malignancies and provide follow-up care, and that such omissions resulted in the delayed diagnosis of Mr. Everhart's cancer and subsequent death. *Id*.

In 2019, after the lift of a stay in a related bankruptcy proceeding, and several years spent appealing an earlier decision regarding the lack of a physician-patient relationship between one defendant, Dr. Hamza, and Mr. Everhart, Defendants filed motions for judgment on the pleadings, citing to this Court's ruling in *Antoon v. Cleveland Clinic Found*., 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974 for the proposition that the medical claim statute of repose barred Plaintiff's claims. *Id*. at ¶ 9. The trial court granted those motions and dismissed Plaintiff's claims in their entirety, upon a finding that all of Plaintiff's claims – including her wrongful death claim – were medical claims as a matter of law. *Id*.

Plaintiff then appealed to the Tenth District Court of Appeals, arguing that the statute of repose was inapplicable to her wrongful death action. *Id*. At the time of its decision, the Tenth District was the first appellate court in Ohio to hold that the statute of repose for medical claims did not apply to wrongful death actions. In fact, **every appellate court that had considered the issue up until that point had found that the statute of repose *did* apply to wrongful death actions**. Multiple other state appellate courts had issued complimentary opinions under either Civ.R. 10(D)(2) or Evid.R. 601(E), wherein those courts had either held that wrongful death actions gave rise to medical claims or otherwise applied those statutes, which expressly incorporate R.C. 2305.113(E)(3)'s definition of a medical claim, to wrongful death actions. See *Smith v. Wyandot Mem. Hosp*., 3d Dist. No. 16-17-07, 2018-Ohio-2441, 114 N.E.3d 1224; *Fletcher v. Univ. Hosps. of Cleveland*, 8th Dist. No. 88573, 2007-Ohio-2778, 172 Ohio App. 3d 153, 873 N.E.2d 365, *rev'd on other grounds*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147; *Martin v. Taylor*, 11th Dist. Lake No. 2021-L-046, 2021-Ohio-4614.

The Tenth District's opinion made it the lone dissenting voice and disrupted a long-settled consensus among Ohio courts, which this Court had previously declined to revisit. *Smith v. Wyandot Mem'l Hosp*., 153 Ohio St.3d 1505, 2018-Ohio-4285, 109 N.E.3d 1260 (discretionary review declined); *Mercer v. Keane*, 2021-Ohio-2923, 2021 Ohio LEXIS 1719, 172 N.E.3d 1047 (Ohio, Aug. 31, 2021) (discretionary review declined). Nonetheless, the Tenth District attempted to distinguish itself from prior rulings issued by the Third and Eighth appellate districts, as well as *Mercer*. As it relates to *Mercer* specifically, the Tenth District rejected the Fifth District's plain language analysis and instead argued that "there is no reference in R.C. 2305.113 to wrongful death claims," which it interpreted to mean that the medical claim statute could not apply. *Id*. at ¶ 47. On the contrary, the Fifth District noted in its opinion that wrongful death actions *were*

independent causes of action, and to "conclude otherwise would convert the wrongful death action from an independent cause of action to a derivative action, one dependent in a separate cause of action." *Mercer*, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 1994-Ohio- 358, 637 N.E.2d 917 (1994).

IV. ARGUMENT

> **Proposition of Law:** Except as otherwise expressly provided therein, the Medical Claim Statute of Repose provided by R.C. § 2305.113(C), applies to wrongful death actions brought under R.C. § 2125.01 and bars any action that is not commenced within four years of the act or omission that is the alleged basis of a medical claim.
>
> **Certified Conflict Question:** Does the statute of repose for medical claims, set forth under R.C. 2305.113(C), apply to statutory wrongful death claims?

A. Wrongful death actions are independent and unique actions. This does not preclude them from overlapping with medical claims.

As an initial point, the decision reached by the Tenth District is not wholly inconsistent with that of the Fifth District. The Fifth District's holding can be summarized thusly: a wrongful death action, while a unique and independent cause of action, is still statutorily designated a "medical claim" when the wrongful death action arises out of the medical care, treatment, or diagnosis received by the decedent. The Tenth District, while still designating a wrongful death action an independent cause of action, held that to treat a wrongful death action as a medical claim would impermissibly render the wrongful death action "derivative" of the medical claim.

Contrary to the Tenth District's criticisms, the Fifth District's holding respects the independence of a wrongful death action while still acknowledging that, for all practical purposes, a wrongful death action premised upon a medical claim is definitionally a medical claim and should be treated as such. When a wrongful death action does *not* arise out of medical care a

decedent received, then it is not a medical claim. It remains separate. When a wrongful death action *is* premised upon a medical claim, however, it must follow the rules governing medical claims. To willfully ignore the places where medical claims and wrongful death actions overlap serves no practical purposes and is inconsistent with the statutory language of R.C. 2305.113. Furthermore, this myopic approach deprives defendants of the numerous protections – of which the statute of repose is only one – that the General Assembly has created to protect defendants in a medical claim, including the affidavit of merit requirement, which is meant to test the sufficiency of a complaint asserting a medical claim. See Civ.R. 10(D)(2).

The Tenth District declined to find that wrongful death actions could give rise to medical claims based upon a faulty reading of R.C. 2305.113(E)(7), which sets forth the definition for *derivative* medical claims:

> "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.

In a bizarre twist of logic, the Tenth District applied the expressio unius est exclusio alterius canon to the above provisions, in finding that a wrongful death claim could not constitute a medical claim, as it is not listed among the derivative claims for relief. *Everhart*, ¶ 26. This ignores the very first

sentence of the statute, where it clearly states that "'Derivative claims for relief'" include, ***but are not limited to***," the types of claims listed below. (Emphasis added). The Tenth District acknowledged that the statute's inclusive language "leaves open the possibility a cause of action for wrongful death falls under this category," but nonetheless concluded that prior case law precludes wrongful death actions from being derivative. ¶ 26, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 1994-Ohio-358, 637 N.E.2d 917 (1994). This, of course, does not address the fact that even if a wrongful death action does not qualify as a derivative medical claim, *it still meets the statutory definition of a medical claim*.

The Tenth District's reading of *Wing* ignores the context of this Court's ruling in that case, which was premised upon an estate's right to file and prosecute a wrongful death action after the decedent prevailed on a medical malpractice claim before his death. *Wing*, at 183. The defendants, who had also been defendants in the prior action, sought to have the plaintiff's claims dismissed based on collateral estoppel, as the wrongful death action was premised upon the same underlying facts as the medical malpractice action, which concluded years prior. *Id*.

This Court held that collateral estoppel can apply between a medical malpractice suit and a subsequent wrongful death action, such that the litigants in *Wing* were bound to the liability determination in the prior suit, though the element of causation, as it related to the decedent's death, had yet to be decided. *Id*. at 184. Subsequently, while it held that wrongful death was an "independent" cause of action, this Court nonetheless refused to sever the connection between wrongful death actions and medical claims entirely, such that litigants can still be estopped from relitigating issues between the two types of action that were decided in the first. *Id*. Thus, the "independence" of wrongful death actions, as developed by this Court, does not totally sever the

connection between medical claims and wrongful death actions and accommodates overlap between them.

B. The expressio unius canon is not applicable here, as there is no statutory ambiguity, and there is no grouping which would give rise to a presumption of exclusivity.

Despite the Tenth District's heavy reliance upon the expression unius canon of construction, it has no relevance here. Expressio unius est exclusio alterius applies only when certain things are specified in a law, contract, or will, other things are impliedly excluded. *Harris v. Atlas Single Ply Sys., Inc.*, 64 Ohio St.3d 171, 173, 593 N.E.2d 1376, 1378 (1992). This Court has long held that the doctrine of expressio unius est exclusio alterius "is an *aid* in interpreting ambiguous statutes" and should not be applied to defeat legislative intent when there is no ambiguity. *State ex rel. Wilson v. Preston*, 173 Ohio St. 203, 209, 181 N.E.2d 31 (1962) (emphasis added).

Courts "'do not have the authority' to dig deeper than the plain meaning of an unambiguous statute 'under the guise of either statutory interpretation or liberal construction.'" *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8, quoting *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 1994-Ohio-380, 626 N.E.2d 939 (1994). In other words, courts cannot look beyond the language of an unambiguous statute to determine its meaning, as the meaning is in its plain language. See *Jones v. Action Coupling & Equip.*, 98 Ohio St.3d 330, 2003-Ohio-1099, ¶ 12, 784 N.E.2d 1172. Importantly, "while the location of a statute in the Revised Code framework may influence the interpretation of an ambiguous statute, such a consideration has no place in the interpretation of an unambiguous statute." *City of Toledo v. Corr. Comm. of Northwest Ohio*, 2017-Ohio-9149, 103 N.E.3d 209, ¶ 42 (6th Dist.).

The Tenth District held that the *Mercer* opinion "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)." *Everhart*, ¶ 47. The wrongful death statute of repose, however, contains no provision that addresses when a wrongful death action premised upon medical claim may be brought. R.C. 2305.113 does. Moreover, the wrongful death statute itself is not instructive here, as it does not contain an exhaustive list of periods of limitation for wrongful death actions, as set forth more fully below. The medical claim statute, in contrast, states clearly and unambiguously that any claim – without limitation – that arises out of the medical care, treatment, or diagnosis of an individual is subject to a four-year statute of repose. Because the wrongful death statute is not exhaustive, both it and the medical claim statute can be simultaneously applied to a wrongful death action.

Even if R.C. 2125.02 was ambiguous, such that a canon of construction could be applied, it would be improper to apply the expressio unius canon to it, as the Tenth District has, as there is no list or grouping of wrongful death time limitations which could be viewed as exhaustive. The Tenth District's reliance on the expressio unius is counterintuitive and inconsistent with the drafting of wrongful death time limitations.

R.C. 2125.02 itself contains only *one* statute of repose, one for products liability matters. There is, however, another statute of repose for wrongful death premises liability claims set forth in R.C. 2305.131, to which R.C. 2125.02 makes no reference. On the most basic level, the expressio unius canon cannot apply here, as there is no grouping – either within the wrongful death statute or elsewhere – that would give rise to an inference that R.C. 2125.02 is meant to set forth an exhaustive list of statutes of repose applicable to wrongful death claims. If one were to folloe the logic applied by the Tenth District, then the premises liability statute of repose in R.C. 2305.131 would likewise be excluded, as the General Assembly chose not to include it within the wrongful death statute.

To complicate matters further, R.C. 2125.02(D)(1), the wrongful death statute of limitations, only has *one* incorporated exception:

> 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.

Following the Tenth District's logic, in reading this statute as truly exclusive, then the premises liability statute of repose in R.C. 2305.131 would be unenforceable, as it is not provided for in R.C. 2125.02(D)(2). Such an analysis quite plainly would be against the intent of the General Assembly, as it would render the wrongful death provisions of the premises liability statute of repose. Such a result would be wasteful and – more importantly – absurd. Thus, it is clear that the General Assembly did not intend for the wrongful death statute to be exhaustive as it relates to other periods of limitation applicable to wrongful death actions.

In contrast, the Fifth District's ruling gives proper credence to the statutory language at issue. The medical claim statute of repose, like the premises liability statute of repose, is not incorporated into the wrongful death statute. Nonetheless, the medical claim statute of repose states that *any* claim which is a medical claim is barred if it is not asserted within four years of the underlying medical care and treatment. A medical claim, as unambiguously defined by the medical claim statute, is *any* claim which arises out of the medical care, treatment, or diagnosis of an individual. It is therefore evident that the Fifth District did *not* err in applying the plain language of the medical claim statute, as the wrongful death statute does not set forth an exhaustive list of time limitations for a wrongful death action, nor does its language lend itself to an expressio unius analysis, such as the one applied by the Tenth District Court of Appeals.

V. CONCLUSION

For the foregoing reasons, this Court should adopt Defendants' Proposition of Law and answer their Certified Conflict Question in the affirmative, by holding that the medical claim statute of repose set forth in R.C. 2305.113(C) applies to *any* action upon a medical claim, including wrongful death actions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court this 26th day of August 2022. Notice of this filing will be sent to all counsel by operation of the Court's electronic filing system and via email to upon the following:

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