Supreme Court of Ohio Clerk of Court - Filed August 29, 2022 - Case No. 2022-0424

IN THE SUPREME COURT OF OHIO

COHOCTON COUNTY MEMORIAL HOSPITAL, ET AL.,	:	**Case No. 2022-0424, 2022-0407**
	:	
	:	**ON APPEAL FROM THE TENTH DISTRICT**
Appellants,	:	**COURT OF APPEALS, CASE NO. 21AP-74**
	:	
vs.	:	
	:	
MACHELLE EVERHART,	:	
	:	
Appellee.	:	

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

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I. INTRODUCTION AND STATEMENT OF AMICI'S INTEREST

This Court has repeatedly held that Ohio's medical-claim statute of repose, codified at R.C. 2305.113(C), "means what it says." *See, e.g.*, *Wilson v. Durrani*, 164 Ohio St. 3d 419, 2020-Ohio-6827, 173 N.E.3d 448, ¶ 24 (quoting *Antoon v. Cleveland Clinic Found.*, 148 Ohio St. 3d 483, 2016-Ohio-7432, 71 N.E. 3d 974, ¶ 23). What it says is this: any claim that arises out of the medical diagnosis, care, or treatment of any person is barred if it is not commenced within four years of the act or omission giving rise to the claim. R.C. 2305.113(C) is thus a "true" statute of repose that enacts an absolute temporal limit on a medical provider's potential liability. *Id.*, ¶ 38. The statute "'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.*, ¶ 16 (quoting *Ruther v. Kaiser*, 134 Ohio St. 3d 408, 2012-Ohio-5686, 983 N.E. 2d 291, ¶ 19).

The medical-claim statute of repose contains no exceptions for wrongful-death claims within its purview. That makes sense, as R.C. 2305.113 defines "medical claim" as *any* claim arising from medical diagnosis, care, or treatment, full-stop. And the Third, Fifth, and Eleventh Districts have held just so, rightly concluding that R.C. 2305.113(C) applies to medical-based wrongful-death claims. *See Smith v. Wyandot Mem. Hosp.*, 2018-Ohio-2441, 114 N.E.3d 1224, ¶ 22 (3d Dist.) ("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."); *Mercer v. Keane*, 2021-Ohio-1576, 172 N.E. 3d 1101 (5th Dist.), ¶ 40, (same); *Martin v. Taylor*, 2021-Ohio-4614, ¶ 46 (11th Dist.) (same).

Here, however, the Tenth District concluded that wrongful-death claims arising out of the medical diagnosis, care, or treatment of the decedent are *not* subject to R.C. 2305.113(C)'s statute of repose, thereby undermining the certainty and finality the statute is supposed to provide.

Everhart v. Coshocton Cnty. Mem. Hosp., 2022-Ohio-629, 186 N.E.3d 232, ¶ 21, 51. It has since been joined by the First and Sixth Districts. *Ewing v. UC Health*, 2022-Ohio-2560, ¶ 31 (1st Dist.); *Davis v. Mercy St. Vincent Med. Ctr.*, 2022-Ohio-1266, 190 N.E. 3d 77 ¶ 63 (6th Dist.).

Under these courts' holdings, a wrongful-death claim based on medical-care acts or omissions 10, 20, or 50 years before could be brought when the patient later dies. That surely is not what the General Assembly intended when it adopted R.C. 2305.113(C) for the express purpose of removing the "unacceptable burden" placed on hospitals and other healthcare providers forced to defend against stale claims. And letting wrongful-death claims slip through R.C. 2305.113(C)'s ambit is no small thing; roughly one-third of reported medical claims involve the death of the patient. If the General Assembly intended such a large exception to the statute of repose, it would have said so unmistakably.

Accordingly, this Court should reverse the decision below, restore certainty to the medical-claim statute of repose, and reaffirm that R.C. 2305.113(C) applies to *any* claim arising out of the medical diagnosis, care, or treatment—just like the statute says.

Ohio Hospital Association

Established in 1915, the Ohio Hospital Association ("OHA") is the nation's first state hospital association. It represents 252 hospitals and 15 health systems throughout Ohio. Ohio's hospitals employ 255,000 individuals, and contribute $31.4 billion to the state's economy, along with $7.9 billion in net community benefit. OHA is recognized nationally for patient safety, healthcare-quality initiatives, and environmental-sustainability programs. Guided by a mission to collaborate with member hospitals and health systems to ensure a healthy Ohio, OHA centers its work on three strategic initiatives: advocacy, economic sustainability, and health outcomes for patients and communities.

Ohio State Medical Association

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

Ohio Osteopathic Association

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

II. STATEMENT OF THE CASE AND FACTS

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

III. ARGUMENT IN SUPPORT OF APPELLANTS' PROPOSITIONS OF LAW

Proposition of Law: The four-year medical-claim statute of repose, R.C. 2305.113(C), applies to wrongful-death claims arising out of medical diagnosis, care, or treatment.

The text of R.C. 2305.113 is plain: a "medical claim" that is subject to a four-year statute of repose includes *any* claim asserted in *any* civil action that "arise[s] out of the medical diagnosis, care, or treatment of *any* person." R.C. 2305.113(E) (emphasis added). That, under any plain reading, includes wrongful-death claims "arising out of" a medical diagnosis, like Appellee's here.

Ensuring that a four-year statute of repose applies to all medical claims is consistent with this Court's prior holdings regarding R.C. 2305.113, which have made clear it is a "true" statute of repose. It is also consistent with the underlying purpose of statutes of repose—namely, creation of an "*absolute* temporal limit on a defendant's potential liability." *Wilson*, 2020-Ohio-6827, ¶ 37 (emphasis added). And so holding furthers the General Assembly's specific intent in adopting R.C. 2305.113(C)'s statute of repose: 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." *Ruther*, 2012-Ohio-5686, ¶ 19. Applying R.C. 2305.113 to medical-based wrongful-death claims thus prevents medical providers from facing "the possibility of unlimited liability indefinitely" for claims that (especially in cases arising from alleged misdiagnosis) may not accrue until decades later. *See id.* at ¶ 19. That policy choice—balancing the rights of plaintiffs and medical-provider defendants—belongs to the General Assembly. This Court has affirmed that choice again and again. *See, e.g.*, *Antoon*, 2016-Ohio-7432, ¶¶ 18–19.

But the court below charted its own course, ignoring the plain text of R.C. 2305.113 and this Court's clear guidance that the statute of repose "means what it says." To get there, the Tenth District read the wrongful-death statute in a vacuum, ignoring that, when the legislature intends to exclude wrongful-death claims from R.C. 2305.113's definition of "medical claims," it does so

explicitly, as in R.C. 2323.43(G)(3). That it chose not to exclude wrongful-death claims from definition of "medical claim" in the statute of repose is telling, but the court of appeals ignored this statutory signpost. The Tenth District also failed to appreciate that R.C. 2305.113(C)'s four-year stature of repose is perfectly compatible with the two-year statute of limitations found in R.C. 2125.02(D). *See, e.g.*, *Martin*, 2021-Ohio-4614, ¶ 46 ("Although the wrongful death claim is subject to a different statute of limitations, it does not follow that is not a 'medical claim' for purposes of the statute of repose."). And, assuming that the statutes cannot be harmonized, the Tenth District failed to heed this Court's commands regarding statutory priority, ignoring that the more specific statute (R.C. 2305.113(C)'s statute of repose for medical claims) must govern over the general (R.C. 2125.02(D)'s default statute of limitations for wrongful-death claims).

The result is an unwritten exception to the statute of repose, encompassing up to a third of all medical-malpractice claims. That cannot be what the General Assembly intended, and it certainly is not how statutes of repose are supposed to work. This Court should correct the error, and hold that medical-based wrongful-death claims are "medical claims" subject to a four-year statute of repose, thereby reaffirming that R.C. 2305.113(C) means what it says.

A. Consistent with the Plain Text of R.C. 2305.113, Medical-Based Wrongful-Death Claims Are "Medical Claims" Subject to a Four-Year Statute of Repose.

Based on a plain-text reading of R.C. 2305.113, there can be no doubt that medical-based wrongful-death claims, like Appellee's here, are "medical claims" subject to a four-year statute of repose. A quick review of R.C. 2305.113 proves the point.

The relevant statute of repose is found at R.C. 2305.113(C). It provides that:

> (1) No action upon a medical . . . claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical . . . claim.

> (2) If an action upon a medical . . . claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical . . . claim, then, any action upon that claim is barred.

R.C. 2305.113(C). The statute then defines "medical claim" as "*any* claim that is asserted in *any* civil action" against, among others, a "physician" or "hospital," arising out of the "the medical diagnosis, care, or treatment of *any* person." R.C. 2305.113(E)(3) (emphasis added). Because "[a]ny means any," this Court "read[s] that sentence as starkly as it is written." *Watkins v. Dep't of Youth Servs.*, 143 Ohio St. 3d 477, 2015-Ohio-1776, 39 N.E.3d 1207, ¶ 15.

Making clear that "any claim" really means *any* claim, the statute of repose includes express reference to "derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person." R.C. 2305.113(E)(3)(a). It defines "derivative claim" expansively and by example, using including-but-not-limited-to language. *State ex rel. Clay v. Cuyahoga Cnty. Med. Exam'rs Office*, 152 Ohio St. 3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶ 35, ("The statutory phrase 'including, but not limited to' means that the examples expressly given are 'a nonexhaustive list of examples.'"). "Medical claims" under R.C. 2305.113 therefore include, but are not limited to, "claims" belonging to a "parent, guardian, custodian, or spouse of an individual who was the subject of any medical diagnosis, care, or treatment . . . that arise from that diagnosis, care, treatment, or operation[.]"[1] R.C. 2305.113(E)(7).

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[1] Moreover, the definition of "derivative claim" includes any claim that seeks recovery of damages for any of the following:

> 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[.]

R.C. 2305.113(E)(7)(a)-(b). Notably, the examples of damages listed in R.C. 2305.113(E)(7)(a) match those listed for wrongful-death actions in R.C. 2125.02(B)(3), and approximately mirror those sought by Appellee's wrongful-death claim here as well. *See, e.g.*, Second Am. Compl., ¶ 49 (alleging that Appellee has "suffered loss of consortium, including loss of love, counsel, guidance, companionship, attention support, services and society").

Straightforward application of the statute to claims like those here results in a clear, concise, workable conclusion for Ohio courts. According to the Tenth District itself, the "underlying theory" of Ms. Everhart's case is that Appellants "deviated from the standard of care when they failed to properly send, receive, and act upon X-ray films and radiology reports," resulting in a failure to diagnose her husband with lung cancer at an earlier stage when his prognosis and treatment options might have been more favorable. *Everhart I*, 2013-Ohio-2210, ¶ 28; *see also* Second Am. Compl. ¶¶ 46–47 (alleging Appellants failed to provide appropriate medical care to husband). That means each of her claims, including her wrongful-death claim, is: (1) a claim; (2) in a civil action; (3) against a hospital or physician; (4) arising out of the medical diagnosis, care, or treatment; (5) of any person. Thus, under the plain text of R.C. 2305.113, Appellee's wrongful-death claim is a "medical claim" for purposes of the statute of repose.

B. This Court Has Held that R.C. 2305.113(C) is a "True" Statute of Repose, Subject to Only Three Exceptions.

This Court has read R.C. 2305.113 just as it is written, affirming that the medical-claim statute of repose "means what it says." *Wilson*, 2020-Ohio-6827, ¶ 24, (quoting *Antoon*, 2016-Ohio-7432, ¶ 23.) When enacting R.C. 2305.113(C), "the General Assembly made a policy decision to grant Ohio medical providers the right to be free from medical negligence occurring outside a specified time period." *Ruther*, 2012-Ohio-5686, ¶ 21. "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." *Id.* That makes R.C. 2305.113(C) a "true statute of repose." *Id.* at ¶ 18.

A true statute of repose operates differently than a statute of limitations because it serves a different purpose. A statute of limitations emphasizes the plaintiff's "duty to diligently prosecute known claims." *Wilson*, 2020-Ohio-6827, ¶ 10. "Statutes of repose, on the other hand, emphasize

defendants' entitlement to be free from liability after a legislatively determined time." *Id.* A true statute of repose, like R.C. 2305.113(C), precludes vested and non-vested claims, *Antoon*, 2016-Ohio-7432 ¶ 1, and "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'" from the defendant's actions, *Wilson*, 2020-Ohio-6827, ¶ 9 (quoting Black's Law Dictionary 1707 (11th ed. 2019)). Statutes of repose are thus focused on a defendant's *actions*, and reflect a legislatively decreed limit on how long a defendant may be subject to liability for those actions. Once the repose period has ran, the statute operates as "an absolute temporal limit on a defendant's potential liability." *Wilson*, 2020-Ohio-6827, ¶ 37; *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (explaining that repose provisions are equivalent to a "cutoff," and are "in essence an 'absolute . . . bar' on a defendant's temporal liability" (ellipsis in original)). As this Court has noted, statutes of repose can be likened "to a discharge in bankruptcy," "providing a 'fresh start' and embodying the idea that at some point a defendant should be able to put past events behind him." *Wilson*, 2020-Ohio-6827, ¶ 9 (cleaned up).

R.C. 2305.113(C) provides a "fresh start" to medical providers and hospitals, preventing them from being subject to liability for an indefinite period. But a statute of repose cannot function as intended if it is shot through with exceptions, creating uncertainty whether a medical provider is subject to ongoing risk of liability. Accordingly, this Court has been clear that, "[i]n light of the purpose of a statute of repose—to create a bar on a defendant's temporal liability—exceptions to a statute of repose require '*a particular indication* that the legislature did not intend the statute to provide complete repose but instead *anticipated the extension* of the statutory period under certain circumstances,' as when the statute of repose itself contains *an express exception*." *Wilson*, 2020-

Ohio-6827, ¶ 29 (quoting *Calif. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S.Ct. 2042, 2050 (2017)) (emphasis added).

Based on its plain text, and this Court's precedent, the medical-claim statute of repose is subject to only three exceptions, all of which are found in the text of R.C. 2305.113 itself and none of which are applicable here.[2] *Id.* (listing the three exceptions to the statute of repose found in R.C. 2305.113(D)). R.C. 2305.113 provides no indication, let alone a "particular" one, that the General Assembly intended to carve out wrongful-death claims from the statute of repose's application.[3] Accordingly, consistent with the plain text of R.C. 2305.113 and this Court's prior holdings, R.C. 2305.113(C)'s four-year statute of repose applies to "any claim," including those for wrongful death, "that arises out of the medical diagnosis, care, or treatment of any person."

C. The Decision Below Is Premised on An Unsound Statutory Construction that Is Inconsistent with This Court's Prior Holdings Regarding R.C. 2305.113(C).

The Tenth District rejected a straightforward, workable application of R.C. 2305.113(C)'s statute of repose, opining instead that medical-based wrongful-death claims should be excluded from the medical-claim statute of repose. The Court of Appeals did so despite no "particular indication" that the General Assembly intended to exclude medical-based wrongful-death claims from R.C. 2305.113(C)'s application. Besides conflicting with R.C. 2305.113(C)'s plain text and this Court's prior guidance regarding the statute's broad application, the decision below rests on three additional errors.

First, it misapprehended the import of R.C. 2323.43, a statutory provision that sets forth certain limits on damages for "medical claims" and actually supports *Appellants'* proposition of

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[2] Those three exceptions are (1) for persons within the age of minority or of unsound mind, for whom the statute of repose tolls, R.C. 2305.113(C); (2) claims that accrue in the last year of the repose period, *id.* at (D)(1); and (3) claims based upon a foreign object left in a patient's body, *id.* at (D)(2).

[3] In fact, when the General Assembly intended to exclude wrongful-death actions from the definition of "medical claim" in R.C. 2305.113, it did so explicitly as discussed in Section III.C., *infra*. *See* R.C. 2323.43(G).

law. That provision states that "medical claims" are given the same meaning as in R.C. 2305.113, the medical-claim statute of repose. *See* R.C. 2323.43(H)(1). In R.C. 2323.43(G), however, the General Assembly then *expressly excluded* "wrongful death actions" from the damages limits for "medical claims." R.C. 2323.43(G)(3). If the definition of "medical claim" taken from R.C. 2305.113 did not otherwise include wrongful-death actions, the General Assembly would have had no reason to exclude wrongful-death claims from the operation of R.C. 2323.43(G). *See, e.g.*, *New Riegel Local Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.*, 157 Ohio St. 3d 164, 2019-Ohio-2851, 133 N.E.3d 482, ¶ 29 ("[I]f R.C. 2305.131(A)(1) did not otherwise apply to a contractual warranty claim, the General Assembly would have had no reason to exclude warranty claims from the operation of the statute."). In fact, if wrongful-death claims are not "medical claims" under R.C. 2305.113, then R.C. 2323.43(G)(3) is superfluous—a construction courts must avoid. *See State v. Moore*, 154 Ohio St. 3d 94, 2018-Ohio-3237, 111 N.E.3d 1146, ¶ 13. The Tenth District turned the clear legislative intent found in R.C. 2323.43(G) on its head, holding that the provision supported its interpretation instead. *Everhart*, 2022-Ohio-629, ¶ 30.

Second, the decision below misinterpreted the meaning of "derivative claim" as used in the definition of "medical claim." *Id.* at ¶¶ 25–26. Contrary to the Tenth District's holding, the use of the term "derivative" in R.C. 2305.113 does not refer to the "dependent" nature of a claim, such that the claim must be "dependent" on the existence of a cause of action held by the patient. *Id.* at ¶ 26. Rather, "derivative" claims, even if independent, are nevertheless subject to the statute of repose if they are "derived from"—or in the words of the statute, "arise from"—the medical diagnosis, care, or treatment of another person. R.C. 2305.113(E)(3)(a); R.C. 2305.113(E)(7).

It makes sense that R.C. 2305.113(C) would include all claims stemming from a defendant's medical diagnosis, care, or treatment of any person, including wrongful-death claims,

because doing so creates an "absolute temporal limit on a defendant's potential liability" for a defendant's acts or omissions, just as true statutes of repose should. *Wilson*, 2020-Ohio-6827, ¶ 37. And though wrongful-death and malpractice claims are distinct claims, it is well settled that they "originat[e]" from "the same wrongful act or neglect." *Ky. Med. Ins. Co. v. Jones*, 2003-Ohio-3301, ¶ 77 (10th Dist.). Indeed, the wrongful-death statute itself requires some negligent or other tortious harm to the deceased, and all wrongful-death claims are thus "derived from" the negligence or other tortious conduct *to another*. *See* R.C. 2125.01 (statute triggered "[w]hen 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[.]")

Plus, Ohio courts—while always acknowledging the independent nature of wrongful-death claims—routinely refer to wrongful-death claims as "derivative" ones. *See, e.g.*, *Clark v. Scarpelli*, 91 Ohio St. 3d 271, 284, 744 N.E.2d 719 (2001) ("[W]e agree with the court of appeals that the language 'loss of consortium or injury to the relationship' encompasses all derivative claims, including claims for wrongful death."); *Alexander v. Davis*, 2022-Ohio-2345, ¶ 32, (1st Dist.) (holding that party was not insulated from liability for "derivative wrongful-death and survivorship claims"); *Beacon Ins. Co. of Am. v. Kleoudis*, 100 Ohio App.3d 79, 88, 652 N.E.2d 1 (8th Dist. 1995) ("[A] claim for wrongful death, although derivative of a claim for bodily injury, is a separate claim for personal injury.").

In support of its holding, the court of appeals stated that the "*causes of action*" identified as "derivative claims for relief" in R.C. 2305.113 "do not include wrongful death." *Everhart*, 2022-Ohio-629, ¶ 26 (emphasis added). But that misreads what the statute says. R.C. 2305.113(E)(7) does not list specific "causes of action"; rather, it gives a broad definition of derivative claims (including claims of a spouse arising out of the underlying medical care of

another) and provides examples of the *types of damages*—not causes of action—sought by those claims. There can be no dispute that the types of damages referenced in R.C. 2305.113(E)(7) are the same type sought in wrongful-death actions, which is confirmed by the wrongful-death statute's nearly-identical listing of damages. *See* n.1, *supra*.

Third and finally, the decision below misapplied Ohio's rules of statutory construction, allowing the wrongful-death statute of limitations, R.C. 2125.02(D), to trump all other potentially applicable statutes. To start, courts should try to harmonize statutory provisions, and that can be done readily here. R.C. 2125.02(D)'s two-year statute of limitations is perfectly compatible with the simultaneous application of R.C. 2305.113(C)'s four-year statute of repose. *E.g.*, *Martin*, 2021-Ohio-4614, ¶ 46 ("Although the wrongful death claim is subject to a different statute of limitations, it does not follow that is not a 'medical claim' for purposes of the statute of repose."). As this Court has noted, the General Assembly often pairs shorter statutes of limitation with longer statutes of repose. *Wilson*, 2020-Ohio-6827, ¶ 10 ("[S]tatutory schemes commonly pair a shorter statute of limitations with a longer statute of repose."). That is the easiest way to read R.C. 2125.02(D) and R.C. 2305.113(C)—the former provides the statute of limitations for wrongful-death actions; the latter, the statute of repose, sets the outermost temporal limit of a defendant's potential liability, regardless when (or whether) the claim accrues.

Even assuming R.C. 2305.113(C) and R.C. 2125.02(D) cannot be harmonized, the Tenth District mishandled the statutory conflict, because the more specific statute—R.C. 2305.113(C) and its four-year statute of repose tailored to medical claims—should govern over the general statute of limitations provisions found in the wrongful-death statute. *See, e.g.*, *Watkins*, 2015-Ohio-1776, ¶ 19 (holding that R.C. 2305.111(C)'s specific limitations period for claims resulting from childhood sexual abuse prevailed over the general limitations period for civil actions against

the State in R.C. 2743.16(A)). "It is a well-settled principle of statutory construction that when an irreconcilable conflict exists between two statutes that address the same subject matter, one general and the other special, the special provision prevails as an exception to the general statute." *State v. Pribble*, 158 Ohio St. 3d 490, 2019-Ohio-4808, 145 N.E.3d 259, ¶ 13. "The rationale behind the general/specific canon is that the particular provision is established upon a nearer and more exact view of the subject than the general, of which it may be regarded as a correction." *Id.* (internal quotation marks omitted). Stated differently, "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence." *Id.* (internal quotation marks omitted).

Here, R.C. 2305.113(C) was designed to address a specific problem: The increasing costs to medical providers and insurers related to medical claims, including the costs related to defending against claims arising from acts and omissions that took place many years before. *See* 2001 Ohio SB 281, § 3 (setting forth the General Assembly's statement of findings and intent). R.C. 2125.02, in contrast, is the general wrongful-death statute, which contains the default statute of limitations for wrongful-death claims. It is R.C. 2305.113(C)'s statute of repose—designed to address medical claims specifically—that should govern over the general provisions contained in R.C. 2125.02.

Nothing in R.C. 2125.02(D)(2) requires a different result. The Tenth District held that R.C. 2125.02(D)(2)'s reference to the products-liability statute of repose, while not referencing any other statute of repose, necessarily precludes application of R.C. 2305.113(C). But the underlying products-liability statute of repose—unlike the medical-claim statute of repose—does not clearly apply to wrongful-death actions, necessitating the cross-reference in R.C. 2125.02(D)(2). *See* R.C. 2305.10 (not specifically defining "product liability claim," and referring instead to "action[s]

based on a product liability claim" and "action[s] for bodily injury or injur[y] to person property"). No such cross-reference is necessary for R.C. 2305.113(C), which, by its terms, applies to any claim arising out of the medical diagnosis, care, or treatment of any person, and includes express reference to "derivative claims." And, at bottom, if the statutes are in conflict, R.C. 2305.113(C) gets the final say, because it is the more specific statute and the one that addresses "the very problem posed by the case at hand." *Pribble*, 2019-Ohio-4808, ¶ 13.

D. Allowing Medical-Based Wrongful-Death Claims To Evade the Medical-Claim Statute of Repose Creates a Massive Loophole That Undermines the General Assembly's Stated Intent.

Finally, it is important to consider the practical implications of allowing medical-based wrongful-death actions to evade the medical-claim statute of repose. Left standing, the Tenth District's decision cleaves a massive gap in R.C. 2305.113(C)'s coverage that could not have been intended by the General Assembly, as demonstrated by review of Ohio's medical-claim data.

Ohio's Department of Insurance is required by Ohio law to prepare an annual report to the General Assembly summarizing "closed claims" from medical professional liability insurance providers, including self-insurers. *See* R.C. 3929.302. That data provides a snapshot into the types of medical claims filed by plaintiffs, including data regarding the "severity" of the injury suffered by the patient. In 2018, the most recent year for which such data is available, 815 out of 3,001 reported claims were for injuries involving death of the patient—27.1 percent of all claims.[4] The numbers in 2017, 2016, and 2015 were similar: Medical claims involving death of the patient

[4] Ohio Dep't of Ins., *Ohio 2018 Medical Professional Liability Closed Claim Report*, App'x C, Exh. 16, *available at* https://insurance.ohio.gov/static/Legal/Reports/Documents/2018ClosedClaimReport.pdf.

amounted to 36.1,[5] 30.7,[6] and 33.6[7] percent of all reported claims, respectively. Averaging the last four reported years together, 31.6[8] percent of medical claims involved the death of the patient.

This means approximately one-third of all reported medical claims create potential liability for medical-based wrongful-death claims. If the General Assembly intended to create such a large exception from the medical-claim statute of repose, it surely would have done so expressly. *See Wilson*, 2020-Ohio-6827, ¶29 ("[E]xceptions to a statute of repose require a 'particular indication that the legislature did not intend the statute to provide complete repose.'"). After all, it is well-settled that legislatures do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

This data also underscores just how thoroughly the decision below undermines the intent of R.C. 2305.113(C). In adopting the statute of repose, the General Assembly struck "a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners." 2001 Ohio SB 281, § 3(6)(a). The General Assembly was specifically concerned with the increased costs that medical-malpractice litigation was causing for medical providers and their insurers, as well as evidentiary issues that arise when defendants are forced to defend against stale claims. *Id.* § 3(6)(b)-(d). The legislature called out the "unacceptable burden" faced by healthcare providers who, due to the threat of later litigation, are forced to maintain "records and other documentation related to the delivery of medical services[] for a period of time in excess" of the four-year statute of repose. *Id.* at § 3(6)(c). Stale claims also make it difficult to "discern the

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[5] Ohio Dep't of Ins., *Ohio 2017 Medical Professional Liability Closed Claim Report*, App'x C, Exh. 16, *available at* https://insurance.ohio.gov/static/Legal/Reports/Documents/2017ClosedClaimReport.pdf.
[6] Ohio Dep't of Ins., *Ohio 2016 Medical Professional Liability Closed Claim Report*, App'x C, Exh. 16, *available at* https://insurance.ohio.gov/static/Legal/Reports/Documents/2016_ClosedClaimReport.pdf.
[7] Ohio Dep't of Ins., *Ohio 2015 Medical Professional Liability Closed Claim Report*, App'x C, Exh. 16, *available at* https://insurance.ohio.gov/static/Legal/Reports/Documents/2015ClosedClaimReport.pdf.
[8] Across the last four reports (2015 – 2018), there have been 10,874 reported medical claims, of which 3,447 (31.6 percent) involved death of the patient.

standard of care relevant to the point in time when the relevant health care services were delivered," since "[o]ver 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." *Id.* at § 3(6)(d).

Each of these problems is exacerbated by the Tenth District's holding here. If medical-based wrongful-death claims are not subject to the four-year statute of repose, healthcare providers will have to maintain records indefinitely to defend against the potential threat of litigation based on conduct that occurred decades ago. Likewise, wrongful-death claims based on decades-old acts or omissions will be fraught with the very evidentiary issues—including evolving standards of care and the loss of fact witnesses—that motivated the General Assembly to pass the statute of repose in the first place. Given that medical-based wrongful-death claims generate the exact same (if not greater) cost- and evidence-based concerns as all other "medical claims," there is simply no reason to think that the General Assembly intended to create such a large exception to the statute of repose without clearly saying so.

IV. CONCLUSION

Amici OHA, OSMA, and OOA respectfully urge the Court to reverse the Tenth District's decision below and confirm that R.C. 2305.113's statute of repose applies to wrongful-death actions arising out of medical diagnosis, care, or treatment.

Respectfully submitted,

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I hereby certify that on August 29, 2022, a copy of the foregoing was filed electronically with the Clerk of the Ohio Supreme Court, and that a copy of the foregoing was served upon the following by email:

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