IN THE SUPREME COURT OF OHIO

Kathleen McCarthy, et al.,	:	
	:	
Plaintiffs-Appellants,	:	**Case No. 2022-0732**
	:	
v.	:	**On Appeal from the**
	:	**Tenth Appellate District,**
Peter K. Lee, M.D., et al.,	:	**Franklin County**
	:	**Case No. 21AP-426**
Defendants-Appellees.	:	

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

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I. INTRODUCTION AND STATEMENT OF AMICI'S INTEREST

Amici curiae — Ohio Hospital Association, Ohio State Medical Association, and Ohio Osteopathic Association — represent thousands of healthcare entities and providers throughout the state. The issue before this Court — whether a minor's derivative loss of consortium claim survives when the parent's underlying medical negligence claim is extinguished as a matter of law — is of utmost importance to amici's members as they are all potential medical negligence defendants. If the Court answers this question consistent with applicable precedent, as the trial court and Tenth District Court of Appeals did, healthcare providers will continue to address derivative claims in the context of medical negligence claims as they have for decades. That is, the derivative claim exists so long as the underlying primary claim for medical negligence exists. If, on the other hand, the Court strays from precedent and creates the exception Appellants seek, derivative claims will survive even when the underlying primary claim is extinguished as a matter of law. This will create great uncertainty as to whether liability exists for a derivative claim even when there is no liability for the primary claim.

And whether there is liability for such claims or not, healthcare providers will be required to defend themselves in such lawsuits years (and maybe even decades) after the primary claim was barred. While it is difficult and seemingly unfair to have to defend a claim many years after the act giving rise to the claim occurred in any circumstance, it is particularly harsh to require healthcare providers to do this when the underlying medical negligence claim itself was legally barred or extinguished years earlier.[1]

[1] Among other reasons, defending stale claims is difficult because over time the availability of relevant evidence, records, and witnesses knowledgeable about the matter diminishes and becomes problematic. Further, rapidly evolving advances in medicine and healthcare make it extremely challenging to ascertain and have juries properly apply the standards of care pertaining to

Established in 1915, the Ohio Hospital Association ("OHA") was 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 billions to the State's economy, including billions 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.

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.

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;

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healthcare services and medical diagnoses relevant at time when the care was provided years, and maybe even decades, earlier.

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 CASE AND FACTS

Two claims interact to present the issue on appeal to this Court. The First Claim is a direct claim for medical negligence by Kathleen McCarthy. The Second Claim is a derivative claim for loss of consortium by Ms. McCarthy's three minor children. What is not before this Court is any question about the First Claim: that claim was properly dismissed because Ms. McCarthy brought it outside of the relevant four-year statute of repose. *See McCarthy v. Lee*, 10th Dist. No. 21AP-105, 2022 WL 910231 at ¶ 31 (March 29, 2022) (affirming dismissal of medical negligence claims based on statute of repose) ("*McCarthy I*"). The ruling on the First Claim was not appealed to this Court.

What is before this Court is a question about the Second Claim, the loss of consortium claim that was derivative of the now-dismissed medical negligence claim. The Tenth District affirmed the dismissal of the Second Claim because it was derivative of the First Claim, which was entirely eliminated and no longer exists due to the statute of repose. *McCarthy v. Lee*, 10th Dist. Franklin No. 21AP-426, 2022-Ohio-1413 at ¶ 9 (Apr. 28, 2022) ("*McCarthy II*"). The Tenth District held that "the statute of repose eliminates the cause of action," and "[w]ithout a primary claim, there can be no derivative loss of consortium claim." *Id.* at ¶ 9. This holding has nothing to do with the statute of repose's narrow exception for minors.[2] It rests entirely on the fundamental

[2] As argued by Appellees, the exception for minors applies to the primary medical negligence claims of minors and not to derivative claims for loss of parental consortium.

legal principle that if a primary claim fails because of the statute of repose, that does not just prevent a remedy, the statute of repose extinguishes the claim altogether. *Id.*

To the extent not restated here, OHA, OSMA, and OOA adopt the Statement of the Case and Facts set forth in the merit brief of Appellees Peter K. Lee, M.D., OhioHealth Colon and Rectal Surgeons, and OhioHealth Physicians Group, Inc.

III. LAW AND ARGUMENT

Amici Proposition of Law: When a medical negligence statute of repose extinguishes the primary medical negligence claim, no derivative claim remains.

A. Because the Medical Negligence Statute of Repose Barred the Parent's Primary Medical Negligence Claim, No Derivative Claim for Loss of Parental Consortium Remains

Appellants attempt to distract the Court with an analysis of the minor-claim exception to the medical negligence statute of repose. *See* R.C 2305.113(C). This exception is irrelevant to the claim dismissed below, and the Court should reject Appellants' invitation to (1) overturn well-settled common law principles, (2) create a new, expanded minor-claim exception to the medical negligence statute of repose by judicial fiat, and (3) turn Ohio into a true outlier among the States on this issue.

This Court should start with the basics. Ohio law is clear that a loss of consortium claim is a derivative claim. *See, e.g.*, *Fehrenbach v. O'Malley*, 113 Ohio St.3d 18, 2007-Ohio-971, ¶ 11 (stating that a loss of consortium claim is a derivative action); *Messmore v. Monarch Machine Tool Co.*, 11 Ohio App.3d 67, 68, 463 N.E.2d 108 (9th Dist. 1983) ("Therefore, a cause of action based upon a loss of consortium is a derivative action."). Under Ohio law, a derivative claim arises from or out of the existence of a primary claim. *See, e.g.*, *Fehrenbach* at ¶ 11 (explaining that a loss of consortium claim is "a derivative action, arising from the same occurrence that produced the alleged injury to the other familial party"); *Kenney v. Ables*, 2016-Ohio-2714, ¶ 20, 63 N.E.3d

788, 792 (5th Dist.). Without a viable underlying primary claim, there can be no loss of consortium claim. *Fehrenbach at ¶ 21*; *see also Messmore*, 11 Ohio App.3d at 68–69 ("Therefore, a cause of action based upon a loss of consortium is a derivative action. That means that the derivative action is dependent upon the existence of a primary cause of action and can be maintained only so long as the primary action continues."). This is true whether the plaintiff asserting the loss of consortium claim is a spouse or child. *See Kenney* at ¶ 20 (spousal loss of consortium claim); *see Wilson v. Columbus Bd. of Educ.*, 589 F. Supp. 2d 952, 972 (S.D. Ohio 2008) (parental loss of consortium claim).

Further, this Court has held that "[o]ur case law requires that if a parent has a claim for injury and the minor child has a claim for loss of consortium, the minor child's complaint ***must*** be filed at the same time as the filing of the parents' complaint." *Fehrenbach* at ¶ 17 (emphasis added). This makes sense because requiring a minor child to join in the parent's underlying primary claim in asserting a loss of parental consortium claim limits the possibility of multiple cases and divergent outcomes, and efficiently utilizes court (and the parties') resources without needless duplication.

Here, the parent's medical negligence claim was barred by the applicable statute of repose, and that decision is not part of the appeal before this Court. Thereafter, derivative claims for loss of parental consortium were filed on behalf of three minor children. But because there no longer existed a primary claim from which a loss of consortium claim derives, the trial court properly dismissed the loss of consortium claims. *McCarthy II*, 2022-Ohio-1413 at ¶ 9.

This result is not new or novel — it is consistent with longstanding Ohio precedent. *See, e.g.*, *Messmore*, 11 Ohio App. 3d at 69 ("[A] derivative action cannot afford greater relief than that relief which would be permitted under the primary cause of action."); *Schiltz v. Meyer*, 32 Ohio

App. 2d 221, 223, 289 N.E.2d 587, 589 (1st Dist. 1971), *aff'd*, 29 Ohio St. 2d 169, 280 N.E.2d 925 (1972). And in the case of *Schiltz*, this is longstanding precedent that this Court has expressly approved. *See Bowen v. Kil-Kare, Inc.*, 63 Ohio St. 3d 84, 93, 585 N.E.2d 384, 392 (1992) (approving the holding in *Schiltz* that where no primary cause of action existed, the derivative loss of consortium claim likewise fails). This rule controls in contexts other than medical negligence too. *See Gearing v. Nationwide Ins. Co.*, 1996-Ohio-113, 76 Ohio St. 3d 34, 41, 665 N.E.2d 1115, 1120 (loss of consortium plaintiffs' insurance-coverage claim is derivative of and fails with the primary injured plaintiff's claim). And as discussed below, it is also consistent with the law in numerous other states.

Appellants seek to circumvent this precedent by arguing that there are exceptions to the general rule that a primary claim must exist in order to pursue a derivative claim, and that another exception should be created. The exceptions Appellants discuss — for res judicata, where there is a longer statute of limitations for the derivative claim than the primary claim, and where there is a contractual waiver of the derivative claim — are not applicable in this case.[3] Hence, amici do not address these arguments in any detail herein.

The new exception Appellants seek to create — that minors can bring their loss of parental consortium claims after they reach the age of majority even though their parent's primary claim was extinguished as a matter of law — is an exception that swallows the general rule. Appellees assert that despite the fact that the underlying, primary claim was barred under the statute of repose, they can still maintain a derivative loss of parental consortium claim because such a claim does not need to be brought until they reach the age of majority, under the exception to the statute of

[3] *See* Appellees' Merit Brief for a thorough explanation as to why these exceptions are not applicable.

repose for minors, R.C. 2305.113(C). Appellants' Merit Brief at 11. However, the Tenth District did not apply the statute of repose to the minors' derivative claims. The statute of repose barred the parent's primary claim and the resulting legal consequence is that no claim derivative of that primary claim can survive. In short, when there is no longer a viable primary claim, there can be no derivative loss of consortium claim regardless of whether it is brought by a spouse or a minor child. Thus, there was no reason for the Tenth District to apply the statute of repose to the derivative claim, and it did not do so. Neither should this Court.

This Court has explained the purpose of the medical negligence statute of repose and the balance the General Assembly struck in crafting it: "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." *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 19. In enacting the statute of repose, the General Assembly wanted to limit, not expand, the number of old or stale claims that could be brought against Ohio's healthcare providers. *Id.* Allowing the exception Appellants seek does just the opposite. The proposed exception allows claims to be brought many years (and even more than a decade) after the primary claim was extinguished as a matter of law. This requires defendant healthcare providers, their employers, and their insurers to guess as to which extinguished claims may, in the distant future, result in derivative claims that will need to be defended. As this Court has recognized, this is precisely what the General Assembly wanted to avoid in enacting the statute of repose for medical negligence claims. *Id.*

Here, there is no debate that the parent's primary claim was properly dismissed under the statute of repose. *McCarthy I,* 10th Dist. Franklin, No.21AP-105, 2022 WL 910231 at ¶ 31. As

such, there can be no derivative claim — regardless of when it is brought — where the primary claim no longer exists.

Take the example of a voluntary dismissal. When a plaintiff voluntarily dismisses a case without prejudice, "that action is deemed to never have existed." *Antoon v. Cleveland Clinic Found.*, 2016-Ohio-7432, ¶ 24, 148 Ohio St. 3d 483, 490, 71 N.E.3d 974, 981. This is similar to when a statute of repose bars a claim. No derivative claim can exist if the primary plaintiff voluntarily dismisses their claim, and likewise no derivative claim can exist where the primary plaintiff's claim is extinguished by the statute of repose.

Appellants are wrong when they suggest that "[t]he claim does not cease to exist upon the expiration of the statute of repose." Appellants' Merit Brief at 23. In fact, this Court has recently held, a statute of repose provides "an absolute temporal limit on a defendant's potential liability," and precludes a cause of action from ever arising after the time limit. *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, ¶ 37; *see also McQuade v. Mayfield Clinic, Inc.*, 2022-Ohio-785, ¶ 18, 186 N.E.3d 278, 285 (a statute of repose "not only bars the enforcement of a remedy but potentially extinguishes the right altogether"), *appeal not allowed*, 2022-Ohio-2446, ¶ 18, 167 Ohio St. 3d 1458, 190 N.E.3d 640 (citing *Minaya v. NVR, Inc.*, 2017-Ohio-9019, 103N.E.3d 160, ¶ 5 (8th Dist.)). When a right is "extinguished altogether," that means that there is no "legally cognizable claim," *see Bowen*, 63 Ohio St.3d at 93, upon which a derivative claim can be based.

The Court should reject Appellants' invitation to apply the narrow exception to the medical-negligence statute of repose, which applies to primary claims of minors, to derivative claims where the primary claim has been extinguished. .

B. Virtually Every Other State to Address the Issue has Decided that Where a Statute of Repose Bars a Primary Claim, a Derivative Loss of Consortium Claim also Fails.

In addition to being contrary to Ohio precedent, adopting Appellants' position would make Ohio an outlier among the states that have addressed the issue of whether a derivative claim can be maintained when the primary claim has been barred by a statute of repose. There exists wide-spread support for the proposition that a loss of consortium claim derives from its underlying, primary claim; so too for the proposition that where a statute of repose eliminates the underlying, primary claim, the derivative claim fails. This rule materializes in many states across different statutes of repose, including in the medical negligence context. Ohio should join virtually every other state that has opined on this issue.

In some other states, courts accept this proposition of law as such a banal principle that it merits no discussion at all. Other courts do discuss the issue, and when they do, they reach the same conclusion that the Tenth District did here.

Below is a non-exhaustive list of jurisdictions throughout the country that have reached this conclusion in a variety of different contexts[4]:

Ohio: "[W]here, as here, the statute of repose bars the underlying claim . . . , it also bars any related loss-of-consortium claims." *In re Gen. Motors LLC Ignition Switch Litigation*, 2021 WL 1415121, *3 (S.D.N.Y. April 14, 2021) (applying Ohio law in products-liability case). "The law is equally clear that [loss of consortium claims] are 'derivative' of the claims of the party with the underlying injury . . . ." *Id.* (citing *Lucio v. Edw. C. Levy Co.*, No. 15-CV-613, 2017 WL 1928058, at *11 (N.D. Ohio May 10, 2017)).

[4] The cases are generally in order of the depth of discussion of this issue in the opinion.

North Carolina: A derivative loss of consortium claim fails when the primary personal injury claim is barred by the statute of repose. *In re Mentor Corp. Obtape Transobturator Sling Products Liab. Litigation*, 2016 WL 873854, *3 (M.D. Ga. Mar. 4, 2016) (applying North Carolina law).

Connecticut: "[A]n action for loss of consortium is derivative of the injured spouse's cause of action, the consortium claim would be barred when the suit brought by the injured spouse is barred." *Levatino v. St. Vincent's Med. Ctr.*, No. X06UWYCV176049870S, 2021 WL 6613436, at *5 (Conn. Super. Ct. Dec. 27, 2021) (quoting *Sanzone v. Board of Police Commissioners*, 219 Conn. 179, 199, 592 A.2d 912 (1991)).

Indiana: A derivative loss of consortium claim fails when the primary personal injury claim is barred by the statute of repose. *Spoonamore v. Armstrong World Indus., Inc.*, 60 F. Supp. 2d 885, 890 (S.D. Ind. 1998), *republished as corrected at* 105 F. Supp. 2d 928 (S.D. Ind. 1999) (applying Indiana law).

Iowa: Iowa law draws a distinction between parental and spousal loss of consortium claims. Spousal claims are "independent, nonderivative claims" whereas parental claims are derivative. *Oppedahl v. Navistar, Inc.*, No. 414CV00475SMRCFB, 2015 WL 12866992, at *8 (S.D. Iowa June 9, 2015) (applying Iowa law). But where a statute of repose bars the underlying claims, even the nonderivative spousal claims fail. *Id.*

Georgia: A derivative loss of consortium claim fails when the primary medical negligence claim is barred by the statute of repose. *See Lyon v. Schramm*, 291 Ga. App. 48, 56, 661 S.E.2d 178, 184 (2008) (Andrews, J., concurring in part and dissenting in part), *aff'd*, 285 Ga. 72, 673 S.E.2d 241 (2009).

Missouri: "[A] statute of repose eliminates the cause of action altogether after a certain period of time following a specified event . . . ." *Ambers-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 914 (Mo. 2015) (applying Missouri law) (quoting *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 834 (Mo. 1991)). In *Ambers-Phillips*, the Missouri Supreme Court affirmed the dismissal of medical negligence claims based on the statute of repose as to all but one defendant, and tacitly affirmed the dismissal of the derivative loss of consortium claim without discussion. *See id.* at 904.

Tennessee: A negligence claim doomed by the statute of repose cannot serve as the basis for a derivative loss of consortium claim. *See Waterhouse v. Tennessee Valley Auth.*, No. 20-5978, 2021 WL 1230371, at *4 (6th Cir. Mar. 17, 2021) (applying Tennessee law) ("because summary judgment was properly granted on the Waterhouses' claim for negligence, it was likewise properly granted on Arthur's derivative loss-of-consortium claim.").

Illinois: A negligence claim doomed by the statute of repose cannot serve as the basis for a derivative loss of consortium claim. *See Rein v. Thermatool Corp.*, No. 19-CV-8130, 2022 WL 2116616, at *16 (N.D. Ill. June 13, 2022) (appeal pending) ("Her claim for a loss of consortium "depends upon the validity of the injured spouse's claims," and as such cannot survive judgment as a matter of law on the negligence claim.") (quoting *McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1167 (7th Cir. 1997) (applying Indiana law); *Hammond v. N. Am. Asbestos Corp.*, 105 Ill. App. 3d 1033, 1041, 435 N.E.2d 540, 547 (1982), *aff'd*, 97 Ill. 2d 195, 454 N.E.2d 210 (1983) (Illinois law)).

Michigan: Where a statute of repose applicable to actions arising from improvements to real property bars a claim, then the loss of consortium claim likewise fails. *See Dunmire v. Bechtel Power Corp.*, No. 190951, 1998 WL 1997746, at *5 (Mich. Ct. App. Jan. 9, 1998).

Florida: If the statute of repose applicable to products-liability claims bars the claim, then the loss of consortium claim fails. *See Dominguez v. Hayward Indus., Inc.*, 201 So. 3d 100, 102 (Fla. Dist. Ct. App. 2015).

Colorado: The loss of consortium claim fails where medical-negligence claim is barred by the statute of repose. *See Adams v. Richardson*, 714 P.2d 921, 925 (Colo. App. 1986).

California: same conclusion implied without discussion. *See The Luckman P'ship, Inc. v. Superior Ct.*, 184 Cal. App. 4th 30, 32, 108 Cal. Rptr. 3d 606 (2010).

Pennsylvania: same conclusion implied without discussion. *See Graver v. Foster Wheeler Corp.*, 2014 PA Super 132, 96 A.3d 390 ("Since the statute of repose operates to bar the Gravers' claims, there is no need to address the parties' remaining arguments.")

Vermont: A loss of consortium claim is derivative of the underlying tort claim, and if the tort claim fails, the derivative claim also fails. *See Derosia v. Book Press, Inc.*, 148 Vt. 217, 220, 531 A.2d 905, 906 (1987).

The overwhelming weight of authority—in a variety of statutory contexts across the country—holds that a loss of consortium claim is derivative of the underlying claim, and if the underlying claim fails, the loss of consortium claim fails too. Ohio would be adopting not just a minority rule, but a unique position if the Court accepts Appellants' position.

IV. CONCLUSION

Amici curiae, Ohio Hospital Association, Ohio State Medical Association, and Ohio Osteopathic Association, respectfully request this Court affirm the judgment of the Tenth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been sent via email on November 30, 2022, to the following counsel of record:

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