[Cite as *Ruther v. Kaiser*, 2011-Ohio-1723.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

TRACY RUTHER, Individually and Administrator of the Estate of Timothy Ruther,	:	CASE NO. CA2010-07-066
Plaintiff-Appellee,	:	O P I N I O N 4/11/2011
- vs -	:	
GEORGE KAISER, D.O., et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09 CV 74405

Santen & Hughes, John D. Holschuh, Jr., Sarah Tankersley, 600 Vine Street, Suite 2700, Cincinnati, Ohio 45202, for plaintiff-appellee

Arnold Todaro & Welch Co., L.P.A., Karen L. Clouse, John B. Welch, 580 Lincoln Park Blvd., Suite 222, Dayton, Ohio 45429, for defendants-appellants, George Kaiser, D.O. and Warren County Family Practice Physicians, Inc.

Richard Cordray, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, pro se

BRESSLER, P.J.

{¶1} Defendants-appellants, George Kaiser, D.O. and the Warren County Family Practice Physicians, appeal the decision of the Warren County Court of Common Pleas denying appellants' motion for summary judgment and finding that a portion of R.C. 2305.113

is unconstitutional as applied to plaintiff-appellee, Tracy Ruther, individually and as administrator of the estate of Timothy Ruther, in a wrongful death and medical malpractice action.

{¶2} This matter is a medical malpractice action filed by appellee and Timothy Ruther ("decedent") against appellants, which arose out of medical treatment decedent received. Before decedent's death, appellee and decedent filed a complaint alleging that appellants were negligent and deviated from the standard of care by failing to properly assess, evaluate, and respond to abnormal laboratory results.

{¶3} While decedent was a patient of Kaiser, decedent had lab work performed on July 19, 1995, May 27, 1997, and October 21, 1998. Each of these tests revealed decedent had significantly elevated liver enzyme levels, but Kaiser did not notify decedent of these abnormalities.

{¶4} In late 2008, after decedent ceased being a patient of Kaiser, decedent began to experience abdominal pain. On December 22, 2008 decedent was diagnosed with a liver lesion and hepatitis C, and on December 30, 2008 he was diagnosed with liver cancer. Based on decedent's affidavit, it was around this time that he became aware of his lab results from 1995, 1997, and 1998.

{¶5} On May 21, 2009, decedent and his family filed a complaint against appellants for medical malpractice. Decedent died approximately one month later, and appellee amended the complaint to add a wrongful death claim.

{¶6} Appellants moved for summary judgment on both claims. The trial court granted summary judgment to appellants as to the wrongful death claim, which has not been appealed. However, the trial court overruled appellants' motion with respect to the medical malpractice claim, and further found that Ohio's statute of repose for medical malpractice claims contained in R.C. 2305.113(C) is unconstitutional as applied to appellee. Appellants

appeal the trial court's decision and raise the following assignment of error.

{¶7} "THE TRIAL COURT ERRED IN DECLARING THE STATUTE OF REPOSE CONTAINED IN [R.C.] 2305.113(C) UNCONSTITUTIONAL AND CONSEQUENTLY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT."

{¶8} Appellants argue that the trial court erred in finding that the statute of repose contained in R.C. 2305.113(C) is unconstitutional as applied to appellee. Further, appellants argue that this statute applies to appellee and bars her claims.

{¶9} Initially, we note that pursuant to R.C. 2505.02(B)(6), this matter is a final appealable order. R.C. 2505.02(B)(6) provides, "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: * * * [a]n order determining the constitutionality of any changes to the Revised Code made by * * * the enactment of section[ ] 2305.113 * * * Revised Code."

{¶10} "Any constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation, and the understanding that it is not [a] court's duty to assess the wisdom of a particular statute." *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶141. "The only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 456, 1999-Ohio-123, quoting *State ex rel. Bowman v. Allen Cty. Bd. of Commrs.* (1931), 124 Ohio St. 174, 196. "It is axiomatic that all legislative enactments enjoy a presumption of constitutionality." *State v. Dorso* (1983), 4 Ohio St.3d 60, 61.

{¶11} Because enactments of the General Assembly are presumed constitutional, "before a court may declare [one] unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Woods v. Telb*, 89 Ohio St.3d 504, 510-11, 2000-Ohio-171, quoting *State ex rel. Dickman v. Defenbacker*

(1955), 164 Ohio St. 142, paragraph one of the syllabus. "[T]he party challenging the constitutionality of a statute bears the burden of proving the unconstitutionality of the statute beyond a reasonable doubt." *Woods* at 511, citing *State v. Thompkins*, 75 Ohio St.3d 558, 560,1996-Ohio-264.

{¶12} A statute may be challenged as unconstitutional on its face or as applied to a particular set of facts. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334 ¶37, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph four of the syllabus. The party who makes an as applied constitutional challenge "bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statute * * * unconstitutional and void when applied to those facts." *Harrold* at ¶38, citing *Beldon* at paragraph six of the syllabus. "In an as applied challenge, the party challenging the constitutionality of the statute contends that the 'application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional. The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative.'" *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, ¶14, quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists* (1992), 506 U.S. 1011, 113 S.Ct. 633. (Some internal quotations omitted.)

{¶13} In finding that R.C. 2305.113(C) is unconstitutional as applied to appellee, the trial court examined the previous version of Ohio's Statute of Repose, which was found to be unconstitutional as applied to the plaintiff in *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45. The trial court concluded that "[i]n essence, the amended statute of repose is functionally identical to the former statute. The statute continues to deny a plaintiff a remedy for the injury and malpractice that occurred within the four-year statute of repose, even though [the injury] could not [have been] discovered within that time frame."

{¶14} The prior version of Ohio's Statute of Repose, which the Ohio Supreme Court found to be unconstitutional in *Hardy*, 32 Ohio St.3d 45, provided in R.C. 2305.11(B)(2):

{¶15} "Except as to persons within the age of minority or of unsound mind, as provided by section 2305.16 of the Revised Code:

{¶16} "In no event shall any action upon a medical, dental, optometric, or chiropractic claim 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.

{¶17} "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, notwithstanding the time when the action is determined to accrue under division (B)(1) of this section, any action upon that claim is barred."

{¶18} The currently enacted version of Ohio's Statue of Repose for bringing a medical claim is in R.C. 2305.113(C), which provides in relevant part:

{¶19} "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:

{¶20} "(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.

{¶21} "(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."

{¶22} Article I, Section 16 of the Ohio Constitution provides:

{¶23} "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

{¶24} In *Hardy* at 46-47 the court explained, "[R.C. 2305.11(B)] is not a traditional statute of limitations, since the appellant was not aware of his injury and thus his cause of action was extinguished before he could act upon it. * * * R.C. 2305.11, if applied to those who suffer bodily injury from medical malpractice but do not discover that injury until four years after the act of malpractice, accomplishes one purpose-to deny a remedy for the wrong. In other words, the courts of Ohio are closed to those who are not reasonably able, within four years, to know of the bodily injury they have suffered."

{¶25} The court in *Hardy* continued at 46-47 and stated, "[w]e agree with the reasoning of the Supreme Court of South Dakota in *Daugaard v. Baltic Co-op. Bldg. Supply Assn.* (S.D.1984), 349 N.W.2d 419, 424-425, that a statute such as R.C. 2305.11(B) unconstitutionally locks the courtroom door before the injured party has had an opportunity to open it. When the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner."

{¶26} After the Ohio Supreme Court decided *Hardy*, it similarly held in *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 61, that the statute of repose is unconstitutional as applied to litigants who discover malpractice injuries before the four-year repose period expires, but at such a time as affords them less than one full year to pursue their claims pursuant to the statute.

{¶27} However, in *Sedar v. Knowlton Construction Company* (1990), 49 Ohio St.3d 193, the Ohio Supreme Court found that the statute at issue in *Hardy* is actually a statute of

limitation which prevents a plaintiff from bringing suit for an injury that had already occurred, but which had not been discovered prior to the expiration of the statutory period. The statute at issue in *Sedar* was, according to the court, a true "statute of repose" that did not limit an already established or vested right of action, but rather prevented an action from ever accruing. Id. at 195. The court in *Sedar* upheld the application of an absolute cut-off for tort claims against certain service providers who performed work related to the design and construction of real property, even though it had previously held in *Hardy* that an absolute cut-off period for claims for medical malpractice actions is unconstitutional because it violates the right-to-remedy guaranteed by the Ohio Constitution. Id.

{¶28} Later, the Ohio Supreme Court decided *Burgess v. Eli Lilly & Co.*, 66 Ohio St.3d 59, 61, 1993-Ohio-193, in which it held that the General Assembly is constitutionally precluded from eliminating the right to remedy "before a claimant knew or should have known of her injury." In *Burgess*, the court applied the reasoning from *Hardy*, and specifically extended that reasoning to invalidate statutes of repose on all types of claims. Then, in *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 1994-Ohio-322, at paragraph two of the syllabus, the Ohio Supreme Court specifically overruled *Sedar*.

{¶29} More recently, in *Groch*, 2008-Ohio-546, the Ohio Supreme Court reinstated the *Sedar* holding. In doing so, the court stated at ¶153:

{¶30} "Petitioners also cite three cases from 1986 and 1987 in which this court struck down different aspects of a medical-malpractice statute of repose on various grounds and as applied to various factual circumstances—*Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, *Hardy*, 32 Ohio St.3d 45, and *Gaines*, 33 Ohio St.3d 54. However, as explained in *Sedar*, 49 Ohio St.3d at 202, those cases are distinguishable because the medical-malpractice statute of repose interpreted in them took away an *existing, actionable negligence claim* before the injured person discovered the injury (when the injury had already occurred) or gave the

injured person too little time to file suit, and therefore denied the injured party's right to a remedy for those reasons. The three medical-malpractice cases petitioners rely on therefore do not support a contrary result here." (Emphasis added and some citations omitted.)

{¶31} Shortly thereafter, the United States District Court for the Northern District of Ohio analyzed *Groch* in *Metz v. Unizen Bank* (N.D.Ohio 2008), Slip Op. No. 5:05 CV 1510 and stated:

{¶32} "In *Groch*, the Court compared and contrasted the statutes at issue in *Sedar* and those at issue in *Hardy* and other medical malpractice cases; the key distinction being that in *Sedar*, no injury had occurred before the expiration of the statutory limitations period, while in *Hardy*, an injury had occurred, but had not yet been discovered. The Court also revisited the *Brennaman* case, chastising the opinion for its lack of detailed reasoning and overbroad conclusions. Although the *Groch* Court did not overrule the specific finding that the statute at issue in *Brennaman* was unconstitutional, it limited the holding in that case to the specific statute and facts at issue therein.

{¶33} "The *Groch* case did not overrule or cast aspersions on the reasoning behind *Hardy* or the other medical malpractice cases which found the applicable limitations periods to be unconstitutional in those circumstances. Rather, it served to clarify the distinctions between the limitations statutes at issue in those cases and the constitutionally valid limitations periods applicable to the products liability issues in *Groch* and *Sedar*. Therefore, *Hardy*, *Gaines*, *Sedar*, and *Groch* all remain valid precedent under Ohio law." (Footnotes and citations omitted.)

{¶34} In addition, the Ohio Second Appellate District analyzed *Groch* in *McClure v. Alexander*, Greene App. No. 2007 CA 98, 2008-Ohio-1313. In *McClure* at ¶21-22, the court noted that:

{¶35} "With respect to the right-to-a-remedy provision, Sedar argued that the statute of repose violated that provision of the Constitution based on the Court's recent decision regarding the four-year statute of repose for medical malpractice actions in *Hardy* * * *. The *Sedar* court distinguished the issue presented in the medical malpractice cases from the issue presented in *Sedar* as follows: 'Operation of the medical malpractice repose statute takes away an existing, actionable negligence claim before the injured person discovers it. Thus, "it denies legal remedy to one who has suffered bodily injury, * * *" in violation of the right-to-a-remedy guarantee. * * * In contrast, R.C. 2305.131 does not take away an existing cause of action, as applied in this case. "[sic] * * * [I]ts effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovering. The injured party literally has no cause of action. * * *' *Sedar*, at 201-02." (Some citations omitted.)

{¶36} Further, in *McClure* at ¶36, the court stated:

{¶37} "In completing its analysis, the [*Groch*] Court noted that the statute before it differed from the statute of repose analyzed in *Sedar* and *Brennaman*, but that it similarly potentially bars a plaintiff's suit before it arises. The statute, therefore, prevents the vesting of a plaintiff's claims if the product that caused the injury was delivered to the end user more than ten years after the plaintiff was injured. 'This feature of the statute triggers the portion of *Sedar's* fundamental analysis concerning Section 16, Article I that is dispositive of our inquiry here. Because such an injured party's cause of action never accrues against the manufacturer or supplier of the product, it never becomes a vested right.' [*Sedar*] at ¶149."

{¶38} Based on the above, we agree with the trial court's determination that Ohio's current statute of repose for medical malpractice claims contained in R.C. 2305.113(C) is unconstitutional as applied to appellee. Contrary to appellants' arguments, *Groch* is

distinguishable from this case because it involved a different statute of repose that can potentially bar a claim before the claim vests. However, the medical-malpractice statute of repose in R.C. 2305.113(C), as applied to appellee, bars her claim after it had already vested, but before she or the decedent knew or reasonably could have known about the claim. This is a violation of the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution. While the statute in its current form is not identical to the statute found to be unconstitutional in *Hardy*, the statute in its current form is not substantially different than the one found unconstitutional in *Hardy*. Our holding should not be construed to mean that R.C. 2305.113(C) is facially unconstitutional; rather, we hold only that the statute is unconstitutional as applied to appellee. Accordingly, appellants' assignment of error is overruled.

{¶39} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.

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