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No. 2019-1560

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS, FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO, CASE NO. C 180196

ROBERT WILSON,
Plaintiff-Appellee,

v.

ABUBAKAR ATIQ DURRANI, M.D., et al.,
Defendants-Appellants.

APPEAL FROM THE COURT OF APPEALS, FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO, CASE NO. C 180194

MIKE SAND, et al.,
Plaintiffs-Appellees,

v.

ABUBAKAR ATIQ DURRANI, M.D., et al.,
Defendants-Appellants.

BRIEF OF AMICUS CURIAE ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO IN SUPPORT OF APPELLANTS ABUBAKAR ATIQ DURRANI, M.D. AND CENTER FOR ADVANCED SPINE TECHNOLOGIES

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I. Statement of Interest of Amicus Curiae

The Academy of Medicine of Cleveland & Northern Ohio (AMCNO) is a nonprofit § 501(c)(6) professional medical association serving the northern Ohio medical community. It has been in existence since 1824 and became known as The Academy of Medicine in 1902. Now known as AMCNO, it has a membership of over 5,000 physicians, making it one of the largest regional medical associations in the United States.

AMCNO provides legislative advocacy for its physician members before the Ohio General Assembly, and also advocates on behalf of its members before the state medical board, other state and federal regulatory boards, and Ohio courts. AMCNO sponsors numerous community initiatives and works collaboratively with hospitals, chiefs of staff, and other related organizations on a myriad of different projects of interest and concern to its members. Put simply, AMCNO is the voice of physicians in northern Ohio—and has been so for over 190 years.

As this Court is aware, physicians, including those in the northern Ohio community, are often litigants in a wide variety of civil litigation. Thus, it is appropriate that AMCNO weigh in on important policy matters that implicate the interests of its physician members. Whether the savings statute set forth at R.C. 2305.19 applies to the medical-malpractice statute of repose set forth at R.C. 2305.113(C) is one such interest. The savings statute operates to "save" claims from expired or soon-to-be expired statutes of limitations; the medical-malpractice statute of repose, on the other hand, is not a statute of limitations, as this Court made clear in *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, and again in *Antoon v. Cleveland Clinic Foundation*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974. On the contrary, it is a "true statute of repose" that instead operates to provide

an outside time limit after which a plaintiff can no longer bring a medical claim, with certain policy-related exceptions not applicable here. AMCNO's physician members are entitled to the certainty of the outside time provided by the medical-malpractice statute of repose and have the statute applied as written by the Ohio General Assembly as part of medical claim-related tort reform.

For these reasons, AMCNO has a strong interest in the outcome of this matter. It urges, on behalf of its entire membership, that the decision of the First District Court of Appeals be reversed and the decision of the Hamilton County Court of Common Pleas be reinstated.

II. Statement of the Case and Facts

Amicus defers to the Statement of Facts set forth in the Merit Brief of Appellants Abubakar Atiq Durrani, M.D. and Center for Advanced Spine Technologies.

III. Argument

Proposition of Law No. 1:

> The reversal savings statute, R.C. 2305.19, does not allow actions to survive beyond the expiration of the statute of repose unless expressly incorporated in the statute of repose.

Put simply, the savings statute does not apply to extend the four-year medical malpractice statute of repose. This is so because the savings statute is a limitations-based statute; the statute of repose, in contrast, is *not* a statute of limitations. Instead, as this Court has made repeatedly clear, the medical malpractice statute of repose is a "true statute of repose" that provides "medical providers certainty with respect to the time within which a claim must be brought and a time after which they may be free from the fear of litigation." *Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 19.

Yet here we are, in 2020, and the parties to these cases are litigating over surgery that took place in 2010—precisely the situation the General Assembly sought to avoid when it enacted a four-year statute of repose for medical claims. To adopt the reasoning of the First District and apply the savings statute to medical claims would thwart the General Assembly's intent and encourage decades-old cases to languish far into the future. The statutory framework and corresponding legislative history of both statutes support that the medical-malpractice statute of repose should be applied as written.

A. Under Ohio law, the savings statute and statute of repose are distinct statutes with different purposes and intents.

The "primary goal of statutory construction is to give effect to the legislature's intent, and in determining the legislature's intent," it is necessary to first look to "the plain language of the statute." *Ayers v. Cleveland*, Slip Opinion No. 2020-Ohio-1047, ¶ 17, citing *State v. Gordon*, 153 Ohio St.3d 601, 2018-Ohio-1975, 109 N.E.3d 1201, ¶ 8. When a statute is plain and unambiguous, it is applied as written. *Id*.

Looking to the plain language of R.C. 2305.113(C), as well the statutory framework of R.C. Chapter 2305 as a whole, the legislature never intended the savings statute to apply to extend the statute of repose. Rather than analyzing the statute's plain language, however, the First District relied on a 24-year-old decision by a federal court sitting in another state—and then applying the law of another state—for guidance on the "goals of the statute of repose" and the related "policy considerations" as to *Ohio's* statute of repose. *Wilson v. Durrani*, 1st Dist. Hamilton Nos. C-180194 and C-180196, 2019-Ohio-3880, ¶ 30-31, citing *Hinkle by Hinkle v. Henderson*, 85 F.3d 298 (7th Cir.1996)). Properly focused instead on the language of the statute itself, and the earlier holdings of this Court, shows that the trial court's decision, and not the First District's, was correct.

1. The medical-malpractice statute of repose—R.C. 2305.113(C)

Enacted as part of comprehensive medical malpractice tort reform in 2002, R.C. 2305.113 is part of a broader legislative package aimed at curbing escalating malpractice insurance costs brought on by medical-malpractice litigation, and the corresponding risk that litigation posed to the delivery of health care in Ohio because practitioners were leaving the state. This statute contains four key components: (A) a one-year statute of limitations; (B) a process by which the statute of limitations can be extended by 180 days; (C) a four-year statute of repose; and (D) a limited discovery-rule, tolling provision. Central to this case is subsection (C), the statute of repose. It states, in its entirety:

> Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply:
>
> (1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.
>
> (2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.

R.C. 2305.113(C). The "division (D)" referenced in the first excerpted paragraph is the discovery rule, which has two parts. The first part allows a person who discovers the injury after the expiration of the one-year statute of limitations to nevertheless bring a claim within one year of the discovery of the injury, provided it is brought "before the expiration of the four year period specified in division (C)(1)"—the statute of repose. *See* R.C. 2305.113(D)(1).

The second part of division (D) applies the same discovery rule to claims "involv[ing] a foreign object that is left in the body," but permits these claims to proceed beyond the four-year statute of repose. *See* R.C. 2305.113(D)(2).

Therefore, a straightforward reading of R.C. 2305.113 demonstrates that only two circumstances exist that permit medical claims to be brought outside of the four-year boundary set by the statute of repose. In the first circumstance, the statute of repose is tolled for as long as the claimant is a minor or of unsound mind. In the second, the statute of repose does not apply at all where a foreign object is left in a patient. These are the only exceptions written into the law.

The General Assembly's intent in drafting this legislation is clear and unambiguous. In fact, it made an explicit "statement of findings and intent":

> The General Assembly finds
>
> * * *
>
> (b) Over time, the availability of relevant evidence pertaining to an incident and the availability of witnesses knowledgeable with respect to the diagnosis, care, or treatment of a prospective claimant becomes problematic.
>
> (c) The maintenance of records and other documentation related to the delivery of medical services, for a period of time in excess of the time period presented in the statute of repose, presents an unacceptable burden to hospitals and health care practitioners.
>
> (d) Over time, the standards of care pertaining to various health care services may change dramatically due to advances being made in health care, science, and technology, thereby making it difficult for expert witnesses and triers of fact to discern the standard of care relevant to the point in time when the relevant health care services were delivered.

Am.Sub.S.B. No. 281, Section 3(A)(6)(b)-(d). In light of these explicit findings, the General Assembly concluded that the four-year "statute of repose on medical, dental, optometric, and

chiropractic claims strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners," and "precludes unfair and unconstitutional aspects of state litigation but does not affect timely malpractice actions brought to redress legitimate grievances." *Id.*, Section 3(A)(6)(a), (f).[1]

These express policy considerations are supported by this Court's jurisprudence on this statute when it recognized that "[f]orcing medical providers to defend against medical claims that occurred 10, 20, or 50 years before presents a host of litigation concerns," including:

- the risk that evidence is unavailable through the death or unknown whereabouts of witnesses,
- the possibility that pertinent documents were not retained,
- the likelihood that evidence would be untrustworthy due to faded memories,
- the potential that technology may have changed to create a different and more stringent standard of care not applicable to the earlier time,
- the risk that medical providers' financial circumstances may have changed—i.e., that practitioners have retired and no longer carry liability insurance,
- the possibility that the practitioner's insurer has become insolvent, and
- the risk that the institutional medical provider may have closed.

Ruther, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 20.

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[1] That the term "statute of repose" is not within the text of R.C. 2305.113(C) is of no consequence. As recognized by this Court in *Ruther* and *Antoon*, the text of the statute operates as a statute of repose. And the General Assembly used that term in its uncodified statement of findings and intent. *See* Am.Sub.S.B. No. 281, Section 3(A)(6). Uncodified law still has the force of law, and deserves the same statutory deference. *Maynard v. Eaton*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, ¶ 7.

2. The savings statute—R.C. 2305.19

It is against the backdrop of R.C. 2305.113(C) that the savings statute must be examined. The savings statute operates to save actions where a particular statute of limitations has expired. It provides, in relevant part:

> In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

R.C. 2305.19(A). When properly invoked, a case refiled within the one-year period prescribed by the savings statute "relates back to the filing date for the preceding action for *limitations* purposes." (Emphasis added.) *Frysinger v. Leech*, 32 Ohio St.3d 38, 42, 512 N.E.2d 337 (1987). In this respect it "saves" an action that would otherwise be barred by the statute of *limitations*.

A statute of limitations, however, is distinct from a statute of repose. "A statute of limitations establishes a time limit for suing in a civil case based on the date when the claim accrued," while a "statute of repose bars any suit that is brought after a specified time since the defendant acted." *Antoon,* 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 11, citing *Black's Law Dictionary* 1636 (10th Ed.2014). With respect to R.C. 2305.113(C)—as this Court made clear—a "statute of repose exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation." *Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 19. The Supreme Court of the United States has observed that it is common to pair a

"shorter statute of limitations," often with a discovery rule, with a "longer statute of repose," so that the "discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, ___ U.S. ___, 137 S.Ct. 2042, 2049-50, 198 L.Ed.2d 584 (2017). Unlike a statute of limitations, which can often be tolled for a variety of reasons (such as the discovery rule), a statute of repose is "in general not subject to tolling," unless "there is a particular indication that the legislature did not intend the statute to provide complete repose," such as "if the statute of repose itself contains an express exception." *Id.* at 2050. "[T]his court and the United States Supreme Court agree that statutes of repose are to be read as enacted and not with an intent to circumvent legislatively imposed time limitations." *Antoon*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 19.

Based on the foregoing analysis, R.C. 2305.113(C) acts as an absolute bar to initiating a cause of action, and it contains no "express exception," except as noted for minors and those of unsound mind. Importantly, under long-standing precedent, "once a complaint has been dismissed without prejudice, legally, that action is deemed to never have existed." *Id.* at ¶ 24, citing *DeVille Photography, Inc. v. Bowers*, 169 Ohio St. 267, 272, 159 N.E.2d 443 (1959). In the context of the savings statute, the significance of this legal principle is important:

> [I]n this case, no action on the medical-malpractice claims "commenced" until the second state-court complaint was filed * * * . By that time, more than four years had passed since the act or omission constituting the alleged basis of the medical claim. Because the action was plainly commenced outside the four-year statute of repose period, the trial court correctly granted the [defendant's] motion to dismiss.

Antoon at ¶ 24. In other words, for purposes of the statute of repose, a second, refiled complaint does not "relate back" to the first as it does for a statute of limitations.

Those precise words from *Antoon* could just as easily been written to apply in this case. Because the voluntary dismissals in the underlying actions rendered the earlier complaints a nullity, and because the actual causes of action did not "plainly commence" until refiled in December 2015, the causes of action based on medical care rendered in 2010 were barred by the four-year statute of repose. A straightforward application of R.C. 2305.113(C), the clear policy set forth in the statute itself, and this Court's holdings in *Ruther* and *Antoon*, should result in the reversal of the First District's decision and a reinstatement of the trial court's dismissal order. Except for the minority and incompetency exceptions not relevant here, the statute of repose operates as an absolute bar.

3. The medical-malpractice statute of repose is a true statute of repose.

A true statute of repose is one that provides an absolute outside time bar within which claims can no longer be brought. *Antoon*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 23. As *Antoon* made clear, "R.C. 2305.113(C) is a true statute of repose that applies to both vested and nonvested claims," meaning that the absolute time bar applies both to causes of action that have and have not accrued within that four-year time period. *Id.* at ¶ 35. Nevertheless, the First District delved into questions of legislative intent and public policy considerations that went beyond the text of the statute, and "wrote" exceptions into R.C. 2305.113(C) that are not found in the statutory text.

a. When the legislature wants the savings statute to apply to a statute of repose, it says so.

This Court has held that the "General Assembly's use of particular language to modify one part of a statute but not another part demonstrates that the General Assembly knows how to make that modification and has chosen not to make that modification in the latter

part of the statute." *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶ 26.

This principle is illustrated in the statute of repose for product liability claims. That statute contains an express exception for the savings statute whereas the medical-malpractice statute of repose does not. *Compare* R.C. 2305.10(C)(1) *with* R.C. 2305.113(C). Notably, the legislation that enacted R.C. 2305.10 also contained revisions to R.C. 2305.113. *See* Am.Sub.S.B. No. 80, Section 1. The products-liability statute of repose, including the exception referencing the savings statute, is within two pages of the text for R.C. 2305.113(C) within the same legislation. *Compare* 150 Ohio Laws 7932 (R.C. 2305.10(C), referencing exception for R.C. 2305.19) *with* 150 Ohio Laws 7934 (R.C. 2305.113(C), referencing no such savings statute exception). And although this legislative document made several changes to R.C. 2305.113, it did not alter division (C)—in other words, it left the statute of repose intact, with no exception for the savings statute.[2]

Certainly, while the General Assembly was in the process of writing a savings statute exception for statutes of repose into R.C. 2305.10 and R.C. 2125.04, it could have easily added the same to R.C. 2305.113. The fact that it chose not to do so further establishes that it intended plaintiffs to have the benefit of the savings statute beyond the statute of repose for products-liability claims, but not for medical claims.

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[2] This legislation also incorporated an explicit exception for the products-liability statute of repose in the separate savings statute under the wrongful-death statute. *See* R.C. 2125.04. Thus, twice in one bill, the legislature added an exception to the statute of repose to a specific provision of law. But it made no such amendment to R.C. 2305.113.

b. The absence of an express exception for medical claims in R.C. 2305.19 does not indicate a legislative intent to apply it to the medical-malpractice statute of repose.

The First District relied heavily on an unreported federal court case, *Atwood v. UC Health*, S.D. Ohio No. 1:16-CV-593, 2018 WL 3956766 (Aug. 17, 2018), which in turn drew much of its analysis from the *Hinkle* case. Citing to *Hinkle* and *Atwood*, it wrote that, "just as the legislature could have included the saving [*sic*] statute as an exception in the statute of repose, the legislature could have included the statute of repose as an exception in the saving [*sic*] statute." *Wilson*, 2019-Ohio-3880, ¶ 29. The court made passing reference to the fact that, in 2009, the legislature added exceptions to R.C. 2305.19 stating that it did not apply to "certain probate proceedings," but engaged in no further analysis. *Id.* However, further analysis is both warranted and instructive.

Division (C) of the savings statute says, "[t]his section does not apply to an action or proceeding arising under section 2106.22, 2107.76, 2109.35, 2115.16, 5806.04, or 5810.05 of the Revised Code." R.C. 2305.19(C). These sections were added in 2009 as part of a larger probate and estate bill, and broadened a previously existing exception from the savings statute for actions under one of these statutes, R.C. 2107.76. *See* Sub.S.B. No. 106, Section 1. The exception to the savings statute contained in R.C. 2107.76 was enacted, in turn, to overturn an earlier ruling of this Court that applied the savings statute to will contests. *Vitantonio, Inc. v. Baxter*, 116 Ohio St.3d 195, 2007-Ohio-6052, 877 N.E.2d 663, ¶ 8.

It does not follow that the presence of these probate exemptions in the savings statute somehow means that all other statutes of repose in the Revised Code are subject to R.C. 2305.19. The reason these exemptions were written was to expressly supersede a judicial decision, and nothing more. The legislature's failure to include R.C. 2305.113 along with

these other exemptions has nothing to do with its legislative intent on the statute of repose; rather, it was because Sub.S.B. No. 106 was a bill on probate law, not medical malpractice, and its inclusion would likely have violated the Constitution's one-subject rule.

B. Applying saving statutes to statutes of limitations and not to statutes of repose is supported by the law of other jurisdictions.

1. Savings statutes apply to save a claim from a statute of limitations, not a statute of repose.

Other jurisdictions recognize that savings statutes are an exception to the statute of limitations. In the leading academic commentary on savings statutes, Professor William D. Ferguson stated:

> It is clear that the saving statute was intended to relieve the plaintiff from the bar of the statute of limitations in certain situations. It is likewise obvious that the savings statute was not intended to destroy the statute of limitations or to eliminate rules of practice and procedure.

William D. Ferguson, *The Statutes of Limitation Saving Statutes* 58 (1978).

Understanding this intent and purpose, courts throughout the country consistently find that savings statutes apply to save a claim from a statute of limitations. *See, e.g.*, *Am. Marine Corp. v. Sholin*, 295 P.3d 924, 927 (Alaska 2013) (finding the savings statute applied to save a claim from the *statute of limitations*); *Oxford v. Perry*, 340 Ark. 577, 582–83, 13 S.W.3d 567 (2000) (same); *Reid v. Spazio*, 970 A.2d 176, 180 (Del.2009) (finding Delaware's savings statute is an exception to the applicable statute of limitations); *Watt v. Heth*, No. 245910, 2005 WL 265165, at *5 (Mich.App. 2005) (applying Michigan's savings statute to statutes of limitations, but not statutes of repose); *Hatley v. Truck Ins. Exch.*, 261 Or. 606, 614–15, 494 P.2d 426 (1972) (holding the purpose of the savings statute was "avoid the bar of the statute of limitations for a diligent plaintiff").

As shown, however, statutes of repose are not the same as statutes of limitations. Rather, nearly every jurisdiction throughout the country, including the Supreme Court of the United States, recognizes that statutes of repose differ in both policy and purpose from a statute of limitations. *California Pub. Employees' Ret. Sys.*, 137 S. Ct. at 2049.[3] Statutes of limitations are procedural devices that limit the remedy, whereas statutes of repose are substantive rights that both limit the remedy and extinguish the right. *See, e.g.*, *Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 366–67, 293 S.E.2d 415 (1982) (noting statutes of repose are a substantive definition of rights whereas statutes of limitations are procedural devices used to limit the remedy); *Bridgwood v. A.J. Wood Constr., Inc.*, 480 Mass. 349, 352, 105 N.E.3d 224 (2018) (describing a statute of limitations as "procedural defenses" and a statute of repose as "substantive right to be free from liability").

These jurisdictions recognize, as does Ohio, that statutes of repose are not the same as statutes of limitations. As such, they do not fall within the ambit of savings statutes. Rather, savings statutes are remedial statutes designed to allow a diligent plaintiff additional time to pursue a remedy. There is nothing to suggest savings statutes were intended to save what would otherwise be an extinguished cause of action. Accordingly, savings statutes apply to statutes of limitations, not statutes of repose, unless expressly provided otherwise.

[3] *See also Police & Fire Ret. Sys. Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 106 (2d Cir.2013) ("[S]tatutes of repose 'create[] a substantive right in those protected to be free from liability after a legislatively-determined period of time.'"); *Albano v. Shea Homes Ltd. Partnership*, 227 Ariz. 121, 254 P.3d 360 (2011) (finding that statutes of repose define substantive rights); *Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co.*, 353 Ark. 201, 218, 114 S.W.3d 189 (2003) (same); *Lewis v. Taylor*, 2016 CO 48, ¶ 47, 375 P.3d 1205 (same); *State v. Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 441-42, 54 A.3d 1005 (2012) (same).

Courts recognizing this distinction harmonize the intent, purpose, and differences between statutes of repose and statutes of limitations to find that saving statutes do not apply to statutes of repose. For example, in *Wright v. Robinson*, 262 Ga. 844, 845, 426 S.E.2d 870, 871 (1993), the Supreme Court of Georgia held its savings statute did not apply to Georgia's medical malpractice statute of repose. In reaching this conclusion, the court recognized the distinction between statutes of repose and statutes of limitations. The court explained that a statute of repose "stands as an unyielding barrier to a plaintiff's right of action." *Id.* Based on this principle—also recognized under Ohio law—the court found a statute of repose is an "absolute" bar to a cause of action. *Id.*

The Supreme Court of Texas came to the same conclusion in *Nathan v. Whittington*, 408 S.W.3d 870, 875 (Tex. 2013). In that case, the court held that Texas's saving statute under Tex.Civ.Prac. & Rem.Code Ann. Section 16.064 did not apply to Texas's Uniform Fraudulent Transfer Act's three-year statute of repose. The court explained that "statutes of repose are of an absolute nature and address concerns beyond the certainty of the litigants." *Id.* Applying a savings statute to this provision frustrates this purpose by extending the repose period indefinitely. *Id.* As such, the court found the savings statute applied only to statutes of limitations, and not statutes of repose. *Id.* at 876 (reasoning "[t]he Legislature has balanced this hardship against the benefits of the certainty that a statute of repose provides by extinguishing claims upon a specific deadline").

This analytical framework recognizes the intent of savings statutes, i.e., to "save" a remedy previously barred by a statute of limitations, while simultaneously recognizing that the statute does not operate to revive a right that has been extinguished by a statutorily enacted statute of repose. These common-sense principles recognizing well-established

distinctions between statutes of limitation and statutes of repose are no different under Ohio's analytical framework, and the same conclusion should therefore result.

2. Courts finding a savings statute applies to a medical-malpractice statute of repose rely on a different or flawed analytical framework.

AMCNO acknowledges that there are some courts in other jurisdictions that find savings statutes apply to extend a statute of repose. But the courts that do so overlook, conflate, or fail to consider altogether the differences between a statute of repose and a statute of limitation. *See, e.g.*, *Atwood*, 2018 WL 3956766 (discussing the definition of a statute of repose and looking at this Court's holding in *Ruther* and *Antoon*); *Vesolowski v. Repay*, 520 N.E.2d 433 (Ind.1988) (holding Indiana's savings statute saved a medical-malpractice action, however, the medical-malpractice legislation was a *statute of limitation* rather than a *statute of repose*); *Limer v. Lyman*, 608 N.E.2d 918, 920 (Ill. App.1993) (holding the savings statute applied to the plaintiff's medical-malpractice claims that were otherwise barred by the statute of repose, because, unlike Ohio, Illinois considers statutes of limitations and statutes of repose to be *the same thing*); *See v. Hartley*, 257 Kan. 813, 820, 896 P.2d 1049, 1053 (1995) (finding a savings statute applied to medical-malpractice statutes of repose and statutes of limitations because, again unlike Ohio, Kansas considers the differences between the two statutes as "semantics" and "basic"); *Cronin v. Howe*, 906 S.W.2d 910, 914-15 (Tenn.1995) (holding the savings statute applied to the plaintiff's claims that were otherwise barred by the statute of repose based on statutory interpretation, and avoiding the procedural versus substantive analysis finding it was not "decisive").

The analytical frameworks of these jurisdictions are either flawed or conflate statutes of limitations with statutes of repose, resulting in an analytical framework different from

what should be the analytical framework under Ohio law. By doing so, these jurisdictions essentially (1) expand the purpose of savings statutes by allowing it to revive a right, and (2) frustrate the purpose of a statute of repose, which is that after a certain time a defendant is free from liability. *California Pub. Employees' Ret. Sys.*, 137 S. Ct. at 2049, quoting *CTS Corp.*, 573 U.S. at 8-9. This result should not be same under Ohio law.

C. Public-policy interests support this rule of law as well.

Policy considerations are not ordinarily relevant when applying a clear, unambiguous statute. *Stewart v. Vivian*, 151 Ohio St.3d 574, 2017-Ohio-7526, 91 N.E.3d 716, ¶ 30. Even so, important public-policy interests are at risk and merit considering future repercussions if the savings statute is found to apply to extend the statute of repose contrary to the General Assembly's stated intent.

For one, the First District took a dismissive stance on public-policy interests and essentially created a case-by-case test to determine whether those interests should be considered. For example, the appellate court found the savings statute "compatible" with the goals of R.C. 2305.113(C) because applying it "at most, extend[ed] the statute of repose by one year." *Wilson*, 2019-Ohio-3880, ¶ 31. This is demonstrably inaccurate on its face. A medical claim, for example, could be filed three years after the alleged negligent act (by operation of the discovery rule), litigated for another three years, dismissed under Civ.R. 41(A), and, if the savings statute applies, refiled just shy of the one-year savings period. This means that physicians might find themselves defending a claim seven or eight years—or, as in this case, 10 years—after the alleged negligent acts took place.

Indeed, some trial court decisions refusing to dismiss cases refiled after the statute of repose had run fall squarely into this category. In *Casares v. Mercy St. Vincent Medical Center*,

Lucas C.P. No. CI201502090, 2018 WL 7437019 (Dec. 27, 2018), for example, the medical care in dispute was provided in 2010, suit was filed in 2012, voluntarily dismissed by the plaintiff in 2014, and refiled in 2015. Because the court allowed the case to move forward even though the refiling was more than four years beyond the events in question, it languished for another four years, proceeded to trial in 2019 resulting in a defense verdict, and is presently on appeal on other issues.[4]

Other cases have similarly languished when the savings statute is inappropriately applied. *See, e.g., Wallace v. Costa*, Cuyahoga C.P. No. CV-16-871593, 2016 WL 8678013 (Dec. 16, 2016) (applying the savings statute where the procedure was performed in 2012, the case filed in 2014, voluntarily dismissed in 2015, refiled in 2016, and ultimately dismissed with prejudice in 2018); *Linehan v. Ohio State Univ. Med. Ctr.*, Ct. Cl. No. 2017-00908JD, 2018 WL 1611224 (Mar. 23, 2018) (applying the savings statute where the event in question occurred in 2010, suit was filed in 2012, voluntarily dismissed in 2016, refiled in 2017, and finally dismissed with prejudice in 2019). As shown, applying the savings statute to extend the statute of repose does not merely "extend[] the statute of repose by one year" as the First District imprecisely reasoned. Instead, when inappropriately applied, it forces medical providers to litigate sometimes decade-old claims contrary to the express purpose of the statute of repose.

But that was not all. By favoring the savings statute over the statute of repose under the guise that it was disfavoring "resolution of cases on technicalities," the First District discounted the well-recognized policy interests of "restricting indefinite liability" and

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[4] *Casares v. Lewis*, 6th Dist. Lucas No. L-10-1043.

ensuring "certainty and predictability" by replacing those interests with a case-by-case test to determine if those policy interests are at stake. *Wilson*, 2019-Ohio-3380, ¶ 32. But this Court in *Ruther* did not recognize those policy interests so they could be part of a case-by-case test for courts to determine if the statute of repose should be applied. *See Ruther*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 19. On the contrary, they are interests that support applying the statute of repose as written, not to determine if it *may* apply.

Indeed, the statute of repose is mandatory in its directive: "[n]o action * * * shall be commenced" on a medical claim more than four years after the alleged negligent act." R.C. 2305.113(C)(1). And the consequence is equally mandatory: if an action is not commenced within that time, "any action upon that claim is barred." R.C. 2305.113(C)(2). The First District's truncated analysis transforms *Ruther* into something it is not and fails to account for the many other valid policy interests, including unavailable witnesses or evidence, faded memories, changing technology that carries with it changing standards of care, the burden of maintaining documents, and altered financial situations—all of which are reasons expressly given by the General Assembly and supported by this Court's jurisprudence.

And lastly, the First District never addressed the gamesmanship that led to the voluntary dismissal of the underlying cases in Butler County in the first instance. The need for invoking the savings statute in these cases came about not because of some inadvertent error giving rise to a failure otherwise than on the merits, but as a conscious act of forum shopping after four earlier trials involving the same defendants yielded defense verdicts. Allowing the savings statute to be used in this manner and for this reason makes a mockery of the avoiding-resolving-cases-on-technicalities principle relied upon by the court below and encourages the very gamesmanship that took place here.

Finally, the stated goal of the legislation codifying R.C. 2305.113 is to protect access to quality medical care. As the General Assembly said, Ohio "has a rational and legitimate state interest in stabilizing the cost of health care delivery." Am.Sub.S.B. No. 281, Section 3(A)(3). It noted many malpractice insurers were refusing to write coverage in Ohio, and that medical providers in turn were having difficulty procuring affordable malpractice insurance, leading "health care practitioners, including a large number of specialists, [to be] forced out of the practice of medicine altogether as a consequence." *Id.*, Section 3(A)(3)(b), (c). The General Assembly's stated goals in enacting tort reform were to "stem the exodus of medical malpractice insurers from the Ohio market" so as to "ensur[e] the availability of quality health care for citizens of this state" while "preserv[ing] the right of patients to seek legal recourse for medical malpractice." *Id.*, Am.Sub.S.B. No. 281, Section 3(B)(1))-(4).

The ensuing years since medical malpractice reform took effect in 2003 demonstrate that these goals have had some success. According to the Ohio Department of Insurance, the yearly number of claims made against health care providers decreased from 5,051 in 2005 to 2,428 in 2017, and the costs of defending claims that predate Am.Sub.S.B. No. 281[5] far exceed those for claims to which the law applies.[6] More significantly, unlike in 2003, professional liability carriers now consider Ohio to be a low-loss cost state for purposes of issuing policies, a far more favorable rating than other surrounding states such as Michigan,

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[5] The claims not subject to Am.Sub.S.B. No. 281 consist mostly, if not entirely, of cases involving minors, for whom the statutes of limitations and repose were tolled until they reached adulthood. In cases where the date of the alleged negligent event predates April 10, 2003, the claim would not be subject to the provisions of the Act.

[6] Ohio 2017 Medical Professional Liability Closed Claim Report, 9-10, https://iop-odi-content.s3.amazonaws.com/static/Legal/Reports/Documents/2017ClosedClaimReport.pdf (last accessed Apr. 3, 2020).

Pennsylvania, Kentucky, New York, and Illinois.[7] This data confirms that Am.Sub.S.B. No. 281 has been effective in ensuring that the cost of professional liability insurance coverage does not act as a barrier to recruiting and retaining physicians in Ohio. The four-year statute of repose has brought a level of certainty to the evaluation process for writing physicians' insurance policies, which furthers the overarching objective of maintaining access to quality and affordable health care—an especially important goal today in these uncertain times. The statute of repose has been a key component of the law's overall success.

IV. Conclusion

This Court's jurisprudence and the General Assembly's intent support finding that the savings statute does not apply to extend the four-year statute of repose. The decision of the First District Court of Appeals should be reversed and the decision of the trial court dismissing the underlying stale claims should be reinstated.

Respectfully submitted,

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[7] *See*, *e.g.,* 2019 Benchmark Study of Healthcare Professional Liability Claims, 24, https://www.zurichna.com/-/media/project/zwp/zna/docs/kh/hc/2019-benchmark-study-of-healthcare-professional-liability-claims.pdf?la=en (last accessed Apr. 3, 2020).

PROOF OF SERVICE

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