No. 2011-0899

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
WARREN COUNTY, OHIO
CASE NO. CA2010-07-066

TRACY RUTHER, etc., et al.,

Plaintiffs-Appellees,

v.

GEORGE KAISER, D.O., et al.,

Defendants-Appellants.

BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANTS

John D. Holschuh, Jr. (0019327)
Sarah Tankersley (0068856)
SANTEN & HUGHES
600 Vine St., Suite 2700
Cincinnati, OH 45202
Tel: (513) 721-4450
Fax: (513) 721-0109
E-mail: SBT@santen-hughes.com

Attorneys for Appellees Tracy Ruther, Individually and as the Administrator of the Estate of Timothy Ruther

Susan M. Audey (0062818)
TUCKER ELLIS & WEST LLP
925 Euclid Ave., Suite 1150
Cleveland, OH 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: susan.audey@tuckerellis.com

Attorney for Amicus Curiae Ohio Association of Civil Trial Attorneys

John B. Welch (0055337)
Karen L. Clouse (0037294)
ARNOLD TODARO & WELCH
580 Lincoln Park Blvd., Suite 222
Dayton, OH 45429-3493
Tel: (937) 296-1600
Fax: (937) 296-1644
E-mail: jwelch@arnoldlaw.net
kclouse@arnoldlaw.net

Attorneys for Defendants-Appellants George Kaiser, D.O. and Warren County Family Practice Physicians, Inc.

Anne Marie Sferra (0030855)
Bridget Purdue Riddell (0082502)
BRICKER & ECKLER LLP
100 South Third St.
Columbus, OH 43215
Tel: (614) 227-2300
Fax: (614) 277-2390
E-mail: asferra@bricker.com
briddell@bricker.com

Attorney for Amici Curiae Ohio Hospital Association, Ohio State Medical Association, American Medical Association, Ohio Osteopathic Association, and Ohio Alliance for Civil Justice

TABLE OF CONTENTS

Page

Table of Authorities ii

I. Interest of Amicus Curiae 1

II. Statement of Facts 2

III. Argument 3

Proposition of Law 3

The medical malpractice statute of repose contained in O.R.C. §2305.113(C) does not violate the open courts provision (Section 16, Article I) and is therefore constitutional. 3

A. *Hardy* cannot be reconciled with *Groch* and should be overruled. 5

B. Alternatively, *Hardy* should be limited to its facts and to the specific statute of repose at issue in that case. 10

IV. Conclusion 12

CERTIFICATE OF SERVICE 13

APPENDIX

Opinion of the Twelfth Appellate District (Apr. 11, 2011) 1-10

TABLE OF AUTHORITIES

Page

Cases

Arbino v. Johnson & Johnson,
116 Ohio St.3d 468, 2007-Ohio-6948 ..... 10, 11

Brennaman v. RMI Co.
(1994), 70 Ohio St.3d 460 10

Flowers v. Walker
(1992), 63 Ohio St.3d 546 6

Gaines v. Preterm-Cleveland, Inc.
(1987), 33 Ohio St.3d 54 11

Groch v. Gen. Motors Corp.,
117 Ohio St.3d 192, 2008-Ohio-546 ..... passim

Hardy v. VerMeulen
(1987), 32 Ohio St.3d 45 ..... passim

McClure v. Alexander,
2d Dist. No. 2007 CA 98, 2008-Ohio-1313 7

Metz v. Unizan Bank
(May 7, 2008), N.D.Ohio No. 5:05 CV 1510, 2008 WL 2017574 ..... 7, 8

Mominee v. Scherbarth
(1986), 28 Ohio St.3d 270 11

Ohio Apt. Assn. v. Levin,
127 Ohio St.3d 76, 2010-Ohio-4414 9

Oliver v. Kaiser Community Health Found.
(1983), 5 Ohio St.3d 111 ..... passim

Sedar v. Knowlton Constr. Co.
(1990), 49 Ohio St.3d 193 ..... passim

State v. Bodyke,
126 Ohio St.3d 266, 2010-Ohio-2424 8

Page

Westfield Ins. Co. v. Galatis,
100 Ohio St.3d 216, 2003-Ohio-5849 9

Statutes

R.C. 2305.113(C) ..... passim

R.C. 2305.113(D)(1) 11

R.C. 2305.113(D)(2) 11

S.B. No. 281 1

Constitutional Provisions

Ohio Constitution, Article I, Section 16 ..... 8, 12

I. Interest of Amicus Curiae

The Ohio Association of Civil Trial Attorneys (OACTA) is a statewide organization comprised of more than 500 attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits. OACTA has long been a voice in the ongoing effort to ensure that the civil justice system is fair, efficient, and just.

To enhance the fairness and efficiency of Ohio medical malpractice law, the General Assembly enacted R.C. 2305.113(C) as part of S.B. No. 281 to address concerns with the availability of relevant evidence and evolving standards of care by specifying a four-year window for asserting medical claims. S.B. No. 281, Section 6(b), (d). In finding R.C. 2305.113(C) unconstitutional as applied to the medical claims asserted in this case, the Twelfth Appellate District effectively reduced the medical malpractice statute of repose to a dead letter, subjecting Ohio medical practitioners, hospitals, and medical institutions to the unique burden of defending claims made indefensible by the passage of time.

This case requires the Court to reconcile its evolving right-to-remedy jurisprudence—which requires a remedy only for accrued claims giving rise to "vested" rights[1]—with its medical malpractice rules for accrual—which provide that a medical malpractice claim accrues when the claimant discovers, or should have discovered, the

---

[1] *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶142; *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 202.

resulting injury.[2] Relying on *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, the court below erroneously concluded that the current medical malpractice statute of repose barred a "vested" right and was "not substantially different" than the earlier version found unconstitutional in *Hardy*. App. Op., ¶38, Appx. 9-10. In doing so, the appellate court, like the trial court before it, not only failed to appreciate the differences between R.C. 2305.113(C) and earlier versions of the statute, but also failed to appreciate the implications of this Court's teaching that a medical claim "accrues" when the claimant discovers, or should have discovered, the resulting injury. Since there is no allegation in this case that any injury was discovered before the expiration of the four-year repose period, the plaintiffs never possessed an accrued medical claim. Because an unaccrued medical claim is not a "vested" right, there is no affront to the right-to-remedy constitutional guarantee when the statute of repose is applied to an unaccrued claim. This is precisely how a true statute of repose operates and how it operated here.

OACTA therefore urges this Court to reverse the decision of the Twelfth Appellate District, overrule *Hardy* or limit it to its facts, and find the newly enacted medical malpractice statute of repose constitutional as applied here.

II. Statement of Facts

OACTA concurs in the Statement of the Case and Facts contained in Appellants' Merit Brief. The critical facts for the appealed issue are:

- Timothy Ruther was a patient of Appellant George Kaiser, D.O., and had laboratory tests done in 1995, 1997, and 1998, which allegedly reported elevated liver enzymes;

[2] *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, syllabus.

- In late 2008—more than ten years after the last of the laboratory tests—Ruther is diagnosed with liver cancer;
- In May 2009, Ruther and his wife Appellee Tracy Ruther filed a complaint asserting a medical claim against Dr. Kaiser and his medical group; they alleged that Dr. Kaiser failed to act on the allegedly abnormal laboratory test results; and
- Ruther died a month later, and the complaint was amended to substitute Tracy Ruther as administrator of his estate and to add a claim for wrongful death.

These facts fit squarely within the type of medical claim barred by the medical malpractice statute of repose. The lower courts' conclusion that R.C. 2305.113(C) barred Appellee's medical claim "after it had already vested, but before she or the decedent knew or reasonably could have known about the claim,"[3] ignores this Court's medical malpractice jurisprudence establishing that a medical claim "accrues"—and therefore "vests"—when the claimant discovers, or should have discovered, the resulting injury. *Oliver*, 5 Ohio St.3d 111, syllabus. Because neither Appellee nor Ruther discovered any resulting injury until sometime in 2008—they had no "vested" right for which they were entitled to a remedy.

III. Argument

Proposition of Law

> **The medical malpractice statute of repose contained in O.R.C. §2305.113(C) does not violate the open courts provision (Section 16, Article I) and is therefore constitutional.**

The appellate court below premised its holding that R.C. 2305.113(C) is unconstitutional as applied to Appellee's medical claim on two grounds. First, it found

[3] App. Op. at ¶38, Appx. 10.

that this Court's reasoning in *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, did not apply because *Groch* involved a different statute of repose that admittedly potentially barred a claim before that claim vested. Relying on *Hardy*, the court reasoned that the medical malpractice statute of repose at issue here—like the statute of repose at issue in *Hardy*—barred Appellee's claim "after it had already vested, but before she or the decedent knew or reasonably could have known about the claim." App. Op. at ¶38, Appx. 10. Second, although the court acknowledged that the statute of repose at issue here is "not identical" to the earlier version found unconstitutional in *Hardy*, the court nonetheless found that the new statute was "not substantially different" and therefore further justified its finding that the new statute is unconstitutional. Id.

Neither ground provides a basis to find R.C. 2305.113(C) unconstitutional as applied. The court's reliance on *Hardy* for finding that Appellee's claim "vested" ignores well-established precedent from this Court that a medical claim "vests" when it accrues, which occurs when the claimant discovers, or should have discovered, the resulting injury. *Oliver*, 5 Ohio St.3d 111, syllabus. Because an undiscovered injury cannot give rise to an accrued cause of action, no "vested" medical claim existed. It therefore makes no difference that a different statute of repose was at issue in *Groch* because the same analysis for constitutionality applies. And as applied here, the new statute operates, like the statute of repose at issue in *Groch*, to bar Appellee's action before it arose, which is precisely as a true statute of repose should operate.

In contrast, *Hardy* never considered whether a medical malpractice claim "vested"; it merely assumed that the right-to-remedy guarantee applied to an unaccrued

medical malpractice claim. This unreasoned assumption is irreconcilable with this Court's precedent in *Groch* and should either be overruled or limited to its facts.

A. *Hardy* cannot be reconciled with *Groch* and should be overruled.

This Court reaffirmed in *Groch* that there is a "critical distinction" between a statute of repose and a statute of limitation. *Groch*, 117 Ohio St.3d 192, 2008-Ohio-547, ¶142. A statute of limitations "'limits the time in which a plaintiff may bring suit *after* the cause of action accrues,'" while a statute of repose "potentially bars a plaintiff's suit *before* the cause of action arises.'" (Emphasis sic.) Id., quoting *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 195. As such, a true statute of repose "does not deny a remedy for a vested cause of action but, rather, bars the action before it ever arises." Id.

Hardy recognized this critical distinction yet nonetheless found that because the plaintiff did not become aware of his injury until after the four-year repose period expired "his cause of action was extinguished before he could act upon it." *Hardy*, 32 Ohio St.3d at 45-46. The Court reached this conclusion even though it acknowledged that a true statute of repose has "the effect of denying a remedy to one before it accrues" and that a medical malpractice cause of action does not accrue until the patient discovers, or should have discovered, the resulting injury. Id. at 46, fn. 3, citing *Oliver*, 5 Ohio St.3d 111. *Hardy* did not explain why or how the right-to-remedy could attach to an unaccrued claim; it merely assumed without analysis that the right applied to the plaintiff's unaccrued medical claim.

This gap in analysis has spawned insupportable attempts to distinguish *Hardy*. In *Sedar*, 49 Ohio St.3d 193, for example, the constitutionality of the then-effective ten-year statute of repose for product liability actions was at issue. There a college student was allegedly injured by a product manufactured more than 20 years earlier. Relying on *Hardy* and arguing that the statute denied a right to a remedy before the student knew he had a cause of action, this Court found *Hardy* distinguishable because the medical malpractice statute of repose took away "an existing, actionable negligence claim before the injured person discovered it." Id. at 201. In contrast, the Court reasoned, the products liability statute of repose prevented what might otherwise have been a cause of action from ever arising. Id. There was no discussion of when a medical malpractice cause of action arises, even though *Hardy* acknowledged, and subsequent precedent confirmed, that no medical malpractice claim could arise before any resulting injury was discovered. See, e.g. *Oliver*, 5 Ohio St.3d 111, syllabus; see, also, *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 548.

Relying on *Sedar*'s distinction and ostensible blessing,[4] other courts followed suit. First, this Court in *Groch* adopted *Sedar*'s distinction. There, the Court merely restated that the medical malpractice statute of repose at issue in *Hardy* and like cases "took away an existing, actionable negligence claim" before the injured person discovered the injury. *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶153. Like *Sedar*, there was no discussion

[4] Although this Court, in *Brennaman v. RMI Co.* (1994), 70 Ohio St.3d 460, subsequently overruled *Sedar* and found *all* statutes of repose unconstitutional, the Court in *Groch* limited *Brennaman* to its facts and the particular statute of repose at issue, and reinstated *Sedar*. *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶146, 148.

or analysis as to when a cause of action accrues for medical claims, nor was there any reference to this Court's decision in *Oliver*.

After *Groch*, other courts did the same. The Second Appellate District in *McClure v. Alexander*, for example, merely restated *Sedar*'s distinction and then quoted the very same existing-actionable-negligence-claim language relied upon in *Groch*. *McClure*, 2d Dist. No. 2007 CA 98, 2008-Ohio-1313, ¶22. In that case involving the construction statute of repose (R.C. 2305.131), the plaintiff alleged a contractor negligently constructed an addition to the plaintiff's home in 1989. It was not until 2004—well past the ten-year construction statute of repose—that the plaintiff discovered the walls to the addition had become rotten due to water damage. Id. at ¶1. Acknowledging that a true statute of repose may prevent a cause of action from accruing as opposed to merely preventing a plaintiff from bringing an action after accrual as a statute of limitations does, the appellate court concluded that the plaintiff's cause of action had not accrued before discovery and therefore never became a vested right. Id. at ¶51. So while *McClure* may pay lip service to *Sedar*'s existing-actionable-negligence-claim distinction, its ultimate holding is irreconcilable with *Hardy's* assumption that the right-to-remedy applies to unaccrued claims based on undiscovered injuries.

The confusion caused by *Hardy's* unreasoned assumption is also illustrated by the district court's decision in *Metz v. Unizan Bank* (May 7, 2008), N.D.Ohio No. 5:05 CV 1510, 2008 WL 2017574—a decision relied upon by the appellate court below. See App. Op. at ¶33, Appx. 8. Relying on both *Groch* and *Sedar* in analyzing a securities' statute

of repose, the district court found the perceived distinction to mean that *Hardy*, *Sedar*, and *Groch* all "remained valid precedent under Ohio law."

> 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.

Metz, 2008 WL 2017574, at *4.

But *Hardy*, *Sedar*, and *Groch* cannot co-exist in light of this Court's decision in *Oliver* and its progeny as to when a cause of action based on a medical claim accrues. And the Court made clear in *Oliver* that a medical malpractice claim accrues when the claimant discovers, or should have discovered, the resulting injury. Without discovery there can be no accrual, without accrual there can be no vesting, and without vesting there can be no affront to the right-to-remedy provision of Section 16, Article I of the Ohio Constitution.

Because *Hardy* is incapable of being reconciled with this Court's subsequent right-to-remedy jurisprudence, it should be overruled. OACTA is mindful that adherence to stare decisis ensures stability and predictability, and those objectives are at risk when prior precedent is overruled. This Court has suggested at times, however, that stare decisis "is not controlling in cases presenting a constitutional question." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶37. But even if it is and the analytical framework

of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, applies,[5] *Hardy* still should be overruled. *Galatis* teaches that an earlier decision should be overruled when (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision; (2) the decision defies practical workability; and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5848, ¶48.

All three requirements are satisfied here. First, as shown, *Hardy*'s unreasoned assumption that an unaccrued medical claim is a vested right is unsupportable under *Groch*, making *Hardy* at the very least undermined by *Groch* and, at best, wrongly decided in light of medical malpractice accrual jurisprudence under *Oliver* and its progeny. *Hardy*'s unjustified analytical leap—all the while noting that the medical malpractice statute of repose is not a statute of limitations but a statute of repose, yet transforming the statute of repose into a limitless statute of limitations—has spawned a line of cases that perpetuated its flawed reasoning. Second, *Hardy* defies practical workability in light of this Court's decision in *Oliver*. This Court made clear when a medical malpractice cause of action accrues and therefore vests, yet *Hardy* obscures that clarity, completely eviscerates R.C. 2305.113(C), and effectively authorizes a limitless period of time to hold physicians, hospitals, and other health care practitioners liable in tort for undiscovered medical injuries. And lastly, no undue hardship would be created if *Hardy* is overruled. On the contrary, it would bring predictability and consistency, and

[5] See, e.g., *Ohio Apt. Assn. v. Levin*, 127 Ohio St.3d 76, 2010-Ohio-4414, ¶27-31 (applying the *Galatis* three-part test when determining whether to overrule precedent in a constitutional challenge under the Uniformity Clause of the Ohio Constitution).

would place medical malpractice plaintiffs on equal footing with plaintiffs in other tort cases where a corresponding statute of repose acts to bar a claim before it accrues, as R.C. 2305.113(C) does here.

B. Alternatively, *Hardy* should be limited to its facts and to the specific statute of repose at issue in that case.

To the extent that the Court is reluctant to overrule *Hardy*, *Hardy* should be limited to the context in which it was decided—under a different statute of repose that, contrary to the appellate court's conclusion, is sufficiently different from the R.C. 2305.113(C) version at issue here. See, e.g., *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶147 (declining to overrule *Brennaman*, but limiting the rule announced there to those contexts in which it would be controlling; i.e., under the specific facts and statute presented).

Limiting *Hardy* to its facts as applied to the medical malpractice statute of repose at issue there comports with the analytical directives of both *Groch* and *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948. This Court in *Arbino* plainly stated that stare decisis does not work "to strike down legislation enacted by the General Assembly merely because it is similar to previous enactments" that the Court has found unconstitutional. Instead, the legislation under analysis must be "substantially the same" as that previously invalidated. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶23. When the new legislation is the result of "continued pursuit of reform" tailored "to address the constitutional defects" earlier identified by the Court, stare decisis is no bar. Id. at ¶24. Instead, the new statute warrants a "fresh review" as to its merits. Id.

That "fresh review" was reaffirmed in *Groch* where the Court emphasized that the constitutional analysis of any specific statute of repose turns on the "particular features" of the applicable statute and must "be evaluated narrowly within its specific context." *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶138.

Evaluating R.C. 2305.113(C) afresh, narrowly, and with attention to its particular features, the earlier version of the medical malpractice statute of repose at issue in *Hardy* is sufficiently different to avoid blanket application of stare decisis here. For one, the new statute does not apply to minors. Compare R.C. 2305.113(C) with *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, syllabus (finding an earlier version of the medical malpractice statute of reposed unconstitutional as applied to minors). Nor does the new statute provide less than a full year to assert any claim discovered in the four-year period. Compare R.C. 2305.113(D)(1) with *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, paragraph two of the syllabus (finding an earlier version of the medical malpractice statute of repose unconstitutional as applied to adults who discovered their injuries in the third year of the repose period but had less than a full year to assert their claims). And finally, the current statute does not apply to medical claims arising out of any "foreign object that is left in the body of the person making the claim." R.C. 2305.113(D)(2); cf. former R.C. 2305.11(B).

Like the statutes at issue in both *Arbino* and *Groch*, R.C. 2305.113(C) here is "more than a rehashing of unconstitutional statutes." *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶147; *Arbino*, 116 Ohio St.3d 468, ¶24. Instead, as shown, the new statute is "sufficiently different" from the version at issue in *Hardy* so that *Hardy* can be limited to

its facts and to contexts where the former statute controlled. Because those facts and that particular statute is not controlling here, if not overruled, *Hardy* can co-exist, as appropriately limited, with *Groch* and *Sedar*.

IV. Conclusion

R.C. 2305.113(C) impairs no vested right, nor is this statute "substantially similar" to previous versions found unconstitutional that would warrant blanket application of stare decisis. To the extent that *Hardy*'s unreasoned assumption that an unaccrued medical claim is a vested right and therefore supports finding R.C. 2305.113(C) violates Section 16, Article I of the Ohio Constitution, *Hardy* should be overruled or, alternatively, limited to its facts, which are not controlling here.

OACTA respectfully requests then that this Court reverse the decision below and find R.C. 2305.113(C) constitutional as applied here and as to all claimants seeking recovery for alleged acts of malpractice committed after the statute's April 11, 2003 effective date.

Respectfully submitted,

Susan M. Audey (0062818)
TUCKER ELLIS & WEST LLP
925 Euclid Ave., Suite 1150
Cleveland, OH 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: susan.audey@tuckerellis.com

Attorney for Amicus Curiae Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Jurisdiction** has been served this 8th day of December, 2011, by U.S. Mail, postage prepaid, upon the following:

John D. Holschuh, Jr.
Sarah Tankersley
SANTEN & HUGHES
600 Vine St., Suite 2700
Cincinnati, OH 45202

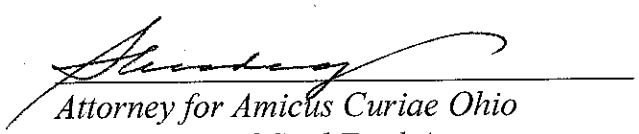
Attorneys for Appellee Tracy Ruther

John B. Welch
Karen L. Clouse
ARNOLD TODARO & WELCH
580 Lincoln Park Blvd., Suite 222
Dayton, OH 45429-3493

Attorneys for Defendants-Appellants George Kaiser, D.O. and Warren County Family Practice Physicians, Inc.

Anne Marie Sferra
Bridget Purdue Riddell
BRICKER & ECKLER LLP
100 South Third St.
Columbus, OH 43215

Attorneys for Amici Curiae Ohio Hospital Association, Ohio State Medical Association, American Medical Association, Ohio Osteopathic Association, and Ohio Alliance for Civil Justice



Attorney for Amicus Curiae Ohio Association of Civil Trial Attorneys

APPENDIX

[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,	:	OPINION 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.