ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 11-0899

TRACY RUTHER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF TIMOTHY RUTHER, DECEASED
Plaintiff-Appellee,

-vs-

GEORGE KAISER, D.O.; WARREN COUNTY FAMILY PRACTICE PHYSICIANS, INC.

Defendant-Appellants.

ON APPEAL FROM THE WARREN COUNTY COURT OF APPEALS
CASE NO. CA2010-07-066

BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION FOR JUSTICE

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INTRODUCTION OF *AMICUS CURIAE*

The *Amicus Curiae* now appearing before this Court is the Ohio Association for Justice ("OAJ"). The OAJ is comprised of over a thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

No attempt will be made by the OAJ to establish in this Brief that all types of statutes of repose are irreconcilable with the Ohio Constitution. By the same token, however, this Court's established precedents stop well short of suggesting that the General Assembly possesses unfettered authority to restrict and eliminate common law causes of action without concern for the fundamental guarantees of a right to a remedy and due process of law. The sole purpose of this Brief is simply to urge this Court to continue to adhere to the sensible compromise that was established for medical malpractice actions in *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 512 N.E.2d 626. That seminal opinion remains the law in Ohio and no sound justification exists for this Court to now override venerable principles of *stare decisis*.

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ARGUMENT

At the outset, it should be observed that Defendant-Appellants, George Kaiser, D.O. and Warren County Family Practice Physicians, Inc., are no longer disputing that Plaintiff-Appellee, Tracy Ruther, Administratrix, is entitled to a jury trial upon her wrongful death claim. The common pleas judge properly found that the time period for seeking this statutory remedy is governed solely by R.C. §2125.02, and Plaintiff easily satisfied the deadline. *Defendants' Merit Brief, Apx. A18-19.* The statute of repose set forth in R.C. §2305.113(C) therefore applies only to the survivorship claim.

There is little that the OAJ can add to the compelling reasoning that has been furnished by the Warren County Court of Common Pleas and the Twelfth Judicial District Court of Appeals. Those opinions offer a thorough analysis of the relevant constitutional issues and, with appropriate reservation, have concluded that R.C. §2305.113(C) is unconstitutional as applied to the particular facts of this case. The OAJ urges this Court to emphatically endorse these unerring rulings, which faithfully adhere to the precedent that was established in *Hardy,* 32 Ohio St.3d 45. In the remainder of this Brief, the *amicus curiae* will offer only a few additional thoughts with regard to the Proposition of Law that has been accepted for review.

PROPOSITION OF LAW NO. I: THE MEDICAL MALPRACTICE STATUTE OF REPOSE CONTAINED IN R.C. §2305.113(C) DOES NOT VIOLATE THE OPEN COURTS PROVISION OF THE OHIO CONSTITUTION, ARTICLE I, SECTION 16 AND IS THEREFORE CONSTITUTIONAL.

Section 16, Article I, of the Ohio Constitution proclaims that:

> 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

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> against the state, in such courts and in such manner, as may be provided by law.

This constitutional provision has been interpreted as providing all citizens with a right to a remedy. *Williams v. Marion Rapid Trans., Inc.* (1949), 152 Ohio St. 114, 117, 87 N.E.2d 334, 335; *Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421, 426, 1994-Ohio-64, 644 N.E.2d 298. "It is fundamental to the law of remedies that parties damaged by the wrongful conduct of others are entitled to be made whole." *Collini v. City of Cincinnati*, (1st Dist. 1993) 87 Ohio App.3d 553, 556, 622 N.E.2d 724, 726 (citations omitted). Injured parties must be afforded an opportunity at a reasonable time and in a reasonable manner to seek redress. *Burgess v. Eli Lilly & Co.*, 66 Ohio St.3d 59, 61-62, 1993-Ohio-193, 609 N.E.2d 140, 142.

This fundamental constitutional guarantee requires more than simply allowing the injured party to recover "some" compensation. Rather, "[w]hen 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." *Hardy,* 32 Ohio St.3d at 47 (citations omitted). This Court thus explained in *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 60, 514 N.E. 2d 709, that:

> Denial of a remedy and denial of a *meaningful* remedy lead to the same result: an injured plaintiff without legal recourse. This result cannot be countenanced. [emphasis original]

Almost twenty-five years ago, this Court invalidated a four year statute of repose for medical malpractice actions in *Hardy*, 32 Ohio St.3d 45. The plaintiff maintained that he had not discovered that the surgery on his right ear had been botched until roughly ten years after the physician-patient relationship had terminated. *Id.*, at 45. The trial judge dismissed the action on the basis of former R.C. §2305.11(B) and the

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appellate court affirmed. In reversing these decisions, the Ohio Supreme Court sagely reasoned that:

> 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.

Id., at 46. After examining the Open Courts/Right to a Remedy clause, the majority emphatically declared that:

> *** [A]s applied to the facts in the case *sub judice*, R.C. 2305.11 is in violation of Section 16, Article I of the Ohio Constitution. The language in the Constitution is clear and leaves little room for maneuvering. Our courts are to be open to those seeking remedy for injury to person, property, or reputation. [emphasis added]

Id., at 46.

Apparently, the General Assembly believed that there was indeed plenty of "room for maneuvering," as S.B. No. 281 was enacted effective April 11, 2003. R.C. §2305.113(C) now directs, in pertinent part, that:

> ***
>
> (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, <u>any action upon that claim is barred.</u> [emphasis added]

Rather obviously, this provision serves to prohibit claims in specified instances

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regardless of when they were either discovered or accrued. In contrast, the statute of repose that governs product liability actions generally provides that no such claim "shall accrue" once a period of ten years has elapsed from the entry of the product into the stream of commerce. *R.C. §2305.10(C)(1).*

Because of this critical distinction in the two basic species of statutes of repose, the logic of *Hardy*, 32 Ohio St.2d 45, was reaffirmed in *Groch v. General Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, 883 N.E. 2d 377. Despite the urging of the defendants and their army of *amici*, the majority refused to grant *carte blanche* authority to the legislature to extinguish common law remedies before they accrue. The *Hardy* opinion was thoroughly examined and left intact. *Id.*, ¶ 117-118 & 153. In the proceedings below, the common pleas judge and appellate court panel all unanimously concluded that *Hardy* remained as binding precedent and precluded the application of R.C. §2305.113(C) to Plaintiff's survivorship claim under the particular facts that had been established in the record.

Defendants and their *amici* have heaped praise upon *Sedar v. Knowlton Construction Co.* (1990), 49 Ohio St.3d 193, 551 N.E.2d 938, but are not actually interested in abiding by the decision's directives. After examining a ten year statute of repose that applied to improvements to real property, this Court took care to warn that:

> *** [T]he situation presented in medical malpractice cases, particularly in *Hardy*, is clearly distinguishable from the situation presented by the operation of R.C. 2305.131. 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. *Hardy, supra*, 32 Ohio St.3d at 48, 512 N.E.2d at 629. [emphasis added]

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Id., 49 Ohio St.3d at 201. Eighteen years later when this Court was again asked to overturn *Hardy* and its progeny, the majority continued to adhere to this sound reasoning:

> *** However, as we explained in *Sedar*, 49 Ohio St.3d at 202, 551 N.E.2d 938, 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 the contrary results here. [emphasis added]

Groch, 117 Ohio St.3d at 219-220 ¶ 153. Despite these admonishments, Defendants and their *amici* have continued to rely heavily upon Ohio authorities having nothing to do with medical malpractice statutes of repose in their effort to salvage R.C. §2305.113(C).

To their credit, Defendants have made no meaningful attempt to establish that the present medical malpractice statute of repose (R.C. §2305.113(C)) is somehow distinguishable in this case from the version that had been examined in *Hardy* (former R.C. §2305.11(B)). As the lower courts properly concluded, separating the two enactments is logically impossible. While some of the terms may vary, the end result is that claims are barred in most instances if they are not brought within four years of the violation of the standard of care, regardless of the date of discovery or accrual.

Curiously, Defendants have proclaimed that: "A plaintiff cannot use discovery of injury as both a shield and a sword, arguing for statute of limitation purposes that the cause of action does not accrue until there is a discovery of the resulting injury but

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arguing for statute of repose purposes that late discovery cannot bar a cause of action." *Defendants' Merit Brief, p. 12.* Actually, the position that was adopted by the lower courts is completely consistent. As a general rule, a "late discovery" of a claim tolls the statute of limitations. *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St. 3d 84, 90, 447 N.E. 2d 727, 732. Likewise, this Court recognized in the syllabus of *Hardy*, 32 Ohio St. 3d 45, that a statute of repose cannot constitutionally extinguish medical malpractice claims whenever the plaintiffs "did not know or could not reasonably have known of their injuries ***." The same legal principles are being applied uniformly to both statutes of limitations and statutes of repose. Defendants and their *amici* are simply refusing to grasp that R.C. §2305.113(C) has nothing to do with the timing of the claim "discovery" or "accrual" and seeks simply to bar the action after four years has elapsed from the violation of the standard of care.

Defendants have attempted to dance around the implications of *Hardy* with a tortured analysis of "vested rights." They maintain that Timothy Ruther, (the "Decedent") did not possess a cause of action "until 2008 when he discovered he had liver cancer and that certain previous lab tests detected elevated liver enzymes; until that discovery, he had no vested right." *Defendants' Merit Brief, pp. 8-9.* The contrived theory then goes that since R.C. §2305.113 would have barred the claim in 2002 (four years following the third office visit of October 21, 1998), no vested rights were really extinguished. *Id.*

In Defendants' view, statutes of repose are constitutionally permissible as long as they preclude claims before they are discovered. Presumably, R.C. §2305.113 would still be unenforceable in those situations where the claim was discovered and "vested" within four years of the negligent act. If the injured plaintiff was still receiving

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treatment from the tortfeasor so that the termination rule tolled the applicable statute of limitations, it could be years before a lawsuit had to be filed notwithstanding the statute of repose. See generally *Frysinger v. Leach* (1987), 32 Ohio St. 3d 38, 512 N.E. 2d 337, syllabus.

A moment should be taken to consider the implications that such an odd standard would have upon healthcare in Ohio. If Defendants' reasoning is adopted, medical providers will have strong incentives to delay the disclosure of episodes of malpractice until the four year statute of repose has expired. Once that deadline has elapsed, the patient can then be informed without fear of liability that a fatal illness was overlooked, infected instruments had been used during a procedure, or an imaging study had been misread. The General Assembly could not have possibly intended to create such a frightening situation. As the legislature has directed in R.C. §1.47(C), a strong presumption exists against any construction of a statute that produces unreasonable or absurd consequences. *Canton v. Imperial Bowling Lanes, Inc.* (1968), 16 Ohio St. 2d 47, 242 N.E. 2d 566, paragraph four of the syllabus; *State ex rel. Belknap v. Lavelle* (1985), 18 Ohio St. 3d 180, 181-182, 480 N.E. 2d 758.

There are a number of glaring flaws with Defendants' twisted logic, the most obvious of which is their representation that: "*** *Hardy* emphasized that the statute of repose was unconstitutional only to the extent that it divested a plaintiff of a vested right." *Defendants' Merit Brief, p. 5.* In truth, the majority opinion contains no such language. *Id.*, 32 Ohio St.3d 45-49. The concept of "vested rights" appears only in this Court's recognition that no one possesses such inviolate interests in the rules of common law. *Id.*, at 49. The argument that the General Assembly was only precluded from interfering with claims that had vested was advanced by Justice Wright, but his

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was a dissenting opinion. *Id.*, at 52-53.

The adoption of Defendants' long discredited "vested rights" theory would require *Hardy* to be overturned. In that instance, the surgeries had been performed in 1973 and 1974 but the malpractice was not discovered until 1984. *Id.*, 32 Ohio St.3d at 45. The lawsuit was then filed within the statute of limitations in 1985. *Id.* According to the instant Defendants' twisted logic, the four year statute of repose would have barred the claim in either 1977 or 1978, which was years before the plaintiff's rights "vested" upon the discovery of the malpractice in 1984. Former R.C. §2305.11(B) therefore should have been found to be a valid legislative enactment under those facts, but the *Hardy* majority held that it is was not. *Id.* at 48-49.

Defendants and their *amici* have plainly misconstrued *Hardy*, which does not revolve around whether the malpractice claim has been barred before any rights have "vested." The majority's concern was plainly with the manifest unfairness of closing the courthouse doors before the right to a recovery was discovered. *Id.*, 32 Ohio St.3d at 46. After reviewing numerous authorities that have been issued from courts across the United States, the majority then declared that:

> Accordingly we hold that R.C. 2305.11(B), as applied to bar a claim of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution. [emphasis added]

Id., at 47. In both *Seder*, 49 Ohio St. 3d at 201, and *Groch*, 117 Ohio St. 3d at 219-220, ¶153, this Court explicitly recognized that the key distinguishing aspect of *Hardy* was that claims were distinguished before they were discovered, not that "vested rights" had been found to have accrued. Since the instant Defendants have openly conceded that the Decedent could not have discovered the existence of his own claim until 2008,

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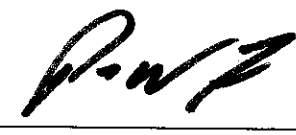
current R.C. §2305.11(B) could not constitutionally bar his recovery in 2002. *Defendants' Merit Brief, pp. 8-9.*

For sound reasons, Defendants have not attempted to establish that extraordinary circumstances somehow exist that will allow principles of *stare decisis* to be discarded and *Hardy* overturned under the standards established in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. As they undoubtedly appreciate, the *Hardy* opinion has furnished a simple and concise limitation on congressional authority that Ohio courts have been following without any apparent difficulty for nearly a quarter of a century. Not so long ago in *Groch* this Court refused to disturb the precedent that had been established in *Hardy*. *Groch*, 117 Ohio St.3d at 219-220 ¶153. Because the Warren County Court of Common Pleas and Twelfth Judicial District Court of Appeals did nothing more than follow the rule of law that had previously been established by this Court, their decisions should not be disturbed.

CONCLUSION

For the foregoing reasons, the OAJ urges this Court to uphold the vitality of *Hardy*, 32 Ohio St.3d 45, and affirm the lower courts in all respects.

Respectfully Submitted,



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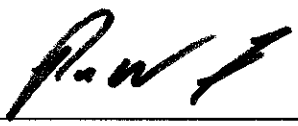

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