

## Medical Claims Subject to Four Year Statute of Repose Also Include Those Resulting in Wrongful Death

“Medical Claims” involve claims relating to the medical and/or hospital care of individuals “arising from medical care and treatment.” R.C. 2305.112(E). Under Ohio’s medical statute of repose, medical claims with few exceptions, must be commenced within four years of the act or omission in issue. R.C. 2305.112(C)(1) & (2). An evolving issue in the law relates to whether the four year medical malpractice statute of repose also applies to wrongful death claims that also fall within the statutory definition of a medical claim.

Two cases have come through the Ohio Court system finding that the four year statute of repose does indeed also apply to wrongful death claims. In *Smith v. Wyandot Memorial Hospital, et al.*, 2018-Ohio-2441, the Third District Court of Appeals held that a wrongful death claim that also falls within the statutory definition of a medical claim under R.C. 2305.113(E) is subject to the four year statute of repose. In *Smith*, there were multiple care providers who allegedly began providing substandard care and treatment around 2004. Mr. Smith later learned he had terminal kidney cancer that led to his death in 2015. Within two years of his death, a lawsuit was filed by the Fiduciary, Mrs. Smith. Clearly, the wrongful death claim was timely filed within the two year statute of limitations for wrongful death under R.C. 2125.01. However, the Wyandot County Court of Common Pleas, in Case No. 17CV0065, granted summary judgment in favor of all defendants. The Court found that the claims, although properly brought under the wrongful death statute of limitations, were subject to the four year statute of repose since they were medical claims as well. Notably, the wrongful death action was filed separately after Mr. Smith’s prior medical negligence action had been disposed of in the very same procedural manner. Mr. Smith’s Fiduciary claimed R.C. 2305.113(C) claims bar of four years does not apply to wrongful death in their appeal.

In *Smith*, the Third District Court of Appeals first looked to the legislative intent for R.C. 2305.113 and applied a plain language assessment. *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81 (1997). The Appellate Court focused on the provision that “any action” involving a medical claim not brought within four years of the negligence it is barred. Therefore, in their mind “any” means any! The Appellate Court further followed the Supreme Court in its determination that R.C. 2305.113 is a “true statute of repose.” *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686. The Court then looked to *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432 § 11 and its finding that a “Statute of repose bars any suit that is brought after a specified time since the defendant acted ...even if this period ends before the plaintiff has suffered a resulting injury. The Court also cited the Staré Decisis on such statutes in *Kerper v. Wood*, 48 Ohio St.613, 620 (1891). The Court went on to address the public policy reasons for certainty as to claims time period including also unavailable evidence and multiple other factors. The Court also cited to the legislator’s concern for the “distress posed to Ohio’s healthcare industry caused by the growing medical -malpractice litigation.”

Mr. Smith’s Fiduciary argued to the Third District that the statute of repose does not apply to wrongful death actions since they have their own statute of limitations under R.C. 2125.02 (D)(1). In *Daniel v. United States*, 977 F. Supp. 2d 777,780 (N.D. Ohio 2013), the Northern District of Ohio found that Ohio’s statute of repose does not apply to wrongful death actions. The Northern District focused on the Supreme Court of Ohio’s “discussion of the relation of medical malpractice and wrongful death statute of limitations.” *Fletcher v. Univ. Hosps. Of Cleveland*, 120 Ohio St.3, 167, 2008-Ohio-5379. The Third Appellate District rejected

this reasoning and found that statutes of repose are completely different than statutes of limitations. *CTS Corp. v. Walburger*, 134 S. Ct. 2175, 2182 (2014), See also *York v. Hutchins*, 12<sup>th</sup> Dist. Butler No. CA 2013-09-0173, 2014-Ohio-988. They noted a statute of limitations focus on the time of the plaintiff's injuries while a statute of repose focuses on the time of the Defendants' acts and/or omissions.

Finally, the Third Appellate District focused on the Eighth Appellate District's decision in *Fletcher v. Univ. Hosps. Of Cleveland*, 172 Ohio App.3d 153, 2007-Ohio-2778. In *Fletcher*, the Eighth District found that an Affidavit of Merit was required with respect to a wrongful death claim based solely on a medical claim. *Id.* at § 8. Since Affidavits of Merit are required in a wrongful death claims involving a medical claim, the statute of repose must also apply to a wrongful death claim the Court reasoned. The Court therefore affirmed the trial court's granting of both motions to dismiss as well as motion for summary judgment.

Medical malpractice practitioners should also be aware of *Margaret Ann Ostrowski v. Tessa Meridores, et al.*, Cuyahoga County Court of Common Pleas Case Number CV-17-873873, Judge Kathleen Sutula, where the Court the also granted summary judgment on a wrongful death statute of repose issue. *Ostrowski* involved a medical malpractice and wrongful death action involving prescription medicines provided to Ostrowski and an eventual overdose death on March 21, 2013. Defendants likewise focused on *Antoon*. In *Ostrowski*, the Defendant alleged that all acts and omissions four years prior to re-filing following a Civ. R. 41(A)(1)(a) should be barred. On February 12, 2018, Judge Kathleen Sutula wrote an opinion nicely assessing the statute of repose in light of the savings statute, the discovery and termination of patient relationship, and the savings statute's applicability. The Common Pleas Court in *Ostrowski* cited to *Fletcher* and found their analysis determinative upon it relating to the statute of repose and held the statute of repose applies to wrongful death matters since it "does not conflict with the policy considerations of R.C. 2125.01." The Common Pleas Court then determined that the savings statute should be liberally construed and has a relation back provision. The date of re-filing therefore related back to the original filing date. The Court then lastly assessed whether the termination of relationship or discovery rules applied under R.C. 2305.11(A). The Court noted the tolling effects of the statute conflict with the statute of repose. The Court found that the purpose of the statute of repose was to prevent a statute of limitations in perpetuity. The Court look to *Hardy* and *Antoon* for guidance in finding the causes of action such as the one at bar. It determined that R.C. 2305.113(C) is a true statute of repose to both vested and non-vested actions and to "hold otherwise would render the explicit language of R.C. 2305.113 (C) meaningless."

The takeaway from evolving caselaw in Ohio is that the statute of repose in medical actions has a broad and sweeping effect on vested and non-vested actions. Saving statute time is still apparently protected for now on a refile as are claims for statutory tolling in minority and unsound mind matters. Therefore, based on the evolution of current caselaw, if anything smells, walks or talks like a medical claim, in order to be safe, it should be filed within four years of the act and/or omission in issue. Otherwise, very recent caselaw in Ohio indicates that such claims, no matter how pled, could be seriously subject to motion to dismiss under Civ. R. 12(B) or summary judgment under Civ. R. 56. The only way to prevent a continuing legal evolution in this regard is through final interpretation by the Supreme Court or legislative change.