

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

Tracy Ruther, Individually and as Administrator of the Estate of Timothy Ruther, Deceased, Plaintiffs	:	CASE NO. 09 CV 74405
	:	JUDGE PEELER
	:	
v.	:	
George Kaiser, D.O., et al, Defendants.	:	<u>DECISION AND ENTRY DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT</u>

Pending before the Court is the Motion for Summary Judgment of Defendants, George Kaiser, D.O. and Warren County Family Practice Physicians, Ins., on the claims of Plaintiff, Tracy Ruther, Individually and as Administrator of the Estate of Timothy Ruther, Deceased, for medical malpractice and wrongful death. For the reasons set forth below, Defendants' Motion is denied.

The Facts

The relevant facts disclose that Timothy Ruther was a patient of George Kaiser, D.O. ("Dr. Kaiser"). Dr. Kaiser was practicing at Warren County Family Physicians, Inc. ("WCFP"). From 1995 to 1998, Dr. Kaiser ordered lab work done on Ruther, which included tests to determine Ruther's liver enzyme levels. It is disputed when Ruther ceased being a patient of Dr. Kaiser, but it appears to be sometime in or prior to 2006. In 2008, Ruther began suffering abdominal cramps, and later that year he was diagnosed with liver cancer.

In May 2009, Ruther and his wife, Tracy Ruther ("Plaintiff"), filed suit against the Defendants, alleging medical malpractice and loss of consortium. However, Ruther died on

June 22, 2009. Plaintiff then amended the complaint to add a claim for wrongful death.

Plaintiff alleges a claim for medical malpractice against Dr. Kaiser. Specifically, Plaintiff contends that Dr. Kaiser deviated from the accepted standard of care in failing to properly assess, evaluate, and respond to Ruther's abnormal laboratory results, including elevated liver enzymes. Plaintiff further alleges a claim for wrongful death against Dr. Kaiser. Finally, Plaintiff argues that R.C. 2305.113(C) is unconstitutional.

Defendants, on the other hand, argue that Plaintiff's medical malpractice claim is time-barred by statute of limitation set forth in R.C. 2305.113, which they argue is not unconstitutional. Defendant further argues that, since Plaintiff's wrongful death claim arises from the same set of facts and circumstances as the medical malpractice claim, it is also time-barred.

The Summary Judgment Standard

Summary judgment is a procedure for moving beyond the allegations in the pleadings and analyzing the evidentiary materials in the record to determine whether an actual need for a trial exists.¹ "Summary judgment is proper when 1) no genuine issue as to material fact remains to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."² "Regardless of who may have the burden of proof at trial, the burden is upon the party moving for summary judgment to establish that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law."³ "After a proper summary judgment motion has been made, the nonmoving party must supply evidence that a material issue of fact exists, evidence of a

¹ *Ormet Primary Aluminum Corp. v. Employers' Ins. of Wasau* (2000), 88 Ohio St.3d 292, 300.

² *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346.

³ *AAA Enterprises, Inc. v. River Place Comm. Urban Redev. Corp.* (1990), 50 Ohio St.3d 157, paragraph 2 of the syllabus.

possible inference is insufficient.”⁴

Defendants’ Motion for Summary Judgment

1. Wrongful Death

The statute of limitations for a wrongful death claim is governed by R.C. 2125.02, which provides that a wrongful death action must be filed within two years of the date of death of the decedent. In the instant case, Ruther passed away in June 2009. Plaintiff amended the complaint to add a wrongful death claim August 2009, well before the two-year statute of limitations had expired.

Defendant contends that Plaintiff’s claim is a “medical claim,” which falls under the statute of limitations set forth in R.C. 2305.113. Ohio law is clear, however, that claims for medical malpractice and wrongful death are separate and distinct claims.⁵ Wrongful death is a statutory cause of action authorized by R.C. Chapter 2125, which differs from a medical malpractice which is a common law cause of action.⁶

Specifically, the Ohio Supreme Court has held: “Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and the recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong.”⁷

The Third District Court of Appeals expanded the Supreme Court’s holding when it found that, even though the plaintiff’s medical malpractice claim was time-barred, the

⁴ *Cox v. Commercial Parts & Serv.* (1994), 96 Ohio App.3d 417, 421.

⁵ *Koler v. St. Joseph Hosp.* (1982), 69 Ohio St.3d 477, 479, citing *Klema v. St. Elizabeth's Hosp.* (1960), 170 Ohio St. 519, 521.

⁶ *Id.*

⁷ *Id.*, citing *Klema*, 170 Ohio St. at 521, citing *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U.S. 648.

wrongful death claim had not.⁸ In *McKee*, the decedent contracted silicosis, but failed to file malpractice claim within the then two-year statute of limitations. However, the decedent's administratrix filed a wrongful death action within two years of his death. The Third District upheld the administratrix's wrongful death action as timely filed.⁹

Similarly, the Sixth Appellate District upheld a wrongful death action where the decedent learned he had berylliosis in 1975, passed away in 1987, and his administratrix filed the wrongful death action in 1989.¹⁰ The court held that, although the decedent's medical malpractice claim, filed in 1989, was time-barred, the wrongful death action, filed within two years of the decedent's death, was timely filed.¹¹ "Thus, the *Anderson* court held that the wrongful death claim filed within two years of the decedent's death was not barred due to the decedent's failure to timely pursue his related tort action while he was alive."¹²

Turning back to the case at hand, Plaintiff's wrongful death action is separate and distinct from the medical malpractice claim. Since R.C. 2125.02 provides for the filing of a wrongful death action within two years of the death of the decedent, and Plaintiff amended the complaint two months after Ruther's death, Plaintiff's wrongful death action was timely filed. Defendants' motion for summary judgment on this claim is denied.

2. Medical Malpractice

Defendants argue that R.C. 2305.113 requires a plaintiff to file a medical malpractice claim within four years of the act or occurrence constituting the alleged basis of the medical claim. Defendants contend that since the lab results at issue were available in 1998, and Plaintiff did not file his medical malpractice claim until 2009, Plaintiff's claim is barred by the statute of repose. Plaintiff, on the other hand, contends that the medical malpractice claim is not time-barred because R.C. 2305.113(C) is unconstitutional. Specifically,

⁸ See, *Heck v. Thiem Corp.*, 19.94 Ohio App. LEXIS 5603, at *4, citing *McKee v. New Idea, Inc.* (1942), 44 N.E.2d 697, 717.

⁹ *Id.* at *5.

¹⁰ *Id.* at *6, citing *Anderson v. Brush-Wellman, Inc.* (1991), 77 Ohio App.3d 657.

¹¹ *Id.*

¹² *Id.*

Plaintiff argues that the statute, as applied to this case, is unconstitutional because it bars Plaintiff's claim before it even arose, thus violating the "open court rule."

Section 16, Article 1 of the Ohio Constitution provides, "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." One distinct guarantee contained in this provision is that "all courts shall be open to every person with a right to a remedy for injury to his person, property, or reputation, with the opportunity for such remedy being granted at a meaningful time and in a meaningful manner."¹³

"A party seeking constitutional review of a statute may proceed in one of two ways: present a facial challenge to the statute as a whole or challenge the statute as applied to a specific set of facts."¹⁴ "Statutes which have the effect of denying a remedy to one before it accrues have sometimes been described as statutes of repose and they differ from traditional statutes of limitations which impose a period of time for bringing suit after one's cause of action accrues."¹⁵ The case at hand deals with a challenge to a statute of repose as it is applied to a specific set of facts.

From 1996 to April 11, 2003, R.C. 2305.11(B) governed the time limitations for bringing a medical malpractice claim. R.C. 2305.11(B)(2) stated:

Except as to persons within the age of minority or of unsound mind, as provided by Section 2305.16 of the Revised Code:

(a) 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.

(b) If an action upon a medical, dental, optometric, or chiropractic claim is

¹³ *Groch v. General Motors Corp.* (2008), 117 Ohio St.3d 192, citing *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193.

¹⁴ *Arbino v. Johnson* (2007), 116 Ohio St.3d 468 (internal citations omitted).

¹⁵ *Hardy v. Vermeulen* (1987), 32 Ohio St.3d 45, fn. 2.

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.

The Ohio Supreme Court, in *Hardy v. Vermeulen*¹⁶, found this statute to be unconstitutional. Specifically, the Court held in the syllabus, "R.C. 2305.11(B), as applied to bar the claims 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 1 of the Ohio Constitution." In other words, the malpractice had already occurred and the plaintiff had already suffered the injury, but he could not bring forth a medical malpractice claim because he did not discover, nor reasonably could have discovered, either within four years. The Court found that by doing this, the statute "accomplishes one purpose -- to deny a remedy for the wrong."¹⁷ Put another way, "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."¹⁸ Such a statute of repose violates the right-to-a-remedy provision of Section 16, Article 1 of the Ohio Constitution.

On April 11, 2003, the legislature amended the statute of repose by enacting R.C. 2305.113. The statute states in pertinent part:

(C) Except as to persons within the age of minority or of unsound mind as provided in 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.

¹⁶ *Hardy v. Vermeulen* (1987), 32 Ohio St.3d 45.

¹⁷ *Id.* at 46.

¹⁸ *Id.*

(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.

(D)(1) If a person making a medical, dental, optometric, or chiropractic claim, in the exercise of reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged claim within three years after the occurrence of the act or omission, but, in the exercise of reasonable care and diligence, discovers the injury resulting from that act or omission before the expiration of the four-year period specified in division (C)(1) of this section, the person may commence an action upon the claim not later than one year after the person discovers the injury from that act or omission.

(2) If the alleged basis of the medical claim, dental claim, optometric claim, or chiropractic claim is the occurrence of an act or omission that involves a foreign object that is left in the body of the person making the claim, the person may commence an action upon the claim not later than one year after the person discovered the foreign object or not later than one year after the person, with reasonable care and diligence, should have discovered the foreign object.

(3) A person who commences an action upon a medical claim, dental claim, optometric claim, or chiropractic claim under the circumstances described in division (D)(1) or (2) of this section has the affirmative burden of proving, by clear and convincing evidence, that the person, with reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within the three-year period described in division (D)(1) of this section or within the one-year period described in division (D)(2) of this section, whichever is applicable.

The Court finds that the statute of repose, as amended in R.C. 2305.113, does not cure any of the defects rendering its predecessor, R.C. 2305.11, unconstitutional. In 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 they could not be discovered within that time frame.

Although the statute appears to generously offer the plaintiff one more year to file a medical malpractice claim, such time extension still is predicated on discovery of the injury within four years of it occurring. The Ohio Supreme Court already deemed such a provision unconstitutional.

Ironically, the statute permits the discovery rule to apply when the malpractice involves a foreign object left a plaintiff's body. Division (D)(2) permits a plaintiff to file a medical malpractice claim one year after discovery of a foreign object left in the plaintiff's body. It is illogical that leaving a foreign object in the body of a patient is more important than any other medical malpractice resulting in injury to a patient such that the four-year statute of repose is inapplicable to foreign objects in the body, but applies to patients injured by other forms of malpractice. The statute is inconsistent, which has led to its inconsistent application by the courts. Moreover, the legislature's selection of a four-year period in which to bring forth a medical malpractice claim appears to be unreasonable and arbitrary considering most often the malpractice cannot be discovered within four years of the occurrence of its occurrence.¹⁹

The Court rejects Defendants' argument that it must follow the holdings in the cases cited by Defendants: *Groch v. General Motors Corporation*²⁰, *Arbino v. Johnson*²¹, *Nickell v. Leggett & Platt*²², and *McClure v. Alexander*²³. First, none of these cases dealt with the statutes at issue in this case, but instead dealt with products liability and damages award statutes. Thus, under the doctrine of stare decisis, the Court is not bound by these decisions.²⁴ Second, the Court finds these cases are distinguishable from the case at hand.

Indeed, in *Groch*, the Ohio Supreme Court stated:

¹⁹ See, *Hardy*, 32 Ohio St.3d 45, 49, J. Douglas concurring.

²⁰ 117 Ohio St.3d 192 (2008).

²¹ 116 Ohio St.3d 468 (1987).

²² 2008-Ohio-5545 (12th Dist.).

²³ 2008-Ohio-1313 (2nd Dist.).

²⁴ *Groch*, 117 Ohio St.3d at 472 ("While stare decisis applies to the rulings rendered in regard to specific statutes, it is limited to circumstances "where the facts of a subsequent case are substantially the same as a former case").

[T]he situation presented in the 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.

In contrast, R.C. 2305.131 does not take away an existing cause of action, as applied in this case. '***[I]ts [*sic*] 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.'²⁵

Similarly, in *Arbino*, the Ohio Supreme Court stated:

The definition of rights is well settled. "When the Constitution speaks of a remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner." *Hardy v. Vermeulen* (1987), 32 Ohio St.3d 45, 47. We have interpreted this provision to prohibit statutes that effectively prevent individuals from pursuing relief for their injuries. See, e.g., *Brenneman v. R.M.I Co.* (1994), 70 Ohio St.3d 460 (finding a statute of repose unconstitutional because it deprived certain plaintiffs of the right to sue before they were aware of their injuries); *Gaines v. Preterm-Cleveland, Inc.* (1987), 22 Ohio St.3d 54 (declaring a statute of repose unconstitutional because it did not give certain litigants the proper time to file an action following discovery of their claims).²⁶

In finding the products liability statute at issue before it, R.C. 2315.18, did not violate the right to right-to-a-remedy or the right to an open court provisions of the Ohio Constitution, the *Arbino* court distinguished that statute from statutes of repose, such as the statute at issue in this case - R.C. 2305.113:

While the statute [R.C. 2315.18] prevents some plaintiffs from obtaining the same dollar figures they may have received prior to the effective date of the

²⁵ *Groch*, 117 Ohio St.3d at 212 (internal citations omitted).

²⁶ *Arbino*, 116 Ohio St.3d at 477 (string citations omitted).

statute, it neither forecloses their ability to pursue a claim at all nor "completely obliterates the entire jury award."²⁷

Likewise in *McClure*, the Second District Court of Appeals cited the Ohio Supreme Court, in *Sedar v. Knowlton Construction Co.*²⁸, to distinguish the statute of repose on construction claims from the statute of repose on medical malpractice claims:

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. *** [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.²⁹

In *Nickell*, the Twelfth District Court of Appeals overturned a trial court's finding that a products liability statute of repose was facially unconstitutional. In doing so, the appellate court found that a products liability claim is statutorily created, and therefore, the legislature has the authority to impose limitations on the remedy. Specifically, the statute (R.C. 2125.02) "is a statutorily created right and limitations imposed by the statute are 'restriction[s] which qualif[y] the right of the action rather than *** limit [] *** the remedy.'"³⁰ The Ohio Supreme Court, in *Hardy*, however, found that a medical malpractice claim is not statutorily created, but is a common law right or action that existed at the time the Constitution was adopted. Thus, a legislature's limitation of the right or action, without a reasonable alternative remedy or substitution for the one it abrogated, was in violation of Section 16, Article 1 of the Ohio Constitution.³¹

Turning back to the case at hand, the Court finds that Plaintiff has proven by clear and

²⁷ *Id.* (internal citations omitted).

²⁸ 49 Ohio St.3d 193 (1990).

²⁹ *McClure*, 2008-Ohio-1313, at ¶ 22.

³⁰ *Nickell*, 2008-Ohio-5545, at ¶ 13, citing *Groch*, 117 Ohio St.3d at 219.

³¹ *Hardy*, 32 Ohio St.3d at 49.

convincing evidence that he could not have discovered the malpractice and the resulting injury, liver cancer, within the four-year limitation set forth in the statute of repose. After the tests were conducted from 1995 to 1998, Plaintiff suffered no symptoms leading to a diagnosis of liver cancer. Indeed, it was not until Plaintiff experienced his first symptom, in 2008, that the malpractice was discovered. Once he discovered the injury and malpractice, Plaintiff promptly filed suit.

The Court finds that Plaintiff could not have discovered the malpractice that had already occurred, and the resulting injury he was suffering, before the expiration of the statute of repose, and therefore, the statute of repose denied Plaintiff a remedy. Accordingly, the Court finds the statute of repose, as applied to the case at hand, is unconstitutional.

Defendants' motion for summary judgment is denied.

It is so ordered.



JUDGE ROBERT W. PEELER