IN THE SUPREME COURT OF OHIO

TRACY RUTHER,	:	Case No. 2011-0899
Plaintiffs-Appellees,	:	On Appeal from the Warren County Court of Appeals,
v.	:	Twelfth Appellate District
GEORGE KAISER, D.O., et. al.,	:	Court of Appeals Case No: CA2010-07-066
Defendants-Appellants.	:	

MERIT BRIEF OF AMICI CURIAE, OHIO HOSPITAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, OHIO OSTEOPATHIC ASSOCIATION, AMERICAN OSTEOPATHIC ASSOCIATION AND OHIO ALLIANCE FOR CIVIL JUSTICE IN SUPPORT OF APPELLANTS

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

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

John D. Holschuh, Jr. (0019327)
Sarah Tankersley (0068856)
Santen & Hughes
600 Vine Street, Suite 2700
Cincinnati, Ohio 45202
Tel: (513) 721-4450
Fax: (513) 721-0109
Email: SBT@santen-hughes.com
Counsel for Plaintiffs-Appellees

John B. Welch (0055337)
Karen L. Clouse (0037294)
580 Lincoln Park Blvd., Suite 222
Dayton, Ohio 45429-3493
Tel: (937) 296-1600
Fax (937) 296-1644
Email: jwelch@arnoldlaw.net
Counsel for Defendants-Appellants, George Kaiser, D.O. and Warren County Family Practice Physicians, Inc.

Susan Audey (0062818)
Tucker Ellis & West LLP
925 Euclid Ave., Suite 1150
Cleveland, Ohio 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
Email: susan.audey@tuckerellis.com

Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Regulations

Ohio Statutes and Regulations

Other Statutes and Regulations

Constitutional Provisions

Treatises

INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

The question at issue in this case is whether Ohio's statute of repose for medical claims —R.C. 2305.113(C)—violates Section 16, Article I of the Ohio Constitution. In answering this question, the Court will determine whether Ohio should become one of the only jurisdictions in the United States to impose never-ending uncertainty upon its physicians and hospitals. The Court's decision on this important question will have a substantial impact on hospitals, physicians, and other health care providers throughout the State of Ohio.

The Ohio Hospital Association (OHA), American Hospital Association (AHA), Ohio State Medical Association (OSMA), American Medical Association (AMA),[1] Ohio Osteopathic Association (OOA), American Osteopathic Association (AOA) and Ohio Alliance for Civil Justice (OACJ) (collectively, "Amici") have a strong interest in obtaining certainty and finality as to potential litigation against their members for medical negligence. The Twelfth District Court of Appeals' decision—finding that R.C. 2305.113(C) violates the "open courts" or "right-to-a-remedy" provision of Section 16, Article I of the Ohio Constitution[2]—will adversely affect members of each of the Amici groups by creating the unending possibility of litigation against medical providers for medical claims. If the Twelfth District's decision stands, Ohio will join a

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[1] The AMA and the OSMA are participating in this brief in their own capacity and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts.

[2] Section 16, Article I of the Ohio Constitution states: "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." This provision is referred to interchangeably as the "open courts" or "right-to-a-remedy" provision of the Ohio Constitution.

very small minority of states that refuse to protect medical providers[3] from perpetual litigation for alleged negligence.

In light of the innumerable patients treated by medical providers in Ohio each year, a statute of repose is necessary to provide a legislative end to litigation relating to alleged medical negligence in order to create stability and certainty for medical providers. If allowed to stand, the Twelfth District's decision will adversely impact hospitals and physicians in Ohio by permitting claims to be brought ten, twenty, or even fifty years after an alleged incident of medical negligence. This evisceration of the statute of repose will affect the ability of every Ohio hospital, physician, and medical provider to plan for the future given the omnipresent specter of unknown old medical claims that could be filed at any time under the "discovery rule" without any regard to the absolute bar found in R.C. 2305.113(C).

Moreover, forcing medical providers to defend against medical claims which occurred ten, twenty, or fifty years prior presents a host of litigation concerns including:

- the risk that evidence has been corrupted and/or disappeared;
- untrustworthy testimony due to faded memories;
- witnesses may no longer be available, i.e. are deceased and/or out of the jurisdiction with unknown addresses;
- the setting in which the incident occurred may have changed, precluding a jury view;
- technology may have changed, challenging the decider-of-fact to ignore what they know about the effectiveness of current technology versus the less effective technology available at the time of the alleged negligence;
- the risk that the defendants may have disposed of records as part of their routine document retention policies; for example, Medicare requires that the typical community hospital must retain medical records for five years (see 42 C.F.R.

[3] The term "medical providers" when used herein refers to hospitals, health systems, physicians, medical residents, nurses, and other health care providers.

482.24(b)(1) and Ohio Adm.Code 3701-7-16(F)) and critical access hospitals must keep records for six years (42 C.F.R. 485.638(c));

- the risk that provider financial circumstances may have changed, i.e. that practitioners have retired, no longer carry applicable liability insurance, or a practitioner's insurer has become insolvent; and

- the risk that the defendant medical provider may no longer be in business or may have closed (e.g., at least 10 hospitals have closed since 2001[4]).

The General Assembly agreed and, with these considerations in mind, made a policy decision to impart upon Ohio medical providers the right to be free from litigation based on alleged acts of medical negligence occurring outside of a certain specified time period. This policy decision is embodied in Ohio's four-year statute of repose for medical negligence, set forth in R.C. 2305.113(C).

By enacting the statute of repose for medical negligence claims, the General Assembly sought to strike a balance between the rights of prospective tort claimants and the rights of Ohio hospitals and physicians. See Section 3(A)(6)(a), Am.Sub.S.B. 281. But the Twelfth District's decision disregards this reasoning and makes Ohio one of only two states that have held that a statute of repose for medical claims violates a constitutional right to a remedy.

Collectively, thousands of medical providers in Ohio are members of the OHA, OSMA, and OOA. These Ohio associations and many of their members work with the larger national associations of the AHA, AMA, and AOA to develop health care legislation and policies in the best interests of their members and the communities they serve. Further, the OACJ is a broad-based, non-profit, coalition which has worked to support tort reform legislation in Ohio since 1987. Its membership includes Ohio trade and professional associations, small and large businesses, medical groups, and others committed to reforming Ohio's civil justice system.

Amici have a strong interest in upholding the constitutionality of the four-year statute of repose at issue.

Amici urge this Court to reverse the Twelfth District's decision and to uphold the constitutionality of the statute of repose applicable to medical claims.

STATEMENT OF THE CASE

Amici defer to the Statement of the Case presented by Appellants.

STATEMENT OF FACTS

Amici defer to the Statement of Facts presented by Appellants.

LAW AND ARGUMENT

Amici Proposition of Law No. 1: The medical malpractice statute of repose contained in R.C. 2305.113(C) does not violate the open courts provision (Section 16, Article I) of the Ohio Constitution.

A. Ohio's Statute of Repose Does Not Impair Any Vested Right.

The Twelfth District's decision relies heavily upon this Court's decision in *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 47, 512 N.E.2d 626, which found the prior version of Ohio's medical malpractice statute of repose to be unconstitutional as to those "who suffer bodily injury from medical malpractice but do not discover that injury until four years after the act of malpractice." *Ruther v. Kaiser*, 12th Dist. No. CA 2010-07-066, 2011-Ohio-1723, ¶24 (quoting *Hardy*, 32 Ohio St.3d at 46-47). The Twelfth District concluded that "[w]hile 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 to be unconstitutional in *Hardy*." Id. at ¶38.

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[4] See Ohio Hospital Association, Hospital Closures, available at http://www.ohanet.org/narrative/hospital_closures.

But this Court's more recent precedent suggests a fundamental change in the Court's approach since *Hardy* as to the appropriate rule to apply to determine when a violation of the right-to-a-remedy provision in Section 16, Article I of the Ohio Constitution occurs. *Hardy* applied an accrual rule, finding that if a statute takes away a right before it accrues, the statute violates Section 16, Article I. Id. at 47. In contrast, the rule applied in *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, came to the opposite conclusion, finding that if a statute takes away a right before it accrues, that right never vests, and the statute therefore does ***not*** violate Section 16, Article I.

The Court should apply the *Groch* vested rights rule in this case, and find that R.C. 2305.113(C) does not violate Section 16, Article I because it does not impair a vested right.

1. The *Hardy* Accrual Rule

In *Hardy*, the majority opinion, relying on *Lafferty v. Shin* (1882), 38 Ohio St. 46, 48, held that under Section 16, Article I, "the legislature cannot deprive a right before it accrues." Id. at 47. In other words, the *Hardy* accrual rule is this: if a statute takes away a right before it accrues, the statute violates Section 16, Article I.

The *Hardy* Court held that "a cause of action for medical malpractice does not accrue until the patient discovers" the injury. Id. Applying *Hardy's* accrual rule, the Court held that because the statute of repose at issue took away the plaintiff's right to a remedy before it accrued, it violated Section 16, Article I. Id.

Justice Wright's dissent in *Hardy* pointed out that the majority's focus on the fact that the right had not yet ***accrued*** was misplaced. Id. at 52 (Wright, J., concurring in judgment only and dissenting in part). Instead, the Court should have asked whether the statute of repose abolished a ***vested*** right. Id. at 53 ("unless the right is vested, or the claim involves a fundamental right, access to the courts may be limited and/or regulated by the General Assembly if a rational basis

exists for the limitation"). The Court's recent precedent in *Groch*, 2008-Ohio-546 appears to adopt the "vested rights" approach.

2. The *Groch* Vested Rights Rule

In *Groch*, this Court reviewed the history of the statute of repose applicable to real property claims in determining whether a new statute of repose applicable to product liability claims was constitutional. In *Groch*, the Court noted that even though it had previously held the statute of repose applicable to real property claims to be unconstitutional (on the basis that it deprived claimant of a right to a remedy before the claimant knew or should have known of his injury), the Court was required to review the new statute of repose before it "in its own light." *Groch*, at ¶¶126-129 (citing *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 639 N.E.2d 425). When the Court reviewed the new, but similar, statute of repose in *Groch*, it concluded that the statute passed constitutional muster.

Similar to Justice Wright's dissent in *Hardy*, the *Groch* Court explained that "[t]he right-to-a-remedy provision of Section 16, Article I applies only to ***existing, vested rights,*** and it is state law which determines what injuries are recognized and what remedies are available." Id. at ¶150 (quoting *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 202, 551 N.E.2d 938) (emphasis added). Thus, a statute of repose does not violate Section 16, Article I of the Ohio Constitution if it "does not deny a remedy for a vested cause of action but, rather, bars the action before it ever arises." *Groch,* 2008-Ohio-546, at ¶142.

The question in *Groch* was whether the statute of repose that barred certain product liability claims denied an injured party a remedy for a "vested" right. Id. at ¶149. The *Groch* Court found that "the statute of repose at issue in this case involves a cause of action that never accrues and thus is prevented from vesting once the ten-year repose period has passed." Id. at

¶177. The *Groch* Court concluded that the statute of repose was not unconstitutional because it did not deny an injured party a remedy for a ***vested*** right.[5]

In other words, in direct contrast to the *Hardy* accrual test, the *Groch* vested rights rule is this: A statute violates Section 16, Article I *only* if it impairs a vested right. And if a cause of action never accrues, it is not a vested right.

The Twelfth District's decision attempted to apply the *Groch* vested right rule, but confused the issue. The Twelfth District's decision held that R.C. 2305.113(C) violated Section 16, Article I because the statute "bars [Appellee's] claim after it had already vested, but before she or the decedent reasonably could have known about the claim." *Ruther v. Kaiser*, 12th Dist. No. CA 2010-07-066, 2011-Ohio-1723, ¶24. But the Twelfth District provides no explanation as to why it believed Appellee's claim had "vested." How could Appellee's claim have vested before it accrued?

3. Application of the *Groch* Vested Right Rule to R.C. 2305.113(C)

This Court should apply the *Groch* vested right rule to the medical malpractice statute of repose. A medical malpractice cause of action does not accrue under Ohio law until the claimant "discovers" the injury. *Hershberger v. Akron City Hospital* (1987), 34 Ohio St.3d 1, 4, 516 N.E.2d 204 ("the cause of action accrues when the physical injury complained of is or should have been discovered by the patient."). Therefore, applying the *Groch* vested right rule: where a party does not discover his injury until after the statute of repose has passed, his "cause of action never accrues * * * [and] it never becomes a vested right." *Groch*, 2008-Ohio-546, at ¶149.

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[5] Although the Court in *Brennaman* found that the product liability statute of repose "violates the right to a remedy," the Court in *Groch* found just the opposite—that the subsequently enacted product liability statute of repose—R.C. 2305.10(C)—did not violate the right to a remedy. The Court reasoned that for claims brought outside of the ten-year repose period, "an injured party's cause of action never accrues against the manufacturer or supplier of the product" and thus "it never becomes a vested right." *Groch*, 2008-Ohio-546, at ¶¶149-154.

Adopting the *Groch* rule, R.C. 2305.113(C) does not unconstitutionally deprive Appellee of a vested right. Rather, because Appellee did not discover the alleged injury until more than fourteen years after the alleged act of medical negligence, no claim ever accrued, and thus did not vest, during the four-year statute of repose set forth in R.C. 2305.113(C). See also *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 55 (Wright, J., concurring in judgment only and dissenting in part) ("To suggest, as does the majority, that every common-law right is indelibly embedded in the Ohio Constitution and that subjective awareness of a potential claim is required prior to the abolishment of a cause of action is sheer legal fiction.").

When the Wisconsin Supreme Court analyzed this issue in *Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund*, 2000 WI 98, 613 N.W.2d 849, it came to a similar conclusion, finding that a medical malpractice "cause of action 'accrues' when the claimant 'discovers' the injury." Id. at ¶82. Thus, '"if a statute of repose has run, no legally recognized cause of action can accrue, and therefore, no right can vest." Id. (quoting Susan C. Randall, Comment, Due Process Challenges to Statutes of Repose (1986), 40 Sw.L.J. 997, 1007).

For all of these reasons, Amici respectfully request that this Court reverse the Twelfth District's decision and hold that the statute of repose found in R.C. 2305.113(C) does not deprive Appellee (or anyone else) of a vested right.

B. The General Assembly Properly Struck a Balance Between the Rights of Claimants and Medical Providers in R.C. 2305.113(C)

1. The Ohio General Assembly had Specific Policy Goals in Mind in Enacting the Statute of Repose for Medical Claims

Senate Bill 281—the bill through which R.C. 2305.113(C) was enacted in 2003—specifies the General Assembly's important policy considerations in enacting a statute of repose for medical malpractice claims. In Senate Bill 281, the General Assembly concluded:

> That a statute of repose on medical, dental, optometric, and chiropractic claims strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners.

Am.Sub.S.B. No. 281, Section 3(A)(6)(a).

The General Assembly went on to state why a statute of repose is necessary to ensure justice and fairness for Ohioans, including:

> (b) Over time, the availability of relevant evidence pertaining to an incident and the availability of witnesses knowledgeable with respect to the diagnosis, care, or treatment of a prospective claimant becomes problematic.
>
> (c) The maintenance of records and other documentation related to the delivery of medical services, for a period of time in excess of the time period presented in the statute of repose, presents an unacceptable burden to hospitals and health care practitioners.
>
> (d) Over time, the standards of care pertaining to various health care services may change dramatically due to advances being made in health care, science, and technology, thereby making it difficult for expert witnesses and triers of fact to discern the standard of care relevant to the point in time when the relevant health care services were delivered.
>
> (e) This legislation precludes unfair and unconstitutional aspects of state litigation but does not affect timely medical malpractice actions brought to redress legitimate grievances.

Id. at Section 3(A)(6)(b)-(e).

In his dissent in *Hardy*—which found the prior version of Ohio's statute of repose for medical claims to be unconstitutional—Justice Wright noted additional policy considerations specific to medical providers:

> The present predicament that the medical profession and health care facilities have in obtaining malpractice insurance at a reasonable cost will rapidly spread to other professions. Whether one is attracted to the concept or not, modern-day tort liability is premised upon spreading the cost of monetary losses through the medium of insurance. Insurance companies are not in business to sustain losses and thus they will not accept a risk where their exposure is incalculable on the basis of actuarial analysis. Today we have simply taken the insurance industry "out of play" in many areas of professional malpractice.

Hardy, 32 Ohio St.3d at 55 (Wright, J., concurring in judgment only and dissenting in part).

As for more recent concerns regarding malpractice insurance availability and rates, the General Assembly addressed this issue by adopting medical malpractice reform laws, most of which were included in Senate Bill 281 (such as the statute of repose at issue). These measures have largely achieved their goal of increasing availability and lowering premiums for Ohio's medical providers.

For example, in 2000, Ohio had nearly thirty medical liability carriers competing in the medical liability insurance market. See OSMA Report.[6] By 2003, Ohio was left with only five carriers, three of which were experiencing increasing financial difficulty. Id. Senate Bill 281 became effective in 2003. Today, due in large part to the General Assembly's efforts to create more certainty and predictability in connection with lawsuits against medical providers (such as the statute of repose), the medical malpractice insurance market has become more stable and Ohio now has fifteen companies writing medical liability coverage for physicians. Id. Likewise, malpractice liability insurance rates have fallen dramatically since 2004, falling twenty-five percent since 2006. Id. Due in part to the reforms enacted by Senate Bill 281, Ohio physicians saved more than $53 million in premium dollars from 2007 to 2009. Id.

2. Other States have Recognized Similar Policy Reasons in Enacting Statutes of Repose for Medical Claims

Other states that have enacted statutes of repose for medical claims have similarly recognized the need to strike a balance, providing to medical providers in their state more predictability and protection from stale claims. For example, *Hardy* (relied upon in the Twelfth District's decision) relied heavily upon *Daugaard v. Baltic Co-op. Bldg. Supply Assn.* (S.D. 1984), 349 N.W.2d 419, 424-425, which was subsequently overruled. In 2003, the South Dakota

Supreme Court overruled *Daugaard* and joined the majority of state supreme courts that have upheld statutes of repose in the context of medical negligence claims. *Cleveland v. City of Lead*, 2003 SD 54, 663 N.W.2d 212, ¶¶35-36 (holding that *Daugaard* "can no longer be supported as a correct interpretation of" the open courts provision of the South Dakota Constitution); see also *Green v. Siegel, Barnett & Schutz,* 1996 SD 146, 557 N.W.2d 396, ¶7 (upholding the constitutionality of the statute of repose for legal malpractice claims).

In overruling its decision in *Daugaard*, the South Dakota Supreme Court asked when, if ever, a statute of repose could be constitutional under *Daugaard*'s reasoning: "[W]hat about 20 years, 50 years or 100 years or 'any longer length of time into perpetuity'?" *City of Lead*, 2003 SD 54, ¶44. The same analysis applies here. If the Twelfth District reasoning is left to stand, the Court will have effectively barred the General Assembly from passing any statute of repose in Ohio for any tort for which the discovery rule might apply.

Moreover, in a recently decided Texas case holding that the Texas medical malpractice statute of repose did not violate the Texas open courts provision, the Texas Supreme Court explained the paramount policy considerations at issue:

> Without a statute of repose, professionals * * * would face never-ending uncertainty as to liability for their work. Insurance coverage and retirement planning would always remain problematic, as would the unending anxiety facing potential defendants.

Methodist Healthcare System of San Antonio, Ltd. v. Schorlemer (2010), 307 S.W.3d 283, 287, 53 Tex.Sup.J 455; see also *Bonin v. Vannaman* (1996), 261 Kan. 199, 219, 929 P.2d 754 ("Health care is readily available in Kansas because medical malpractice insurance is available to physicians at a reasonable rate, in part due to the passage of [Kansas'] 8-year statute of repose.")

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[6] The OSMA Report is available at http://www.osma.org/advocacy/medical-liabilitytort-reform/medical-liability-tort-reform-accomplishments.

This never-ending exposure to litigation and potential liability would "inject[] actuarial uncertainty into the insurance market." *Methodist Healthcare System of San Antonio, Ltd.*, 307 S.W.3d at 291. Recognizing that a few plaintiffs would be barred by this statutory roadblock, the Texas Supreme Court noted, "some defendants would likewise suffer unfortunate consequences were potential liability left indeterminate." Id. at 288.

In upholding the statute of repose, the Texas Supreme Court went on to state:

> One practical upside of curbing open-ended exposure is to prevent defendants from answering claims where evidence may prove elusive due to unavailable witnesses (perhaps deceased), faded memories, lost or destroyed records, and institutions that no longer exist.

Id.

Because the "essential function of all statutes of repose is to abrogate the discovery rule and similar exceptions to the statute of limitations," "[t]o hold that a statute of repose must yield to the plaintiff's ability to discover her injury would treat a statute of repose like a statute of limitations, and would effectively repeal this and all other statutes of repose." Id.

Similarly, in upholding the Wisconsin medical malpractice statute of repose, the Wisconsin Supreme Court acknowledged that the statute of repose represented a legislative policy choice: "We remain persuaded that the time limitation periods articulated by statutes of repose inherently are policy considerations better left to the legislative branch of government." *Aicher*, 2000 WI 98, ¶54. It then held that no right to remedy was violated under Wisconsin law because:

> the legislature chose not to recognize a right based on a claim discovered more than five years after the allegedly negligent act or omission * * * * Were we to extend a right to remedy outside the limits of these recognized rights, we effectively would eviscerate the ability of the legislature to enact any statute of repose.

Aicher, 2000 WI 98, ¶54. In so holding, the Wisconsin Supreme Court further concluded that "[i]f malpractice carriers were required to defend such stale claims, there would be a substantial increase in the cost of health care." Id. at ¶75.

These policy decisions and the reasoning behind them are equally applicable here. As in Texas and Wisconsin, Ohio medical providers will experience similar evidentiary and financial consequences should Ohio's medical malpractice statute of repose be found unconstitutional. Likewise, the same concerns expressed by the Wisconsin Supreme Court regarding the cost of health care are just as prevalent here in Ohio.

Indeed, to disregard the General Assembly's reasoned policy decisions underlying the Ohio medical malpractice statute of repose and to eviscerate the absolute bar imposed by the statute of repose under the guise of the discovery rule will have ripple effects beyond the medical malpractice context. To hold that the "discovery rule" applies to statutes of repose puts into question the ability of the General Assembly to ever impose a statute of repose in any context.

C. The Vast Majority of Other States have Rejected Similar Challenges to Statutes of Repose for Medical Claims Premised on an Open Courts or Right to Remedy Challenge.

Thirty-two states and one territory have enacted medical malpractice statutes of repose. See Robin Miller, Validity of Medical Malpractice Statutes of Repose (2011), 5 A.L.R.6th 133, Summary; see also *Methodist Healthcare System of San Antonio*, 307 S.W.3d at 288, fn. 29-30.[7]

[7] The statutes cited in Robin Miller, Validity of Medical Malpractice Statutes of Repose (2011), 5 A.L.R.6th 133 and *Methodist Healthcare System of San Antonio*, 307 S.W.3d at 288, fn. 29-30 include: Ala.Code 6-5-482; Cal.Civ.Proc.Code 340.5; Colo.Rev.Stat. 13-80-102.5(3)(b); Conn.Gen.Stat.Ann. 52-584; Fla.Stat.Ann. 95.11(4)(b); Ga.Code Ann. 9-3-72; Guam Code Ann. Title 7, Section 11308; 735 Ill.Comp.Stat.Ann. 5/13-212(a); Haw.Rev.Stat.Ann. 657-7.3; Iowa Code Ann. 614.1(9)(a); Kan.Stat.Ann. 60-513(c); Ky.Rev.Stat.Ann. 413.140(2); La.Rev.Stat.Ann. 9:5628(A); Mass.Gen.Laws Ann., Chapter 260, Section 4; Md.Code Ann., Cts. & Jud. Proc. 5-109(a)(1); Mich.Comp.Laws Ann., Chapter 600.5838a(2); Miss.Code Ann. 15-1-36(2)(a); Mont.Code Ann. 27-2-205(1); Mo.Ann.Stat. 516.105(3); N.C.Gen.Stat. 1-15(c); N.D.Cent.Code 28-01-18(3); Neb.Rev.Stat.Ann. 44-2828; Or.Rev.Stat.12.110(4); 40

At least sixteen states have upheld statutes of repose in medical malpractice cases against constitutional challenges premised, as here, on an open courts provision or similar constitutional provision guaranteeing the right to a remedy. See Robin Miller, Validity of Medical Malpractice Statutes of Repose, 5 A.L.R.6th 133, 9-11; see also *Methodist Healthcare System of San Antonio*, 307 S.W.3d at 289, fn. 31. Examples include:

1. **Alabama**: *Barlow v. Humana, Inc.* (Ala. 1986), 495 So.2d 1048, 1051 (upholding medical malpractice statute of ultimate repose against an open courts challenge).

2. **Connecticut**: *Golden v. Johnson Memorial Hosp., Inc.* (2001), 66 Conn.App. 518, 785 A.2d 234 (upholding statute of repose for medical negligence against open courts challenge); *Stein v. Katz* (1989), 213 Conn. 282, 285, 567 A.2d 1183, 1185 (application of the three-year medical malpractice statute of repose did not violate the "open courts" provision of the Connecticut constitution).

3. **Delaware**: *Dunn v. St. Francis Hosp., Inc.* (Del. 1979), 401 A.2d 77, 80-81 ("In setting a time limit for inherently 'unknowable injuries' it must be remembered that '[a] finite cut-off is probably necessary at some point in time regardless of the state of the patient's knowledge if the policy considerations underlying the statute of limitations are to be vindicated.'") (quoting King, *The Law of Medical Malpractice*, 283 (1977).

4. **Florida**: *Carr v. Broward County* (Fla. 1989), 541 So.2d 92, 14 Fla.L.Weekly 110 (upholding Florida's four-year medical malpractice statute of repose against open courts challenge finding that the legislative findings accompanying enactment of the statute demonstrated an overriding public necessity for enactment).

5. **Illinois**: *Mega v. Holy Cross Hosp.* (1986), 111 Ill.2d 416, 425-429, 490 N.E.2d 665 (upholding statute of repose against challenge that statute violated "certain remedy" provision of the Illinois Constitution, noting "[w]e realize our holding here means that [plaintiff's] action was barred before he learned of his injury" and "[t]hat the repose provision may, in a particular instance, bar an action before it is discovered is an accidental rather than necessary consequence").

6. **Kansas**: *Bonin v. Vannaman* (1996), 261 Kan. 199, 221, 929 P.2d 754 (rejecting open courts and due process challenges to eight-year statute of repose for medical negligence as to minors).

Pa.Const.Stat.Ann. 1303.513(b); S.C.Code Ann. 15-3-545(B); Tenn.Code Ann. 29-26-116(a)(4); Utah Code Ann. 78B-3-404(2)(a); Va.Code Ann. 8.01-243(C); Vt.Stat.Ann., Title 12, Section 521; Wash.Rev.Code Ann. 4.16.350; W.Va.Code Ann. 55-7B-4(a); Wis.Stat.Ann. 893.55(1m).

7. **Louisiana**: *Crier v. Whitecloud* (La. 1986), 496 So.2d 305, 310 (upholding statute of repose for medical malpractice claims on the grounds that the legislature may abolish a right before it vests).

8. **Maine**: *Choroszy v. Tso* (Me. 1994), 647 A.2d 803, 807 (upholding three-year medical malpractice statute of repose against open courts challenge, finding "[a]lthough we recognize that the three-year period of repose may cause some hardship for the [Plaintiffs], that hardship was contemplated by the Legislature when it made its policy choice").

9. **Maryland**: *Hill v. Fitzgerald* (1985), 304 Md. 689, 700-704, 501 A.2d 27 (upholding statute of repose against right to remedy challenge finding no vested right in the common law discovery rule).

10. **Massachusetts**: *Plummer v. Gillieson* (1998), 44 Mass.App.Ct. 578, 581, 692 N.E.2d 528 (upholding medical malpractice statute of repose, finding that "[s]tatutes modifying or abrogating common law rights do not violate" Massachusetts' constitutional right to a remedy).

11. **Nebraska**: *Colton v. Dewey* (1982), 212 Neb. 126, 129-131, 321 N.W.2d 913 (upholding ten-year medical malpractice statute of repose holding that a party has no vested right in an injury occurring more than ten years after the negligent act).

12. **North Carolina**: *Walker v. Santos* (1984), 320 S.E.2d 407, 408, 70 N.C.App. 623, (upholding medical malpractice statute of repose against open courts challenge).

13. **Oregon**: *Christiansen v. Providence Health Sys. of Or. Corp.* (2008), 344 Ore. 445, 449-455, 184 P.3d 1121 (finding statute of ultimate repose in medical negligence action against hospital and obstetrician did not violate constitutional right to a remedy clause).

14. **Tennessee**: *Harrison v. Schrader* (Tenn. 1978), 569 S.W.2d 822, 827 (upholding medical malpractice statute of repose against open courts challenge, finding "[u]ndeniably some hardship results from the application of this statute, but it is not the role of this Court to pass upon the wisdom or lack thereof of the legislation under review").

15. **Texas**: *Methodist Healthcare System of San Antonio, Ltd.*, 307 S.W.3d at 283 (finding that the medical malpractice statute of repose does not violate the open courts provision of the Texas Constitution).

16. **Wisconsin**: *Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund*, 2000 WI 98, 613 N.W.2d 849, ¶6 (upholding medical malpractice statute of limitations against right to remedy challenge).

In contrast, only one case was found in which a state, other than Ohio, has specifically held that a medical negligence statute of repose unconstitutionally violated its state constitution's

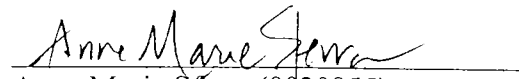
open courts provision. See *McCollum v. Sisters of Charity of Nazareth Health Corp.* (Ky. 1990), 799 S.W.2d 15. Thus, if the Twelfth District's decision is left to stand, Ohio will remain an outlier in failing to recognize that a statute of repose for medical claims does not violate the constitutional right to open courts or right to a remedy. See *McCollum*, 799 S.W.2d at 15.

The Court should consider the most recent statute of repose for medical claims in light of its recent precedent and in light of the prevailing wisdom of the vast majority of other states that have considered this issue. Applying the *Groch* vested rights rule, the Court should reverse the Twelfth District's decision and conclude that R.C. 2305.113(C) does not impair any vested right in this case. Such a conclusion will provide certainty, finality and clarity for all of Ohio's medical providers and for the lower courts tasked with deciding whether claims may be pursued against Ohio's medical providers.

CONCLUSION

The Twelfth District has imposed an unending burden of potential litigation on the medical community, taking away the legislatively imposed right of Ohio medical providers to be free from potential litigation after the four-year period of repose set forth in R.C. 2305.113(C). Amici urge the Court to reverse the Twelfth District's decision and uphold the constitutionality of R.C. 2305.113(C).

Respectfully submitted,



Anne Marie Sferra (0030855)
Bridget Purdue Riddell (0082502)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
(614) 227-2390 (facsimile)
Email: asferra@bricker.com
briddell@bricker.com

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF AMICI CURIAE was sent via regular U.S. mail, postage prepaid this 12th day of December 2011, to the following:

John D. Holschuh, Jr.
Sarah Tankersley
Santen & Hughes
600 Vine Street, Suite 2700
Cincinnati, OH 45202
Counsel for Plaintiff-Appellee

John B. Welch
Karen L. Clouse
580 Lincoln Park Blvd., Suite 222
Dayton, OH 45429-3493
Counsel for Defendants-Appellants, George Kaiser, D.O. and Warren County Family Practice Physicians, Inc.

Susan Audey
Tucker Ellis & West LLP
925 Euclid Ave., Suite 1150
Cleveland, OH 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
Email: susan.audey@tuckerellis.com
Counsel for Amicus Curiae, Ohio Association of Civil Trial Attorneys

Anne Marie Sferra