IN THE SUPREME COURT OF OHIO

ABUBAKAR ATIQ DURRANI, M.D., ET AL.	:	**Case No. 2019-1560**
Petitioners,	:	**ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS, CASE NO. C 180194**
vs.	:	
MIKE SAND, ET AL.,	:	
Respondents.	:	
ABUBAKAR ATIQ DURRANI, M.D., ET AL.	:	**Case No. 2019-1560**
Petitioners,	:	**ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS, CASE NO. C 180196**
vs.	:	
ROBERT WILSON,	:	
Respondent.	:	

MEMORANDUM OF THE OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, AND OHIO OSTEOPATHIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF JURISDICTION

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I. INTRODUCTION AND STATEMENT OF AMICI'S INTEREST

The timeliness of medical-malpractice claims in Ohio is governed by two statutes—the statute of repose and the statute of limitations. Both are products of a detailed framework enacted by the General Assembly to balance the rights of plaintiffs and health care providers. The "Repose Statute," R.C. 2305.113(C), contains no exception for Ohio's "Savings Statute," R.C. 2305.19. The statute of limitations, R.C. 2305.113(A)–(B), by contrast, is directly linked to the Savings Statute. Yet the decision below erroneously extended the Savings Statute to reach the Repose Statute as well.

This ruling is of great and immediate concern to healthcare providers statewide. Amici—the Ohio Hospital Association, the Ohio State Medical Association, and the Ohio Osteopathic Association—rely on Ohio's balanced statutory framework for stability and predictability in dealing with potential tort claims. The purpose of the Repose Statute is to give providers certainty about when a claim may be brought. Allowing the Savings Statute to override the Repose Statute threatens to extend that exposure in an indeterminate and easily abused manner.

The First District's decision upended Ohio's statutory balance by invoking one-sided "policy considerations" to circumvent "legislative intent" and the text of the Repose Statute in support of a judicially created exception. *Wilson v. Durrani*, 2019-Ohio-3880, ¶ 30. Those "policy considerations" concern the challenges Amici's members face every day: the impact of litigation on access to quality care in Ohio and the fundamental question whether the statute's text or the courts' "policy considerations" will control medical-malpractice law in the state. *Id.*

The First District's opinion disregarded several basic canons of statutory construction. It treated the Savings Statute as an implicit exception to the Repose Statute, despite the legislature's express inclusion of other exceptions. It gave precedence to the generic, earlier-enacted Savings Statute over the specific, later-enacted Repose Statute. And it ignored that the

General Assembly expressly incorporated the Savings Statute into ***other*** statutes of repose, but not the medical-malpractice Repose Statute at issue here. The court's decision would allow countless malpractice plaintiffs to forum-shop with new complaints more than four years after the alleged malpractice, as happened here. Based on its misreading of the statutory text to "not definitively speak to the question at hand," the court below "creat[ed] a savings statute exception to the medical malpractice statute of repose" that the legislature never enacted. *Id.* ¶ 31 n. 1.

The First District's decision carries enormous consequences for Ohio's hospitals, physicians, and the patients who depend on them. The opinion would lengthen the time in which providers may be sued, expand plaintiffs' ability to shop for a more attractive forum years after suing, and elevate judicial "policy considerations" over the Ohio's legislature chosen text. Each contributes to judicial erosion of the Repose Statute.

This is not the first time Ohio's medical providers, as Amici, have asked this Court to enforce the Repose Statute as enacted, rather than as contorted in the courts below. This Court's decisions in *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, and *Antoon v. Cleveland Clinic Foundation*, 148 Ohio St.3d 483, 2016-Ohio-7432, both responded to these concerns by interpreting the Repose Statute to provide the certainty and finality intended by the General Assembly. Consistent with that precedent, Amici ask this Court to accept jurisdiction, answer the question raised in its *Antoon* decision, and reaffirm that the Repose Statute is a "true statute of repose" that "means what it says," 2016-Ohio-7432, ¶ 23, not what courts think it should say.

Ohio Hospital Association

Established in 1915, the Ohio Hospital Association represents 236 hospitals and 14 health systems throughout Ohio that employ 255,000 Ohioans and contribute $31.4 billion to Ohio's economy along with $6.4 billion in net community benefit. OHA is the nation's first state hospital association and is recognized nationally for our patient safety and health care quality

initiatives and environmental sustainability programs. Guided by a mission to collaborate with member hospitals and health systems to ensure a healthy Ohio, the work of OHA centers on three strategic initiatives: advocacy, economic sustainability, and patient safety and quality.

Ohio State Medical Association

The Ohio State Medical Association is a statewide medical association representing 10,000 Ohio physicians, residents, fellows, medical students, and practice managers. The OSMA is affiliated with the American Medical Association at the national level and county medical societies at the local level. It is dedicated to advancing the practice of medicine for physicians and their patients, advocating on behalf of Ohio physicians, and protecting the medical profession. The OSMA values the sanctity of the physician-patient relationship, the role of physicians as the leaders of health care teams, innovation that transforms health care delivery and improves the health of patients and the patient experience, access to high-quality and affordable health care, and the role of patients in improving their health.

Ohio Osteopathic Association

The Ohio Osteopathic Association advocates for approximately 6,000 osteopathic physicians, historically osteopathic hospitals, 1,000 osteopathic medical students, and the Ohio University Heritage College of Osteopathic Medicine. OOA is a state society of the American Osteopathic Association. Its founding purposes include promoting the health of all Ohioans, cooperating with all public health agencies, maintaining high standards at all Ohio osteopathic institutions, encouraging research and investigation—especially pertaining to the principles of the osteopathic school of medicine, and maintaining the highest standards of ethical conduct in all phases of osteopathic medicine and surgery.

II. THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This Court has acknowledged the important role that the Repose Statute plays in defining the proper bounds of medical-malpractice litigation. Twice in the past seven years, this Court has accepted for review—and then reversed—appellate decisions that failed to give effect to the Repose Statute as written by the General Assembly. In *Ruther v. Kaiser*, the Court reversed an appellate decision that held the Repose Statute violated the right-to-remedy clause of the Ohio Constitution. Then, in *Antoon v. Cleveland Clinic Foundation*, the Court reversed a decision that held the Repose Statute does not bar medical malpractice claims that have vested.

This appeal concerns the important and far-reaching question: whether the Repose Statute contains an unwritten tolling exception when plaintiffs ***voluntarily*** dismiss a timely filed suit for obvious tactical reasons and then file a second, otherwise untimely suit in a forum they deem more hospitable. This Court expressly reserved judgment on that question in its *Antoon* decision, which also featured Amici's participation and enforced the Repose Statute's terms to prevent circumvention. Below, the appellate court once again failed to apply the Repose Statute as written—this time by "creat[ing] a saving-statute exception to the medical malpractice statute of repose." *Wilson*, 2019-Ohio-3880, 16 n.1. That "exception" lacks any basis in text, structure, or precedent. Yet as interpreted below, it would allow plaintiffs to re-file claims up to one year after taking a voluntary dismissal—potentially several years after the Repose Statute has expired.[1]

This Court anticipated that issue in *Antoon*, but declined to decide it because the plaintiffs in *Antoon* failed to comply with the Savings Statute. *See id.* ¶ 30. This appeal, however, squarely presents that issue of law based on undisputed facts. Resolving the question is virtually

[1] It is hardly clear, moreover, that Ohio courts should interpret the *reversal* savings statute to treat a *voluntary* dismissal, taken for obviously tactical reasons, as a "fail[ure] otherwise than upon the merits" to trigger the savings statute in the first place.

inevitable: it is dispositive in not only these two cases, but also hundreds more pending state court suits, parallel litigation in federal court, and countless future lawsuits. Given the disagreement between the trial and appellate courts here, and between the state and federal courts that have addressed the question so far, no benefit would follow from letting the inconsistency and uncertainty fester. To the contrary, Ohio's statutory policies of certainty and stability, *see Antoon*, 2016-Ohio-7432, ¶¶ 11–19, can only be vindicated by limiting the unnecessary and duplicative proceedings tolerated by the First District's erroneous holding.

More troubling still is the possibility that lower courts will follow the First District's flawed reasoning to further erode the Repose Statute. By setting aside "legislative intent" (and, indeed, the statute's actual words) and relying on its own unbalanced assessment of "policy considerations" to craft a new extra-statutory exception, the court below exposed the Repose Statute to atextual revision and extended the Savings Statute beyond its textual limits. If the First District's decision stands, other litigants will no doubt advance similar policy-based reasoning in hopes of crafting further judicially-created exceptions and limitations to the actual text of Ohio's Repose Statute. Such a result would flatly contradict this Court's instruction that "statutes of repose are to be read as enacted," and that a court's role "is not to express agreement or disagreement with the public policy that led to its enactment." *Id.* ¶¶ 19, 33.

III. STATEMENT OF THE CASE AND FACTS

Amici hereby incorporate Petitioners' statement of the case and facts.

IV. ARGUMENT IN SUPPORT OF THE APPLICABLE PROPOSITION OF LAW

Proposition of Law: The medical-malpractice statute of repose, R.C. 2305.113(C), contains no exception for the reversal saving statute, R.C. 2305.19, allowing plaintiffs to file an untimely suit after a voluntary dismissal.

The General Assembly drafted the Repose Statute without any exception for the Savings Statute. The Repose Statute did, however, include express exceptions for a ***different*** savings statute (R.C. 2305.16), claims involving foreign objects left in the body (R.C. 2305.113(D)(2)), and injuries discovered in the last year before the Repose Statute expires (R.C. 2305.113(D)(1)). Nothing supports the conclusion that the Saving Statute itself carved out an additional, unwritten exception allowing claims to be filed more than four years after the alleged malpractice when plaintiffs voluntarily dismiss their initial, timely suits. Rather, the Repose Statute's text, structure, and precedent confirms the General Assembly's intent to create a "true statute of repose" that bars claims absent an express exception.

A. The Text Of the Repose Statute Determines The "Policy Considerations" Balanced By The General Assembly For Medical Malpractice Claims And Contains No Exception For The Savings Statute.

The General Assembly balanced competing interests by enacting both a statute of limitations and a statute of repose in R.C. 2305.113 to govern the timeliness of medical malpractice claims. The statute of limitations is set forth in subsections (A) and (B). It is ***plaintiff***-focused and defines the time within which a plaintiff must file a claim after it "accrues." For purposes of this statute, a claim accrues "when ***a patient*** discovers or in the exercise of reasonable care and diligence should have discovered the resulting injury." *Ruther*, 2012-Ohio-5686, at ¶ 17 (emphasis added). Under subsection (A), a claim must be brought within one year after the cause of action accrues, and subsection (B) provides a six-month extension if the plaintiff gives written notice of intent to sue.

The statute of repose set forth in subsection (C), by contrast, is *defendant*-focused and sets forth a four-year filing deadline:

> ***<u>Except as to</u> persons within the age of minority or of unsound mind as provided by <u>section 2305.16</u>*** of the Revised Code, and ***<u>except as provided in division (D)</u>*** 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.
>
> (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***. [Emphasis added]

The Repose Statute thus defines the time after which a defendant no longer needs to guard against a potential malpractice claim. As this Court held in *Antoon*, "R.C. 2305.113(C) is a true statute of repose that applies to both vested and nonvested claims" and thus cuts off a defendant's liability regardless of whether a claim was filed within the statute of limitations in subsections (A) or (B). *Antoon*, 2016-Ohio-7432, ¶ 35.

This framework also contains ***specific, explicit exceptions to the Repose Statute***. As shown in the above-quoted language, the four-year statute of repose applies to ***all*** medical malpractice claims "***[e]xcept 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," which contains two additional exceptions. Under (D)(1), if a plaintiff discovers an injury in the fourth year after the alleged malpractice, she may sue within one year of discovering the injury. Under (D)(2), if a claim is based on a foreign object left in the body, the plaintiff may bring an action within one year of discovering the foreign object.[2]

Plainly, the Repose Statute does not include an exception for claims filed under the Savings Statute. The General Assembly's decision to include three express exceptions to the Repose Statute but ***not*** the Savings Statute "indicates that the omission … was intentional." *State*

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[2] If a plaintiff seeks an extension under (D), he or she has the burden of proving by clear and convincing evidence that (D)(1) or (D)(2) applies. R.C. 2305.113(D)(3).

ex rel. Ohio Presbyterian Retirement Services, Inc. v. Indus. Commission of Ohio, 151 Ohio St.3d 92, 2017-Ohio-7577, ¶ 28.

This is not the only statutory difference illustrating that the General Assembly meant what it said. Comparing the statutes of repose for medical-malpractice claims and product-liability claims, enacted in 2003 and 2005, respectively, shows that the products statute contains ***additional*** exceptions the legislature did not adopt for medical-malpractice claims:

> **Products:** "Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section ***or in section 2305.19 of the Revised Code***, no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered …." [R.C. 2305.10(C)(1) (emphasis added)]

> **Malpractice:** "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: …." [R.C. 2305.113(C)]

The General Assembly clearly knew how to incorporate the Saving Statute into a statute of repose. Indeed, it chose to do so for product liability claims—but not for medical malpractice claims. The three exceptions set forth in R.C. 2305.113(C) are the only ones it included.

Reading these three parts of R.C. 2305.113 together shows how they work together and reflect the General Assembly's decision about how best to balance the competing interests of access to the courts for plaintiffs and certainty and predictability for defendants in malpractice litigation. The legislature enacted separate statutes of limitations and repose for reasons this Court has recognized as reasonable. *See Ruther*, 2012-Ohio-5686, ¶ 19 ("Many policy reasons support this legislation. Just as a plaintiff is entitled to a meaningful time and opportunity to pursue a claim, a defendant is entitled to a reasonable time after which he or she can be assured that a defense will not have to be mounted for actions occurring years before."), *Antoon*, 2016-Ohio-7432, ¶ 34 ("Significant public-policy considerations support granting repose to

defendants, and the General Assembly has determined that four years is a reasonable length of time to bring a medical-malpractice claim."). As its drafters noted, the statute "strikes a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners," and "precludes unfair and unconstitutional aspects of state litigation but does not affect timely medical malpractice actions brought to redress legitimate grievances." Am.Sub.S.B. No. 281 (124th Gen. Assembly) § 3(A)(6)(a), (e).

These concerns apply to the work of Amici's members every single day. Indeed the specific, competing policy interests in medical malpractice litigation were apparent when the General Assembly enacted R.C. 2305.113. The legislature considered the importance of both "continu[ing] to hold negligent health care providers accountable for their actions," and "preserv[ing] the right of patients to seek legal recourse for medical malpractice." *Id.* § 3(B)(3)-(4). Yet the General Assembly also expressed concern regarding the diminishing availability of relevant evidence and witnesses over time, the "unacceptable burden to hospitals and health care practitioners" to indefinitely maintain records and documentation, and the difficulties in applying evolving standards of care rather than "the standard of care relevant to the point in time when the relevant health care services were delivered." *Id.* § 3(A)(6)(b)–(d). This statutory framework is not ambiguous and leaves no wiggle-room for courts to second-guess the General Assembly's intent. As stated in *Antoon*, "statutes of repose are to be read as enacted," 2016-Ohio-7432, ¶ 19.

B. The Structure Of R.C. 2305.113 and 2305.19 Does Not Render The Provisions Ambiguous.

The First District only briefly acknowledged the language of the Repose Statute before it concluded that "legislative intent is indeterminate." *See Wilson*, 2019-Ohio-3880, ¶¶ 29–30. The only basis the First District offered was a 2009 amendment to the Savings Statute that states: "This section does not apply to an action or proceeding arising under section 2106.22, 2107.76,

2109.35, 2115.16, 5806.04, or 5810.05 of the Revised Code." *See id.*; R.C. 2305.19(C). According to the First District, the fact that the General Assembly did not include R.C. 2305.113 in that list of exclusions might indicate it intended the Savings Statute to trump the Repose Statute. *See Wilson*, 2019-Ohio-3880, ¶ 29. That reasoning is flawed in several respects.

First, the legislature had no need to include R.C. 2305.113 in the list of exceptions added in 2009. The Savings Statue was already inapplicable to the Repose Statute, and the legislature did nothing to extend it. Two basic canons of construction make this clear: more specific statutes control more general statutes, and later statutes control earlier statutes. Indeed, the General Assembly directly codified these principles as guides to the courts interpreting its statutory language. *See* R.C. 1.51 ("[T]he special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."). Here, the Savings Statute currently codified in R.C. 2305.19 dates back to the Ohio General Code and long predates the Repose Statute, which was enacted in 2003. *See* Am.Sub.S.B. No. 281 (124th Gen. Assembly). Moreover, the Repose Statute speaks specifically to any "action upon a medical, dental, optometric, or chiropractic claim," R.C. 2305.113, while the Savings Statute generally addresses "any action," R.C. 2305.19(A). Because the Repose Statute was a newer and more specific exception for medical malpractice claims, it superseded the older, more general Savings Statute. There was no need to also include R.C. 2305.113 in the list of exceptions enacted in 2009. Rather than "finding arguments regarding legislative intent unpersuasive" and "indeterminate," *Wilson*, 2019-Ohio-3880, ¶ 29, these interpretive canons show the Repose Statute bars plaintiffs' untimely second bites at the apple.

Second, the language of the Savings Statute confirms that it does not trump a ***statute of repose***. Rather, the plain language of the Savings Statute addresses only a ***statute of limitations***:

a plaintiff may re-file an action "within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later." R.C. 2305.19(A). While the Savings Statute may contemplate that a plaintiff might sue outside the original statute of limitations, it says nothing to indicate a plaintiff could sue outside the applicable statute of repose.

These fundamental principles of statutory interpretation accord with the related but distinct purposes of statutes of limitations and repose. *See Antoon*, 2016-Ohio-7432, ¶ 11 ("Statutes of repose and statutes of limitations have distinct applications…."). A statute of limitations is ***plaintiff***-focused and based on the belief that "plaintiffs should litigate their claims as swiftly as possible." *See id*. ¶¶ 11–12. Applying the Savings Statute to extend a statute of limitations when the plaintiff has timely brought a prior action is consistent with that purpose. In contrast, a statute of repose is ***defendant***-focused and "exists to give medical providers certainty with respect to the time within which a claim can be brought and a time after which they may be free from the fear of litigation." *Id*. ¶ 22. A plaintiff's attempt to use the Savings Statute to dismiss and re-file claims for a strategic advantage contradicts the purpose of a statute of repose.

The court below overlooked these clear textual indications from the legislative branch that the medical-malpractice Repose Statute should take precedence over the generic Savings Statute. The language and intent of the General Assembly was not "indeterminate," and no statutory ambiguity licensed the courts to turn to their own understanding of the best policy outcomes. As this Court stated in *Antoon*, "the plain language of the statute is clear, unambiguous, and means what it says." 2016-Ohio-7432, ¶ 23.

C. Controlling Precedents And "Policy Considerations" Show That The First District Disrupted The General Assembly's Policy Determination.

The First District ultimately rested its decision to create an exception for the Savings Statute on "policy considerations." *Wilson*, 2019-Ohio-3880, ¶¶ 30-32. Even assuming the court's consideration of policy were warranted, its analysis was incorrect and incomplete. The risk of error inherent in such policy-weighing illustrates the dangers of departing from the legislature's written words in favor of a court's unwritten policy priorities. The opinion below, for example, stated that the statute of repose serves two policy goals: (1) eliminating indefinite potential liability and (2) giving defendants greater certainty and predictability. *Id.* ¶ 30. Even assuming the "reasons support[ing] this legislation" are limited to two (in reality, the list is significantly longer[3]), the court misapplied both policies.

With respect to indefinite liability, the First District stated that "the [savings] statute is compatible with the first goal of the statute of repose—at most, extending the statute of repose by one year." *Id.* ¶ 31. But nothing suggests that the legislature worried solely about *unlimited* delay; it determined that the appropriate length of time to file suit was *four years* (barring express exceptions that do not apply here). The Savings Statute, were it to apply, would contravene the purpose of the Repose Statute to end malpractice exposure after four years.

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[3] This Court has recognized that "[m]any policy reasons support this legislation." *Ruther*, 2012-Ohio-5686, ¶¶ 19–20 (noting concerns about loss of evidence; unavailability of witnesses; and changes in standards of care, providers' financial circumstances, and insurance coverage). Many of these same concerns were before the General Assembly when it enacted R.C. 2305.113. *See* Am.Sub.S.B. No. 281 § 3(A)(6)(e) (explaining legislative intent to "preclud[e] unfair and unconstitutional aspects of state litigation"). The statute of repose is meant to "increase the availability of medical malpractice insurance to Ohio's hospitals, physicians, and other health care practitioners, thus ensuring the availability of quality health care for the citizens of this state." *Id.* § 3(A)–(B). The First District's analysis ignored these additional policy considerations. The First District's approach plainly could cause the opposite effects: higher premiums, increased costs, fewer physicians, and reduced access.

The extended timeframe enabled by the First District, moreover, is not merely a single year beyond the four-year repose period. It would permit a new suit to be filed a year after a voluntary dismissal even if a plaintiff sued in the fourth year, litigated the case for years more, and then (perhaps, as here, in response to perceived unfavorable trial prospects) voluntarily dismissed the case and re-filed a year later in a different forum. The disruption and extension of the defendant's potential liability would be extensive: a subsequent suit could come several years after the Repose Statute expired—an outcome inconsistent with eliminating indefinite liability.

As to the second policy goal of "certainty and predictability," the First District's opinion stated these "are only affected where the defendant is unaware that the first action was filed." *Wilson*, 2019-Ohio-3880, ¶ 31. Not so. Anyone who has ever dealt with inchoate legal exposure understands that risks may be known, yet still uncertain and unpredictable—particularly the longer the cloud of legal exposure extends from the initial event. Such concerns were clearly before the General Assembly when it enacted the package of tort-reform legislation that contained the Repose Statute. *See* Am.Sub.S.B. No. 281 § 3(A)(6)(b), (d) (noting that witnesses may move or retire, and that standards may evolve beyond "the standard of care relevant to the point in time when the relevant health care services were delivered"). Those concerns apply regardless of whether a defendant is aware of prior litigation. The General Assembly accordingly made the policy judgment that a four-year cut-off to file claims was appropriate.

Given the untenable approach to policy balancing seen here, it is unsurprising that other courts have rightfully deferred to the legislature's judgment regarding time limits and exceptions in malpractice suits. In *Wade*, the Court of Appeals addressed a prior version of the medical malpractice statute of repose and correctly held that the legislature's reference to one specific exception in the statute of repose meant it did not intend to include any others. *See Wade v.*

Reynolds, 34 Ohio App.3d 61, 61, 517 N.E.2d 227 (10th Dist. 1986). The prior statute of repose applied "regardless of legal disability and notwithstanding section 2305.16 of the Revised Code." The court concluded that this express reference to R.C. 2305.16 precluded any inference that the legislature intended the statute of repose to apply notwithstanding the Savings Statute. *See id*.

When the General Assembly amended the medical-malpractice statute in 2003, it changed the structure of the statute of repose but again expressly mentioned specific statutory exceptions: the four-year limit applied "[e]xcept … as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section." In light of *Wade*, the General Assembly had every reason to conclude that courts would interpret its express reference to those other statutes in the amended 2305.113 as exclusive, precluding any judicial elaboration of additional unwritten exemptions.[4]

This Court also rejected the notion that such policy considerations justified a departure from the text of the Repose Statute in *Antoon*. In that case, as here, the plaintiff sued in the fifth year after the alleged malpractice (one year beyond the statute of repose) and had previously filed lawsuits against the defendants (thus putting them on notice). *See Antoon*, 2016-Ohio-7432, ¶¶ 2–6. Just as those policy considerations did not justify an exception to the Repose Statute for vested claims in *Antoon*, they do not justify creating an exception for the Savings Statute here.

The First Circuit also ignored other policy considerations that weigh *against* the exception it created. The General Assembly expressly stated that it intended the Repose Statute to "preclude[ ] unfair … aspects of state litigation." Am.Sub.S.B. No. 281 § 3(A)(6)(e). Yet here,

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[4] The Southern District of Ohio's decision in *Atwood*—which the First District relied on to the exclusion of this Court's reasoning in *Antoon* and *Ruther*—likewise failed to recognize that *Wade* supplied the interpretive background against which the General Assembly legislated in 2003. *See Atwood v. UC Health*, No. 1:16cv593, 2018 U.S. Dist. LEXIS 139495, at *21 (S.D. Ohio Aug. 17, 2018).

it was only after plaintiffs' counsel lost several cases at trial in Butler County that they voluntarily dismissed their clients' claims and then re-filed the claims in Hamilton County. There was no procedural defect in the prior litigation—the only apparent function of the Savings Statute was to facilitate a move to a more favorable forum. Indeed, this posture flips the normal equities on their head: rather than barring litigation based on a procedural technicality that operates to benefit defendants, here the *plaintiffs* are the ones seeking to exploit a technicality to pursue a stale lawsuit the law otherwise would bar. The "liberal construction" plaintiffs attempt to give this "remedial statute," therefore, cannot rely on a preference for avoiding decisions based "upon mere technicalities of procedure." *Wilson*, 2019-Ohio-3880, ¶ 21 (quoting *Cero Realty Corp. v. Am. Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 85, 167 N.E.2d 774 (1960)).

The errors in the First District's policy analysis reflect a more fundamental problem—the fact that it second-guessed the General Assembly's policy decisions at all. This Court's "role in reviewing a statute is not to express agreement or disagreement with the public policy that led to its enactment." *Antoon*, 2016-Ohio-7432, ¶ 33. The words and structure of R.C. 2305.113 are court's best indication of how Ohio "strike[s] a rational balance between the rights of prospective claimants and the rights of hospitals and health care practitioners." Am.Sub.S.B. No. 281 §§ 3(A)(6)(a), 3(C)(1) (further requesting that "the Ohio Supreme Court … uphold this intent in the courts of Ohio"). Here, the Court should restore the Repose Statute as enacted and reject the exception that the First District created for the Savings Statute.

V. CONCLUSION

Amici OHA, OSMA, and OOA respectfully urge the Court to accept jurisdiction in this case, to adopt Petitioners' Proposition of Law, reverse the Court of Appeals' decision below, and answer the question left open in *Antoon*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, a copy of the foregoing was filed electronically with the Clerk of the Ohio Supreme Court, and that a copy of the foregoing was served upon the following by email:

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