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**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR
GREAT GENERAL INTEREST**

Contrary to Appellants' contentions, this case does not involve any novel or unsettled legal issues that require Supreme Court review. Rather, the trial and appellate courts reached their conclusions by applying plain statutory language and established principles of vicarious liability. This Court recently analyzed the overlapping relationship between the one-year statute of limitations that governs medical claims and the doctrine of vicarious liability. See *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559. The Fifth District Court of Appeals' decision in this matter is entirely consistent with this Court's ruling in *Comer*. Nothing about the factual or procedural history of this case requires further Supreme Court guidance.

In *Comer*, this Court considered whether a hospital could be held liable under the doctrine of agency by estoppel for the actions of an independent contractor physician even though the statute of limitations as to the physician had already expired. *Id.* In other words, the Court analyzed whether a principal can be held liable for an agent's actions under circumstances where the agent cannot be held liable. *Id.* This Court concluded that because a master's liability flows solely through the agent, the master cannot be held liable once the agent's liability is extinguished. *Id.*

Specifically, this Court recognized that "an agent who committed the tort is primarily liable for its actions, while the principal is merely secondarily liable." *Id.* at 189 citing *Losito v. Kruse* (1940), 136 Ohio St. 183; *Herron v. Youngstown* (1940), 136 Ohio St. 190. "If there is no liability assigned to the agent, it logically flows that there can be no liability imposed upon the principal for the agent's actions." *Id.* Thus, "if the independent contractor is not and cannot be liable because of the expiration of the statute of limitations, no potential liability exists to flow through to the secondary party, i.e. the hospital, under an agency theory." *Id.* at 190-91.

This Court would have to completely abandon the foregoing principles in order to reach the conclusion that Appellants have asserted.¹ Appellants concede that (1) their claims arise from medical care rendered by a registered nurse, (2) that a cause of action against the nurse would be a “medical claim” subject to the one year statute of limitations, and (3) that the one-year limitations period expired before Appellants filed this cause of action. In short, Appellants acknowledge that a direct claim against the nurse who rendered the care in this case would be time-barred. Nonetheless, Appellants contend that the registered nurse’s employer can be held liable for the nurse’s alleged negligence even though the nurse cannot be held liable. *Comer* leaves no doubt that Appellants’ position is unfounded. Appellees’ secondary liability was extinguished when the nurse’s primary liability was extinguished. In the absence of the nurse’s primary liability, there is no liability that may flow through to Appellees on an agency theory. *Id.* at 191.

This Court has comprehensively addressed all of the issues raised in Appellants’ propositions of law. The fundamental principles of vicarious liability and *respondeat superior* are well-settled. This case does not provide any basis to revisit law that this Court clarified less than two years ago.

Moreover, the statutory language at issue is clear and unambiguous. See R.C. § 2305.113. The provision states that claims against registered nurses arising out of medical treatment are subject to a one year statute of limitations. R.C. § 2305.113(E)(3). The statute further provides that “derivative claims for relief that arise from the medical diagnosis, care, or

¹ Appellees recognize that *Comer* addressed the doctrine of agency by estoppel whereas this case involves a more traditional agency relationship. Nonetheless, this Court’s reasoning and analysis apply equally to either scenario. Regardless of the nature of the agency, the master cannot be held liable if the servant’s liability has already been extinguished.

treatment of a person” fall within the one year limitations period. R.C. § 2305.113(E)(3)(a). A vicarious liability claim that aims to hold a principal liable for the actions of its agent are derivative claims. See *Comer*, 106 Ohio St.3d 185; *Albain v. Flower Hosp.* (1990), 50 Ohio St.3d 251, 255, *rev'd on other grounds*; *Pretty v. Mueller* (1997), 132 Ohio App.3d 717, 723; *Burns v. Rice* (2004), 157 Ohio App.3d 620, 640; Black's Law Dictionary (5th ed. 1979) 399.

Thus, the plain statutory language confirms that Appellants' cause of action is a medical claim that is subject to the one year statute of limitations. The statute is clear and unambiguous. There is simply nothing for this Court to analyze or interpret. See *Sears v. Weimer* (1944), 143 Ohio St. 312 (“An unambiguous statute is to applied, not interpreted.”); *Jasinsky v. Potts* (1950), 153 Ohio St. 529, 534 (same); *Wingate v. Hordge* (1979), 60 Ohio St.2d 55, 58 (same).

Finally, it should be noted that appellate courts have not had any difficulty applying R.C. § 2305.113 to vicarious liability claims. In *Bradford v. Surgical Med. Neuro. Associates, Inc.* (1994), Ohio App.3d 102 and *McMinn v. D.V. Ramani, M.D. & Associates, Inc.* (1984), 20 Ohio App.3d 167, the courts applied the one year statute of limitations to medical negligence claims filed against physicians' professional corporations. The allegedly negligent physicians were not named as defendants in either case. As is the case with Appellees, the statute does not specifically designate “physicians' professional corporations” as covered entities. See R.C. § 2305.113(E)(3). Nonetheless, the courts in the foregoing cases recognized that a medical claim is a medical claim regardless of whether it is filed against the medical provider or his or her employer. Changing the name of the defendant does not magically transform a medical claim into a personal injury claim. Appellate and trial courts throughout Ohio are correctly applying the one year statute of limitations to derivative vicarious liability claims. This Court's guidance is unnecessary.

Appellees respectfully submit that Supreme Court jurisdiction should be confined to a narrow class of cases that present significant, novel propositions of law. This case does not involve any such issues. This case deals with an unambiguous statute and well-established principles of agency and vicarious liability. Appellants' misguided contentions are completely inconsistent with this Court's recent pronouncement in *Comer*. Nothing about the case compels this Court to revisit *Comer* or clarify longstanding principles of *respondeat superior*. Consequently, the case is not of great public or general interest. The Court should deny jurisdiction to consider Appellants' arguments.

STATEMENT OF THE CASE & FACTS

Appellants filed this medical malpractice action on May 19, 2005. The Complaint alleged that Appellees, Stark County Visiting Nurses Service & Hospice aka Visiting Nurse Health Care Systems of Stark County, Inc. and Visiting Nurse Service, Inc. and Affiliates, negligently applied gauze to Appellant's post-surgical wound in contravention of her physician's orders. The Complaint further alleged that Appellees' negligence proximately caused Appellant harm. The alleged negligence purportedly occurred between May 22, 2003 and June 6, 2003.

Appellees filed a Motion for Summary Judgment on June 20, 2005. In that Motion, the Appellees argued that they were entitled to summary judgment as a matter of law because Appellants failed to file their Complaint prior to the expiration of the one year statute of limitations that governs medical malpractice claims. Appellants were required to file their Complaint no later than June 6, 2004. They did not file their claims until May 19, 2005, nearly one year too late. Appellants responded that the one year statute of limitations was not applicable because their claims were not medical claims. Instead, Appellants asserted that their claims were typical personal injury claims subject to a two year statute of limitations.²

The trial court granted summary judgment in favor of Appellees on August 5, 2005. In doing so; the trial court held that Appellants' Complaint asserted medical claims that were subject to the one year statute of limitations contained in R.C. § 2305.113. In particular, the court noted that the Complaint alleged that Appellees negligently applied gauze to a postoperative wound in contravention of a physician's orders. Thus, Appellants' claims were medical claims rather than personal injury claims. Appellees were entitled to summary judgment

² Appellants never asserted any arguments that they complied with the one year statute of limitations. Therefore, they waived any such argument. Appellants' sole basis for appeal was that the one year statute of limitations was inapplicable.

as a matter of law because Appellants filed their Complaint well after the expiration of the one year statute of limitations.

Appellants subsequently appealed the trial court's Judgment Entry. Following briefing and oral argument, the Fifth District Court of Appeals agreed that Appellants' claims were medical claims because they arose out of medical treatment. Moreover, the court held that since Appellants' cause of action was a derivative claim based on the doctrine of *respondeat superior*, the one year statute of limitations that governs medical claims was applicable. Specifically, the court observed that "corporations which employ physicians are responsible under the doctrine of respondeat superior and are included in the statutory definition" of medical claims. However, the court reversed and remanded the matter to the trial court because the record was devoid of any evidence that the employee who rendered the medical care in this case was in fact a "licensed practical nurse, registered nurse, advanced practice nurse, physical therapist, or physician assistant nurse," as required by the statute.

Following remand, Appellees followed the appellate court's directive and submitted a second Motion for Summary Judgment, which was accompanied by the Affidavit of Ina Ladich, R.N. Ms. Ladich's Affidavit averred that she was the only employee of Appellees who rendered treatment to Appellant. Moreover, Ms. Ladich confirmed that she is in fact a registered nurse.

The trial court subsequently granted summary judgment in favor of Appellees on June 23, 2006. The court's Judgment Entry recognized that the Fifth District Court of Appeals had already addressed all of the applicable legal arguments in *Sliger I*. The court also recognized that Appellees had submitted proper evidence confirming that the employee who rendered care to Appellant was a registered nurse.

In spite of the Fifth District's clear ruling in *Sliger I*, Appellants appealed the trial court's decision a second time. The Fifth District affirmed the trial court's ruling, citing its decision in *Sliger I* and the law of the case doctrine. Appellants then filed their Notice of Appeal and Memorandum in Support of Jurisdiction in this Court.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Appellees will address Appellants' propositions of law simultaneously, as they are interrelated. Ohio Revised Code §2305.113(A) provides as follows:

Except as otherwise provided in this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the cause of action accrued.

Ohio Revised Code §2305.113(E)(3) further defines a "medical claim" as follows:

"Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a **licensed practical nurse, registered nurse, advanced practice nurse**, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person.

"Medical claim" includes the following:

(a) Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person;

(b) Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies:

(i) The claim results from acts or omissions in providing medical care.

(ii) The claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.

(Emphasis added).

The statute explicitly states that "medical claims" include both derivative claims that arise from medical care or treatment as well as any other claim that arises from an act or omission in providing medical care. See R.C. § 2305.113(E)(3)(a-b). The language of the statute could not be any more clear. The statute does not contain any indication that subsections (a) and (b) are predicated on the fact that the claim is brought against one of the enumerated categories of defendants. A vicarious liability claim that aims to hold a principal liable for the actions of its agent is a derivative claim. See *Albain v. Flower Hosp.* (1990), 50 Ohio St.3d 251, 255, *rev'd on*

other grounds; *Pretty v. Mueller* (1997), 132 Ohio App.3d 717, 723; *Burns v. Rice* (2004), 157 Ohio App.3d 620, 640; Black's Law Dictionary (5th ed. 1979) 399. Therefore, Appellants' claims were "medical claims" governed by the one-year statute of limitations contained in R.C. § 2305.113(A). The plain meaning of the statute demonstrates that it is applicable to this case.

Furthermore, Appellants' claims were premised on the doctrine of *respondeat superior*. In other words, Appellants sought to hold Appellees vicariously liable for the acts or omissions of their employee nurse (Ms. Ladich) who treated Appellant. The statute makes it clear that if Appellants had filed claims against Ms. Ladich, the claims would be "medical claims" subject to the one-year statute of limitations. See R.C. § 2305.113(E)(3). If the Complaint had been filed solely against Ms. Ladich, it would have unquestionably been time-barred. Appellants have never disputed that fact. Instead, Appellants contend that a different statute of limitations applies because they named Appellees as defendants in lieu of Ms. Ladich. However, the statute cannot be rendered inapplicable by simply changing the name of the defendant.

Appellants' argument stems from a fundamental misunderstanding of the doctrine of *respondeat superior*. This Court has made it clear that "an agent who committed the tort is primarily liable for its actions, while the principal is merely secondarily liable." *Comer*, 106 Ohio St.3d at 189. "If there is no liability assigned to the agent, it logically flows that there can be no liability imposed upon the principal for the agent's actions." *Id.* Thus, "if the independent contractor is not and cannot be liable because of the expiration of the statute of limitations, no potential liability exists to flow through to the secondary party, i.e. the hospital, under an agency theory." *Id.* at 190-91. The same reasoning applies in a case involving a direct agency as opposed to an agency by estoppel. Appellees cannot be held liable for their agent's alleged negligence because the claims against her were extinguished the day the statute of limitations

expired. Once the claim against the agent expired, the claim against the principal necessarily expired as well. There cannot be two separate statutes of limitation for one alleged act of negligence.

The fallacy of Appellants' position is also readily apparent by considering an analogous scenario that commonly arises in medical malpractice cases. Physicians are generally employed by independent professional corporations rather than hospitals. When plaintiffs file medical malpractice claims against physicians, they frequently name the independent professional corporations as defendants as well. These independent professional corporations are not listed within the list of categories enumerated in R.C. § 2305.113(E)(3). They are no different than any other corporation. If Appellants' argument were adopted, the claim against the physician would be governed by a one-year statute of limitations while the claim against his corporation would be governed by a two-year statute of limitations, in spite of the fact that the claims against the corporation arose solely from the acts or omissions of the physician. That is clearly not the law in Ohio. See e.g., *Bradford v. Surgical & Med. Neuro. Associate, Inc.* (1994), 95 Ohio App.3d 102; *McMinn v. D.V. Ramani, M.D. & Associates, Inc.* (1984), 20 Ohio App.3d 167 (both cases applying one-year statute of limitations against physicians' professional corporations).

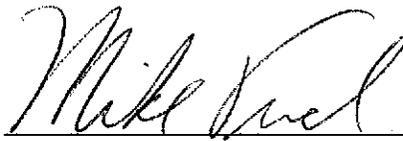
Appellants' position would also permit claimants to circumvent the one-year statute of limitations altogether by simply filing claims against a physician's professional corporation without separately naming the physician. The inequity of either result is obvious. A medical malpractice claim cannot be transformed into a typical personal injury claim simply by changing the party that is named as a defendant. Appellants' claims arose out of medical care and treatment provided by a registered nurse employed by Appellees. The claims are "medical claims" regardless of whether they were filed against the nurse or her employer. Simply omitting

the individual nurse as a defendant does not transform the nature of the case, nor does it alter the applicable statute of limitations. Appellants' cause of action is time-barred. The trial court's decision to grant summary judgment was correct.

CONCLUSION

In light of the foregoing, Appellees hereby respectfully request that the Court deny jurisdiction to consider this appeal. This case does not present any substantial or novel issues that warrant Supreme Court review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true copy of the foregoing MEMORANDUM IN OPPOSITION TO JURISDICTION

was served via regular U.S. mail this 19th day of April, 2007 upon:

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