

MONICA FLETCHER, INDIVIDUALLY  
AND AS ADMINISTRATRIX OF THE  
ESTATE OF VICTOR SHAW, DECEASED

Appellee,

vs.

UNIVERSITY HOSPITALS OF  
CLEVELAND, et al.,

Appellants.

Supreme Court Case No.

Appeal from the Cuyahoga County  
Court of Appeals, Eighth Appellate  
District

Court of Appeals  
Case No. CA-06-088573

**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT UNIVERSITY HOSPITALS OF CLEVELAND**

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VICTOR SHAW**

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SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THIS CASE IS  
A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case presents an important issue concerning the applicability and interpretation of Ohio Civil Rule 10(D)(2) and the proper procedure for ensuring compliance with the Affidavit of Merit requirement set forth in that rule. The Court of Appeals recognized that this case presented “an issue of first impression” and “found no appellate cases construing Civ.R. 10(D)(2) or determining the proper procedure for ensuring compliance with it.” Guidance from the Supreme Court is appropriate in this case.

Following the request of the General Assembly, the Supreme Court amended Civil Rule 10(D) on July 1, 2005 to address the public interest in eliminating insufficient and unsupported medical claims. Following the amendment, the custom and practice of defendants has been to challenge non-compliance with Civil Rule 10(D)(2) with a motion to dismiss pursuant to Civil Rule 12(B)(6) which is the procedural vehicle to test the sufficiency of a complaint.

Despite acknowledging “[t]he lack of authority” and “little opportunity for appellate review of this issue,” the Court of Appeals created a unique procedural remedy contrary to the clear guidance provided by other jurisdictions. In order to give meaning and effect to similar procedural rules, courts in other jurisdictions have uniformly held that a motion to dismiss provides the proper remedy for challenging a failure to file an affidavit of merit with a complaint containing a medical claim.

The Court of Appeals also ignored the clear language and intent of Civil Rule 10(D)(2) by holding that the failure to include an Affidavit of Merit did not affect the sufficiency of a complaint alleging a medical claim and did not subject that complaint to a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant Civil Rule 12(B)(6).

Instead, in apparent reliance upon proximity to Civil Rule 10(D)(1), the Court of Appeals held that a motion for more definite statement provided the proper remedy for a Civil Rule 10(D)(2) violation and that a defendant who did not file a motion for more definite statement prior to filing an answer would be deemed to have waived the right to move for dismissal.

The Court of Appeals' approach in grouping Civil Rule 10(D)(1) and Civil Rule 10(D)(2) together and utilizing the same procedural mechanism for responding to a failure to comply with either rule ignores fundamental differences in intent and substance between these two rules. Civil Rule 10(D)(1) requires that a copy of an account or written instrument be attached to the complaint because "[a]n attached written instrument is more comprehensible than a detailed description of that instrument" and "is the best evidence of the agreement" supporting the claim or defense being asserted in an account or contract matter. *Oxford Sys. Integration, Inc. v. Smith-Boughan Mechanical Servs.*, 159 Ohio App.3d 533, 824 N.E.2d 586, 2005-Ohio-210, ¶ 14 (*quoting* 4 Harper & Solimine, *Anderson's Civil Practice* 281, Section 151.18). Moreover, the account or written instrument constitutes part of the pleading itself and is admissible as evidence.

Civil Rule 10(D)(2) addresses an entirely different type of action -- a medical claim as defined in R.C. 2305.111 -- and is intended "to establish the sufficiency of the complaint" filed in a medical liability action. *See* Staff Note to Ohio Civ. R. 10(D)(2). The Affidavit of Merit required under Civil Rule 10(D)(2) "shall not otherwise be admissible as evidence or used for purposes of impeachment" and has an entirely different function -- "to establish the adequacy of the complaint" -- from the account or written instrument required under Civil Rule 10(D)(1) to provide best evidence for the account or contract claim alleged in the complaint.

Guidance from the Supreme Court is required to address the fundamental jurisprudential failings from this case of first impression. The damaging effects of this decision already have

begun to take root as evidenced by the fact that a federal court recently followed and adopted this misguided reasoning as stating the law of Ohio on this issue.

*Fletcher's* holding teaches that the proper remedy here . . . is not the outright dismissal of the Complaint.

Defendants have not sought a more definite statement under Federal Rule of Civil Procedure 12(e). Instead, they have moved to dismiss the Complaint for failure to state a claim upon which this Court can grant relief. The majority of defendants have also filed answers. (Docs.# 8, 9, 10.) Under *Fletcher*, these acts would foreclose a subsequent attack on the lack of an affidavit of merit in Ohio courts.

*Teasdale v. Heck* (S.D. Ohio 2007), U.S. Dist. Ct. Case No. 2:07-CV-348, 2007 WL 1875784.

If allowed to stand, the Court of Appeals' approach will undermine the stated purpose of Civil Rule 10(D)(2) in preventing unsubstantiated claims against health care providers and reducing unnecessary expenses in terms of loss of professional time and incurring legal costs associated with the defense of frivolous lawsuits. Defendants will be deprived of the cost-effective recourse provided through Civil Rule 10(D)(2) to quickly challenge insufficient medical claims. Instead, the practical effect of filing a motion for more definite statement, obtaining a trial court order after further briefing and then, where there is non-compliance, a motion to dismiss, followed by further briefing and argument, serves only to increase the time and expense that this Court sought to reduce by the amendment of Civil Rule 10.

The Supreme Court and the General Assembly certainly did not intend that Civil Rule 10(D)(2) would make insufficient medical claims more difficult to dismiss thereby increasing the burden and expense on health care providers in defending these claims. In order to prevent this unintended and inequitable result, this Court should accept jurisdiction over the present matter to determine the appropriate procedural mechanism for responding to a failure to comply with the

requirements of Civil Rule 10(D)(2) and the effect of a decision finding non-compliance with those requirements.

### **STATEMENT OF THE CASE AND FACTS**

On September 2, 2003, Plaintiff-Appellant Monica Fletcher (“Ms. Fletcher”) filed a wrongful death and survivorship Complaint in the Mahoning County Court of Common Pleas, Case No. 2003 CV 03014, asserting a medical claim against certain health care providers. On March 30, 2005, Ms. Fletcher voluntarily dismissed her Complaint, without prejudice, pursuant to Civil Rule 41(A)(1).

On March 29, 2006, Ms. Fletcher refiled her medical malpractice and wrongful death Complaint in the Cuyahoga County Court of Common Pleas against Defendants-Appellees University Hospitals of Cleveland and Raymond Onders, M.D. Ms. Fletcher did not attach or file an Affidavit of Merit with her Complaint and did not request an extension of time in which to file an Affidavit of Merit.

On May 2, 2006, University Hospitals filed a Motion to Dismiss Plaintiff’s Complaint for failure to comply with Civil Rule 10(D)(2). On July 13, 2006, the trial court issued an Order granting Defendant’s Motion to Dismiss and dismissed the Complaint with prejudice. (Appx., p. 1).

The Eighth District Court of Appeals reversed the trial court based solely upon “an issue of first impression” -- i.e., the only proper challenge to a complaint alleging a medical claim that does not include an attached Affidavit of Merit “is for the defendant to request a more definite statement” pursuant to Civil Rule 12 (E). (Appx., p.8). The Court of Appeals reasoned that, although “[t]he common pleas court correctly determined that appellant’s complaint presented a medical claim as to which she was required to supply an affidavit of merit pursuant to Civ.R.

10(D)(2), and that appellant failed to include an affidavit with her complaint,” (Appx., p. 7), and despite Civil Rule 10(D)(2) unambiguously requiring an affidavit of merit to establish the sufficiency of a complaint, “[i]t does not follow . . . that a complaint which does not contain an affidavit of merit fails to state a claim, and is therefore subject to dismissal.” (Appx., p. 7).

The Court of Appeals further held that “[a] defendant who fails to file a motion for more definite statement before filing has been held to have waived the right to assert the plaintiff’s failure to attach a written copy of a written instrument as a basis for dismissing the complaint (citations omitted)” and that “the filing of a motion to dismiss will generally waive the right to assert that a more definite statement is required.” (Appx., pp. 8-9).

The Appellate Court relied upon an incorrect analysis and an erroneous application of Civil Rule 12(E), without the benefit of briefs or oral argument, to determine this issue of first impression. University Hospitals filed an Application for Reconsideration to address this new procedural mechanism. The Court of Appeals denied the Application for Reconsideration, reiterating its view, which is contrary to the specific language of the rule and the Staff Notes, that “the sufficiency of the complaint was not affected by the absence of an affidavit of merit.” (Appx., p. 11). Moreover, despite noting that this case involved “an issue of first impression in this state,” the Court of Appeals found that decisions from other jurisdictions interpreting procedural rules and statutes imposing similar affidavit requirements did not aid in its review and refused to reconsider its analysis of the appropriate method for challenging a Civil Rule 10(D)(2) violation. (Appx., p. 11).

## **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

### **Proposition of Law No. I: A Motion For Failure To State A Claim Upon Which Relief Can Be Granted Pursuant To Civil Rule 12(B)(6) Is The Proper Procedure For Challenging The Failure To File An Affidavit Of Merit In Accordance With Civil Rule 10(D)(2)**

Ohio Civil Rule 10(D)(2) requires a plaintiff asserting a medical liability claim to include an affidavit of merit from a qualified expert in order to establish the adequacy of the complaint. Civil Rule 10(D)(2) was adopted in response to the following request from the General Assembly contained in Section 3 of Sub. H.B. 215:

The General Assembly respectfully requests the Supreme Court to require a plaintiff filing a medical liability claim to include a certificate of expert review with the complaint or to file the certificate of expert review with the court within thirty days after the filing of the claim. The General Assembly respectfully requests that the certificate of expert review require the signature of an expert witness from the same specialty as the defendant; said witness shall be required to meet the evidentiary and case law requirements of a medical expert capable of testifying at trial. *A certificate of expert review should be required to state with particularity the expert's familiarity with the applicable standard of care, the expert's qualifications, the expert's opinion as to how the applicable standard of care was breached, and the expert's opinion as to how the breach resulted in the injury or death.*

Sub. H.B. 215, Section 3 (emphasis added).

The version of Civil Rule 10(D)(2) in effect at the time of the trial court ruling stated, in pertinent part, as follows:

*(2) Affidavit of merit; medical liability claim.*

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim ... as defined in section 2305.113 of the Revised Code, shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence.

\* \* \*

(c) An affidavit of merit is *required solely to establish the adequacy of the complaint* and shall not otherwise be admissible as evidence or used for purposes of impeachment.

Ohio Civ.R. 10(D)(2) (July 1, 2005) (emphasis added).

As stated in the 2005 Staff Notes to Civil Rule 10(D):

Division (D)(2)(c) provides that *an affidavit of merit is intended to establish the sufficiency of the complaint* filed in a medical liability action and specifies that an affidavit of merit is not otherwise admissible as evidence or for purposes of impeachment.

See 2005 Staff Note to Ohio Civ.R. 10(D) (emphasis added).

The Staff Notes (July 1, 2007 Amendments) to Civil Rule 10(D) state as follows:

The rule is intended to make clear that the affidavit is necessary to establish the sufficiency of the complaint. *The failure to comply with the rule can result in the dismissal of the complaint, . . . .*

See 2007 Staff Note to Ohio Civ.R. 10(D) (emphasis added).

Civil Rule 12(B) enumerates defenses that may be raised on motion in response to a pleading and states, in relevant part, as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may \* \* \* be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, [and] (6) *failure to state a claim upon which relief can be granted \* \* \*.*"

Ohio Civ.R. 12(B) (emphasis added).

The recognized method in Ohio for testing the *sufficiency* of a complaint, and not the merits of a case, is through the filing of a motion to dismiss for failure to state a claim pursuant to Civil Rule 12(B)(6) without need for first filing a motion for more definite statement under

Civil Rule 12(E). As a general rule, “[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.” *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 547, 1992-Ohio-73; *see also State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 647 N.E.2d 788, 1995-Ohio-202; *State ex rel. Watley v. State of Ohio Bd. of Nursing*, 10<sup>th</sup> Dist. No. 07AP-69, 2007-Ohio-3295. The sufficiency of a complaint is a question of law and the standard of review is *de novo*. *Greeley v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981.

The Court of Appeals correctly recognized that this Court has not addressed the appropriate mechanism for challenging a Civil Rule 10(D)(2) violation, but did not look to decisions from other jurisdictions which consistently have held that a motion to dismiss provides the proper mechanism for responding to a failure to comply with a statutory or procedural requirement for an affidavit or certification in a complaint alleging a medical claim.

- *Williams v. Boyle* (Colo.App. 2003), 72 P.3d 392 (holding that trial court did not err in granting motion to dismiss patient's medical malpractice claims against physician for failure to file certificate of review required under C.R.S.A. § 13-20-602.)
- *Webb v. First Correctional Medical* (D.Del. 2007), U.S. Dist Ct. Case No. CIV.A. 07-31-GMS, 2007 WL 1341188 (holding that medical malpractice claim against was dismissed for failure to state a claim upon which relief may be granted where Plaintiff failed to include with his complaint an affidavit of merit signed by an expert witness as required under Del.Code Ann. tit. 18 § 6853)
- *Anderson v. Wagner* (Fla. App. 5 Dist. 2006), 955 So.2d 586 (holding that motion to dismiss is proper remedy for responding to a medical malpractice complaint filed without a corroborating expert opinion as required under F.S.A. § 766.203)
- *Williams v. Alvista Healthcare Center, Inc.* (Ga.App. 2007), 283 Ga.App. 613, 642 S.E.2d 232 (holding that motion to dismiss based upon the lack of an expert affidavit in a professional

malpractice action is a motion to dismiss for failure to state a claim and finding that Plaintiffs' failure to accompany their complaint against nursing home with affidavit of expert witness, as required under Ga. Code. Ann. §9-11.9.1, required dismissal of wrongful death action);

- *Walzer v. Osborne* (2006), 395 Md. 563, 911 A.2d 427 (“Because Respondent failed to attach the expert report to the certificate of qualified expert in a timely manner [required under Md. Code §3-2A-04(b)], the trial court was required to dismiss Respondent's medical malpractice claim.”)
- *Glisson v. Gerrity* (2007), 274 Mich.App. 525, 734 N.W.2d 614 (holding that dismissal of medical malpractice complaint with prejudice was required where plaintiff failed to comply with the affidavit of merit requirements contained in M.C.L.A. §§ 600.2912d and the limitations period had expired)
- *Walker v. Whitfield Nursing Ctr., Inc.* (Miss. 2006), 931 So.2d 583, 588-89 holding that Plaintiff failed to state a claim upon which relief can be granted due to his failure to comply with Miss.Code Ann. § 11-1-58 requirement that an attorney's certificate of compliance of consultation with an expert or a medical report from an expert be attached to the complaint)
- *Washoe Medical Center v. Second Judicial Dist. Court of State of Nev. ex rel. County of Washoe* (Nev. 2006), 148 P.3d 790 (holding that medical malpractice complaint filed without medical expert affidavit required under N.R.S. §41A.071 is void *ab initio* and must be dismissed.)
- *Caldwell v. Malaghaggi*, (D.N.J. 2007), U.S. Dist Ct. Case No. 06-922RBK, 2007 WL 2085355 (Granting summary judgment as to Plaintiff's malpractice claims in the complaint because Plaintiff failed to serve an affidavit of merit, as required by New Jersey's Affidavit of Merit Statute, N.J.S.A. § 2A:53A-27 et seq.)
- *Estate of Spell v. Ghanem* (2005), 175 N.C. App. 191, 622 S.E.2d 725 (holding that defendant's motion to dismiss based on failure to comply with Civil Rule 9(j) pleading requirements in medical malpractice actions should be brought at the trial level.)
- *Holbrook v. Woodham* (W.D.Pa. 2007), U.S. Dist. Ct. Case. No. CIV.A. 3:05-304, 2007 WL 2071618 (granting motion to dismiss where Plaintiffs failed to comply with Pa. R. Civ. P. 1042.3

requirement to submit a certificate of merit within sixty days of filing their complaint)

- *Sloan v. Farmer* (Tex.App.-Dallas 2007), 217 S.W.3d 763 (reversing trial court denial of motion to dismiss failed to comply with Tex. Civ. Prac. & Rem.Code Ann. § 74.351(b) which requires a plaintiff to provide expert reports for each physician or health care provider against whom a liability claim is being asserted within 120 days of the complaint being filed)
- *Davis v. Mound View Health Care* (2006), 220 W.Va. 28, 640 S.E.2d 91 (holding that trial court properly granted motion to dismiss Appellant's medical malpractice action for failure to comply with W. Va.Code § 55-7B-6(b)'s pre-suit notice of claim and certificate of merit provisions)

These cases recognize an established jurisprudence in addressing the issue before this Court. In jurisdictions having a similar requirement, a complaint in a medical negligence action must contain an affidavit of merit in order to be adequate and sufficient. Courts in other jurisdictions unanimously agree that the sufficiency of a complaint should be tested through a motion to dismiss for failure to state a claim upon which relief can be granted.

The Court of Appeals instead looked to Civil Rule 10(D)(1) and determined that it provided a superior remedy for a failure to comply with Civil Rule 10(D)(2). But Civil Rule 10(D)(1) is substantively and procedurally different. It provides that “[w]hen a claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading.” The purpose for requiring a written instrument to be attached to a complaint is to *promote clarity* and to *provide the best evidence* for agreement supporting the claim or defense being asserted:

*An attached written instrument is more comprehensible than a detailed description of that instrument, the instrument itself should be construed as much a part of the pleading as any descriptive paragraph. The instrument is the best evidence of the agreement.* The term “written instrument” is a very broad term; hence any pleading based on a written instrument – from a

promissory note to a deed – should have a copy of that instrument attached.

*Oxford Sys. Integration, Inc. v. Smith-Boughan Mechanical Servs.*, 159 Ohio App.3d 533, 824 N.E.2d 586, 2005-Ohio-210, ¶ 14 (quoting 4 Harper & Solimine, *Anderson's Civil Practice* 281, Section 151.18) (emphasis added).

In light of the purpose of Civil Rule 10(D)(1), a motion for more definite statement filed pursuant to Civil Rule 12(E) provides the appropriate method for responding to a failure to attach a written instrument to a complaint:

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

Ohio Civ.R. 12(E).

In contrast, Civil Rule 10(D)(2) applies only to medical liability claims<sup>1</sup>, provides specific requirements for the affidavit of merit<sup>2</sup> and makes clear that the affidavit “is required solely to establish the adequacy of the complaint and shall not otherwise be admissible as evidence ...”<sup>3</sup> This narrow focus is directed towards establishing the sufficiency of a complaint through expert testimony, which is best determined through a Civil Rule 12(B)(6) motion, and not toward providing best evidence or making a pleading more comprehensible through a Civil Rule 12 (E) motion.

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<sup>1</sup> Ohio Civ.R. 10(D)(2)(a)

<sup>2</sup> Ohio Civ.R. 10(D)(2)(a)(i-iii)

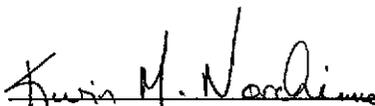
<sup>3</sup> Ohio Civ.R. 10(D)(2)(d)

Therefore, consistent with this narrow focus and the underlying purpose of Civil Rule 10(D)(2), the Court should reverse the judgment of the Court of Appeals and hold that a motion to dismiss for failure to state a claim, pursuant to Civil Rule 12(B)(6), provides the proper remedy for a failure to attach the affidavit of merit required under Civil Rule 10(D)(2).

**CONCLUSION**

Based upon the foregoing facts and legal authorities, Appellant University Hospitals of Cleveland submits that this case involves matters of public and great general interest which warrant this Court accepting jurisdiction to determine whether a Civil Rule 12(B)(6) motion to dismiss provides the proper procedural mechanism for responding to a failure to comply with the Civil Rule 10(D)(2) requirement to attach an Affidavit of Merit to a complaint alleging a medical liability claim.

Respectfully submitted,

  
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Counsel for Appellant  
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**CERTIFICATE OF SERVICE**

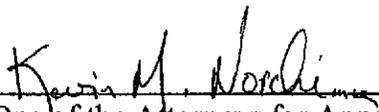
A copy of the foregoing Memorandum in Support of Jurisdiction has been sent via regular U.S. mail, postage prepaid, this 14<sup>th</sup> day of August, 2007 to:

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102.0016



CASE: CV-06-587892

377979

MONICA FLETCHER, ETC.  
VS.  
UNIVERSITY HOSPITALS OF CLEVELAND, ET

JUDGE: PETER J CORRIGAN  
ROOM: 19C JUSTICE CENTER  
DOCKET DATE: 07/13/2006  
DEFENDANT'S MOTION TO DISMISS IS GRANTED.  
THERE IS NO JUST REASON FOR DELAY. CASE IS  
DISMISSED WITH PREJUDICE. COURT COST  
ASSESSED TO THE PLAINTIFF(S).

BOOK 3610 PAGE 0743 07/13/2006  
NOTICE ISSUED

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**FROM:**  
CUYAHOGA COUNTY - COURT OF COMMON PLEAS  
GERALD E. FUERST - CLERK OF COURTS  
JUSTICE CENTER - COURT TOWER  
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CLEVELAND, OH 44113

**TO:**  
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**Court of Appeals of Ohio** JUL 2 2007

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 88573

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**MONICA FLETCHER, ETC.**

PLAINTIFF-APPELLANT

vs.

**UNIVERSITY HOSPITALS  
OF CLEVELAND, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-587892

**BEFORE:** Rocco, J., Cooney, P.J., McMonagle, J.

**RELEASED:** June 7, 2007

**JOURNALIZED:** JUL 2 2007

CA06088573

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VOL 638 00298

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**FILED AND JOURNALIZED  
PER APP. R. 22(E)**

**JUL -2 2007**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY \_\_\_\_\_ DEP.**

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**ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED**

**JUN -7 2007**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY \_\_\_\_\_ DEP.**

CA06088573

45826293



N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

**0638 00299**

**NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED**

KENNETH A. ROCCO, J.:

Appellant Monica Fletcher claims the trial court erred by dismissing her wrongful death claim for failure to attach an affidavit of merit to the complaint as required by Civ.R. 10(D)(2). We remove this case from the accelerated docket, sua sponte, because it presents "a unique issue of law of substantial precedential value in determining similar cases." We have found no appellate cases construing Civ.R. 10(D)(2) or determining the proper procedure for ensuring compliance with it.<sup>1</sup> Thus, this appears to be an issue of first impression.

Appellant filed her complaint in this case on March 29, 2006 on behalf of herself and as administratrix of the estate of Victor Shaw, having previously filed and voluntarily dismissed the same claims in an action in the Mahoning County Common Pleas Court. She alleged that defendants University Hospitals of Cleveland and Dr. Raymond Onders provided negligent medical care to Victor Shaw, and sought damages for both medical malpractice and wrongful death.

Appellee University Hospitals filed a motion to dismiss the complaint for failure to state a claim because appellant failed to attach to the complaint an

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<sup>1</sup>The lack of authority on these points should not be surprising. Civ.R. 10(D)(2) became effective July 1, 2005, so there has been little opportunity for appellate review of this issue.

affidavit of merit, as required by Civ.R. 10(D)(2). Appellant responded to this motion. The court subsequently dismissed the case, with prejudice.

Civ.R. 10(D)(2), effective July 1, 2005, provides, in pertinent part:

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim \* \* \* as defined in section 2305.113 of the Revised Code, shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit of merit shall be provided by an expert witness \* \* \* [and] shall include all of the following:

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit.

(c) An affidavit of merit is required solely to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment.

Appellant did not request an extension of time to file an affidavit of merit.

Rather, she argued that no affidavit was required. Therefore, subsection (D)(2)(b) is inapplicable.

Appellant argues that a wrongful death action is not a "medical claim." Civ.R. 10(D)(2) specifically refers to a medical claim "as defined by section 2305.113 of the Revised Code." Therefore, we must look to this statute for guidance as to the meaning of this term.

R.C. 2305.113(E)(3) defines a medical claim as follows:

(3) "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.

(c) Claims that arise out of the medical diagnosis, care, or treatment of any person and that are brought under section 3721.17 of the Revised Code.

The wrongful death claim asserted by appellant was a medical claim as defined by R.C. 2305.113. It was a claim against a physician and a hospital that arose out of the medical diagnosis, care or treatment of the decedent, and the claim resulted from alleged acts or omissions in providing medical care. We are well aware that R.C. 2305.113 does not supply the statute of limitations for a wrongful death claim. See *Koler v. St. Joseph Hosp.* (1982), 69 Ohio St.2d 477; *Evans v. Southern Ohio Med. Center* (1995), 103 Ohio App.3d 250; *Brosse v. Cumming* (1984), 20 Ohio App.3d 224. However, that fact does not preclude a claim for wrongful death from being a "medical claim" as defined in R.C. 2305.113. The common pleas court in this case correctly determined that appellant's complaint presented a medical claim as to which she was required to supply an affidavit of merit pursuant to Civ.R. 10(D)(2), and that appellant failed to include an affidavit with her complaint. Pursuant to Civ.R. 10(D)(2)(c), the affidavit is required to "establish the adequacy of the complaint."

It does not follow, however, that a complaint which does not contain an affidavit of merit fails to state a claim, and is therefore subject to dismissal. A well-developed body of law establishes the remedy for the related situation in which a party fails to attach a written instrument to a pleading which includes a claim or defense founded on it, as required by Civ.R. 10(D)(1). "The proper procedure in attacking the failure of a plaintiff to attach a copy of a written

instrument \*\*\* is to serve a motion for a definite statement pursuant to Civ.R. 12(E).” *Point Rental Co. v. Posani* (1976), 52 Ohio App.2d 183, 186; see also *Natl. Check Bureau v. Buerger*, Lorain App. No. 06CA008882, 2006-Ohio-6673, ¶ 14; *Lorain Music Co v. Eidt*, Crawford App. No. 3-2000-17, 2000-Ohio-1799 and cases cited therein. We can conceive of no reason why the procedure for challenging a failure to comply with Civ.R. 10(D)(1) should not also apply to Civ.R. 10(D)(2); indeed, the very fact that they are grouped together implies that they should be treated alike. Both sections promote the same purpose: Even though Ohio is a notice pleading state, our public policy requires parties asserting these special kinds of claims to provide some minimal evidence to support them before the opposing party will be required to respond. Therefore, we hold that the proper remedy for failure to attach the required affidavit(s) is for the defendant to request a more definite statement. If the plaintiff fails to comply with an order to provide a more definite statement, “the court may strike the pleading to which the motion was directed, or make any other orders as it deems just, which would include involuntary dismissal with prejudice pursuant to Civ. R. 41(B)(1).” *Point Rental*, 52 Ohio App.2d at 186.

A defendant who fails to file a motion for a more definite statement before filing his answer has been held to have waived the right to assert the plaintiff's failure to attach a copy of a written instrument as a basis for dismissing the

complaint. See *Castle Hill Holdings, LLC v. Al Hut, Inc.*, Cuyahoga App. No. 86442, 2006-Ohio-1353, ¶29. Furthermore, Civ.R. 12(G) requires a party to join all available motions, so the filing of a motion to dismiss for failure to state a claim will generally waive the right to assert that a more definite statement is required. However, in light of the fact that the procedure for enforcing Civ.R. 10(D)(2) was not settled at the time the motion to dismiss was filed, defendants-appellees may request leave to amend their motion to seek a more definite statement.

We hold that the court erred by dismissing the complaint for failure to state a claim. We reverse and remand with instructions for further proceedings consistent with this opinion.

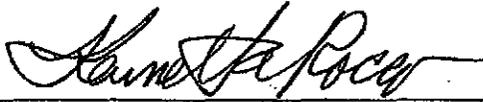
Reversed and remanded.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to  
Rule 27 of the Rules of Appellate Procedure.



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KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, P.J., and  
CHRISTINE T. McMONAGLE, J., CONCUR

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

MONICA FLETCHER, ETC.

Appellant

COA NO.  
88573

LOWER COURT NO.  
CP CV-587892

-vs-

COMMON PLEAS COURT

UNIVERSITY HOSPITALS OF CLEVE., ETAL

Appellee

MOTION NO. 397703

Date 07/02/2007

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Journal Entry

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APPELLEE'S MOTION FOR RECONSIDERATION IS DENIED. IN FINDING THAT A MOTION FOR A MORE DEFINITE STATEMENT SHOULD BE FILED, WE NECESSARILY CONCLUDED THAT THE SUFFICIENCY OF THE COMPLAINT WAS NOT AFFECTED BY THE ABSENCE OF AN AFFIDAVIT OF MERIT, DESPITE APPELLEE'S CONTRARY ARGUMENTS. THIS IS AN ISSUE OF FIRST IMPRESSION IN THIS STATE; APPELLEE HAS NOT DEMONSTRATED THAT CASE LAW FROM OTHER JURISDICTIONS INVOLVING THEIR OWN STATUTES OR COURT RULES WOULD AID OUR REVIEW OF OHIO CIV.R. 10(D)(2). HENCE, RECONSIDERATION WOULD NOT PERMIT ANY MORE THOROUGH ANALYSIS THAN THIS COURT DID INITIALLY.

**RECEIVED FOR FILING**

JUL - 2 2007

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY  DEP.

Presiding Judge COLLEEN CONWAY COONEY,  
Concurs -

Judge CHRISTINE T. MCMONAGLE, Concurs

  
Judge KENNETH A. ROCCO

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED