

IN THE SUPREME COURT OF OHIO

LINDA L. HANS,

Appellant,

v.

THE OHIO STATE UNIVERSITY
MEDICAL CENTER,

Appellee.

}
}
} Case No. 2007-1466
}
} On Appeal from the Franklin County Court
} of Appeals, Tenth Appellate District
}
} Court of Appeals
} Case No. 07AP-10
}
}
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THE OHIO STATE UNIVERSITY MEDICAL CENTER'S MEMORANDUM IN
OPPOSITION TO THE APPELLANTS' JURISDICTIONAL MEMORANDUM

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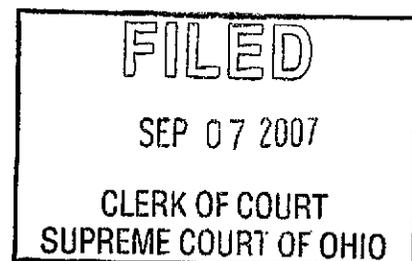


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I. Statement of the Case and Facts

Calvin G. Hans was first admitted at The Ohio State University Medical Center (“OSUMC”) on February 1, 1997. Four days later he underwent surgery to remove a mass near his kidney, the kidney itself and an adrenal gland. After his discharge, he underwent three separate rounds of chemotherapy at OSUMC, the last of which took place on May 12, 1997. He was readmitted to OSUMC on May 29, 1997 and treated for respiratory problems, but his condition deteriorated and he died on July 20, 1997. Linda L. Hans – his executrix and the appellant here – was, of course, aware of all this; and she had access to the medical records that documented Mr. Hans’ treatment at OSUMC and identified *everyone* who was involved in that treatment. What is more, by September 1998, when she filed the first of three medical malpractice lawsuits – one in which she contended that William Schirmer, M.D. had committed malpractice during Mr. Hans’ initial surgery at OSUMC – she had, obviously enough, concluded that OSUMC was a potential defendant.

But she did not sue OSUMC until three years later, when she says that an expert – whom she retained in her second medical malpractice lawsuit, against Michael Stanek, D.O., an oncologist involved in Mr. Hans’ chemotherapy, and who reviewed the very same medical records that were available to Ms. Hans since 1997 – first suggested that an OSUMC physician’s assistant and one or more OSUMC nurses may have been negligent. And now she says that the statute of limitations against OSUMC did not begin to run until then.

II. This Case is of No Public or Great General Interest.

This case is of no public or great general interest because the three arguments Ms. Hans raises – that *Flowers v. Walker* (1992), 63 Ohio St. 3d 546 and *Akers v. Alonzo* (1992), 65 Ohio St. 3d 422 are in conflict; that the Tenth District Court of Appeals “impliedly invited such review and clarification”; and that, unless this issue is resolved, plaintiffs’ lawyers will file all manner of “unwarranted wholesale” suits against “all medical providers” – are flatly untrue.

III. Argument in Opposition to the Appellants’ Proposition of Law

The “cognizable event” that triggers the statute of limitations in medical malpractice cases is the later of (1) the termination of the physician-plaintiff relationship or (2) the date the plaintiff discovers, or, in the exercise of reasonable care and diligence, should have discovered, the resulting injury. (Response to Proposition of Law No. 1)

A. There is no “conflict” between the *Flowers* and the *Akers* cases.

Ms. Hans says that *Flowers* and *Akers* conflict and that the two decisions have spawned “inconsistent and confusing results.” (Memorandum at 1). But they do not conflict at all. In fact, the Supreme Court itself said so, right in the *Akers* decision, which found *Flowers* not in “conflict,” but “readily distinguishable on the facts”:

Contrary to defendants’ assertions, we do not believe that *Flowers* compels a reversal of the court of appeals’ judgment below, but rather find it to be readily distinguishable from the cause sub judice. In *Flowers*, supra, the patient was aware that other persons were involved in the faulty interpretation of her mammogram, but she was not aware of their identities. When Mrs. Flowers discovered approximately eight months later she had cancer, that discovery constituted the “cognizable event” which gave rise to a duty to ascertain the identity of the tortfeasors who misinterpreted her prior mammogram. In contradistinction, there is nothing in the record herein that indicates that plaintiffs knew or should have known before March 21, 1989 that the pathology slides had been

erroneously diagnosed as being negative for cancer. The "cognizable event" in the instant cause took place when plaintiffs discovered through an expert pathologist they had employed during the initial lawsuit that the pathology slides had been misread by Dr. de Lamerens and that Akers actually had cancer eight months before it was correctly diagnosed. Mrs. Akers has stated in two affidavits that neither she nor her husband was aware of Dr. de Lamerens' role in diagnosing the pathology slides or that such slides were even in existence, let alone that they had been misinterpreted by some physician other than Dr. Alonzo.

While *Flowers*, supra, holds that the occurrence of the cognizable event imposes a duty of inquiry on the plaintiff, it does not hold that the plaintiff has a duty to ascertain the cognizable event itself, especially in a situation such as here, where the patient had no way of knowing either that there had been another physician involved or that that other physician had made an incorrect diagnosis.

Akers, 65 Ohio St. 3d 422, 425 (emphasis added).

There was, to be sure, a dissenting opinion in *Akers*, which Justice Wright wrote and in which Chief Justice Moyer and Justice Holmes joined. But the dissenters' view of the two cases offers Ms. Hans no support. Whereas the majority viewed the cases as distinguishable on the facts, *the dissenters viewed the cases as not distinguishable at all*:

I do not mean to imply by this dissent that the court's opinion has weakened the precedent set by *Flowers*. . . . To the contrary, I wish only to state my firm disagreement with the majority's treatment of this uncommon factual scenario within the analytic framework established by these cases.

Id. at 428 (emphasis added). In other words, the *Akers* Court was unanimous in treating *Flowers* as good law; the dissenters merely quarreled with the application of *Flowers* to the facts in *Akers*.

B. The Court of Appeals did not “Impliedly Invite” this Court’s Review.

Ms. Hans seizes on one out-of-context quote in the Tenth District’s opinion to suggest that that Court “impliedly invited” this Court to accept jurisdiction over this appeal. *See* Memorandum at 1. But the opinion neither stated nor implied anything of the kind. In fact, the text Ms. Hans quotes is nothing more than the Tenth District’s summary of *another appellate court’s opinion*: “The [other] appellate court . . . noted the disparate results in the two cases and stated that the results were indicative of the difficulty of the issue and suggested that the Supreme Court would consider the individual circumstances of each case.” *See* Appellate decision at ¶26.

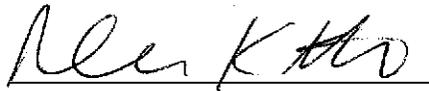
C. *Flowers and Akers* have not Spawned “Unwarranted Wholesale” Suits Against “All Medical Providers.”

Ms. Hans’ suggestion that, in the absence of “clarification” from this Court, plaintiffs’ lawyers will file baseless suits against “all medical providers” has not proven true during the 15 years that have elapsed since this Court decided the two cases, and, given the requirement that malpractice lawyers obtain an affidavit of merit before filing any suit, it seems unlikely that the future will bring anything different. More important, though, is what Ms. Hans’ suggestion *fails to note*. The individuals whose conduct she now challenges – a physician’s assistant and one or more nurses – *were employees of OSUMC*. As a state institution, OSUMC – not its employees – is the only appropriate defendant in a case alleging that those employees were negligent, and Ms. Hans has always known the role OSUMC played in Mr. Hans’ treatment.

IV. Conclusion

This Court need not now revisit two 15-year-old decisions merely to afford Ms. Hans a remedy for the very same conduct that prompted her to file the first of her three lawsuits in 1998. The decisions are not in conflict, and no one seems “confused” as to the state of the law. As such, OSUMC urges the Court to deny jurisdiction in this matter.

Respectfully submitted,



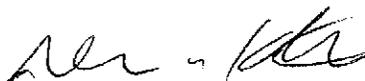
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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent by ordinary U.S. mail, this 7th day of September, 2006 to the following counsel of record:

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