

Statement in Opposition to Claimed Jurisdiction

Now comes the Plaintiff-Appellee, MONICA FLETCHER, Administratrix of the Estate of Victor Shaw and, pursuant to Rule III, Section 2(D) of the Rules of Practice of the Supreme Court of Ohio, hereby renders her statement of position in this discretionary appeal:

1. This case does not present a question which is of either public or great general interest; and
2. The proposition of law suggested in the Memoranda filed by each Appellant should not be adopted by this Court.

Lack of Public or Great General Interest

There are numerous reasons to support the contention that this particular case is of neither public nor great general interest. They include:

1. This Court has adopted significant amendments to Rule 10(D)(2) of the Ohio Rules of Civil Procedure which were not yet in effect at the time that the Eighth District Court of Appeals published its opinion in this case;
2. There are several significant facts in this case that distinguish it in such a fashion that it is not an appropriate vehicle for this Court to use to adopt a proposition of law for cases which do not share the peculiar circumstances of this lawsuit; and
3. The universe of cases which present a medical claim that are filed without an accompanying Affidavit of Merit is not sufficiently large to usurp this Court's limited resources for the sole purpose of evaluating competing methods to procedurally address those few cases in which complaints are filed without an accompanying Affidavit of Merit.

Significant Amendments to Rule 10(D)(2)

The Court of Appeals released its opinion in this case on June 7, 2007. As of that date, dismissals of complaints asserting medical claims which were not accompanied by an Affidavit of Merit were involuntary in nature pursuant to Rule 41 (B) of the Ohio Rules of Civil Procedure. Section (B)(3) of that Rule provides that, subject to certain exceptions, such dismissals operate as an adjudication upon the merits, thereby preventing any re-filing of the claims even if an Affidavit of Merit could be thereafter presented. Such was the state of the law in this case. The trial court's order of dismissal specifically stated that it was "with prejudice". Before the amendments to Rule 10(D), defendants to medical claims argued vociferously for the immediate dismissal of non-complying complaints thereby preventing aggrieved plaintiffs from any opportunity to present their claims. Plaintiffs could not re-file their claims as the result of a procedural impediment, even if inadvertent in nature. If that were still the law today, this case would present an issue of public and great general interest. However, such is no longer the case.

In the two years following the original promulgation of the Affidavit of Merit requirements, this Court recognized that the interests of justice require that legitimate medical claims should not be forever barred due to a procedural impediment. For that reason, this Court has recently adopted amendments to Rule 10(D) of the Ohio Rules of Civil Procedure which became effective on July 1, 2007. The Rule now specifically states that "any dismissal for the failure to comply with this Rule shall operate as a failure otherwise than on the merits." This amendment dictates that the legal issue presented in this appeal is no longer of significant importance.

Rule 10(D) of the Ohio Rules of Civil Procedure was adopted to prevent frivolous lawsuits against health care providers. If a plaintiff is able to present an Affidavit of Merit, such case cannot be deemed frivolous. It is of minor significance whether the Affidavit of Merit is presented in response to a motion for more definite statement or as an attachment to a re-filed complaint. If a plaintiff is unable to present an Affidavit of Merit, it is immaterial whether the dismissal of his lawsuit is as a result of a motion for more definite statement rather than a motion to dismiss for failure to state a claim.

This Case is Too Fact-Specific to be of General Interest

Should this Court accept jurisdiction of this appeal, the Court would have to address a myriad of issues which are of no public or general interest. The first such issue would be the Trial Court's inappropriate protocol in its dismissal of this lawsuit. Rule 41(B)(1) of the Ohio Rules of Civil Procedure provides that upon the failure of a plaintiff to comply with the rules of procedure (such as by failing to submit an Affidavit of Merit), "...the Court upon motion of a defendant or on its own motion may, **after notice to the plaintiff's counsel,** dismiss an action or claim. (Emphasis added). The dismissal of this lawsuit was effected by the Trial Court without any notice to Plaintiff's counsel. The alacrity of the Trial Court's dismissal is best evidenced by the fact that its written notice of dismissal crossed in the mail with Plaintiff's motion requesting leave of court to file a *sur-reply* brief. Certainly Ohio courts do not need direction upon the issue of whether a plaintiff should have full opportunity to be heard before the dismissal of his lawsuit. Furthermore, the procedure adopted by the Court of Appeals in this case would assure compliance with the requirement to provide notice to Plaintiff's counsel. Presumably, a defendant's motion for

more definite statement would result in an order mandating a specific date for the filing of an Affidavit of Merit absent which the case would be dismissed. Therefore, the procedure adopted by the Court of Appeals in this case would be in compliance with the Ohio Rules of Civil Procedure, whereas the protocol followed by the Trial Court ignored the safeguards provided by Rule 41(B)(1) of the Ohio Rules of Civil Procedure.

A second distinction which segregates this case from one of public or great general interest concerns the Trial Court's dismissal of the case against Dr. Onders prior to the time that service of process was accomplished upon him. A review of the Trial Court's electronic docket demonstrates that, on April 14, 2006, notice was mailed to Plaintiff's counsel that the attempted certified mail service upon Dr. Onders was unclaimed. On June 21st, the Court granted Plaintiff's motion for alternative service of process by ordinary mail. On July 13, 2006, without any docketed notice as to whether or not regular mail service had been accomplished upon Dr. Onders, the Trial Court dismissed the complaint against him with prejudice. If this Court were to accept jurisdiction to entertain this appeal, it would be required to evaluate whether or not a Trial Court can dismiss a complaint even before it is served upon the defendant. Such a proposition of law would most certainly be of no public or great general interest.

A review of the entire history of this case is necessary to identify an additional procedural issue which makes this case fact-specific and of no great or general public interest. This lawsuit was originally filed in the Mahoning County Court of Common Pleas in 2003, prior to the adoption of the original changes to Rule 10(D). Venue was proper in Mahoning County at that time because there were two Mahoning County defendants who

had rendered emergency room care to Plaintiff's decedent in Youngstown following his discharge from University Hospitals. When the case was re-filed, it was necessary to bring suit in Cuyahoga County because the two Mahoning County defendants were not named in the new complaint. (The inference is, of course, that a medical review of the case subsequent to its voluntary dismissal did not reveal reasonable cause to continue to bring claims against the Mahoning County defendants). In any event, by the time that the case was re-filed, the original modifications to Rule 10(D) had been adopted. Because these amendments have now been in effect for more than two years, it seems likely that there would be no ongoing general interest in determining whether the Affidavit of Merit requirement relates to claims that had originally been filed prior to the adoption of the amendments to the rule.

Finally, and probably of most importance, it is again noted that the dismissal in this pending appeal was effected with prejudice. That fact again distinguishes this case from any future medical claim dismissed for failure to file an Affidavit of Merit.

Paucity of Medical Claims Filed Without an Affidavit of Merit

At the time that this lawsuit was re-filed, a question existed concerning whether or not the Affidavit of Merit requirement applied to wrongful death claims, even if those claims were based upon allegations of medical negligence. The only case law which existed at that time was a Trial Court decision from the Court of Common Pleas of Clermont County, McLellan v. Clermont Mercy Hospital, (C.P. Clermont County, January 3, 2006, Case No. 2005 CVH 1264). The case concluded that a wrongful death action is not included within the purview of Rule 10(D)(2) and, thus, no Affidavit of Merit is necessary in a wrongful

death claim. However, the opinion published by the Cuyahoga County Court of Appeals which led to the appeal in this case trumps that earlier Trial Court opinion. The opinion at issue in this appeal clearly states that "the wrongful death claim asserted by Appellant was a medical claim as defined by R.C. 2305.113." Although *dicta* in nature, it will bring to an end that school of thought that wrongful death claims arising from medical negligence need not be supported by an Affidavit of Merit. With that loophole closed and with the Affidavit of Merit requirement now in effect for more than two years, it seems quite probable that any complaint setting forth a medical claim, including wrongful death actions, will be accompanied either by an Affidavit of Merit or a contemporaneous motion seeking leave of court to file such affidavit. It is difficult to conceive a reason to support the contention that there will be enough future cases to merit this Court's attention to establishing a definitive procedure for cases which are filed without an Affidavit of Merit or a motion for additional time.

Appellants' Proposed Proposition of Law is Inappropriate

Appellants have proposed a proposition of law which would prevent a trial court from exercising any discretion in deciding whether or not to dismiss a medical claim that was not accompanied by an Affidavit of Merit or a motion requesting additional time to file such affidavit. In addition to that notion being overruled by the Eighth District Court of Appeals in this case, four other Ohio cases have refused to adopt such a stringent proposition of law when ruling under identical or similar circumstances.

This appeal is not the only occasion in which the Eighth District Court of Appeals has found that a trial court erred by dismissing a medical malpractice complaint for failure

to state a claim due to the absence of an Affidavit of Merit. In Ervin v. Cleveland Clinic Found., 2007-Ohio-818, a unanimous court earlier this year found that a trial court abused its discretion by dismissing a medical malpractice action for failure to comply with Rule 10 (D)(2). The Court reversed the Trial Court's dismissal and found that an extension of time should have been afforded to Plaintiff for the filing of an Affidavit of Merit, even though a motion requesting such extension had not been filed contemporaneously with the complaint.

Similarly, the Fifth District Court of Appeals of Muskingum County contemplated the lack of an Affidavit of Merit or Motion for Extension in the case of Campbell v. Aepli, 2007-Ohio-3688. Once again, a trial court's order dismissing the medical malpractice complaint pursuant to Rule 12 (B)(6) of the Ohio Rules of Civil Procedure was reversed as an abuse of discretion. The Court of Appeals found that Plaintiff should have been granted leave to amend the complaint to incorporate an Affidavit of Merit. The Court stated "Ohio law clearly favors the Trial Court deciding the case on its merits, and C.R. 10(D) above does not require the dismissal of the complaint for failure to comply with the rule. Rather, the civil rules clearly provide for curing by granting leave to file an amended complaint."

In the case of Wallace v. Grafton Correctional Inst., 2007-Ohio-4157, the Ohio Court of Claims denied a Motion to Dismiss for failure to file an Affidavit of Merit or Motion for Extension. The Court, *sua sponte*, entered an order requiring Plaintiff "... to file an Affidavit of Merit in support of his medical claims pursuant to Civ. R. 10(D) within 90 days of the date of this entry. Failure to file such an affidavit will result in dismissal of the remainder of plaintiff's medical claims." It is exactly this type of order which the Court of

Appeals has contemplated when establishing a Motion for More Definite Statement as the appropriate procedural remedy for the failure to file an Affidavit of Merit.

Finally, in the case of *Banfield v. Brodell*, 169 Ohio App. 3d 110, 2006-Ohio-5267, the Court of Appeals for the Seventh District of Ohio reversed the dismissal of a medical malpractice case due to the lack of an Affidavit of Merit or Motion for Extension. Of significance, the defendant in that lawsuit filed a Notice of Appeal to the Ohio Supreme Court which appeal was assigned Case No. 2006-2069. After reviewing the memoranda of the parties, this Court concluded that the appeal did not present an issue of great general importance and declined to exercise jurisdiction, dismissing the appeal.

Appellant University Hospitals argues in its memoranda that decisions from other jurisdictions have "...consistently held that a Motion to Dismiss provides the proper mechanism for responding to a failure to comply with the statutory or procedural requirement for an affidavit or certification in a complaint alleging a medical claim." Plaintiff respectfully suggests that a review of the cases cited by Appellant does not support that contention. The statutes upon which dismissal is requested differ from state to state. The Colorado statute affords the plaintiff 60 days after service of the complaint to file a Certificate of Review. The Maryland statute provides a period of 90 days following the filing of the complaint. Texas law affords the plaintiff 120 days to file an affidavit following the filing of the complaint. Many of the cases, including those from Georgia, Mississippi and North Carolina afforded the parties significant periods of discovery before entertaining a Motion to Dismiss. In essence, none of these cases present factual circumstances sufficiently similar to Ohio to have any value as legal precedent.

Rule 1 (B) of the Ohio Rules of Civil Procedure states: "These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." The procedure adopted by the Court of Appeals in this case promotes that policy. In contrast, the procedure proposed by Appellants contravenes that mandate. The Court of Appeals contemplates a procedure which would permit the filing of an Affidavit of Merit in this pending lawsuit. Appellants want this Court to adopt a procedure that would require the dismissal of the lawsuit, followed by its re-filing with the Affidavit of Merit. Such procedure promotes delay and unnecessary expense without any countervailing benefit. If a plaintiff cannot present an Affidavit of Merit, the case will not go forward. If a plaintiff can present an Affidavit of Merit, requiring the dismissal and re-filing of the case is violative of the mandates of Rule 1 (B) of the Ohio Rules of Civil Procedure.

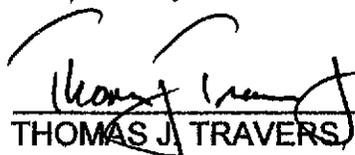
Conclusion

In the case of Peterson v. Teodosio, (1973), 34 Ohio St. 2d 161, this Court stated:

"The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies. Civ.R. 1(B) requires that the Civil Rules shall be applied 'to effect just results.' Pleadings are simply an end to that objective."

The opinion of the Court of Appeals in this case has followed that directive. Its opinion is well reasoned and should be permitted to stand. Appellee therefore prays for an order from this Court declining jurisdiction with the resulting dismissal of this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Memorandum has been mailed this ¹⁴25 day of September 2007 to: Christina J. Marshall, Esq. and John V. Jackson, II, Esq., Sutter, O'Connell & Farchione Co., LPA, 3600 Erievue Tower, 1301 East 9th Street, Cleveland, OH 44114, Attorneys for Defendant/Appellant, Raymond Onders, M.D.; and Kevin M. Norchi, Esq. and Michael L. Golding, Esq., Norchi, Barrett & Forbes, LLC, Commerce Park IV, 23240 Chagrin Blvd., Suite 600, Beachwood, OH 44122, Attorneys for Defendant/Appellant University Hospitals of Cleveland.


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