

IN THE SUPREME COURT OF OHIO

08-0140

Linder Tribble, :
: :
Appellant, : On Appeal from the
: Hamilton County Court
v. : of Appeals, First
: Appellate District
Children's Hospital Medical Center, et. al., :
: Court of Appeals
Appellees. : Case No. C070058

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, LINDER TRIBBLE

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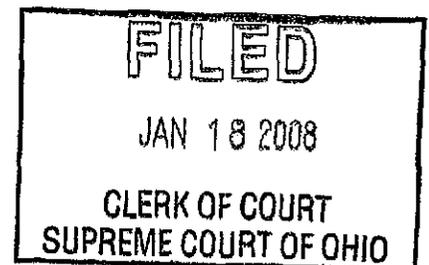


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The appellant has been denied her constitutional right to access to the courts under Section 16, Article I of the Ohio Constitution by her case being summarily dismissed on the basis that she did not state a claim recognized in Ohio upon which she could recover. While motions to dismiss are a means to test the sufficiency of a party's complaint,¹ they should only be granted when there are no facts or theory upon which the plaintiff can prevail.²

Lower courts are required to accept all allegations in the complaint as true³ and to give the benefit of the doubt to the non-moving party.⁴ Granting a motion to dismiss closes the door to the courthouse. The denial of access to the courts to any citizen of Ohio is a constitutional affront to all citizens warranting Supreme Court review. In this case, the trial judge granted a motion to dismiss, referencing as authority the case of *Doe v. Archdiocese of Cincinnati*⁵ without any further explanation as to which aspects of the *Doe*⁶ decision were applicable to this case (i.e., was it the statute of limitations issue, or negligent infliction of emotional distress issue, or both). (See trial judge's Entries Granting Defendant's Motion to Dismiss, Appendix B).

The Appellate Court in its judgment entry affirming the trial court's dismissal,

¹*State ex rel. Hanson v. Guernsey Cty. Bd. of Comm'rs.* (1992) 65 Ohio St.3d 545, 546, 605 N.E.2d 378.

²*Cincinnati v. Beretta U.S.A. Corp.* (2002), 95 Ohio St.3d 416, 418, 2002-Ohio-2480; *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.3d 242, 327 N.E.2d 753; Civ. R. 12(B)(6).

³*Doe v. Archdiocese of Cincinnati*, Slip Opinion No. 2008-Ohio-67; citing *State ex rel. CNG Fin. Corp. v. Nadel*, 111 Ohio St.3d 149, 2006-Ohio-5344, 855 N.E.2d 473, 13.

⁴*Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584.

⁵167 Ohio App. 3d 488, 2006-Ohio-2221

⁶*id.*

found that since no viable cause of action existed for negligent infliction of emotional distress that no further review was necessary; thus not addressing whether the appellant filed her claim timely. The Appellate Court refrained from analyzing the statute of limitations issue (see Court of Appeals judgment entry at Appendix A). This would have required a determination of whether a claim for negligent infliction of emotional distress of a grandparent, not in a doctor-patient relationship, was a “medical claim” and limited to the one year statute of limitations versus two or four years. This appellant, on behalf of citizens of Ohio, is petitioning this Court to accept this case for review as an opportunity to further define the applicable statute of limitations.⁷ By rendering its decision in the form of judgment entry, the Court of Appeals designated it as unpublishable under App. R. 11.1(E) . By limiting its effect, there is no definitive authority upon which the general public, the Bar, and the lower judiciary can rely for guidance. Just as important, this Court has just announced its decision in *Doe*,⁸ which has a direct bearing on this appeal on the question of equitable estoppel.

STATEMENT OF THE CASE AND FACTS

(Procedural Posture)

This case, originally filed in Hamilton County Common Pleas Court (Case No. A0505095) and voluntarily dismissed without prejudice, was refiled on September 6, 2006. The defense filed a motion to dismiss alleging (1) that there were no causes of action upon which the plaintiff, now appellant, could prevail, and (2) even if there were, her claims

⁷*Rome v. Flower Mem. Hosp.* (1994), 70 Ohio St.3d 14, 635 N.E.2d 1239.

⁸*supra.* (Supreme Court Slip Opinion)

were barred by the one-year statute of limitations which applies to medical malpractice claims. The trial judge granted the motion to dismiss citing the Appellate Court decision in *Doe v. Archdiocese of Cincinnati*⁹ with no further explanation or comment. (See trial judge's Entries Granting Defendant's Motion to Dismiss, Appendix B). The Appellate Court's decision in *Doe*¹⁰ has been overturned by this Court by its opinion dated January 16, 2008.

The trial judge inadvertently issued his entry granting the motion to dismiss under an inaccurate case number. This error was corrected by a *nunc pro tunc* entry and an amended notice of appeal and docket statement reflecting the correct trial case number. The judgment entry of the Court of Appeals, affirming the trial court's ruling, was journalized on December 5, 2007 (Appendix A).

(Facts)

Appellant, age 47, claimed in her complaint that, upon seeing her 11 month old grandson in the intensive care unit at Children's Hospital, Cincinnati, Ohio, and being advised that his condition was critical, and that he could die or be permanently paralyzed as a result of negligent actions or inactions of the appellees,¹¹ she suffered severe, instant, emotional distress and shock to her system. This resulted in her passing out and experiencing a severe cardiac event, requiring emergency stabilization, and transfer by ambulance across the street to University Hospital, where she remained for 12 days.

⁹*supra.* (appellate decision)

¹⁰*id.*

¹¹Though the grandson survived emergency surgery, he is left with disabilities.

The parents of the minor, and the appellant, concerned that their statute of limitations could be one year from the incident, served “180-day” extension letters¹² on the appellees.¹³ Following the delivery of the “180-day” letters, the parties decided to pursue the possibility of alternative dispute resolution. Extensions of the statute of limitations as to those claims of the parents to which §2305.113 O.R.C. was applicable were executed. Appellant sought to be included in these extensions; however, defense representatives refused to include appellant, claiming she did not have a “medical claim.” The child was also not included in these extensions as his statute of limitations is tolled during his minority.¹⁴

Based upon appellees’ position that appellant’s cause of action was not a “medical claim,” she filed her complaint within two years, which was timely under §2305.10 or §2305.09 O.R.C.¹⁵ The original complaint was filed before the First District Court of Appeal’s decision in *Fehrenbach v. O’Malley*.¹⁶ In *Fehrenbach*,¹⁷ the Appellate Court found parents’ claims arising out of injury to a child resulting from medical negligence, though a “medical claim,” was tied to the tolling of the one-year statute of limitations based on the minority of the child. This holding was recently affirmed by this Court.¹⁸

Not wanting to “muddy the waters” while the parents were going through the

¹²§2305.11, §2305.113(B)(1) O.R.C.

¹³*Rome, supra*.

¹⁴§2305.16 O.R.C.; *Fehrenbach v. O’Malley*, 113 Ohio St.3d 18, 2007-Ohio-971.

¹⁵Also see *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 451 N.E.2d 759; *Lawyers Cooperative Publishing Co. v. Muething* (1992), 65 Ohio St.3d 273, 603 N.E.2d 469; *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St.3d 131, 447 N.E.2d 109; cf. *Hershberger v. Akron City Hosp.* (1987), 34 OS3d 1, 516 N.E.2d 204.

¹⁶(2005) 164 Ohio App.3d 80.

¹⁷*id.*

¹⁸*Fehrenbach, id.*

alternative dispute resolution process, appellant voluntarily dismissed her case, without prejudice, pursuant to Civ. R. 41(A)(1)(a). Following the Court of Appeals' *Fehrenbach*¹⁹ decision, and with no private, non-judicial resolution as to the parents' and the child's claims, appellant refiled her case within the one-year permitted for her to do so under the savings clause.²⁰ It is this refiled case which is the subject of this appeal.

The First District Court of Appeals, only days before filing the instant case in the that Court, issued its opinion in *Strasel v. Seven Hills OB-GYN Assoc., Inc.*²¹ affirming an emotional distress award for a mother who claimed emotional distress from worrying about her fetus after she had undergone a D & C without knowing at the time she was pregnant. The Court of Appeals in the case at bar, however, determined as to this appellant that there was no applicable cause of action. Finding no justiciable claim, the court chose not to address whether the case was timely filed, ruling such issue was moot (Appendix A).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: When defendants state in writing, prior to suit, that a plaintiff's cause of action is not a "medical claim," they are equitably estopped from later asserting the one-year statute of limitations defense which applies to "medical claims."²²

Proposition of Law No. II: A claim for emotional distress resulting in cardiac injury of a third party grandparent is not a "medical claim" under §2305.013 O.R.C., but is governed under either §2305.09 or §2305.10 O.R.C. for statute

¹⁹*id.*

²⁰§2305.19 O.R.C.

²¹2007-Ohio-171, ¶22; also see *Galland v. Meridia Health Systems, Inc.*, 9th Dist. No. CA23163, 2006-Ohio-4867, *Padney v. Metrohealth Medical Center* (2001), 145 Ohio App.3d 759, 764 N.E.2d 492, *Paugh v. Hanks*, *supra*.

²²*Doe, supra*. (Slip Opinion 2008-Ohio-67)

of limitation purposes.

Proposition of Law No. III: If the emotional distress claim of a grandparent who witnesses the dire effects of negligence on her grandchild by health care professionals is a “medical claim,” then it is tolled with that of the grandchild’s claim pursuant to *Fehrenbach v. O’Malley*.²³

Propositions of Law I, II and III will be argued together.

It is recognized that in order to grant a motion to dismiss, there can be no basis upon which the plaintiff can prevail.²⁴ This is a high burden placed on the moving party, and one not met in this case. The trial court gave no insight into its reasoning in granting the motion to dismiss by simply referencing to *Doe v. Archdiocese of Cincinnati*²⁵ as its authority. There was no further explanation. Thus, it was speculated that the two possible issues within that decision which had application to this case were “equitable estoppel” as applied to statutes of limitations,²⁶ and negligent infliction of emotional distress and accompanying loss of filial consortium.²⁷ However, it is appellant’s contention that when the reasoning in *Doe*²⁸ on those issues was applied to the facts in this case, it was inappropriate for the trial court to rely upon *Doe*²⁹ as authority for granting the motion to dismiss.

This Court, in its review of the reasoning of the Appellate Court, has weighed in on

²³113 Ohio St.3d 18, 2007-Ohio-971.

²⁴*Mitchell v. Lawson Milk Co.* (1988) 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756; *Doe v. Archdiocese of Cincinnati, supra.*, ¶16

²⁵*supra.* (appellate decision)

²⁶*id.* ¶7-¶17

²⁷*id.* ¶23-¶26

²⁸*id.*

²⁹*id.*

the equitable estoppel issue³⁰ as relates to the tolling of the statute of limitations. This Court's analysis directly bears on the actions of the appellees, and the appellant, Linder Tribble's, right to pursue her claims. This Court has reiterated in *Doe*³¹ there can be grounds for equitable estoppel as to the statute of limitation defenses. This case, unlike the facts in *Doe*,³² presents that situation.

A complete reading of this Court's decision in *Doe*³³ does not support the lower court's dismissal. In *Doe*,³⁴ the plaintiff waited 39 years to file her case. She claimed she had been pressured not to pursue her claims earlier when she learned she was pregnant as a result of sexual abuse by a priest and coerced into placing her baby for adoption. The appellate *Doe*³⁵ court found that though the statute of limitations had technically run, the defendants were equitably estopped to invoke that defense. This Court, within the last few days, has rejected this argument in *Doe*³⁶ due to the extreme length of time of 39 years. Unlike in *Doe*,³⁷ the appellees are not hindered by the timeliness of appellant's filing. There is no fraud. Instead, the appellees rejected the appellant pursuing her claims earlier by rejecting the concept that she might have a "medical claim." Under this Court's finding in *Doe*,³⁸ the appellees should not be permitted to ignore their own actions and admissions

³⁰*Doe, supra.*, ¶¶7-11 (Slip Opinion 2008-Ohio-67).

³¹*id.*

³²*supra.* (appellate decision).

³³*supra.* (Slip Opinion 2008-Ohio-67).

³⁴*supra.* (appellate decision)

³⁵*id.*

³⁶*supra.* (Slip Opinion 2008-Ohio-67).

³⁷*id.*

³⁸*id.*

which resulted in the time in which appellant filed her case in court. Contrary to *Doe*,³⁹ there has been no finding by the lower courts nor any agreement by the appellant that her case was filed outside the applicable statute of limitations. There has been no judicial determination as to what is the applicable statute of limitations. In the case now before this Court, Linder Tribble did not sit on her rights, but, instead, relied upon the appellees' written position that she did not have a "medical claim," and their refusal to include her in the waivers and extensions of the statute of limitations, and in the alternative dispute resolution process. She filed her claims appropriately within the two years that she was a "bystander" to seeing her infant grandson in grave condition in the intensive care unit at Children's Hospital and hearing of his dire prognosis as a result of negligence of the appellees. Her emotional reaction was immediate and substantial. She passed out, had a documented cardiac event requiring her to be stabilized, and was transferred to another hospital where she remained for 12 days.

At p. 6 of appellees' memorandum in their motion to dismiss, they admit that they "did not even have a medical professional-patient relationship . . ." with appellant and, therefore, they "owed her no duty." In their answer,⁴⁰ appellees claim that they did "not provide medical services" to the appellant. Thus, by their own admissions in court documents, there was no "medical claim."

Yet, appellees claimed in their answer and motion to dismiss that Linder Tribble had a "medical claim," which was time barred. If, in fact, one can stretch the definition of a

³⁹*id.*

⁴⁰Sixth Defense, ¶ 11.

“medical claim” to this grandparent, and one who was not in a personal treatment relationship with the appellees, to the situation now before this Court, the statute of limitations still has not run as it is derived from a medical provider-patient relationship which is still in effect⁴¹ with the grandchild still being treated by the appellees.⁴² Moreover, this Court has recently concluded that the joinder rules apply and the time for filing a lawsuit, if it was a “medical claim,” would be tolled with that of the minor.⁴³ If appellant’s emotional injury with its physical component is considered to be a derivative action, then it would be joined with that of the minor’s,⁴⁴ which, in this case, has approximately 14 more years before tolling.

A “medical claim,” by statute, includes a “derivative claim”.⁴⁵ Section 2305.113 O.R.C., in effect in 2003, did not include a non-custodial grandparent, nor did it include a cause of action not related to the loss of services or consortium one would experience resulting from a “medical claim”. Even the statute in effect currently does not define a “derivative claim” to include a grandparent under these circumstances.⁴⁶ If the appellant's claim is not a “medical claim,” it was timely filed.⁴⁷ The appellees’ position that appellant’s

⁴¹See *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111; also see *Dobrovich v. Kaiser Permanente*, 2005-Ohio-2444

⁴²Also see §2305.16 O.R.C., and First District Court of Appeals cases of *Loudin v. Mills*, C-990569, 00-LW-1959 (1st), and *Fehrenbach v. O’Malley*, *supra.*, in which the Court of Appeals found that the statute of limitations in a medical malpractice case does not run as to parents until it runs as to the injured child. In this case, that would be another 14 years, when the child turns 18. *Fehrenbach* was affirmed by the Ohio Supreme Court in 113 Ohio St.3d 18, 2007-Ohio-971.

⁴³*Fehrenbach v. O’Malley*, *supra.*

⁴⁴Civ. R. 19.1; *Fehrenbach*, *supra.* at ¶11-¶23

⁴⁵*Rome*, *supra.*

⁴⁶§2305.113(7)(a)(b) O.R.C.

⁴⁷See §2305.10 and §2305.09 O.R.C.; *Loudin*, *supra.* at p. 14; also see *Schultz v. Barberton Glass Co.*, *supra.*; *Paugh v. Hanks*, *supra.*; *Lawyers Cooperative Publishing Co. v. Muething*, *supra.*

case was time barred should at the very least be examined. The failure to do so by the lower courts places this issue in front of this Court, as appellant's constitutional access to the courts has been arbitrarily denied.⁴⁸

In support of their position that appellant's claim fit the definition of a "medical claim," the appellees cited *Butler v. Jewish Hospitals, Inc.*,⁴⁹ a 1995 unreported opinion (see attached in Appendix C). In that case, a wife was informed that her husband had died only to walk into his room minutes later and find he was alive. The appellate court determined that the wife's claim was time barred, as it was controlled by the one year statute of limitations as "a medical claim." While *Butler*⁵⁰ is unpublished and should have no authoritative effect, it is also not even analogous to the facts of the instant case. In *Butler*,⁵¹ there was no alleged negligent treatment of the patient, there was no witnessing of the consequences of the defendants' actions, and there was no demonstrable severe emotional harm resulting in the physical manifestations as there are herein.

Proposition of Law No. IV: The courts of Ohio are open to a grandparent to pursue a claim for emotional distress and her own physical harm which results from witnessing her 11-month-old grandson in the intensive care unit in critical and life-threatening condition, and being told that he could die or be permanently paralyzed as a result of negligence of the appellees. Section 16, Article I, Ohio Constitution.

Proposition of Law No. V: A grandmother who witnesses her infant grandson in a hospital intensive care unit, and being told that his critical condition is a result of hospital negligence, and suffers such severe emotional distress that she instantly passes out and experiences a cardiac event,

⁴⁸Section 16, Article I, Ohio Constitution.

⁴⁹(May 3, 1995), Hamilton App. No. C-940119, unreported.

⁵⁰*id.*

⁵¹*id.*

requiring hospitalization, qualifies as a “bystander” and is allowed to pursue her own cause of action for negligent infliction of emotional distress. (See *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 451 N.E.2d 759).

Propositions of Law Nos. IV and V will be argued together.

This Court has found that “negligently inflicted emotional and psychiatric injury sustained by a plaintiff who also suffers contemporaneous physical injury . . . need not be severe and debilitating to be compensable.”⁵² In *Galland v. Meridia Health Systems, Inc.*,⁵³ the Ninth District Court of Appeals found that a father had a viable cause of action as a bystander to his daughter’s injury when he was concerned that she had been exposed to AIDS by stepping on a contaminated needle. This Court allowed the *Galland*⁵⁴ decision to stand when it dismissed the appeal as being improvidently accepted.⁵⁵

Courts have found emotional distress claims independent torts in which the feared peril did not have to occur.⁵⁶ The First District Court of Appeals, in its most recent decision in *Strasel*⁵⁷, dated January 19, 2007, determined that a mother who feared “that her baby was subjected to a real physical peril . . . regardless of whether the peril led to an actual injury,” from a negligently undertaken D & C while the baby was in utero, was entitled to emotional distress damages as she had an appreciation of risk to her child. Linder Tribble also had an appreciation of the risk of injury to her grandchild.

⁵²*Binns v. Fredendall* (1987), 32 Ohio St.3d 344 ¶, of the syllabus followed in *Galland v. Meridia Health Systems, Inc.*, 2004-Ohio-1416 at ¶ 13, 04-LW-1249 (9th)

⁵³2004-Ohio-1416 at ¶ 13, 04-LW-1249 (9th)

⁵⁴*id.*

⁵⁵105 Ohio St.3d 1217, 2005-Ohio-1654 as referenced in *Strasel, supra.* at ¶20

⁵⁶*Meyers v. Hot Bagels Factory, Inc.* (1999), 131 Ohio App.3d 82, 92, discretionary appeal not allowed in (1999), 85 Ohio St.3d 1487, 709 N.E.2d 1214, following *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 6 OBR 421, 453 N.E.2d 666.

⁵⁷*supra.* at ¶22

Years before the *Strasel*⁵⁸ decision, this same court of appeals found that a claim for serious emotional distress can exist regardless of whether there is or is not contemporaneous physical injury.⁵⁹

In *Paugh*,⁶⁰ the Supreme Court set forth three elements for a straight emotional distress claim where there was no physical injury: (1) the proximity of the plaintiff to the scene; (2) whether there was shock, and (3) the relationship of the plaintiff to the victim. Appellant meets these elements. *Paugh*⁶¹ recognized negligent infliction of emotional distress where a plaintiff is aware of the potential of physical injury to another. Herein, appellant, became aware of the injury and further potential harm to her grandson, upon which suffered her own severe, emotional response.

This Court has already enunciated that the term “bystander” is not to be so strictly construed that it only refers to one who actually witnesses a tortious event as a third party, but includes a person who appreciates the peril connected to the tortious event.⁶² Based on *Paugh*,⁶³ appellant stated a cause of action which should have negated sustaining a motion to dismiss. Under *Paugh*,⁶⁴ appellant was a bystander. She witnessed her infant grandson’s condition, and appreciated the peril to him. Her emotional distress was so severe it manifested in a serious physical response.

⁵⁸*supra*.

⁵⁹*Meyers, supra*. at 94.

⁶⁰*supra*.

⁶¹*id*.

⁶²*Paugh, id.* (woman asleep while cars crash into her home and fears for safety of her children).

⁶³*id*.

⁶⁴*id*.

In *Schultz*,⁶⁵ the precursor to *Paugh*,⁶⁶ this Court recognized the tort of negligent infliction of emotional distress. The plaintiff witnessed an object hitting his windshield. He was not physically injured. The Court announced that “[a] cause of action may be stated for the negligent infliction of serious emotional distress without a contemporaneous physical injury.” The *Schultz*⁶⁷ court recognized that an emotional injury can be as damaging to an individual as one first precipitated by a physical injury.⁶⁸ In *Paugh*,⁶⁹ this Court furthered this reasoning in permitting damages for emotional distress to a woman who was asleep when cars hit her house. These decisions recognized one’s right to emotional tranquility.⁷⁰

Appellees cited *Heiner v. Moretuzzo*,⁷¹ and *Dobran v. Franciscan Medical Center*⁷² to support their position that the appellant did not have a viable cause of action. Neither of these cases are applicable as there was no underlying medical condition caused by the defendant (i.e., in *Dobran*,⁷³ cancer; in *Heiner*,⁷⁴ possible AIDS), nor was there the manifestation of the emotional distress demonstrated by immediate physical harm which occurred simultaneously with witnessing the effects of the alleged negligence.

Ohio recognizes that a grandparent is a foreseeable person who would suffer

⁶⁵ *supra*.

⁶⁶ *supra*.

⁶⁷ *supra*.

⁶⁸ *id.* at 135

⁶⁹ *supra*.

⁷⁰ *Paugh*, *id.* at 74

⁷¹ (1995), 73 Ohio St.3d 80, 652 N.E.2d 664

⁷² (2004), 102 Ohio St.3d 54, 2004-Ohio-1883, 806 N.E.2d 537, 2004-Ohio-LEXIS-874

⁷³ *id.*

⁷⁴ *supra*.

substantial stress as a result of the negligence.⁷⁵ In *Ramage v. Central Ohio Emergency Serv. Inc.*,⁷⁶ this Court acknowledged the right of a grandparent to recover for mental anguish and loss of society of a grandchild even when there are surviving parents, or a surviving spouse and/or minor children. It stands to reasons that:

“... the more closely the plaintiff and victim are related, the more likely it is that the emotional injury was reasonably foreseeable.”⁷⁷

Foreseeability does not require knowing beforehand which family relative may suffer emotional injury, only that it is possible that one could.⁷⁸

In the instant case, the Court of Appeals ignored its recent decision in *Strasel*,⁷⁹ and appears to conclude that in order for there to be an emotional distress claim, one has to actually see the medical malpractice. Witnessing results of a possible blameworthy party is outside of the Appellate Court’s definition of a “bystander”. This limitation is in conflict with this Court’s ruling in *Paugh*.⁸⁰ While there is arguably no evidence that appellant experienced an appreciation of physical peril to herself, she certainly appreciated the physical peril to her infant grandson. She did have a “sensory perception of the event.” Her sensory perception was so severe she had an immediate cardiac event. This “sensory perception” and appreciation is analogous to that in *Strasel*⁸¹ where the emotional distress resulted from the appreciation “of the very real risk of injury” to the infant resulting in the

⁷⁵*Ramage v. Central Ohio Emergency Serv. Inc.* (1992), 64 O.S.3d 97, 106, 592 N.E.2d 828

⁷⁶*id.*

⁷⁷*Paugh, supra.* at 80

⁷⁸*Paugh, id.* at 78; Cf. with *Gallimore v. Children’s Hospital Medical Center* (1993), 67 Ohio St.3d 244, 617 N.E.2d 1052.

⁷⁹*supra.*

⁸⁰*supra.*

⁸¹*supra.* at ¶ 22.

mother suffering her own emotional injury. As the “Strasel’s baby was placed in actual physical peril. . .”⁸² by the medical malpractice, so, too, was appellant’s grandson.

Moreover, to permit emotional distress awards in situations such as cases in regard to funerals and burials,⁸³ and not in a case such as this one, presents an additional denial of equal access to the courts in violation of Section 16, Article I, Ohio Constitution. Where it appears that the claim is genuine, i.e., that “the mental distress is undoubtedly real and serious, there is no essential reason to deny recovery.”⁸⁴

CONCLUSION

The trial court was in error to cite the appellate decision in *Doe*⁸⁵ with no further explanation as to which part of *Doe*⁸⁶ applied as its authority to dismiss appellant’s case. The Court of Appeals further denied appellant her constitutional right to access to the courts of Ohio guaranteed under Section 16, Article I of the Ohio Constitution.⁸⁷ She has suffered a direct and immediate, severe emotional and physical injury as a result of tortfeasors’ damage to her infant grandson, and her case was timely filed.⁸⁸

⁸²*Strasel, id.* at ¶18.

⁸³*Cf. Brownlee v. Pratt* (1946), 77 Ohio App. 533; *Criswell v. Brentwood Hosp.* (1989), 49 Ohio App. 3d 163, 165, 551 N.E.2d 1315, 1317; *Columbus Finance v. Howard* (1975), 42 Ohio St.2d 178; *Housh v. Peth* (1956), 165 Ohio St. 35

⁸⁴*Carney v. Knollwood Cemetery Assn.* (1986), 33 Ohio App.3d 31 at fn. 4

⁸⁵*supra.* (appellate decision)

⁸⁶*id.*

⁸⁷*Ramage, supra.*

⁸⁸*Doe, supra.* (Slip Opinion 2008-Ohio-67).

Respectfully submitted,

By: 
Marlene Penny Manes

COUNSEL FOR APPELLANT,
LINDER TRIBBLE

Proof of Service

This is to certify that a copy of this Memorandum in Support of Jurisdiction was served this 17th day of January, 2008, by ordinary U.S. mail, postage prepaid, on:

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COUNSEL FOR APPELLEES, CHILDREN'S HOSPITAL MEDICAL CENTER
AND THE CHILDREN'S HOSPITAL, CINCINNATI, OHIO


Marlene Penny Manes

COUNSEL FOR APPELLANT,
LINDER TRIBBLE

APPENDIX



D76160608

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
DEC 05 2007

LINDER TRIBBLE,	:	APPEAL NO. C-070058
	:	TRIAL NO. A-0607631
Plaintiff-Appellant,	:	
	:	JUDGMENT ENTRY.
vs.	:	
CHILDREN'S HOSPITAL MEDICAL	:	
CENTER	:	
	:	
and	:	
	:	
THE CHILDREN'S HOSPITAL	:	
	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

In one assignment of error, Linder Tribble appeals from the trial court's judgment dismissing her complaint under Civ.R. 12(B)(6). She raises two main arguments: (1) that she properly pleaded a cause of action for negligent infliction of emotional distress, and (2) that her suit was not time-barred. For the following reasons, we affirm the judgment of the trial court.

Appellate review of a Civ.R. 12(B)(6) ruling is de novo.² We must accept the factual allegations in Tribble's complaint as true and view all reasonable inferences in her favor to

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.
² *Perrysburg Township v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶5; *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶4-5.

OHIO FIRST DISTRICT COURT OF APPEALS

determine if her complaint states, as a matter of law, a claim upon which relief may be granted.³

In Tribble's complaint, she claimed that, upon seeing her 11-month-old grandson in the hospital and hearing that the hospital's allegedly negligent treatment of him could result in his death or in grave medical problems, she had suffered a heart condition and was hospitalized for several days. As a result, Tribble asserted, the hospital was liable to her for negligent infliction of emotional distress.

The trial court correctly concluded that Tribble had failed to state a legal claim. Negligent infliction of emotional distress occurs when a plaintiff has witnessed or experienced a dangerous accident, or has appreciated actual physical peril.⁴ In the case of a bystander, this tort requires that the bystander "be traumatized by the emotionally distressing occurrence of a sudden, negligently caused event."⁵ A bystander "does not include a person who was nowhere near the accident and had no sensory perception of the events surrounding the accident."⁶

Visiting a hospital patient who has allegedly been the victim of medical malpractice does not meet the elements of this tort. Tribble did not assert that she had been anywhere near a sudden accident, or that she had had a sensory perception of the events surrounding an accident. Tribble's complaint was properly dismissed.

³*State ex rel. Hanson v. Guernsey Cty. Bd. Of Commrs.* (1992), 65 Ohio St.3d 545, 547, 1992-Ohio-73, 605 N.E.2d 378; see, also, *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584.

⁴*Heiner v. Moretuzzo*, 73 Ohio St.3d 80, 85-86, 1995-Ohio-65, 652 N.E.2d 664; *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 78, 451 N.E.2d 759.

⁵*Brose v. Bartlemay* (Apr. 16, 1997), 1st Dist. No. C-960423.

⁶*Burris v. Grange Mutual Cos.* (1989), 46 Ohio St.3d 84, 92-93, 545 N.E.2d 83, overruled on other grounds in *Savoie v. Grange Mutual Ins. Co.*, 67 Ohio St.3d 500, 1993-Ohio-134, 620 N.E.2d 809; see, also, *Doe v. Archdiocese*, 167 Ohio App.3d 488, 2006-Ohio- 2221, 855 N.E.2d 894, ¶123.

OHIO FIRST DISTRICT COURT OF APPEALS

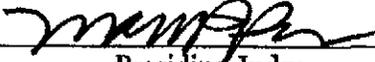
Tribble also contends that her claim was not time-barred. We acknowledge that the Ohio Supreme Court's recent holding in *Fehrenbach v. O'Malley*⁷ may extend the statute of limitations in this case until after Tribble's grandson reaches the age of majority. But given the disposition of Tribble's first argument, this issue is moot. We therefore decline to address it.⁸

We overrule Tribble's sole assignment of error. The judgment of the trial court is affirmed.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., HENDON and DINKELACKER, JJ.

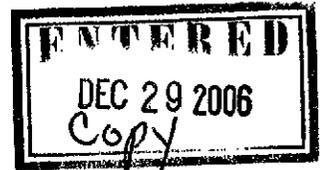
To the Clerk:

Enter upon the Journal of the Court on December 5, 2007
per order of the Court 
Presiding Judge

⁷113 Ohio St.3d 18, 2007-Ohio-971, 862 N.E.2d 489.

⁸ See App.R. 12(A)(1)(c).

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



LINDER TRIBBLE, : Case No. A0505095
Plaintiff, : Judge Robert C. Winkler
-v- : ENTRY GRANTING
CHILDREN'S HOSPITAL MEDICAL : DEFENDANT'S MOTION TO
CENTER, et al. : DISMISS
Defendant. :

This matter came before the Court on Defendant, Children's Hospital Medical Center's, Motion to Dismiss. The Court has reviewed said motion and response thereto and being fully apprised in the premises hereby GRANTS same.

IT IS SO ORDERED.

COPY

Original signed for filing.
Judge Robert C. Winkler

Judge Robert C. Winkler

Authority: *Doe v. Archdiocese of Cincinnati*, 167 Ohio App. 3d 488, 496 (2006).

Copies to:

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**COURT OF COMMON PLEAS
HAMILTON COUNTY**

LINDER TRIBBLE,	:	Case No. A 0607631
Plaintiff,	:	Judge Robert C. Winkler
-v-	:	<u>NUNC PRO TUNC ENTRY</u>
CHILDREN'S HOSPITAL MEDICAL	:	<u>GRANTING DEFENDANT'S</u>
CENTER, et al.	:	<u>MOTION TO DISMISS</u>
Defendant.	:	

This matter came before the Court on Defendant, Children's Hospital Medical Center's Motion to Dismiss. The Court has reviewed said motion and response thereto and being fully apprised in the premises hereby GRANTS same.

IT IS SO ORDERED.

COPY
Original signed for filing.
Judge Robert C. Winkler

**_____
Judge Robert C. Winkler**

Authority: *Doe v. Archdioceses of Cincinnati*, 167 Ohio App.3d 488, 496 (2006).

Copies to:

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CLERK ORDERED TO ENTER
UPON THE JOURNAL

MAY - 8 1995

COURT OF APPEALS

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

PRESENTED TO THE CLERK
OF COURTS FOR FILING

MAY - 8 1995

COURT OF APPEALS

ROSA P. BUTLER : APPEAL NO. C-940119
and : TRIAL NO. A-9303190
ROBERT B. BUTLER, :
Plaintiffs-Appellants, :
vs. : MEMORANDUM DECISION
JEWISH HOSPITALS, INC., : AND
Defendant-Appellee. : JUDGMENT ENTRY.

Timothy A. Garry, Jr., Esq., No. 0032901, 2250 Kroger Building,
1014 Vine Street, Cincinnati, Ohio 45202, for Plaintiffs-
Appellants,

John A. Goldberg, Esq., No. 00094770, Suite 2300, 312 Walnut
Street, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal, the record
filed herein, the briefs, and arguments.

Plaintiffs-appellants, Rosa and Robert Butler, appeal
from the trial court's order granting summary judgment to the
defendant-appellee, Jewish Hospital, on grounds that the
Butlers' claims for damages from emotional injuries and loss of
consortium were barred by the one-year statute of limitations for
medical claims governed by R.C. 2305.11(B). We have *sua sponte*
removed this case from the accelerated calendar.

Rosa Butler's eighty-three-year-old spouse, Joseph, who was

partially paralyzed by a stroke six years earlier, was hospitalized at Jewish Hospital on April 18, 1991, for what was believed to be a virus. According to Rosa Butler, while she was speaking to the attending physician outside her spouse's room, a nurse "blurted out 'Dr. Roth, Mr. Butler just died.'" When Rosa Butler entered the room she discovered that her spouse was not dead. On April 16, 1993, she filed her complaint against Jewish Hospital, more than one year but less than two years after the cause of action accrued, claiming that the nurse's negligence caused her to suffer permanent emotional distress.

R.C. 2305.11(D)(3) defines a "medical claim" as follows:

[A]ny claim that is asserted in any civil action against a physician, podiatrist or hospital * * * or against a registered nurse * * * and that arises out of the care * * * or treatment of any person.

Principally, the Butlers argue that Rosa Butler's claim is not a medical claim because she was not a patient, and, therefore, the two-year statute of limitations for personal injuries (R.C. 2305.10) is applicable. We agree with the trial court's well-written memorandum decision finding that the statute is clear, unequivocal, and definite. Accordingly, the language "any claim" against a registered nurse that arises out of the care or treatment of "any person" reflects the intent of the legislature to include Rosa Butler's negligence claim within the definition of "medical claim" despite the fact she was not herself the patient.

We do not find on point the line of authorities cited by the Butlers concerning negligent use of hospital equipment while

ita caring for a patient which results in injury to the patient.
level furthermore, those decisions have been either expressly reversed
kin or reversed by implication in *Rome v. Flower Mem. Hosp.* (1994),
s 70 Ohio St.3d 14, 635 N.E.2d 1239. Neither are the Butlers'
title claims comparable, as they argue, to a claim against a hospital
O for negligent credentialing, which in *Browning v. Burt* (1993), 66
al, Ohio St.3d 544, 556-557, 613 N.E.2d 993, 1003-1004, was held not
to be a medical claim because it does not arise out of medical
diagnosis, care, or treatment of a person. Finally, we also
reject the Butlers' argument that R.C. 2305.11(D)(7) should be
read to exclude Rosa Butler's claim from the definition of a
"medical claim" since to do so would require that we construe
R.C. 2305.11(D)(7) as exhaustive in its scope when the statutory
language is expressly to the contrary.

Therefore, the judgment of the trial court is affirmed.

And the Court, being of the opinion that there were reason-
able grounds for this appeal, allows no penalty. It is further
Ordered that costs be taxed in compliance with App.R. 24, that a
copy of this Memorandum Decision and Judgment Entry shall consti-
tute the mandate, and that said mandate shall be sent to the
trial court for execution pursuant to App.R. 27.

Exceptions noted.

GORMAN, P.J., HILDEBRANDT and PAINTER, JJ.

To the Clerk:

Enter upon the Journal of the Court on 5/3/95
per Order of the Court Forman J.
Presiding Judge