

08-0392

No. _____

IN THE SUPREME COURT OF OHIO

ESTATE OF DONALD R. STEVIC,
by Betty A. Stevic, Executrix, et al.,

Plaintiffs-Appellees,

v.

BIO-MEDICAL APPLICATIONS OF OHIO, INC.
d/b/a RICHLAND COUNTY DIALYSIS SERVICES, et al.
Defendants-Appellants

ON DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS FOR RICHLAND COUNTY, OHIO,
FIFTH APPELLATE DISTRICT
CASE No. 2006CA0095

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT BIO-MEDICAL APPLICATIONS OF OHIO, INC.
d/b/a RICHLAND COUNTY DIALYSIS SERVICES, et al.**

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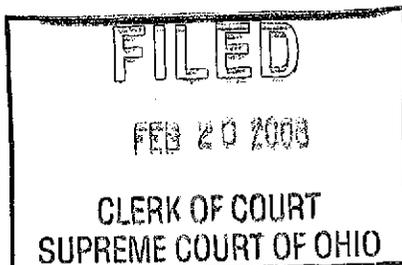


TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Explanation of Why this Case is a Case of Public or Great General Interest	1
Statement of the Case and Facts	7
Proposition of Law.....	10
<p>Under R.C. 2305.113(E)(3)(b), medical claims include claims that arise out of the medical diagnosis, care or treatment of any person and results from acts or omissions in providing medical care, or results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment. R.C. 2305.113(E)(3)(b) does not require claims to be filed against one of the classes or categories of individuals or entities identified in R.C. 2305.113(E)(3) to be considered a “medical claim.”</p>	
Argument in Support of Proposition of Law	10
Conclusion	14
Proof of Service	15

TABLE OF AUTHORITIES

Page

Cases

Family Medicine Found., Inc. v. Bright,
96 Ohio St.3d 183, 185, 772 N.E.2d 1177, 1179 (2002) 13

Judy v. Ohio Bur. Of Motor Vehicles,
100 Ohio St. 3d 122, 2003 Ohio 5277, 797 N.E.2d 45 12

Penrod v. Ohio Dep't of Admin. Servs.,
2005 Ohio 5836, P13 (Dist. 10 2005) 12

Rome v. Flower Memorial Hospital,
70 Ohio St. 3d 14, 635 N.E.2d 1239 (1994) 2, 8, 11

Sliger v. Stark Cty. Visiting Nurses Serv. & Hospice,
Stark App.No. 2005CA00207, 2006-Ohio-852 6

State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.,
95 Ohio St. 367, 372-373, 116 N.E. 516 (1917) 12

State v. Hairston,
101 Ohio St. 3d 308, 309, 2004 -Ohio- 969, 804 N.E.2d 471 11, 12

Statutes

R.C §1.42 13

R.C. 2305.11(D)..... 2

R.C. 2305.11(D)(3) 12, 13

R.C. 2305.113(A)..... 5

R.C. 2305.113(E) 2

R.C. 2305.113(E)(3)(b)(i) 13

R.C. 2305.113(E)(3)(b)(ii) 13

R.C. 2305.113(E)(3)(b)..... 1

R.C. 2315.18(B)(3) 4

R.C. 2323.43 4

R.C. 3702.30(4)(b)..... 1

R.C. 3702.30(A)(4)(b) 1

R.C. 4723.01(P)(Q)..... 1

Other Authorities

Am. S.B. 281 2, 13
Am. S.B. 281 Section 3(A)(1) 4
Am. S.B. 281 Section 3(A)(6)(b) 4
Am. S.B. 281 Section 3(A)(6)(c) 5
OAC 3701-83-23(B) 1
OAC 3701-83-23(C) 1
OAC 3701-83-23(D) 1
OAC 4723-23-01 1
OAC 5101:3-13-01.9(9) 1

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

This case presents a critical issue and a matter of first impression: what is the definition of a “medical claim” under the medical malpractice tort reform statute, R.C. 2305.113(E)(3)(b)? In particular, is the phrase “medical claim” limited to its pre-tort reform definition, which requires a claim to be filed against one of the classes or categories of individuals enumerated in R.C. 2305.113(E)(3), or does a claim against a health care provider present a “medical claim” under R.C. 2305.113(E)(3)(b) if the claim arises out of the medical diagnosis, care, or treatment of any person and results from acts or omissions in providing medical care, or from the hiring, training, supervision, retention, or termination of caregivers who provide medical diagnosis, care, or treatment.

In the action underlying this appeal, Appellant Bio-Medical Applications of Ohio, Inc. d/b/a Richland County Dialysis Services, moved for judgment on the pleadings arguing that the complaint filed by Appellant Betty Stevic, Executrix of the Estate of Donald Stevic, presented medical claims under R.C. 2305.113(E)(3)(b) that were barred by the one year statute of limitations. Appellant based its motion upon the fact that it operates a “freestanding dialysis center.” R.C. 3702.30(A)(4)(b); R.C. 3702.30(4)(b); and, OAC 3701-83-23(D). Through the employ of registered nurses, licensed practical nurses, and dialysis technicians certified by the Ohio Board of Nursing, Appellant provides dialysis care to patients with end-stage renal failure. R.C. 4723.01(P)(Q). Dialysis care is defined by law as a medical treatment that removes toxic waste products from a patient’s system in order to alleviate symptoms of end-stage renal disease and maintain life. OAC 5101:3-13-01.9(9); OAC 3701-83-23(B) and (C); See also, OAC 4723-23-01. Since Appellee alleged that the decedent was injured as he was transferred from his

wheelchair to a dialysis chair using a Hoyer lift, a procedure that is “ancillary to and an inherently necessary part” of dialysis care, Appellee argued that the Appellant’s claims presented medical claims because the injury arose from acts or omissions in providing medical diagnosis, care, or treatment. See, *Rome v. Flower Memorial Hospital*, 70 Ohio St. 3d 14, 635 N.E.2d 1239 (1994).

Appellee’s Complaint does not indicate whether it was a nurse or dialysis technician who performed the Hoyer transfer. Appellant argued, however, that the class or category of the alleged tortfeasor does not matter; the Appellee’s Complaint presents “medical claims” because the plain language of R.C. 2305.113(E)(3)(b) does not require a claim to be filed against the individuals or entities identified in R.C. 2305.113(E)(3). Appellee concluded that judgment was appropriate because Appellant did not file her Complaint within the one-year statute of limitations that applies to medical claims.

The trial court agreed that Appellee’s Complaint presented medical claims under R.C. 2305.113(E)(3)(b) and therefore, granted Appellee judgment on the pleadings. But the majority of the Fifth District Court of Appeals panel, in its January 7, 2008 Opinion reversing and remanding judgment, ignored the definition of “medical claim” in R.C. 2305.113(E)(3)(b). (See Ex. 1, time-stamped copy of the Fifth District’s Opinion). Instead, the Fifth District construed and applied R.C. 2305.113(E)(3), which effectively imposed the pre-tort reform definition of “medical claims,” and rendered R.C. 2305.113(E)(3)(b) a meaningless redundancy.

R.C. 2305.113(E)(3)(b) is a relatively new statutory provision that was enacted as part of Am. S.B. 281, Ohio’s medical malpractice tort reform statute. Am. S.B. 281, as codified in R.C. 2305.113(E) amended the former definition of “medical claim” set forth in R.C. 2305.11(D) to include a host of “health care providers” that previously had not been afforded

protection by the one-year statute of limitations. Thus, as of April 9, 2003, the phrase “medical claim” refers to:

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-basis, emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person...

See, R.C. 2305.113(E)(3).

The definition of “medical claim” set forth in R.C. 2305.113(E)(3) *does not* embody the universe of potential medical claims. But, rather than set forth an exhaustive list of individuals or entities that provide medical diagnosis, care, and treatment, the General Assembly enacted R.C. 2305.113(E)(3)(b), which expressly “includes” within the definition of medical claims,

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

(i) the claim results from acts or omissions in providing medical care;

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

By enacting R.C. 2305.113(E)(3)(b), the General Assembly evidenced its intent to bring within the definition of medical claims **all** claims filed against health care providers and caregivers for injuries that arise from acts or omissions in providing “medical diagnosis, care and treatment” without regard to the type of license held by the caregiver who rendered care, or the location at which care was rendered.

Whether a claim is a “medical claim” or a claim for bodily injury is a matter of public and great general interest because of the tremendous impact on health care providers; not

simply because of the statute of limitations, but now medical claims are subject to certain limitations on damages as set forth in R.C. 2323.43. In 2003, the General Assembly recognized that medical malpractice litigation and awards to plaintiffs exceeding one million dollars increased the cost of health care and the cost of insurance premiums paid by health care providers. These increased costs threatened the availability and affordability of health care in Ohio. See, Am. S.B. 281 Section 3(A)(1). To stabilize the cost of health care services and the insurance premiums, the General Assembly enacted R.C. 2323.43, and thereby limited the amount of non-economic damages that a plaintiff asserting a medical claim can recover.

As of April 2003, the amount of non-economic damages a plaintiff asserting a medical claim can recover is limited to “the greater of two hundred fifty thousand dollars, or three times the plaintiff’s economic loss to a maximum of five hundred thousand dollars.” If the plaintiff sustains a catastrophic injury, however, the plaintiff may recover as much as one million dollars in non-economic damages. Claims for non-catastrophic bodily injury not occasioned by medical negligence are subject to limitations on damages as well, but claims for catastrophic bodily injury are not subject to any limit on non-economic damages. See, R.C. 2315.18(B)(3). Thus, the potential exposure for catastrophic injuries in a claim for bodily injury far exceeds that available in a medical claim. As such, a health care provider that is not protected by tort reform remains subject to unlimited financial exposure and its attendant consequences of increased health care costs and insurance premiums.

The General Assembly also limited the time in which a plaintiff has to file a medical claim. The General Assembly determined that the availability of relevant evidence pertaining to an incident deteriorates over time, as does the availability of witnesses knowledgeable about the plaintiff’s diagnosis, care or treatment. *Id.* at Section 3(A)(6)(b). So

too, hospitals and health care providers are burdened by the need to maintain records for long periods of time. *Id.* at Section 3(A)(6)(c). To address these issues, the General Assembly tightened the time period in which a plaintiff may file a medical claim.

The burden of preserving evidence and maintaining medical records and the reasons for enacting the limitations on non-economic damages has nothing to do with the category of person who allegedly commits a negligent act and everything to do with protecting the availability and affordability of health care. If a health care provider is not afforded the protection of the one-year limitations period or statutory limits on damages simply because it is not specifically mentioned in R.C. 2305.113(E)(3), then there is a negative impact upon that health care provider's ability to secure reasonable insurance premiums or continue to provide affordable health care services. But, the majority decision by the Fifth District appellate panel calls into question the applicability of the one-year limitations period in R.C. 2305.113(A) and the damage caps to claims involving negligent medical diagnosis, care, or treatment. Consequently, Ohio health care providers not specifically mentioned in R.C. 2305.113(E)(3), their insurers, patients, and the attorneys who defend or prosecute medical claims, have great uncertainty and doubt as to whether a claim presents a "medical claim" under tort reform.

The Fifth District's failure to construe R.C. 2305.113(E)(3)(b) as enacted has stripped the protections of tort reform from many health care providers, such as specialty clinics, freestanding dialysis centers, psychologists, licensed independent social workers, ultrasound technicians, x-ray technicians, visiting nurse agencies, and staffing agencies that provide state tested nurse's aides ("STNA"). Moreover, the Fifth District's reasoning has patently absurd results. For instance, consider the situation in which a visiting nurse agency sends an STNA to the home of "Patient A," an elderly patient with a spine injury. During a bed bath, the STNA

improperly turns the patient, aggravating the spinal injury and causing permanent paralysis of the patient's lower extremities. Using the Fifth District's reasoning, Patient A may have a claim for bodily injury against the visiting nurse agency with a two-year statute of limitations and unlimited damages for a catastrophic injury because the STNA is not specifically identified in R.C. 2305.113(E)(3).

Patient B has the same injury as patient A, but this time, the same visiting nurse agency dispatches a nurse to perform the patient's bed bath. Just like the STNA, the nurse improperly turns the patient aggravating the spinal injury that results in permanent paralysis. Now, the claim against the visiting nurse agency presents a medical claim with a one-year statute of limitations period and limited non-economic damages; not because treatment differed; but because the nurse whose actions occasioned the injury is specifically listed in R.C. 2305.113(E)(3). See for example, *Sliger v. Stark Cty. Visiting Nurses Serv. & Hospice*, Stark App.No. 2005CA00207, 2006-Ohio-852.

The outcome in the instant matter is just as absurd. As pled in Appellee's Complaint, Decedent was injured during a procedure that was "ancillary to and inherently necessary" to his dialysis care. According to the Fifth District, it does not matter how the decedent was injured. Rather, Appellee's Complaint presents a medical claim only if (1) a nurse caused the injury; or (2) Appellant qualifies as a hospital. Under either scenario, Appellee would be entitled to the one-year statute for medical claims and accompanying limitations on damages. There is no dispute that either situation would comport with the legislative intent underlying tort reform.

It appears, however, that the Fifth District believes that if the Decedent's injury was caused by a dialysis technician, Appellee's Complaint presents a claim for "bodily injury:"

not because the medical diagnosis, care, or treatment differed, but because the incident occurred at the hands of a technician at a freestanding dialysis center, and neither are specifically mentioned in R.C. 2305.113(E)(3). Thus, the dialysis center, which provides life-saving medical care, is only afforded tort reform protection if its nurses cause a medical injury--not dialysis technicians. When it enacted R.C. 2305.113(E)(3)(b), the General Assembly could not have intended to expose a health care provider to separate damages or limitations periods for the same actions and injuries simply based upon who rendered care. Such an outcome does not promote the purpose or intent of tort reform.

The Fifth District's logic may have been valid under the pre-tort reform definition of medical claim. In 2003, however, the Ohio General Assembly enacted R.C. 2305.113(E)(3)(b), which changed the focus of a "medical claim" from "who rendered care" to "what was the type of care rendered," and "did the injury result from acts and omissions in rendering such care." Under R.C. 2305.113(E)(3)(b), all health care providers are afforded the same statute of limitations and limitations on damages for medically related injuries regardless of the class or category of individual who was negligent, without the necessity of the General Assembly identifying each and every potential provider of health care services.

STATEMENT OF THE CASE AND FACTS

In her First Amended Complaint for Personal Injuries and Other Tort Damages, Plaintiff Betty A. Stevic (in her individual capacity and as the executrix of Estate of Donald R. Stevic, deceased) asserted personal-injury and loss-of-consortium claims against Bio-Medical Application of Ohio, Inc. (d/b/a FMC Dialysis Services of Richland County), Fresenius Medical Care N.A., and Fresenius USA Manufacturing, Inc. (collectively, "the Center") based on injuries

Mr. Stevic allegedly received when he fell from a “Hoyer lift.” The Center is a freestanding kidney dialysis center. (See Am. Compl., ¶6.)

Plaintiff alleged that Mr. Stevic was a Center “kidney dialysis patient.” (Am. Compl. ¶3.) On October 4, 2003, while at the Center for “schedule dialysis,” “[e]mployees of the defendants . . . dropped [Mr. Stevic] or otherwise allowed him to fall from the Hoyer device that was being used to move [Mr. Stevic] into position for dialysis.” (Am. Compl. ¶8.) Plaintiff also alleged that the Center’s “employees or persons under their control” failed to (1) “secure the decedent safely and properly in the Hoyer device”; (2) “ensure the safety of the decedent [sic] during the transfer process”; (3) “supervise and properly see that decedent was transferred safely using the Hoyer device into a proper position for dialysis”; (4) “properly apply the harness straps and other parts of the Hoyer lift before raising decedent from his wheelchair.” (Am. Compl., ¶¶ 9-12.)

The Center admitted that Mr. Stevic was a dialysis patient and that he had received “dialysis treatment” on October 4, 2003, but the Center denied any negligence. (Answer, ¶¶ 3, passim.) And, among other affirmative defenses, the Center asserted that Plaintiff’s claims were “barred by the applicable statute of limitations.” (Answer, ¶ 24.) Plaintiff had filed her original Complaint on October 3, 2005 -- two years after Mr. Stevic allegedly sustained his injuries -- and she filed the First Amended Complaint one day later, on October 4, 2005.

Thereafter, the Center filed its Motion for Judgment on the Pleadings, arguing that Plaintiff had failed to file her Complaint within the one-year limitations period in R.C. 2305.113(E)(3)(b) as it applies to “medical claims.” The Center argued that, based on this Court’s decision in *Rome*, Plaintiff’s personal-injury claims – as alleged – arose out of medical

care or treatment of a person. (MJP, p. 4.) The Center also argued that, when the General Assembly amended R.C. 2305.11 in April 2003 and ultimately codified it R.C. 2305.113, the General Assembly understood that “modern medical care is delivered at a wide variety of outpatient and/or specialty clinics.” (MJP, p. 12.) As such, the broad language used at division (E)(3)(b) emphasizes the *type* of services delivered and received (i.e., medical care) and *not the place* where medical care is delivered. (MJP, pp. 12-13.) Thus, because Plaintiff had alleged that Mr. Stevic’s injuries occurred as a result of defendants’ acts or omissions in providing medical care, any claim against the Center was barred by the one-year limitations period that had expired on October 4, 2004. (MJP, p. 14.)

In response, Plaintiff argued that neither kidney dialysis centers nor their employees are specifically listed providers of care (like a physician or hospital) in R.C. 2305.113(E)(3) and, therefore, the Center the two-year limitations period applied. (Resp. to MJP, pp. 3-4.) Plaintiff contended that, for the one-year limitations period in R.C. 2305.113 to apply, a defendant must show (1) that the care provided falls within the definition of “medical claim” and (2) the action must be brought against a specifically enumerated medical provider. (Id. at 4.)

In reply, the Center pointed out that the General Assembly enacted a broader definition of “medical claim” in R.C. 2305.113. Rather than limit the definition of “medical claim” as previously described in R.C. 2305.11, the General Assembly further defined “medical claim” to include “[c]laims 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[; or] (ii) The claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.” R.C.

2305.113(E)(3)(b) To otherwise limit the meaning of “medical claims” to only persons identified in the statute would render the amendment simply redundant.

The trial court granted judgment to the Center on the pleadings, but the Court of Appeals held that there was insufficient information on the face of the complaint to award judgment. In reaching this conclusion, the Fifth District only looked at R.C. 2305.113(E)(3)--without regard to section (b), and held that “we must look to whether appellee falls under the categories designated in R.C. 2305.113(E). Only then, the majority concluded could the trial court decide which limitations period applied. Thus, the Fifth District failed to comprehend the issue before it: that under R.C. 2305.113(E)(3)(b) a claim presents a medical claim if it arises from acts or omissions in providing medical care and treatment or from the supervision of caregivers who provide medical care and treatment. The plain language of R.C. 2305.113(E)(3)(b) does not require that a claim be filed against a home, hospital or physician in order to constitute a medical claim.

PROPOSITION OF LAW

Under R.C. 2305.113(E)(3)(b), medical claims include claims that arise out of the medical diagnosis, care or treatment of any person and results from acts or omissions in providing medical care, or results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment. R.C. 2305.113(E)(3)(b) does not require claims to be filed against one of the classes or categories of individuals or entities identified in R.C. 2305.113(E)(3) to be considered a “medical claim.”

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Appellee’s Complaint presents medical claims as defined by R.C. 2305.113(E)(3)(b) as determined by the face of Appellee’s Complaint because Appellant’s claims arise out of acts or omissions in providing the dialysis care (i.e., “medical care and treatment”) to the decedent. (See, Complaint, ¶14) (“Defendants’ employees...acted for failed to act in a manner that constitutes negligence and as a result of the defendants’ employees’ actions,

omissions and/or failure to act, decedent fell to the ground injuring himself”). R.C. 2305.113(E)(3)(b), defines medical claims as:

(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...[Edit and emphasis added].

Thus, under R.C. 2305.113(E)(3)(b), a claim is a medical claim if it arises out of medical diagnosis, care and treatment, and results from acts or omissions in providing medical care, or results from the hiring, training, or supervision of caregivers who provide medical diagnosis, care or treatment. R.C. 2305.113(E)(3)(b) does not include any language that requires a medical claim to be filed against one of the specific entities identified in R.C. 2305.113(E)(3). Since Appellee’s Complaint alleged that acts and omissions by Appellant’s employee caused decedent’s injury, and since the decedent’s injury arose from medical diagnosis, care, and treatment as established under *Rome*, Appellee’s claims present “medical claims” regardless of whether the decedent’s alleged injury was occasioned by a nurse, a dialysis technician, or an STNA.

Basic principles of statutory construction support the Appellant’s position that the entity against which a claim is filed is irrelevant to the determination of whether a claim is a medical claim under R.C. 2305.115(E)(3)(b). The first rule of statutory construction is for the Court to give effect to the legislative intent. *State v. Hairston*, 101 Ohio St. 3d 308, 309, 2004-Ohio-969 ¶11, 804 N.E.2d 471. (“The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it”). If

the statute is unambiguous, the court must look to the language of the statute and must give effect to **all** words in the statute. The Court may not add or delete any words. *Judy v. Ohio Bur. Of Motor Vehicles*, 100 Ohio St. 3d 122, 2003 Ohio 5277 ¶19 , 797 N.E.2d 45. As stated by the Tenth District Court of Appeals,

[S]tatutory language must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative. [Emphasis added].

Penrod v. Ohio Dep't of Admin. Servs., Franklin Co. App.No. 04AP-1118, 2005 Ohio 5836, ¶13 (Dist. 10 2005), citing, *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 372-373, 116 N.E. 516 (1917). In other words, where there is no ambiguity, the court must simply apply the statute as written. *Hairston*, 101 Ohio St. 3d at 309. (“[If] the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation”).

R.C. 2305.113(E)(3)(b) must be applied as written because it unambiguously expresses the legislature’s intent to broaden the definition of medical claims to include **all** claims against health care providers arising from acts or omissions in providing medical diagnosis, care, or treatment, regardless of the class or category of individual who occasions the underlying injury. R.C. 2305.113(E)(3)(b) is an entirely new statutory provision that became effective on April 11, 2003 (six months before Appellant’s cause of action accrued), as one of the amendments to R.C. 2305.11(D)(3).¹ The fact that the General Assembly purposefully enacted

¹ R.C. 2305.11(D)(3) defined “Medical Claims” as “any claim***asserted in any civil action against a physician, podiatrist, or hospital, against any employee or agent of a physician, podiatrist or hospital, or against a registered nurse, midwife, or physical therapist, and that arises out of the medical diagnosis, care, or treatment of any person. ‘Medical claim’ includes derivative claims for relief that arise from the medical diagnosis, care or treatment of a person

an entirely new statutory provision defining medical claims is, by itself, evidence of the intent to broaden the definition of medical claim.

The General Assembly's intent to broaden the definition of "medical claims" from the pre-tort reform meaning is made more manifest, however, because of the word, "includes." To properly construe "includes," the court is obligated to apply rules of grammar and common usage. R.C. §1.42. The common meaning of "includes" is "to take in or comprise as a part of a whole or group."² Thus, by "including" R.C. 2305.113(E)(3)(b)(i) and (ii), the Ohio General Assembly brought within the definition of medical claims all claims against health care providers that arise from acts or omissions in providing medical diagnosis, care, or treatment or which result from the hiring, training and supervision of caregivers who provide such treatment.

If this Court determines that the plain language of R.C. 2305.113(E)(3)(b) is ambiguous, it should refer to the legislative history of Am. S.B. 281 to ascertain the General Assembly's reason for enacting the provision. *Family Medicine Found., Inc. v. Bright*, 96 Ohio St.3d 183, 185, 772 N.E.2d 1177, 1179 (2002) ("When construing an ambiguous statute, a court must give effect to the intent of the legislature***In order to determine that intent, the court may consider a host of factors, including the object sought to be attained by the statute"). The General Assembly passed Am. S.B. 281 because it believed it a necessary step in limiting the deleterious effects that malpractice litigation and excessive jury verdicts have on the availability and cost of health care services. If this Court construes R.C. 2305.113(E)(3)(b) as requiring a medical claim to be filed against one of the entities specified in R.C. 2305.113(E)(3), then it will thwart the goal of tort reform legislation. As a result health care providers that do not qualify as

and a claim that is asserted in a civil action against a hospital, and that is based on negligent credentialing." R.C. 2305.11(D)(3) did not contain any provision analogous to R.C. 2305.113(E)(3)(b).

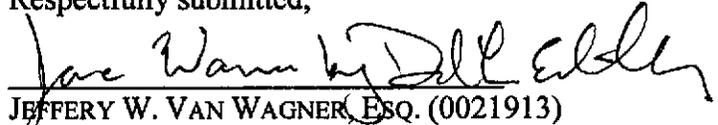
² <<http://www.m-w.com/dictionary/includes>>

hospitals, or homes, but who otherwise provide medical care (i.e. dialysis clinics, visiting nurse agencies, psychologists, and such) will not be afforded the protection of the one-year statute of limitations or the economic certainty that accompanies the damage limits, especially with respect to catastrophic injuries. In R.C. 2305.113(E)(3)(b), the Ohio General Assembly provided a means to protect all health care providers, without having to specifically mention each provider is entitled to such protection. The only conclusion that this Court can draw from the intent is that the General Assembly meant to broaden the definition of medical claims so that it encompassed the “medical diagnosis care and treatment” by all health care providers and caregivers. To decide otherwise is to read R.C. 2305.113(E)(3)(b) out of the statute.

CONCLUSION

The construction and application of R.C. 2305.113(E)(3)(b) is a matter of public and great general interest it has an impact on whether health care providers not specifically enumerated in R.C. 2305.113(E)(3) are entitled to the protection of tort reform legislation. Thus, Appellee Bio-Medical Applications of Ohio, Inc. d/b/a Richland County Dialysis Services respectfully requests that this Honorable Court accept jurisdiction and construe R.C. 2305.113(E)(3)(b).

Respectfully submitted,



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PROOF OF SERVICE

On February 20, 2008, a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Bio-Medical Applications of Ohio, Inc. was served by U.S. Mail, postage pre-paid, on the following:

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COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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RICHLAND COUNTY OHIO
FILED
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ESTATE OF DONALD R. STEVIC
BY BETTY A. STEVIC, EXEC.

Plaintiff-Appellant

-vs-

BIO-MEDICAL APPLICATION
OF OHIO, INC.

Defendant-Appellee

JUDGES:

William B. Hoffman, P.J.
Sheila G. Farmer, J.
Julie A. Edwards, J.

Case No. 2006 CA 0095

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal From Richland County Court
Of Common Pleas, Case No. 05CV1008

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellants

For Defendant-Appellee

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Edwards, J.

{¶1} Plaintiff-appellant Betty A. Stevic, Executrix of the Estate of Donald Stevic, appeals from the October 16, 2006, Judgment Entry of the Richland County Court of Common Pleas granting the Motion for Judgment on the Pleadings filed by defendant-appellee Bio-Medical Application of Ohio, Inc., dba FMC Dialysis Services of Richland County.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 4, 2003, Donald Stevic went to the Richland County Kidney Dialysis Center for dialysis treatment. While at the center, employees of the center dropped Donald Stevic [hereinafter "the decedent"] or otherwise allowed him to fall from a Hoyer lift, which is a mechanical lift device that was being used to move him into position for dialysis. As a result, the decedent suffered a fractured hip, abrasions and other injuries and, in February of 2004, died.

{¶3} Subsequently, on October 3, 2005, appellant Betty A. Stevic, as Executrix of the Estate of Donald Stevic, filed a complaint for personal injuries and other tort damages against appellant Bio-Medical Application of Ohio, Inc., dba FMC Dialysis Services of Richland County, which appellant alleged owned or operated the Kidney Dialysis Center.¹ The complaint set forth a survival claim and also a derivative claim for loss of consortium. A first amended complaint was filed on October 4, 2005.

{¶4} On August 14, 2006, appellee filed a Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C). Appellee, in its motion, argued that appellant had failed to file her complaint within the one year statute of limitations set forth in R.C.

¹ While other defendants were named in appellant's complaint, they were voluntarily dismissed without prejudice on October 28, 2005.

2305.113 for medical claims. Appellant, in her memorandum in opposition, argued that the two year statute of limitations set forth in R.C. 2305.10 for bodily injury applied and that, therefore, the complaint was timely filed.

{¶5} Pursuant to a Judgment Entry filed on October 16, 2006, the trial court granted appellee's motion and dismissed appellant's complaint.

{¶6} Appellant now raises the following assignment of error on appeal:

{¶7} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE'S MOTION FOR JUDGMENT ON THE PLEADINGS."

{¶8} Appellant, in her sole assignment of error, argues that the trial court erred in granting appellee's Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C). We agree.

{¶9} Motions for judgment on the pleadings are governed by Civ.R. 12(C), which states: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Pursuant to Civ.R. 12(C), "dismissal is [only] appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 1996-Ohio-459, 664 N.E.2d 931. The very nature of a Civ.R. 12(C) motion is specifically designed for resolving solely questions of law. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166, 297 N.E.2d 113, 117. Reviewing courts will reverse a judgment on the pleadings if plaintiffs can prove

corporation, association, board, entity, or authority that is responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care, and treatment to individuals. 'Hospital' does not include any hospital operated by the government of the United States or any of its branches."

{¶20} In the case sub judice, the complaint alleges that the decedent fell while he was being positioned for kidney dialysis treatment at the Richland County Kidney Center in Mansfield, Ohio. The complaint further alleges that appellee owns or operates the center where the decedent fell. It is unclear from the allegations in the complaint whether or not appellee falls within the definition of a "hospital". It is unclear whether or not appellee is a corporation and, if so, whether appellee "employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care, and treatment to individuals." See R.C. 2305.113(E)(1). Based on the foregoing, we cannot determine, based on the face of the complaint, whether appellant's claim is a medical malpractice claim or not.

{¶21} Even assuming, arguendo, that the trial court dismissed the complaint because it found the allegations of negligence made against the employees of Richland County Kidney Center constituted a medical claim governed by the one year statute of limitations, we do not agree with that dismissal. We do not agree with that dismissal even though we concede that an employer may not be held to be vicariously liable for the negligence of its employees or agents under the doctrine of respondeat superior, if the employee or agent cannot be liable due to the expiration of the statute of limitations. See *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712. An

employer such as appellee is only secondarily liable if its employee is primarily liable. See *Comer*, supra. We also concede that the employee may not need to be a named party in the lawsuit against the employer. See *Comer*, supra. Thus, the issue becomes whether or not appellee's employees were primarily liable in this case. If appellee's employees cannot be held to be primarily liable because of the expiration of the statute of limitations, then appellee cannot be held secondarily liable under the theory of respondeat superior. See *Comer*, supra.

{¶22} In the case sub judice, appellant alleged in the complaint that appellee's employees were negligent in, among other matters, failing to secure the decedent in the Hoyer device, dropping the decedent or allowing him to fall, and failing to properly apply the harness straps and other parts of the Hoyer lift. However, it is unclear from the language in the complaint whether or not the employees were employees of a hospital or were nurses, physical therapists, physician assistants or emergency medical technicians. See R.C. 2305.113(E)(3). Nowhere in the complaint are the employees identified in any manner or by any title. If the employees are nurses, physical therapists, emergency medical technicians, or physicians assistants or employees of a hospital and, assuming that the activities they were involved in arise out of medical diagnosis care, or treatment, then appellant's claims against them are medical claims under R.C. 2305.113 and the one year statute of limitations set forth in R.C. 2305.113(A) applies. Because appellant's claims against such employees would be barred by the one year statute of limitations set forth in R.C. 2305.113(A), appellant's claim against appellee, as an employer of such employees, would fail because the

employer can only be secondarily liable if the employee can be primarily liable. See *Comer, supra*.

{¶23} However, because, as is stated above, it is unclear from the complaint whether appellee's employees were any of the types of persons identified in R.C. 2305.113(E)(3), we find that the trial court erred in granting appellant's Motion for Judgment on the Pleadings pursuant to Civ. R. 12(C).

{¶24} For the above reasons, we find that the trial court erred in granting appellant's Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C).

{¶25} Appellant's sole assignment of error is, therefore, sustained.

{¶26} Accordingly, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings.

By: Edwards, J.

Hoffman, P.J. concurs and

Farmer, J. dissents




JUDGES

JAE/0702

Farmer, J., dissenting

{¶27} I respectfully dissent from the majority's view that the one year statute of limitations does not apply sub judice. Based upon the clear and unambiguous language of R.C. 2305.113(E)(3), I would find the fall from the Hoyer lift during the course of treatment while at the Richland County Kidney Dialysis Center to be a medical claim.

{¶28} The incident arose out of and during the course of the decedent's medical treatment. Therefore, the one year statute of limitations requires a dismissal of appellant's claims.

{¶29} I would affirm the trial court's decision.


JUDGE SHEILA FARMER

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FIFTH APPELLATE DISTRICT

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Defendant-Appellee

JUDGMENT ENTRY

CASE NO. 2006 CA 0095

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellee.

Julie A. Edwards
William B. Hoffman

JUDGES