

IN THE SUPREME COURT OF OHIO

MONICA FLETCHER, INDIVIDUALLY, : Case No. 07-1529
AND AS ADMINISTRATRIX OF THE :
ESTATE OF VICTOR SHAW, : Appeal from Cuyahoga County
DECEASED : Court of Appeals, Eighth Appellate
Appellee, : District
:
v. : Court of Appeals
:
UNIVERSITY HOSPITALS OF : Case No. CA-06-088573
CLEVELAND, et al. :
Appellant. :

**BRIEF OF *AMICI CURIAE*, THE OHIO HOSPITAL ASSOCIATION,
THE OHIO STATE MEDICAL ASSOCIATION,
AND THE OHIO OSTEOPATHIC ASSOCIATION,
IN SUPPORT OF APPELLANT UNIVERSITY HOSPITALS OF CLEVELAND**

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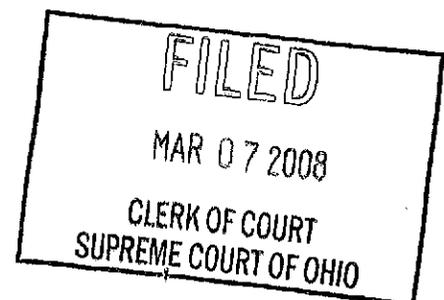


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STATEMENT OF INTEREST OF *AMICI CURIAE*

The issues presented in this appeal are of great importance to physicians, hospitals, and medical service providers throughout the State of Ohio. If the decision of the Eighth District Court of Appeals is permitted to stand, the costs of meritless medical negligence claims will continue to burden Ohio's health care system, the medical liability insurance market, and the millions of Ohio citizens that they serve. Civil Rule 10(D)(2) is the product of a lengthy legislative and judicial process aimed at curbing the costs of meritless medical negligence lawsuits while preserving the rights of plaintiffs to bring meritorious claims in Ohio's courts. The decision of the Eighth District Court of Appeals completely thwarts the intention of Rule 10(D)(2) by preventing defendants from effectively filing a Rule 12(B)(6) motion to dismiss to challenge the sufficiency of a plaintiff's complaint for failure to attach the requisite affidavit(s) of merit. Without the ability to file an effective rule 12(B)(6) motion to dismiss, hospitals, doctors, and other health care providers will be forced to incur costs—in time, money, and reputation—against meritless claims. *Amici curiae* respectfully request this Court to construe the affidavit of merit requirement to give it the meaning and effect intended and to instruct the lower courts to enforce it accordingly.

The Ohio Hospital Association (“OHA”) is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. From its first major legislative undertaking involving the federal Harrison Narcotic Act, the OHA has provided a mechanism for Ohio's hospitals to come together and develop health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of more than one hundred seventy (170) private, state and federal government hospitals and more than forty (40) health systems, all located within the state of Ohio. These hospitals and health systems employ more than 240,000 employees. The

total number of people working in Ohio hospitals, including physicians and volunteers, is more than 300,000. The OHA's mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities.

The Ohio State Medical Association ("OSMA") is a non-profit professional association founded in 1835 and is comprised of approximately 20,000 physicians, medical residents, and medical students in the State of Ohio. OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. The OSMA strives to improve public health through education, to encourage interchange of ideas among members, and to maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The Ohio Osteopathic Association ("OOA") is a non-profit professional association, founded in 1898, that represents Ohio's 3,300 osteopathic physicians, thirteen member health care facilities accredited by the American Osteopathic Association's Healthcare Facilities Accreditation Program, and the Ohio University College of Osteopathic Medicine in Athens, Ohio. Osteopathic physicians make up eleven percent of all licensed physicians in Ohio and twenty-six percent of the family physicians in the state. OOA's objectives include the promotion of Ohio's public health and maintenance of high standards at all osteopathic institutions within the state.

STATEMENT OF FACTS

The relevant facts are set forth in the Merit Brief of Defendant-Appellant University Hospitals of Cleveland. Those facts are adopted by reference and incorporated herein.

ARGUMENT

PROPOSITION OF LAW:

A motion for failure to state a claim upon which relief can be granted pursuant to Civil Rule 12(B)(6) is the proper procedure for challenging the failure to file an affidavit of merit in accordance with Civil Rule 10(D)(2).

Ohio Civil Rule 10(D)(2) requires an affidavit of merit to be filed with any complaint that contains a claim for medical negligence. The affidavit is necessary to establish the sufficiency of the complaint with respect to any medical claim asserted. By requiring an affidavit of merit, Civil Rule 10(D)(2) serves as a safeguard against unsubstantiated claims and minimizes the costs incurred by medical service providers and their insurers in defending meritless lawsuits. But, unless compliance with Rule 10(D)(2) is uniformly enforced under Civil Rule 12(B)(6) by Ohio's lower courts, Rule 10(D)(2) will be rendered meaningless against the meritless claims it was designed to prohibit.

If the decision of the Eighth District is allowed to stand, defendants will be deprived of the cost-effective recourse provided by Rule 10(D)(2) to expeditiously challenge insufficient complaints filed in medical negligence actions. And, instead, they will be required to jump through the unnecessary procedural hoop of filing a motion for a more definite statement simply to preserve their right to later file a motion to dismiss an insufficient complaint. Such a procedure serves only to increase the time and expense associated with litigating unsubstantiated medical malpractice claims—which is exactly what Rule 10(D)(2) was designed to reduce. If Ohio Civil Rule 10(D)(2) is to be a

meaningful rule—and *amici curiae* respectfully submit that is what this Court and the General Assembly intended in enacting it—then it must be enforced by the lower courts with a meaningful remedy for noncompliance. A motion to dismiss under Rule 12(B)(6) provides such a meaningful remedy and is, therefore, the proper procedure to challenge the failure to file the affidavit of merit required by Rule 10(D)(2).

A. The Eighth District’s Decision Strips Rule 10(D)(2) of its Intended Practical Effect.

1. The history of Civil Rule 10(D)(2) demonstrates that its purpose is to prevent the filing of meritless actions alleging medical negligence.

For more than 30 years, the Ohio General Assembly has been concerned about the escalating costs associated with frivolous and/or meritless medical claims filed against Ohio’s physicians, hospitals, and other health care providers.¹ In an effort to curb the filing of such claims by using a screening mechanism at the front end of litigation, the General Assembly enacted former R.C. 2307.42 in 1989.² This statute required, among other things, that every complaint alleging medical negligence be accompanied by an affidavit of plaintiff or plaintiff’s counsel stating that medical records had been requested for review from each defendant.

In Hiatt v. S. Health Facilities, Inc., 68

Ohio St.3d 236, 1994-Ohio-294, this Court invalidated R.C. 2307.42’s requirement that an affidavit be filed contemporaneously with a complaint alleging medical negligence on the basis that the statute conflicted with Ohio Civil Rule 11, promulgated by the Ohio Supreme Court pursuant to Section 5(B), Article IV of the Ohio Constitution. When such

¹ In 1975, the General Assembly passed Am.Sub.H.B. No. 682 -- a bill aimed at reforming laws applicable to medical negligence cases.

² Former R.C. 2307.42 was enacted pursuant to House Bill 642, effective March 17, 1989.

a conflict exists, the civil rule “control[s] over subsequently enacted statutes purporting to govern procedural matters.” *Hiatt*, 68 Ohio St.3d at 237. The *Hiatt* Court held: “Since the conflict involves the form and content of the complaint to initiate a medical malpractice case, it is a procedural matter and, therefore, Civ.R. 11 prevails over the statute, R.C. 2307.42.” *Hiatt*, 68 Ohio St.3d at 238.

The General Assembly attempted to address the infirmities of former R.C. 2307.42 by including a new “certificate of merit” provision for medical malpractice claims (R.C. 2305.011) in Amended Substitute House Bill 350 (effective January 27, 1997).³ See H.B. 350, Section 5, Paragraph (H)(1) (in enacting R.C. 2305.011, the General Assembly stated that the certificate of merit requirement was to “respond to the issues raised by the holding of the Supreme Court in *Hiatt*[.]”). R.C. 2305.011 required a plaintiff asserting a medical claim to file with the court a sworn statement called a certificate of merit, which served a similar purpose as the affidavit of merit at issue in this case.

In enacting R.C. 2305.011, the General Assembly expressed its intent “[t]o recognize the salutary effect that the certificate of merit provisions [would] have in reducing insupportable, frivolous claims, as unequivocally demonstrated in the hearings before the General Assembly.” H.B. 350, Section 5, Paragraph (H)(4). The General Assembly also expressed its intent “to join the legislatures of other states that similarly have found certificate of merit provisions to be an effective response to the escalating costs and burden of frivolous medical * * * malpractice claims[.]” H.B. 350, Section 5, Paragraph (H)(5). Plainly, the intent of R.C. 2305.011 was to provide defendants relief

³ Hereafter “H.B. 350.”

from the burdens associated with defending against unsubstantiated complaints of medical negligence.

The certificate of merit provision in R.C. 2305.011 was invalidated when this Court held H.B. 350 unconstitutional *in toto* for violating the single-subject rule of the Ohio Constitution and the doctrine of separation of powers. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 501, 1999-Ohio-123. In dicta, the *Sheward* majority indicated that R.C. 2305.011 suffered from the same constitutional infirmity as did its predecessor in *Hiatt*. *Id.* at 479, n.13. But, *Sheward* also stated: “The question whether the Civil Rules should, or could, be amended to allow for certificate-of-merit requirements is entirely distinct from the question of whether the General Assembly can do so of its own volition.” *Id.*

In light of this dicta in *Sheward*, the General Assembly recognized that its goal of minimizing the costs of defending against meritless medical liability claims by using a screening mechanism at the front end of the litigation process would best be served by an amendment to the Ohio Civil Rules. Thus, when the General Assembly considered affidavits of merit for medical malpractice claims in 2005, it requested that this Court amend the Civil Rules to require plaintiffs who assert medical liability claims to file a “certificate of expert review.” See Sub.H.B. No. 215, Section 3, effective September 13,

2004.⁴ In response, this Court promulgated the affidavit of merit requirement at issue in Civil Rule 10(D)(2), which became effective July 1, 2005.⁵

Like its predecessor statute, the purpose of the affidavit of merit requirement in Rule 10(D)(2) is to reduce the number of nonmeritorious medical negligence claims that must be defended by imposing a screening requirement at the outset of litigation. A qualified medical expert is required to review available medical records and certify that substandard care was the cause of plaintiff's injury. Without an affidavit of merit requirement, plaintiffs could initiate lawsuits based on uninformed opinion (or no medical opinion at all), without exercising reasonable due diligence to determine whether the defendants provided substandard care. Or, worse, plaintiffs could initiate a lawsuit merely to extract a settlement, knowing that many defendants would settle to avoid the cost and inconvenience of the suit, and the risk of a potential adverse judgment.

It is evident from the history preceding the adoption of Ohio Civil Rule 10(D)(2) that the General Assembly has been dedicated, for decades, to responding to the escalating costs associated with meritless claims of medical negligence. Rule 10(D)(2) was adopted by this Court in light of its considered judgment and the considered judgment of the General Assembly that the problem of meritless medical liability claims needs to be addressed—and to be addressed at the source. Ohio is not unique in its desire to address the problem of meritless medical negligence claims at its source, nor is it unique in

⁴ Sub.H.B. No. 215 also included, among other things, a requirement that medical malpractice insurers annually provide the Ohio Department of Insurance with detailed information about each and every claim asserted against a risk located in Ohio, so that the state can better track the costs of such claims. See R.C. 3929.302.

⁵ See Staff Notes to Ohio Civ.R. 10, stating that Rule 10 was “amended in response to a request from the General Assembly contained in Section 3 of Sub. H.B. 215 of the 125th General Assembly, effective September 13, 2004.” This Court amended the affidavit of merit requirement in Rule 10(D)(2), effective July 1, 2007, but such amendment is not relevant to the issue before the Court.

selecting an affidavit of merit as the mechanism for screening meritless cases. Twenty-three other states have similar requirements designed to avoid or mitigate the costs imposed on medical malpractice defendants by meritless claims.⁶

But, it is not enough to have a rule requiring an affidavit of merit. To be meaningful and effective, the rule must be enforced. The first line of defense against meritless medical malpractice claims, and the commensurate costs associated therewith, must be consistent enforcement of Rule 10(D)(2) by Ohio's lower courts. Without this, Civil Rule 10(D)(2) cannot achieve its intended goal and, ironically, may result in higher, rather than lower, costs to defend meritless medical claims.

The Eighth District's decision strips Rule 10(D)(2) of its intended practical effect by requiring the expenditure of more, rather than less, time and money to defend nonmeritorious medical claims. That is, under the Eighth District's decision, **where a plaintiff completely fails to comply** with Rule 10(D)(2) by failing to timely file an affidavit of merit, **it is the defendant who is required to jump through unnecessary procedural hoops**. Specifically, under the Eighth District's decision a defendant who is defending an unsubstantiated medical malpractice claim must file a motion for a more definite statement in order to preserve its right to subsequently file a motion to dismiss the unsubstantiated medical claim. A defendant who fails to file a motion for a more definite statement waives its right to file a motion to dismiss and, thus, is stuck defending against the unsubstantiated medical claim. *Amici curiae* respectfully submit that this result is at

⁶ As of March 1, 2008, the following states (in addition to Ohio) have adopted some form of certificate or affidavit of merit requirement in conjunction with medical liability claims: Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and West Virginia. See Exhibit A attached hereto.

direct odds with the very purpose—and intended practical effect—of the affidavit of merit requirement.

2. Meritless medical negligence claims impose tremendous costs on Ohioans.

The costs associated with medical malpractice defense are staggering. Recent data collected by the Ohio Department of Insurance (“ODI”), as well as research conducted by scholars and practitioners illustrates that those costs have a significant impact on insurance and health care costs for all Ohioans. According to a recent ODI report, based on data collected from medical malpractice insurers under R.C. 3929.302’s mandatory reporting provisions, the average cost of simply investigating and defending a medical malpractice claim in Ohio, excluding the cost of any payment to the claimant, is \$25,672. See Ohio Dept. of Ins., Ohio 2006 Medical Liability Closed Claim Report (2008), at 3 (“OMLCCR”) (excerpts attached hereto as Exhibit B).⁷ Yet almost eighty percent (80%) of all claims reported resulted in no indemnity payment to the claimant. *Id.* This means that in 2006, 3,210 out of the total 4,004 claims that closed did not result in any payment to the claimant.⁸ **That is, claims ultimately determined to have no merit cost Ohioans more than eighty-two million dollars (\$82,000,000) to investigate and defend in 2006 alone.**

⁷ The full report can be found at <http://www.ohioinsurance.gov/agent/medmal.htm>.

⁸ Consistent with the findings in the OMLCCR, a 2006 study in the *New England Journal of Medicine* revealed that a number of medical liability claims could be kept out of the judicial system with an effective screening mechanism. A random sample of medical malpractice claims found that three percent (3%) of the claims involved “no verifiable medical injuries,” thirty-seven percent (37%) “did not involve errors,” and claims involving no errors accounted for twenty-two percent (22%) of administrative costs. See Studdert & Mello, et al., Abstract, Claims, Errors, and Compensation Payments in Medical Malpractice Litigation (2006), 354 *New Eng. J. Med.* 2024, at 2033, available at <http://content.nejm.org/cgi/content/short/354/19/2024>.

It is precisely these costs that constitute an unusually large proportion of insurance expenses and play a significant role in the cost of premiums. According to the Insurance Information Institute (“III”), approximately forty percent (40%) of all medical malpractice insurance expenses nationally can be attributed to defense costs that do not include payouts to claimants. Note, Putting the Caps on Caps: Reconciling the Goal of Medical Malpractice Reform with the Twin Objectives of Tort Law (2006), 59 Vand. L. Rev. 1457, 1472 (citing Nathanson, It’s the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform (2004), 108 Penn St. L. Rev. 1077).

Merely having to defend against medical malpractice claims—the vast majority of which never result in payment to the claimant—significantly impacts health care professionals’ decisions⁹ and imposes tremendous costs on insurance companies and self-insured entities, all of which ultimately impact patients. For instance, a 2003 survey¹⁰ of medical students and residents revealed “grave concerns” about their ability to practice medicine in high-risk specialties due to liability concerns. See American Medical Association, Medical Liability Reform – NOW! (2008), at 2-3.¹¹ “[G]rowing concerns about liability issues may cause [medical students and residents] to avoid high-risk specialties or states with adverse liability climates,” thereby exacerbating shortages in

⁹ The medical liability environment not only impacts decisions of where to locate and what specialty, if any, to pursue, but also impacts decisions regarding medical treatment (i.e., whether defensive medicine is practiced in an effort to avoid lawsuits). A 2003 Department of Health and Human Services report estimated the cost of defensive medicine to be at least \$70 billion per year. See American Medical Association, Medical Liability Reform – NOW! (2008), at 8 (citing to HHS report).

¹⁰ Notably, this survey was conducted one year before the General Assembly requested this Court to promulgate an affidavit of merit requirement, and during the height of the last medical malpractice insurance crisis.

¹¹ This report can be found at <http://www.ama-assn.org/go/mlrnow>.

these needed practices (such as obstetrics). *Id.* Obviously, a shortage or unavailability of particular medical services impacts those in need of such services.

With respect to the impact on insurance and self-insureds, “the mere filing of claims significantly affects defense costs, independently of how often plaintiffs recover damages.” Note, Lessons Learned from the “Laboratories of Democracy”: A Critique of Federal Medical Liability Reform, 91 Cornell L. Rev. 1159, 1198 (citing Nathanson, *supra*). The costs associated with defending medical malpractice claims drive insurance premium increases and “[t]he failure to mitigate these costs will impact a provider’s liability premium regardless of the underlying merits of the lawsuits involved.” Ohio Dept. of Ins., Final Report and Recommendations of the Ohio Medical Malpractice Commission (2005), at 13.¹² Ultimately, the increasing cost of insurance to health care providers adversely impacts those needing medical care.

When a plaintiff fails to comply with Rule 10(D)(2) and the defendant moves for dismissal on that basis, the court ultimately decides whether or not the defendant must bear the substantial burden, financial and otherwise, of mounting a defense to an unsubstantiated claim of liability. This scenario is precisely what Rule 10(D) was designed to prevent—the inequitable distribution of power in medical malpractice claims wherein plaintiffs can hold medical care providers hostage for the value of defending against the claim despite its complete lack of merit. And, as set forth above, such inequity has repercussions not just for medical liability defendants, but also for health care providers, insurers and, ultimately, health care consumers throughout the State.

¹² This Report can be found at <http://www.ohiosa.com/uploads/OhioMedMalCommissionFinalRpt.pdf>.TIMESTAMP1115644439.

“Given the staggering amount of money spent on the defense of ultimately meritless [medical] claims * * * a successful method of reform will naturally be one that effectively eliminates meritless suits from the legal system as quickly as possible.” Nathanson, *supra* at 1119. Because affidavits of merit target and impact expenses incurred in defending meritless medical negligence cases as quickly as possible, they are an effective means of reducing malpractice defense costs. See *id.*

Ohio’s medical malpractice insurance market has only recently begun recovering from a very unstable period during which many carriers left the Ohio market and health care providers faced huge increases in premiums.¹³ During this time, news stories throughout the State featured doctors who were closing their doors or limiting their practices because they were unable to obtain affordable insurance coverage. Numerous hospitals closed maternity wards and eliminated other patient services. While this situation recently has improved for many health care providers, the failure to screen out meritless claims before they result in significant costs is at odds with continued progress in this regard.

B. The Only Meaningful Recourse for Failure to File an Affidavit of Merit is for a Trial Court to Dismiss the Claim

As set forth above, Ohio Civil Rule 10(D)(2) was designed to weed out unsubstantiated medical malpractice claims before medical malpractice defendants are forced to expend significant resources defending against them.

In relevant part, Civil Rule 10(D)(2) provides:

¹³ From 2000 through 2006, Ohio’s five largest medical malpractice insurers (which cumulatively wrote about two-thirds of medical malpractice insurance in Ohio) experienced an aggregate increase in physician and surgeon malpractice rates of 189.6%. See Ohio Dept. of Ins., Table, Ohio Medical Malpractice Insurance: Physicians & Surgeons Rate Changes for the Top Five Insurers Table, attached as Exhibit C.

Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness[.]

Additionally, the affidavit of merit for each defendant must contain a statement that the affiant reviewed relevant medical records, is familiar with the applicable standard of care, is of the opinion that the standard of care was breached by one or more of the defendants and that such breach caused injury to the plaintiff. Ohio Civil Rule 10(D)(2)(a). In short, Rule 10(D)(2) “requires that all medical-malpractice complaints filed in Ohio courts include an affidavit of merit signed by a qualified expert attesting that there is sufficient medical evidence supporting the plaintiff’s claim.” *Manley v. Marsico*, 116 Ohio St.3d 85, 2007-Ohio-5543, at ¶3.

The issue before the Court is: What is the proper recourse for a defendant faced with a medical malpractice complaint that fails to comply with Rule 10(D)(2)? The Eighth District held that “the proper remedy for failure to attach the required affidavit(s) is for the defendant to request a more definite statement.” *Fletcher v. University Hospitals of Cleveland*, 172 Ohio App. 3d 153, 2007-Ohio-2778, at ¶9. This decision not only conflicts with the intent of the Rule (as discussed above), but also with other decisions construing this Rule and the approach taken by this Court when it has construed other provisions in which an affidavit is required to be filed with a complaint.

- 1. Ohio courts have dismissed medical negligence claims for failure to comply with Rule 10(D)(2) without requiring a defendant to file a motion for a more definite statement.**

By its express terms, Civil Rule 10(D)(2) has very limited application—it only applies to test the sufficiency of complaints alleging medical, dental, optometric, or

chiropractic claims as defined in R.C. 2305.113. The rationale underlying the rule is straightforward—to ensure at the outset of litigation that a qualified medical professional with knowledge of the medical diagnosis or treatment attests that substandard care was provided that resulted in harm to the plaintiff. As the Eighth District recently stated:

Affidavits of merit are to be filed **with complaints** in medical malpractice cases in order to discourage plaintiffs from filing meritless claims. A plaintiff needs to obtain an affidavit of merit that indicates at least one expert finds the case has merit. (Emphasis in original.)

Colon v. Fortune, Cuyahoga App. No. 89527, 2008-Ohio-576, at ¶12.¹⁴ As the *Colon* Court held, in the absence of such attestation, the unsubstantiated claim should not proceed through the court system; it should be dismissed. *Id.* at ¶12-16. Without mentioning *Fletcher*, *Colon* affirmed the trial court's dismissal of plaintiff's complaint for failure to file an affidavit of merit pursuant to Rule 10(D)(2). The *Colon* defendants did not need to jump through the unnecessary *Fletcher* hoop of first filing a motion for a more definite statement.

In another decision, the Eighth District distinguished *Fletcher* on the basis that *Fletcher* never requested an extension of time to file an affidavit of merit. *Chromik v. Kaiser Permanente*, Cuyahoga App. No. 89088, 2007-Ohio-5856. *Chromik*, on the other hand, filed a motion for extension of time to provide the required affidavits of merit when he re-filed his complaint. The trial court granted *Chromik* two thirty-day extensions and advised all parties that no additional extensions would be granted. When *Chromik* filed a third request for an extension to provide affidavits of merit, the trial court granted defendant's motion for judgment on the pleadings and dismissed the case with prejudice.

¹⁴ Even though *Colon* was decided after *Fletcher*, it did not mention Rule 10(D)(1). Only one appellate case was found that adopted the Rule 10(D)(1) reasoning in *Fletcher*. *Stewart v. Forum Health*, Mahoning App. No. 06-MA-120, 2007-Ohio-6922, at ¶32.

The distinction between *Chromik* and *Fletcher* is illogical and encourages plaintiffs to disregard the affidavit of merit requirement. That is, nothing happens to a plaintiff who ignores the requirement by not filing the affidavits or a properly supported motion for an extension to file the affidavits, but (according to the Eighth District) dismissal is appropriate if plaintiff first files for an extension of time. As a result, if a plaintiff does nothing to comply with Rule 10(D)(2)—and only if a plaintiff does nothing—he is entitled to proceed with his action and, at a minimum, buy the extra time allowed by the unnecessary *Fletcher* “hoop.”

Other Ohio courts have dismissed medical malpractice complaints when affidavits of merit have not been attached to the complaint or filed within the time period set forth in Rule 10(D)(2), without requiring a defendant to first file a motion for a more definite statement. See, e.g., *Holbein v. Genesis Healthcare Sys.*, Muskingum App. No. CT2006-0048, 2007-Ohio-5550. In *Holbein*, as in the instant case, the plaintiffs voluntarily dismissed their complaint and then re-filed it. Upon re-filing, the *Holbein* plaintiffs did not timely file an affidavit of merit. After noting that an affidavit of merit is to guard against frivolous lawsuits, the *Holbein* Court dismissed the action, holding that “[g]iven the specific facts of this case, [and] the re-filing and the extension granted to appellants, we find the rule would have no meaning or effect if it was not enforced.” *Id.* at ¶51 (emphasis added.) As the *Holbein* Court recognized, to make the rule meaningful, the remedy for failure to comply must be dismissal.

The same result should be reached in the instant action. Any other result rewards a plaintiff for failing to comply with the affidavit of merit requirement.

2. In other contexts, this Court has dismissed actions where a plaintiff fails to file an affidavit with the complaint.

Not only is the *Fletcher* decision contrary to the intent of Rule 10(D)(2) and other decisions construing the Rule, it is also contrary to this Court's approach in construing other statutes or rules that require the filing of an affidavit with a complaint. For instance, although not a civil rule, R.C. 2969.25 also requires the filing of an affidavit to accompany a complaint for the purpose of minimizing frivolous lawsuits. Pursuant to R.C. 2969.25(A), an inmate commencing a civil action or appeal against a government entity or employee "shall file" with the court an affidavit containing a description of "each civil action or appeal of a civil action that the inmate has filed in the previous five years in any state or federal court." R.C. 2969.25(A). This Court has held that compliance with R.C. 2969.25's affidavit requirement is mandatory, and failure to comply results in dismissal of the action. See, e.g., *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 422, 1998-Ohio-218 (affirming dismissal of the petition where inmate "failed to comply with the mandatory requirements of R.C. 2969.25 in commencing his action"); *State ex rel. Hawk v. Athens County*, 106 Ohio St.3d 183, 184, 2005-Ohio-4383 ("[t]he requirements of R.C. 2969.25 are mandatory, and failure to comply with them subjects an inmate's action to dismissal.").

Another example in which this Court has dismissed actions for failure to file an affidavit required to be filed with the commencement of the action is Ohio S.Ct. Prac. Rule X(4)(B), applicable to original actions commenced in this Court. Rule X(4)(B) provides: "All complaints shall contain a specific statement of facts upon which the claim for relief is based, **shall be supported by an affidavit of the relator or counsel specifying the details of the claim[.]**" S.Ct. Prac. Rule X(4)(B) (emphasis added). Failure to file the

affidavit required by this rule is a ground for dismissal of the action. *State ex rel. Comm. for the Charter Amendment for an Elected Law Dir. v. City of Bay Vill.*, 115 Ohio St.3d 400, 2007-Ohio-5380 (dismissing the original action because relators failed to comply with S.Ct.Prac.R. X(4)(B)).

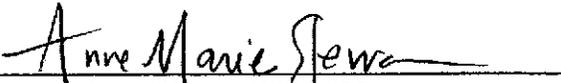
Although this Court's decisions construing R.C. 2969.25 and Ohio S.Ct. Prac. Rule X(4)(B) are not directly applicable to the instant case (and do not implicate the Ohio Rules of Civil Procedure), they demonstrate that this Court has used a straightforward, common sense approach to hold that when a plaintiff (or petitioner) fails to file an affidavit required to be filed with the complaint, the action is dismissed.

Amici curiae request that the Court adopt a similar approach in connection with the affidavits of merit required to establish the sufficiency of a medical negligence claim. If a plaintiff fails to timely file the required affidavit of merit, the action should be dismissed, period. That is what was intended by the Rule and that is what should happen. Any other result completely thwarts the intention of the Rule.

CONCLUSION

The Eighth District Court of Appeals' decision strips Rule 10(D)(2) of its substance and completely thwarts its purpose. *Amici curiae* urge this Court to reverse the decision of the Eighth District Court of Appeals and hold that the proper procedure for challenging a plaintiff's failure to file an affidavit of merit in support of her medical malpractice claim is a motion to dismiss, without more.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of *Amici Curiae*, The Ohio Hospital Association, The Ohio State Medical Association, and The Ohio Osteopathic Association, in Support of Appellant University Hospitals of Cleveland was sent via regular U.S. mail, postage prepaid this 7th day of March 2008, to the following:

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EXHIBITS

LIST OF EXHIBITS

Exhibit A – List of other State Statutes

Exhibit B – Excerpts from Ohio 2006 Medical Liability Closed Claim Report (2008)

Exhibit C – Ohio Department of Ins., Physicians and Surgeons Rate Changes for Top Five Insurers – 2000 to 2006

States	Affidavit of Merit Statutes
1) Arizona	A.R.S. § 12-2602
2) Colorado	C.R.S.A § 13-20-602
3) Connecticut	Conn. Gen. Stat. § 52-190a
4) Delaware	Del. Code. Ann. tit. 18 § 6853
5) Florida	F.S.A. § 766.203
6) Georgia	Ga. Code Ann. §9-11.9.1
7) Illinois	§ 735 ILCS 5/2-622
8) Maryland	Md. Code §3-2A-04(b)
9) Michigan	M.C.L.A. §§ 600.291(d)
10) Minnesota	Minn. Stat. § 544.42
11) Mississippi	Miss. Code Ann. § 11-1-58
12) Missouri	R.S. Mo. § 538.225
13) Nevada	N.R.S. § 41A.071
14) New Jersey	N.J.S.A. § 2A:53A-27
15) New York	5-30 New York Civil Practice: CPLR § 3012-a
16) North Dakota	N.D. Cent. Code § 29-01-46
17) North Carolina	Civil Rule 9(j)
18) Pennsylvania	Pa. R. Civ. P. 1042.3
19) South Carolina	S.C. Code Ann. § 15-36-100
20) Texas	Tex. Civ. Prac. & Rem. Code Ann. §74.351(b)
21) Virginia	Va. Code Ann. § 8.01-20.1
22) Washington	Rev. Code Wash. § 7.70.150
23) West Virginia	W. Va. Code §55-7B-6(b)





Ohio Department of Insurance

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Ted Strickland, Governor
Mary Jo Hudson, Director

Ohio 2006 Medical Liability Closed Claim Report

January 2008



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Ohio Medical Malpractice Closed Claim Report - 2006

I. Introduction

Pursuant to Ohio Revised Code ("ORC") §3929.302 and Ohio Administrative Code ("OAC") 3901-1-64, the Department of Insurance ("Department") hereby submits its second annual report to the General Assembly summarizing the Ohio medical liability closed claim data received by the Department for calendar year 2006. A copy of the first annual report is available on the Department's web site www.ohioinsurance.gov.

II. Overview

ORC §3929.302 requires all entities that provide medical malpractice insurance to health care providers located in Ohio, including authorized insurers, surplus lines insurers, risk retention groups and self-insurers, to report data to the Department regarding medical malpractice claims that close during the year. In addition, each entity must report the costs of defending medical liability claims and paying judgments and/or settlements on behalf of health care providers and health care facilities.

The Department is required to prepare an annual report to the General Assembly summarizing the closed claim data on a statewide basis. The data is summarized in this report in order to maintain the confidentiality of the specific data filed by each reporting entity.

Copies of ORC §3929.302 and OAC 3901-1-64 are attached to this report as Appendices A and B.

III. Data Collection

A secured application on the Department's web site has been set up in order to capture the data elements required by OAC 3901-1-64, Medical Liability Data Collection. Companies must submit data by May 1 for each medical, dental, optometric or chiropractic claim closed in the prior calendar year.

IV. Description of Analysis

For the purposes of this report, and based on general practice, when an insurer or other insuring entity opens a file and begins to investigate the circumstances of a demand for compensation due to alleged malpractice of a health care provider or facility, a claim has occurred, whether or not a lawsuit is ever filed. When the file is closed for one of the many reasons detailed in this report, even when the claimant receives no payment, the claim is considered closed. Multiple closed claim records can be generated from one incident, since a closed claim record must be entered for each health care provider and/or facility from which a demand for compensation is sought.

Ohio Medical Malpractice Closed Claim Report - 2006

In this report, two primary pieces of data are analyzed:

- **Paid Indemnity:** The amount of compensation paid on behalf of each defendant to a claimant.
- **Allocated Loss Adjustment Expense (ALAE):** The expenses incurred by a reporting entity, other than paid indemnity, which relate to a specific claim, such as the costs of investigation and defense counsel fees and expenses. As a business practice, some of the reporting entities do not allocate loss adjustment expenses to a specific claim.

This report organizes and summarizes the data to reflect the types of medical malpractice claims, the age and size of these claims, differences among regions of the state, differences among medical professionals, and several other categories.

V. Limitations of Analysis

The analysis is based entirely on historical closed claim data. That is, claims are reported to us and included in this analysis based on the year in which they reach a final outcome. Some arose from recent medical incidents, but most arose from incidents that occurred several years ago.

This report is not intended to be used to evaluate past or current medical liability insurance rates.

In addition, this data does not reflect plaintiffs' attorney fees, which are not separately collected and cannot be broken out from this data or from any data available to the Department.

VI. Key Findings

- **Total Claims:** For 2006, a total of 4,004 claims were reported by 93 entities. Authorized insurers¹ reported the majority of the claims, 2,495. Self-insured entities reported 1,283 claims; surplus lines insurers reported 169 claims; and risk retention groups reported 57 claims. For 2005, a total of 5,051 claims were reported by 91 entities. Total claims reported for 2006 were approximately 20% less than the number reported for 2005.

¹ Authorized (admitted) insurers are licensed to write business in the state; are subject to the Department's rate, policy form and solvency regulation; and are backed by the Ohio Insurance Guaranty Fund. Surplus lines insurers are not authorized and do not have guaranty fund backing, but are allowed to write policies for those doctors and hospitals that cannot obtain coverage from an authorized insurer. These companies must be on a list of accepted surplus lines insurers and are regulated for financial strength by their domiciliary state or country. Risk retention groups are permitted by federal law to cover the liability insurance risk of the group's members. These groups are not backed by the guaranty fund.

**Ohio Medical Malpractice Insurance
Physicians & Surgeons Rate Changes for the Top Five Insurers**

Company	2005 Direct Written Premium	2005 Market Share	2000 Rate Change	2001 Rate Change	2002 Rate Change	2003 Rate Change	2004 Rate Change	2005 Rate Change	2006 Rate Change
The Medical Assurance Company	124,001,669	22.7%	9.6%	30.0%	43.6%	19.3%	8.6%	1.7%	0.0%
The Medical Protective Company	95,625,943	17.5%	8.4%	6.3%	21.7%	27.5%	40.0%	10.2%	-5.0%
OHIC Insurance Company	39,889,825	7.3%	24.3%	28.0%	24.2%	17.0%	17.9%	12.9%	2.3%
American Physicians Assurance Corporation	35,491,844	6.5%	14.9%	29.5%	29.0%	87.6%	9.1%	2.5%	-3.6%
The Doctors Company, An Interinsurance Exchange	31,172,452	5.7%	8.4%	14.9%	49.2%	18.0%	10.0%	6.9%	
Total for Top Five Companies	326,181,733	59.8%	14.3%	20.5%	31.2%	27.4%	20.1%	6.7%	-1.7%
Total Ohio Industry	545,680,892	100.0%							
Cumulative Change for Top Five Companies			14.3%	37.7%	80.6%	130.2%	176.3%	194.7%	189.6%

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EXHIBIT

Ohio Department of Insurance
Med Mal Rate Changes 2000 to 2006

Most Recent Filing Effective Date: November 1, 2006
Exhibit Last Revised: November 1, 2006