

No. 2008-0392

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 RESPONSE OF JURISDICTION
OF APPELLEES, ESTATE OF DONALD R. STEVIC,
BY BETTY A. STEVIC, EXECUTRIX, ET AL.

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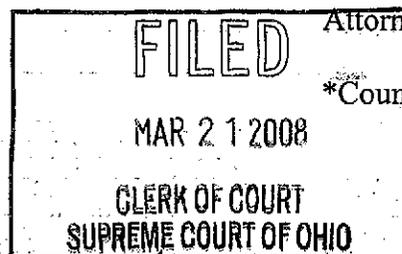


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Statement of Appellee's Position

Appellant does not contend that a substantial Constitutional question is raised in this case. Therefore, the only question is whether or not the case is of great public or general interest.

Appellee respectfully submits that the case presented for consideration is not of great general interest, nor of any significant public interest. The starting point for determination of this issue is Appellant's brief.

At the bottom of Page 3 and continuing on Page 4 of Appellant's brief, this Court is asked to find that this particular case presents issues of public and/or great general interest. The absence of any compelling argument therein is evidence that the case does not meet the standards required. Appellant argues that public and great general interest exists "because of the tremendous impact on health care providers; . . ." (P. 3). Appellant further argues that healthcare affordability and caps on non-economic damages are further issues involved (P. 4).

Appellee respectfully suggests that this case has nothing to do with healthcare affordability or caps on damages. This case involves a patient at a kidney dialysis center who fell and was injured. A negligence action was brought for bodily injury relating to the fall. Appellee respectfully submits that, while the case is undoubtedly important to the litigants at bar, there is no great general interest or public interest at stake.

Moreover, this appears to be an issue that is lightly litigated. The Fifth District Court of Appeals has addressed the legal issues on at least two separate occasions

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(this case included). In its decision on this case, the Fifth District Court of Appeals made reference to a case from the Tenth District Court of Appeals.¹ Otherwise, this does not appear to be a case where numerous litigants are anxiously waiting for the Supreme Court of Ohio to render its' interpretation of the issue presented.

Appellee's Argument on Appellee's Proposition of Law

(A) The one year statute for medical malpractice claims set forth in R.C. 2305.113(A) only applies to civil actions asserted against specifically named categories of health care providers and not to those admitted from R.C. 2305.113(E)(3).

In order for the one (1) year medical malpractice statute of limitations to apply it must be clear that the claims asserted are "medical claims". In determining whether or not a "medical claim" has been asserted, a two step examination is required. First, a court must examine whether or not the claim has been asserted against one of the specifically named categories of providers. In the instant case, it is undisputed that the record is void of any reference to one of the specifically enumerated categories of providers.

After determining whether or not the claim has been asserted against one of the protected categories of providers, the court must next look to the type of service or care provided to determine if it constitutes a "medical claim". The applicable statute reads in relevant part as follows:

"Medical claim" means 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,

¹ Johnson v. Ohio Dept. of Rehab and Corr., Franklin App No 06AP-196, 2006-Ohio-6432.

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registered nurse, advanced practice nurse, physical therapist, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care or treatment of any person." R.C. 2305.113(E)(3) (underlining added).

Appellant focuses solely on the type of care and not on who provided the care.

You cannot simply skip the part of a statute that is not favorable.

(B) A fair reading of R.C. 2305.113(E)(3)(b) must be read in conjunction with R.C. 2305.113(E)(3).

Appellant asks this court to read R.C. 2305.113(E)(3)(b) by itself without reference to R.C. 2305.113 (E)(3). Had the legislature desired the interpretation suggested by Appellant it could have simply said:

"Medical claim" means any claim asserted in a civil action that arises from or out of the medical diagnosis, care or treatment of any person, including a claim that results from acts or omissions in providing medical care, and a claim that results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care or treatment."

A fair reading of R.C. 2305.113 (E)(3) indicates that a medical malpractice claim is a claim asserted against only those categories of providers listed in the statute.

(C) The legislature has expanded the list of covered providers, but has never indicated that unlisted providers are covered.

Former Section 2305.11, effective April 16, 1993, specifically listed eight (8) categories of providers covered by the one (1) year statute of limitations. "Midwife" was added as the ninth group on January 27, 1997. By April 11, 2003, R.C. 2305.113 included the following additional providers:

1. Home;
2. Residential facility;
3. Licensed practical nurse;
4. Advanced practical nurse;

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5. Physician assistant
6. EMT-Basic;
7. EMT-intermediate;
8. EMT-paramedic.

All of the above new categories were retained in the 2005 enactment (SB80-April 7, 2005) and 2006 enactment (SB154-May 17, 2006).

Some day a new enactment may add "certified dialysis technician" and "corporations operating freestanding dialysis centers", but they are not included at this point in history.

(D) The provider "definitions" in the statute indicate a specific intent that only listed providers are covered by the one (1) year statute of limitations.

Great care and attention is given in this statute to define terms like "registered nurse", "home", "residential facility", "licensed practical nurse", "physician assistant" and the others listed therein. If the legislature intended that all types of providers be covered (including ones not named) then the attention to detail and definition would be wasted and unnecessary.

All of the words of the statute should be read and given their plain meaning. As medical care and treatment has evolved, so has the statute. Since 1993, several new types of medical providers have been added and included in the one (1) year statute of limitations that historically, had been reserved for doctors and hospitals. As medical treatments are further developed and refined, the legislature will likely choose to add additional categories. As more and more medical treatment moves "off site" and away from hospitals, the legislature will likely bring some of those providers within the one (1) year statute of limitations. But for now, the legislature has chosen a specific group of

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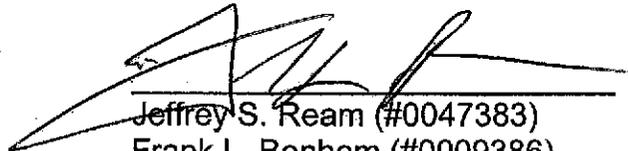
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medical providers for the one (1) year statute of limitations. The record does not indicate that Appellant or its' employees are included in the list.

While the record in this case is not entirely clear as to the exact type of employee involved in the transfer and preparation process for Mr. Stevic, it is clear that the defendant is an Ohio corporation which operates a free standing kidney dialysis center. It is undisputed that defendant is not a category of medical provider covered by the one (1) year statute of limitations. Accordingly, the decision of the Fifth Appellate District was correct.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Memorandum in Response of Jurisdiction of Appellee Estate of Donald R. Stevic to be served upon attorneys for Appellant, Jeffrey W. Van Wagner, Elizabeth A. Harvey and Jane F. Warner, ULMER & BERNE LLP, Skylight Office Tower, 1660 W. 2nd St., Suite 1100, Cleveland, Ohio 44113-1448 by regular U.S. mail on this 20 day of March, 2007.

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