

IN THE SUPREME COURT OF OHIO

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CASE NO. 2007-1529

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MONICA FLETCHER, INDIVIDUALLY AND AS ADMINISTRATRIX  
OF THE ESTATE OF VICTOR SHAW, DECEASED  
Plaintiff-Appellee

-vs-

UNIVERSITY HOSPITALS OF CLEVELAND; RAYMOND ONDERS, M.D.  
Defendant-Appellants

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BRIEF OF *AMICUS CURIAE*,  
OHIO ASSOCIATION OF JUSTICE  
IN SUPPORT OF PLAINTIFF-APPELLEE, MONICA  
FLETCHER, ADMINISTRATRIX

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Thomas J. Travers, Esq. (#0010967)  
**THOMAS J. TRAVERS, LLC**  
3870 Starr Centre Drive – Suite B  
Canfield, Ohio 44406  
(330) 533-1700  
*Attorney for Plaintiff-Appellees, Monica  
Fletcher, Administratrix*

Paul W. Flowers, Esq. (#0046625)  
**[Counsel of Record]**  
**PAUL W. FLOWERS, Co., L.P.A.**  
50 Public Square, Ste. 3500  
Cleveland, Ohio 44113  
(216) 344-9393  
Fax: (216) 344-9395  
*Amicus Curiae Chairman, Ohio Association  
for Justice*

Christina J. Marshall, Esq. (#0069963)  
John V. Jackson, Esq. (#0025051)  
**SUTTER, O'CONNELL & FARCHIONE Co.**  
3600 Erieview Tower  
1301 East 9<sup>th</sup> Street  
Cleveland, Ohio 44114  
(216) 928-2200  
Fax: (216) 928-4400  
*Attorneys for Defendant-Appellant,  
Raymond Onders, M.D.*

Kevin M. Norchi, Esq. (#0034695)  
Michael L. Golding, Esq. (#0062587)  
**NORCHI, BARRETT & FORBES LLC**  
Commerce Park IV  
23240 Chagrin Blvd., Suite 600  
Beachwood, Ohio 44122  
(216) 514-9500  
FAX: (216) 514-4304  
*Attorneys for Defendant-Appellant,  
University Hospitals of Cleveland*

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CLERK OF COURT  
SUPREME COURT OF OHIO

Irene C. Keyse-Walker, Esq. (#0013143)

**TUCKER ELLIS & WEST LLP**

1100 Huntington Building

925 Euclid Avenue

Cleveland, Ohio 44115-1414

(216) 592-5000

Fax: (216) 592-5009

*Attorney for Amicus Curiae, Ohio*

*Association of Civil Trial Attorneys*

Anne Marie Sferra, Esq. (#0030855)

**BRICKER & ECKLER LLP**

100 S. Third Street

Columbus, Ohio 43215-4291

(216) 523-5405

Fax: (216) 523-7071

*Attorney for Amicus Curiae, The Ohio*

*Osteopathic Association, The Ohio State*

*Medical Association, and The Ohio*

*Hospital Association*

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## INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”), formally known as the Ohio Academy of Trial Lawyers. The OAJ is comprised of approximately two thousand (2,000) attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

This *Amicus Curiae* is intervening in this appeal on behalf of Plaintiff-Appellee, Monica Fletcher, Individually and as the Administratrix of the Estate of Victor Shaw, Deceased. It is not the purpose of this Brief to suggest that the affidavit of merit requirement imposed by Civ.R. 10(D)(2) is unfair, unworkable, or unenforceable. By all appearances, the rule is here to stay. The affidavit of merit requirement must not be allowed, however, to be twisted into a mere trap for the unwary. Procedural gamesmanship already abounds within the Ohio judicial system and no legitimate interests will be served by adding yet another mechanism for derailing potentially legitimate medical malpractice claims at their inception. The decision which was rendered by the Eighth Judicial District Court of Appeals in the proceedings below strikes a sensible balance which permits such actions to proceed only after a proper affidavit of merit has been presented without requiring the immediate and irrevocable termination of the litigation whenever there has been non-compliance. This Court should therefore affirm this sound decision.

## 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).**

### **I. APPROPRIATENESS OF DISMISSAL WITH PREJUDICE.**

The Merit Briefs which have been submitted by Defendant-Appellants, Raymond Onders, M.D. and University Hospitals of Cleveland, gloss over the most concerning aspect of the proceedings below. Little meaningful mention has been made to the fact that the trial judge had granted the defense motion and dismissed the medical malpractice action “with prejudice” for failure to comply with Civ.R. 10(D)(2). *Journal Entry of July 13, 2006*. The harshest of all civil penalties was thus meted against the Plaintiff notwithstanding her counsel’s good faith belief that the affidavit of merit was unnecessary because the action had been commenced prior to the effective date of the new rule.<sup>1</sup>

Defendants no longer appear to be defending the trial judge’s ruling *in toto* and have not seriously suggested that a claim should ever be dismissed with prejudice when Civ.R. 10(D)(2) has not been satisfied. The OAJ’s primary purpose for submitting this Brief is to urge this Court to steer clear of the notion that a dismissal under the Rule, regardless of the form of the Motion which is submitted, should be on the merits. Such a drastic sanction is particularly inappropriate given that oftentimes the plaintiffs’ “violation” of Civ.R. 10(D)(2) is the product of a good faith misunderstanding or misinterpretation of the provision. Motions to dismiss are

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<sup>1</sup> The medical malpractice claim had originally been filed on September 2, 2003. *Mahoning C.P. Case No. 2003CV03014*. On March 30, 2005, Plaintiff voluntarily dismissed the proceedings, without prejudice, pursuant to Civ.R. 41(A)(1). The instant action was then re-filed on March 29, 2006. *Cuyahoga C.P. Case No. 587892*. The affidavit of merit requirement had been adopted in Civ.R. 10(D)(2) in the interim effective July 1, 2005.

now being routinely filed arguing that the affidavit attached to the pleading is "fatally defective" because the expert is purportedly unqualified for one reason or another or he/she has supposedly failed to utilize the talismanic language which is believed to be necessary. Requiring potentially legitimate claims to be permanently extinguished early in the proceedings upon such hyper-technical grounds would violate the fundamental maxim that lawsuits should be resolved, as far as reasonably possible, upon their merits. *Sazima v. Chalko*, 86 Ohio St.3d 151, 158-159, 1999-Ohio-92, 712 N.E.2d 729, 736; *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 431 N.E.2d 644, 647; *National Mut. Ins. Co. v. Papenhagen* (1987), 30 Ohio St.3d 14, 15, 505 N.E.2d 980, 981; *Barksdale v. Van's Auto Sales, Inc.* (1988), 38 Ohio St.3d 127, 128, 527 N.E.2d 284, 285.

The correctness of the OAJ's position in this regard is now beyond dispute, as this Court has added a modification to Civ.R. 10(D)(2) to clarify in subsection (d) that:

\*\*\* Any dismissal for lack of jurisdiction under this rule shall operate as a failure otherwise than on the merits. [emphasis added]

At a minimum, this Court should therefore confirm that dismissals ordered as a result of a failure to comply with Civ.R. 10(D)(2) should always be without prejudice.

## II. SUPERIORITY OF MOTIONS FOR MORE DEFINITE STATEMENT.

Defendants' argument to this Court boils down to nothing more than a procedural preference. Their view is that Civ.R. 10(D)(2) is enforceable through a motion to dismiss which has been filed under Civ.R. 12(B)(6) while the Eighth District had followed a long line of authorities in the proceedings below recognizing that the more suitable course is to seek a more definite statement through Civ.R. 12(E). *Fletcher v. University Hosps. of Cleveland* (8<sup>th</sup> Dist. 2007), 172 Ohio App.3d 153, 157-158, 2007-Ohio-2778, 873 N.E.2d 365, 368-369 ¶ 9-11. There is no practical difference between these two approaches because the end result is the

same. If the plaintiff fails to respond appropriately to the defense motion and comply to the Court's satisfaction with Civ.R. 10(D)(2), a dismissal will be ordered. A trial judge's authority to terminate the litigation, without prejudice, has been specifically furnished by the text of Rule 12(B)(6) and has been implied from Rule 12(E). *Point Rental Co. v. Posani* (10<sup>th</sup> Dist. 1976), 52 Ohio App.2d 183, 186, 368 N.E.2d 1267, 1269. In no event is the plaintiff allowed to proceed with the merits of the malpractice claim without first tendering the requisite affidavit of merit.

Neither approach requires anything more of the defendant than submitting a simple motion alerting the Court that Civ.R. 10(D)(2) has not been satisfied. An opportunity to cure any defect is afforded in both instances. A plaintiff is always entitled to amend the pleadings, if possible, when Civ.R. 12(B)(6) has been invoked. *Jordan v. Cuyahoga Metro Hous. Auth.* (8<sup>th</sup> Dist. 2005), 161 Ohio App.3d 216, 221-223, 2005-Ohio-2443, 829 N.E.2d 1237; *Elder v. Fischer* (1<sup>st</sup> Dist. 1998), 129 Ohio App.3d 209, 223, 717 N.E.2d 730. When a more definite statement has been sought, Civ.R. 12(E) also requires that the plaintiff be allowed to correct the pleading deficiency. *Point Rental*, 52 Ohio App.2d at 186.

Both Defendants seem to be under the impression that motions to dismiss are now appropriate as a result of the amendments to Civ.R. 10(D)(2) which had gone into operation on July 1, 2007. The current version of the Rule still does not, however, contain any reference to either Civ.R. 12(B)(6) or Civ.R. 12(E). It is now provided that:

(d) An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment. Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.

As previously observed, “dismissal” is still a potential remedy under both Civ.R. 12(B)(6) and Civ.R. 12(E). Both rules also serve to allow challenges to “the adequacy of the complaint”. The adoption of subsection (d) certainly does not require acceptance of Defendants’ position.

On the other hand, subsection (e) establishes a procedure which comports more closely with a motion for more definite statement under Civ.R. 12(E).

(e) If an affidavit of merit as required by this rule has been filed as to any defendant along with the complaint or amended complaint in which claims are first asserted against that defendant, and the affidavit of merit is determined by the court to be defective pursuant to the provisions of division (D)(2)(a) of this rule, the court shall grant the plaintiff a reasonable time, not to exceed sixty days, to file an affidavit of merit intended to cure the defect.

*Civ.R. 10(D)(2)*. Rule 12(E) also expressly requires that the plaintiff be afforded an opportunity to cure the defect through an amended pleading once the original complaint has been determined to be deficient. *Westmoreland v. Valley Homes Mut. Housing Corp.* (1975), 42 Ohio St.2d 291, 292, 328 N.E.2d 406; *Point Rental*, 52 Ohio App.2d at 186. Rule 12(E) is thus a more suitable mechanism for enforcing Rule 10(D)(2).

As a result of the new revisions to Rule 10(D)(2), enforcement through Rule 12(B)(6) would be unworkable. Generally speaking, motions to dismiss operate as an adjudication upon the merits of the defective claim. *Briggs v. Cincinnati Rec. Commn.* (1<sup>st</sup> Dist. 1998), 132 Ohio App.3d 610, 611, 725 N.E.2d 1161; *Kastl v. McPherson* (March 23, 1984), 2<sup>nd</sup> Dist. No. 8389, 1984 W.L. 4423 \*4-6. However, one of the purposes of the 2007 amendments to Rule 10(D)(2) was to clarify that dismissals with prejudice are not appropriate when the requirement of an affidavit of merit has not been satisfied. The Staff Notes explain that:

The rule is intended to make clear that the affidavit is necessary to establish the sufficiency of the complaint. The failure to comply with the rule can result in the dismissal of the complaint, and this dismissal is considered to be a dismissal otherwise than

upon the merits pursuant to Civ.R. 10(D)(2)(d). [emphasis added]

Motions to dismiss brought under Rule 12(B)(6) are thus wholly inappropriate when Rule 10(D)(2) allegedly has been violated.

The Eighth District's position is also consistent with a long line of authorities interpreting Civ.R. 10(D). The written instrument requirement had been examined in *Castle Hill Holdings, LLC v. Al Hut, Inc.* (Mar. 23, 2006), 8<sup>th</sup> Dist. No. 86442, 2006-Ohio-1353, 2006 W.L. 726911. The panel observed that "Civ.R. 10(D) does not expressly require the dismissal of a complaint which does not comply with the rule, and such defects may be cured by less dramatic means." *Id.*, p. \*3. Citing *Point Rental*, 52 Ohio App.3d 183, 368 N.E.2d 1267, and *Schwartz v. BankOne, Portsmouth, N.A.* (4<sup>th</sup> Dist. 1992), 84 Ohio App.3d 806, 809, 619 N.E.2d 10, 12 fn. 4, the Eighth District held that a defendant seeking to enforce Civ.R. 10(D)(1) is required to request a more definite statement under Civ.R. 12(E), which allows the pleading to be stricken if the deficiencies are not cured. *Castle Hill*, 2006-Ohio-1353, p. \*3; see also, *Lorain Music Co. v. Eidt* (Nov. 21, 2000), 3rd Dist. No. 3-2000-17, 2000-Ohio-1799, 2000 W.L. 1726161 (motion for more definite statement is the proper response to noncompliance with Civ.R. 10(D)); *Aveni v. Howells* (May 30, 1996), 8th Dist. No. 69809, 1996 W.L. 284896, p. \*2 (trial court did not err in refusing to dismiss a complaint where the plaintiff had failed to attach medical bills in dispute because defendant failed to challenge this deficiency via a motion for more definite statement under Civ. R. 12(E)); *Landskroner v. Landskroner* (8th Dist. 2003), 154 Ohio App.3d 471, 2003-Ohio-4945, 797 N.E.2d 1002 (dismissal of complaint for failure to attach copy of account was not warranted where defendant failed to file motion for more definite statement pursuant to Civ. R. 12(E)); *Yeung v. Neumeier* (Nov. 5, 2002), 3rd Dist. No. 15-02-04, 2002-Ohio-6009, 2002 W.L. 31455006, p. \*1 (trial court did not err in

denying motion to dismiss for failure to attach document to complaint where defendant failed to file a motion for a more definite statement prior to filing the answer).

This is also the rule in the Fifth District. In *Calloway v. Calloway* (Feb. 25, 2002), 5<sup>th</sup> Dist. No. 2001CA00274, 2002-Ohio-904, 2002 W.L. 276779, the defendant argued that dismissal was necessary under Civ.R. 10(D) (now Civ.R. 10(D)(1)) because the plaintiff had failed to attach a copy of a prenuptial agreement to a civil complaint that was focused on the instrument. Just as in the instant action, the defendant recognized that the terms of Civ.R. 10(D) did not authorize a dismissal and couched his motion instead upon Civ.R. 12(B)(6). *Id.*, at \*2. This Court was unimpressed and held that:

\*\*\* Civ.R.10(D) does not expressly require the dismissal of a complaint that does not comply with the rule, and such defects may be cured by less drastic means. \*\*\*

*Id.* The assignment of error was sustained and the trial judge's dismissal order was reversed.

*Id.*

The Fifth District reaffirmed that dismissal is not an option when a written instrument is missing from the pleading in violation of former Civ.R. 10(D) in *State Farm Mut. Auto. Ins. Co. v. Loken* (Sept. 20, 2004), 5th Dist. No. 04-CA-40, 2004-Ohio-5074, 2004 W.L. 2260709, p. \*3. Significantly, it was further held that if the defendant fails to request a more definite statement under Civ.R. 12(E) "before filing his answer [he] has lost his right to assert Civ.R. 10(D) as a basis for dismissing the plaintiff's complaint." *Id.*; see also, *Schwartz*, 84 Ohio App.3d at 809 fn. 4, citing *Phillips v. Fishel* (Jan. 28, 1983), 11th Dist. No. 9-041, 1983 W.L. 6273, p. \*2.

No legitimate reason exists for current Civ.R. 10(D)(1) (formerly Civ.R. 10(D)) to be interpreted differently than Civ.R. 10(D)(2). Both require attachments to the pleadings in order to confirm that the allegations are legitimate, clarify the basis for liability, and permit a defense

to be prepared. Neither specifically authorizes a dismissal as an appropriate sanction for a violation. In accordance with the overwhelming consensus of authority interpreting Civ.R. 10(D)(1), including the precedents from the intermediate appellate courts, this Court should hold that the rule may only be enforced through a timely motion for more definite statement in accordance with Civ.R. 12(E).

This sensible logic was applied recently in the context of Civ.R. 10(D)(2) by the Fifth District in *Campbell v. Aepli*, 5<sup>th</sup> Dist. No. CT06-0069, 2007-Ohio-3688, 2007 W.L. 2069944. At the defendant's considerable urging, the trial judge had dismissed the re-filed medical malpractice claim with prejudice and without granting leave to amend the pleading. *Id.* at ¶ 5-7. Based upon the overwhelming consensus of authority interpreting former Civ.R. 10(D), the panel unanimously held that a motion for more definite statement under Civ.R. 12(E) was the only appropriate mechanism for challenging the defective pleading. *Id.* ¶ 45.

That is, of course, precisely the same result that was reached by the Eighth District in the instant action. The Second District has also embraced this common sense construction of Rule 10(D)(2). *Maguire v. National City Bank*, 2<sup>nd</sup> Dist. No. 22168, 2007-Ohio-4570, 2007 W.L. 2502424 ¶ 19. Rather than disrupt this consensus of authority and sow the seeds of confusion, this Court should reject the Proposition of Law which has been fashioned.

**CONCLUSION**

For the foregoing reasons, this Court to affirm the Eighth District's holding in the proceedings below that a motion for more definite statement under Civ.R. 12(E) is the only proper method for seeking enforcement of Civ.R. 10(D)(2).

Respectfully submitted,



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Paul W. Flowers, Esq. (#0046625)  
**[Counsel of Record]**  
**PAUL W. FLOWERS CO., L.P.A.**  
*Amicus Curiae Chairman, Ohio  
Association for Justice*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Brief** was served by regular U.S. Mail on this 4<sup>th</sup> day

of April, 2008 upon:

Thomas J. Travers, Esq.  
**THOMAS J. TRAVERS, LLC**  
3870 Starr Centre Drive – Suite B  
Canfield, Ohio 44406  
*Attorney for Plaintiff-Appellees, Monica  
Fletcher, Administratrix*

Christina J. Marshall, Esq.  
John V. Jackson, Esq.  
**SUTTER, O'CONNELL & FARCHIONE CO.**  
3600 Erieview Tower  
1301 East 9<sup>th</sup> Street  
Cleveland, Ohio 44114  
*Attorneys for Defendant-Appellant,  
Raymond Onders, M.D.*

Kevin M. Norchi, Esq.  
Michael L. Golding, Esq.  
**NORCHI, BARRETT & FORBES LLC**  
Commerce Park IV  
23240 Chagrin Blvd., Suite 600  
Beachwood, Ohio 44122  
*Attorneys for Defendant-Appellant,  
University Hospitals of Cleveland*

Irene C. Keyse-Walker, Esq.  
**TUCKER ELLIS & WEST LLP**  
1100 Huntington Building  
925 Euclid Avenue  
Cleveland, Ohio 44115-1414  
*Attorney for Amicus Curiae, Ohio  
Association of Civil Trial Attorneys*

Anne Marie Sferra, Esq.  
**BRICKER & ECKLER LLP**  
100 S. Third Street  
Columbus, Ohio 43215-4291  
*Attorney for Amicus Curiae, The Ohio  
Osteopathic Association, The Ohio State  
Medical Association, and The Ohio  
Hospital Association*



---

Paul W. Flowers, Esq. (#0046625)  
**PAUL W. FLOWERS CO., L.P.A.**  
*Amicus Curiae* Chairman, Ohio  
Association for Justice