

IN THE
SUPREME COURT OF OHIO

MONICA FLETCHER, Individually and as Administratrix of the Estate of Victor Shaw, Deceased)	Supreme Court Case No. 07-1529
)	
Appellee,)	Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
)	
vs.)	
)	
UNIVERSITY HOSPITALS OF CLEVELAND, et al.)	Court of Appeals Case No. CA-06-088573
)	
Appellants.)	

MERIT BRIEF OF APPELLEE

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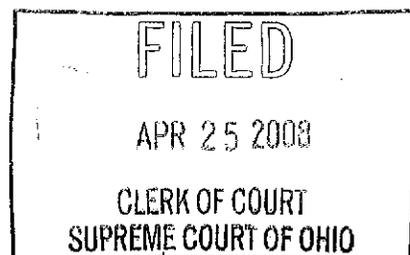


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STATEMENT OF FACTS

Although the statements of facts presented in the Briefs of Appellants contain correct recitations of facts, they fail to grant appropriate emphasis to the most important facts in this case. Each of Appellants' briefs presumes that this is a typical, mainstream medical negligence case. It is not. Distinguishing factors include:

1. At the time that Plaintiff's Complaint was re-filed, the only existing Ohio case law concluded that wrongful death actions, including those arising from claimed negligence in medical care or diagnosis, did not constitute "medical claims" and did not therefore require an accompanying Affidavit of Merit;
2. The re-filing of the lawsuit presented claims against only some of the Defendants to the original action, raising the inference that expert medical support had been secured against only some of the original Defendants. The inference is further supported by the fact that the Plaintiff and Plaintiff's counsel are residents of Mahoning County where the action had originally been filed; the re-filing was in Cuyahoga County because venue was no longer proper in Mahoning County after the Mahoning County Defendants were not included in the re-filed Complaint;
3. The Trial Court was so anxious to effect a dismissal of the Complaint that it did so without oral hearing, without notice that it concluded that the wrongful death actions did constitute medical claims thereby requiring an Affidavit of Merit, and without notice of the Court's intended dismissal of the lawsuit;
4. The Trial Court dismissed the case against Defendant, Dr. Onders, even though Dr. Onders had not filed a Motion to Dismiss of any nature (presumably because he had not yet been formally served despite the appearance in court of his trial attorney from the original action and a pending motion pursuant to Civ. R. 4.6(D) requesting alternative service of process); and

5. At the time that the original Complaint was filed in this case, there was no Affidavit of Merit requirement. Before its refiling, however, this Court promulgated the new requirements of Rule 10(D)(2). This rule has been applied retroactively. Subsequent to the trial court's order of dismissal, the rule was amended to include the requirement that such dismissals are without prejudice. This amendment should also, of course, be applied to this case. Civ. R. 86(DD). Nevertheless, the Briefs of Appellants choose to ignore this obvious error in the trial court's order of dismissal.

ARGUMENT

First Proposition of Law: It is error for a Trial Court to sustain a Defendant's Motion to Dismiss the Plaintiff's Complaint without notice of the intended dismissal under those circumstances when it is unclear from the face of the Complaint whether its allegations constitute a medical claim as defined in §2305.113 of the Ohio Revised Code.

Second Proposition of Law: Under circumstances where it is unclear from the face of the Complaint whether its allegations constitute a "medical claim", the filing of a Motion for More Definite Statement pursuant to Civ. R. 12(E) is the appropriate remedy.

It is respectfully suggested that, today, only the smallest number of medical negligence cases are filed without an accompanying Affidavit of Merit or a Request for Additional Time to File such Affidavit. The law today is well known and almost universally adhered to.

Appellee argues that the suggestions found in the Briefs of Appellants that the procedure authored by the Court of Appeals would work an extraordinarily onerous and expensive burden upon the medical community is not supported by fact. If there is a medical claim today that is filed without an Affidavit of Merit or a Request for an Extension, it is likely the result of an issue concerning whether the allegations of the Complaint truly constitute "medical claims". In such circumstance, the interests of justice require that the Court assess whether the Complaint does constitute a medical claim prior to the time that the case is unceremoniously dismissed.

Take, for example, the circumstance of a patient who is injured while in the hospital, though not the result of any alleged professional negligence. If such case were filed without an affidavit and the trial judge erroneously concluded that it was, in fact, a medical malpractice action, the fair way to handle such scenario is for the court to advise Plaintiff's counsel of its opinion that the nature of the case does require an Affidavit of Merit and afford the Plaintiff the opportunity to remedy the omission. Under that hypothetical circumstance, a motion for more definite statement seems the exactly correct procedure to guarantee that all parties are treated fairly. Upon the Trial Court's order granting notice of its opinion that an Affidavit of Merit would be required, Plaintiff would be then afforded an appropriate opportunity to file an amended pleading incorporating the required Affidavit. A final order granting a Motion to Dismiss without notice or hearing would not appear to be an equitable result. The procedure articulated by the Court of Appeals in this case would assure that such inequity could be avoided.

Essentially, Appellee argues herein that a Complaint, filed without an affidavit but with only a questionable basis of being a medical claim, be treated the same as the analogous circumstance of a Complaint with a defective affidavit. Civ. R. 10(E) provides that if "... the

affidavit of merit is determined 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." The opinion of the Court of Appeals in this case seems designed to follow the intent of that rule by providing a process to determine whether a defect exists for the purpose of providing an avenue to cure any defect found.

Other Courts of Appeals have also attempted to craft a procedure to circumvent an unfair dismissal of a complaint over an affidavit of merit issue. *Campbell v. Aepli*, 5th Dist No. CT06-0069, 2007-Ohio-3688; *Banfield v. Brodell*, (2006), 169 Ohio App. 3d110, 2006-Ohio-5267.

The instant case presents an example of why an analysis of the affidavit requirement should precede a rote dismissal of the case upon a Defendant's request. At the time that the case was refiled, only one opinion existed concerning whether a wrongful death action filed pursuant to Section 2125.01 O.R.C, could be considered a medical claim as defined in Section 2305.113 of the Ohio Revised Code . In *McClellan v. Clermont Mercy Hospital*, (C.P. Clermont County, January 3, 2006, Case No.2005 CVH 1264), the trial court authored a well-reasoned opinion concluding that an Affidavit of Merit is not required in a wrongful death action. The trial court in the instant action apparently concluded otherwise, (though no opinion was presented), and simply dismissed the lawsuit "with prejudice" without notice of its conclusion contrary to current law of that time. The Motion for More Definite Statement procedure would have alerted the Plaintiff to the court's legal conclusion, permitted an appropriate amended pleading, and avoided this unjust result.

CONCLUSION

In *Peterson v. Teodosio* (1973), 34 Ohio St. 2nd 161, the Supreme Court stated : "The Spirit of the Civil Rules is the resolution of cases upon their merits, not pleading deficiencies. Civ. R. 1(B) requires that the Civil Rules shall be applied 'to effect just results.' Pleadings are simply an end to that objective." The decision of the Court of Appeals in this case was obviously crafted to pursue that policy goal. Appellee prays that this Court does likewise.

So few medical claims are today filed without an Affidavit of Merit or a Request for an Extension to file that Affidavit that it seems quite reasonable for a Trial Court to be afforded an opportunity to inquire concerning the threshold question of whether the nature of the case requires an affidavit before simply dismissing the lawsuit. The Motion for More Definite Statement is the appropriate vehicle to address such circumstance. The decision of the Cuyahoga County Court of Appeals should be affirmed.

Alternatively, should this court choose to adopt Rule 12(B)(6) as the appropriate procedure, Appellee prays for an order of remand for the limited purpose of requiring the trial court to amend its order of dismissal to eliminate its "with prejudice" component.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Merit Brief of Appellee has been mailed this 24th day of April, 2007 to: Christina J. Marshall, Esq. And John V. Jackson, II, Esq., Sutter, O'Connell & Farchione Co., LPA, 3600 Erieview Tower, 1301 East 9th Street, Cleveland, Ohio 44114, Attorney for Defendant, Raymond Onders, M.D.; and Kevin MN. Norchi, Esq., Norchi, Barrett & Forbes, LLC, Commerce Park IV, 23240 Chagrin Blvd., Suite 600, Beachwood, Ohio 44122, Attorneys for Defendant University Hospitals of Cleveland; Ann Marie Sferra, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215, Counsel for Amici Curiae, Ohio Hospital Association, Ohio State Medical Association, and Ohio Osteopathic Association; Irene C. Keyse-Walker, Tucker Ellis & West LLP, 1100 Huntington Building, 925 Euclid Avenue, Cleveland, Ohio 44115, Attorney for Amicus Curiae Ohio Association of Civil Trial Attorneys.



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