

No. 2008-0392

**IN THE SUPREME COURT OF OHIO**

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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

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

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**BRIEF OF APPELLEES, ESTATE OF DONALD R. STEVIC,  
BY BETTY A. STEVIC, EXECUTRIX, ET AL.**

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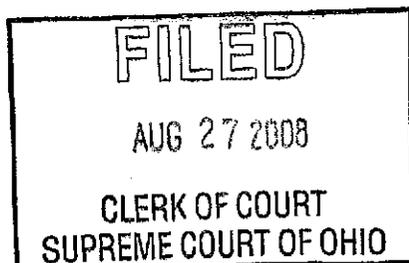
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**I. STATEMENT OF THE FACTS**

On October 4, 2003, Donald Stevic went to the Richland County Kidney Center for a dialysis treatment. (Am. Complaint, at Paragraph 8). The Richland County Kidney Center is a freestanding dialysis center owned by the Appellant (Am. Complaint, Paragraph 7). While employees or persons under the control of Appellant were transferring Donald Stevic from his wheelchair into a proper position for dialysis by means of a "Hoyer device", he was dropped or allowed to fall; and was injured (Am. Complaint, Paragraph 8). Subsequent thereto, Mr. Stevic died on February 15, 2004 (Am. Complaint, Paragraph 2).

On October 3, 2005, Donald Stevic's wife, in her individual and fiduciary capacity as Executor of her husband's estate, filed suit against the Appellant; and on October 4, 2005, she filed an Amended Complaint. The Complaint set forth a survival claim for personal injury and a derivative claim. The Complaint was filed within the two (2) year statute of limitations for personal injury (R.C. 2305.10), but more than one (1) year after the date of the fall.

On April 10, 2006, Appellee served Appellant with discovery requests, which sought information about the employees involved in Donald Stevic's fall. However, Appellant has never provided Appellee with answers to this discovery request.

Further, on August 11, 2006, Appellant filed a motion for judgment on the pleadings, alleging that Appellee's lawsuit was barred by the one (1) year statute of limitations, which expired on October 4, 2004. The trial court granted Appellant's motion on the pleadings, and the case was dismissed.

Subsequent thereto, on January 8, 2008, the Fifth District Court of Appeals reversed the trial court; based on the face of the Complaint, the Fifth District could not determine whether Donald Stevic's claim was a medical malpractice claim or not.

## **II. LAW AND ARGUMENT**

### **Proposition of Law**

**R.C. 2305.113 (E)(3) provides for a two-pronged test in determining whether a civil action constitutes a "medical claim" for purposes of the one (1) year statute of limitations. R.C. 2305.113(E)(3) sets forth specifically enumerated health care provider categories against whom the claim is asserted; and secondly, provides that the claim must arise from medical diagnosis, care or treatment.**

#### **A. R.C. 2305.113(E)(3) specifically sets forth the categories of health care providers against whom a civil action constitutes a "medical claim".**

Appellee respectfully submits that the Fifth District Court of Appeals properly concluded that because it was unclear whether Appellant's employees were any of the types of persons identified in R.C. 2305.113(E)(3), that the trial court erred in granting Appellant's Motion For Judgment on the Pleadings.

In granting a motion for judgment on the pleadings under CIV. R. 12 (C) a trial court must construe all material allegations in the complaint with all reasonable inferences drawn therefrom, in favor of the nonmoving party. In addition, the trial court must find beyond doubt, that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. State ex rel. Midwest Pride IV, Inc. v. Pontious (1996), 75 Ohio St. 3d 565. As is the case with a CIV. R. 56 motion, the court must also conclude that there are no material factual issues contested or unknown.

Appellee claims that negligent employees dropped Mr. Stevic or allowed him to fall (Am. Complaint Paragraph 8). The complaint also asserts that employees of Appellant failed to act in a careful and prudent manner when moving Mr. Stevic from his wheelchair in preparation for dialysis treatment (Am. Complaint Paragraph 13). The Amended Complaint further claims that Mr. Stevic fell to the ground as a result of the negligence of Appellant's employees or persons under Appellant's control. Nowhere in the Amended Complaint or in Appellant's answer does it refer to or mention any employee by name, job title, job description or the like. Thus, it is unknown what kind of employees were involved in the series of events leading to Mr. Stevic's fall.

If the employees were employees of a (1) physician, (2) podiatrist, (3) hospital, (4) home or (5) residential facility then arguably, the one (1) year statute of limitations in R.C. 2305.113 may apply. If not, then the two (2) year statute of limitations under R.C. 2305.10 applies.

In a similar situation, the Fifth District Court of Appeals held that a trial court's granting of a motion for summary judgment against the plaintiff was "premature given the state of the record". Sliger v. Stark Cty. Visiting Nurses Serv. and Hospice, 2006 – Ohio – 852.

In Sliger, the court considered the various categories of medical providers covered by the one (1) year statute of limitations in R.C. 2305.113(E)(3) and concluded that the trial court record was void of any reference to any category designated in the statute. Absent any evidence that the alleged negligent employee was included in one of the designated categories, the court found that the granting of the motion was premature.

In reaching its decision the Sliger court stated as follows:

**“One might assume that an employee of appellee’s is a nurse, but such a quantum leap is not appropriate without further discovery.”**

In the instant case, Appellee would respectfully point out that Appellee served discovery requests on Appellant on or about April 10, 2006, seeking, among other things, information about the employees involved in Mr. Stevic’s fall. Responses were never received. Even today, it is unclear whether those employees were technicians, aides, nurses, etc. Not knowing what kind of employee they were, it is improper to infer or assume that they are an employee covered by the one (1) year statute of limitations.

Furthermore, in order for the one (1) year medical malpractice statute of limitations to apply it must be clear that the claims asserted by Appellee 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.

**B. In addition to the specifically enumerated categories of health care providers, R.C. 2305.113(E)(3) also defines a “medical claim” as being one for medical diagnosis, care or treatment.**

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 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, physician assistant, emergency medical technician-basic, 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)**

Given the lack of discovery and absence of information in the record, the Appellant is asking this Court to make a presumption that Appellant’s employees were engaged in providing medical diagnosis, care or treatment at the time that Mr. Stevic fell to the ground and was injured. In Sliger, the injury was related to the application of a surgical dressing to an open wound and the appellate court noted that such action was obviously medical care. In the instant case, Appellee has not alleged that Mr. Stevic was injured or harmed as a direct result of receiving dialysis treatment. Rather, a claim has been asserted that Mr. Stevic fell to the ground while being helped from his wheelchair. Accordingly, there are unresolved questions of fact as to exactly how Mr. Stevic was injured. It is not clear from the record that Mr. Stevic was injured as a result of directly receiving medical diagnosis, care or treatment.

**C. The legislative intent of R.C. 2305.113(E)(3) is apparent, and should be applied as plainly written.**

Appellee submits that the construction of R.C. 2305.113(E)(3) makes it evident that the General Assembly did not intend the statute to include employees of unknown job titles or descriptions.

The case of Rosette v. Countrywide Home Loans, Inc., (2005), 105 Ohio St. 3d 296, (hereinafter cited as "Rosette"), involved statutory construction as to the applicable statute of limitations for statutory damages that a mortgagor may recover from a mortgagee for failure to timely file a mortgage release. In particular, this case involved whether R. C. 5301.36(C) created a statutory liability or whether it is a statute for a penalty. This Court stated:

**"In construing a statute, a court must ascertain the intent of the legislature. \*\*\* In determining intent, a court must look to the language of the statute, giving effect to the words used and not deleting words used or inserting words not used. Rosette at P. 298 (Emphasis added.)"**

In view of the fact that R.C. 5301.36(C) did not include the terms "penalty" or "forfeiture", this Court held:

**"To presume that the legislature meant "penalty" or "forfeiture" when it used the term "damages" is to presume imprecision on the part of the General Assembly. We decline to make such a presumption in this case." Rosette at P. 299.**

The Appellee contends that the instant case is analogous to Rosette, as the Appellant is also asking the Court to make a presumption. Although the General Assembly provided specifically named categories of providers in R.C. 2305.113(E)(3), the Appellant is requesting the Court to presume that General Assembly intended to include in its list an employee of an unknown job title or description, and that such a category should be inserted into the statute.

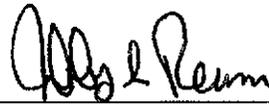
Therefore, the Appellee submits that in construing R.C. 2305.113(E)(3), it is readily apparent that the Legislature did not intend to include therein an "unknown employee" of a health care provider.

**III. CONCLUSION**

Appellant has not demonstrated that the employees involved in Mr. Stevic's fall were the type of employees covered by the one (1) year statute of limitations for medical malpractice claims. Furthermore, the record does not clearly show that Appellant's employees were directly engaged in providing medical diagnosis, care or treatment. Accordingly, the Fifth District's decision should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served by regular U.S. mail this  
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