

No. 09-0580

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**In the Supreme Court of Ohio**

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APPEAL FROM THE COURT OF APPEALS  
FIFTH APPELLATE DISTRICT  
TUSCARAWAS COUNTY, OHIO  
CASE NO. 08-CA-28

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CORA ERWIN, Administratrix of the Estate of Russel Erwin

Appellees,

vs.

JOSEPH E. BRYAN, M.D., et al.

Appellants.

**MEMORANDUM IN SUPPORT OF JURISDICTION**

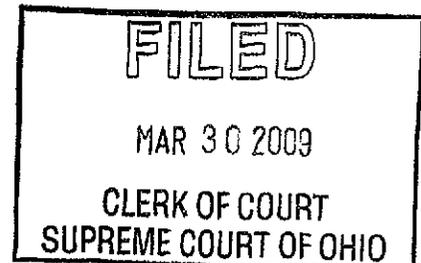
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I. **EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

The Fifth District Court of Appeals' decision in this case fundamentally alters the statute of limitations in medical malpractice actions. The opinion effectively extends the statute of limitations beyond the time permitted pursuant to R.C. §2305.111 and §2125.02. In direct contravention of this Court's decisions, the Fifth District Court of Appeals has held that a plaintiff does not have a duty to discover the identity of tortfeasors *within the statute of limitations*. The Court held that even if the plaintiff knows the physician's name and knows the physician was involved in the care at issue the plaintiff does not need to bring suit against the physician before the statute of limitations expires. Rather, according to the Fifth District's decision, a plaintiff may utilize Civ. R. 15(D) to amend her complaint naming a new defendant, after the statute has expired, when the plaintiff learns through experts or otherwise that the defendant has engaged in tortious conduct.

This case presents a question of great public interest because the decision of the Fifth District Court of Appeals has materially changed the statute of limitations applicable to medical malpractice actions. The Court has usurped the policy decisions of the General Assembly, has ignored the unambiguous language of the Civil Rules and has misinterpreted this Court's decisions pertaining to both the statute of limitations and Civ. R. 15(D) John Doe pleading requirements.

It is the responsibility of the General Assembly to weigh the public policy concerns in determining the appropriate statute of limitations for given claims. As stated by this Court "statutes of limitations represent a public policy about the privilege litigate .

. . . and are within [the] policy-making prerogative of the General Assembly." *Vaccariello v. Smith & Nephew Richards, Inc.* (2002), 94 Ohio St. 380. In this case, the Fifth District Court of Appeals has clearly substituted its judgment as to what the statute of limitations should be in medical malpractice cases for that of Ohio's General Assembly. Allowing the Fifth District's decision to stand will result in an unwarranted expansion of the statute of limitations in medical malpractice actions throughout Ohio and create great confusion as to the permissible use of John Doe pleading throughout the state of Ohio.

## II. STATEMENT OF CASE AND FACTS

This case arises out of Decedent, Russel Erwin's hospitalization at Union Hospital from June 29, 2004 through July 6, 2004. Defendant, Joseph Bryan, M.D. was the attending physician. Decedent was suffering seizure-like episodes and was admitted to the intensive care unit. On the day of admission, June 29, 2004, Dr. Bryan asked Defendant, William Swoger, M.D., a pulmonologist and intensive care physician, to consult on the case. (*See*, Defendant-Appellee's Motion for Summary Judgment, Exhibit 1). On that same date, Dr. Swoger evaluated Decedent and as part of the evaluation spoke to Plaintiff, Cora Erwin and her son. (*See*, Defendant-Appellee's Motion for Summary Judgment, **Exhibit 1B**). Upon concluding his evaluation, Dr. Swoger dictated a consultation record documenting his evaluation. The record was transcribed that same date and made part of Mr. Erwin's medical chart from Union Hospital. (*See*, "DD" date of dictation on p. 3, **Exhibit 1B** attached to Defendant-Appellee's Motion for Summary Judgment). The consultation record clearly identifies Dr. Swoger's involvement in Mr. Erwin's care.

Dr. Swoger remained involved in Mr. Erwin's care until July 4, 2004. In addition to his direct contact with Decedent's family members, Dr. Swoger's name is noted in the medical records multiple times. (See, "History and Physical" at **Exhibit 1A** and "Discharge Summary" at **Exhibit 1C** attached to Defendant-Appellee's Motion for Summary Judgment).

After Decedent's condition had improved, he was discharged from the hospital on July 6, 2004. On July 15, 2004, nine days later, Decedent arrested and died. An autopsy was performed and the conclusion was that the Decedent had died from a pulmonary embolus.

Plaintiff, Cora Erwin, originally filed this wrongful death action on July 10, 2006. In her complaint, Plaintiff named as defendants, Joseph Bryan, M.D., Professional Corporation of Joseph Bryan, M.D. and the Union Hospital Association.<sup>1</sup> Additionally, Plaintiff named John Doe, M.D. and John Doe, M.D.'s Professional Corp. and asserted in the Complaint "the names of John Doe, M.D. and corporations are unknown at the time of the filing of this complaint, despite Plaintiff's best and reasonable efforts to discover their identities." Plaintiff asserted that the Defendants provided negligent medical care to Decedent, Russell Erwin. Specifically, Plaintiffs contended that the Defendants failed to provide prophylactic treatment during the course of Decedent's hospitalization to prevent the pulmonary embolus.

Subsequently, on or about June 29, 2007, nearly three years after the Decedent's death, after the case had been pending for nearly one year, after significant discovery had taken place and as the then scheduled trial date of August 7, 2007 approached, Plaintiff

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<sup>1</sup> Plaintiff did not assert a survival cause of action for medical malpractice nor could she. Had Plaintiff wished to do so, she had to file such a claim within one year.

filed a Motion for Leave to Amend her Complaint to substitute Dr. Swoger and Union Internal Medicine Specialists, Inc. (hereinafter referred to as UIMS) for the John Doe Defendants. In her Motion, Plaintiff claimed that Dr. Swoger was not named in the original complaint for several reasons, including:

- (1) that the identity of additional physicians beyond Dr. Bryan who contributed to decedent's death "could not be ascertained at the time of filing the original Complaint"; (Plaintiff's Motion for Leave at p. 5)
- (2) that plaintiff's counsel had received records from the client only several weeks before the expiration of the statute of limitations as to the wrongful death claims; (Plaintiff's Motion for Leave at p. 6)
- (3) that plaintiff's expert, subsequent to the expiration of the statute of limitations, identified Dr. Swoger as providing negligent care. (Plaintiff's Motion for Leave at p. 5)

The trial court granted Plaintiff's Motion for Leave and on or about July 13, 2007, Plaintiff filed an Amended Complaint naming Dr. Swoger and UIMS as Defendants in this action.

Subsequently, Dr. Swoger and UIMS moved for summary judgment on the grounds that Plaintiff's claims were barred by the two year statute of limitations applicable to wrongful death actions. On April 8, 2008, the trial court agreed and granted summary judgment in favor of Dr. Swoger and UIMS. On February 13, 2009, the Fifth District Court of Appeals reversed the trial court's order granting summary judgment.

In its Opinion, the Court of Appeals held that despite the fact that Plaintiff's complaint was filed against Dr. Swoger nearly 3 years after the Decedent's death, Plaintiff's complaint was timely filed by virtue of Civ. R. 15(D). The Court concluded that since Plaintiff did not learn of Dr. Swoger's allegedly tortious conduct until her expert concluded, after the statute expired, that he was negligent she was permitted to use

the John Doe pleading mechanism. In reaching this conclusion, the Court relied on a number of cases ostensibly standing for the proposition that the statute of limitations does not begin to run until the plaintiff "discovers" that the defendant engaged in wrongful conduct. In this regard, the Court stated:

We find these cases to be persuasive in the case at bar. All of these cases stand for the proposition that the statute of limitations begins to run once the plaintiff acquires additional information of the defendant's wrongful conduct. . . .

\* \* \*

For us to require that a plaintiff must name every potential defendant in a complaint before investigating the potential culpability of each defendant would encourage unnecessary litigation. Merely because a doctor's name may appear in a report does not mean that culpability should be presumed. Diligence in determining potential liability prior to naming a person as a defendant should not be discouraged, but rather should be encouraged.

\* \* \*

If a plaintiff is also unaware of the culpability of a particular person until during the discovery process, he should be able to avail himself of the provisions of Civ. R. 15(C) and (D) and join that defendant in his claim. We must apply common sense in determining that a person's name may be "known" to a plaintiff, but be "unknown" as a defendant for purposes of litigation.

(*See*, Opinion at pp 10-11).

It is clear that the Fifth District has substituted its opinion as to what constitutes a fair statute of limitations in place of the policy decisions of the General Assembly and has significantly misapplied the holdings of this Court under the guise of Civ. R. 15(D). This Court now has the opportunity to provide guidance to the Fifth District as well as all Ohio Appellate and trial courts as to the proper application of the statute of limitations applicable to medical malpractice actions and its interplay with Civ. R. 15(D).

### III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

#### Proposition of Law No. 1:

**The Fifth District's Decision contravenes the General Assembly's determination as to the appropriate statute of limitations for medical malpractice actions and this Court's interpretation of same by permitting Plaintiff to amend her complaint after the statute has expired when she allegedly learns from an expert or otherwise that the Defendants engaged in tortious conduct**

In this case, Plaintiff does not dispute that her cause of action for wrongful death accrued on the date of Decedent's death, July 15, 2006. Moreover, Plaintiff concedes that "barring an application of one of the exceptions to the rule, the statute of limitation upon the plaintiff's wrongful death claim [against Dr. Swoger] expired on July 18, 2006."

However, Plaintiff argued that she should be permitted to utilize Civ. R. 15(D) to amend her complaint and substitute Dr. Swoger as a Defendant on the grounds that she did not know of his culpable conduct until after the statute of limitations expired. Plaintiff admitted she knew of Dr. Swoger's identity prior to the statute of limitations but was unaware of his "role" because her counsel "had received records from the client only several weeks before the expiration of the statute of limitations as to the wrongful death claims; (Plaintiff's Motion for Leave at p. 6) and, that her expert, subsequent to the expiration of the statute of limitations, identified Dr. Swoger as providing negligent care. (Plaintiff's Motion for Leave at p. 5)

A. **A Medical Malpractice Plaintiff Has A Duty To Discover The Defendant-Physician's Role In The Care And Treatment And Determine If The Physician Should Be Named As A Defendant Prior To The Expiration Of The Statute Of Limitations**

In *Flowers v. Walker* (1992), 63 Ohio St.3d 546, syllabus, this Court defined a plaintiff's duties with respect to filing medical malpractice actions once a cause of action for medical malpractice accrues as follows:

the occurrence of a "cognizable event" imposes upon the plaintiff a duty to (1) determine whether the injury suffered is the proximate result of malpractice and (2) ascertain the identity of the tortfeasor or tortfeasors.

*Flowers v. Walker* (1992), 63 Ohio St.3d 546, syllabus.

In *Flowers*, the plaintiff alleged that the defendant-radiologist had failed to properly interpret a mammogram resulting in a delay in diagnosing her breast cancer. Plaintiff filed her complaint more than one year after discovering the cancer and contended that the statute of limitations had not expired since she did not know of the defendant's involvement in her care prior to the expiration of the statute. The Court rejected this argument explaining:

Mrs. Flowers maintains, however, that she did not discover, and could not have reasonably discovered, the identity of Dr. Walker within one year of discovering her cancer. Mrs. Flowers argues that the "cognizable event" did not occur until she knew the identity of Dr. Walker. We disagree.

In a medical malpractice case, the statute of limitations starts to run upon the occurrence of a "cognizable event." The occurrence of a "cognizable event" imposes upon the plaintiff the duty to (1) determine whether the injury suffered is the proximate result of malpractice and (2) ascertain the identity of the tortfeasor or tortfeasors. The identity of the practitioner who committed the alleged malpractice is one of the facts that the plaintiff must investigate, and discover, once she has reason to believe that she is the victim of medical malpractice.

(*Id.* at 550, emphasis added).

In *Hans v. Ohio State University* (June 28, 2007), 10<sup>th</sup> Dist. App. No. 07AP-10, 2007 Ohio App. LEXIS 3294, unreported, the Tenth District Court of Appeals rejected a very similar argument to Plaintiff's argument in this appeal. The court summarized the plaintiff's argument as follows:

However, appellant argues that her claims did not accrue for purposes of R.C. 2743.16(A) and 2305.11(B)(1) until she discovered the "existence" and "role" of the physician's assistant and nurses at OSUMC. Appellant claims she did not know these individuals contributed to the decedent's death until her expert witness, Dr. Spiridonidis reviewed the medical records and informed her in the spring of 2001.

(*Id.* at p. 2).

The Court rejected this argument, stating:

The occurrence of a cognizable event makes it incumbent upon that individual to investigate his or her case completely. *Simons v. Kearney* (Wayne App. No. 01 CA0035, 2002-Ohio-761). The identity of the practitioner who committed the alleged malpractice is one of the facts that plaintiff must investigate, and discover, once she has reason to believe that she is a victim of medical malpractice. *Flowers*, at 550.

(*Id.* at p. 3).

The medical records here were fully available to appellant, and the identities of those involved in the alleged medical malpractice were readily recognizable on the face of the records. As found in *Flowers*, once appellant suspected medical malpractice had occurred upon the death of decedent, she had the duty to examine the records to determine the identities of all those involved, or possibly involved, in decedent's allegedly negligent treatment. It is immaterial that appellant may not have known the legal significance of the actions of the physician's assistant and nurses.

(*Id.* at p. 5).

The fact that appellant might not have realized that the physician's assistant and nurses may have provided negligent treatment until her medical expert examined the medical records, did not relieve appellant of her duty to examine the available records and identify potential tortfeasors within the statute of limitations.

(*Id.* at p. 7).

In *Stanley v. Magone* (Dec. 11 1995), 12<sup>th</sup> App. Dist. No. CA95-05-096, CA95-06-112, 1995 Ohio App. LEXIS 5427, unreported, plaintiff contended that the statute of limitations had not expired prior to filing suit. Specifically, she argued that “discovery” of the malpractice did not occur until she learned of the extent of the defendant’s role in her care. In rejecting this argument, the court explained:

Stanley realized that she had a potential medical malpractice claim at some point during the summer of 1992. At that time she had not met Dr. Ritan and did not know that he had examined an x-ray of her arm. However, Stanley's hospital records clearly indicated that Dr. Ritan had provided radiological services and Dr. Ritan billed Stanley for his services. Importantly, although Stanley first contacted her attorney in June 1992, she made no immediate attempt to review all of her medical records. Moreover, Stanley did not immediately submit her medical records, x-rays or any other documentation to her medical expert, Dr. Gardner.

(*Id.* at \*4).

In the present case, Plaintiff had two years from Decedent’s death to obtain the records and investigate her malpractice claim and discover the identity of the alleged tortfeasors. *Flowers, supra*. There is absolutely no dispute that Dr. Swoger’s identity and involvement in Decedent’s care were clearly contained within the medical records. (*See, Defendants’ Motion for Summary Judgment, Exhibits 1A-1C*). The fact that Plaintiff was dilatory in seeking counsel, obtaining records and determining the significance of the physician’s involvement does not extend the statute of limitations.

The Fifth District’s decision in this case improperly permits a plaintiff to delay in the investigation of her case. Rather than compelling plaintiffs to thoroughly investigate their case within the statute of limitations as required under *Flowers*, the Fifth District has given the green light to dilatory investigation. This Court should take the opportunity

to make clear that Civ. R. 15(D) cannot be used to excuse a plaintiff's duty to comply with the statute of limitations.

**B. Plaintiff's Complaint Against Dr. Swoger And UIMS Does Not Relate Back To Original The Original Complaint Pursuant To Civ. R. 15 (D).**

In its decision, the Fifth District concluded that "fairness" and "common sense" dictated to allow Plaintiff to amend her complaint via Civ. R. 15(D). In order to arrive at its decision, the Fifth District ignored the clear language of Civ. R. 15(D). In this regard, the Court stated:

If a plaintiff is also unaware of the culpability of a particular person until during the discovery process, he should be able to avail himself of the provisions of Civ. R. 15(C) and (D) and join that defendant in his claim. We must apply common sense in determining that a person's name may be "known" to a plaintiff, but be "unknown" as a defendant for purposes of litigation.

(See, Opinion at pp 10-11).

This Court has repeatedly stated that: "[i]t is a well settled principle of statutory construction that words used in a statute are to be given their plain and ordinary meaning unless otherwise indicated." *United Transp. Union Ins. Ass'n v. Tracy* (1998), 82 Ohio St.3d 333. Moreover, "It is the duty of this court to give effect to the *words used* [in a statute], not to delete words used *or to insert words not used.*" *Dougherty v. Torrence* (1982), 2 Ohio St. 3d 69, 70, citing *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St. 2d 1, 4.

Civ. R. 15(D) is clear and unambiguous. It only applies where, at the time of the expiration of the statute of limitations, plaintiff does not know the identity of the defendant. One need only look to the title of this section to understand its plain meaning, "AMENDMENTS WHERE *NAME OF PARTY UNKNOWN*". The rule reads in full as follows:

## 15 (D) Amendments where name of party unknown

When the plaintiff does not know the name of a defendant that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and the copy thereof must be served personally upon the defendant.

Thus, Civ. R. 15 (D) only permits use of the John Doe pleading/amendment provision where, at the time of the filing of the complaint, plaintiff (a) did not know the name of the defendant and (b) could not discover the name of the defendant. *See, Mark v. Mellot Manufacturing Co., Inc.* (Sept. 13, 1989), Ross App. No. 1494, 1989 Ohio App. LEXIS 3572.

In *Mark, supra*, the Court specifically held Civ. R. 15(D) is inapplicable where the plaintiff knew of the defendant's identity prior to filing the original complaint. In *Mark, supra*, the plaintiff had asserted a product liability claim due to severe injuries he sustained in a rip saw accident. As the Plaintiff did in the present case, the plaintiff in *Mark* had filed a complaint naming a specific defendant as well as "John Doe" defendants. Subsequently, after the statute of limitations had expired, Plaintiff amended his complaint naming Frick as one of the former John Doe defendants.

In upholding the trial court's decision that plaintiff could not utilize Civ. R. 15(D), the Fourth District Court of Appeals explained:

Civ.R. 15(D) is applicable *only* where the identity of the defendant is *unknown*.

\* \* \*

The record indicates that appellant in fact discovered Frick's name as the manufacturer of the sawmill before he filed the original complaint on December 18, 1984. No attempt of service of process was made on Frick at that time. It is readily apparent that appellant could have timely filed against Frick. Civ.R. 3(A) and Civ.R. 15(D) are not applicable in this case to extend the statute of limitations. We find appellant's fifth assignment

of error not to be well-taken.

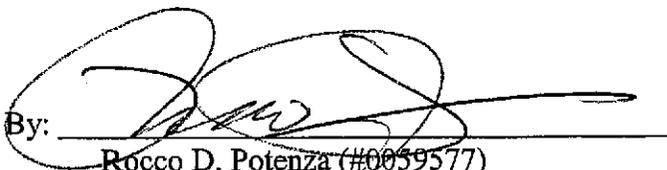
(*Mark, supra* at \*5, emphasis in original)

Similarly, in the present case, the undisputed evidence demonstrated that Plaintiff knew Dr. Swoger's name prior to filing her complaint and the medical records clearly disclosed his role in Decedent's care. Accordingly, since Plaintiff was aware of Dr. Swoger's identity and since Dr. Swoger's involvement in Decedent's care was clearly set forth in the medical records, Civ. R. 15(D) is of no avail and Plaintiff's Amended Complaint does not relate back to the original filing.

### **CONCLUSION**

In the present case, the Fifth District's opinion has substantially altered the statute of limitations for filing a medical malpractice case in the State of Ohio. The Court has extended the time for filing complaints against physicians in the State of Ohio in an unprincipled decision that is contrary to the public policy as determined by the General Assembly. Moreover, contrary to this Court's decisions, the Fifth District imposes essentially no duty upon a medical malpractice plaintiff to thoroughly investigate her case within the statute of limitations. It is extremely important to physicians and medical providers throughout the State of Ohio that this Court take this opportunity to clarify the duties imposed upon a medical malpractice plaintiff once a cause of action for malpractice accrues.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was served by regular U.S. mail, first class postage prepaid, this ~~27<sup>th</sup>~~ day of March, 2009 upon:

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## **APPENDIX**

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

CORA ERWIN, ADMINISTRATRIX  
OF THE ESTATE OF RUSSEL ERWIN

Plaintiff-Appellant

-vs-

JOSEPH E. BRYAN, M.D., ET AL.

Defendant-Appellees

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 08-CA-28

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County Court  
of Common Pleas Court Case No. 2006-  
CM-07-0423

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTERED

**FILED**  
District Court of Appeals  
Tuscarawas Co., Ohio

FEB 13 2009

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*Delaney, J.*

{¶1} Plaintiff-Appellant, Cora Erwin, acting as Administratrix of the estate of Russell Erwin, appeals from the Tuscarawas County Court of Common Pleas granting of Defendants-Appellees, William Swoger, M.D. ("Swoger") and Union Internal Medicine Specialties, Inc.'s ("UIMS") motion for summary judgment. Defendants in the underlying lawsuit are Joseph E. Bryan, M.D. ("Bryan"), Union Hospital Association ("Union Hospital"), William V. Swoger, M.D., and Union Internal Medicine Specialties, Inc. For the purposes of this appeal, however, Defendants Bryan and Union Hospital are not involved.

#### STATEMENT OF THE CASE AND FACTS

{¶2} On July 10, 2006, Appellant filed a complaint in the Tuscarawas County Court of Common Pleas on behalf of her deceased husband, Russell Erwin ("Decedent"). The complaint is captioned "Cora Erwin, Individually and as Administratrix of Russell Erwin, Deceased v. Joseph E. Bryan, M.D., Professional Corporation of Joseph Bryan, M.D., The Union Hospital Association, John Doe, M.D. No. 1 Through 5 (whose real names and addresses are unknown at the time of filing this Complaint despite Plaintiffs' best and reasonable efforts to ascertain same), and John Doe, M.D.'s Professional Corporation No. 1 Through 5 (whose real names and addresses are unknown at the time of filing this Complaint despite Plaintiffs' best and reasonable efforts to ascertain same).

{¶3} In her complaint, Appellant brought forth a wrongful death action as the personal representative of the Decedent, who died on July 15, 2004. The complaint

specifically named Defendant Bryan as a treating physician of the Decedent. The complaint further named five John Doe, M.D. defendants.

{¶14} According to the complaint, the Decedent was taken to the Union Hospital emergency room at approximately 1:30 a.m. on June 29, 2004. The Decedent was unresponsive and unable to give a medical history. Earlier that day, the Decedent complained of not feeling well and of generalized fatigue and weakness. After he was stabilized, the Decedent was admitted to the hospital under the care of Defendant Bryan. At approximately 8:00 a.m. on the date of admittance, the Decedent manifested signs of progressive hypoxia requiring respiratory support. Resultantly, he was medicated to induce paralysis and was intubated at approximately 1:00 p.m. that day.

{¶15} The Decedent remained on the ventilator for approximately 96 hours and was extubated on July 3, 2004. On July 5, 2004, the Decedent had an episode of atrial arrhythmia that was treated with medication. The Decedent was discharged from the hospital and sent home on July 7, 2004.

{¶16} During the morning hours of July 15, 2004, the Decedent complained of nausea and lethargy to Appellant. He then collapsed and an emergency medical squad was called to the scene to attempt resuscitation. These attempts were unsuccessful, including attempts made at Union Hospital. The Decedent was declared dead at Union Hospital on July 15, 2004, at 2:54 p.m.

{¶17} On July 16, 2004, the Decedent underwent an autopsy, the results of which revealed the presence of a massive and fatal thromboembolism with evidence of both recent and organizing peripheral thromboemboli, which was determined to be the immediate cause of death.

{¶8} Appellant asserted that as a direct and proximate result of the negligent acts and/or omissions on the part of one or more of the named Defendants, the Decedent was neither timely diagnosed, nor timely treated for pulmonary embolism, the result of which was a massive pulmonary embolism that resulted in his death at the age of 51 years old. The action was brought pursuant to R.C. 2125.02(A)(1), Ohio's wrongful death statute.

{¶9} The complaint was mailed by certified mail and was served upon Defendants Bryan and Union Hospital on July 13, 2006.

{¶10} On July 24, 2006, Bryan filed his answer to the original complaint. On August 4, 2006, Union Hospital filed their answer to the original complaint. Defendant Bryan filed a motion to dismiss Appellant's complaint on September 7, 2006, which he later withdrew on September 20, 2006.

{¶11} On June 26, 2007, Appellant's attorney filed a request for service of the original complaint on two named John Does: William V. Swoger, M.D., and Union Internal Medicine Specialties, Inc. The complaint was personally served on June 27, 2007, on both Defendants.

{¶12} On June 29, 2007, Appellant filed a motion for leave to amend complaint pursuant to Ohio Civ.R.15. The trial court granted the motion on July 9, 2007. The amended complaint was filed on July 13, 2007, and by the certificate of service, it was served on the named defendants by regular U.S. mail. On July 23, 2007, Defendants Swoger and UIMS filed their answer to Appellant's original complaint and Defendant Bryan filed his Answer to Appellant's amended complaint.

{¶13} On July 27, 2007, Appellees Swoger and UIMS filed their answer to Appellant's amended complaint. On July 30, 2007, Defendant Union Hospital filed their answer to Appellant's amended complaint.

{¶14} On February 28, 2008, Appellees Swoger and UIMS filed a motion for leave to file a motion for summary judgment. The court granted the motion for leave on March 13, 2008. The motion for summary judgment was filed on March 13, 2008. Appellant filed a brief in opposition to Defendants Swoger and UIMS's motion for summary judgment on March 27, 2008. Appellees Swoger and UIMS filed a reply brief on March 31, 2008.

{¶15} By non-oral hearing, on April 4, 2008, the trial court granted Appellees' motion for summary judgment and dismissed the complaint and amended complaint against Defendants Swoger and UIMS with prejudice. It is from that judgment that Appellant now appeals.

{¶16} Appellant raises one Assignment of Error:

{¶17} "I. THE TRIAL JUDGE ERRED, AS A MATTER OF LAW, IN GRANTING SUMMARY JUDGMENT UPON THE STATUTE OF LIMITATIONS DEFENSE."

I.

{¶18} In her sole assignment of error, Appellant argues that the trial court erred in granting Appellee's motion for summary judgment. Appellant makes several arguments supporting her claim. First, Appellant argues that the Plaintiff, while aware generally of the name of Defendant Swoger, was not aware of his potential culpability as a defendant until during the discovery process after the original complaint was filed.

{¶19} Next, Appellant argues that she complied with the requirements of Civ.R. 15(D), having personally served Defendants Swoger and UIMS with a summons and a copy of the original complaint, which specified that Defendants' names were unknown at the time of the filing of the original complaint.

{¶20} Appellees, on the other hand, argue that Civ. R. 15(D) is inapplicable because Appellant was aware of Defendant Swoger's identity prior to the filing of her original complaint. They further argue that Appellant had a duty to discover Defendant Swoger's role in the Decedent's care prior to the expiration of the statute of limitations.

{¶21} Additionally, Appellees argue that Appellant's amended pleading cannot relate back to the original complaint, as Appellant failed to comply with Civ.R. 15(D) because she did not personally serve the amended complaint and summons with the words "name unknown" in the summons.

{¶22} Our standard of review on a summary judgment claim is de novo, "and as an appellate court, we must stand in the shoes of the trial court and review summary judgment on the same standard and evidence as the trial court." *Osnaburg Twp. Zoning Inspector v. Eslich Environmental, Inc.*, 5<sup>th</sup> Dist. No. 2008CA00026, 2008-Ohio-6671 citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

{¶23} Civil Rule 56(C) states in part:

{¶24} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the

action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

{¶25} Summary judgment is a procedural device to terminate litigation so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

{¶26} Turning to Appellant’s first argument, generally a cause of action accrues at the time that a wrongful act is committed and the statute of limitations begins to run at that time. *Collins v. Sotka* (1998), 81 Ohio St.3d 505, 507, 692 N.E.2d 581. However, “the discovery rule is an exception to this general rule and provides that a cause of action does not arise until the plaintiff discovers, or should have discovered, that he or she was injured *by the wrongful conduct of the defendant.*” *Norgard v. Brush Wellman, Inc.* (2002), 95 Ohio St.3d 165, 766 N.E.2d 977, 2002-Ohio-2007, at ¶8 (emphasis added), citing *Collins*, supra, citing *O’Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 447 N.E.2d 727.

{¶27} The discovery of an injury is insufficient to begin the running of the statute of limitations if there is no indication of wrongful conduct of the defendant. See *Norgard*, supra, at ¶10, citing *Browning v. Burt* (1993), 66 Ohio St.3d 544, 559, 613 N.E.2d 993. In *Browning*, the defendant, Dr. Burt, had been accused of performing experimental surgeries on his patients, severely maiming them. Browning sued Burt for malpractice and the hospital for negligent credentialing. The court found that the discovery of the injury and malpractice on the part of Dr. Burt was insufficient to trigger the statute of limitations on the negligent credentialing claim because the discovery of

the malpractice was not sufficient to raise suspicion of negligent credentialing practices on the part of the hospital. Specifically, the court stated:

{¶28} “[D]iscovery of a physician’s medical malpractice does not, in itself, constitute an ‘alerting event’ nor does discovery implicate the hospital’s credentialing practices or require the investigation of the hospital in this regard. To hold otherwise would encourage baseless claims of negligent credentialing and a hospital would be named in nearly every lawsuit involving the malpractice of a physician.” *Browning*, supra, at 561. The court reasoned that the fact that Browning was injured by Dr. Burt was not enough to suspect that the hospital’s conduct was wrongful.

{¶29} In *Collins*, supra, the Supreme Court also concluded that “the fact that a body was discovered and/or that a death took place is irrelevant unless there is proof that a defendant was at fault and caused the death.” *Collins*, supra, at 509. In other words, “a wrongful death claim is not triggered merely by the death of a person, but by ‘the death of a person \* \* \* caused by a wrongful act’ (Emphasis added.) R.C. 2125.01(A)(1). Therefore in order for a wrongful death case to be brought, the death must be wrongful.” *Id.*, at 509, 692 N.E.2d 581.

{¶30} Additionally, in *Akers v. Alonzo* (1992), 65 Ohio St.3d 422, 605 N.E.2d 1, 1992-Ohio-66, the Supreme Court addressed a similar issue. Akers sought treatment from Dr. Alonzo in 1984 after he observed blood in his urine. Alonzo admitted Akers to the hospital and performed multiple biopsies of Akers’ bladder. The test results were interpreted as demonstrating chronic inflammation with no evidence of carcinoma of the bladder. Alonzo subsequently performed two additional biopsies on Akers’ bladder in 1984, both of which were interpreted as negative for evidence of carcinoma. Akers was

subsequently referred to a second urologist, who examined Akers and requested that the pathology slides from the three prior biopsies be forwarded to him for evaluation by a pathologist, who determined that Akers was suffering from transitional cell carcinoma in situ as well as transitional cell dysplasia. Akers began chemotherapy treatment for bladder cancer, which lasted over two years.

{¶31} Akers filed suit against Alonzo in 1988. It was only after the filing of that lawsuit that he learned of the identity of J.A. de Lamerens, M.D., who allegedly interpreted the pathology slides as being negative for carcinoma at least three different times during 1984. Akers' expert expressed an opinion that de Lamerens had misdiagnosed all three tests and that the resulting delay in treatment contributed to the cancer's progression. The Supreme Court, in reviewing whether an action against de Lamerens was timely filed, determined that there was nothing to indicate that plaintiff knew before March 21, 1989, that the pathology slides had been erroneously diagnosed as being negative for cancer, and therefore that the "cognizable event" that triggered the statute of limitations for suing de Lamerens was when plaintiffs discovered through an expert that they had employed during the initial lawsuit that the pathology slides had been misread by de Lamerens. "Mrs. Akers has stated in two affidavits that neither she nor her husband was aware of Dr. de Lamerens' role in diagnosing the pathology slides or that such slides were even in existence, let alone that they had been misinterpreted by some physician other than Dr. Alonzo." *Id.*, at 426.

{¶32} In distinguishing *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 589 N.E.2d 1284 (which Appellee also cites in the present case), the Supreme Court in *Akers*, stated, "While *Flowers*, *supra*, holds that the occurrence of the cognizable event

imposes a duty of inquiry on the plaintiff, it does not hold that the plaintiff has a duty to ascertain the cognizable event itself, especially in a situation such as here where the patient had no way of knowing either that there had been another physician involved or that the other physician had made an incorrect diagnosis.” *Akers*, supra, at 425-426.<sup>1</sup>

{¶33} We find these cases to be persuasive in the case at bar. All of these cases “stand for the proposition that the statute of limitations begins to run once the plaintiff acquires additional information of the defendant’s wrongful conduct. For instance, consider the facts of *Browning*. Just as a negligent-credentialing claim is dependent on facts necessary to form a medical-malpractice action, so too is an employer intentional-tort claim dependent on facts necessary to form a workers’ compensation action. According to *Fyffe v. Jenos Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus, a plaintiff must prove three elements to support a claim for employer intentional tort. One of these elements is proof that the employer knew, with substantial certainty, that the employer’s conduct would harm the worker. Thus, claims for both negligent credentialing and an employer intentional tort accrue only when the plaintiff acquires knowledge about the defendant above and beyond the injury itself.” *Norgard*, supra, at ¶17.

{¶34} Similarly, the fact that Defendant Bryan may have committed malpractice was not enough to suspect that the actions of Defendants Swoger and UIMS were also wrongful. For us to require that a plaintiff must name every potential defendant in a complaint before investigating the potential culpability of each defendant would

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<sup>1</sup> We find *Flowers* to be inapposite to the present case as well based on this explanation by the Supreme Court. Additionally, we find *LaNeve et al. v. Atlas Recycling, Inc. et al.*, 172 Ohio St.3d 44, 2008-Ohio-3921, to be distinguishable, as in *LaNeve*, the defendant was never personally served with either the original complaint and summons or the amended complaint and summons, but rather was only served by certified mail.

encourage unnecessary litigation. Merely because a doctor's name may appear in a report does not mean that culpability should be presumed. Diligence in determining potential liability prior to naming a person as a defendant should not be discouraged, but rather should be encouraged.

{¶35} The underlying purpose of the statute of limitations is fairness to both sides. See *Norgard*, supra. "Once a plaintiff knows of an injury and the cause of the injury, the law gives the plaintiff a reasonable time to file suit. Yet if a plaintiff is unaware that his or her rights have been infringed, how can it be said that he or she slept on those rights? To deny an employee the right to file an action before he or she discovers that the injury was caused by the employer's wrongful conduct is to deny the employee the right to bring any claim at all. By applying the discovery rule as we do, we take away the advantage of employers who conceal harmful information until it is too late for their employees to use it." *Id.* at ¶19.

{¶36} If a plaintiff is also unaware of the culpability of a particular person until during the discovery process, he should be able to avail himself of the provisions of Civ.R.15(C) and (D) and join that defendant in his claim. We must apply common sense in determining that a person's name may be "known" to a plaintiff, but be "unknown" as a defendant for purposes of litigation.

{¶37} When we construe the evidence in a light most favorable to Appellant, as we are required to do in a summary judgment posture, we find that Appellant, while knowing the name of Defendant Swoger in the semantical sense, did not know the name of Defendant Swoger as a potentially culpable party until the deposition of

Defendant Bryan was taken. Until Appellant received this information, she had no reason to believe that Swoger's conduct was potentially negligent.

{¶38} In determining whether proper service has been made upon a previously unknown defendant, we now turn to Appellant's second argument. Civil Rules 15(C) and (D) and Civ.R.3(A) are to be read in conjunction with one another when attempting to determine "if a previously unknown, now known, defendant has been properly served so as to avoid the time bar of an applicable statute of limitations \* \* \*." *Amerine v. Haughton Elevator Co.* (1989) 42 Ohio St.3d. 57, 537 N.E.2d 208, syllabus. Civil Rule 3(A) provides that "[A] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant \* \* \* or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D)." Civil Rule 15(D) sets forth the requirements for properly amending a complaint to add the name of a defendant who was previous sued under a fictitious name, such as "John Doe" when the true identity of the defendant becomes known to a plaintiff. *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d at 59, 537 N.E.2d 208. These requirements include: (1) that the plaintiff must amend the complaint upon the discovery of the defendant's true name; (2) that the summons must contain the words "name unknown;" and (3) that the defendant must be personally served. Then, pursuant to Civ.R.15(C), an amended pleading will relate back to the date of the original pleading when "the claim \* \* \* asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading \* \* \*."

{¶39} It is undisputed that Appellant's original complaint was filed prior to the expiration of the applicable statute of limitations, and that the statute of limitations had expired at the time that Appellant discovered the identity of Defendant Swoger as a named defendant. Thus, in order for her amended complaint to have been timely commenced against Swoger, it must relate back to her original complaint pursuant to Civ. R. 15.

{¶40} The question is: what did Appellant need to personally serve upon Appellee in order to comply with Civ.Rs. 3(A) and 15(C) and (D)? The Tenth District Court of Appeals has addressed this question, and we find their reasoning to be persuasive. In *Easter v. Complete General Construction Co.*, 06AP-763, 2007-Ohio-1297, the court stated that Civ. R. 15(D) provides that "in a case in which the plaintiff does not know the name of a defendant, and designates that defendant by a fictitious name, the plaintiff 'must aver in the complaint the fact that he could not discover the name.' The record reveals that appellant indeed averred in her complaint the fact that she could not discover appellee's name.

{¶41} "In addition, '[t]he summons must contain the words 'name unknown' and a copy thereof must be served personally upon the defendant. 'The word 'thereof' refers to the 'summons.' This is in accordance with the rule of grammar that, "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent \* \* \*." (Internal citations, omitted).

{¶42} "R.C. 1.42 provides that '[w]ords and phrases [in a statute] shall be read in context and construed according to the rules of grammar and common usage.' Accordingly, it is the summons that must be personally served upon the defendant.

{¶43} “Moreover, it is the original summons that must be personally served upon the defendant, because it would be illogical to require that a new summons, issued with an amended complaint, contain the words ‘name unknown’ when the defendant’s name, by that time, would no longer be unknown to the plaintiff. But the defendant’s name would be unknown at the time of the filing of the original complaint and service of the original summons.

{¶44} “\* \* \*

{¶45} “If we interpreted Civ.R. 15(D) to require that a plaintiff amend his or her complaint to correct a fictitious name and serve the newly identified defendant with a copy of the amended complaint, all within the one-year period provided by Civ.R. 3(A), then we would be shortening the one-year period that Civ.R. 3(A) affords plaintiffs in which to obtain service upon a fictitiously-named defendant, and we would further contravene the plain language of Civ.R. 3(A), which allows the plaintiff, after obtaining such service, to correct the name ‘later’ pursuant to Civ.R. 15(D).

{¶46} “Based upon the plain language of Civ.R. 15(C) and (D), and Civ.R. 3(A), read in conjunction with one another, we hold that in order for an amended complaint to relate back to the original complaint vis a vis a defendant originally identified by a fictitious name, the plaintiff is required to personally serve the newly identified John Doe defendant with a copy of the original summons and complaint within one year of the filing of the original complaint \* \* \*.” *Easter*, supra, at ¶¶22-27.

{¶47} The Eleventh District Court of Appeals has also determined that Civ. R. 15(D) requires personal service only of the original complaint and summons on a John Doe defendant, not the amended complaint and summons. *Burya v. Lake Metroparks*

*Bd. Of Park Commissioners*, 11<sup>th</sup> Dist. No. 2005-L-015, 2006-Ohio-5192, ¶38. Additionally, the Supreme Court of Ohio has construed Civ. R. 15(D) to require only either the original complaint or an amended complaint substituting the actual names of the defendant to be personally served within the limitations period. *Varno v. Bally Manufacturing Co., et al.* (1985), 19 Ohio St.3d 21, 482, N.E.2d 342, syllabus (overruled on other grounds). See also *Loescher v. Plastipak Packaging, Inc. et al.* (2003), 152 Ohio App.3d 479, 788 N.E.2d 681, 2003-Ohio-1850 (holding that a previously unknown defendant was properly served within one-year period for service on identified defendant, and thus amended personal injury complaint which named the previously unknown defendant related back to original complaint for statute of limitations purposes, even though the summons on the original complaint did not contain the words "name unknown"; the complaint listed one named defendant and five John Doe defendants, names unknown, complaint was attached to summons; only the first defendant needed to be identified in summons).

{¶48} In the present case, the original complaint was filed on July 10, 2006. Defendant Bryan was deposed on February 7, 2007. The original complaint and summons were personally served upon Defendants Swoger and UIMS on June 27, 2007. Defendant Bryan was named on that summons and five John Doe defendants, names unknown, were named in the complaint along with Defendant Bryan. Thus, we find that Appellant complied with the requirements as set forth by Civ.R.15(C) and (D) and Civ.R. 3(A).

{¶49} Based on the foregoing, we find Appellant's assignment of error to be well taken and reverse the judgment of the Tuscarawas County Court of Common Pleas and remand for further proceedings consistent with this opinion.

By: Delaney, J. and

Gwin, P.J. concur.

Wise, J. dissents.

  
HON. PATRICIA A. DELANEY

  
HON W. SCOTT GWIN

\_\_\_\_\_  
HON. JOHN W. WISE

PAD:kgb

*Wise, J., Dissenting*

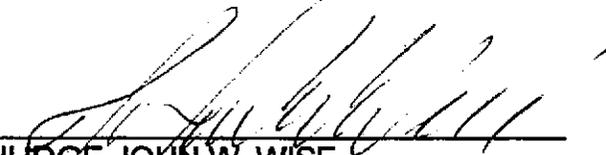
{¶50} I respectfully dissent from the majority decision.

{¶51} In the case sub judice, I find that Plaintiff's Amended Complaint cannot relate back to the original Complaint under Civ.R. 15(D) as such rule only permits same when the Plaintiff does not know the name of the defendant and could not discover the defendant's name at such time.

{¶52} The facts in this case do not support such a finding. This is not a case where the Plaintiff was unable to discover the name and/or identity of this defendant. The Plaintiff admitted in her deposition that she was aware that Dr. Swoger was the pulmonologist who treated her husband when he was admitted to the hospital on June 24, 2008. She also admitted she knew Dr. Swoger by name, having seen him around the hospital where she worked as a housekeeper. Furthermore, Dr. Swoger's name appears throughout decedent's chart. Dr. Swoger's consultation report dated June 29, 2004, listing him as a consulting physician, was part of decedent's chart and specifically stated that he participated in decedent's care and that he would be following the patient in the ICU. Additionally, Dr. Swoger's name appears in the "History and Physical Report" prepared by Dr. Bryan wherein Dr. Bryan states that he "[w]ill have Dr. Swoger consult regarding intermittent airway obstruction. Likewise, Dr. McFadden's consultation report, which again was part of decedent's medical chart, stated that Dr. Swoger was consulted and that he assisted with the respirator.

{¶53} I would therefore affirm the decision of the trial court, finding that Appellant's Amended Complaint did not relate back to the filing of the original Complaint and find that Appellant's claims against Dr. Swoger and Union Internal Medicine

Specialties, Inc. are barred by the two-year statute of limitations for wrongful death actions.



JUDGE JOHN W. WISE

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED  
5th District Court of Appeals  
Tuscarawas Co., Ohio

FEB 13 2009

ROCKNE W. CLARKE  
Clerk of Courts

CORA ERWIN, ADMINISTRATRIX  
OF THE ESTATE OF RUSSEL ERWIN

Plaintiff-Appellant

-vs-

JUDGMENT ENTRY

JOSEPH E. BRYAN, M.D. ET AL.

Defendant-Appellees

Case No. 08-CA-28

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is reversed and remanded to the trial court for further proceedings consistent with this opinion. Costs assessed to Appellees.

*Patricia A. Delaney*  
HON. PATRICIA A. DELANEY

*W. Scott Gwin*  
HON. W. SCOTT GWIN

HON. JOHN W. WISE

I the undersigned Clerk of Courts hereby  
testify this to be a true and correct copy of  
the original filed in the court of  
Appeals of Tuscarawas County, Ohio.

Rockne W. Clarke  
Clerk of Courts, Tuscarawas County

*Rockne W. Clarke*  
Deputy Clerk