

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2009-0580

CORA ERWIN, ADMINISTRATRIX OF THE ESTATE OF RUSSELL ERWIN
Plaintiff-Appellee

-vs-

JOSEPH E. BRYAN, M.D.; WILLIAM V. SWOGER, M.D.; UNION INTERNAL
MEDICINE SPECIALIST, INC.
Defendant -Appellants

ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT
TUSCARAWAS COUNTY, OHIO
CASE NO. 08-CA-28

MEMORANDUM OPPOSING JURISDICTION OF
PLAINTIFF-APPELLEE, CORA ERWIN, ADMINISTRATRIX

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STATEMENT OF ABSENCE OF ISSUES OF PUBLIC OR GREAT IMPORTANCE

The Fifth District's opinion below is far from revolutionary. Just last year in *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St. 3d 324, 2008-Ohio-3921, 894 N.E. 2d 25, this Court furnished substantial elucidation upon the issue of how Civ. R. 15(D) can be employed in certain narrow instances to allow a defendant to be joined to a lawsuit after the statute of limitations has expired. Justice Cupp's majority opinion recognized that such substitutions of a recently identified tortfeasor are authorized so long as the procedural formalities are strictly followed and proper service is completed within one year of the filing of the original Complaint. In the proceedings below, the Fifth District was fully apprised by the parties of the implications of *LaNeve* and faithfully adhered to the ruling. There is simply no merit to the assertion that "the Fifth District Court of Appeals has materially changed the statute of limitations applicable to medical malpractice actions." *Defendant-Appellants' Memorandum in Support of Jurisdiction*, p. 1.

If the General Assembly truly had envisioned a different result, one would have expected appropriate legislation to have been enacted in the wake of *LaNeve*. But the statute of limitations that existed then remains intact. The inescapable truth is that Civ. R. 15(D) has long permitted newly discovered defendants to be joined to lawsuits in certain carefully delineated instances after the deadline for bring suit has lapsed. The rulings which were issued by this Court in *LaNeve*, 119 Ohio St. 3d 324, and *Amerine v. Haughton Elev. Co.*, (1989), 42 Ohio St. 3d 57, 59, 537 N.E. 2d 208, already ensure that the limitations period will not be artificially extended beyond reason. No issues of public or great general importance thus are at stake in this proceeding.

STATEMENT OF CASE AND FACTS

The Memorandum in Support of Jurisdiction which was submitted by Defendant-Appellees, William V. Swoger, D.O. and Union Internal Medicine Specialists, Inc., on March 30, 2009 (hereinafter "Defendants' Memorandum"), takes great liberties with the facts. No discernable attempt has been made to comply with the maxim that all reasonable inferences must be drawn in favor of the opposing party in summary judgment proceedings. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924, 925; *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 433, 424 N.E.2d 311, 315; *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-106, 483 N.E.2d 150, 155; *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 88, 585 N.E.2d 384, 389.

For example, Defendants have cited Exhibit 1B of their Motion for Summary Judgment for the contention that "Dr. Swoger evaluated Decedent and as part of the evaluation spoke to Plaintiff, Cora Erwin and her son." *Defendants' Memorandum*, p. 2. Exhibit 1B is Dr. Swoger's two-page consultation report, in which he indicated merely that he "had a discussion with the wife and son at the bedside to obtain [the Decedent's] medical history." *Defendants' William Swoger, D.O. and Union Internal Specialists' Motion for Summary Judgment served February 27, 2008, Exhibit 1B*, p. 1. There is nothing in this document, or any other portion of the chart which has been submitted, that even remotely suggests that Plaintiffs should have appreciated that Dr. Swoger was part of the "team" responsible for the absence of critical DVT prevention measures. No one could have foreseen that he had played a role in the fatality until Dr. Joseph D. Bryan's deposition was taken on February 7, 2007. In defending his own treatment of the Decedent, Dr. Bryan strongly intimated that Dr. Swoger had played a role in the critical

decisions which were rendered which, according to Plaintiff's experts, produce the fatality.

Numerous other physicians in addition to Dr. Bryan and Dr. Swoger were involved in the Decedent's treatment, as well as several nurses, technicians, and other hospital staff members. Plaintiff confirmed her uncertainty over Dr. Swoger's role during her discovery deposition. While being pressed by defense counsel she stated "I think" he was involved and only knew him "[t]o see him." *Id.*, pp. 4-5.

Defendants have made much ado over the consultation report contained within the medical chart which was supposed to have alerted Plaintiff's counsel that the author – Dr. Swoger – was deserving of inclusion in the malpractice action. *Defendants' Memorandum*, p. 9. Not surprisingly, the document does not contain the slightest hint that Dr. Swoger did anything wrong. The report was prepared on the first day of admission (June 29, 2004), was devoted primarily to the Decedent's medical history and the physical examination that was conducted, and was actually just slightly more than two pages in length. *Defendants' William Swoger, D.O. and Union Internal Specialists' Motion for Summary Judgment served February 27, 2008, Exhibit 1B*. Dr. McFadden had prepared a substantially more comprehensive discharge summary, yet not one is suggesting that he also should have been sued as a result. *Id.*, *Exhibit 1C*. Neither Dr. Swoger's consultation report nor the remainder Union Hospital medical chart permitted any an inference that he had violated the standard of care. That determination could not be made until Dr. Bryan was deposed.

ARGUMENT

**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 ALREADY LEARNS
FROM AN EXPERT OR OTHERWISE THAT THE
DEFENDANT ENGAGED IN TORTIOUS CONDUCT**

A. REQUIREMENTS OF THE STATUTE OF LIMITATIONS.

The time period for filing a wrongful death claim is governed by R.C. §2125.02(D)(1), which generally requires such actions to “be commenced within two years after the decedent’s death.” Because the statute of limitations argument is an affirmative defense, Defendants bear the burden of proof. *Kline v. Felix* (9th Dist. 1991), 81 Ohio App.3d 36, 39, 610 N.E.2d 447, 449; *Evans v. Southern Ohio Med. Cntr.* (4th Dist. 1995), 103 Ohio App.3d 250, 255, 659 N.E.2d 326, 329. Legitimate factual disputes must be submitted to the jury. *Wells v. Jochenning* (8th Dist. 1989), 63 Ohio App.3d 364, 367, 578 N.E.2d 878; *Pump v. Fox* (6th Dist. 1961), 113 Ohio App. 150, 177 N.E.2d 520; *Chelsea v. Cramer* (Oct. 24, 2002), 3rd Dist. No. 9-02-36, 2002-Ohio-5801, 2002 W.L. 31388937, pp. *3-5; *Combs v. Children’s Med. Cntr., Inc.* (July 29, 1996), 12th Dist. No. CA95-12-217, 1996 W.L. 421768, p. *3.

B. RELATION BACK UNDER CIV. R. 15(D).

Here, there is no dispute that, barring the application of one of the exceptions to the rule, the statute of limitations upon Plaintiff’s wrongful death claim expired on July 18, 2006. The original Complaint was thus timely filed on July 10, 2006. Defendants’ Memorandum is premised upon the fact that Dr. Swoger and Union Internal Medicine were not substituted for John Doe M.D. No. 1 and John Doe M.D.’s Professional

Corporation No. 1 until the Amended Complaint was filed on July 13, 2007. They are no longer disputing that they were both personally served on June 27, 2007, which was within one year of the filing of the original Complaint.

Ohio courts have long disfavored resolution of cases on technicalities, rather than on the merits. *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. Towards this end, the Ohio Rules of Civil Procedure recognize that it is not always possible, without the benefit of discovery, for a plaintiff to identify all of the appropriate defendants before the statute of limitations expires. Civ.R. 15(D) provides that:

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 a copy thereof must be served personally upon the defendant. [bold in original].

If this rule is satisfied, the revised pleading joining Dr. Swoger and Union Internal Medicine will relate back to the timely original Complaint of July 10, 2006. *Amerine*, 42 Ohio St.3d at 59.

Not long ago this Court released *LaNeve*, 119 Ohio St. 3d 324. That personal injury action had also involved an attempt after the statute of limitations had expired to join several public business entities to the litigation. *Id.* at p. *1. They had all allegedly been involved in furnishing hazardous chemicals to the plaintiff's employer, and thus a diligent investigation seemingly would have uncovered both their identities and their roles in the incident within two years of the date of the injury. *Id.* Nevertheless, this

Court focused instead upon whether the plaintiff had complied with the requirements of Civ.R. 15(D) while amending his complaint. *Id.* at pp. *1-3. Because neither the original complaint nor the amended complaint contained the words “name unknown” and both had been served by certified mail, Civ.R. 15(D) was unavailable to the injured employee. *Id.* at p. *3. That holding does not justify the trial judge’s dismissal of the instant action, since Plaintiff’s original complaint alleged in the caption that the “real names and addresses” of the John Does were “unknown at the time of filing” and was personally served upon the Defendants by the Sheriff on June 27, 2007.

C. PLAINTIFF’S KNOWLEDGE OF DEFENDANTS’ CULPABILITY.

In the proceedings below Defendants initially focused their argument upon the phrase “the plaintiff does not know the name of a defendant” which appears in Civ.R. 15(D). They maintained that because Dr. Swoger had been mentioned in the medical records and Plaintiff had vaguely recalled during her deposition that he had been involved briefly in the Decedent’s week long course of treatment, he was not “unknown” to her at the time the original Complaint was filed. *Defendants’ Motion for Summary Judgment, pp. 6-12.* The Union Hospital chart reflects, however, that numerous physicians cared for the Decedent prior to his demise, including Dr. McFadden, Dr. Kubina, Dr. Braden, Dr. Rosenberg, Dr. Russell, and Dr. Bhagat. According to Defendants’ logic, all of these physicians should have been sued in the original Complaint regardless of whether a case for negligence could be established against them. Civ.R. 15(D) would never be available with respect to any health care provider mentioned in the chart (including nurses, technicians, medical students, *etc.*) since their names were deemed to be “known.” If accepted by this Court, such a dangerous precedent would have serious ramifications for both the medical community and the judicial system.

The reference in Civ.R. 15(D) to “the plaintiff does not know the name of a defendant” presupposes that the party-to-be is actually a “defendant.” One is not a “defendant” unless he/she has allegedly engaged in wrongful or tortious misconduct which has injured the plaintiff. Here, there is no dispute that Plaintiff had not yet received the complete Union Hospital medical chart at the time that the original Complaint had to be prepared. *Plaintiff’s Memorandum in Opposition to Summary Judgment, Exhibit A, paragraph 6.* The affidavit which was submitted by Plaintiff’s counsel on this critical point was un rebutted. *Id.* Even after the records were released, not even a clairvoyant could have predicted that Dr. Swoger could be held responsible for the absence of any DVT prevention measures until Dr. Bryan (the original physician-defendant) testified during his deposition of February 7, 2007 that the unwritten understanding at the hospital was that an entire “team” of physicians was responsible for managing the Decedent’s care.

In support of the Motion for Summary Judgment, only a few pages of the chart had been submitted which merely suggested that Dr. Swoger had been “consulted” once on June 29, 2004 (the date of admission) for critical care purposes and played a secondary role during the intubation process. *Defendants’ Motion for Summary Judgment, Exhibits 1A, 1B & 1C.* Notably, no evidence complying with Civ. R. 56(E) was ever offered confirming that these records had been available to Plaintiff before the statute of limitations expired.¹ Plaintiff had testified, without equivocation, that her clear impression was that Dr. Bryan was ultimately in charge of her husband’s course of treatment. *Cora Erwin Deposition, pp. 36-38, 43-48, 55-56 & 83-84.* Her

¹ It had been, of course, Defendants’ burden to affirmatively establish the appropriateness of summary judgment through admissible evidence. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264, 274; *Vahila v. Hall*, 77 Ohio St.3d 421, 428-430, 1997-Ohio-259, 674 N.E. 2d 1164; *Stillwell v. Johnson* (1st Dist. 1991), 76 Ohio App.3d 684, 688, 602 N.E.2d 1254, 1257.

understanding in this regard is fully supported by the five page History and Physical Report, which was dictated solely by Dr. Bryan after he had terminated his care of the Decedent. Dr. McFadden's Discharge Summary had further confirmed that initially the "patient was referred to Dr. Bryan because of the complexity of the case who admitted the patient to the Intensive Care Unit." Dr. Swoger was mentioned only because he was "consulted" and "assisted in helping manage the respirator."

D. THE DUTY TO INVESTIGATE.

Defendants' heavy reliance upon *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 589 N.E.2d 1284, is misplaced. *Defendants' Memorandum*, pp. 7-8. In that medical malpractice action, the plaintiff had made no attempt to avail herself of "relation back" under Civ.R. 15(D). Instead, she had filed her lawsuit against the radiologist well past the one-year statute of limitations imposed by former R.C. §2305.11(A). Her theory was that the "cognizable event" did not occur, and the limitation period did not begin to run, until she had identified the physician's role with certainty. *Id.*, 63 Ohio St.3d at 548-549. In rejecting this contention, this Court observed that not only had the plaintiff been afforded reason to believe that malpractice had occurred before the deadline for filing had expired, she had actually consulted with an attorney and issued a 180-day letter to another physician within that period. *Id.* at 549.

In the case *sub judice*, Plaintiff has never disputed that the cognizable event occurred with the Decedent's death on July 15, 2004. Unlike the plaintiff in *Flowers*, she commenced her lawsuit against the physician who was, by all appearances, completely in charge of her late husband's care along with several "John Does" five days before this deadline expired. As a result, Civ.R. 15(D) was available to her once she received the complete medical chart and learned that, at least according to Dr. Bryan, Dr. Swoger was part of the "team" managing the patient's care.

Recent decisions analyzing the discovery rule in medical malpractice/wrongful death actions thoroughly debunk Defendants' contention that *Flowers'* "duty to investigate" requires all aspects of the claim to be uncovered before the statute of limitations expires. *Defendant's Memorandum*, pp. 7-10. Under the discovery rule, the statute of limitations does not even start (and thus a duty to investigate logically would not as well) when critical facts are unknown to the plaintiff. See generally, *Oliver v. Kaiser Comm. Health Found.* (1983), 5 Ohio St.3d 111, 449 N.E.2d 438, syllabus; *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St.3d 1, 516 N.E.2d 204, paragraph one of the syllabus; *Girardi v. Boyles* (Mar. 2, 2006), 10th Dist. No. 05AP-557, 2006-Ohio-947, 2006 W.L. 496045 pp. *2-5; *McGuire v. Milligan* (Apr. 28, 2004), 9th Dist. No. 03CA0051, 2004-Ohio-2125, 2004 W.L. 895798, pp. *1-2. In discussing this principle in general, the Supreme Court of Ohio has observed that "[i]ts underlying purpose is fairness to both sides. 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?" *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 169, 2002-Ohio-2007, 766 N.E.2d 977, 981; see also *NCR Corp. v. U.S. Mineral Prods. Co.*, (Oct. 1, 1993), 2nd Dist. Nos. 13931, 1993 W.L. 386223, p. *2, *rev'd on other grounds*, 72 Ohio St.3d 269, 1995-Ohio-191, 649 N.E.2d 175. ("The purpose of the judicial discovery rule is to postpone the running of the statute of limitation until a person knows, or should have known, that he has a claim. It is a rule of fairness which prevents a person from losing his claim before he is aware of the claim.").

Knowledge of the defendant's identity alone is not sufficient to overcome the discovery rule, as the plaintiff must also be aware of his/her potentially tortious actions. See generally, *Norgard*, 95 Ohio St.3d at 166. The Eighth District has explained the

implications of *Norgard* as follows:

The new rule now “entails a two-pronged test – i.e., discovery not just that one has been injured but also that the injury was caused by the conduct of the defendant – and that a statute of limitations does not begin to run until both prongs have been satisfied.” *Norgard* at syllabus. Under *Norgard*, the statute of limitations set forth in R.C. 2305.10 starts to run when the damaged party discovers, or in the exercise of reasonable diligence should have discovered, that he was injured by the wrongful conduct of another. [emphasis added].

Kay v. City of Cleveland (Jan. 16, 2003), 8th Dist. No. 81099, 2003-Ohio-171, 2003 W.L. 125280, p. *4. It has been further reasoned that:

Before a statute of limitations begins to run, not only must the plaintiff discover that they have an injury, but the plaintiff must also discover with reasonable diligence that the defendant’s wrongful conduct caused that injury. [citation omitted; emphasis added].

Makris v. Scandinavian Health Spa, Inc. (Sept. 20, 1999), 7th Dist. No. 98CA183, 1999 W.L. 759989, p. *2. Indeed, this Court’s position in *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 509, 692 N.E.2d 581, was that:

***[I]n order for a wrongful death case to be brought, the death must be wrongful. 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. [emphasis added].

Flowers’ duty to investigate thus does not arise merely from the occurrence of a death or injury. In *Corcino v. Neurosurgical Sers., Inc.* (Mar. 27, 2002), 9th Dist. No. 01CA007903, 2002-Ohio-1375, 2002 W.L. 462856, the court reversed summary judgment granted in favor of physicians and a medical practice. The plaintiff had suffered a series of strokes, and filed a medical malpractice action against her physicians. The defendants all argued that the cognizable event had occurred and she should have known of her duty to fully investigate the claims long before the lawsuit was

actually filed. In analyzing whether the discovery rule applied to preclude summary judgment upon the statute of limitations defense, the *Corcino* court concluded explained that:

The relevant issue is at what point [plaintiff's] condition would have alerted a reasonable patient that an improper medical procedure, treatment, or diagnosis has taken place. See *Akers*, 65 Ohio St.3d at 425, 605 N.E.2d 1, citing *Allenius*, 42 Ohio St.3d at 134, 538 N.E.2d 93. Appellees present no evidence to substantiate their claim that the mere occurrence of [plaintiff]'s second stroke should have put the [the plaintiffs] on notice to investigate whether her injury was the proximate result of malpractice. See *Flowers*, 63 Ohio St.3d at syllabus.

Similarly, appellants present no evidence to substantiate their claim that the cognizable event occurred in May 1995. As such, genuine issues of material fact remain to be litigated. If questions of fact remain as to the date of the cognizable event, summary judgment is not proper. *Leftwich v. Martelino* (1997), 117 Ohio App.3d 405, 411, 690 N.E.2d 932. See, also, *Evans v. Southern Ohio Med. Ctr.* (1995), 103 Ohio App.3d 250, 256, 659 N.E.2d 326. ***

Id. at pp. *2-3. See also *Chelsea v. Cramer* (Oct. 24, 2002), 3rd Dist. No. 9-02-36, 2002-Ohio-5801, 2002 W.L. 31388937, pp. *4-5 (reversing summary judgment in favor of physician and clinic where genuine issue of material fact existed whether plaintiff had discovered a cognizable event to trigger statute of limitations). Accordingly, *Flowers'* "duty to investigate" is not as complete and absolute as Defendants would have this Court believe.

As the Fifth District properly recognized below, reasonable minds could certainly conclude that Plaintiff had no reason to believe Defendants themselves were at fault for the absence of DVT prevention measures based upon their uneventful interactions with the consulting physician on the day of admission and the medical chart alone. See generally *Board of Edn. Sch. Dist. v. Joseph A. Regner Assoc.* (Oct. 26, 1989), 8th Dist. No. 56053, 1989 W.L. 129104, p. *4 ("It is a question of fact as to when the Board knew

or, in the exercise of reasonable diligence, should have known of the damage.”); *see also* *Laipply v. Bates* (7th Dist. 2006), 166 Ohio App.3d 132, 138-139, 2006-Ohio-1766, 849 N.E.2d 308, 312-313; *Knowles v. Mercurio Custom Homes, Inc.* (Jan. 7, 2005), 1st Dist. No. C-040025, 2005-Ohio-33, 2005 W.L. 27468, p. *5.

E. DEFENDANTS’ INAPPOSITE AUTHORITIES

Defendants contend that *Mark v. Mellott Manuf. Co.* (Sept. 13, 1989), 4th Dist. Case No. 1494, 1989 W.L. 106933, recognizes that the defendant to be joined must be a total, unidentifiable stranger to the plaintiff before Civ. R. 15(D) can be invoked. *Defendants’ Memorandum*, pp. 11-12. That plaintiff had been “severely injured when he became entangled in a rip saw at his place of employment.” *Id.* at p. *1. His ensuing products liability action entailed a number of statute of limitations issues, the least significant of which was his attempt to secure relation back under Civ. R. 15(D). *Id.* at pp. *1-5. In the final paragraph of the opinion, the court observed that his original complaint had not alleged that the John Doe defendant, later identified as the Frick Company (“Frick”), could not be discovered and thus the rule was inapplicable. *Id.* at p. *5. Where, as here, such an allegation has been provided, *Mark* is immaterial. *Clint v. R.M.I. Co.* (Dec. 13, 1990), 8th Dist. No. 57187, 1990 W.L. 204348, p. *3.

The Fourth District did remark in closing that the “record indicated that the appellant in fact discovered Frick’s name as the manufacturer of the before he filed the original complaint.” *Mark*, 1989 W.L. 106933, p. *5. This *dicta* actually supports Plaintiff’s position, since both the identity of the John Doe defendant and its role in causing the injury as the “manufacturer” was known. *Id.* The plaintiff had been injured on Frick’s rip saw and could hardly maintain that he had failed to appreciate that a manufacturer could be potentially liable in his products liability action. *Mark* would justify summary judgment only if Plaintiff had possessed any reason to believe that Dr.

Swoger – who was just one of several physicians who had cared for the Decedent at Union Hospital – was part of the “team” responsible for dispensing with the critical DVT prevention measures.

It should also be noted that *Mark* was issued nearly two (2) decades ago and more recent authorities have attached little significance to the plaintiff’s knowledge of the defendant’s “identity” and have focused instead upon whether the pleading and service requirements of Civ.R. 15(D) have been met. In *Loescher v. Plastipak Packaging, Inc.* (3rd Dist. 2003), 152 Ohio App.3d 479, 2003-Ohio-1850, 788 N.E.2d 681, the plaintiff sought to amend her complaint several months after the statute of limitations had expired to substitute Arrowhead Conveyor, LLC (“Arrowhead”) for one of her John Doe defendants. *Id.* at 481. She had been injured in a workplace accident and there is every reason to believe that Arrowhead, which was a publically registered limited liability company, could have been easily identified as the manufacturer/supplier of the hazardous equipment within two years of the accrual of the claim. *Id.* This did not concern the Third District, which proceeded to observe that the original complaint had alleged that the names of the John Doe defendants were “unknown.” *Id.* at 482. Furthermore, “[o]nce the identity of Arrowhead was learned, an amended complaint identifying Arrowhead and a new summons directed to Arrowhead were personally served upon Arrowhead.” *Id.* at 483. That is, of course, precisely the same procedure that the instant Plaintiff dutifully followed.

In response to Plaintiff’s observations that an unduly restricted interpretation of Civ.R. 15(D) will lead to countless health care providers being sued out of fear that the relation back mechanism will be unavailable, Defendants have pointed to *Stanley v. Magone* (Dec. 11, 1995), 12th Dist. No. CA95-05-096, 1995 W.L. 728503. *Defendants’ Memorandum*, p. 9. But, *Stanley* was a garden variety statute of limitations case and

the panel was not called upon to examine Civ.R. 15(D). It was the plaintiff's original complaint, and not an amended one, which had been filed too late. *Id.* at p. *1. Her argument that an exception should therefore be made to the statute of limitations thus was not well received. *Id.* at p. *4. The Twelfth District stopped well short of adopting the needlessly harsh principle – which lies at the heart of Defendants' analysis – that any health care provider who briefly interacts with the patient and is identified in the medical records must be sued prior to the expiration of the statute of limitations because Civ.R. 15(D) will be unavailable as a matter of law. This court should decline the invitation to be the first to so hold. Such an unwise standard would not only tax the judicial system, but would also impose serious hardship upon plaintiffs who are now required to submit an affidavit of merit with respect to each health care provided included in the action. *Civ. R. 10(D)(2)*.

F. IMPLICATIONS OF THE AFFIDAVIT OF MERIT REQUIREMENT.

It must also be stressed that the authorities which Defendants have cited were all issued prior to the adoption of Civ.R. 10(D)(2). That recently enacted rule prohibits the filing of a medical malpractice action until an affidavit can be obtained from a duly qualified health care provider confirming that legitimate grounds for the claim exist. *Campbell v. Aepli* (July 16, 2007), 5th Dist. No. CTo6-0069, 2007-Ohio-3688, 2007 W.L. 2069944. Unlike the situation that existed prior to July 1, 2005, plaintiffs no longer have the luxury of blindly suing every physician whose name appears in the chart.

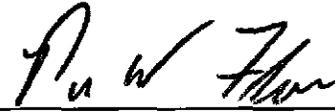
CONCLUSION

Because no issues of public or great general importance are at stake in this proceeding, this Court should decline any further review of the well-reasoned decision that was issued by the Fifth District in the proceedings below.

Respectfully submitted,

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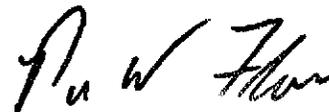


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum** has been sent by regular U.S. Mail, on this 28th day of April, 2009 to:

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