

ORIGINAL

No. 2009-0580

In the Supreme Court of Ohio

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

CORA ERWIN, Administratrix of the Estate of Russel Erwin

Appellees,

vs.

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

Appellants.

**MERIT BRIEF OF APPELLANTS WILLIAM V. SWOGER, M.D. AND UNION
INTERNAL MEDICINE SPECIALTIES, INC.**

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BRIEF

I. STATEMENT OF FACTS

This is a medical malpractice action/wrongful death action in which Appellee, Cora Erwin, filed her Complaint against the Appellant's, William Swoger, M.D. and Union Internal Medicine Specialties, Inc. (hereinafter respectively referred to as "Dr. Swoger" and "UIMS") more than 3 years after the Decedent's death. Applying the statute of limitations' "discovery rule" to Civ. R. 15(D), the Court of Appeals for the Fifth District held that Appellee's claim against Dr. Swoger was timely. The Fifth District concluded that Appellee appropriately utilized the John Doe pleading mechanism because Dr. Swoger's status as a *defendant* was unknown until her counsel learned in a deposition that Dr. Swoger may have been involved in the allegedly wrongful conduct. The Court so ruled despite the fact that Appellee was fully aware prior to the expiration of the statute of limitations that Defendant, Dr. Swoger was involved in Decedent's care.

A. Procedural Background

Appellee, Cora Erwin, originally filed this wrongful death action on July 10, 2006. (*See* Supplement at p. 1). In her complaint, Appellee asserted that the Defendants provided negligent medical care to Appellee's Decedent his during his hospitalization at Union Hospital Association from June 29, 2004 to July 5, 2004, thereby causing his death on July 15, 2004. (*See* Supplement at p. 1-9). Appellee specifically named as defendants, Joseph Bryan, M.D., Professional Corporation of Joseph Bryan, M.D. and the

Union Hospital Association.¹ Additionally, Appellee 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." (*See* Supplement at p. 4).

In her complaint, Appellee alleged that the Decedent died as a result of a pulmonary embolism, a blood clot in the lungs. (*See* Supplement at p. 5). Appellee alleges that the Defendants deviated from accepted standards of care by, among other things, failing to recognize the Decedent's risk for development of deep vein thrombosis and pulmonary embolism and failing to order measures which would have protected against the occurrence of pulmonary embolism. (*See* Supplement at p. 5-6) As a result, Appellee contends that the Defendants' alleged negligence proximately caused Decedent's death. (*See* Supplement at p. 6)

In its August 24, 2006, scheduling order, the trial court set the matter for trial for August 7, 2007. Subsequently, on or about June 27, 2007, after significant discovery had taken place, Appellee requested that Dr. Swoger and UIM be personally served with a copy of a summons and the original complaint. Also, on June 29, 2007, Appellee filed a Motion for Leave to Amend her Complaint to substitute Dr. Swoger and UIMs for the John Doe Defendant's. In her Motion, Appellee claimed that Dr. Swoger was not named in the original Complaint for several reasons, stating as follows:

- (1) At the time of the original filing of this Complaint, Plaintiff's counsel had received records from the client only several weeks before the

¹ 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 from Decedent's death. (*See* Complaint, Supplement pp. 1-9)

expiration of the statute of limitations as to the wrongful death claims;
(*See Supplement at p. 15*)

- (2) 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"; (*See Supplement at p. 14*)
- (3) that information learned during discovery (via interrogatories and Dr. Bryan's deposition) coupled with input from plaintiff's expert, subsequent to the expiration of the statute of limitations, identified Dr. Swoger as providing negligent care. (*See Supplement at p. 16*).

The trial court granted Appellee's Motion for Leave and, on July 13, 2007, Appellee filed an Amended Complaint naming Dr. Swoger and UIMS as Defendants in this action. In the Amended Complaint, Appellee again asserted the same theories of substandard care that she had raised in her original Complaint. On or about June 26, 2007 Dr. Swoger was personally served with the original summons and complaint. The summons did not contain the words "name unknown." (*See Supplement at p. 33*)

B. FACTUAL BACKGROUND

On June 29, 2004, Decedent, Russell Erwin, who was 51 years old, presented to the Union Hospital Emergency Room unresponsive and unable to provide any history. (*See Supplement at p. 14*). It was reported that earlier that day he was complaining of fatigue and weakness. (*See Supplement at p. 14*) He was admitted to the intensive care unit under the care of Defendant, Joseph E. Bryan, M.D.. (*See Supplement at p. 39*) Upon admission, Dr. Bryan was concerned that Decedent may have been experiencing alcohol withdrawal seizures or a stroke, among other diagnoses. (*See Supplement at p. 39*). Due to the respiratory issues, Dr. Bryan asked Dr. Swoger, a pulmonologist and intensive care physician, to consult on the case. (*See Supplement at p. 39*).

On that same date, Dr. Swoger evaluated Decedent and as part of the evaluation spoke to Plaintiff, Cora Erwin and her son. (*See* Supplement at pp. 35, 41). Upon concluding his evaluation that day, Dr. Swoger dictated a consultation record documenting his evaluation. (*See* Supplement at pp. 41-43) Dr. Swoger intubated Decedent and placed him on a ventilator. (*See* Supplement at pp. 41-43) In concluding his consultation note he stated: "Thanks for allowing me to participate in his care. I will follow him in the ICU setting and give further advice as warranted." (*See* Supplement at p. 43). The record was transcribed that same date and made part of Mr. Erwin's medical chart from Union Hospital. (*See* Supplement at p. 43) This record provides three pages of detailed notes and clearly identifies Dr. Swoger's involvement in Mr. Erwin's care.

Dr. Swoger remained involved in Mr. Erwin's care until July 4, 2004. (*See* Supplement at p. 35) Decedent was discharged from Union Hospital two days later, July 6, 2004. (*See* Supplement at p. 44) On July 15, 2004, Decedent collapsed at home. Resuscitative efforts by EMS were unsuccessful and passed away. (*See* Supplement at p. 4) An autopsy was performed revealing the presence of among other things, a pulmonary embolus (*See* Supplement at p. 5)

In addition to his direct contact with Decedent's family members, Dr. Swoger's name is noted throughout the medical records multiple times. In Dr. McFadden's dictated discharge summary, which was dictated on July 10, 2004, Dr. McFadden states: "Dr. Swoger was a consultant who assisted in helping managing the respirator." (*See* Supplement at p. 45) Also, in Dr. Bryan's dictated history and physical, Dr. Bryan indicated in his plan "will have Dr. Swoger consult regarding intermittent airway obstruction." (*See* Supplement at p. 39)

Not only was Dr. Swoger's involvement well documented and clearly ascertainable from the medical records, Appellee clearly demonstrated that she knew that Dr. Swoger was involved in her husband's care. During her deposition, Appellee provided the following testimony:

Q. Was your husband already induced into a coma?

A. I think they did it prior to that.

Q. Who did it?

A. They had another doctor come in and do it. Dr. Swoger, I think.

(See Supplement at p. 48, ll. 13-17)

Q. And was that the – did the pulmonologist come in, then, to do that, or who came in to do that, that intubation?

A. Dr. Swoger, I'm thinking.

Q: Do you know Dr. Swoger?

A: To see him.

(See Supplement at p. 49, ll. 2-7)

Q. You saw Dr. Bryan on that first admission date two times; once in the morning, and then once later in the afternoon or evening?

A. Yes.

Q. And you also saw Dr. Swoger?

A. Yes.

(See Supplement at p. 50-51, ll. 20-13-17)

On April 7, 2008, upon Appellant's Motion, the trial court granted summary judgment to Appellants. The court concluded that based on these undisputed facts, plaintiff's claim was barred by the two-year statute of limitations applicable to wrongful

death actions. Moreover, the court rejected Appellee's argument that she had properly invoked Civ. R. 15(D).

On February 13, 2009, the Court of Appeals for the Fifth District reversed the trial court's decision. (See Appendix at A4). The Court held, that despite the fact that Appellee's complaint was filed against Dr. Swoger nearly 3 years after the Decedent's death, Appellee's complaint was timely. Without expressly acknowledging such, the Court applied the "discovery rule" applicable to the statute of limitations with Civ. R. 15(D).² In any event, the Court concluded that since Appellee did not learn that Dr. Swoger's conduct was wrongful until the deposition of Dr. Bryan and/or until her expert concluded that Dr. Swoger was negligent her complaint against Dr. Swoger was timely by virtue of Civ. R. 15(D). (See Appendix at A15-16).

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.

² In other words, if the Court had held that Appellee did not discover her claim against Dr. Swoger until the deposition of Codefendant, Dr. Bryan and/or her expert advised of Dr. Swoger's negligence, then the statute of limitations would not have expired and there would be no need to resort to Civ. R. 15(D) or 15(C).

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.

... while knowing the name of Defendant Swoger in the semantical sense, did not know the name of Defendant Dr. Swoger as a potentially culpable party until the deposition of Dr. Bryan.

(See Appendix at pp. A15-16)

The Fifth District's decision in this case is in error and is contrary to Ohio law. Moreover, this case creates a very dangerous precedent in medical malpractice cases. In the name of "fairness" and "common sense", the Fifth District has created a limitless statute of limitation in medical malpractice cases. Without explaining how it is that Appellee was unable to determine Dr. Swoger's culpability, the court has held that discovery of malpractice, and, therefore, accrual of a malpractice claim, does not occur until a plaintiff (and/or her attorney) is told by an expert or a codefendant, that another physician may have been involved in the malpractice.

As well be demonstrated below, the Court's decision should be reversed and a clear and unequivocal standard should be established defining the parameters of the "discovery rule" and its interplay with the proper application of Civ. R. 15(D).

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

Where a Plaintiff knows the identity of a defendant before the expiration of the statute of limitations, the plaintiff may not utilize the John doe pleading rule set forth at Civ. R. 15(D) to later substitute that defendant as a named defendant. 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.

A. STANDARD FOR SUMMARY JUDGMENT

In accordance with *Ohio Civ. R. 56(C)*, summary judgment is appropriate when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can only come to but one conclusion, and viewing the evidence in the light most favorable to the nonmoving party, and that conclusion is adverse to the party against whom the motion for summary judgment is made. *State Ex. Rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589; *State ex. rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183; *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1, 2. The party moving for summary judgment must establish the materials presented before the trial court demonstrate that no genuine issue of material facts exists for trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

This burden is met by the moving party by establishing that the non-moving party has presented insufficient evidence to prove an essential element of their case. *Id.* at 293. Once the moving party has satisfied its initial burden, the non-moving party then has the

reciprocal burden to show that there is indeed a genuine issue for trial. *Id. at 293; Vahila v. Hall* (1997), 77 Ohio St. 3d 421, 429. While the Court must view the evidence most strongly in favor of the non-moving party, the motion for summary judgment still forces the party opposing the motion to produce evidence on all issues for which that party bears the burden of production at trial. *Wing v. Anchor Media Ltd. of Texas* (1991), 59 Ohio St. 3d 108, 111; *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112, 115.

B. APPELLEE’S CLAIM AGAINST DR. SWOGER AND UIMS IS BARRED BY R.C. 2125.02

R.C. 2125.02, the statute of limitations applicable to wrongful death, provides that “[a]n action for wrongful death shall be commenced within two years after the decedent's death.” (Appendix at p. A27)

Appellee did not dispute at either the trial court or appellate court level that R.C. 2125.02 is controlling in this case. Moreover, Appellee did not dispute that her cause of action for wrongful death accrued on the date of Decedent’s death, July 15, 2006. Finally, Appellee did not dispute that “barring an application of one of the exceptions to the rule, the statute of limitation upon the Appellees wrongful death claim [against Dr. Swoger] expired on July 18, 2006.” (*See* Brief of Plaintiff-Appellant, Fifth District Court of Appeals at 9)

Thus, unless Appellee’s Amended Complaint in which she named Appellants, Dr. Swoger and UIMS, related back to her originally filed complaint, Appellee’s claims are barred pursuant to R.C. 2125.02. Since, as more fully set forth below, Civ. R. 15(D) is inapplicable, Appellee’s claims against Dr. Swoger and UIMS are barred by the statute of limitations.

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

The undisputed facts presented to the trial court demonstrated that prior to filing her original complaint Appellee knew Dr. Swoger's identity and knew he was involved in the Decedent's care. In fact, Appellee was aware of Dr. Swoger's involvement from the time of the care at issue as she personally spoke with Dr. Swoger and provided a medical history to him. Moreover, it was further undisputed that Dr. Swoger's involvement in Decedent's care was thoroughly documented in the medical records, including Dr. Swoger's three page, detailed, dictated consultation record.

However, despite these undisputed facts, the Court of Appeals concluded that Civ. R. 15(D) applied because while his name was known to Appellee, his status as a "defendant" was still unknown. The Court of Appeals conclusions were clearly in error. The clear and unambiguous language of Civ. R. 15(D) demonstrates that it does not apply where the plaintiff is aware of the defendant's identity prior to filing the original complaint.

a. **Civ. R. 15(D) Is Inapplicable Since Appellee was Aware of Dr. Swoger's Name prior to filing her Original Complaint.**

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.

Moreover, this Court recently admonished that when resort is made to Civ. R. 15(D), "because of the unique situation" presented by the rule, the specific requirements of the rule must be followed. *Laneve v. Atlas Recycling, Inc.* (2008), *119 Ohio St. 3d 324; 2008 Ohio 3921; 894 N.E.2d 25*. The unique situation is that Civ. R. 15(D) allows a claim to be brought against a defendant after the statute of limitations expires.

Civ. R. 15(D) is clear and unambiguous. It only applies where, at the time of the expiration of the statute of limitations, Appellee does not know the name 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.

(Appendix at p. A31). (Emphasis added).

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 Company* (1989), 4th Dist. App., 1989 WL 106933, unreported.

The Court of Appeals decision clearly ignores the plain language of Civ. R. 15(D). In reviewing the decision the court interposes language that in no way can be fairly interpreted from a review of the rule. Certainly, if this Court, in enacting the civil

rules, had intended on having Civ. R. 15(D) apply where the plaintiff knows the persons name but does not know whether they should properly be a “defendant,” it could have easily stated so.

In *Mark, supra*, the Court specifically held Civ. R. 15(D) is inapplicable where the Plaintiff knew of the defendants 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 Plaintiff did in the present case, Plaintiff 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 Defendant-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.

Further, in *Varno v. Bally Mfg Co. (1985)*, 19 Ohio St. 3d 21; 482 N.E.2d 34, overruled for other reasons, this Court explained the circumstances for which Civ. R. 15(D) was designed: “the application of *Civ. R. 15(D)* is limited to those cases in which the defendant's identity and whereabouts are known to the plaintiff, but the actual name of the defendant is unknown.” *Id. at 24, 344*. In *Varno*, the Court was persuaded by the

concerns raised by the Montgomery County Court of Appeals in *Vocke v. Dayton* (1973), 36 Ohio App. 2d 139, 65 O.O.2d 15.

In *Vocke*, the plaintiff had sued the city of Dayton and had named three John Doe's in her complaint. Thereafter, plaintiff amended her complaint naming several individual employees of the City of Dayton. In concluding that plaintiff was not permitted to amend her complaint pursuant to Civ. R. 15(D), the court explained:

If the present plaintiff were to prevail in her contention, any claimant could, within the period of limitation, file a petition without designation or description of any defendant, and without service upon anyone, in the mere hope that within a year thereafter he might discover a missing party to designate."

The same concern is present in virtually every medical malpractice case and would be encouraged by upholding the Fifth District's opinion. Specifically, a medical malpractice plaintiff need only file a claim against one defendant, within the statute of limitation, and then name John Doe defendants in the mere hope that within a year thereafter he might discover a missing party to designate. *Varno* specifically found that this practice would violate Civ. R. 15(D).

In the present case, the undisputed evidence demonstrates that Appellee did know Dr. Swoger's name prior to filing her complaint. Moreover, the medical records available to plaintiff clearly identified Dr. Swoger as participating in the Decedent's care and specifically detailed the care he provided. Accordingly, since Appellee was aware of Dr. Swoger's name at the time of the filing of her original Complaint, Civ. R. 15(D) is of no avail and Appellee's complaint does not relate back to the original filing.

- b. **Appellee's Complaint Cannot Relate Back as Plaintiff Failed to Comply With Civil R 15(D).**

Pursuant to Civil Rule 15(D), in an appropriate case, in order to have a complaint relate back, this Court has held there must be strict adherence to the procedural requirements set forth in the rule. *Amerine v. Haughton Elevator Co.* (1989) 42 Ohio St. 3d 57. Part of the procedural requirements is that when the name of the John Doe Defendant is discovered, the John Doe Defendant must be personally served with the summons that contains the words “name unknown”. In this regard, the Ohio Supreme Court stated:

Civil Rule 15(D) specifically requires that the summons *must* be served personally upon the Defendant. In this case, service was performed by way of certified mail which is clearly not in accordance with the requirement of Civil Rule 15(D). **Civil Rule 15(D) also requires that the summons must contain the words “name unknown”. Appellants also failed to meet this requirement of the rule.**

Accordingly, due to appellant’s failure to meet the specific requirements of Civil Rule 15(D), the judgment of the Court of Appeals is affirmed albeit for different reasons.

(*See Amerine*, supra at 59).

Recently, this Court in *Laneve*, supra, reaffirmed that specific adherence to the rule’s requirements is required. In finding that plaintiff’s failure to comply with the requirement that the summons contain the words “name unknown,” this Court stated:

Contrary to the express requirements of the rule, the summons for LaNeve’s complaint or amended complaint, however, did not include the words “name unknown” with respect to any of the defendants, and it was served by certified mail. LaNeve did not attempt, or obtain, personal service of the summons for either the complaint or the amended complaint on China Shipping or ContainerPort. As a result, LaNeve failed to meet the specific requirements of Civ. R. 15(D); LaNeve is unable to claim the benefit of the relation back of the amended complaint as provided by Civ. R. 3(A); and LaNeve’s attempted action against China Shipping and ContainerPort is, therefore, outside of the applicable statute of limitations. See *Amerine*, 42 Ohio St. 3d 57, 537 N.E. 2d 208. LaNeve’s amended complaint is time-barred by the principles set forth in *Amerine*.

Id. at 327.

Just as the plaintiffs in *Amerine* and *LaNeve*, Appellee failed to meet the specific requirements of Civil Rule 15(D). Nowhere in the summons, does Plaintiff use the words “name unknown”. As Plaintiff has failed to meet the specific procedural requirements of Civil Rule 15(D), Plaintiff’s claim fails as a matter of law. Accordingly, her complaint against Appellants does not relate back to her original complaint and Appellee’s claim is barred as a matter of law.

c. The Fifth District Court Of Appeals Erred In Finding That Pursuant To The “Discovery Rule,” Appellee’s Claim Was Timely Filed Via Civ. R. 15(D)

While the above analysis clearly demonstrates that Civ. R. 15(D) only applies when a plaintiff does not know the name of the John Doe Defendant (as opposed to whether or not that Defendant has engaged in culpable conduct), the Fifth District also erred in its interpretation of the “discovery rule” applicable to the statute of limitations in medical malpractice cases. While the court did not expressly hold that Appellee’s medical malpractice claim accrued when she allegedly discovered Dr. Swoger’s culpability that is clearly the import of the court’s decision. As stated by the court:

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. . .”

(See Appendix at p. A14).

The discovery rule applicable to medical malpractice actions has evolved over the last 25 years. The discovery rule was initially adopted by this Court in 1983 in *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, 5 Ohio B. 247, 449 N.E.2d 438, syllabus. Prior to *Oliver*, a medical malpractice action accrued upon the

termination of the physician-patient relationship. Concerned that this resulted in plaintiff's claims being extinguished before a plaintiff was aware or should have been aware of the claim, the Court adopted the discovery rule, stating:

Under R.C. 2305.11(A), a cause of action for medical malpractice accrues and the statute of limitations begins to run when the patient discovers, or in the exercise of reasonable diligence should have discovered the resulting injury.

(*Id.* at syllabus).

Over the next five years this Court used various terminology to define the event that triggers the running of the limitation period. Some cases used the terminology "discovery of the malpractice." While other cases used "discovery of the injury." And, in some cases the words were used interchangeably. Thus, in 1987, this Court revisited the issue in an effort to clarify the triggering event for the running of the statute of limitations in *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St. 3d 1, 516 N.E.2d 204.

The Court adopted an approach that required an evaluation of three factors:

"* * * [T]he trial court must look to the facts of the particular case and make the following determinations: when the injured party became aware, or should have become aware, of the extent and seriousness of his condition; whether the injured party was aware, or should have been aware, that such condition was related to a specific professional medical service previously rendered him; and whether such condition would put a reasonable person on notice of need for further inquiry as to the cause of such condition. * * *" (Citations omitted.)

Hershberger at 208.

Two years later, the Court again revisited the discovery rule in *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 134, 538 N.E.2d 93. In that case, the three prong test of *Hershberger* was distilled into the "cognizable event" test. The Court explained:

Admittedly, "extent and seriousness" are not terms of art and, therefore, do not lend themselves to easily discernible definitions. Since the three

prongs of *Hershberger* overlap considerably, we believe that the best manner in which to explain "extent and seriousness of his condition" is to combine the three prongs. Thus, we now hold that the "extent and seriousness of his condition" language of the test set forth in *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St. 3d 1, 516 N.E.2d 204, paragraph one of the syllabus, requires that there be an occurrence of a "cognizable event" which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.

Moreover, we do not believe that a patient must be aware of the *full* extent of the injury before there is a cognizable event. It is enough that some noteworthy event, the "cognizable event," has occurred which does or should alert a reasonable person-patient that an improper medical procedure, treatment or diagnosis has taken place.

If a patient believes, because of harm she has suffered, that her treating medical professional has done something wrong, such a fact is sufficient to alert a plaintiff ""* * * to the necessity for investigation and pursuit of her remedies. * * *"*Graham v. Hansen* (1982), 128 Cal. App. 3d 965, 973, 180 Cal. Rptr. 604, [***10] 609.

(*Allenius*, supra at 133-134).

Subsequently, in *Flowers v. Walker* (1992), 63 Ohio St.3d 546, this Court addressed the application of the discovery rule to the type of factual circumstances as presented in this case. Namely, where a plaintiff files an action against one defendant within the statute of limitations, but, thereafter, discovers that another defendant may have committed malpractice.

In *Flowers*, the plaintiff saw her gynecologist, Dr. Milheim, who ordered a mammogram for routine evaluation. The mammogram was performed at St. Joseph's Hospital in November 1986 and was interpreted by Dr. Walker, a radiologist, as normal. Over the next two years, plaintiff saw Dr. Milheim on several occasions because she felt a lump in her breast. Dr. Milheim assured plaintiff that everything was normal because the mammogram done in 1986 was negative. In June 1987, plaintiff was diagnosed with

breast cancer. A mammogram taken at that time, performed by another physician revealed a cancerous mass in plaintiff's breast.

In December, 1987, plaintiff consulted an attorney to investigate possible medical malpractice claim against Dr. Milheim. Plaintiff served Dr. Milheim with a 180 day letter. In August 1988, during the course of this investigation, plaintiff and her attorney learned for the first time of Dr. Walker's identity and that he may have negligently interpreted the November 1986 mammogram. On March 9, 1989, plaintiff brought suit against Dr. Walker.

The trial court granted Dr. Walker's motion for summary judgment finding that plaintiff's complaint was barred plaintiff's claims. On appeal, this Court addressed the issue as follows:

Mrs. Flowers argues that the "cognizable event" occurred, and the statute of limitations began to run, when she discovered the identity of Dr. Walker and his role in performing and interpreting the November 7, 1986 mammogram. We disagree.

A "cognizable event" is the occurrence of facts and circumstances which lead, or should lead, the patient to believe that the physical condition or injury of which she complains is related to a medical diagnosis, treatment, or procedure that the patient previously received. *Id.* at syllabus.

Moreover, *constructive* knowledge of facts, rather than *actual* knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule. *McGee v. Weinberg* (1979), 97 Cal.App.3d 798, 803-804, 159 Cal.Rptr. 86, 89-90; *Graham v. Hansen* (1982), 128 Cal.App.3d 965, 973-974, 180 Cal.Rptr. 604, 609-610. A plaintiff need not have discovered all the relevant facts necessary to file a claim in order to trigger the statute of limitations. ** *Allenius, supra*, 42 Ohio St.3d at 133-134, 538 N.E.2d at 96. Rather, the "cognizable event" itself puts the plaintiff on notice to investigate the facts and circumstances relevant to her claim in order to pursue her remedies. *Id.* See, also, *Graham, supra*, 128 Cal.App.3d at 972-973, 180 Cal.Rptr. at 609; *McGee, supra*, 97 Cal.App.3d at 803, 159 Cal.Rptr. at 89-90

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 the present case, the Fifth District determined that *Flowers* was inapposite. (See Appendix at A14 fn 1). Instead, the court concluded that this case was more analogous to *Akers v. Alonzo* (1992), 65 Ohio St.3d 422, 605 N.E.2d 1, 1992 Ohio 66. However, the court’s reliance on *Akers* is misplaced as *Akers* is distinguishable from the present case.

In *Akers*, the plaintiff pursued a claim for failure to diagnose bladder cancer. The defendant urologist, Dr. Alonzo, had taken several biopsies from plaintiff’s bladder which did not identify the cancer. However, after plaintiff continued to complain of blood in his urine, plaintiff was referred to a surgeon. At that time, plaintiff was diagnosed with bladder carcinoma. Plaintiff initially brought suit against his urologist, Dr. Alonzo. However, subsequently plaintiff learned that Dr. DeLamerens', a pathologist, had interpreted the pathology slides.

In finding this case distinguishable from *Flowers*, this Court 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 that other physician had made an incorrect diagnosis.

Id. at 425-426.

Clearly, *Akers*, is distinguishable from the present case. The significant factor distinguishing *Akers* from *Flowers* was that the plaintiff in *Akers* had no way of discovering the defendant pathologist's involvement in his care. Here, as in *Flowers*, Dr. Swoger identity was clearly set forth in the medical records. Moreover, unlike the plaintiff in *Akers*, Appellee knew that Dr. Swoger was involved in the Decedent's care and in fact provided him her husband's medical history at the time of Dr. Swoger's initial consultation.

In addition to the fact, that *Akers* is clearly distinguishable from the facts in the present case. A number of appellate decisions have addressed similar issues since *Flowers* and *Akers* were decided in 1992. These cases have repeatedly rejected the argument adopted by the Fifth District in this case.

In *Hans v. Ohio State University* (June 28, 2007), 10th Dist. App. No. 07AP-10, 2007 Ohio App. LEXIS 3294, unreported, the Tenth District Court of Appeals, rejected a the same argument adopted by the Fifth District in this case. Plaintiff's decedent was diagnosed with cancer and came under the care and treatment of the defendant-surgeon. Three rounds of chemotherapy were instituted. The last two rounds of chemotherapy were ordered by a physician's assistant. Plaintiff's decedent subsequently passed away due to the toxicity of the chemotherapy agents.

Plaintiff brought several suits against physicians involved in decedent's care. After dismissing each of these cases, Plaintiff brought suit against OSUMC in October

2001, more than 4 years after the decedent's death alleging, among other things, that an unknown physician's assistant and unknown nurses provided negligent care. The trial court granted summary on the grounds that plaintiff's claims were barred by the statute of limitations.

The court of appeals, summarized the plaintiff's argument on appeal 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. 3).

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. 4) emphasis added.

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) emphasis added.

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), 12th 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). ¹ See, also, *Kaplun v. Brenner* (2000), Montgomery Appeal No. 17791, 2000 WL 234707, unreported (rejecting argument that defendant was properly named after statute had expired because plaintiff did not know of malpractice until after plaintiff’s expert reviewed case); *Van Boxel v. Norton Family Practice* (1999) Summit Appeal No. C.A. 19229, 1999 WL 247783 unreported (rejecting argument that defendant was properly named after statute had expired because plaintiff did not know of malpractice until after plaintiff’s expert reviewed case; *Jones v. St. Anthony Medical Center* (February 20, 1996), Franklin Co. No. 95APE08-1014, unreported, (“Unlike *Akers*, Mr. Jones was aware of the existence of x-rays, and his own pleadings reflected he was aware other physicians would review his x-rays...according to the *Flowers*’ analysis, such awareness prompts a duty to discovery the tortfeasor’s identities); and *Yaceczko v. Roy*

(January 10, 2001), Summit County No. 20091, unreported, (rejecting argument that statute began to run when the plaintiff learned of two conflicting x-ray reports because plaintiff could have discovered this information had he reviewed the relevant medical records before the statute expired).

In the present case, Appellee had two years from Decedent's death to obtain the records, 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 reality of the matter is the Appellee did not seek counsel until shortly before the statute on her claim expired. (*See Supplement at p. 15*). The fact that Appellee 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 a plaintiff to thoroughly investigate her case within the statute of limitations as required under *Flowers*, the Fifth District has given the green light to dilatory investigation. Neither Civ. R. 15(D) nor the discovery rule can be used to excuse a plaintiff's duty to comply with the statute of limitations.

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 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 that this Court takes this opportunity to clarify the duties imposed upon a medical malpractice plaintiff once a cause of action for malpractice accrues.

Accordingly, the Appellants, Dr. Swoger and UIMs, respectfully request this Court to reverse the Fifth District's decision in this case and reinstate the summary judgment that had been granted in Appellants' favor by the trial court.

Respectfully submitted,

By: 

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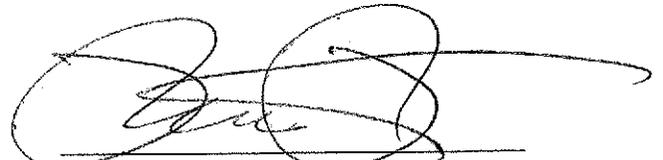
*Attorney for Defendants-Appellants, William
V. Swoger, M.D. and Union Internal
Medicine Specialties, Inc.*

CERTIFICATE OF SERVICE

A copy of the foregoing was served by regular U.S. mail, first class postage prepaid, this 8th day of September, 2009 upon:

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<<HCP #49293-v1>>

APPENDIX

IN THE SUPREME COURT OF OHIO

CORA ERWIN, ADMINISTRATRIX OF
THE ESTATE OF RUSSELL ERWIN

Plaintiff-Appellee

v.

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

Defendants-Appellants.

SUPREME COURT CASE NO.

09-0580

On Appeal from the Court of Appeals,
Tuscarawas County, Ohio, Fifth Appellate
District, Case No. 08-CA-28

**NOTICE OF APPEAL OF DEFENDANTS- APPELLANTS, WILLIAM V. SWOGER,
D.O. AND UNION INTERNAL MEDICINE SPECIALTIES, INC.**

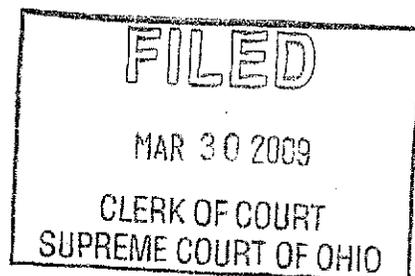
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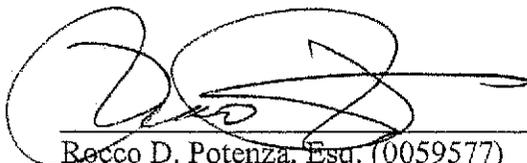


NOTICE OF APPEAL

Defendants-Appellants William Swoger, D.O. and Union Internal Medical Specialties, Inc. hereby give notice of their appeal to the Ohio Supreme Court from the Journal Entry of the Court of Appeals for Tuscarawas County, Ohio, Fifth Appellate District, dated February 13, 2009, entered in *Cora Erwin, Administratrix of the Estate of Russel Erwin v. Joseph Bryan, M.D., et a al.*, Fifth District Court of Appeals Case No. 08-CA-28.

This is a case of public or great general interest.

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 27th day of March, 2009 upon:

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<<HCP #472607-v1>>

IN THE COURT OF APPEALS FOR 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

JUDGMENT ENTRY

Case No. 08-CA-28

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

FEB 13 2009

ROCKNE W. CLARKE
Clerk of Courts

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
Tuscarawas County, Ohio.

Rockne W. Clarke
Clerk of Courts, Tuscarawas County

[Signature]
Deputy Clerk

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

APPEARANCES:

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ROCKNE W. CLARKE

Clerk of Courts For Defendants-Appellees:

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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.

{¶4} 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.

{¶5} 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.

{¶6} 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.

{¶7} 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.

{¶18} 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.

{¶19} 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.*, 5th 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 425-426.¹

{¶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

¹ 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, 11th 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).

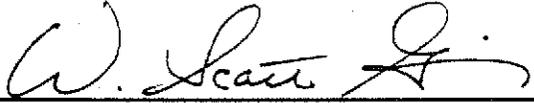
{¶49} Based on the foregoing, we find Appellant's assignment of error to be well taken and reverse the judgment of the Tuscarawas County Court of Common Pleas and remand for further proceedings consistent with this opinion.

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

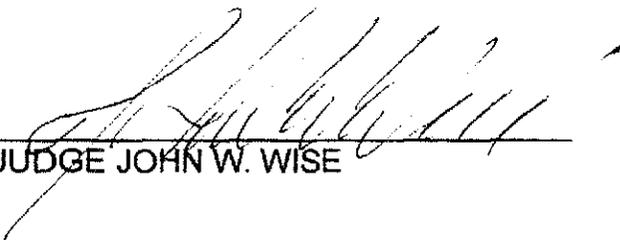
{¶150} I respectfully dissent from the majority decision.

{¶151} 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.

{¶152} 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.

{¶153} 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

FILED
COURT OF COMMON PLEAS
TUSCARAWAS COUNTY OHIO

IN THE COURT OF COMMON PLEAS

2009 JUL 10 A 10: 09

TUSCARAWAS COUNTY, OHIO

ROCKNE W. CLARKE
CLERK OF COURTS

GENERAL TRIAL DIVISION

**CORA ERWIN, INDIVIDUALLY AND
AS ADMINISTRATRIX OF THE
ESTATE OF RUSSELL ERWIN,
DECEASED,**

CASE NO. 2009 CM 02 0149

**JUDGE
EDWARD EMMETT O'FARRELL**

vs.

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

DEFENDANTS

JUDGMENT ENTRY-FURTHER
NON-ORAL CONSIDERATION
CONDUCTED ON 7/9/2009-COURT
ACKNOWLEDGES 7/1/2009 ENTRY
ISSUED BY THE SUPREME COURT
OF OHIO AND FILED AT THE CLERK
OF COURT'S, TUSCARAWAS COUNTY,
OHIO, GENERAL TRIAL DIVISION ON
7/7/2009 ACCEPTING THE APPEAL OF
APPELLANTS WILLIAM V. SWOGER,
D.O. AND UNION INTERNAL MEDICINE
SPECIALTIES, INC., FROM OPINION
AND JUDGMENT ENTRY OF COURT OF
APPEALS FOR TUSCARAWAS COUNTY,
OHIO FILED 2/13/2009-STAY ORDERS
CONTAINED IN 5/1/2009 JUDGMENT
ENTRY EXTENDED INDEFINITELY
UNTIL RESOLUTION OF APPEAL IN
THE SUPREME COURT OF OHIO-
ORDERS ENTERED

This matter was considered by Edward Emmett O'Farrell, Judge, Court of Common Pleas, Tuscarawas County, Ohio, General Trial Division, on 7/9/2009 on a **Non-Oral** basis relative to the following:

RECEIVED
JUL 14 2009

- ◆ 2/13/2009 **Opinion and Judgment Entry** issued by Court of Appeals for Tuscarawas County, Ohio, in Appellate Case No. 08-CA-28 **reversing and remanding** the 4/8/2008 Judgment Entry of this Court **Granting Summary Judgment and Dismissing** Complaint against Defendants William Swoger, D.O., and Union Internal Medicine Specialties, Inc., in Case No. 2006 CM 07 0423.
- ◆ 5/1/2009 **Judgment Entry** in this case **Staying**, Indefinitely, these proceedings until the Supreme Court of Ohio decides an **Appeal** taken to that Court by Appellants William Swoger, D.O. and Union Internal Medicine Specialties, Inc., in Case No. 2006 CM 07 0423.
- ◆ 7/1/2009 **Entry** issued by the Supreme Court of Ohio in Case No. 2009 CM02 0149 and filed at the Clerk's of Courts, Court of Common Pleas, Tuscarawas County, Ohio, General Trial Division on 7/7/2009 accepting Appellant's Appeal for Decision.

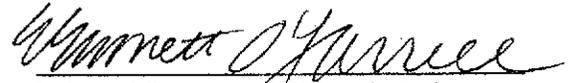
The Court

FINDS that by virtue of the Supreme Court of Ohio in its 7/1/2009 Entry accepting the Appeal of Appellants Swoger and Union Internal Medicine Specialties, Inc., the **Stay Orders** contained in the 5/1/2009 Judgment Entry, in this case, should be extended indefinitely and this case placed on **Inactive Case Status**.

It is therefore

ORDERED that for the reasons indicated above the **Stay Orders** contained in this Court's 5/1/2009 **Judgment Entry** are extended indefinitely. The **Stay Orders** shall remain in full force and effect until the Supreme Court of Ohio has issued a decision in the **Appeal** in that Court in Case No. 2009 -0580.

ORDERED that the Clerk of Courts shall place this case on **Inactive Case Status** until further reactivation Orders are issued.


Edward Emmett O'Farrell, Judge

1/9/2009
Date

Copies to: Court Administrator's Office
Attys. Jessica A. Perse & Ronald A. Margolis
Atty. Rocco D. Potenza
Atty. John P. O'Neil

EEO'F/rb

§ **2125.02**. Persons entitled to recover; determination of damages; limitation of actions

(A) (1) Except as provided in this division, a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. A parent who abandoned a minor child who is the decedent shall not receive a benefit in a civil action for wrongful death brought under this division.

(2) The jury, or the court if the civil action for wrongful death is not tried to a jury, may award damages authorized by division (B) of this section, as it determines are proportioned to the injury and loss resulting to the beneficiaries described in division (A)(1) of this section by reason of the wrongful death and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

(3) (a) The date of the decedent's death fixes, subject to division (A)(3)(b)(iii) of this section, the status of all beneficiaries of the civil action for wrongful death for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after the decedent's death is a beneficiary of the action.

(b) (i) In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

(ii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence of the cost of an annuity in connection with an issue of recoverable future damages. If that evidence is presented, then, in addition to the factors described in division (A)(3)(b)(i) of this section and, if applicable, division (A)(3)(b)(iii) of this section, the jury or court may consider that evidence in determining the future damages suffered by reason of the wrongful death. If that evidence is presented, the present value in dollars of an annuity is its cost.

(iii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence that the surviving spouse of the decedent is remarried. If that evidence is presented, then, in addition to the factors described in divisions (A)(3)(b)(i) and (ii) of this section, the jury or court may consider that evidence in determining the damages suffered by the surviving spouse by reason of the wrongful death.

(B) Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:

(1) Loss of support from the reasonably expected earning capacity of the decedent;

(2) Loss of services of the decedent;

(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;

(4) Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;

(5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.

(C) A personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of a civil action for wrongful death, may settle with the defendant the amount to be paid.

(D) (1) Except as provided in division (D)(2) of this section, a civil action for wrongful death shall be commenced within two years after the decedent's death.

(2) (a) Except as otherwise provided in divisions (D)(2)(b), (c), (d), (e), (f), and (g) of this section or in section 2125.04 of the Revised Code, no cause of action for wrongful death involving a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(b) Division (D)(2)(a) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(c) Division (D)(2)(a) of this section does not bar a civil action for wrongful death involving a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the decedent's death, has not expired in accordance with the terms of that warranty.

(d) If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section but less than two years prior to the expiration of that period, a civil action for wrongful death involving a product liability claim may be commenced within two years after the decedent's death.

(e) If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, a civil action for wrongful death involving a product liability claim may be commenced within two years after the disability is removed.

(f) (i) Division (D)(2)(a) of this section does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is a substance or device described in division (B)(1), (2), (3), or (4) of section 2305.10 of the Revised Code and the decedent's death

resulted from exposure to the product during the ten-year period described in division (D)(2)(a) of this section.

(ii) If division (D)(2)(f)(i) of this section applies regarding a civil action for wrongful death, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death based on a cause of action described in division (D)(2)(f)(i) of this section shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(g) Division (D)(2)(a) of this section does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is a substance or device described in division (B)(5) of section 2315.10 of the Revised Code. If division (D)(2)(g) of this section applies regarding a civil action for wrongful death, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death based on a cause of action described in division (D)(2)(g) of this section shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(E) (1) If the personal representative of a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from a civil action for wrongful death or if any person listed in division (A)(1) of this section who is permitted to benefit from a civil action for wrongful death commenced in relation to a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from the action, the personal representative or the person may file a motion in the court in which the action is commenced requesting the court to issue an order finding that the parent abandoned the minor and is not entitled to recover damages in the action based on the death of the minor.

(2) The movant who files a motion described in division (E)(1) of this section shall name the parent who abandoned the deceased minor and, whether or not that parent is a resident of this state, the parent shall be served with a summons and a copy of the motion in accordance with the Rules of Civil Procedure. Upon the filing of the motion, the court shall conduct a hearing. In the hearing on the motion, the movant has the burden of proving, by a preponderance of the evidence, that the parent abandoned the minor. If, at the hearing, the court finds that the movant has sustained that burden of proof, the court shall issue an order that includes its findings that the parent abandoned the minor and that, because of the prohibition set forth in division (A)(1) of this section, the parent is not entitled to recover damages in the action based on the death of the minor.

(3) A motion requesting a court to issue an order finding that a specified parent abandoned a minor child and is not entitled to recover damages in a civil action for

wrongful death based on the death of the minor may be filed at any time during the pendency of the action.

(F) This section does not create a new cause of action or substantive legal right against any person involving a product liability claim.

(G) As used in this section:

(1) "Annuity" means an annuity that would be purchased from either of the following types of insurance companies:

(a) An insurance company that the A. M. Best Company, in its most recently published rating guide of life insurance companies, has rated A or better and has rated XII or higher as to financial size or strength;

(b) (i) An insurance company that the superintendent of insurance, under rules adopted pursuant to Chapter 119. of the Revised Code for purposes of implementing this division, determines is licensed to do business in this state and, considering the factors described in division (G)(1)(b)(ii) of this section, is a stable insurance company that issues annuities that are safe and desirable.

(ii) In making determinations as described in division (G)(1)(b)(i) of this section, the superintendent shall be guided by the principle that the jury or court in a civil action for wrongful death should be presented only with evidence as to the cost of annuities that are safe and desirable for the beneficiaries of the action who are awarded compensatory damages under this section. In making the determinations, the superintendent shall consider the financial condition, general standing, operating results, profitability, leverage, liquidity, amount and soundness of reinsurance, adequacy of reserves, and the management of a particular insurance company involved and also may consider ratings, grades, and classifications of any nationally recognized rating services of insurance companies and any other factors relevant to the making of the determinations.

(2) "Future damages" means damages that result from the wrongful death and that will accrue after the verdict or determination of liability by the jury or court is rendered in the civil action for wrongful death.

(3) "Abandoned" means that a parent of a minor failed without justifiable cause to communicate with the minor, care for the minor, and provide for the maintenance or support of the minor as required by law or judicial decree for a period of at least one year immediately prior to the date of the death of the minor.

(4) "Minor" means a person who is less than eighteen years of age.

(5) "Harm" means death.

(6) "Manufacturer," "product," "product liability claim," and "supplier" have the same meanings as in section 2307.71 of the Revised Code.

(H) Divisions (D), (G)(5), and (G)(6) of this section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after the effective date of this amendment, in which those divisions are relevant, regardless of when the cause of action accrued and

notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to the effective date of this amendment.

History:

GC § 10509-167; 114 v 320(438); Bureau of Code Revision, 10-1-53; 125 v 903(981) (Eff 10-1-53); 133 v S 104 (Eff 11-21-69); 139 v H 332 (Eff 2-5-82); 142 v H 1 (Eff 1-5-88); 144 v H 166 (Eff 8-3-92); 146 v H 350 (Eff 1-27-97); 149 v S 108, § 2.01. Eff 7-6-2001; 150 v S 80, § 1, eff. 4-7-05.

Ohio Rules Of Civil Procedure
Title III Pleadings And Motions

Ohio Civ. R. 15 (2009)

Review Court Orders which may amend this Rule.

Rule 15. Amended and supplemental pleadings

(A) Amendments.

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(B) Amendments to conform to the evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(C) Relation back of amendments.

Whenever the claim or defense 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, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of

clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

(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 a copy thereof must be served personally upon the defendant.

(E) Supplemental pleadings.

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefore.

Rule 3. Commencement of action; venue

(A) Commencement.

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 an incorrectly named defendant whose name is later corrected pursuant to Civ. R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ. R. 15(D).

(B) Venue: where proper.

Any action may be venued, commenced, and decided in any court in any county. When applied to county and municipal courts, "county," as used in this rule, shall be construed, where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

- (1)** The county in which the defendant resides;
- (2)** The county in which the defendant has his or her principal place of business;
- (3)** A county in which the defendant conducted activity that gave rise to the claim for relief;
- (4)** A county in which a public officer maintains his or her principal office if suit is brought against the officer in the officer's official capacity;
- (5)** A county in which the property, or any part of the property, is situated if the subject of the action is real property or tangible personal property;
- (6)** The county in which all or part of the claim for relief arose; or, if the claim for relief arose upon a river, other watercourse, or a road, that is the boundary of the state, or of two or more counties, in any county bordering on the river, watercourse, or road, and opposite to the place where the claim for relief arose;
- (7)** In actions described in Civ. R. 4.3, in the county where plaintiff resides;
- (8)** In an action against an executor, administrator, guardian, or trustee, in the county in which the executor, administrator, guardian, or trustee was appointed;
- (9)** In actions for divorce, annulment, or legal separation, in the county in which the plaintiff is and has been a resident for at least ninety days immediately preceding the filing of the complaint;
- (10)** In actions for a civil protection order, in the county in which the petitioner currently or temporarily resides;
- (11)** In tort actions involving asbestos claims, silicosis claims, or mixed dust disease claims, only in the county in which all of the exposed plaintiffs reside, a county where all of the exposed plaintiffs were exposed to asbestos, silica, or mixed dust, or the county in which the defendant has his or her principal place of business.
- (12)** If there is no available forum in divisions (B)(1) to (B)(10) of this rule, in the

county in which plaintiff resides, has his or her principal place of business, or regularly and systematically conducts business activity;

(13) If there is no available forum in divisions (B)(1) to (B)(11) of this rule:

(a) In a county in which defendant has property or debts owing to the defendant subject to attachment or garnishment;

(b) In a county in which defendant has appointed an agent to receive service of process or in which an agent has been appointed by operation of law.

(C) Change of venue.

(1) When an action has been commenced in a county other than stated to be proper in division (B) of this rule, upon timely assertion of the defense of improper venue as provided in Civ. R. 12, the court shall transfer the action to a county stated to be proper in division (B) of this rule.

(2) When an action is transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in division (B) of this rule.

(3) Before entering a default judgment in an action in which the defendant has not appeared, the court, if it finds that the action has been commenced in a county other than stated to be proper in division (B) of this rule, may transfer the action to a county that is proper. The clerk of the court to which the action is transferred shall notify the defendant of the transfer, stating in the notice that the defendant shall have twenty-eight days from the receipt of the notice to answer in the transferred action.

(4) Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.

(D) Venue: no proper forum in Ohio.

When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the proper forum. If all defendants agree to the conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice. If all defendants do not agree to or comply with the conditions, the court shall hear the action.

If the court determines that a proper forum does not exist in another jurisdiction, it shall hear the action.

(E) Venue: multiple defendants and multiple claims for relief.

In any action, brought by one or more plaintiffs against one or more defendants involving one or more claims for relief, the forum shall be deemed a proper forum, and venue in the forum shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief.

Neither the dismissal of any claim nor of any party except an indispensable party shall affect the jurisdiction of the court over the remaining parties.

(F) Venue: notice of pending litigation; transfer of judgments.

(1) When an action affecting the title to or possession of real property or tangible personal property is commenced in a county other than the county in which all of the real property or tangible personal property is situated, the plaintiff shall cause a certified copy of the complaint to be filed with the clerk of the court of common pleas in each county or additional county in which the real property or tangible personal property affected by the action is situated. If the plaintiff fails to file a certified copy of the complaint, third persons will not be charged with notice of the pendency of the action.

To the extent authorized by the laws of the United States, division (F)(1) of this rule also applies to actions, other than proceedings in bankruptcy, affecting title to or possession of real property in this state commenced in a United States District Court whenever the real property is situated wholly or partly in a county other than the county in which the permanent records of the court are kept.

(2) After final judgment, or upon dismissal of the action, the clerk of the court that issued the judgment shall transmit a certified copy of the judgment or dismissal to the clerk of the court of common pleas in each county or additional county in which real or tangible personal property affected by the action is situated.

(3) When the clerk has transmitted a certified copy of the judgment to another county in accordance with division (F)(2) of this rule, and the judgment is later appealed, vacated or modified, the appellant or the party at whose instance the judgment was vacated or modified must cause a certified copy of the notice of appeal or order of vacation or modification to be filed with the clerk of the court of common pleas of each county or additional county in which the real property or tangible personal property is situated. Unless a certified copy of the notice of appeal or order of vacation or modification is so filed, third persons will not be charged with notice of the appeal, vacation, or modification.

(4) The clerk of the court receiving a certified copy filed or transmitted in accordance with the provisions of division (F) of this rule shall number, index, docket, and file it in the records of the receiving court. The clerk shall index the first certified copy received in connection with a particular action in the indices to the records of actions commenced in the clerk's own court, but may number, docket, and file it in either the regular records of the court or in a separate set of records. When the clerk subsequently receives a certified copy in connection with that same action, the clerk need not index it, but shall docket and file it in the same set of records

under the same case number previously assigned to the action.

(5) When an action affecting title to registered land is commenced in a county other than the county in which all of such land is situated, any certified copy required or permitted by this division (F) of this rule shall be filed with or transmitted to the county recorder, rather than the clerk of the court of common pleas, of each county or additional county in which the land is situated.

(G) Venue: collateral attack; appeal.

The provisions of this rule relate to venue and are not jurisdictional. No order, judgment, or decree shall be void or subject to collateral attack solely on the ground that there was improper venue; however, nothing here shall affect the right to appeal an error of court concerning venue.

(H) As used in division (B)(11) of this rule:

(1) "Asbestos claim" has the same meaning as in section 2307.91 of the Revised Code;

(2) "Silicosis claim" and "mixed dust disease claim" have the same meaning as in section 2307.84 of the Revised Code;

(3) In reference to an asbestos claim, "tort action" has the same meaning as in section 2307.91 of the Revised Code;

(4) In reference to a silicosis claim or a mixed dust disease claim, "tort action" has the same meaning as in section 2307.84 of the Revised Code.

History:

Amended, eff 7-1-71; 7-1-86; 7-1-91; 7-1-98; 7-1-05.

Ohio Rules Of Civil Procedure
Title VII Judgment

Ohio Civ. R. 56 (2009)

Review Court Orders which may amend this Rule.

Rule 56. Summary judgment

(A) For party seeking affirmative relief.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion for pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings.

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion.

If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are

actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) When affidavits unavailable.

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

History:

Amended, eff 7-1-76; 7-1-97; 7-1-99.