

In the Supreme Court of Ohio
No. 2009-0580

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

CORA ERWIN, Administratrix of the Estate of Russell Erwin

Appellees,

vs.

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

Appellants.

BRIEF OF AMICUS CURIAE
THE OHIO STATE BAR ASSOCIATION
In Support of Plaintiff-Appellee Cora Erwin

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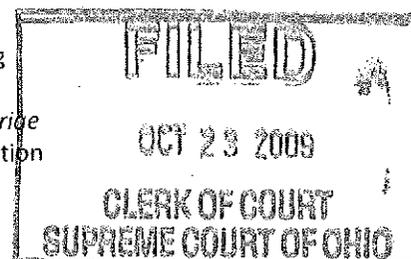


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II. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio State Bar Association (“OSBA”) is an unincorporated association of more than 25,000 members, including lawyers, judges, law students, and paralegals. The OSBA’s lawyer members range from sole practitioners to members practicing in the nation’s largest law firms. Its members’ practices include every aspect of legal service. As stated in its Constitution, the OSBA’s purpose is, in part, “to promote improvement of the law, our legal system and the administration of justice.” This *amicus curiae* brief furthers these purposes.

The present case presents an issue of fundamental interest to the public and Bar of Ohio – the efficiency of the litigation process. More specifically, in an era of diminishing resources, can Ohio countenance a process that requires lawyers to name as defendants in a medical claim every provider who may have been even peripherally involved with a patient’s care?

Members of the Association represent both sides in medical claims disputes. Neither plaintiff nor defendant is well-served by increasing the costs of litigation. Clearly, the public is not. While this brief does not speak for medical providers, it is evident based on public pronouncements and the costs of simply filing an Answer that such providers are also not well-served by including every one whose name appears in a patient’s file as a defendant.

The OSBA takes no position on the merits of the underlying medical claim. Rather, the OSBA believes the most important issue before this Court is whether the

legal process to be endorsed is rational, efficient and protects the public, participants in the process and the Bar.

III. ARGUMENT

A. First Proposition of Law

Requiring plaintiffs in medical claims to name health care providers identified in their medical records as defendants without knowledge of their culpability, in order to avoid statute of limitations issues, is bad policy and practice.

If the Supreme Court of Ohio reverses the decision of the Court of Appeals in this case, and accepts the argument of the Appellants, the Court will put lawyers representing plaintiffs with medical claims in an untenable position: either risk violating Ohio law and the Rules of Professional Responsibility by asserting a potentially frivolous claim,¹ or create a substantial risk of legal malpractice for failing to name as a defendant a person who may ultimately be discovered to bear some liability. Because of the latter risk, if the Court accepts Appellants' argument, it will encourage the "shotgunning" of defendants, *viz.*, naming an individual as a defendant when that person's potential

¹ Prof.Cond.R. 3.1 of the Ohio Rules of Professional Conduct states "a lawyer shall not bring or defend a proceeding...unless there is a basis in law and fact for doing so that is not frivolous..."

Prof.Cond.R. 4.4(a) states that "in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violates the legal rights of such a person."

R.C. 2323.51 addresses the filing of frivolous claims. Civil Rule 11 states that the signature of counsel to a pleading constitutes a certification that the attorney has read the document ; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. A willful violation of this rule can subject the attorney to sanctions.

liability cannot be reasonably ascertained at the time of filing. "Shotgunning" is a practice condemned as bad for the medical profession and the public, as well as the bar and courts. However, if Appellants' argument is accepted, lawyers will be routinely forced, as a proactive defensive measure, to join as defendants health care professionals whom they might not otherwise, out of necessity to protect their clients' rights and avoid exposure for legal malpractice.

While the Ohio State Bar Association cannot and does not speak for the medical profession or other health care providers, the positions taken in an earlier case and in communications to members by the associations representing the medical profession clearly disclose their opposition to the practice of "shotgunning" defendants. In an *amicus curiae* brief filed by the American Medical Association and the Ohio State Medical Association in 2005 in the case of *Barbato v. Mercy Mercy Med. Ctr.*,² in the same court of appeals that decided the instant case, the medical associations stated:

The AMA, the OSMA, and their physician members have a direct and important interest which will be affected by the outcome of this case. *Amici* have adopted numerous policies deploring unfounded and excessive litigation against physicians for claims of medical malpractice. One aspect of such excess is the inclusion of clearly blameless physicians as defendants in cases that might otherwise have a core of legitimacy. If a physician has some peripheral connection with the plaintiff's medical care, he or she is likely to be swept into the suit, regardless of his or her individual conduct.

² 5th Dist. No. 2005 CA 00044, 2005-Ohio-5219.

The AMA and the OSMA recognize that malpractice lawsuits against their members are an inevitable aspect of the American system of justice. However, justice also assumes an element of good faith on the part of the lawyers who file those suits.³

By its decision in this case, the Court will present a clear choice for practitioners—either name all health care professionals whose names appear in a medical record and then dismiss non-culpable parties based upon further formal discovery, or name only those tortfeasors whose fault is reasonably apparent from the medical records and add other potentially liable parties who are identified during formal discovery. The OSBA believes this Court’s precedent has already advocated the latter choice to be the best course.

Avoiding the “Shotgunning” of Defendants

Historically, some procedures have been developed with the cooperation of the bar and medical profession in an attempt to minimize the necessity of “shotgunning” defendants, which procedures place special burdens on plaintiffs filing medical claims that are not required of other tort claimants.

Legislatively, for example, R.C. 2305.113(B),⁴ known as the “180 day letter” provision, was enacted to give plaintiffs the ability to briefly to extend the statute of limitations in medical claims. In recognition of the fact that a lay person might come to a lawyer at the last minute, with no expertise or documents to substantiate such a claim

³ Id. at p.6

⁴ Formerly R.C. 2305.11(a)

or identify culpable health care professionals, the 180 day letter provision was enacted to allow counsel some time to obtain voluminous medical records, consult with medical experts, or otherwise investigate such a claim before filing a medical claim and naming a health care provider as a defendant.

More recently, the Civil Rules were amended to include the affidavit of merit provision of Civil R. 10(D)(2) . Effective July 1, 2005, an affidavit of merit must be filed with any medical claim as defined in R.C. 2305.113. By the express provisions of the Rule, the filing of a medical claim must be accompanied by the sworn statement of a medical expert who meets the qualifications of Evid. R. 601(D) and Evid.R. 702, averring that the medical expert has reviewed all medical records reasonably available to the plaintiff concerning the allegations in the complaint, is familiar with the appropriate standard of care, and is of the opinion that the defendant(s) fell below accepted standards of care and proximately caused injury to the plaintiff. Such an affidavit is required for **each** defendant. So, any time an injured patient sues a doctor, hospital (which, of necessity requires suing all its employees and independent contractors), dentist, optometrist, or chiropractor, the patient's attorney must obtain medical records, locate and pay a qualified expert to review the records, and file the appropriate affidavit. These all must be accomplished prior to filing the claim. No other tort claim requires, by rule or statute, an affidavit of merit **before filing a claim**.

In conjunction with representatives of health care providers, the Ohio State Bar Association took an active role in the drafting and promulgation of the affidavit of merit requirement. The Ohio State Medical Association recognized the importance of the

Affidavit of Merit requirement in the effort to minimize “shotgun” lawsuits, in its

July/August 2005 newsletter:

Starting July 1, 2005, a new provision in OSMA’s tort reform law (H.B. 215), will require all plaintiff attorneys to file an “Affidavit of Merit” attesting to the specific role of any physician named as a defendant in a medical liability lawsuit.

The Affidavit of Merit requirement is designed to decrease the number of so-called ‘shotgun’ lawsuits filed against physicians, thereby reducing costs and creating a more stable medical liability insurance market. The measure also helps ensure that only qualified expert witnesses are able to testify in medical liability cases.

Instead of filing suit against every physician who treated the patient only to sort out the details later, plaintiff attorneys will be required to invest the time and resources to verify the proper defendants.

Specifically, the Affidavit of Merit and H.B. 215 require the following:

1. Plaintiff attorneys to file an Affidavit of Merit from an appropriately qualified medical expert for each named defendant in a medical liability case. This ensures that plaintiff attorneys engage in the appropriate due diligence prior to filing a lawsuit and that only meritorious defendants are named in the case.
2. Expert witness must spend three-fourths of their time in the active clinical practice of medicine or its instruction, and must practice in the same or substantially similar medical specialty as the defendant.
3. Medical expert witnesses must state with particularity in the Affidavit of Merit their qualifications, familiarity with the applicable standard of care, opinion as to the manner in which the standard was breached, and how the breach resulted in the injury or death.⁵

⁵ http://osma.org/files/members/Ohio_Medicine_July_August2005.pdf. Last visited Monday, October 19, 2009.

Importantly, because some trial courts were initially interpreting the affidavit of merit requirement to mandate that expert affidavits be based *exclusively* on a review of medical records – and to preclude any formal discovery - the Rule was subsequently amended effective July 1, 2007. This amendment recognized the necessity in some cases of allowing a medical claim to be filed without any affidavits, and formal discovery conducted, in order to determine whether affidavits could be obtained. **Implicit in such amendment was the recognition that simply identifying health care providers in a medical chart was often inadequate to discern *culpability* on the part of such medical professionals.**

The Staff Notes to Civ.R. 10(D)

The staff note to the current version of Civ.R. 10(D) contains critical language relevant to this appeal. While this language discusses the availability of an extension of time to obtain affidavits under Civ.R. 10(D)(2)(b) , it is equally pertinent to the relation back arguments urged by this amicus in this case:

Because there may be circumstances in which the plaintiff is unable to provide an affidavit of merit when the complaint is filed, division (D)(2)(b) of the rule requires the trial court, when good cause is shown, to provide a reasonable period of time for the plaintiff to obtain and file the affidavit. Division (D)(2)(c) details the circumstances and factors which the Court should consider in determining whether good cause exists to grant the plaintiff an extension of time to file the affidavit of merit. For example, “good cause” may exist in a circumstance where the plaintiff obtains counsel near the expiration of the statute of limitations, and counsel does not have sufficient time to identify a qualified health care provider to conduct the necessary review of applicable medical

records and prepare an affidavit. Similarly, the relevant medical records may not have been provided to the plaintiff in a timely fashion by the defendant or a nonparty to the litigation who possesses the records. Further, there may be situations where the medical records do not reveal the names of all of the potential defendants and so until discovery reveals those names, it may be necessary to name a “John Doe” defendant. Once discovery has revealed the name of a defendant previously designated as John Doe and that person is added as a party, the affidavit of merit is required as to that newly named defendant. **The medical records might also fail to reveal how or whether medical providers who are identified in the records were involved in the care that led to the malpractice.** Under these and other circumstances not described here, the court must afford the plaintiff a reasonable period of time to submit an affidavit that satisfies the requirements set forth in the rule.

It is intended that the granting of an extension of time to file an affidavit of merit should be **liberally applied**, but within the parameters of the “good cause” requirement. The court should also exercise its discretion to **aid plaintiff** in obtaining the **requisite information**. (Emphasis added.)⁶

If the Court in this case adopts the position urged by Appellants, which position is contrary to the language in the Staff Note to Civ.R. 10(D), it will be encouraging a return to a practice condemned by both the bar and the medical profession. For Appellants’ position compels the presumption that every health care professional named in a medical record may be liable until proven otherwise and must, therefore, be named in the suit.

⁶ The question of whether the plaintiff in this case needed to file an extension under Civ. R. 10(D)(2)(b) to get an affidavit as to Dr. Swoger once he was identified as a defendant is not before the Court.

Plaintiff's claim against Dr. Swoger

In deciding whether Dr. Swoger and his professional corporation were timely sued, the Ohio State Bar Association respectfully asks the Supreme Court of Ohio to recognize, as do the staff notes to Civil Rule 10(D), that a patient's medical records may have been destroyed, are often voluminous, contain inaccuracies and/or are incomplete, are often slow to be turned over to the patient,⁷ contain myriad illegible entries, do not identify who many of the writers actually are, do not reflect verbal consultations between doctors, and most assuredly do not provide yellow highlighting identifying an individual whose name appears in the record as "a tortfeasor in the case".

As any individual who has been a patient in a hospital knows, teams of physician specialists, lab technicians, and nurses, working for different legal entities, now perform medical treatment, all under the aegis of the hospital. The role and identity of many of these specialists, such as pathologists and radiologists, are usually totally unknown to the patients. A typical hospital admission can produce a chart with physicians' progress notes, physicians' orders, nurses' notes, medication-administration records, respiratory, occupational, and physical therapist forms, consultation reports, a discharge summary, operative reports, and anesthesia records. Other records can include radiology records, pathology records, department logs, videotapes, controlled substances records, and billing records.⁸

⁷ According to plaintiff's brief in the court of appeals, it was undisputed that at the time of the original filing the plaintiff had not received the complete medical chart.

⁸ James P. Frickleton, *How to mine the medical records*, Trial, Volume 40, No. 5 (May 2004)

In addition, the question of who employs the nurses, attending physicians, consultants, residents and other allied medical professionals can be positively byzantine to the average lay person, and usually unknowable from the medical records. *See, e.g., Clark v. Southview Hosp. & Family Health Ctr.*⁹ (Emergency room doctor not an employee of the Hospital, but of a professional corporation that contracts with the Hospital). The result of all of this is that a patient may very well learn through formal discovery—and only through formal discovery—that a medical professional whom the patient has never met or heard of is responsible for the patient’s injury. To require the plaintiff to sue every defendant whose name is “known”— *i.e.* listed, in the medical record, is expensive, harms reputations, results in increased insurance premiums, and is unduly burdensome. It wastes the time of doctors, attorneys and the courts.

Appellants argue that a plaintiff has a “duty to discover” not only the possibility he or she may have been injured as a result of malpractice, but to **also discover the identity of any and all defendants before filing suit**. However, Appellants do not offer any suggestion as to how a plaintiff in a medical claim can comply with such a duty as Appellants would impose, without the formal powers of discovery available only upon filing. Formal post-filing discovery is often necessary to identify a tortfeasor, and to make the legally required connection between that individual and the conduct that harmed the patient. The staff note to Civ.R. 10(D) expressly recognizes this situation

⁹ (1994), 68 Ohio.St.3d 435, 682 N.E.2d 46.

and allows for, and in fact compels, the use of Affidavits of Merit to join additional defendants subsequent to the filing of the initial complaint.

B. Second Proposition of Law

A complaint amended under Civil Rule 15(D) naming a new individual defendant relates back to the original complaint filed pursuant to Civil Rule 15(C) even though, at the time of the original filing the plaintiff knows the name of such individual, but has not discovered (or in the exercise of reasonable care could not have discovered) the connection between that individual and the tortious conduct causing injury to the plaintiff.

**Harmonizing the Civil Rules with
the Substantive Tort Law of the Case**

The Rules of Civil Procedure must be read in a manner that harmonizes the Rules with the substantive area of law involved. In this case, the application of Civil Rules 15(C) and (D) must be harmonized with the substantive law of “discovery of cognizable events” governing statute of limitations in medical claims.

Civ.R. 15(D) expressly states that when a plaintiff does not know the name of “a defendant,” the plaintiff may use a “John Doe” filing. There is a world of difference in the substantive tort law of medical malpractice between knowing the names of all the doctors appearing in a medical record, and having a reasonable basis to believe that any particular doctor(s) should be named as defendants. As the Court of Appeals majority wrote in this case, “[w]e must apply common sense in determining that a person’s name may be ‘known’ to a plaintiff, (as Dr. Swoger’s name was here) but be ‘unknown’ as a defendant for purposes of litigation.”¹⁰ We find that Appellants, while knowing the name of Defendant Swoger in the semantic sense, did not know the name of defendant

¹⁰ *Erwin v. Bryan*, 2009-Ohio-758 *Erwin*, *supra* fn 9, ¶135, ¶136.

Swoger as a potentially culpable party until the deposition of Defendant Bryan was taken. Until Appellant received this information he had no reason to believe that Swoger's conduct was potentially negligent."¹¹

The Discovery Rule

Contrary to Appellants' proposition of law, the Court of Appeals decision contravenes neither the legislative statute of limitations for medical claims, nor this Court's interpretation of same.

The legislature and the Court have historically different functions in statute of limitations questions. The legislature sets their duration, but the question of when a claim accrues belongs to the Court. *O'Striker v. Jim Walter Corp.*¹² (Absent legislative definition, it is left to the judiciary to determine when a cause of action "arose for purposes of statutes of limitations".)

Historically, a tort cause of action accrued and the statute of limitations began to run at the time the wrongful act was committed. *See, Collins v. Sotka*;¹³ *Kunz v. Buckeye Union Ins. Co.*¹⁴ But as the Court of Appeals decision in this case notes, "the underlying purpose of the statute of limitations is fairness to both sides."¹⁵ To address the unfairness of the situation where a plaintiff was injured but had not yet discovered that

¹¹ *Id.* at ¶37

¹² (1983), 4 Ohio St.3d 84, 447 N.E.2d 727, paragraph one of the syllabus.

¹³ (1998), 81 Ohio St.3d 506, 507, 692 N.E.2d 581.

¹⁴ (1982), 1 Ohio St.3d 79, 437 N.E.2d 1194.

¹⁵ *Erwin, supra* fn 9, ¶35.

injury during the statute of limitations period, this Court, in a series of decisions over time beginning with *O'Stricker*, has developed and refined the "discovery" exception to that general rule.

In *O'Stricker*, the Court held that "[w]hen an injury does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct of defendant, for purposes of the statute of limitations contained in R.C. 2305.10." (Emphasis added.)¹⁶ A few months later, in *Oliver v. Kaiser Community Health Found.*,¹⁷ the Court held that a "cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the **resulting injury.**" (Emphasis added.)¹⁸ Further developing the discovery rule several years later in *Hershberger v. Akron City Hosp.*¹⁹ this Court held:

"In a medical malpractice action, for the purposes of determining the accrual date in applying the statute of limitations under R.C. 2305.11(A) , the 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

¹⁶ *O'Stricker*, Paragraph two of syllabus.

¹⁷ (1983), 5 Ohio St.3d 111, 449 N.E.2d 438 (syllabus).

¹⁸ *Id.* at

¹⁹ (1987), 34 Ohio St.3d 1, 516 N.E.2d 204.

condition would put a reasonable person on notice of need for further inquiry **as to the cause** of such condition. (Emphasis added.)²⁰

In *Allenius v. Thomas*²¹ this Court combined the three prongs of the *Hershberger* test and articulated the “cognizable event” as the triggering event for the running of the statute of limitations in a medical claim. This further refinement of the discovery rule “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.” (Emphasis added.)²² All of these cases recognize that for a patient to be on notice of a potential cause of action, the patient must be aware not only of some “injury,” but of its causal relationship to some medical care or procedure.

Next, in *Flowers v. Walker*,²³ this Court made it clear that the discovery rule imposes a duty of inquiry on the plaintiff, holding that the occurrence of the statute-triggering “cognizable event” imposes upon the plaintiff the duty to exercise due diligence to (1) determine whether the injury suffered is the proximate result of malpractice and (2) ascertain the identity of the tortfeasor or tortfeasors. But, the *Flowers* Court acknowledged that a person can be aware of “an injury” without having

²⁰ *Id.* Paragraph one of syllabus.

²¹ (1989), 42 Ohio St.3d 131, 538 N.E.2d 93.

²² *Id.* syllabus

²³ (1992), 63 Ohio St.3d 546, 589 N.E.2d 1284.

reason to believe that malpractice has been committed.²⁴ This is consistent with Ohio Jury instructions, which specifically provide that under Ohio law a jury may not infer negligence from the mere occurrence of a bad outcome.²⁵

Flowers was decided in May of 1992. A short seven months later, in *Akers v. Alonzo*,²⁶ this Court distinguished *Flowers*, holding that while *Flowers* established a duty of inquiry on the plaintiff, it did not hold that the plaintiff “has a duty to ascertain the cognizable event itself, especially in a situation...**where the patient has no way of knowing either that there had been another physician involved or that the physician had made an incorrect diagnosis.**” (Emphasis added.)²⁷ *Akers* clearly recognized that a separate cognizable event may occur, and give rise to a separate claim against an additional tortfeasor, on the basis of information obtained during formal discovery, after suit was commenced.

In the next case in the development of the discovery rule, *Browning v. Burt*,²⁸ this Court noted that not every claim asserted against a hospital is a medical claim, and identified the separate tort of negligent credentialing.²⁹ Despite the fact that this claim was not a medical claim in the traditional sense, the court applied the discovery rule to it, creating an “alerting event” test for negligent credentialing claims. This is clearly a

²⁴ *Id* at 550.

²⁵ 3 Ohio Jury Instructions Section 331.01(6).

²⁶ 65 Ohio St.3d 422, 1992-Ohio-66.

²⁷ *Id* at 425-26.

²⁸ (1993), 66 Ohio St.3d 544, 613 N.E.2d 993.

²⁹ *Id.* at 557.

discovery rule, in which this Court held that “the period of limitations set forth in R.C. 2305.10 commences to run when the victim knows or should have discovered that he or she was injured as a result of the hospital's negligent credentialing procedures or practices.”³⁰ In *Browning*, the “alerting event” was determined to be an exposé on the television show *West 57th street* in October of 1988, despite the fact that the treatment of plaintiff Browning, by Dr. Burt, upon which her negligent credentialing claim was premised, went as far back as 1981. Once again, even though the *identity* of the new tortfeasor was previously *known*, the culpable *conduct* of such tortfeasor was only subsequently discovered, giving rise to a separate cognizable event.

In 1998, in *Collins v. Sotka*,³¹ the discovery rule was found applicable to a wrongful death claim and, finally, in *Norgard v. Brush Wellman*,³² the most recent case in the evolution of the discovery rule, this Court applied the discovery rule to an employer intentional tort claim. In so doing, the Court noted that **“since the rule's adoption, the court has reiterated that discovery of an injury alone is insufficient to start the statute of limitations running if at that time there is no indication of wrongful conduct of the defendant.”**³³ Moreover, the Court noted that the discovery rule must be specifically tailored to the particular context in which it is to be applied, citing

³⁰ *Id.* Paragraph four of syllabus.

³¹ (1998), 81 Ohio St.3d 506, 692 N.E.2d 581, Paragraph one of syllabus.

³² 95 Ohio St.3d 165, 2002-Ohio-2007.

³³ *Id.* at ¶10.

Browning v. Burt.³⁴ Finally, in *Norgard*, the Court held that “these [discovery] cases all stand for the proposition that the statute of limitations begins to run **once the plaintiff acquires additional information of the defendant's wrongful conduct.**” (Emphasis added.)³⁵

The substitution of “John Doe” in the amended complaint in this case related back to the filing of the original complaint

The historical review of the discovery rule demonstrates that the statute of limitations does not begin to run as to a particular medical provider until the discovery of a “cognizable event.” Simply put, the “cognizable event” requires sufficient information reasonably to enable a plaintiff to make a connection between the occurrence of an injury, and of wrongful conduct by the medical provider contributing to that injury. So long as the plaintiff could not reasonably have been expected to know of the connection between the conduct that injured him or her, and a medical provider whose identity, or “name” appears in the medical record, it is entirely proper to use the fictitious name provisions of Civ.R. 15(D) , and the relation back provisions of Civ.R. 15 (C) to join such a medical provider upon discovery of such wrongful conduct. Doing so harmonizes the Rule with the substantive law in medical claims. The Court of Appeals was entirely correct, therefore, in holding that when a plaintiff has used a fictitious name in the filing of a complaint, “if the plaintiff is also unaware of the culpability of a

³⁴ *Id.*

³⁵ *Id.* ¶17.

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.”³⁶

C. Third Proposition of Law

There can be more than one cognizable event in a medical claim, thus triggering different statutes of limitations for different parties.

This case can be decided without having to analyze the interrelationship of the fictitious name provisions of Civ.R. 15(D) and the relation back provisions of Civ. R. 15 (C), using the Court’s discovery rule precedent, as summarized in the second proposition of law. As this Court has recognized, there can be different events in the same case that trigger the discovery rule. *Cf. Browning v. Burt* (“The court of appeals was absolutely correct in recognizing that the facts or events which might trigger the running of the statute of limitations for medical malpractice claims against a doctor do not necessarily commence the running of a statute of limitations on claims against a hospital for hospital negligence unrelated to the medical diagnosis, care, or treatment of a person”);³⁷ *Akers v. Alonzo* (a second cognizable event occurred when the plaintiff learns that the “other physician had made an incorrect diagnosis.”)³⁸ Because an amended complaint was filed naming Dr. Swoger as a new defendant within one year of the discovery of his potential culpability, this case was timely filed against Dr. Swoger and his professional corporation, without regard to, or reliance upon, the naming of a John Doe in the original complaint.

³⁶ *Erwin v. Bryan*, 5th Dist. No. 08-CA-28, 2009-Ohio-758, ¶136.

³⁷ *Burt*, *supra* at 560.

³⁸ *Akers*, *supra* at 426.

The wording of 2305.113(D)(1), the medical malpractice statute of limitations, when read in conjunction with the case law on the discovery rule, in no way suggests that a medical claim is defined by or limited to a single cognizable event. The plain language of the statute supports the notion that there can be more than one cognizable event arising as a result of discovery and, hence, different statutes of limitations, in the same case:

If a person making a medical claim...in the exercise of reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim...but, **in the exercise of reasonable care and diligence, discovers the injury resulting from that act** or omission...the person may commence an action upon the claim not later than one year **after the person discovers the injury resulting from that act or omission.**

Indeed, it is entirely plausible for a patient to suffer a single injury, or different injuries, as a result of separate acts of negligence, during a single hospitalization. The statute expressly acknowledges that a plaintiff can file a claim within one year of discovering such an "act or omission." And while Appellants suggest that such "discovery" of any and all such "acts or omissions," as well as any and all responsible physicians, must occur **before** filing, without the benefit of the power of formal discovery available **after** filing, neither the statute or the Staff Note to Civ.R. 10, as previously discussed, support such a proposition. The OSBA believes it would be bad practice and policy to adopt such an interpretation which would be impossible to comply with in many, if not most, circumstances.

Russell Erwin died July 15, 2004, from a pulmonary embolism that was not diagnosed while he was in the hospital the week before. His wife, as administrator of his estate, filed a wrongful death suit, alleging medical negligence, on July 10, 2006. The defendants that were named at the filing of the original suit were Dr. Joseph Bryan, his professional corporation, and Union Hospital. Dr. Bryan was in charge of Erwin's care³⁹. Under the facts of this particular case, both the discovery of an injury and the cognizable event as to Dr. Bryan and, potentially, the hospital can reasonably be said to have occurred when Russell Erwin died. However, as to Dr. Swoger, there was no reasonable basis upon which to assume, or impute, liability to him merely because of his known involvement in the care of the patient or simply because his name appears in the chart. For Appellants to suggest otherwise, without citing to any facts in the record to support such a conclusion, requires such an assumption as to any medical provider involved in Erwin's care at any time during his hospitalization.

The cognizable event as to Dr. Swoger occurred during Dr. Bryan's deposition when Dr. Bryan identified Swoger's role in the malpractice leading to Mr. Erwin's death. Dr. Bryan testified that the unwritten understanding at the hospital was that a team was involved in clot prevention measures, and Dr. Swoger was a part of that team.⁴⁰ This is precisely the kind of information giving rise to a "cognizable event" that may not be apparent at all from the face of a patient's medical chart, and is otherwise unknowable to a patient or patient's family in the absence of formal discovery. At this

³⁹ Appellants' Brief, Court of Appeals at 12.

⁴⁰ Appellee's Memorandum Opposing Jurisdiction at 7.

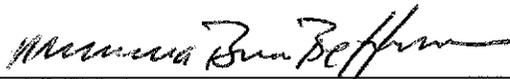
point, Mrs. Erwin, without any previous John Doe filing, could have simply filed a separate lawsuit against Dr. Swoger and his corporation, and sought consolidation of the two cases, or moved for leave to file an amended complaint. *See, Akers.*⁴¹ In this case, once Mrs. Erwin discovered at Dr. Bryan's deposition the connection between Dr. Swoger's involvement in the husband's care, and the allegedly substandard treatment leading to her husband's death, a new cognizable event occurred, permitting the filing of medical claim against him. To hold otherwise would impose a duty of doing the impossible upon patients and their counsel – to discover that which they have no ability, power or means to discover. As a result, it would necessitate the blanket naming of all medical care providers in order to avoid such surprise revelations, as well as encourage the concealment of the role of all potentially culpable medical providers until after suit is filed and the statute is deemed to have run as to any and all culpable parties. None of those natural and unavoidable consequences of Appellants' position are of any benefit to the public, the bar, the courts, or indeed, the medical profession.

⁴¹ *Akers, supra.*

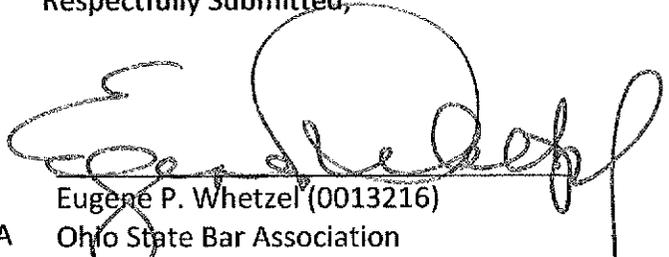
Conclusion

For the reasons stated in this brief, amicus OSBA respectfully asks the Court to affirm the decision of the court of appeals in this case.

Respectfully Submitted,

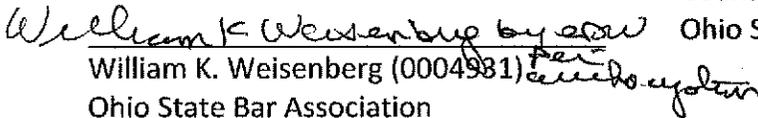


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Certificate of Service

I certify that on October 23, 2009, I served a copy of the foregoing document by regular U.S. mail addressed as follows:

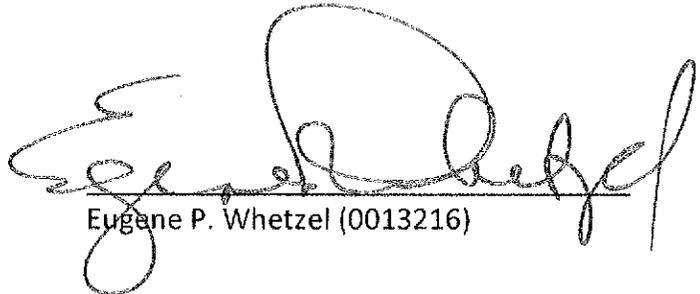
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