

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2009-0580

CORA ERWIN, ADMINISTRATOR OF THE ESTATE OF RUSSEL ERWIN
Plaintiff-Appellee

-v-

JOSEPH E. BRYAN, M.D., ET AL.
Defendant-Appellants

On Appeal from the Fifth District Court of Appeals, Tuscarawas County, Case No. 08CA28

BRIEF OF AMICUS CURIAE
OHIO ASSOCIATION FOR JUSTICE
IN SUPPORT OF PLAINTIFF-APPELLEE, CORA ERWIN, ADMINISTRATOR OF
THE ESTATE OF RUSSEL ERWIN

Paul W. Flowers, Esq. (#0046625)
[Counsel of Record]
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395
Attorney for Plaintiff-Appellee, Cora Erwin

Ronald A. Margolis, Esq. (#0031241)
Jessica Perse, J.D., M.D. (#0078823)
Becker & Mishkind, Co., L.P.A.
Skylight Office Tower
1660 West Second Street, Suite 660
Cleveland, OH 44113
(216) 241-2600
Fax: (216) 241-5757
Attorneys for Plaintiff-Appellee, Cora Erwin

Jonathan R. Stoudt (#0083839)
[Counsel of Record]
Michael J. Rourke (#0022950)
Rourke & Blumental, LLP
495 South High Street, Suite 450
Columbus, OH 43215
(614) 220-9200
Fax: (614) 220-7900
jstoudt@randblp.com
mrourke@randblp.com
*Attorneys for Amicus Curiae
Ohio Association for Justice*

Rocco Potenza, Jr., Esq. (#0059577)
[Counsel of Record]
Hanna, Cambell & Powell, LLP
3737 Embassy Parkway
Akron, Ohio 44334
(330) 670-7300
Fax: (330) 670-0977
*Attorney for Defendants-Appellants
William V. Swoger, M.D. and Union
Internal Medicine Specialties, Inc.*

Marianna Brown Bettman (#0002038)
[Counsel of Record]
634 Sycamore Street, Apt. 6N
Cincinnati, OH 45202
(513) 281-0978
Fax: (513) 281-0088
mbettman@fuse.net
*Attorney for Amicus Curiae
Ohio State Bar Association*

William K. Weisenberg (#0004931)
Eugene P. Whetzel (#0013216)
Ohio State Bar Association
1700 Lake Shore Drive
Columbus, OH 43204
(614) 487-2050
Fax: (614) 485-3191
wwaisenberg@ohiobar.org
gwhetzel@ohiobar.org
*Attorneys for Amicus Curiae
Ohio State Bar Association*

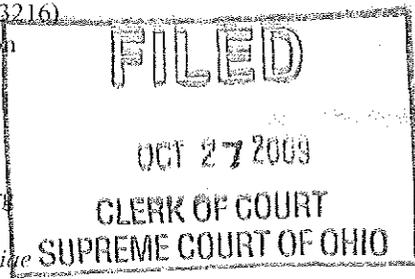


TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
INTRODUCTION AND INTERESTS OF AMICUS CURIAE.....	1
APPELLANTS’ PROPOSITION OF LAW.....	2
ARGUMENT	2
I. Under Ohio law, a plaintiff must have knowledge of some fact or facts which would cause a reasonable person to suspect wrongful conduct in order for a “cognizable event” to occur.....	2
II. The inclusion of a provider’s name within a patient’s medical records is not, in itself, a fact or occurrence which should cause a reasonable person to suspect wrongful conduct...	6
III. Appellants’ proposition of law raises significant public policy concerns and would force victims of medical malpractice to proceed under an unworkable legal structure.....	11
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	17

TABLE OF AUTHORITIES

Case Authorities:

<i>Akers v. Alonzo</i> (1992), 65 Ohio St.3d 422, 605 N.E.2d 1.....	6, 9-10
<i>Allenius v. Thomas</i> (1987), 42 Ohio St.3d 131, 538 N.E.2d 93.....	1, 5
<i>Browning v. Burt</i> (1993) 66 Ohio St.3d 544, 613 N.E.2d 993.....	5-6
<i>Clark v. Hawkes Hosp. of Mt. Carmel</i> (1984), 9 Ohio St.3d 182, 450 N.E.2d 559.....	4
<i>Collins v. Sotka</i> (1998), 81 Ohio St.3d 506, 692 N.E.2d 581.....	4, 12-13
<i>DeLong v. Cambell</i> (1952), 157 Ohio St. 22, 47 O.O.27, 104 N.E.2d 177	2
<i>Deskings v. Young</i> (1986), 26 Ohio St.3d 8, 26 OBR 27, 496 N.E.2d 897.....	4
<i>Flowers v. Walker</i> (1992), 63 Ohio St.3d 546, 589 N.E.2d 1284.....	5, 7-10
<i>Frysingher v. Leech</i> (1987), 32 Ohio St.3d 38, 512 N.E.2d 337.....	3
<i>Hershberger v. Akron City Hosp.</i> (1987), 34 Ohio St.3d 1, 516 N.E.2d 204.....	4-5
<i>Hoffman v. Davidson</i> (1987), 31 Ohio St.3d 60, 31 OBR 165, 508 N.E.2d 958.....	4
<i>Melnyk v. Cleveland Clinic</i> (1972), 32 Ohio St.2d 198, 61 O.O.2d 430, 290 N.E.2d 916.....	2-3, 13, 15
<i>Norgard v. Brush Wellman</i> , 95 Ohio St.3d 165, 2002-Ohio-2007, 766 N.E.2d 977	6
<i>Oliver v. Kaiser Cmty. Health Found.</i> (1983), 5 Ohio St.3d 111, 449 N.E.2d 438.....	3-4
<i>O'Stricker v. Jim Walter Corp.</i> (1983), 4 Ohio St.3d 84, 447 N.E.2d 727.....	4
<i>Richards v. St. Thomas Hosp.</i> (1986), 24 Ohio St.3d 27, 24 OBR 71, 492 N.E.2d 821.....	4

<i>Saunders v. Choi</i> (1984), 12 Ohio St.3d 247, 12 OBR 327, 466 N.E.2d 889.....	4
<i>Shover v. Cordis Corp.</i> (1991), 61 Ohio St.3d 213, 574 N.E.2d 457.....	13
<i>Wylar v. Tripi</i> (1971), 25 Ohio St.2d 164, 54 O.O.2d 283, 267 N.E.2d 419.....	3

Statutes and Court Rules:

Civ.R. 10.....	11-14
Civ.R. 11.....	14
Civ.R. 15.....	1, 16
R.C. 2125.02.....	4
R.C. 2305.10.....	4, 6
R.C. 2305.11	3, 7
R.C. 2305.113.....	3, 15
R.C. 2307.23.....	13-14
R.C. 2323.45.....	12

INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This Amicus Curiae represents the interests of the Ohio Association for Justice (“OAJ”), formerly known as the Ohio Academy of Trial Lawyers. The OAJ is comprised of approximately two thousand attorneys practicing personal injury and consumer law within the State of Ohio. The members of OAJ are dedicated to protecting the rights of individuals in litigation and to the improvement and promotion of public confidence in the legal system.

The purpose of this brief is to express the OAJ’s concerns regarding the continued viability of the discovery rule in medical malpractice actions, and to highlight the adverse consequences which would result should Appellants’ position be adopted. Although this Amicus Curiae fully supports all arguments presented by Plaintiff-Appellee Cora Erwin, Administrator of the Estate of Russell Erwin, the issue concerning whether Civ. R. 15 (D) was properly utilized in this matter will not be addressed herein.

The Appellants’ proposition of law removes a critical element of the “cognizable event” analysis first set forth by this Court in *Allenius v. Thomas* (1987), 42 Ohio St.3d 131, 538 N.E.2d 93, and would significantly inhibit the ability of individuals harmed by medical malpractice to seek redress in a court of law. Any erosion of this oft-relied upon and well-reasoned rule would lead to widespread confusion and a number of difficulties for patients, practicing attorneys, and members of the health care industry in Ohio. The OAJ respectfully requests that the Court take these issues into consideration in its determination of this matter.

APPELLANTS' PROPOSITION OF LAW: Where a Plaintiff knows the identity of a defendant before 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.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

I. Under Ohio law, a plaintiff must have knowledge of some fact or facts which would cause a reasonable person to suspect wrongful conduct in order for a "cognizable event" to occur.

Prior to 1972, medical malpractice actions in Ohio were governed by the "termination rule," which stated that the statute of limitations "begins to run at the latest upon the termination of the physician-patient relationship which, within the time limited by the statute, the act constituting malpractice is known or unknown by the one upon whom it was committed." *DeLong v. Cambell* (1952), 157 Ohio St.22, 47 O.O.27, 104 N.E.2d 177, at paragraph one of the syllabus. This Court first recognized a discovery rule as to medical malpractice actions, albeit in a limited context, in *Melnyk v. Cleveland Clinic* (1972), 32 Ohio St.2d 198, 61 O.O.2d 430, 290 N.E.2d 916. In that case, which concerned the negligent act of leaving a metal forceps in a plaintiff's abdomen after surgery, the Court noted as follows:

"Here the lapse of time does not entail the danger of a false or frivolous claim, nor the danger of a speculative or uncertain claim. The circumstances do not permit the

suggestion that [the plaintiff] may have knowingly slept on her rights but, on the contrary, establish that the cause of action was unknown and unknowable to her until shortly before she instituted suit. Justice cries out that she fairly be afforded a day in court and it appears evident to us that this may be done ***.” Id. at 200, fn. 5.

The Court thus recognized that in factually similar circumstances, the statute of limitations is tolled “until such time as the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act.” Id. at 201.

After years of struggling with the harsh effects of the termination rule,¹ and the “obvious and flagrant injustice” that frequently resulted from its application, the Court finally extended the *Melnyk* majority’s reasoning to all medical negligence situations in *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, 449 N.E.2d 438. In the syllabus, the Court held that: “Under R.C. 2305.11(A),² 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.” Id. at paragraph one of the syllabus. Although the syllabus expressed this standard in terms of “the resulting injury,” Justice Brown’s

¹ The Court first recognized the widespread acceptance of the discovery rule and expressed its concerns as to the issue more than a decade earlier, prior to the *Melnyk* decision, in *Wylor v. Tripi* (1971), 25 Ohio St.2d 164, 54 O.O.2d 283, 267 N.E.2d 419. The *Wylor* Court begrudgingly adhered to the strict termination rule despite “the unconscionable result that the injured party’s right to recovery can be barred by the statute of limitations before he is even aware of its existence.” Id. at 168 (citations omitted). The termination rule still applies in situations where the physician-patient relationship continues after a “cognizable event” occurs. See *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337, at paragraph one of the syllabus.

² The statute of limitations for medical malpractice actions is now codified at R.C. 2305.113.

majority opinion framed the issue as “discovery of the malpractice.” *Id.* at 112; see, also, *Hershberger v. Akron City Hospital* (1987), 34 Ohio St.3d 1, 3-4, 516 N.E.2d 204.³

The *Oliver* holding led to a great deal of confusion regarding what, in fact, needed to be “discovered” in order for a cause of action to accrue. See *Hershberger*, 34 Ohio St.3d at 4; citing *Clark v. Hawkes Hosp. of Mt. Carmel* (1984), 9 Ohio St.3d 182, 183, 450 N.E.2d 559 (“the resulting injury”); *Saunders v. Choi* (1984), 12 Ohio St.3d 247, 248, 12 OBR 327, 466 N.E.2d 889 (“the alleged malpractice”); *Richards v. St. Thomas Hosp.* (1986), 24 Ohio St.3d 27, 28, 24 OBR 71, 492 N.E.2d 821 (“the resulting injury”); *Deskins v. Young* (1986), 26 Ohio St.3d 8, 11, 26 OBR 27, 496 N.E.2d 897 (“the alleged malpractice”); *Hoffman v. Davidson* (1987), 31 Ohio St.3d 60, 62, 31 OBR 165, 508 N.E.2d 958 (“the physical injury complained of”). As such, the *Hershberger* Court set forth the following standard:

“[F]or the purposes of determining the accrual date in applying the statute of limitations *** 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, which, of course, may occur without the necessity of further medical consultation; *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

³ The discovery rule is not limited to medical malpractice claims. In *O’Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 447 N.E.2d 727, the Court extended this standard to other actions governed by the statute of limitations for personal injury actions codified in former R.C. 2305.10. *Id.* at paragraph two of the syllabus. The Court later found that the rule was also applicable to toll the two year statute of limitations for wrongful death actions found in R.C. 2125.02(D). See *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 511, 692 N.E.2d 581.

have put a reasonable person on notice of need for further inquiry as to the cause of such condition.” 34 Ohio St.3d at 5-6 (emphasis added).

This analysis was further clarified in *Allenius v. Thomas* (1987), 42 Ohio St.3d 131, wherein these three prongs were essentially combined so that the cause of action accrues upon the 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.” Id. at 133 (emphasis added).

Throughout the *Oliver* progeny and implicit within its “cognizable event” analysis, this Court has repeatedly recognized that the statute of limitations cannot begin to run until the plaintiff has, or should have, discovered both (1) the injury complained of, and (2) *some indicia of wrongful conduct on the part of a potential defendant*. See *Hershberger*, 34 Ohio St.3d at 5-6 (“condition was related to a specific professional medical service previously rendered him”); *Allenius*, 42 Ohio St.3d at 133 (“the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient”); *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549, 589 N.E.2d 1284 (“related to a medical diagnosis, treatment, or procedure that the patient previously received”). These cases require, at a minimum, some scintilla of evidence which would cause a reasonable plaintiff to suspect wrongful conduct before a cause of action can accrue.⁴ It follows that in cases involving concurrent causative factors, there

⁴ Although specifically differentiated from the “cognizable event” test described herein, two of this Court’s more recent cases concerning the discovery rule in non-medical claim situations closely mirror this sentiment. In *Browning v. Burt*, this Court held that “[i]n

can be two or more “cognizable events” as to different defendants for the same legal injury. See, e.g., *Browning v. Burt* (1993) 66 Ohio St.3d 544, 560, 613 N.E.2d 993; *Akers v. Alonzo* (1992), 65 Ohio St.3d 422, 424, 605 N.E.2d. 1. This malleable, fact-specific analysis is imperative in the typically complex situations pertaining to medical care. In almost any medical malpractice case, there may be several potential causes of action against different individuals whose negligent actions combine, together or at different points in time, to cause injuries to a patient. However not all of these causes of action, or individuals, are discoverable even with the exercise of all due diligence on the part of the patient.

II. The inclusion of a provider’s name within a patient’s medical records is not, in itself, a fact or occurrence which should cause a reasonable person to suspect wrongful conduct.

Appellants’ argument assumes that Mrs. Erwin had reason to suspect malpractice, and that the “cognizable event” had occurred, based upon a single fact: “there is absolutely no dispute that Dr. Swoger’s identity and involvement in Decedent’s care were clearly contained within the medical records.” (See Merit Brief of Appellants, p. 23). No explanation has been offered as to how this could place Mrs. Erwin on notice that her husband’s death “was related to a specific medical service” rendered by Dr. Swoger.

tailoring a rule of discovery applicable to R.C. 2305.10 for bodily injury actions arising from negligent credentialing by a hospital, we hold that a cause of action for negligent credentialing arises when the plaintiff knows or should know that he or she was injured *as a result of the hospital’s negligent credentialing procedures or practices.*” *Browning*, 66 Ohio St.3d at 560 (emphasis added). The majority in *Norgard v. Brush Wellman*, 95 Ohio St.3d 165, 2002-Ohio-2007, 766 N.E.2d 977, came to a similar conclusion regarding employer intentional tort actions, holding that “[a] cause of action based upon an employer intentional tort accrues when the employee discovers, or by the exercise of reasonable diligence should have discovered, the workplace injury *and the wrongful conduct of the employer.*” *Id.* at paragraph one of the syllabus (emphasis added).

Appellants argue that this Court's decision in *Flowers v. Walker* (1992), 63 Ohio St.3d 546 is controlling in this matter. In *Flowers*, the Court was faced with the issue of whether a lawsuit filed against a previously unidentified radiologist, Dr. Walker, for negligently interpreting a November 1986 mammogram was timely pursuant to former R.C. 2305.11(A). *Id.* at 547. After being diagnosed with breast cancer in June 1987, the plaintiff investigated her gynecologist's potential liability for failing to diagnose and treat her condition over the course of the previous year. *Id.* Her gynecologist had assured her during this time that her November 1986 mammogram results were negative for cancer. *Id.* at 546. It was during this investigation that the identity of the Dr. Walker was revealed. *Id.* at 547. Flowers filed her complaint in March of 1989, more than one year from the date she was diagnosed with breast cancer, but only six months after discovering Dr. Walker's identity. *Id.* In its opinion, the Court held as follows:

“[C]onstructive knowledge of facts, rather than *actual* knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule. A plaintiff need not have discovered all the relevant facts necessary to file a claim in order to trigger the statute of limitations. 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.* at 549 (citations omitted) (emphasis added).

The Court thus found, under the circumstances of that case, that the “cognizable event” as to Mrs. Flower's claim occurred at the time she was diagnosed with breast cancer. *Id.* at 550.

Appellants place undue emphasis on the following language from the *Flowers* opinion: “[t]he 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 has been the victim of malpractice.” *Id.* at 550. Unlike the matter at hand, however, the discovery of Dr. Walker’s identity in *Flowers* was not necessary to place a reasonable person on notice of the potentially wrongful conduct at issue. The *existence of his role* in the plaintiff’s care was already known. As noted by the Court, at the time she was diagnosed: “[*Flowers*] suspected that her mammogram had been misread to her detriment. What she did not know was who misread the mammogram. That could have been determined before the statute ran. It is no greater burden than that placed on a plaintiff in any tort action.” *Id.* at 550 (emphasis added).

Such cause for suspicion as to Dr. Swoger role, or conduct, was not present in this matter. Nor was his culpability a matter “[t]hat could have been determined before the statute ran.” *Id.* As noted in Mrs. Erwin’s Merit Brief on appeal, the notations of Dr. Swoger’s involvement in the medical records that were available pre-suit suggested only that he had been consulted on the date of admission, and that he played a minor role during the intubation process. (See Brief of Plaintiff-Appellant Cora Erwin, p.11; Defendant’s Motion for Summary Judgment, Exhibits 1A, 1B, and 1C). While his “identity” in this case may have been apparent from the face of the records, these indications of a minor, peripheral role in decedent’s care do not, and should not, create a suspicion of “wrongful conduct” or malpractice on his part.

Appellants’ proposition of law misconstrues *Flowers*, as it actually suggests that “the plaintiff must investigate and discover that she has been the victim of malpractice, once she becomes aware of the identity of a practitioner.” This wayward logic leads to a dangerous conclusion: where a patient has reason to believe that his injuries are the result

of malpractice, a “cognizable event” has occurred not only as to the physician suspected, but also as to *all others identified within the patient's medical records*. This Court has never applied its “cognizable event” analysis in such a broad-stroked manner.

As recognized by the Fifth District, the fact pattern here is more akin to that in *Akers v. Alonzo* (1992), 65 Ohio St.3d 422. In that case, the patient began treatment with a urologist, Dr. Alonzo, after discovering blood in his urine. *Id.* at 422. Dr. Alonzo performed a cystoscopy and multiple biopsies of Akers’s bladder, which were subsequently analyzed and found to be negative for cancer by Dr. de Lamerens, a pathologist. *Id.* When his symptoms continued, however, Akers was referred to a second urologist who requested that the previous pathology slides be examined at Ohio State University Hospital. *Id.* After this second review it was determined that Akers had transitional cell carcinoma and transitional cell dysplasia. *Id.*

Akers initially filed his lawsuit against Dr. Alonzo and an oncologist for failing to timely diagnose his condition, but did not learn of the involvement (or identity) of Dr. de Lamerens until discovery in that matter had progressed. *Id.* Akers proceeded to file an action against Dr. de Lamerens within a year of the date in which his involvement was revealed, but more than one year after Akers’s unfortunate diagnosis. *Id.*

On appeal, the Supreme Court was faced with the question of whether the discovery rule applied so as to toll the statute of limitations until Dr. de Lamerens’s involvement was discovered during the course of the initial lawsuit. *Id.* at 424. The Court responded in the affirmative, distinguishing *Flowers* as follows:

“In *Flowers, supra*, the patient was aware that other persons were involved in the faulty interpretation of her mammogram, but she was not aware of their identities. When

Mrs. Flowers discovered approximately eight months later she had cancer, that discovery constituted the ‘cognizable event’ which gave rise to a duty to ascertain the identity of the tortfeasors who misinterpreted her prior mammogram. In contradistinction, there is *nothing in the record herein that indicates that plaintiffs knew or should have known before March 21, 1989 that the pathology slides had been erroneously diagnosed as being negative for cancer.* The ‘cognizable event’ in the instant cause took place when plaintiffs discovered through an expert pathologist they had employed during the initial lawsuit that the pathology slides had been misread by Dr. de Lamerens and that Akers actually had cancer eight months before it was correctly diagnosed.***

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 (emphasis added) (citations omitted).

In this case, further information as the extent of Dr. Swoger’s involvement and role in Decedent’s care was necessary before any suggestion of malpractice on his part could be inferred. As is often the case, this information remained concealed to Mrs. Erwin, despite all reasonable diligence on her part, until she was able to conduct formal discovery in this case. Mrs. Erwin did not fail in her “duty of inquiry” by bringing suit against Dr. Bryant alone when the medical records were inadequate to implicate Dr. Swoger as well. In sum, she should not be said to have violated the duty to “ascertain the cognizable event” as to Dr. Swoger in this instance.

This Court should not accept Appellants' contention that the mere identification of a physician within a patient's medical records is enough to raise suspicions as to his/her potential liability. The Fifth District's sound reasoning in this regard should be upheld.

III. Appellants' proposition of law raises significant public policy concerns and would force victims of medical malpractice to proceed under an unworkable legal structure.

In most cases, the only information available to an individual injured by medical negligence prior to filing suit is contained within his or her medical records. Before an action is filed, without the benefit of formal discovery, the patient has no means of knowing if these records are complete, accurate, or honest reflections of what transpired in his or her care. Civ.R. 10(D) nevertheless requires plaintiffs to attach an Affidavit of Merit provided by an expert witness relative to each defendant in medical claims at the time an action is brought. The Rule requires that the affidavit include (i) a statement that the affiant has reviewed all medical records reasonably available to the plaintiff; (ii) a statement that the affiant is familiar with the applicable standard of care; and (iii) an opinion of the affiant that the standard of care was breached by one or more defendants and that said breach caused injury to the plaintiff. See Civ.R. 10(D). As such, Civ.R. 10(D) requires that a plaintiff in a medical claim be able to reasonably identify a legal cause of action before filing suit, often based entirely on records created by the defendants.

Difficulties often arise (and "cognizable events" remain concealed), when (1) no medical record information is generated concerning a particular medical contact; (2) the medical records are altered or destroyed; (3) the records are incomplete or silent with

regard to relevant and critical facts; or (4) the records are inaccurate and/or subsequent sworn testimony of medical providers is inconsistent with the information contained therein.⁵ These common scenarios often make it impossible for patients, attorneys, or reviewing medical experts to identify all potential causes of action prior to filing suit. Medical records, even in modern times, remain an inadequate means by which to be certain of a particular caregiver's identity,⁶ or to support suspicions as to a specific aspect of care. Often, it is only when formal discovery has commenced (such as in Defendant-Appellant Bryan's February 7, 2007 deposition) that facts are first revealed that "lead, or should lead" a reasonable plaintiff to suspect that her damages were related to a specific aspect of her treatment, i.e. the "wrongful conduct" of another tortfeasor. Appellants' argument, which is premised entirely on the fact that Dr. Swoger was "identified in the records," fails to take these frequent difficulties into account.⁷

⁵ This Court has acknowledged these difficulties. The Staff Notes accompanying the most recent July 1, 2007 amendments to Civ.R. 10(D) note that "good cause" may exist for an extension of time to file an Affidavit of Merit "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 ***. 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***."

⁶ In enacting R.C. 2323.45, the General Assembly also recognized the potential for these scenarios. This provision allows defendant health care providers to seek dismissal of a medical claim early in the litigation process by motion when accompanied by an "affidavit of noninvolvement." Dismissal can be granted when the affidavit demonstrates that the defendant was "misidentified or otherwise not involved" in a patient's care and "could not have caused the alleged malpractice." It is apparent that in drafting this provision, the General Assembly was aware of situations in which medical records are inaccurate or incomplete. Such a provision would be of little benefit otherwise, as patients lack any incentive to pursue claims against those obviously not involved (and no means by which to comply with Civ.R.10(D) unless some "misidentification" had occurred.)

⁷ In adopting the discovery rule in wrongful death actions, the *Collins* Court expressed its concerns that otherwise a tortfeasor (in that case a convicted murderer) "need only kill his or her victim and fraudulently conceal the cause of death for two years to be absolved."

It is not difficult to fathom a number of situations where the patient, while aware of the identity of a “team-member” involved in her care, still has no reason to suspect that such person may have negligently contributed to her injuries. For example, if the medical records indicate that a registered nurse contacted an on-call physician by telephone and followed his/her orders concerning the patient’s care, it may very well appear to all qualified nursing experts that the registered nurse met the applicable standard of care in her profession despite a subsequent legal injury. Accepting the medical record notation as true and accurate, there would not appear to be any indicia of “wrongful conduct” on the nurse’s part and the patient would not be able to bring suit against him/her properly and in compliance with Civ.R. 10(D). However, if the on-call physician later testifies in his deposition that he was never contacted, contrary to the medical chart, the nurse’s conduct in failing to notify a physician would give rise to potential liability.⁸ Under the Appellants’ proposition of law, the patient would be unable to pursue this newly revealed cause of action based on a statute of limitations defense simply because the nurse’s name was included in the plaintiff’s chart.⁹

Collins, 81 Ohio St.3d at 510; quoting *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 233, 574 N.E.2d 457 (Douglas, J., dissenting). While medical negligence situations do not rise to this level of moral reprehensibility, it should be noted that health care providers also have the power, at the time of the wrongful conduct, to “create the narrative” as to a patient’s claims. Reversal of the Fifth District’s decision on this point of law could very well give physicians, nurses, and others involved in a patient’s care an incentive to be less than forthcoming or entirely accurate within a patient’s chart, so as to conceal a “cognizable event.”

⁸ In situations where a non-party provider is expressly implicated by his/her peers during formal discovery, “the lapse of time does not entail the danger of a false or frivolous claim, nor the danger of a speculative or uncertain claim.” *Melnyk*, 32 Ohio St.2d at 200 (citation omitted).

⁹ Furthermore, the physician would be entitled to utilize this previously unknown discrepancy to reduce or completely eliminate the plaintiff’s ability to recover. Under R.C. 2307.23 (C), effective April 7, 2005 “it is an affirmative defense for each party to

As recognized by the lower court in this matter, the rule set forth by the Appellants would force patients to choose between two equally unacceptable alternatives: (1) name as defendants in the initial complaint *every* medical provider who had any contact with the patient as soon as there was reason to suspect culpability *as to one of them*; or (2) run the risk of discovering, through formal discovery, that an unnamed party was responsible for part or all of the patient's claimed injuries, but that recovery is barred by the statute of limitations.¹⁰

The first alternative, commonly referred to as "shotgunning" of defendants, is a practice that is abhorrent to physicians and attorneys alike, and would contradict the very purpose behind both Civ.R.10 (D) and Civ.R. 11. A reversal of the Fifth District's holding in this case would necessitate that a patient file these potentially nonmeritorious claims to protect his or her rights. This practice carries significant implications, both financial and otherwise, for individual members of the health care profession. Given the oft-stated public policy interest of discouraging excessive litigation, patients with valid malpractice claims should not assume that all physicians, nurses, and others with even the

the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the tortious conduct that proximately caused the injury or loss to person or property or the wrongful death is attributable to one or more persons from whom the plaintiff does not seek recovery in this action." Appellants' proposition of law, coupled with this section, would lead to the highly unconscionable result of a plaintiff being unable to seek recovery against a potentially liable physician simply because his/her name was included in medical records, and yet still allowing the defendant to apportion blame to that individual based on actions/omissions which were not so "identified."

¹⁰ The incentive to take a "shotgun" approach would fall upon plaintiffs' attorneys as well, as every unnamed medical provider ultimately found negligent would create a significant risk of legal malpractice liability.

slightest involvement in their care are potentially liable, nor should patients be forced to proceed as though they are.¹¹

The second alternative will lead to the unconscionable and unjust result this Court has sought to avoid since the discovery rule was first adopted: patients who have suffered injury as a result of negligent medical care would be deprived of any opportunity to present their claims, due to no fault of their own. There are many circumstances, including those in the instant case, which “do not permit the suggestion that [the plaintiff] may have knowingly slept on her rights***.” *Melnyk*, 32 Ohio St.2d at 200 (citation omitted). Mrs. Erwin’s potential claims against Appellants were both unknown and unknowable, even upon review of the medical records, until Dr. Bryan’s deposition. Basic principles of fairness and justice require that patients be afforded a reasonable opportunity to assert claims brought to light in this manner.

CONCLUSION

As stated above, this Amicus Curiae supports all arguments set forth by Plaintiff-Appellee. This Court should find that the “cognizable event” as to her claims against the Appellants did not occur until February 7, 2007, when Dr. Bryan revealed in his deposition the extent of Dr. Swoger’s role in this matter. At that point, Plaintiff-Appellee could permissibly proceed by bringing a separate action against Dr. Swoger or, as in this

¹¹ Such a practice also runs contrary to the policy reflected in the “180 day letter” statute, codified at R.C. 2305.113 (B)(1), which allows a patient to extend the applicable statute of limitations when he/she “gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim.” This provision aims to assist and encourage attorneys to investigate, to the extent possible without the benefit of formal discovery, the merits of potential medical claims and to name only those individuals as defendant who such investigation has revealed to bear potential responsibility. Nevertheless, the 180 day letter provision does not eliminate this problem, because of the significant limitations on such pre-suit investigations.

case, utilizing the “John Doe” substitution provision contained in Civ.R. 15(D). As such, the OAJ urges this Court to affirm the Fifth District’s ruling in all respects.

Respectfully submitted,



Jonathan R. Stoudt (#0083839)
Rourke & Blumenthal, LLP
495 South High Street, Suite 450
Columbus, OH 43215
Telephone: (614) 220-9200
Facsimile: (614) 220-7900
jstoudt@randblp.com
Attorney for Amicus Curiae
Ohio Association for Justice



Michael J. Rourke (#0022950)
Rourke & Blumenthal, LLP
495 South High Street, Suite 450
Columbus, OH 43215
Telephone: (614) 220-9200
Facsimile: (614) 220-7900
mrourke@randblp.com
Attorney for Amicus Curiae
Ohio Association for Justice

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served by regular U.S. Mail on this

27th day of October, 2009 upon the following:

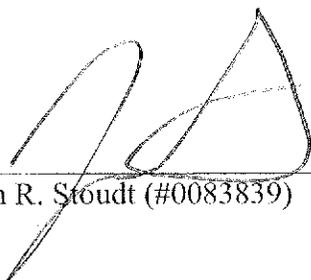
Paul W. Flowers, Esq. (0046625)
[Counsel of Record]
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
Attorney for Plaintiff-Appellee, Cora Erwin

Ronald A. Margolis, Esq. (0031241)
Jessica Perse, J.D., M.D. (0078823)
Becker & Mishkind, Co., L.P.A.
Skylight Office Tower
1660 West Second Street, Suite 660
Cleveland, Ohio 44113
Attorneys for Plaintiff-Appellee, Cora Erwin

Rocco Potenza, Jr., Esq. (0059577)
[Counsel of Record]
Hanna, Cambell & Powell, LLP
3737 Embassy Parkway
Akron, Ohio 44334
*Attorney for Defendants-Appellants
William V. Swoger, M.D. and Union
Internal Medicine Specialties, Inc.*

Marianna Brown Bettman (0002038)
[Counsel of Record]
634 Sycamore Street, Apt. 6N
Cincinnati, Ohio 45202
*Attorney for Amicus Curiae
Ohio State Bar Association*

William K. Weisenberg (0004931)
Eugene P. Whetzel (0013216)
Ohio State Bar Association
1700 Lake Shore Drive
Columbus, Ohio 43204
*Attorneys for Amicus Curiae
Ohio State Bar Association*


Jonathan R. Stoudt (#0083839)