

ORIGINAL

IN THE SUPREME COURT OF OHIO

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CASE NO. 2009-0580

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

-vs-

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

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

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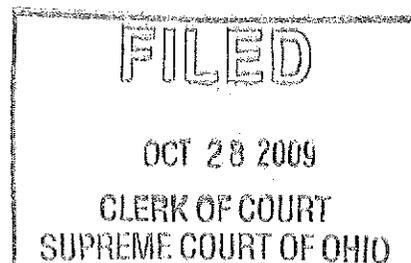
MERIT BRIEF OF  
PLAINTIFF-APPELLEE, CORA ERWIN, ADMINISTRATRIX

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## STATEMENT OF CASE

Plaintiff-Appellant, Cora Erwin, commenced this medical malpractice action in the Tuscarawas County Court of Common Pleas on July 10, 2006, Case No. 2006 CM 070423. She alleged that Russell Erwin, Sr., deceased (hereinafter the "Decedent") had died on July 15, 2004 as a result of substandard medical care which had been furnished by Defendants, Joseph E. Bryan, M.D. (hereinafter "Dr. Bryan"), Professional Corporation of Joseph Bryan M.D., and the Union Hospital Association (hereinafter "Union Hospital"). She also identified several unknown defendants in the following manner:

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)

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)

*Supplement to the Brief of Appellants ("Appellants' Supp."), pp. 1-2.* The named Defendants submitted Answers denying liability.

On February 7, 2007, Plaintiff's counsel deposed Dr. Bryan. He maintained, for the first time in the proceedings, that the unwritten understanding at Union Hospital was for a "team" of physicians to undertake responsibility for caring for a patient. A critical care and pulmonary physician, William V. Swoger, D.O. (hereinafter "Dr. Swoger"), had been involved as part of this group effort. In a further deposition conducted on February 8, 2008, Julie Marie Mason, R.N. (hereinafter "Nurse Mason") confirmed that, according to the chart, Dr. Bryan had actually been in charge of the

Decedent's care and Dr. Swoger had just been responsible for "ventilation control."

Within months after Dr. Bryan had testified that Dr. Swoger was actually a member of the "team" responsible for managing the Decedent's care, Plaintiff requested leave on June 29, 2007 to amend her Complaint pursuant to Civ.R. 15 to substitute John Doe, M.D. No. 1 with Dr. Swoger. *Appellants' Supp.*, p. 10. She also sought to join his professional corporation, Union Internal Medicine Specialists, Inc. (hereinafter "Union Internal Medicine"), in the place of John Doe, M.D.'s Professional Corporation No. 1. At the same time, a request was submitted to the Clerk for personal service of a Summons and original Complaint upon the New Party Defendants. This was accomplished on June 27, 2007. *Merit Brief of Appellants*, p. 3.

On July 9, 2007, Judge Edward Emmet O'Farrell granted leave to amend the Complaint. The pleading was formally filed on July 13, 2007 and successfully served.

New Party Defendants William Swoger, D.O. and Union Internal Medicine Specialists' Motion for Summary Judgment was filed on February 28, 2008 (hereinafter "Defendants' Motion"). They maintained that Plaintiff's claims against them had been raised after the two-year statute of limitations for wrongful death actions, R.C. §2125.02, had expired. Plaintiff submitted her timely Brief in Opposition on March 27, 2008 (hereinafter "Plaintiff's Brief"). She argued that the Amended Complaint which had been personally served upon Dr. Swoger and Union Internal Medicine on June 27, 2007 related back to the original Complaint of July 10, 2006 pursuant to Civ.R. 15(D). A Reply Brief followed on March 31, 2008. In a Judgment Entry dated April 8, 2008, Judge O'Farrell granted Defendants' Motion for Summary Judgment upon the statute of limitations defense.

Plaintiffs' appeal followed. On February 10, 2009, the Fifth District reversed the trial judge and remanded the action for further proceedings against the New Party

Defendants. *Erwin v. Bryan*, 5<sup>th</sup> Dist. No. 08-CA-28, 2009-Ohio-758, 2009 W.L. 418753. The majority held that Plaintiff had satisfied the requirements for relation back under Civ. R. 15(D) by amending the Complaint to include the previously unknown defendants and having the original Complaint personally served upon them within one year of the commencement of the action. *Id.*, ¶26-49.

On July 1, 2009, this Court agreed to review the appellate court's decision. *Erwin v. Bryan*, 122 Ohio St.3d 1454, 2009-Ohio-3131, 908 N.E.2d 945.

## STATEMENT OF THE FACTS

In the proceedings below, none of the Defendants requested summary judgment upon the merits of Plaintiff's medical malpractice/wrongful death action. Dr. Swoger and Union Internal Medicine invoked Civ.R. 56(B) only upon the statute of limitations defense. The facts which are pertinent to the instant appeal may thus be succinctly stated as follows.

Plaintiff, Cora Erwin, was the wife of the Decedent. *Deposition of Cora Erwin taken March 29, 2007 (hereinafter "Erwin Deposition"), pp. 12-13.* The Decedent had owned his own excavation company. *Id.* Plaintiff worked as a housekeeper for Defendant Union Hospital. *Id., p.8.*

On the evening of June 29, 2004, the Decedent was taken to the Union Hospital Emergency Room by ambulance following a seizure he had suffered in bed. *Erwin Deposition., pp. 27-31.* Over Plaintiff's protests, he was placed under Dr. Bryan's care. *Id., pp. 36-37, 43-44 & 72.* As a hospital employee, Plaintiff had been familiar with Dr. Bryan and was concerned with his "bedside manner." *Id.* Without examining the patient, Dr. Bryan told Plaintiff that he was suffering from alcohol withdrawals. *Id., pp. 45-46.* Plaintiff strongly disagreed with this assessment.<sup>1</sup> *Id.*

There is no dispute that Dr. Bryan ordered the Decedent to be intubated and sedated to the point that, in Plaintiff's view, he was comatose. *Erwin Deposition, pp. 46-48.* Plaintiff thought during her deposition that Dr. Swoger had performed the

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<sup>1</sup> Although it had nothing to do with the statute of limitations issue, Defendants made it a point in the proceedings below to accuse the Decedent of being an alcoholic. *Defendants' Motion, p. 3.* During his deposition of February 7, 2007, Dr. Bryan eagerly testified that Plaintiff herself "was drunk or near drunk every day" at the hospital. The nurse who was substantially more involved with the Decedent's daily care and who had interacted frequently with Plaintiff and the other family members, Nurse Mason, denied during her own deposition of February 8, 2008 that she had any recollection of Plaintiff acting intoxicated or otherwise being impaired.

intubation, but she was not sure. *Id.*, p. 54. She had never had any prior experience with him and he never spoke to her. *Id.*, pp. 54-55. The Decedent remained in the Intensive Care Unit (ICU) and by July 5, 2004 Dr. McFadden had taken over for Dr. Bryan. *Id.*, pp. 45 & 88-91. The Decedent was transferred to a step-down unit and ultimately discharged on July 6, 2004. *Id.*, pp. 45 & 97.

On July 15, 2004, the Decedent passed out at home. *Erwin Deposition*, pp. 103-104. Plaintiff thought he was suffering from a heart attack and called emergency rescue personnel. *Id.*, p. 105. The Decedent passed away in the emergency room shortly thereafter. *Id.*, pp. 120-121. Following the autopsy, Plaintiff was informed that he had died from two massive blood clots in his lungs. *Id.*, p. 121. Her experts intend to establish in these proceedings that Defendants' failure to undertake standard measures required to prevent deep venous thrombosis (DVT) in high risk patients, such as the Decedent, while he was admitted to Union Hospital led to his demise at the age of fifty-two. See *Affidavit of Merit of Dr. Carl Schoenberger filed September 12, 2006*; *Affidavit of Merit of Joseph Caprini, M.D. filed July 20, 2007*.

## ARGUMENT

### **PROPOSITION OF LAW NO. 1: THE FIFTH DISTRICT'S DECISION CONTRAVENES THE GENERAL ASSEMBLY'S DETERMINATION AS TO THE APPROPRIATE STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE ACTIONS AND THIS COURT'S INTERPRETATION OF SAME BY PERMITTING PLAINTIFF TO AMEND HER COMPLAINT AFTER THE STATUTE HAS EXPIRED WHEN SHE ALREADY LEARNS FROM AN EXPERT OR OTHERWISE THAT THE DEFENDANT ENGAGED IN TORTIOUS CONDUCT**

#### **A. REQUIREMENTS OF THE STATUTE OF LIMITATIONS.**

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

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

Here, there is no dispute that, barring the application of one of the exceptions to the rule, the statute of limitations upon Plaintiff’s wrongful death claim expired on July 18, 2006. The original Complaint was thus timely filed on July 10, 2006. Defendants’ demand for summary judgment was premised upon the fact that Dr. Swoger and Union

Internal Medicine were not substituted for John Doe M.D. No. 1 and John Doe M.D.'s Professional Corporation No. 1 until the Amended Complaint was filed on July 13, 2007. They are no longer disputing that they were both personally served on June 27, 2007 with the original summons and complaint, which was within one year of the commencement of the lawsuit. *Merit Brief of Appellants, p.3.*

Ohio courts have long disfavored resolution of cases on technicalities, rather than on the merits. *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 431 N.E.2d 644, 647; *National Mut. Ins. Co. v. Papenhagen* (1987), 30 Ohio St.3d 14, 15, 505 N.E.2d 980, 981. Towards this end, the Ohio Rules of Civil Procedure recognize that it is not always possible, without the benefit of discovery, for a plaintiff to identify all of the appropriate defendants before the statute of limitations expires. Civ.R. 15(D) provides that:

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

If this rule is satisfied, the revised pleading joining Dr. Swoger and Union Internal Medicine will relate back to the timely original Complaint of July 10, 2006. *Amerine v. Haughton Elev. Co.* (1989), 42 Ohio St.3d 57, 59, 537 N.E. 2d 208.

Perhaps the most important objective behind Civ. R. 15(D) is to reduce the pressure upon the plaintiff (and the plaintiff's counsel) to specifically name every conceivable defendant in the complaint. Such "shotgun" pleadings are hardly unique to the world of medical malpractice, but are an unfortunate aspect of every field of civil

litigation. As has been forcefully established by *Amici*, The Ohio State Bar Association and Ohio Association for Justice, the Rule ensures that a one-year period will be available following the commencement of the action in which those who were previously believed to have only a peripheral connection to the events, or even no role at all, can be joined if his/her involvement is later determined to be actionable. Oftentimes, it is only after discovery is underway that the potential defendant's participation in or contribution to the cause of action becomes evident. And once the originally named defendants begin pointing their fingers at those who are not yet parties, the need for joinder becomes particularly acute. Civ. R. 15(D) is thus an important device which allows an attorney to name only those defendants in the original complaint who are reasonably believed, consistent with Civ. R. 11 and R.C. §2323.51, to be legally responsible for the harm claimed.

### **C. PLAINTIFF'S KNOWLEDGE OF DEFENDANTS' CULPABILITY.**

Defendants' demand for summary judgment focuses upon the phrase "the plaintiff does not know the name of a defendant" which appears in Civ.R. 15(D). They maintain that because Dr. Swoger had been mentioned in the medical records and Plaintiff had vaguely recalled during her deposition that he had been involved briefly in the Decedent's week long course of treatment, he was not "unknown" to her at the time the original Complaint was filed. *Defendants' Motion for Summary Judgment*, pp. 6-12. The Union Hospital chart reflects, however, that numerous physicians cared for the Decedent prior to his demise, including Dr. McFadden, Dr. Kubina, Dr. Braden, Dr. Rosenberg, Dr. Russell, and Dr. Bhagat. According to Defendants' logic, all of these physicians should have been sued in the original Complaint regardless of whether a case for negligence could be established against them based upon what was known at the time. Civ.R. 15(D) would never be available with respect to any health care provider

mentioned in the chart (including nurses, technicians, medical students, etc.) since their names were deemed to be “known.” If accepted by this Court, such a dangerous precedent would have serious ramifications for both the medical community and the judicial system.

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

In support of the Motion for Summary Judgment, only a few pages of the chart had been submitted which merely suggested that Dr. Swoger had been “consulted” once on June 29, 2004 (the date of admission) for critical care purposes and played a secondary role during the intubation process. *Defendants’ Motion for Summary Judgment, Exhibits 1A, 1B & 1C.* Notably, no evidence complying with Civ. R. 56(E) was ever offered confirming that these records had been available to Plaintiff before the statute of limitations expired.<sup>2</sup> Plaintiff had testified, without equivocation, that her

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<sup>2</sup> It had been, of course, Defendants’ burden to affirmatively establish the appropriateness of summary judgment through admissible evidence. *Dresher v. Burt*,

clear impression was that Dr. Bryan was ultimately in charge of her husband's course of treatment. *Cora Erwin Deposition*, pp. 36-38, 43-48, 55-56 & 83-84. Her understanding in this regard is fully supported by the five page History and Physical Report, which was dictated solely by Dr. Bryan after he had terminated his care of the Decedent. Dr. McFadden's Discharge Summary had further confirmed that initially the "patient was referred to Dr. Bryan because of the complexity of the case who admitted the patient to the Intensive Care Unit." *Appellants' Supp.*, p.45. Dr. Swoger was mentioned only because he was "consulted" and "assisted in helping manage the respirator." *Id.*

In an attempt to create the illusion that Dr. Swoger's alleged role in the decision to forego DVT prevention measures should have been appreciated before the statute of limitations expired, Defendants have taken great liberties with the evidentiary record. No discernable attempt has been made to comply with the maxim that all reasonable inferences must be drawn in favor of the opposing party in summary judgment proceedings. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924, 925; *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 433, 424 N.E.2d 311, 315; *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-106, 483 N.E.2d 150, 155; *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 88, 585 N.E.2d 384, 389.

For example, Defendants have cited Exhibit 1B of their Motion for Summary Judgment for the contention that "Dr. Swoger evaluated Decedent and as part of the evaluation spoke to Plaintiff, Cora Erwin and her son." *Merit Brief of Appellants*, p. 4. Exhibit 1B is Dr. Swoger's two-page consultation report, in which he indicated merely that

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75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264, 274; *Vahila v. Hall*, 77 Ohio St.3d 421, 428-430, 1997-Ohio-259, 674 N.E. 2d 1164; *Stillwell v. Johnson* (1<sup>st</sup> Dist. 1991), 76 Ohio App.3d 684, 688, 602 N.E.2d 1254, 1257.

he “had a discussion with the wife and son at the bedside to obtain [the Decedent’s] medical history.” *Appellants’ Supp.*, p. 41. There is nothing in this document, or any other portion of the chart which has been submitted, that even remotely suggests that Plaintiffs should have understood that Dr. Swoger was part of the “team” responsible for the absence of critical DVT prevention measures. No one could have foreseen that he had played a role in the fatality until Dr. Bryan’s deposition was taken on February 7, 2007.

Defendants have further proclaimed, as they did at the trial court level, that Plaintiff “clearly demonstrated that she knew that Dr. Swoger was involved in her husband’s care.” *Merit Brief of Appellants*, p. 5. They then proceed to cite nothing more than excerpts from Plaintiff’s deposition during which she stated “I think” Dr. Swoger was involved and only knew him “[t]o see him.” *Id.* No meaningful mention has been made in Defendants’ Brief of the numerous other physicians who provided care to the Decedent during his week-long hospital admission from June 29, 2004 through July 6, 2004.

Defendants further contend that “Dr. Swoger’s name is noted in the medical records multiple times.” *Merit Brief of Appellants*, p. 4. By the undersigned counsel’s count, he is actually referenced only three times outside of his own consultation report.<sup>3</sup> Defendants’ description of the document as a “three page, detailed, dictated consultation record” is also a stretch. *Id.*, p. 10. The report was prepared on the first day of admission (June 29, 2004), was devoted primarily to the Decedent’s medical history and the physical examination that was conducted, and was actually just slightly more than two pages in length. *Appellants’ Supp.*, pp. 41-43. Dr. McFadden had prepared a substantially more comprehensive discharge summary, yet not one is suggesting that he also should have

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<sup>3</sup> Rather repetitively, Dr. Bryan twice noted in his admission summary that he intended to have Dr. Swoger evaluate the Decedent for purposes of consultation. *Appellants’ Supp.*, p. 39. Dr. Swoger’s consultation was also mentioned a third time in Dr. McFadden’s discharge summary. *Id.*, p. 45.

been sued as a result. *Id.*, pp. 44-46. Neither Dr. Swoger's consultation report nor the remainder Union Hospital medical chart permitted any an inference that he had violated the standard of care. That deduction could not be made until Dr. Bryan was deposed.

#### **D. THE FIFTH DISTRICT'S REASONING.**

In their effort to secure an early termination from the claims against them, Defendants have assured this Court that the Fifth District's opinion "creates a very dangerous precedent in medical malpractice cases." *Merit Brief of Appellants*, p. 7. If this were indeed true, one would have expected to hear in this appeal from one of the *amici* which traditionally promote the interests of the health care community and their insurers. But none has offered any support for Defendants' unduly narrow and potentially disruptive interpretation of Civ. R. 15(D), including the Ohio Hospital Association, the Ohio State Medical Association, and the Ohio Insurance Institute.

In rejecting the notion that the defendant to be joined under Civ. R. 15(D) must be a virtual stranger to the Plaintiff, the Fifth District analyzed several judicial precedents involving the discovery rule. *Erwin*, 2009-Ohio-758 ¶ 26-37. Such an approach to the issue makes perfect sense, as a considerable body of law has been developed establishing how a plaintiff can secure additional time to commence an action whenever certain essential elements of the claim are unknown and cannot reasonably be discovered. The majority observed that a plaintiff must generally know, or should have known, of the defendants' potentially wrongful conduct (and not just his/her identity) before the statute of limitations begins to run. *Id.* The court concluded that:

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.

*Id.*, ¶ 36. Applying this sensible standard to the issue of whether Defendants were “unknown” for purposes of relation back through Civ. R. 15(D), the appellate court held that:

When we construe the evidence in a light most favorable to [Plaintiff], as we are required to do in a summary judgment posture, we find that [Plaintiff], while knowing the name of Defendant Swoger in the semantical sense, did not know the name of the Defendant Swoger as a potentially culpable party until the deposition of Defendant Bryan was taken. Until [Plaintiff] received this information, she had no reason to believe that Swoger’s conduct was potentially negligent.

*Id.*, ¶ 37.

As a they did while they were attempting to secure this Court’s acceptance of jurisdiction over the appeal, Defendants have greatly exaggerated the scope of the Fifth District’s well-reasoned opinion. They contend that:

While the court did not expressly hold that [Plaintiff’s] medical malpractice claim accrued when she allegedly discovered Dr. Swoger’s culpability that is clearly the import of the court’s decision.

*Merit Brief of Appellants*, p. 15. But the Fifth District did not have to resolve this case on the grounds that the discovery rule extended the statute of limitations. If the discovery rule was held to apply, then the Amended Complaint of July 13, 2007 would have been timely even without the benefit of Civ.R. 15(D). Dr. Swoger’s alleged involvement in the decision to forego the DVT prevention measures was not disclosed until Dr. Bryan’s deposition of February 7, 2007 and, as a result, Plaintiff would have had until February 7, 2009 to satisfy the two-year statute of limitations imposed by R.C. §2125.02(D)(1). But the decision was rendered instead on the basis that Civ. R. 15(D) had been satisfied and principles of relation back were thus available. *Erwin*, 2009-

Ohio-758 ¶ 26-37.

Likewise, there is no truth to Defendants' dire prognostications that "the Fifth District has created a limitless statute of limitations in medical malpractice cases." *Merit Brief of Appellants*, p. 7. As explicitly directed by Civ.R. 15(D) and recognized in *LeNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 327, 2008-Ohio-3921, 894 N.E. 2d 25, 28, ¶ 12, relation back is available only if proper service is obtained within one year of the filing of the original complaint. Once that deadline has expired, the plaintiff is out-of-luck regardless of the circumstances. See *e.g.*, *Hummons v. Dayton*, 2nd Dist. No. 23116, 2009-Ohio-5398, 2009 W.L. 3246831 ¶ 16-20; *Oglesby v. Consolidated Rail Corp.*, 6th Dist. No. E-08-055, 2009-Ohio-1744, 2009 W.L. 1143121 ¶ 32-34.

At the most, the decision rendered below affords an additional year to the applicable statute of limitations when the requirements of Civ.R. 15(D) have been satisfied. *Erwin*, 2009-Ohio-758 ¶ 48. And it must be conceded by all concerned that this extension is entirely appropriate whenever there is no way for the New Party Defendants to be identified before the original two-year period imposed by R.C. §2125.02(D)(1) had expired. There is thus nothing sinister or untoward about an additional twelve months being added to the statute of limitations, as that is precisely what Civ.R. 3(A) & 15(D) contemplate in appropriate instances. This case boils down to nothing more than how strictly the "does not know the name" requirement is to be construed, which makes the appellate court's references to the discovery rule perfectly appropriate.

In attempting to undermine the Fifth District's observations about the discovery rule, Defendants have misapplied decisions such as *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 589 N.E.2d 1284. *Merit Brief of Appellants*, pp. 17-19. In that medical malpractice action, the plaintiff had made no attempt to avail herself of "relation back"

under Civ.R. 15(D). Instead, she had filed her lawsuit against the radiologist well past the one-year statute of limitations imposed by former R.C. §2305.11(A). Her theory was that the “cognizable event” did not occur, and the limitation period did not begin to run, until she had identified the physician’s role with certainty. *Id.*, 63 Ohio St.3d at 548-549. In rejecting this contention, this Court observed that not only had the plaintiff been afforded reason to believe that malpractice had occurred before the deadline for filing had expired, she had actually consulted with an attorney and issued a 180-day letter to another physician within that period. *Id.* at 549.

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

Recent decisions analyzing the discovery rule in medical malpractice/wrongful death actions thoroughly debunk Defendants’ contention that *Flowers*’ “duty to investigate” requires all aspects of the claim to be uncovered before the statute of limitations expires. *Merit Brief of Appellants*, pp. 17-19. Under the discovery rule, the statute of limitations does not even start (and thus a duty to investigate logically would not as well) when critical facts are unknown to the plaintiff. See generally, *Oliver v. Kaiser Comm. Health Found.* (1983), 5 Ohio St.3d 111, 449 N.E.2d 438, syllabus; *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St.3d 1, 516 N.E.2d 204, paragraph one of the syllabus; *Girardi v. Boyles* (Mar. 2, 2006), 10<sup>th</sup> Dist. No. 05AP-557, 2006-Ohio-947, 2006 W.L. 496045 pp. \*2-5; *McGuire v. Milligan* (Apr. 28, 2004), 9<sup>th</sup> Dist.

No. 03CA0051, 2004-Ohio-2125, 2004 W.L. 895798, pp. \*1-2. In discussing this principle in general, this Court has observed that “[i]ts underlying purpose is fairness to both sides. Once a plaintiff knows of an injury and the cause of the injury, the law gives the plaintiff a reasonable time to file suit. Yet if a plaintiff is unaware that his or her rights have been infringed, how can it be said that he or she slept on those rights?” *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 169, 2002-Ohio-2007, 766 N.E.2d 977, 981; see also *NCR Corp. v. U.S. Mineral Prods. Co.*, (Oct. 1, 1993), 2<sup>nd</sup> Dist. Nos. 13931, 1993 W.L. 386223, p. \*2, *rev’d on other grounds*, 72 Ohio St.3d 269, 1995-Ohio-191, 649 N.E.2d 175. (“The purpose of the judicial discovery rule is to postpone the running of the statute of limitation until a person knows, or should have known, that he has a claim. It is a rule of fairness which prevents a person from losing his claim before he is aware of the claim.”).

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

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

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

Before a statute of limitations begins to run, not only must the plaintiff discover that they have an injury, but the

plaintiff must also discover with reasonable diligence that the defendant's wrongful conduct caused that injury. [citation omitted; emphasis added].

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

\*\*\*[I]n order for a wrongful death case to be brought, the death must be wrongful. The fact that a body was discovered and/or that a death took place is irrelevant unless there is proof that a defendant was at fault and caused the death. [emphasis added].

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

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

Similarly, appellants present no evidence to substantiate their claim that the cognizable event occurred in May 1995.

Plaintiff is aware of the defendant's identity prior to filing the original complaint." *Defendants' Court of Appeals Brief, p. 8.* The same could be said of Defendants. They have yet to identify any authorities supporting the dubious proposition that the relation back mechanism is never available when – through mere happenstance – the plaintiff has been previously introduced to the defendant to be joined. Under Defendants' nonsensical view of the rule, a health care provider can be brought into an action under Civ. R. 15(D) only in the rare instance that he/she never had occasion to interact with the plaintiff and was never mentioned in the medical chart.

Not long ago this Court released *LaNeve*, 119 Ohio St. 3d 324. That personal injury action had also involved an attempt after the statute of limitations had expired to join several public business entities to the litigation. *Id.* at p. \*1. They had all allegedly been involved in furnishing hazardous chemicals to the plaintiff's employer, and thus a diligent investigation seemingly would have uncovered both their identities and their roles in the incident within two years of the date of the injury. *Id.* Nevertheless, this Court focused instead upon whether the plaintiff had complied with the requirements of Civ.R. 15(D) while amending his complaint. *Id.* at pp. \*1-3. Because neither the original complaint nor the amended complaint contained the words "name unknown" and both had been served by certified mail, Civ.R. 15(D) was unavailable to the injured employee. *Id.* at p. \*3. That holding does not justify the trial judge's dismissal of the instant action, since Plaintiff's original complaint alleged in the caption that the "real names and addresses" of the John Does were "unknown at the time of filing" and was personally served upon the Defendants by the Sheriff on June 27, 2007.

Defendants' reliance upon *Varno v. Bally Mfg. Co.* (1985), 19 Ohio St. 3d 21, 482 N.E. 2d 342, is seriously misplaced. *Merit Brief of Appellants, pp. 12-13.* This Court had held that "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.*, 19 Ohio St. 3d at 24. This was *dicta*, as the pertinent question – as recognized in the opening of the opinion – was whether service was required upon the defendant. *Id.*, at 22. The majority concluded that service had to be completed within the original statute of limitations, which rendered Civ. R. 15(D) largely superfluous. *Id.*, at 24. Fortunately, the Civil Rules were amended in response to *Varno*, "effectively negat[ing]" the holding. *Amerine*, 42 Ohio St. 3d at 58 fn. 1. While the actual terms of Civ. R. 15(D) itself were not altered, the result was still that plaintiffs were afforded an additional year in which to identify the unknown defendants and perfect personal service upon them. *Ramski v. Sears, Roebuck & Co.* (N.D. Ohio 1987), 656 F. Supp. 963, 966-967.

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

The Fourth District did remark in closing that the "record indicated that the appellant in fact discovered Frick's name as the manufacturer of the before he filed the

original complaint.” *Mark*, 1989 W.L. 106933, p. \*5. This *dicta* actually supports Plaintiff’s position, since both the identity of the John Doe defendant and its role in causing the injury as the “manufacturer” was known. *Id.* The plaintiff had been injured on Frick’s rip saw and could hardly maintain that he had failed to appreciate that a manufacturer could be potentially liable in his products liability action. *Mark* would justify summary judgment only if Plaintiff had possessed any reason to believe that Dr. Swoger – who was just one of several physicians who had cared for the Decedent at Union Hospital – was part of the “team” responsible for dispensing with the critical DVT prevention measures.

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

Towards the end of their Brief, Defendants have offered a string of citations to numerous decisions having little to do with the precise Civ.R. 15(D) issue presently at hand. *Merit Brief of Appellants*, pp. 22-23. In *Kaphun v. Brenner* (Mar. 3, 2000), 2nd Dist. No. 17791, 2000 W.L. 234707, the plaintiff failed to file her original and her amended complaint within the applicable statute of limitations period. Here, there is no dispute that Plaintiff's original complaint was timely filed. In *Van Boxel v. Norton* *Fam. Prac.* (Apr. 28, 1999), 9th Dist. No. C.A. 19229, 1999 W.L. 247783, the plaintiff's counsel had documentation in his possession prior to the expiration of the statute of limitations regarding the identity of a physician who committed malpractice. That was not a case where, as here, discovery was necessary to determine negligent parties.

Likewise, *Stanley v. Magone* (Dec. 11, 1995), 12th Dist. No. CA95-05-096, 1995 W.L. 728503, and *Hans v. The Ohio State Univ. Med. Ctr.* (June 28, 2007), 2007-Ohio-3294, 2007 W.L. 1847832, suffer the same deficiency as the other cases cited by Defendants. These opinions, like the others, did not involve a motion to amend a timely filed complaint pursuant to Civ.R. 15(D). Furthermore, none of the cases cited by Defendants involved a timely filed complaint against Doe defendants. They are thus substantively and procedurally inapposite.

#### **F. IMPLICATIONS OF THE AFFIDAVIT OF MERIT REQUIREMENT.**

It must also be stressed that the authorities which Defendants have cited were all issued prior to the adoption of Civ.R. 10(D)(2). That recently enacted rule prohibits the filing of a medical malpractice action until an affidavit can be obtained from a duly qualified health care provider confirming that legitimate grounds for the claim exist. *Campbell v. Aepli* (July 16, 2007), 5<sup>th</sup> Dist. No. CT06-0069, 2007-Ohio-3688, 2007 W.L. 2069944. Unlike the situation that existed prior to July 1, 2005, plaintiffs no longer have the luxury of blindly suing every physician whose name appears in the

chart. As urged by the *amici* which have submitted briefs in this appeal, the Court should steer well clear of any holding which would encourage even more litigation against health care providers who are only theoretically and tangentially related to the alleged malpractice.

In the spirit of Civ.R. 10(D)(2), this Court should reject Defendants' ill-conceived interpretation of Civ.R. 15(D) and hold that a defendant is only "known" to a plaintiff in the medical malpractice context when the actionable conduct is, or reasonably should have been, sufficiently understood so as to permit an affidavit of merit to be obtained. As Plaintiff's counsel had explained in her affidavit to the trial judge:

I could not have named Dr. Swoger earlier, in light of an inability to obtain medical records and obtain an appropriate expert review. It is not my habit, routine or practice to file suit against physicians unless I am able to do so with due diligence, review and analysis. Once that was completed, Dr. Swoger was added as a party defendant in this case.

*Plaintiff's Brief in Opposition to Summary Judgment, Exhibit A, paragraph 9.* Dr. Swoger's sentiments notwithstanding, the medical community should be applauding such restraint.

#### **G. THE CLERK'S DEFECTIVE SUMMONS.**

As an apparent fall-back position, Defendants had further asserted in the Motion for Summary Judgment that Plaintiff had failed to follow the requirements of Civ. R. 15(D) because the summons which had been personally served upon them allegedly did not contain the talismanic words "name unknown." *Merit Brief of Appellants, pp. 13-15.* No attempt has been made to explain how Plaintiff can be held responsible for a defective "summons" which is strictly up to the Clerk of Courts to prepare. *Civ. R. 4(A).*

Included in Defendants' Supplement is the "Summons on Complaint" dated June 26, 2007 which, everyone agrees, was personally served upon Dr. Swoger the next

day. *Appellants' Supp.*, p. 33; *Merit Brief of Appellants*, p. 3. There has also been no disagreement that the original Complaint accompanied the summons and plainly stated in the caption that the John Does' "\*\*\*\*" real names and addresses are unknown at the time of filing \*\*\*." *Id.*, p. 1 (*emphasis added*).

A moment should be taken to consider the absurdities of Defendants' interpretation of Civ. R. 15(D). When the Summons on Complaint was issued on June 26, 2007, the New Party Defendants' alleged roles in the malpractice was understood. Dr. Bryan had been deposed a few months earlier. Indeed, Dr. Swoger's name and address were prominently displayed on the Summons. *Appellants' Supp.*, p. 33. In Defendants' view, that Summons still should have included the words "name unknown" even though their names were known by that point in time. Defendants' position is, in essence, that Civ. R. 15(D) requires the Clerk to prepare a summons which falsely states that the names of the defendants being joined are "unknown."

A similar situation was examined in *Loescher*, 152 Ohio App. 3d 479. The plaintiff had filed a timely action against her employer and several "John Doe" defendants. After the two-year statute of limitations had lapsed, she filed a second amended complaint identifying John Doe No. 3 as Arrowhead Conveyor L.L.C. ("Arrowhead"). At Arrowhead's request, the trial judge granted summary judgment on the grounds that the summons did not contain the words "name unknown" and thus the action was untimely. On appeal, the panel unanimously reversed this decision. They observed that the defendant had been provided with the original complaint which "contained the required language and was incorporated into the original summons by the language of the summons \*\*\*." *Id.*, 152 Ohio App. 3d at 483. Compliance with Civ. R. 15(D) was thus established. *Id.*

Plaintiff followed precisely the same procedure here. The Summons on

Complaint also incorporated the attached original Complaint by reference:

You are hereby summoned that a complaint (a copy of which is hereby attached and made a part hereof) has been filed against you in the court by the Plaintiff(s) named herein. [emphasis added]

*Appellants' Supp.*, p. 33. The original Complaint contained the requisite name "unknown" language, which was true at the time that the pleading was prepared. *Id.*, pp. 1-2. As *Loescher*, 152 Ohio App.3d at 483, so instructs, relation back is thus available under Civ. R. 15(D).

Defendants have retorted that *Loescher*, 152 Ohio App.3d 479, "was clearly in error," but have failed to cite any authorities criticizing or contradicting the Third District. *Defendants' Court of Appeals Brief*, p. 16. Notably, current Supreme Court Justice Cupp had concurred in *Loescher*. He later left the appellate decision intact when he authored the Supreme Court's majority opinion examining Civ. R. 15(D) in *LaNeve*, 2008-Ohio-3921. Given that the same jurist concurred in both decisions, it is reasonable to conclude that *LaNeve* is entirely consistent with *Loescher*.

Defendants do not appear to be suggesting that the First Amended Complaint of July 13, 2007 was required to contain the phrase "name unknown" or had to be personally served upon them. *Merit Brief of Appellants*, pp. 13-15. Such a bizarre formality would make little sense. *Easter v. Complete Gen. Constr. Co.*, 10th Dist. Case No. 06AP-763, 2007-Ohio-1297, 2007 W.L. 853337, p. \*5 ("[I]t 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."). It is now established that Civ. R. 15(D), as interpreted in *Amerine*, 42 Ohio St.3d at 59, only requires the original Summons and Complaint to set forth such language and be personally served upon the defendants to be joined. The

Tenth District has explained that:

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 à 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. We join other Ohio appellate districts in so holding. See, e.g., *McConville v. Jackson Comfort Sys., Inc.* (1994), 95 Ohio App.3d 297, 642 N.E.2d 416; *Austin v. The Standard Bldg.* (Dec. 4, 1997), 8th Dist. No. 71840; *Mitulski v. USS/Kobe Steel Co.* (May 26, 1999), 9th Dist. No. 98CA007085. [footnotes omitted, emphasis added].

*Easter*, 2007-Ohio-1297, p. \*5. The criticisms of Plaintiff's supposed procrastination notwithstanding, this deadline was satisfied since the original complaint was filed on July 10, 2006 and was served with a summons personally upon the New Party Defendants, once their culpability was recognized, less than a year later on June 27, 2007. See *Entry of July 9, 2007*.

There is some suggestion in *West v. Otis Elev. Co.* (10th Dist. 1997), 118 Ohio App.3d 763, 767, 694 N.E.2d 93, 95, that the "amended complaint" and its corresponding summons were required to contain the phrase "name unknown," but the panel made this remark in passing and offered no supporting analysis. Ten years later in *Easter*, 2007-Ohio-1297, the same court delved into the issue more deeply and concluded that only the original complaint and summons needed to comply with these requirements of Civ. R. 15(D). This is the approach the instant Plaintiff faithfully followed.

The *Amerine*, 42 Ohio St.3d 57, 537 N.E. 2d 208, decision cited by Defendants does not compel a different interpretation or conclusion. *Merit Brief of Appellants*, p. 15. That opinion addressed and analyzed the specific question whether the plaintiff's

attempted service via certified mail satisfied the requirements of Civ. R. 15(D). The *Amerine* court held that it did not. Nothing in *Amerine* or its related authorities suggest that the summons itself must falsely state that the new defendants' names are "unknown." This Court should therefore decline the invitation to construe the Rule in a manner which will produce absurd consequences and only foster considerable confusion.

**CONCLUSION**

Because Plaintiff dutifully complied with Civ. R. 15(D) when joining the New Party Defendants to the action after their alleged role in the malpractice had been disclosed, the sound decision of the Fifth Judicial District Court of Appeals should be affirmed in all respects.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Brief** has been sent by regular U.S.

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