

ORIGINAL

No. 2009-0580

In the Supreme Court of Ohio

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

CORA ERWIN, Administratrix of the Estate of Russel Erwin

Appellees,

vs.

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

Appellants.

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

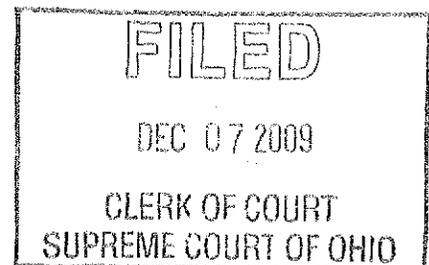
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TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

BRIEF.....1

A. Introduction.....1

B. Brief Factual Review.....1

C. Case Clearly Implicates The Discovery Rule Applicable to Medical Malpractice Claims.....2

D. Appellee’s Claim Against Dr. Swoger Is Barred By R.C. ¶ 2305.113. The “Cognizable Event” Rule Imposes An Objective, Not Subjective Standard, That Triggers The Running Of The Statute Of Limitations When A Plaintiff Becomes Aware Of Facts That An Injury(Or Death) May Be Related To Medical Care And Treatment. The “Cognizable Event” Is Not Based On A Plaintiff’s Subjective Knowledge Of A Defendant’s Alleged Wrongdoing.....3

E. Civ. R. 15(D), By Its Very Terms, Only Applies Where At The Time Of The Filing Of The Complaint The Plaintiff Does Not Know The Identity Of The Defendant.....10

F. Holding That The Statute Of Limitations Bars Appellee’s Claims Will Encourage Plaintiffs To Promptly Investigate And Prosecute Their Claims.....12

CONCLUSION.....14

TABLE OF AUTHORITIES

<i>Akers v. Alonzo</i> (1992), 65 Ohio St.3d 422, 605 N.E.2d 1, 1992 Ohio 66	5
<i>Allenius v. Thomas</i> (1989), 42 Ohio St.3d 131, 134, 538 N.E.2d 93	4
<i>Cundall v. U.S. Bank</i> (2009), 122 Ohio St. 3d 188; 909 N.E.2d 1244.....	5
<i>Doe v. Archdiocese of Cincinnati</i> (2008), 109 Ohio St. 3d 491, 493, 849 N.E.2d 268.....	13
<i>Dougherty v. Torrence</i> (1982), 2 Ohio St. 3d 69, 70.....	10
<i>Flowers v. Walker</i> (1992), 63 Ohio St.3d 546.....	4, 6
<i>Hans v. Ohio State University</i> (June 28, 2007), 10 th Dist. App. No. 07AP-10, 2007 Ohio App. LEXIS 294.....	7
<i>Hershberger v. Akron City Hosp.</i> (1987), 34 Ohio St. 3d 1, 516 N.E.2d 204	4
<i>Norgard v. Brush Wellman</i> (2002), 95 Ohio St. 3d 165, 766 N.E.2d 977.....	5
<i>Stanley v. Magone</i> (Dec. 11 1995), 12 th App. Dist. No. CA95-05-096, CA95-06-112, 1995 Ohio App. LEXIS 542.....	12
<i>United Transp. Union Ins. Ass'n v. Tracy</i> (1998), 82 Ohio St.3d 333.....	10
<i>Varno v. Bally Mfg Co.</i> (1985), 19 Ohio St. 3d 21; 482 N.E.2d 34	11

CIVIL RULES

<i>Civ. R. 15(D)</i>	11
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BRIEF

A. Introduction

In this case, it is undisputed that Appellee waited until the 11th hour to investigate her claims despite the fact that she was aware of *facts* sufficient to trigger the running of the statute of limitations. Apparently, because of this delay, Counsel could not do an adequate investigation. Appellee does not deny that Dr. Swoger's identity was disclosed in the medical records and further does not deny that the care and treatment he provided were set forth in those medical records. Instead, she claims that it was appropriate for her to bring Dr. Swoger into this case, nearly three years later because she allegedly could not have discovered her claim against him without the benefit of formal discovery.

The simple fact is that the only reason Appellee was unable to determine whether Dr. Swoger was a potentially culpable party was Appellee's own lack of diligence. This case presents no exceptional or unusual circumstances. Thus, it would be a travesty to render a ruling that would permit plaintiffs to sit on their rights and not pursue prompt investigation of potential malpractice claims. To do so, would clearly create a "discovery rule" that is subjective and never ending.

B. Brief Factual Review

Appellee's Decedent, who was 52 years old died suddenly and unexpectedly on July 15, 2004, nine days after being hospitalized at Union Hospital for nearly 1 week. The Union Hospital records demonstrated that, among other physicians, Dr. Swoger was involved in Decedent's care. The records disclosed Dr. Swoger's identity and the care he provided. An Autopsy concluded that Appellee had died as result of pulmonary emboli.

Significantly, for nearly two years, Appellee did not pursue any investigation of her claim. Appellee first consulted Counsel on June 19, 2006, several weeks before the expiration of the two year statute of limitations. (See Pearse Affidavit attached to Plaintiff's Brief in Opposition to Motion for Summary Judgment). As a result, her Counsel "could not have named Dr. Swoger earlier, in light of an inability to obtain medical records and obtain an appropriate expert review." *Id.* Plaintiff served her Complaint naming Dr. Swoger on June 26, 2007.

C. This Case Clearly Implicates The Discovery Rule Applicable To Medical Malpractice Claims.

In her brief, Appellee argues that since the Court of Appeals decided this case based on Civ. R. 15(D) it does not create a precedent that threatens to create a limitless statute of limitations. However, it cannot be seriously debated that the Fifth District's decision implicates the future application of the discovery rule. In fact, the Fifth District specifically stated it was applying the "discovery rule" to find in Appellee's favor. After analyzing a number of cases applying the discovery rule, the court stated:

We find these cases to be persuasive in the case at bar. All of these cases "stand for the proposition that the statute of limitations begins to run once the plaintiff acquires additional information of the defendant's wrongful conduct."

Erwin, 2009-Ohio-758, ¶ 33.

Moreover, from the briefs submitted by Appellee and Amici, OAJ and OSBA, it is clear all are advocating application of the "discovery rule" to this case. For example, Appellee states:

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.

(Merit Brief of Appellee, p. 12)

Thus, this case clearly implicates the “discovery rule.” As such, lower courts faced with the issue of when a medical malpractice action accrues pursuant to the “discovery rule” will look to this case for guidance.

D. Appellee’s Claim Against Dr. Swoger Is Barred By R.C. ¶ 2305.113. The “Cognizable Event” Rule Imposes An Objective, Not Subjective Standard, That Triggers The Running Of The Statute Of Limitations When A Plaintiff Becomes Aware Of Facts That An Injury(Or Death) May Be Related To Medical Care And Treatment. The “cognizable event” is not based on a plaintiff’s subjective knowledge of a defendant’s alleged wrongdoing.

Appellee does not dispute that a “cognizable event” occurred at the time of Decedent’s death. However, she claims that it only began the running of the statute with respect to her claims against Dr. Bryan. She further claims it was only with the benefit of formal discovery that she could have known of Dr. Swoger’s negligence. Accordingly, she claims the statute was not triggered until she learned of Dr. Swoger’s wrongdoing. Essentially, it is Appellee’s position that until she knew of Dr. Swoger’s alleged culpability from an expert or another physician that a proposed defendant has engaged in wrongful conduct “discovery” has not occurred.

This Court has had many opportunities to address the statute of limitations in the context of medical malpractice cases. In its continuing effort to refine its definition of the events that trigger the accrual of the statute of limitations, this Court has repeatedly rejected the notion that the statute is triggered only after a plaintiff needs has obtained

subjective knowledge of the legal theories. For example, in *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St. 3d 1, 5, 516 N.E.2d 204, the Court explained;

The concept of "legal injury" as initiating the running of the statute also is not without problems. Legal theories are ordinarily not within the province of the average layman. Furthermore, to utilize "legal injury" might effectuate a complete undermining of the discovery rule since anyone could allege ignorance of his legal rights. It would also be most difficult to refute such an allegation, whether or not true, without proceeding to full trial. An issue of fact could be compounded unless objective proof, which would ordinarily not be available, could sufficiently infer such subjective knowledge or belief. It is therefore the knowledge, actual or inferable, of *facts*, not legal theories, which initiates the running of the one-year statute of limitations.

In his concurring opinion in *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 538 N.E.2d 93, Chief Justice Moyer emphasized that it is discovery of the physical injury -- not discovery of the legal claim -- which triggers the statute of limitations. In this regard, he explained:

"[I]n determining when the statute of limitations is triggered, "[t]he test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation." * * * As indicated by the majority, it is a cognizable event such as the occurrence of pain or injury * * * rather than knowledge of its legal significance that starts the running of the statute of limitations." *Allenius, supra*, at 135, 538 N.E.2d at 97.

In her brief, Appellee claims that despite these cases, recent decisions require that a plaintiff have actual knowledge of virtually all aspects of her claim before the statute of limitations begins to run. (See Merit Brief of Appellees, 15-16). However, this is clearly contrary to this Court's rulings applying the medical malpractice statute of limitations. In *Flowers v. Walker* (1992), 63 Ohio St.3d 546, the Court explained:

Moreover, *constructive* knowledge of facts, rather than *actual* knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule. **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.

Flowers at 549.

In his dissent in *Akers v. Alonzo* (1992), 65 Ohio St.3d 422, 605 N.E.2d 1, 1992 Ohio 66, Justice Wright again emphasized that a plaintiff need not possess all of the facts before the statute begins to run, explaining:

The "cognizable event" analysis is profoundly weakened if the plaintiff is not required to explore the circumstances of her injury until she has actual knowledge of the alleged malpractice. This is why this court has stressed that *constructive knowledge* of facts which suggest malpractice is sufficient to start the running of the statute of limitations. See *Flowers*, *supra*, 63 Ohio St.3d at 549, 589 N.E.2d at 1287.

Id. (Wright, J., Dissenting Opinion, concurred by Moyer, C.J., and Holmes, J.)

Appellee places heavy reliance on *Norgard v. Brush Wellman* (2002), 95 Ohio St. 3d 165, 766 N.E.2d 977, and suggests that this decision somehow has altered this Court’s holding in *Flowers*. However, earlier this year, this Court reemphasized *Flowers* focus on “constructive knowledge” of facts in *Cundall v. U.S. Bank* (2009), 122 Ohio St. 3d 188; 2009 Ohio 2523; 909 N.E.2d 1244. *Cundall* involved the application of the discovery rule in a fraud case. In response to the argument that actual knowledge of the fraud was what triggered “discovery” this Court stated:

As the First District has recognized, "this standard does not require the victim of the alleged fraud to possess concrete and detailed knowledge, down to the exact penny of damages, of the alleged fraud; rather, the standard requires only facts sufficient to alert a reasonable person of the *possibility* of fraud." (Emphasis added.) *Palm Beach Co. v. Dun & Bradstreet*. (1995), 106 Ohio App. 3d 167, 171, 665 N.E.2d 718. Rather, "[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." (Emphasis sic.) *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549, 589 N.E.2d 1284

Id. at 194.

Thus, clearly *Flowers* is and should remain good law. Plaintiff also has dubiously claimed that *Flowers* is distinguishable from the present case. In her brief, Appellee argues that, unlike here, the plaintiff in *Flowers* had “been afforded reason to believe that malpractice had occurred before the deadline for filing had expired.” Appellee takes great liberties as there is no such statement to this effect in *Flowers*. Moreover, the facts in *Flowers* have no meaningful distinction from those in the present case.

Just like Appellee, the plaintiff in *Flowers* claimed she could not have discovered her claim against the Defendant radiologist prior to the expiration of the statute of limitations as she did not know he was involved in her care until after the expiration of the statute. In rejecting this argument, the Court, in its *syllabus*, defined the duties of a plaintiff once they have reason to suspect malpractice, as follows:

In a medical malpractice case, the statute of limitations starts to run upon the occurrence of a “cognizable event.” The occurrence of a “cognizable event” imposes upon the plaintiff the duty to (1) determine whether the injury suffered is the proximate result of malpractice and (2) ascertain the identity of the tortfeasor or tortfeasors. The identity of the practitioner who committed the alleged malpractice is one of the facts that the plaintiff must investigate, and discover, once she has reason to believe that she is the victim of medical malpractice. (*Flowers*, at syllabus).

Thus, pursuant to *Flowers* once Appellee was on notice of a possible malpractice claim (which Appellee admits occurred at the time of Decedent’s death), it was incumbent upon her not to simply assume that Dr. Bryan was negligent, but to actually conduct an investigation to discover her possible claims and against whom those claims need to be asserted. This Court could not have established a clearer standard.

In Appellant's Merit Brief, the Appellant herein cited a number of cases applying the *Flowers*' decision under the same type of circumstances present in the case *sub judice*. (See Appellant's Merit Brief at p. 20-22). In those cases, the plaintiff argued, as Appellee does here, that the statute of limitations was not triggered until they learned of the defendant's wrongful conduct from a medical expert. Appellee did not address these cases in her brief. In fact, Appellee cited no case involving remotely similar circumstances to the present case.

In *Hans v. Ohio State University* (June 28, 2007), 10th Dist. App. No. 07AP-10, 2007 Ohio App. LEXIS 3294, the 10th District provided an excellent analysis of the proper application of this Court's rulings, explaining:

The occurrence of a cognizable event makes it incumbent upon that individual to investigate his or her case completely. *Simons v. Kearney* (Wayne App. No. 01 CA0035, 2002-Ohio-761). ***The identity of the practitioner who committed the alleged malpractice is one of the facts that plaintiff must investigate, and discover, once she has reason to believe that she is a victim of medical malpractice.*** *Flowers*, at 550.

(*Id.* at 4)

The medical records here were fully available to appellant, and the identities of those involved in the alleged medical malpractice were readily recognizable on the face of the records. As found in *Flowers*, once appellant suspected medical malpractice had occurred upon the death of decedent, she had the duty to examine the records to determine the identities of all those involved, or possibly involved, in decedent's allegedly negligent treatment. ***It is immaterial that appellant may not have known the legal significance of the actions of the physician's assistant and nurses.***

(*Id.* at p. 5) emphasis added.

The fact that appellant might not have realized that the physician's assistant and nurses may have provided negligent treatment until her medical expert examined the medical records, did not relieve appellant of her duty to examine the available records and identify potential tortfeasors within the statute of limitations.

(*Id. at p. 7*).

The dangers posed by Appellee's position become quite evident when the claims and arguments are more closely scrutinized. It is Appellee's position that despite the fact that the "cognizable event" occurred with respect to her claim against Dr. Bryan at the time of Decedent's death the "cognizable event" with respect to Dr. Swoger did not occur until Dr. Bryan's deposition. She claims that it was impossible without the benefit of Dr. Bryan's deposition for her to have known of Dr. Swoger's alleged negligence.

The problem with plaintiff's argument is she provides no rational reason why it was appropriate for the "cognizable event" to be triggered against Dr. Bryan but not Dr. Swoger. Her claim against Dr. Bryan is that he failed to provide measures to prevent DVT/PE's from occurring and had Dr. Bryan done so Decedent would not have died of a PE. So, what facts triggered Appellee's claim against Dr. Bryan? Was it actual knowledge of the legal theory of her claim – i.e. failure to prescribe DVT prophylaxis. The answer is clearly no. A layperson would have no way of knowing that theory. Did Dr. Bryan explicitly indicate in his records that it was his duty to decide whether DVT prophylaxis should be instituted? Again, the answer is no. Rather, it was the fact that Appellee's husband, a 52 year old man, had died suddenly and unexpectedly within days of being discharged from the hospital. It was these facts that triggered the running of the statute of limitations. And, Appellee and her *Amici* agree that it was appropriate for the statute to begin to run at that point in time.

One must ask why these facts trigger the statute running as to Dr. Bryan and not the other physicians involved in Decedent's care. Appellee argues that since Dr. Bryan was in charge it was reasonable for her to assume that Dr. Bryan, to the exclusion of all

others, was in charge of this decision. However, there was nothing in Dr. Bryan's charting that remotely suggests it was his duty alone to evaluate DVT prophylaxis.

In the present case, rather than assuming Dr. Bryan was the only potentially culpable party, it was incumbent upon Appellee to engage in appropriate investigation, including an investigation to "ascertain the identity of the tortfeasor or tortfeasors" as required by *Flowers*. This required that she obtain a complete copy of the chart and submit the chart to experts for review in a timely manner. Had she done those things, there is no doubt Appellee would have been able to determine whether Dr. Swoger should be named as a defendant.

Finally, and particularly telling in this case, is the Affidavit of Merit submitted by Appellee from expert, Joseph Caprini, M.D.. Contrary to Appellee's claim that the only way she could have known of Swoger's alleged wrongful conduct was through formal discovery, Appellee's expert Joseph Caprini, M.D. was able to make a determination as to Dr. Swoger's alleged negligence *solely based on the records and without Dr. Bryan's deposition*. In his affidavit, Dr. Caprini states as follows:

4. I have reviewed *all medical records reasonably available* to the plaintiff, or his counsel concerning the allegations of substandard care on the part of defendants Union Hospital, Edward Brian, M.D. and William Swoger, M.D..
5. I am familiar with the applicable standard of care and **based upon my review of the medical records** reasonably available at this time concerning the allegations of substandard care it is my professional opinion that the standard of care was breached and that the breach caused injury to the plaintiff.

(Affidavit of Joseph Caprini, M.D. filed July 20, 2007).

Thus, it is beyond any argument, that had Appellee engaged in an appropriate investigation within the statute of limitations, the type of investigation compelled by this

court's rulings, Appellee could have determined whether to have included Dr. Swoger. Appellee's dilatory actions in waiting nearly two years to engage in any type of investigation does not warrant creating a rule that would "effectuate a complete undermining of the discovery rule." *Hershberger, supra* at 5.

E. Civ. R. 15(D), By Its Very Terms, Only Applies Where At The Time Of The Filing Of The Complaint The Plaintiff Does Not Know The Identity Of The Defendant.

In her brief, Appellee ignores the clear mandates of this Court's fundamental principles of statutory construction. Rather, Appellee continues her efforts to rewrite Civ. R. 15(D) and give a new meaning to the rule that runs counter to its clear and unambiguous language.

This Court has repeatedly stated that: "[i]t is a well settled principle of statutory construction that words used in a statute are to be given their plain and ordinary meaning unless otherwise indicated." *United Transp. Union Ins. Ass'n v. Tracy* (1998), 82 Ohio St.3d 333. Moreover, "[i]t is the duty of this court to give effect to the *words used* [in a statute], not to delete words used *or to insert words not used.*" *Dougherty v. Torrence* (1982), 2 Ohio St. 3d 69, 70, citing *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St. 2d 1, 4.

Despite these admonitions that is clearly what Appellee is attempting to do. Civ. R. 15(D) is clear and unambiguous. It only applies where, at the time of the expiration of the statute of limitations, plaintiff does not know the name of the defendant. One need only look to the title of this section to understand its plain meaning, "**AMENDMENTS WHERE NAME OF PARTY UNKNOWN**". If, as Appellee, argues the rule permits amendment where the culpability of a party was not known, the Rule could easily have been captioned: "**AMENDMENTS WHERE CULPABILITY OF PARTY**

UNKNOWN". Moreover, instead of the plain language used in the rule¹, the rule could easily have been written as follows if it was intended to mean as Appellee argues:

15 (D) Amendments where *culpability* of party unknown

When the plaintiff does not know the *culpability* of a defendant that defendant may be designated in a pleading or proceeding by any name and description. When the *culpability* 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 *culpability*. The summons must contain the words "name unknown," and the copy thereof must be served personally upon the defendant.

However, contrary to Appellee's claims this rule is drafted in clear, unambiguous language. The only interpretation to be made is that it applies only where at the time of the filing of the complaint, the plaintiff does not know the name of the defendant.

Finally, Appellee again fails to cite a single case that applies Civ. R. 15(D) in the manner being suggested. Rather, Appellee resorts to meaningless distinctions in the cases cited by Appellants. For example, in regards to the *Varno v. Bally* (1985), 19 Ohio St.3d 21, 482 N.E.2d 34, this Court had one of its first opportunities to address Civ. R. 15(D).

In *Varno*, this Court clearly indicated that the rule applies in "those cases in which the defendant's identity and whereabouts are known to a plaintiff, but the actual name of the defendant is unknown." The Court also held that based on the Civil Rules in effect at the time, service on the fictitious defendant had to occur before the statute of limitations expired. It was this later holding that was addressed in subsequent amendments to Civ.

¹ Civ. R. 15(D) reads in full as follows: **(D) Amendments where name of party unknown**
When the plaintiff does not know the name of a defendant that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and the copy thereof must be served personally upon the defendant.

R. 15(D) and Civ. R. 3(A). However, those amendments did not attempt to change the Court's holding that Civ. R. 15(D) applied only where the parties name was unknown at the time of filing.

Thus, pursuant to the plain language employed by Civ. R. 15(D), Appellee's claims against Dr. Swoger should not relate back to her original complaint.

F. Holding That The Statute Of Limitations Bars Appellee's Claims Will Encourage Plaintiffs To Promptly Investigate And Prosecute Their Claims.

Appellee argues that finding that the statute of limitations bars Appellee's claims in this case, will only encourage plaintiffs to file suit in a shotgun approach naming a number of defendants who might not otherwise be named in a medical malpractice case. To the contrary, the analysis sets forth above illustrates the dangers of the arguments being advanced by Appellees and *Amici* OSBA and OAJ in this case. Rather, barring Appellee's claim in this case will encourage plaintiffs to timely conduct an appropriate investigation of their potential claims consistent with this Court's rulings and the policy decisions of the General Assembly.

In *Stanley v. Magone* (Dec. 11 1995), 12th App. Dist. No. CA95-05-096, CA95-06-112, 1995 Ohio App. LEXIS 5427, the court addressed the very same argument being advanced by Appellees. In rejecting this argument, the Court persuasively explained:

Stanley complains that the trial court's ruling will only encourage plaintiffs to name as defendants every health care worker involved in their treatment. Stanley asserts under her third issue for review that no court may require a plaintiff to sue physicians or hospitals before the plaintiff has reason to associate her injury with any medical service provided by such physicians or hospitals. Stanley also complains that only negligent physicians and hospitals are protected by strict interpretation of the statute of limitations in medical malpractice cases.

This court does not encourage plaintiffs to file unfounded complaints. However, this court does encourage plaintiffs, once they have reason to believe that medical negligence has occurred, to investigate their potential claims as thoroughly and expeditiously as possible. As the trial court pointed out, “[t]o accept the plaintiff’s argument under the facts presented to this Court would leave open the limitations for a potentially indefinite term.” (*Id.* at *4).

This holding is consistent with the principles behind statutes of limitations, “[t]hrough statutes of limitation, the General Assembly limits the time within which various claims may be asserted in Ohio’s courts. These statutes of limitation serve a gate-keeping function for courts by (1) ensuring fairness to the defendant; (2) encouraging prompt prosecution of causes of action; (3) suppressing stale and fraudulent claims; and (4) avoiding the inconveniences engendered by delay - specifically, the difficulties of proof present in older cases.” *Doe v. Archdiocese of Cincinnati* (2008), 109 Ohio St. 3d 491, 493, 849 N.E.2d 268. (Citations omitted).

The Legislature in Ohio has determined that medical malpractice plaintiffs would be granted a certain period of time in which they can be reasonably expected to fully investigate their medical malpractice claims, which includes obtaining the appropriate medical records and obtaining an appropriate expert evaluation. In this case, since it involved a wrongful death matter, Appellee had an additional year in which to complete this investigation.

In this case, Appellee had two full years to investigate her claim, identify potential tortfeasors and bring suit. Having failed to file her Complaint against Dr. Swoger within that time, Appellee’s claims against Dr. Swoger should be barred by the statute of limitations.

CONCLUSION

In the present case, the Fifth District's opinion has substantially altered the statute of limitations for filing a medical malpractice case in the State of Ohio. The Court has extended the time for filing complaints against physicians in the State of Ohio contrary to the public policy as determined by the General Assembly. Moreover, contrary to this Court's decisions, the Fifth District imposes essentially no duty upon a medical malpractice plaintiff to thoroughly investigate her case within the statute of limitations. It is extremely important that this Court takes this opportunity to clarify the duties imposed upon a medical malpractice plaintiff once a cause of action for malpractice accrues.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Brief Of Appellants William V. Swoger, M.D. And Union Internal Medicine Specialties, Inc.** was served via facsimile and regular U.S. mail on this 7th day of December 2009, upon:

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A handwritten signature in black ink, appearing to read 'Rocco D. Potenza', is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

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<<HCP #49293-v1>>