

IN THE SUPREME COURT OF OHIO

ORIGINAL

CORA ERWIN, Administratrix of the	:	Case No. 2009-0580
Estate of Russell Erwin	:	
	:	
Appellee,	:	Appeal from the Tuscarawas County
	:	Court of Appeals,
v.	:	Fifth Appellate District,
	:	Case No. 08-CA-28
	:	
JOSEPH E. BRYAN M.D., et al.	:	
	:	
Appellants.	:	

**REPLY BRIEF OF AMICI CURIAE,  
OHIO STATE MEDICAL ASSOCIATION,  
OHIO HOSPITAL ASSOCIATION, AND  
OHIO OSTEOPATHIC ASSOCIATION  
IN SUPPORT OF APPELLANTS**

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## **INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE**

Amici curiae, the Ohio State Medical Association (“OSMA”), the Ohio Hospital Association (“OHA”), and the Ohio Osteopathic Association (collectively, “Amici”) file this Reply Brief in response to Appellee’s Merit Brief.

Appellee supported her arguments in her Merit Brief by implying that because medical organizations such as the OSMA and OHA had not appeared as amici curiae on behalf of Appellants, they do not support Appellants’ interpretation of Civ. R. 15(D). Appellee’s Brief, at 12. This could not be further from the truth.

Although Amici (and other medical organizations) have filed amicus briefs in this Court in cases that affect their members, they do not make an appearance in every case that touches healthcare providers. Amici’s nonappearance in this or any other case involving healthcare providers should not be construed by this Court (or anyone) as implicit support for any position, especially any position advocated against a physician or hospital defendant.

Because Amici’s nonappearance has been erroneously construed as indifference to the issue before the Court, Amici will take the opportunity to respond to this misstatement in this Reply Brief. Amici (1) recognize that the issues before the Court in this case will have a significant effect on healthcare providers and (2) do not agree with the positions asserted by Appellee or the amici supporting Appellee. Amici strongly believe that in the interest of closure, certainty, and fairness, the statute of limitations in R.C. 2305.113 and R.C. 2125.02 should be strictly adhered to, with very limited exception. Specifically, as to the role of Rule 15(D) in wrongful death claims premised on medical negligence, Amici agree with Appellants that where a plaintiff knows the identity of a particular healthcare provider before the expiration of the statute of limitations, the plaintiff should not be permitted to utilize Rule 15(D) to extend the

applicable statute of limitations by naming a “John Doe” defendant and later substituting the previously known healthcare provider as a named defendant.

Moreover, as to the Fifth District’s broad interpretation of the “discovery rule,” Amici share Appellants’ concern that the rule propounded by the Fifth District—that “the statute begins to run once the plaintiff acquires additional information of the defendant’s wrongful conduct”—sets a very dangerous precedent that effectively creates a limitless statute of limitations in medical malpractice claims. *Erwin v. Bryan*, 5<sup>th</sup> Dist. No 08-CA-28, 2009-Ohio-758, at ¶33.

The OSMA is a non-profit professional association of approximately 20,000 physicians, medical residents, and medical students in the state of Ohio. The OSMA’s membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. The OSMA’s purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The OHA is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For decades, the OHA has provided a mechanism for Ohio’s hospitals to come together and develop healthcare legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of more than one hundred seventy (170) private, state and federal government hospitals and more than forty (40) health systems, all located within the state of Ohio; collectively they employ more than 230,000 employees. The OHA’s mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities. In this regard, the OHA actively supports patient safety initiatives, insurance industry reform, and tort reform measures. The OHA was involved in the formation of the Ohio

Patient Safety Institute<sup>1</sup> which is dedicated to improving patient safety in the State of Ohio, and created OHA Insurance Solutions, Inc.<sup>2</sup> to restore stability and predictability to Ohio's medical liability insurance market.

The OOA is a non-profit professional association, founded in 1898, that represents Ohio's 3,400 licensed physicians (DOs), 18 health-care facilities accredited by the American Osteopathic Association, and the Ohio University College of Osteopathic Medicine in Athens, Ohio. Osteopathic physicians make up eleven percent of all licensed physicians in Ohio and twenty-six percent of the family physicians in the state. OOA's objectives include the promotion of Ohio's public health and maintenance of high standards at all osteopathic institutions within the state.

For the reasons stated herein and in Appellants' Merit Brief, Amici urge the Court to reverse the decision of the Fifth District Court of Appeals.

## LAW AND ARGUMENT

### APPELLANTS' PROPOSITION OF LAW NO. 1:

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

**The Fifth District's Decision contravenes the General Assembly's determination as to the appropriate statute of limitations for medical malpractice actions and this Court's interpretation of same by permitting Plaintiff to amend her Complaint after the statute has expired when she allegedly learns from an expert or otherwise that the Defendants engaged in tortious conduct.**

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<sup>1</sup> <http://www.ohiopatientsafety.org>

<sup>2</sup> <http://www.ohainsurance.com>

**I. Appellants' Interpretation of Rule 15(D) Should be Adopted.**

Amici agree with Appellants that where a plaintiff knows (or with the exercise of reasonable diligence should have known) the identity of a person who can be named as a defendant before the expiration of the statute of limitations, the plaintiff should not be permitted to utilize Rule 15(D) to extend the applicable statute of limitations for an additional year by including a "John Doe" defendant and later substituting, as a defendant, the person who previously was known to the plaintiff.

**A. The Danger of "Shotgun" Pleadings is Unfounded.**

Appellee and her amici, The Ohio State Bar Association ("OSBA") and the Ohio Association for Justice ("OAJ"), warn that if Appellants' proposed rule is adopted, plaintiffs will be forced to "name as defendants in a medical claim every provider who may have been even peripherally involved with the patient's care," returning to the "shotgun" pleadings of days past. Appellee's Brief, at 7-8; OSBA Brief, at 6-12; OAJ Brief, at 14-15.

Amici are firmly opposed to such "shotgun" pleadings. And, as the OSBA notes in its brief, Amici are on record in their opposition to the inclusion of "clearly blameless physicians as defendants." OSBA Brief, at 8 (quoting the AMA and OSMA's Amicus Brief in *Barbato v. Mercy Med. Ctr.*, 5<sup>th</sup> Dist. No. 2005-CA-00044, 2005-Ohio-5219). However, this doomsday scenario is simply not a significant threat in light of the affidavit of merit requirement set forth in Ohio Civil Rule 10(D)(2) and the "good faith" requirement set forth in R.C. 2323.42.

Ohio Civil Rule 10(D)(2) requires that the filing of a medical claim must be accompanied by an affidavit of merit, which is the sworn statement of a medical expert who can aver that each medical provider named as a defendant fell below the accepted standard of care and proximately caused injury to the plaintiff. R.C. 2305.113; see also OSBA Brief, at 10-11 (quoting the OSMA's 2005 newsletter explaining the importance of an affidavit of merit requirement). As

Appellee and the OSBA note in their Merit Briefs, because of the affidavit of merit requirement, plaintiffs no longer have the “luxury of blindly suing every physician whose name appears in the chart.” Appellee’s Brief, at 22-23; see also OSBA Brief, at 10. In other words, “shotgunning” is no longer permitted.

Therefore, the dangers heralded by Appellee and the OSBA that accepting Appellants’ position will “encourage even more litigation against healthcare providers who are only theoretically or tangentially related to the alleged malpractice” due to these “shotgun” pleadings is unfounded. Appellee’s Brief, at 23. Simply put, a plaintiff must be able to support his claim with an affidavit of merit before bringing suit or must bring suit and request an extension under Rule 10(D)(2) to supply an affidavit of merit. Hence, unsupportable litigation against healthcare providers who are merely “theoretically or tangentially” related to the alleged malpractice will be dismissed under Rule 10(D)(2).

Not only has this Court taken action to prevent “shotgun” pleadings by adopting Ohio Civil Rule 10(D)(2), the General Assembly has likewise taken steps to prevent this litigation tactic. In 2003, the General Assembly adopted R.C. 2323.42 which provides sanctions for plaintiffs who maintain their medical negligence lawsuits against defendants without “a reasonable good faith basis upon which to assert the claim in question \* \* \* \*” R.C. 2323.42. Thus, this requirement also guards against “shotgun” litigation.

Plaintiffs asserting medical negligence claims, like all other plaintiffs, have a predetermined period of time, set forth in a statute of limitations, within which to assert their claims. Like all other plaintiffs, if they sit on their rights and fail to timely assert their claims, such claims cannot be pursued. Contrary to Appellee’s suggestion, Ohio law does not provide plaintiffs asserting medical negligence claims the option of naming as defendants and

maintaining suit against every person remotely related to the alleged malpractice. “Shotgun” litigation is not and should not be tolerated in Ohio.

**B. Although Rule 15(D) is Not Applicable, Other Provisions are Specifically Available to Plaintiffs Who Need Additional Time to Investigate Medical Negligence Claims.**

Simply naming John Does and later substituting — after the expiration of the statute of limitations — the names of medical provider defendants who were specifically and sufficiently identified in the patient’s medical chart as to generally understand their role in the patient’s medical treatment is improper. Rather, if a potential plaintiff truly needs additional time to review her claim, she should either request a 90-day extension of time to file an affidavit of merit pursuant to Rule 10(D)(2) or send a 180-day letter in the case of a medical malpractice action. Regardless of whether these provisions are utilized, this Court must ensure — and instruct Ohio’s lower courts to ensure — that plaintiffs who are dilatory in pursuing their rights are not treated more favorably than those who diligently investigate and timely assert their potential claims.

Here, Appellee appears to have been dilatory. Even though she worked at the hospital where the medical records were located, she sat on her rights for nearly two full years, without requesting the relevant medical records. Then, shortly before the two-year wrongful death statute of limitations expired, she met with an attorney. In light of these facts, the Court must be careful not to adopt a rule of law that rewards dilatory conduct and obliterates the statute of limitations.

**1. Plaintiffs may request an extension to file an affidavit of merit.**

This Court and the General Assembly have specifically provided periods of time within which plaintiffs must file and support their claims of medical negligence. As the OSBA notes in its Merit Brief, a plaintiff may obtain up to a 90-day extension of time to file an affidavit of

merit. Rule 10(D)(2)(b); OSBA Brief, at 11-12. Therefore, if a plaintiff does not have enough information to obtain an affidavit of merit as to a medical provider identified in a patient's medical chart within the applicable statute of limitations, he can and should file for an extension of time pursuant to Rule 10(D) – not use a “John Doe” defendant. This way, physicians are at least on notice of the potential claim, and the claims against them eventually will either be dismissed or an affidavit of merit will be filed within the applicable time period (usually 90 days).

Appellee further argues that even if she had timely obtained and reviewed the medical records, the records alone did not reflect that the physicians treating the Decedent worked as a “team” responsible for managing the Decedent's care, and therefore that Dr. Swoger, a member of that team, could have also been “responsible for the absence of critical DVT prevention measures.” Appellee's Brief, at 1-2, 11. This argument is flawed.

First it is undisputed that (1) Appellee was aware that Dr. Swoger treated Decedent, (2) Dr. Swoger's name appears in Decedent's medical record multiple times, and (3) Dr. Swoger's detailed consultation report is included in Decedent's medical record. Appellants' Brief, pp. 3-5, 10. Additionally, Dr. Swoger is a pulmonologist (Appellants' Brief, p.3) and Appellee's original complaint “asserted that as a direct and proximate result of the negligent acts and/or omissions on the part of one or more of the named Defendants, the Decedent was neither timely diagnosed, nor timely treated for pulmonary embolism, the result of which was a massive pulmonary embolism that resulted in his death . . . .” *Erwin v. Bryan*, 5th Dist. No. 08-CA-28, 2009-Ohio-758, at ¶ 8. Given these assertions, it is not a stretch to expect that the care provided to Decedent by any pulmonologist would have been important enough to have been reviewed and investigated prior to the expiration of the two-year statute of limitations. It is axiomatic that

Appellee, like any person filing a lawsuit, had a duty to investigate Dr. Swoger's role in the alleged malpractice prior to the expiration of the statute of limitations. Appellants' Brief at 23; see also Appellee's Brief, at 11. Nothing in the briefing before this Court shows that this was done.

Second, if the medical records were truly insufficient to extrapolate that Dr. Swoger may have worked as a part of a "team" of hospital physicians who provided Decedent's medical care, Rule 10(D)(2) specifically provides for such a situation. If the trial court agrees that the medical records alone are insufficient to evaluate a provider's care, a plaintiff may name parties believed to be culpable and conduct depositions in conjunction with a request for an extension of time to file an affidavit of merit. See Staff Notes to Ohio Civ. R. 10(D). This was not done here.

Third, the Staff Notes to Rule 10(D)(2) mention the use of "John Doe" defendants only in the context of the absence of a medical provider's name in the medical records. More specifically, the Staff Notes provide: "[T]here may be situations where the medical records do not reveal the names of all of the potential defendants and so until discovery reveals those names, it may be necessary to name a 'John Doe' defendant." Staff Notes to Ohio Civ. R. 10(D). In contrast, where the medical records "fail to reveal how or whether identified providers who are identified in the [medical] records were involved in the care that led to the malpractice," the Staff Notes provide that the "court must afford the plaintiff a reasonable period of time to submit an affidavit that satisfies the requirements set forth in the rule." Staff Notes to Ohio Civ. R. 10(D) (emphasis added). In sum, the Staff Notes do not advise plaintiffs to name "John Doe" in place of a medical provider who is identified in the patient's chart, but whose involvement in the patient's care is unclear. See Staff Notes to Civ. R. 10(D).

**2. Plaintiffs alleging medical malpractice can extend the statute of limitations by sending a 180-day letter.**

Additionally, as the OSBA notes in its Merit Brief, the General Assembly has provided an additional tool that can be employed by plaintiffs who need additional time to review and investigate potential medical malpractice claims prior to bringing suit: the 180-day letter. See R.C. 2305.113(B); OSBA Brief, at 9-10. The OSBA correctly notes that the purpose of this 180-day letter is to permit counsel additional time to obtain and review medical records and investigate a claim when a client contacts counsel and little time remains before expiration of the statute of limitations. See OSBA Brief, at 9-10. The 180-day letter applicable to medical malpractice claims (but not to wrongful death claims) is a valuable tool for injured parties who need additional time to review medical records before bringing a claim.

**3. The fact that Plaintiff was dilatory in obtaining Decedent's medical records is not an excuse to extend the statute of limitations.**

Appellee's counsel asserted at the trial level that he could not have named Dr. Swoger earlier because he was unable "to obtain medical records and obtain appropriate expert review." Appellee's Brief, at 23 (quoting Plaintiff's Brief in Opposition to Summary Judgment, Exhibit A, ¶ 9). There is no allegation that anyone deliberately (or negligently) delayed in responding to Appellee's request for medical records, nor is there any judicial finding to this effect. Rather, it appears that Appellee brought her case to counsel shortly before the statute of limitations ran, and counsel was unable to obtain all of the records in the short period of time before the statute of limitations expired. The fact that Appellee was dilatory in contacting counsel and/or obtaining the relevant medical records does not, and cannot, extend the statute of limitations.

In sum, Amici fully support Appellants' position: *only* when a medical provider is truly "unknown" to a plaintiff (i.e., the patient did not meet the provider in the course of treatment, the provider's name does not appear on the patient's chart, and the provider's name cannot be

discovered with reasonable due diligence), should the use of Rule 15(D) be permitted to extend the applicable statute of limitations.

**II. The Fifth District's Interpretation of the Discovery Rule Effectively Creates a Limitless Statute of Limitations for Medical Claims.**

As Appellants note, although the Fifth District “did not expressly hold that Appellee’s claim accrued when she allegedly discovered Dr. Swoger’s culpability, that is clearly the import of the court’s decision.” Appellants’ Brief, at 15. Amici share Appellants’ concern that the rule propounded by the Fifth District—that “the statute begins to run once the plaintiff acquires additional information of the defendant’s wrongful conduct”<sup>3</sup>—sets a very dangerous precedent that effectively eliminates statutes of limitations for medical claims.

The discovery rule requires that the statute of limitations begins to run upon the occurrence of a cognizable event. *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 550, 589 N.E.2d 1284. A “cognizable event” is: “the occurrence of facts and circumstances which lead, or should lead, the patient to believe that the physical condition or injury of which she complains is related to a medical diagnosis, treatment or procedure that the patient previously received.” Appellants’ Brief, at 18 (citing *Flowers*, 63 Ohio St.3d at 550). Once a “cognizable event” occurs, a plaintiff is put “on notice to investigate the facts and circumstances relevant to her claim in order to pursue her remedies.” *Id.* Specifically, “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 she is the victim of malpractice.” Appellants’ Brief, at 19 (quoting *Flowers*, 63 Ohio St.3d at 550).

The Fifth District has twisted the discovery rule, however, to create *individual* cognizable events which can occur any time a plaintiff happens to acquire specific information about a

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<sup>3</sup> *Erwin*, 2009-Ohio-758, at ¶33.

*particular* person's alleged wrongful conduct. Here, for example Appellee proffers that because Dr. Swoger's omission "was not disclosed until Dr. Bryan's deposition on February 7, 2007," the statute should not begin to run until the date of that deposition. Appellee's Brief, at 13. If Appellee's interpretation of the discovery rule is adopted, plaintiffs will be permitted to bring suits against medical professionals years after the statute of limitations has expired, dependent entirely upon the date on which the plaintiff happens to decide to investigate the matter further.

For example, assume that the family member of a decedent contacts an attorney within a year of the decedent's death suspecting that the death was caused by medical negligence. Doctors A and B are named in the decedent's medical chart. The family member and counsel suspect, without consulting any experts, that only Doctor A committed malpractice. A decision is made not to pursue the action. Then, three years later, the family member decides to look into the issue again and discovers, after speaking with an expert, that Doctor B may have been culpable. If we accept Appellee's proposed rule—that the statute of limitations does not begin to run until another medical professional opines that a physician may be culpable—then the case against Doctor B, brought years after the injury occurred, must be permitted to go forward.

Under Appellee's proposed rule, the one-year statute of limitations in R.C. 2305.113 and two-year statute of limitations in R.C. 2125.02 will essentially become obsolete. Running of the applicable statute of limitations will be different for each medical provider involved in a patient's care, and will be entirely dependent upon the date on which a plaintiff happens to communicate with a medical provider who opines as to the medical negligence of another. Medical professionals will be left with no predictability, no certainty, no closure, and the essentially endless possibility that they could be named as a defendant in a lawsuit many years after an injury occurred.

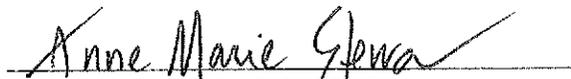
In the instant case, then, Appellee's assertion that "if the discovery rule was held to apply, then the Amended Complaint . . . would have been timely even without the benefit of Civ. R. 15(D)" cannot stand. Appellee Brief, at 13. The cognizable event here occurred upon the Decedent's death as to *all* medical professionals named in the Decedent's chart who provided care at the hospital. Upon the occurrence of this cognizable event, it was incumbent upon Appellee to investigate the potential culpability of each person identified in the medical chart before the statute of limitations ran. See Appellants' Brief at 18-19 (quoting *Flowers*, 63 Ohio St.3d at 550) ("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").

Any other result completely thwarts the public policy underlying statutes of limitation and transforms the "discovery rule" into an open-ended statute of limitations. It is well-established that "sound public policy justifies a limitation for commencement of actions." See, e.g., *Summers v. Connolly* (1953), 159 Ohio St. 396, 402, 112 N.E.2d 391. Statutes of limitations "are considered as designed to secure the peace of society and to protect the individual from being prosecuted upon stale claims." *Id.* "[S]tatutes of limitations 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 inconvenience engendered by delay – specifically the difficulties of proof presented in older cases." *Doe v. Archdiocese of Cincinnati*, 109 Ohio St. 3d 491, 493, 2006-Ohio-2625, at ¶ 10 (citing *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 88, 447 N.E.2d 727). All of these public policy considerations would be undermined if the Fifth District's decision is not overturned.

**CONCLUSION**

Amici urge this Court to reverse the decision of the Fifth District Court of Appeals. If not reversed, parties will be able to use Rule 15 amendments and/or the "discovery rule" to render statutes of limitations meaningless.

Respectfully submitted,



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I hereby certify that a true copy of the foregoing Reply Brief of Amici Curiae, Ohio State Medical Association, Ohio Hospital Association, and Ohio Osteopathic Association in Support of Appellants was sent via regular U.S. mail, postage prepaid this 7<sup>th</sup> day of December 2009, to the following:

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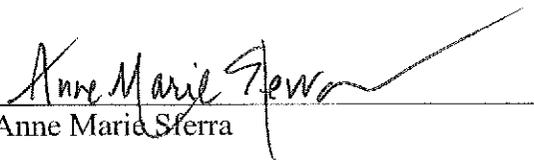
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