

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| Marian C. Whitley, <i>et al.</i> , | : | |
| | : | Case No. 2009-1484 |
| Plaintiffs-Appellants, | : | |
| | : | |
| v. | : | On Appeal from the Lawrence |
| | : | County Court of Appeals, |
| River's Bend Healthcare, <i>et al.</i> , | : | Fourth Appellate District |
| | : | |
| Defendants-Appellees. | : | |

BRIEF OF *AMICUS CURIAE*
THE OHIO ASSOCIATION FOR JUSTICE
ON BEHALF OF PLAINTIFFS-APPELLANTS

Paul Giorgianni (0064806)
 Counsel of Record
 Giorgianni Law LLC
 1538 Arlington Avenue
 Columbus, Ohio 43212-2710
 Phone: 614-205-5550
 Fax: 614-481-8242
 E-mail: Paul@GiorgianniLaw.com

Phillip A. Kuri (0061910)
 Counsel of Record
 Peter D. Traska (0079036)
 Elk & Elk Co., Ltd.
 6105 Parkland Boulevard
 Mayfield Heights, Ohio 44124
 Phone: 440-442-6677
 Fax: 440-442-7944
 E-mail: PKuri@elkandelk.com
 PTraska@elkandelk.com
Counsel of Record for Plaintiffs-Appellants

Paul W. Flowers (0046625)
Amicus Curiae Chairman,
 Ohio Association of Justice
 Paul W. Flowers Co., L.P.A.
 Terminal Tower, 35th Floor
 50 Public Square
 Cleveland, Ohio 44113
 Phone: 216-344-9393
 Fax: 216-344-9395
 E-mail: pwf@pwfco.com

Timothy A. Spirko (0070589)
 Counsel of Record
 Buckingham, Doolittle & Burroughs LLP
 One Cleveland Center – 17th Floor
 1375 East 9th Street
 Cleveland, Ohio 44114-1724
 Phone: 216-621-5300
 Fax: 216-621-5440
 E-mail: TSpirko@bdbl.com
Counsel of Record for Defendants-Appellees

Attorneys for Amicus Curiae
The Ohio Association for Justice

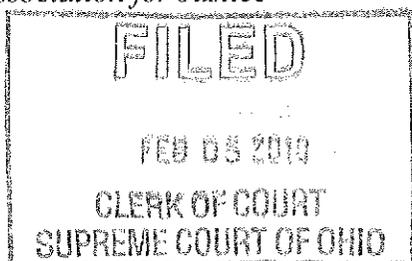


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PROPOSITIONS OF LAW

1. The substitution of a deceased plaintiff's estate relates back to the filing of the complaint.
2. The Ohio Nursing Home Bill of Rights allows the adult child of a nursing home resident to represent said resident in court.

ABOUT THE OHIO ASSOCIATION FOR JUSTICE

The Ohio Association for Justice is Ohio's largest victims-rights advocacy association, comprised of 2,000 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The Association is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable. This case is of particular interest to the Association because the court of appeals' holding contravenes this Court's holding that "[t]he spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies." *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175.

STATEMENT OF FACTS

Amicus curiae the Ohio Association for Justice adopts the Statement of Facts in the brief of Plaintiffs-Appellants.

ARGUMENT

I. Proposition of Law 1. The substitution of a deceased plaintiff's estate relates back to the filing of the complaint.

A. Standards of review.

Proposition of Law 1 concerns construction of the Ohio Rules of Civil Procedure, a task appellate courts undertake *de novo*.

“[T]he purpose of pleading is to facilitate a proper decision on the merits.” *Conley v. Gibson* (1957), 355 U.S. 41, 48. “The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies.” *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175. The Ohio Rules of Civil Procedure themselves require that they be “construed and applied to effect just results by eliminating . . . all . . . impediments to the expeditious administration of justice.” Civ.R. 1(B).

B. Summary.

This Court should reverse because Plaintiffs-Appellants’ negligence claims are not barred by limitations.

The lower courts awarded summary judgment for Defendants on the ground that Plaintiffs’ re-filed complaint was barred by the one-year statute of limitations for medical claims, R.C. 2305.113. The lower courts reasoned that Plaintiffs’ first action was a “nullity” because the original plaintiff (the deceased victim’s former guardian) lacked standing to sue. Thus, according to the lower courts, there was no “re-filing” invoking the Saving Statute, R.C. 2305.19, but rather just one filing (the second one), which filing occurred after the medical-claims limitations period expired.

Proposition of Law 1 presents two questions: (1) whether the Ohio Rules of Civil Procedure empower trial courts to substitute the proper plaintiff for a plaintiff who lacks standing; and (2) if so, whether such substitution “relates back” to, and so be deemed part of, the complaint.

As to the first question, the lower courts held that the Civil Rules do not allow trial courts to substitute the proper plaintiff for a plaintiff who lacks standing. The lower courts held that no procedure exists to correct such problem, because a complaint filed by a plaintiff lacking standing is a “nullity” upon which the trial court is powerless to act. The only remedy is dismissal and re-filing. The lower courts thus did not reach the second question of whether a substitution of plaintiffs might “relate back” to the complaint.

This Court should reverse and hold that the Civil Rules do empower trial courts to substitute the proper plaintiff for a plaintiff who lacks standing. This Court would merely be following *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77: “The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter.” In this case, in the first action (filed April 15, 2005), the defect of the plaintiff lacking standing was cured 54 days after the complaint was filed by the trial court’s June 8th entry replacing the incorrect plaintiff (the former guardian) with the correct plaintiffs (the victim’s estate fiduciaries). Because the estate fiduciaries (the Plaintiffs-Appellants) were properly installed as the plaintiffs in that first action, they were at liberty to (and did) voluntarily dismiss and re-file within the one-year, “Saving Statute” period. There is no need to resort to “relation back” theory to defeat Defendants’ limitations argument.

As to the second question, this Court should hold that Plaintiffs-Appellants were properly installed as parties in that first action and that that substitution related back to the complaint. Such holding would dispel the trial court’s *initial* rationale for granting Defendants summary judgment. (Following a premature appeal and remand, the trial court abandoned this initial ra-

tionale in favor of the “nullity” rationale.) The trial court’s initial rationale was that the *first action* was barred by the medical-claim limitations period because the substitution of the estate fiduciaries, which occurred after the medical-claim limitations period expired, did not “relate back” to the complaint.

The trial court’s initial rationale is incorrect for two reasons. First, the June 8, 2005 substitution entry in that first action did indeed “relate back.” Second, even if Defendants could have prevailed in the *first* action by asserting that limitations defense and arguing “no relation back,” that limitations defense disappeared when that first action was dismissed. Once the first action was dismissed, the applicable statute of limitations became the one-year Saving Statute, R.C. 2305.19, not the medical-claim statute of limitations. Because the second action was filed within the one-year Savings Statute period, the second action is not barred by limitations.

Neither the lower courts nor Defendants-Appellees have identified any public-policy rationale or benefit supporting their argument that lack of standing cannot be cured under the Civil Rules, or their argument that, if lack of standing be curable, the cure does not relate back to the complaint.

C. Because the Civil Rules empower courts to substitute and add plaintiffs and defendants (as the trial court’s June 8, 2005 substitution entry did), the first action was not a “nullity,” and the Saving Statute applies to the second action.

1. Summary.

The Ohio Rules of Civil Procedure provide courts wide berth for administering cases, including substituting and adding parties. Necessarily, any defect curable by applying the Civil Rules cannot be a defect rendering the civil action a “nullity.” In this case, the party who originally filed the complaint (the former guardian) lacked standing. This Court has held: “The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17.” *State ex rel. Jones v.*

Suster (1998), 84 Ohio St.3d 70, 77. The trial court’s June 8, 2005 entry curing the “standing” defect by substituting Plaintiffs-Appellants for the former guardian was a proper exercise of judicial power under Civil Rules 17(A), 21, and 15(C). Necessarily, then, the “standing” defect could not render the civil action a “nullity,” as the lower courts ultimately ruled.

Because Plaintiffs-Appellants (the estate fiduciaries) were properly installed as parties in that first action, and because the second action was a timely re-filing by those same Plaintiffs within the Saving Statute, there is no need to resort to “relation back” theory to defeat Defendants’ limitations argument.

2. The Civil Rules empower courts to freely substitute and add plaintiffs and defendants.

All actions in Ohio’s trial courts are governed by the Ohio Rules of Civil Procedure. *See* Civ.R. 1(A). Seven rules empower courts to administer their litigation by substituting and adding plaintiffs and defendants:

- Rule 15 (titled, “Amended and Supplemental Pleadings”);
- Rule 17(A) (“Real Party in Interest”);
- Rule 19 (“Joinder of Persons Needed for Just Adjudication”);
- Rule 19.1 (“Compulsory Joinder”);
- Rule 20 (“Permissive Joinder”);
- Rule 21 (“Misjoinder and Nonjoinder of Parties”); and
- Rule 24 (“Intervention”).

The lower courts’ “nullity” holding in this case undermines the integrity of all seven rules.

a. Rule 21 (Misjoinder and Nonjoinder of Parties).

Civil Rule 21 vests trial courts with broad power to – and a mandate to – substitute and add parties liberally as justice requires. Rule 21 provides:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Civ.R. 21. The original and continuing purpose of the rule is to eliminate the onerous and harsh pleading rules that pre-existed the Civil Rules. *See* Civ.R. 21 staff note. The liberality of Civ.R. 21 extends in multiple dimensions:

- The rule refers to “parties,” not merely “defendants.”
- The rule allows for both “dropping” and “adding” parties.
- The rule allows courts to act upon motion or *sua sponte*.
- The rule allows for dropping and adding parties “at any stage of the action” – including after trial and upon appeal.

It would be difficult to draw a broader rule of joinder. Regarding the identical federal Rule 21, the authoritative treatise on American civil procedure opines: “[T]here is no reason why a substitution of parties cannot be made under rule 21, in the discretion of the court and in the interest of justice.” 7 Wright, *et al.*, Federal Practice & Procedure (2001) 499, Section 1686.

Rule 21 expressly prohibits even mere dismissal of an action for misjoinder: “Misjoinder of parties is not ground for dismissal of an action.” Thus, the trial court in this case would have erred even by *dismissing* the first action. The trial court erred even more egregiously by holding, in the re-filed action, that the first action was a “nullity.”

b. Rule 17(A) (“Real Party in Interest”).

Civil Rule 17(A) echoes Civil Rule 21 and vests trial courts with broad power to – and a mandate to – substitute and add parties liberally so that the real party in interest is a party to the action. The rule both forbids dismissal for misjoinder and contains its own “relation back” provision. Civil Rule 17(A) provides:

Every action shall be prosecuted in the name of the real party in interest. . . .
No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after

objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect *as if the action had been commenced* in the name of the real party in interest.

Civ.R. 17(A) (emphasis added).

Here, a living person – a former guardian – commenced an action. Just 54 days later, the trial court substituted the real party in interest – the estate fiduciaries.

c. Rule 15 (Amended and Supplemental Pleadings).

Civil Rule 15 governs amended and supplemental pleadings. A change in parties effects an amendment to the pleadings and thus implicates Civil Rule 15. Amendments may be made at any time, “even after judgment.” Civ.R. 15(B).

Here, the trial court’s June 8, 2005 entry curing the “standing” defect in the first action implicated Civil Rule 15 in addition to Civil Rules 21 and 17(A).

d. Rules 19 (Joinder of Persons Needed for Just Adjudication), 19.1 (Compulsory Joinder), 20 (Permissive Joinder), and 24 (Intervention).

Civil Rules 19, 19.1, 20, and 24 govern joinder of parties in situations not presented by this case. But it is worth noting that in keeping with the Civil Rules’ policy of liberal joinder, these rules provide for *involuntary* joinder of plaintiffs and *realignment* of plaintiffs as defendants and *vice versa*, as justice requires. And in only one situation do these rules call for dismissal of an action due to non-joinder:

If a person as described in subdivision (A)(1), (2), or (3) hereof [“persons to be joined if feasible”] cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

Civ.R. 19(B). In every other situation, the Civil Rules empower courts to substitute and add parties as justice requires.

e. Conclusion.

The Rules of Civil Procedure empower courts to freely substitute and add plaintiffs and defendants. These liberal joinder rules are a cornerstone of modern pleading procedure. The Civil Rules and R.C. 2305.17 (defining “commencement of an action” for purposes of the statutes of limitations) provide definitions and procedures for dealing with pleading defects. The lower courts’ decision in this case calls into question the applicability of all the Civil Rules governing joinder.

Sound judicial administration and public policy recommend against injecting a “nullity” concept into these joinder rules. Joinder analysis (especially under Rules 19 and 19.1) can be complicated and subjective. No good would come from imputing another conceptual layer to that analysis – a layer in which some joinder defect can render an action a “nullity” immune from the power the Civil Rules vest in trial courts. Litigation over whether or not a trial court has the power to cure a particular joinder defect would be wasteful of judicial resources and more often than not, as in this case, serve only as a procedural trap and an unfair escape hatch for tortfeasors.

3. The first action was real, not a nullity.

Ohio’s statutes of limitations provide that an action is commenced by filing a complaint and obtaining service within one year:

An action is commenced within the meaning of [these statutes of limitations] by filing a petition in the office of the clerk of the proper court . . . , if service is obtained within one year.

R.C. 2305.17. Thus, within the meaning of the statute of limitations, the first action commenced when Plaintiffs’ counsel filed a complaint April 15, 2005.

At that point, the action was vulnerable to summary judgment based on the plaintiff’s lack of standing. The victim had died, and the plaintiff was the victim’s former guardian (rather

than the victim's estate fiduciaries). But Defendants never filed such a summary judgment motion. So as long as the case remained pending, the parties and their counsel were obliged to obey the Ohio Rules of Civil Procedure, the local rules of court, and whatever orders the trial judge might issue. The parties and their counsel were empowered by the Civil Rules to demand discovery of each other and, as officers of the court, to issue subpoenas under Civil Rule 45. It was all real. Nothing suggested the "nullity" that the trial court and court of appeals later found.

This was merely a case of a plaintiff lacking standing – a curable defect. "The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17." *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77. On June 8, 2005, just 54 days after the complaint was filed, the trial court exercised its power under the Civil Rules to substitute the victim's estate fiduciaries as plaintiffs in place of the former guardian. That cured the "standing" defect.

There is no need to resort to "relation back" theory to defeat Defendants' limitations argument. Plaintiffs-Appellants were at liberty to (and did) voluntarily dismiss and re-file within the one-year, "Saving Statute" period. Upon dismissal, the applicable statute of limitations was the Saving Statute, which provides for one additional year to re-file, even if the otherwise-applicable limitations has expired:

In any action that is commenced or attempted to be commenced, . . . if the plaintiff fails otherwise than upon the merits, the plaintiff . . . may commence a new action *within one year after . . . the plaintiff's failure otherwise than upon the merits* or within the period of the original applicable statute of limitations, *whichever occurs later*.

R.C. 2305.19(A) (emphasis added). The lower courts erred in granting summary judgment on the ground that the Saving Statute did not apply.

4. The lower courts' decision is supported by little law.

In awarding Defendants summary judgment, the lower courts by-passed any application of the Rules of Civil Procedure and relied on just three authorities:

- *Levering v. Riverside Methodist Hosp.* (10th Dist. 1981), 2 Ohio App.3d 157;
- *Simms v. Alliance Community Hosp.*, 5th Dist., 2008-Ohio-847; and
- *Estate of Newland v. St. Rita's Med. Ctr.*, 3rd Dist., 2008-Ohio-1342.

These cases are weak authority for the lower courts' decision.

a. *Levering v. Riverside Methodist Hospital* (10th Dist. 1981), 2 Ohio App.3d 157.

In *Levering*, an attorney filed a medical-claim complaint unaware that his client had died. The trial court granted defendants summary judgment, and the court of appeals affirmed, holding that when the lone named plaintiff is deceased, the complaint is a “nullity”:

A complaint for personal injury requires a plaintiff and a defendant. There was only a defendant; hence, the complaint was a nullity and not a pleading. Civ. R. 15, which pertains to amendments of pleadings, does not apply.

Id. at 159.

There are two reasons why *Levering* is weak authority for the lower courts' holding here.

First, in *Levering*, there was literally no plaintiff. The named plaintiff (the victim) was deceased when the attorney filed the complaint. In this case, in contrast, the named plaintiff (the victim's guardian) was alive. She merely lacked standing. Thus, the “nullity” theory – that a complaint is a nullity when the lone named plaintiff or lone named defendant is deceased – could not apply to the facts of this case. All the named parties were living; this case is merely a case of lack of standing and misjoinder – a defect for which the Civil Rules provide a cure.

Second, the court in *Levering* relied entirely upon *Barnhart v. Schultz* (1978), 53 Ohio St.2d 59, which has since been overruled. In *Barnhart*, the named *defendant* was deceased when

the plaintiffs filed their complaint. The plaintiff filed an amended complaint naming the executor of the estate defendant – but only after the limitations period had expired. This Court upheld the limitations defense, holding that the original complaint was a nullity.¹ Five years later, presented with the identical facts, this Court in *Baker v. McKnight* (1983), 4 Ohio St.3d 125, overruled *Barnhart*.

Even though *Levering* was based entirely on the now-overruled *Barnhart*, the court of appeals in this case reasoned that *Levering* and the “nullity” theory survive, limited now to situations in which it is the named plaintiff, rather than the defendant, who is deceased when the complaint is filed. (Ct. App. Op. ¶¶ 14-17.)

That conclusion is wrong for two reasons.

First, this Court in *Baker* **completely** overruled *Barnhart* and the “nullity” theory:

[W]e erred in *Barnhart* in opting for a technically precise rule of law that ignores the practical realities of modern personal injury practice, and hereby overrule *Barnhart*.

....

We find it preferable to overrule *Barnhart* outright than to nibble away for years at the overly technical and unnecessarily severe rule of law announced in that case.

¹ The *Barnhart* syllabus reads:

1. A timely complaint in negligence which designates as a sole defendant one who died after the cause of action accrued but before the complaint was filed has neither met the requirements of the applicable statute of limitations nor commenced an action pursuant to Civ. R. 3(A).

2. A timely complaint in negligence which designates as a sole defendant one who died after the cause of action accrued but before the complaint was filed may not be amended to substitute an administrator of the deceased defendant’s estate for the original defendant after the limitations period has expired, even though service on the administrator is obtained within the one-year, post-filing period provided for in Civ. R. 3(A).

Barnhart v. Schultz (1978), 53 Ohio St.2d 59, syllabus, overruled by *Baker v. McKnight* (1983), 4 Ohio St.3d 125.

Baker, 4 Ohio St.3d at 126, 129. The Court rejected the *Barnhart* “nullity” theory in favor of the “misnomer” theory – that a pleading naming a deceased person is not a nullity but merely a curable error. *Id.* at 128-129. Nothing is left of *Barnhart*. Thus, nothing is left of *Levering*, because *Levering* relied entirely upon *Barnhart*.

The second flaw in the court of appeals’s reliance on *Levering* is that the court of appeals cherry-picked the *Levering* result while ignoring the rationale for that result. The court of appeals insists that *Levering* survives *Baker* because *Baker* involved a deceased defendant while this case involves a deceased plaintiff. But the *Levering* court rejected such distinction, reaching its result by reasoning that the “nullity” theory applied to the deceased *plaintiff* to the same extent it did to the deceased *defendant* in *Barnhart*:

Plaintiff seeks to distinguish *Barnhart* on the basis that *Barnhart* involved a deceased defendant and this case involves a deceased plaintiff. However, that distinction is without merit. The complaint filed in *Barnhart* was a nullity because there was no party-defendant, the named defendant having been deceased prior to the filing of the complaint. Similarly, the complaint in this case was a nullity because there was no party-plaintiff, the named plaintiff having been deceased prior to the filing of the complaint.

Levering, 2 Ohio App.3d at 159. The court of appeals’s logic is inherently flawed, relying on the *Levering* result while ignoring the *Levering* rationale for that result.

b. *Simms v. Alliance Community Hosp.*, 5th Dist., 2008-Ohio-847.

In *Simms*, an attorney filed a medical-claim complaint unaware that his client had died. The trial court dismissed the action without prejudice because the complaint lacked a Civ.R. 10(D) affidavit of merit. The attorney, now representing his former client’s estate fiduciary, filed a new complaint after the one-year limitations period had expired. The trial court granted summary judgment based on the statute of limitations. The court of appeals affirmed, reasoning that “if a plaintiff is deceased at the time the complaint is filed, it is a nullity.” *Id.* at ¶22.

There are three reasons why *Simms* is weak authority for the lower courts' award of summary judgment to Defendants-Appellees in this case.

First, in *Simms* (as in *Levering*) there was literally no plaintiff. The named plaintiff (the victim) was deceased when the attorney filed the complaint. In this case, in contrast, the named plaintiff (the victim's guardian) was alive and merely lacked standing.

Second, because the attorney in *Simms* did not try to substitute a new plaintiff, the substitution-of-plaintiff issue upon which this case depends was not presented in *Simms*. In *Simms* the "standing" defect was never cured. In this case, in contrast, the trial court's June 8, 2005 party-substitution entry cured the "standing" defect.

Third, the court in *Simms* relied entirely upon *Levering*. The court cited no other case nor other authority, and did not consider the policies underlying the relation-back rules of Civil Rules 17(A) and 15(C).

c. *Estate of Newland v. St. Rita's Med. Ctr.*, 3rd Dist., 2008-Ohio-1342.

In *Newland*, an attorney filed a medical-clam complaint unaware that his client had died. When the attorney learned of the death over a year later, he filed an amended complaint specifying "Estate of Betty Newland" as the only plaintiff. The trial court dismissed the action, and the court of appeals affirmed, not necessarily based on limitations but for multiple reasons – all of which distinguish *Newland* from this case:

- Neither the original nor the amended complaint complied with the R.C. 2125.02 requirement that "an action for wrongful death shall be brought in the name of the personal representative of the decedent." "The amended complaint names the 'Estate of Betty J. Newland' as the plaintiff and does not allege who the personal representative is." *Id.* at ¶7. *Accord id.* at ¶12.
- "Plaintiff did not comply with Civ. R. 10(D)(2)" (requiring an affidavit of merit). *Id.* at ¶7 *Accord id.* at ¶¶13-15.

- “Plaintiff’s references to “Rachael Stephenson”, “Elsie Walden” and “the first action” are either careless typographical errors and/or irrelevant.” *Id.* at ¶7.
- The plaintiff’s attorney failed for over 14 months to discover that his “client” had died. *Id.* at ¶¶3-4.
- “Typically, the proper remedy [for an affidavit-of-merit violation] is for the defendant to move for a more definite statement. Nevertheless, in the case sub judice, we believe that the trial court would not be precluded from considering the lack of a proper affidavit as one additional factor in support of dismissal, when coupled with the two previous failures to name a proper plaintiff, and the overall procedural history of this case.” *Id.* at ¶15.
- As to the merits of any claim, the two complaints failed to state a claim upon which relief could be granted. *Id.* at ¶¶ 16-18.
- The plaintiff’s dereliction regarding the amended complaint was heightened by the fact that the trial court had invited an amended complaint following a status conference. *Id.* at ¶¶ 4, 19.

Newland does contain *dicta* supporting the lower courts’ “nullity” holding:

[T]he filing date of any new amended complaint in this case would not relate back to the filing date of the original complaint because the original complaint was brought in the name of Betty Newland, who was deceased at the time of filing, and the complaint therefore has remained a nullity from its inception.

Id. at ¶22. But even this *dicta* is weak authority. First: *Newland* contains no mention – much less analysis – of the Civil Rules. Second: the context of this fleeting *dicta* was not the merits of the case but rather the appellate court’s overruling the plaintiff-appellant’s motion for remand for the trial court to consider a Rule 60(B) motion for relief from judgment. Third: the only authorities the court of appeal cited in support of this ill-considered *dicta* are *Levering* and *Simms*.

d. Conclusion.

Levering, *Simms*, and *Newland* are weak authority for the lower courts’ decision in this case. These cases should not trump application of the Civil Rules.

D. The June 8, 2005 substitution entry “related back” 54 days to the complaint.

1. Introduction.

Part I-C above refutes the lower courts’ “nullity” rationale and demonstrates that because Plaintiffs were substituted in the first action, and because Plaintiffs dismissed and re-filed within one-year, the re-filed action is timely, without resort to the “relation back” rule.

Prior to the premature appeal and remand that preceded the lower-court decisions, the trial court purported to grant summary judgment based on a different rationale – a rationale the trial court abandoned in favor of its “nullity” rationale. The trial court’s initial rationale for granting Defendants summary judgment in the re-filed action was that the *first* action was barred by the medical-claim statute of limitations “because the decedent’s ‘last date of treatment’ was April 25, 2004, and the estate was not substituted as a party [in the first action] until June 8, 2005 — over one year later” (Ct. App. Op. ¶6). In other words, even if the first action had been otherwise viable (and not a nullity), Defendants could have prevailed on the medical-claim statute of limitations because the June 8th substitution did not “relate back” to the first complaint. This Part I-D refutes this initial, abandoned rationale.

2. Summary.

The facts relevant to this “relation back” analysis are:

- The complaint in the first action was filed April 15, 2005.
- The medical-claim limitations period expired ten days later, on April 25.
- The estate fiduciaries were substituted as plaintiffs 44 days after that, on June 8.
- The trial court’s “no relation back” rationale being addressed here takes place within the *re-filed* action, three years later.

The trial court's initial, abandoned rationale was that the first action was barred by the medical-claim limitations period because the substitution of the estate fiduciaries did not "relate back" to the complaint; thus, the second action must also be barred.

The trial court's rationale is incorrect for two reasons. First, the June 8, 2005 substitution entry did indeed "relate back" to the complaint. Second, even if Defendants could have prevailed in the *first* action by asserting the limitations defense and arguing "no relation back," that limitations defense disappeared when that first action was dismissed. Once the second action was commenced (the action currently before this Court), the applicable limitations statute became the Savings Statute, R.C. 2305.19, not the medical-claim statute of limitations. Because the second action was filed within the one-year Savings Statute period, the second action is not barred by limitations.

3. The June 8, 2005 substitution entry related back to the complaint.

Civil Rules 17(A) and 15(C) empower courts to deem a substitution of parties as relating back to the complaint. Here, the June 8, 2005 substitution entry related back the 54 days to the complaint, which was filed within the medical-claim limitations period.

Civil Rule 17(A) contains its own "relation back" provision:

Every action shall be prosecuted in the name of the real party in interest. . . .
No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect *as if the action had been commenced* in the name of the real party in interest.

Civ.R. 17(A) (emphasis added).

And, because any court order substituting or adding a party effectively amends a pleading, such order also comes under the aegis of Civil Rule 15. The leading civil procedure treatise opines that any Rule 21 party addition is effectively a pleading amendment that is governed by

the Rule 15(C) relation-back rule: “[I]f the prerequisites prescribed in Rule 15(c) have been met, the addition of a party under Rule 21 should relate back and prevent the successful interposition of a statute-of-limitations defense.” 7 Wright, *et al.*, Federal Practice & Procedure (2001) 505, Section 1688.

The Rule 15(C) relation-back rule provides:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Here, all the Rule 15(C) prerequisites were satisfied by the trial court’s substituting Plaintiffs (the victim’s estate fiduciaries) for her former guardian. The claims were unchanged; only the nominal plaintiffs changed.

In *Baker v. McKnight* (1983), 4 Ohio St.3d 125, this Court held that the Rule 15(C) relation-back rule applied to an amended complaint correcting the defect of the original named defendant being deceased when the plaintiff filed the complaint. Similarly, the relation-back rule applies to the trial court’s June 8, 2005 entry substituting the correct plaintiff (the estate fiduciaries) for the incorrect plaintiff (the former guardian).

For two reasons, the case for relation-back is even stronger here than it was in *Baker*.

First: In *Baker* the named party was not even alive. Here, the named party was alive and merely lacked standing.

Second: The purpose of the limitations defense is to protect defendants from having to defend against old claims about which they had no notice. That purpose is implicated when the defendant is not made a party to the litigation until after the limitations period has expired. The purpose is not implicated when, as in this case, the defect is the plaintiff’s lack of standing. In *Andujar v. Rogowski* (S.D.N.Y 1986), 113 F.R.D. 151, 154, the trial court added three new plaintiffs to a three-year-old case even though the limitations period had expired. The court rejected

the argument that federal Rule 15(c) (which at that time was identical to the current Ohio Rule 15(C)) did not apply to changes in plaintiff. The court, quoting the Wright treatise, wrote:

As long as a defendant is fully apprised of a claim arising from specific conduct and has prepared to defend the actions against him, he will not be prejudiced by the addition of a new plaintiff and thus should not be allowed to raise a limitations defense.

As long as the original complaint gives defendant adequate notice, an amendment relating back is proper even if it exposes defendant to greater damages. Further, as long as the original complaint provides defendant with adequate notice of the conduct, transaction, or occurrence upon which plaintiff bases his claim and the parties before the court remain the same, it is reasonable to assume that defendant has knowledge of any claim plaintiff might assert in any capacity arising out of the event in dispute.

Andujar, 113 F.R.D. at 155 (quoting 6 Wright & Miller § 1501 (1st ed. 1971 & Supp. 1986)).

Applying *Baker* to substitution of plaintiffs is consistent with the Civil Rules' pervasive policy of liberal substitution of parties and resolving disputes based on the merits. The Rules themselves require that they be "construed and applied to effect just results by eliminating . . . all . . . impediments to the expeditious administration of justice." Civ.R. 1(B). "The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies." *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175.

The reason the Civil Rules include liberal "relation back" rules in Rule 17(A) and 15(C) is to avoid irrational applications of statutes of limitations, as occurred in this case. The Civil Rules include the "relation back" concept because it "avoids unnecessary problems caused by statutes of limitations." *Patterson v. V & M Auto Body* (1992), 63 Ohio St.3d 573, 575.

The "relation back" of a substitution of plaintiffs is a concept that pre-dates the federal and Ohio Rules of Civil Procedure. See *Missouri, Kansas & Texas Ry. v. Wulf* (1913) 226 U.S. 570, 576 (allowing, with relation back, substitution of plaintiff who lacked standing in FELA claim); Wright, *supra*, vol. 6A, p. 64, Section 1496 (stating that the relation-back rule "has its roots in the former federal equity practice and a number of state codes").

The vast weight of authority holds that the relation-back rule contained in the Federal Rules of Civil Procedure and the state rules modeled thereafter applies to a change in plaintiff.

First: The Advisory Committee Note to the 1966 version of federal Rule 15(c) (which mirrored the current Ohio rule) says so expressly:

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs.

Fed.R.Civ.P. 15(c) advisory committee note of 1966, ¶6, reprinted in Wright, *supra*, vol. 12A, p. 188. The reason “the problem is generally easier” is that rarely is a defendant prejudiced when claims remain unchanged and there is merely a nominal change in plaintiff.

Second: Many courts have held that substitution of the estate fiduciary as plaintiff, replacing a living person who lacked standing – the same facts as this case – relates back to the complaint:

- *De Garza v. Chetister* (1978), 62 Ohio App.2d 149, 156 (substituting wrongful-death representative for surviving spouse);
- *Martinez v. Segovia* (N.M.App. 2002), 62 P.3d 331, 334-337 (substituting estate fiduciary for decedent, even though decedent died prior to the complaint being filed); *Chavez v. Univ. of New Mexico* (N.M. 1985), 711 P.2d 883, 885-889 (substituting parents in their capacity as estate fiduciaries for parents individually, even though parents had lacked standing because they were not appointed fiduciaries until after they filed complaint – indeed, not until after the limitations period expired);
- *Ellis v. Hilburn* (Ala. 1997), 688 So.2d 236, 238-239 (substituting surviving spouse in her capacity as estate fiduciary for surviving spouse individually);
- *Beal v. Seattle* (Wash. 1997), 954 P.2d 237, 239-244 (en banc) (substituting estate fiduciary for guardian of the surviving children, where the same person served both roles but was not appointed estate fiduciary until after the limitations period had expired); *Fitch v. Johns-Manville Corp.* (Wash.App. 1987), 733 P.2d 562, 563 (substituting surviving spouse in her capacity as estate fiduciary for surviving spouse individually);

- *Chapman v. King* (Tenn. 1978), 572 S.W.2d 925, 927-929 (substituting surviving spouse for decedent's parents);
- *Flores v. Cameron County* (C.A.5 1996), 92 F.3d 258, 271-273 (substituting, post-trial, decedent's mother in her capacity as estate fiduciary for mother individually);
- *Strother v. District of Columbia* (D.C.App. 1977), 372 A.2d 1291, 1296-1299 (substituting son in his capacity as estate fiduciary, even though son had filed the complaint before he was appointed fiduciary);
- *Atlanta Newspapers, Inc. v. Shaw* (Ga.App. 1971), 182 S.E.2d 683, 686-687 (substituting surviving spouse in her capacity as estate fiduciary for surviving spouse individually);
- *Doan v. Chesapeake & Ohio Ry. Co.* (Mich.App. 1969), 171 N.W.2d 27, 32 (substituting surviving spouse in her capacity as estate fiduciary for surviving spouse individually, even though appointment as fiduciary occurred after the limitations period expired); *Osner v. Boughner* (Mich.App. 1986), 394 N.W.2d 411, 411-412 (same);
- *Hess v. Eddy* (C.A.11 1982), 689 F.2d 977, 979-982 (substituting surviving spouse in her capacity as estate fiduciary for surviving spouse individually, even though she was not appointed fiduciary until after the limitations period expired), abrogated on other grounds as recognized by *Jones v. Preuit & Mauldin* (C.A.11 1989), 876 F.2d 1480.
- See also *Estate of Kuhns v. Marco* (Iowa 2000), 620 N.W.2d 488, 490-496 (en banc) (substituting estate fiduciary for the estate of the decedent).

Third: The principle that an amendment replacing a plaintiff who lacks standing (or adding an entirely new plaintiff) "relates back" to the complaint has been applied in analogous contexts:

- In *Burcl v. North Carolina Baptist Hospital, Inc.* (N.C. 1982), 293 S.E.2d 85, 87-95, the court substituted parent in her capacity as in-state fiduciary of her daughter's estate for herself as out-of-state estate fiduciary, even though she lacked standing until the in-state appointment, which occurred after the limitations period expired.
- In *Giroir v. South Louisiana Medical Center* (La. 1985), 475 So.2d 1040, 1043-1045, the Supreme Court of Louisiana added the victim's children as plaintiffs in an action for survival and wrongful death.
- In *Rennie v. Pozzi* (Or. 1982), 656 P.2d 934, 937-940, the Supreme Court of Oregon substituted the re-appointed estate fiduciary, even though the com-

plaint had been filed during the period of his initial appointment, which had been “held for naught.”

- In *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.* (C.A.2 1997), 106 F.3d 11, 18-21, the court substituted the ostensible assignors for the ostensible assignees, despite the fact that the invalidity of the attempted assignment meant the assignees never had standing to sue.
- In *State ex rel. Stephens v. Henson* (Mo.App. 1989), 772 S.W.2d 706, 710-713, the court added the decedent’s four children as plaintiffs in a wrongful death action eight years after the surviving spouse had filed the first complaint. In *Rotella v. Joseph* (Mo.App. 1981), 615 S.W.2d 616, 623, the court substituted an in-state “next friend” of an infant in place of an out-of-state fiduciary of the infant’s deceased mother.
- In *Gordon v. Gillespie* (Ga.App. 1975), 217 S.E.2d 628, 631-633, one child of a decedent filed a complaint for wrongful death, and the appellate court added the other children.
- In *Burns v. Anchorage Funeral Chapel* (Alaska 1972), 495 P.2d 70, 72-76, the court substituted the decedent’s next of kin for the estate fiduciary who lacked standing.
- In *Hayward v. Valley Vista Care Corp.* (Idaho 2001), 33 P.3d 816, 820-823, the Supreme Court of Idaho substituted the decedent’s son as statutory wrongful-death representative in place of the son as estate fiduciary.
- In *Watford v. West* (Okla. 2003), 78 P.3d 946, 947-951, the Supreme Court of Oklahoma substituted the 18-year-old victim for his parents, who had filed the complaint “individually” and as his “next friends.”
- In *Raynor Brothers v. American Cyanamid Co.* (C.A.9 1982), 695 F.2d 382, 384, the court substituted a partnership comprised of the major shareholders of the original plaintiff corporation.
- In *Sprague v. Sysco Corp.* (Wash.App. 1999), 982 P.2d 1202, 1204-1208, the original plaintiff, who alleged employment discrimination, lacked standing because she had gone through a bankruptcy after the discrimination occurred but before she filed her complaint. The court held that following the reopening of the bankruptcy case, the bankruptcy trustee should have been substituted for the plaintiff.
- In *Acheivers Investments, Inc. v. Karalekas* (D.C.App. 1996), 675 A.2d 946, 948-950, the court substituted the Republic of South Africa in place of a South African “homeland” that lacked standing because it was not a recognized foreign government.
- In *Hayes-Albion Corp. v. Whiting Corp.* (Mich.App. 1990), 459 N.W.2d 47, the court added the plaintiff’s insurer as a plaintiff.

- In *Dow Corning Corp. v. Chemical Design, Inc.* (W.D.N.Y. 1998), 3 F.Supp.2d 361, 363-365, the court substituted the original plaintiff's corporate affiliate in place of the original plaintiff, because it was the affiliate who was the party to the contract upon which the action was brought.
- In *Mathis v. Bess* (S.D.N.Y. 1991), 761 F.Supp. 1023, 1027, the court *sua sponte* added a plaintiff in a §1983 action.
- In *Andujar v. Rogowski* (S.D.N.Y. 1986), 113 F.R.D. 151, 154, the trial court added three new plaintiffs to a three-year-old case even though the limitations period had expired.
- In *Levin v. Weissman* (E.D.Pa. 1984), 594 F.Supp. 322, affirmed (C.A.3 1985), 760 F.2d 263, the trial court added the plaintiff's wife as a co-plaintiff -- in the middle of the trial, after the plaintiff rested his case.
- In *Yorden v. Flaste* (D.Del. 1974), 374 F. Supp. 516, 518-522, the court substituted the guardian of an incompetent surviving spouse for the decedent's estate fiduciary.
- In *Owen v. Paramount Productions* (S.D.Cal. 1941), 41 F.Supp. 557, the court in a patent-infringement case substituted the surviving spouse in her capacity as estate fiduciary for herself individually.

These cases only hint at the myriad fact patterns in which justice can be achieved only by trial courts exercising the powers of joinder and "relation back" vested in them by modern rules of procedure. It would be imprudent to create a categorical rule barring "relation back" of the replacement of a plaintiff who lacked standing.

Whether pursuant to Rule 15(C) or 17(A), the June 8, 2005 substitution related back 54 days to the April 15, 2005 complaint.

4. In the second action, the applicable statute of limitations was the Saving Statute, not the medical-claim statute of limitations.

Even if Defendants-Appellees could have prevailed in the *first* action by asserting the limitations defense and arguing "no relation back," that limitations defense disappeared when that first action was dismissed. After that, the applicable statute of limitations was the Saving Statute, R.C. 2305.19, not the medical-claim statute of limitations.

Defendants did not in the first action challenge the trial court's substitution bringing Plaintiffs into the first action. It was only in the *second* action that Defendants challenged the trial court's substitution in the *first* action. Upon the voluntary dismissal, the applicable statute of limitations was the Saving Statute, which provides for one additional year to re-file, even if the otherwise-applicable limitations has expired:

In any action that is commenced or attempted to be commenced, . . . if the plaintiff fails otherwise than upon the merits, the plaintiff . . . may commence a new action *within one year after . . . the plaintiff's failure otherwise than upon the merits* or within the period of the original applicable statute of limitations, *whichever occurs later*.

R.C. 2305.19(A) (emphasis added). All three requirements of the Saving Statute are satisfied:

- The first action was “commenced” within the meaning of the statute of limitations. (See Part I-C-3 above.) (And if not “commenced,” the act of filing a complaint in the clerk of court constitutes an “attempt” to commence.)
- The same plaintiffs – the estate fiduciaries – both voluntarily dismissed the first action and filed the second action.
- The second action was filed within one year after the dismissal.

Thus, the second action was protected by the Saving Statute even if the first action would have been barred by the medical-claim statute of limitations had Defendants moved for judgment on that basis.

5. Conclusion.

The trial court's initial but abandoned rationale – that the medical-claim statute of limitations barred Plaintiffs' claims because the substitution of Plaintiffs occurred after the limitations period expired – is erroneous. The substitution related back to the complaint. And even if it did not, Defendants lost that defense after Plaintiffs-Appellants obtained the protection of the Saving Statute, R.C. 2305.19(A).

E. The lower courts' summary judgment so smacks of injustice as to undermine public confidence in the judiciary.

1. Summary.

Neither the lower courts nor Defendants-Appellees identified any public-policy rationale or benefit supporting their argument that lack of standing cannot be cured under the Civil Rules, or their argument that, if lack of standing be curable, the cure does not relate back to the complaint. The lower courts' summary judgment is not merely wrong. It so smacks of injustice as to undermine public confidence in the judiciary. It does so in three respects:

1. The lower courts' "nullity" rationale is a repugnant hyper-technicality.
2. The lower courts' decision relies upon the limitations defense but fails to serve the purpose for which the General Assembly created the limitations defense.
3. The trial court allowed the "nullity" to persist for nine months after the court accredited the action by substituting Plaintiffs.

2. The lower courts' rationale is a repugnant hyper-technicality.

The repugnant hyper-technicality of the lower courts' "nullity" holding is brought into sharper focus when one imagines the same fact pattern but with the same person being both the victim's former guardian and the victim's estate fiduciary – likely the scenario in a majority of such cases. In that most typical of cases, everything, including the name of the lone plaintiff, remains unchanged from the original complaint to the amended complaint. The only change is in the plaintiff's secondary appellation — estate fiduciary rather than guardian. Under the lower courts' "nullity" holding, an otherwise perfect complaint would be a nullity for no reason other than the case caption stating "Jane Smith, Guardian" rather than "Jane Smith, Administrator." And the penalty for this *de minimis* defect could be extinguishment of an uncontestable tort claim. The court of appeals majority's assertion that this is not merely a procedural defect (Ct. App. Op. ¶15) rings hollow.

There might be some merit to the lower courts' "nullity" rationale in the situation in which an attorney files a complaint naming in bad faith a fictitious plaintiff – say, "Donald Duck" – and then seeks the benefit of the relation-back rule. But not so here – nor in any other case cited in this brief. The decedent's guardian was a real person, who hired an attorney who in good faith filed a complaint, which 54 days later, with court approval, was taken up by the proper plaintiffs, the victim's estate fiduciaries. The lower courts' "nullity" theory deserves no application to these facts.

3. The lower courts' decision relies upon the limitations defense but fails to serve the purpose for which the General Assembly created the limitations defense.

The lower courts' "nullity" holding sustains an otherwise unavailable limitations defense without serving the intended purpose of the limitations defense. The purpose of the limitations defense is to protect defendants against claims of which they had no notice until so much time has passed that evidence is compromised:

Statutes of limitations are constitutionally permissible methods of preventing stale claims, in order that necessary evidence pertinent to the issues is preserved. The preservation of pertinent evidence is the responsibility of the potentially liable party once it has notice of a possible claim. . . . Notice is imperative in that subsequent measures can be taken by the responsible party to protect its resources.

Wargetz v. Villa Sancta Anna Home for the Aged (1984), 11 Ohio St.3d 15, 17-18. Here, Defendants were served with process and made defendants within the limitations period. This is not a case in which the defendants are within the class of persons intended to be protected by the statute of limitations.

Ironically, the substitution of the real party in interest, which Defendants-Appellants oppose here, is a benefit to defendants: "The only concern defendants have is that the action be brought in the name of the party authorized so that they may not again be hailed into court to answer for the same wrong." *De Garza v. Chetister* (1978), 62 Ohio App.2d 149, 156 (quotation

marks and citation omitted) (ordering substitution of wrongful-death representative for surviving spouse). In other words, the law is designed such that once a defendant is on notice of the claim, the substitution of the real party in interest can only benefit the plaintiff. Misjoinder is an escape from liability only under the erroneous “nullity” theory.

Making the lower courts’ holding all the more disreputable is that it encourages defendants who recognize the pleading defect to remain silent, defend the case as they otherwise would, and only after the limitations period expires move for summary judgment based on limitations. Most of the cases inventoried in Part I-D-3 above reflect such strategic behavior by tortfeasors.

4. The trial court allowed the “nullity” to persist for nine months after accrediting the action by substituting Plaintiffs.

On June 8, 2005, just 54 days after Plaintiffs-Appellants’ counsel filed the complaint, Plaintiffs-Appellants’ advised the trial court of the victim’s death and moved to substitute themselves (the estate fiduciaries) for the guardian. Under the trial court’s and the court of appeals’s reasoning, the trial court on June 8, 2005 should have *denied* substitution of plaintiffs and cleared the case from its docket on the ground that it was a “nullity.”

But the trial court did not do that. The trial court instead substituted plaintiffs and allowed the case to continue. And the case did continue for another *nine months*, until Plaintiffs voluntarily dismissed the case, relying on the Saving Statute.

Plaintiffs-Appellants re-filed their case only six weeks later. Only after that did the trial court advise Plaintiffs-Appellants that the first complaint had been – despite all appearances and representations by the trial court – a “nullity.” This “nullity” holding under these circumstances does not portray Ohio’s courts dispensing justice.

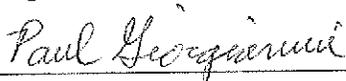
II. Proposition of Law 2. The Ohio Nursing Home Bill of Rights allows the adult child of a nursing home resident to represent said resident in court.

The OAJ supports Proposition of Law 2 for the reasons stated in Plaintiffs-Appellants' brief.

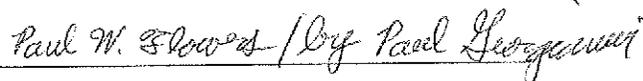
CONCLUSION

This Court should reverse and remand for further proceedings.

Respectfully submitted,



Paul Giorgianni (0064806)
Counsel of Record
Giorgianni Law LLC
1538 Arlington Avenue
Columbus, Ohio 43212-2710
Phone: 614-205-5550
Fax: 614-481-8242
E-mail: Paul@GiorgianniLaw.com



Paul W. Flowers (0046625)
Amicus Curiae Chairman, Ohio Association of Justice
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
Phone: 216-344-9393
Fax: 216-344-9395
E-mail: pwf@pwfco.com

Attorneys for Amicus Curiae The Ohio Association for Justice

CERTIFICATE OF SERVICE

A copy of this document was sent on February 5, 2010 by regular, first-class U.S. Mail to:

Phillip A. Kuri
Elk and Elk
6105 Parkland Boulevard
Mayfield Heights, Ohio 44124
Counsel of Record for Appellants

Timothy A. Spirko
One Cleveland Center – 17th Floor
1375 East 9th Street
Cleveland, Ohio 44114-1724
Counsel of Record for Appellees



Paul Giorgianni