

ORIGINAL

IN THE SUPREME COURT OF OHIO

CORA ERWIN, ADMINISTRATRIX ) ON APPEAL FROM THE FIFTH  
 ) APPELLATE DISTRICT,  
 PLAINTIFF-APPELLEE, ) TUSCARAWAS COUNTY, OHIO  
 ) CASE NO. 2008-AP-04-0028  
 vs. )  
 ) SUPREME COURT  
 JOSEPH E. BRYAN, M.D. et al. ) CASE NO. 2009-0580  
 )  
 DEFENDANT-APPELLANTS. )

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PLAINTIFF-APPELLEE'S MOTION FOR RECONSIDERATION

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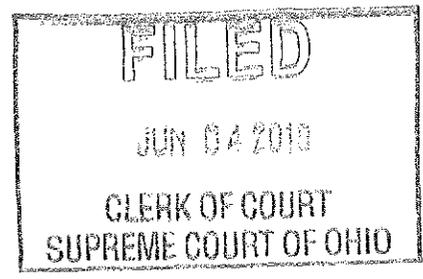
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## MOTION

Plaintiff-Appellee, Cora Erwin, Administratrix of the Estate of Russell Erwin, Deceased, hereby requests that this Court reconsider the decision which was rendered on May 25, 2010. *Sup. Ct. Prac. R. 11.2(B)(4)*. No attempt will be made herein to re-argue the positions which were previously raised during the course of this appeal. The Court's majority opinion raises new concerns, however, which merit additional attention. It has been noted that jurists should be open to rethinking their positions once difficult decisions have been made. *Buckeye Comm. Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181, 186-188 (Lundberg Stratton, J., concurring).

### **I. TIME OF FILING PERSONAL SERVICE UPON UNKNOWN DEFENDANTS**

The majority opinion may well be interpreted by many as effectively precluding any practical use of Civ.R. 15(D) in not only medical malpractice actions, but in all civil lawsuits. The following standard was established:

Accordingly, a plaintiff may use Civ.R. 15(D) to file a complaint designating a defendant by any name and designation when the plaintiff does not know the *name* of that defendant, provided that the plaintiff avers in the complaint that the name could not be discovered, the summons contains the words "name unknown," and that summons is personally served on that defendant. Although the plaintiff may designate a defendant whose name is unknown by "any name and description," the complaint must nonetheless sufficiently identify that party to facilitate obtaining personal service on that defendant upon the filing of the complaint. [emphasis added]

*Erwin v. Bryan*, \_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-2202, \_\_\_ N.E.2d \_\_\_, ¶31. The decision thus, at least arguably, requires the original summons and complaint to be served at the time of filing upon the defendant whose name is unknown. Plaintiff was later faulted for failing to "attempt personal service on the fictitiously named

defendants using descriptions provided in her complaint.” *Id.*, ¶ 34. She had, however, personally served the original complaint upon Defendant-Appellants, William V. Swoger, M.D. and Union Internal Medicine Specialist, Inc., after the statute of limitations had lapsed but prior to the expiration of the additional year for service afforded by Civ. R. 3(A). *Id.*, ¶ 13.

Defendants never argued in their Merit Brief that such a detailed description was necessary in the original complaint. Nor was there any suggestion that the original complaint had to be personally served upon the unknown defendant at the time of filing. As a matter of simple fairness, Plaintiff should be afforded an opportunity to address these new issues through the instant Motion for Reconsideration.

Defendants undoubtedly stopped short of advocating such extreme positions because it is inconceivable that the original complaint could ever be served at the time of filing upon a defendant whose name is unknown. Without a name, a process server cannot hope to locate the individual. And the process server could never furnish the endorsement required by Civ.R. 4.1(B) if he/she remained uncertain as to the identity of the person who had just be handed the summons and complaint.

To use the instant case as an example, alleging in the Complaint that John Doe was a pulmonologist and intensive care physician who had evaluated the Decedent at Union Hospital on June 29, 2004 still would not have allowed personal service to be obtained upon the filing of the Complaint. Union Hospital is filled with physicians, and a process server would have no way of identifying the right one with any confidence. Without a name, personal service simply is not possible under Rule 4.1(B).

This Court had recognized that Civ.R. 15(D) is designed to be available in those situations where a defendant’s name is unknown. *Erwin*, 2010-Ohio-2202, ¶23. But if

personal service of the original complaint is required upon the unknown defendant, it logically follows that the rule can never be successfully employed. The hopeless conundrum will always arise that the defendant's name must be unknown to first invoke the rule yet the inability to personally serve him/her will preclude any successful application of the provision.

Rule 15(D) was undoubtedly enacted to advance legitimate objectives. Yet the *Erwin* decision's apparent requirement of time-of-filing personal service upon the unknown defendants threatens to render the provision utterly useless. The Civil Rules should never be interpreted in a manner that renders them superfluous, and thus reconsideration is justified.

## II. ELIMINATION OF THE RELATION BACK MECHANISM

The majority opinion follows the rule which had previously been adopted in *Varno v. Valley Mfg. Co.* (1985), 19 Ohio St.3d 21, 482 N.E.2d 342. But this Court had unanimously recognized that "effective July 1986, Civ.R. 3(A) was amended and the amendment to the rule effectively negates our holding in *Varno*." *Amerine v. Houghton Elev. Co.* (1989), 42 Ohio St.3d 57, 58, 537 N.E.2d 208, 209 fn. 1. The decision in *Amerine* held that the "relation back" principle which was produced when Civ.R. 15(D) was read in conjunction with revised Civ.R. 3(A) allowed a John Doe to be identified and served past the deadline for filing the claim.

\*\*\* Under Civ. R. 3(A), as amended, service does not have to be made on the formerly fictitious, now identified defendant within the statute of limitations as long as the original complaint has been filed before expiration of the statute of limitations. As indicated in fn. 1, *supra*, the amendment of Civ.R. 3(A) supersedes our decision in *Varno v. Bally Mfg. Co.* (1985), 19 Ohio St.3d 21, 19 O.B.R. 18, 482 N.E.2d 342. \*\*\* [emphasis added]

*Id.*, 42 Ohio St.3d at 59.

This oft-cited aspect of the unanimous *Amerine* ruling appears to have been silently overturned by paragraph two of the syllabus of *Erwin*, 2010-Ohio-2202. This Court has now directed that:

Civ. R 15(D) does not authorize a claimant to designate defendants using fictitious names as placeholders in a complaint filed within the statute-of-limitations period and then identify, name, and personally serve those defendants after the limitations period has elapsed. [emphasis added]

*Id.*, paragraph two of the syllabus. Identifying and serving the fictitiously named defendants after the limitations period has passed is the only conceivable purpose of the amendments to Civ. R. 3(A). As recognized in *Amerine*, 42 Ohio St. 3d at 59, the rule was modified to allow a full year to perfect service “upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).” If the original complaint now needs to be personally served upon the unknown defendant at the time of filing, there will never be any need for “relation back.” Everyone agrees that the original complaint needs to be filed within the statute of limitations, and if the unknown defendants are somehow personally served along with all the known defendants at that same time then no statute of limitations defense can possibly exist.

It should go without saying that there must have been some reason for Civ.R. 3(A) to be revised to permit an additional year past the timely filing of the original complaint for service “upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).” Requiring the John Doe to be personally served at the time the original complaint is filed precludes the revisions from ever serving any discernable function. The amendment was plainly intended to override *Varno*, particularly the requirement that the unknown defendant must be described

and personally served within the statute of limitations. Defendants themselves had recognized this simple verity:

\*\*\* The [*Varno*] 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 latter holding that was addressed in subsequent amendments to Civ. 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. [emphasis added]

*Defendants' Reply Brief*, pp. 11-12. There had thus been no dispute between the parties that little was left of *Varno*. Unless corrected, this Court's majority opinion will likely be misconstrued as reviving the *Varno* rule *in toto*, overturning an integral aspect of the unanimous *Amerine* opinion, and nullifying the amendment to Civ. R. 3(A).

### III. CONTINUED VIABILITY OF STATUTE OF LIMITATIONS

It is difficult to understand how this Court could conclude that: "To construe the rule to allow the use of placeholders for unidentified defendants would eliminate the statute of limitations for every cause of action." *Erwin*, 2010-Ohio-2202, ¶ 4. The original complaint still must be filed within the limitations period and a plaintiff will have, at most, an additional twelve months to identify and personally serve the John Does as allowed by Civ. R. 3(A). That was precisely the procedure which was approved in *Amerine*, 42 Ohio St. 3d 57, and in *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St. 3d 324, 2008-Ohio-3921, 894 N.E. 2d 25 ¶ 15. The "relation back" principle was recognized in both decisions. No concerns were expressed that the controlling statute of limitations were somehow being eviscerated.

Likewise, Plaintiff has never disputed that the General Assembly is empowered

to enact statutes of limitations subject to constitutional restraints. *Erwin*, 2010-Ohio-2202, ¶ 29. At the same time, however, Section 5, Article IV of the Ohio Constitution vests this Court with authority over all matters of judicial practice and procedure. *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 159-160, 359 N.E.2d 702, 703; *Rockey v. 84 Lumber Co.*, 66 Ohio St.3d 221, 1993-Ohio-174, 611 N.E.2d 789; *Hiatt v. Southern Health Facilities, Inc.*, 68 Ohio St.3d 236, 1994-Ohio-294, 626 N.E.2d 71; *Hobbs v. Lopez* (4<sup>th</sup> Dist. 1994), 96 Ohio App.3d 670, 645 N.E.2d 1261. Surely the formal prerequisites for commencing an action, naming parties, and perfecting service are purely procedural and solely within their prerogative of the judicial branch. See, *Fraiberg v. Cuyahoga Cty. Court of Common Pleas*, 76 Ohio St. 3d 374, 376, 1996-Ohio-384, 667 N.E. 2d 1189, 1192; *Hecker v. Norfolk & W. Ry. Co.* (3<sup>rd</sup> Dist. 1993), 86 Ohio App. 3d 543, 545, 621 N.E. 2d 601, 603.

Defendant never argued in this appeal, and this Court certainly did not hold in the majority opinion, that either revised Civ. R. 3(A) or Civ. R. 15(D) were unenforceable as an improper encroachment upon exclusive legislative authority. It must therefore be presumed that both provisions remain in full force and effect and any construction which effectively strips them of any practical application cannot be countenanced.

#### **IV. PLAINTIFF'S COMPLIANCE WITH THE CIVIL RULES**

With regard to whether Defendants' names were unknown to Plaintiff, this Court determined that she "knew [his] name at the time she filed the original complaint by virtue of her employment at Union Hospital, and she recognized him when he provided care to her husband." *Erwin*, 2010-Ohio-2202, ¶ 33. Plaintiff's testimony actually had been:

- Q. \*\*\* [D]id the pulmonologist come in, then, to do that, or who came in to do that, the intubation?
- A. Dr. Swoger, I'm thinking.
- Q. Do you know Dr. Swoger?
- A. To see him.
- Q. Do you have any type of experience with him one way or the other as far as a medical physician?
- A. No.
- Q. Did you ask him any questions?
- A. No.
- Q. What did he say in the room, if anything?
- A. Didn't say nothing to me.
- Q. Nothing?
- A. Oh, he said he was sorry. He said he knew me from being around.
- Q. What was he sorry for?
- A. Just what I was going through, I suppose.
- Q. Well, how long were you out of the room for this intubation?
- A. However long it took him to put it in. I don't know. I never left the door, though. I stood right outside the door.
- Q. And after that was completed, did Dr. Swoger say anything to you ma'am?
- A. No.
- Q. Discuss anything with you?
- A. No. [emphasis added]

*Deposition of Cora Erwin taken March 29, 2007, pp. 54-55.* Given that the claims against Defendants had been terminated upon summary judgment, Plaintiff was entitled to have this evidence construed most strongly in her favor. *Byrd v. Smith*, 110 Ohio St. 3d 24, 27, 2006-Ohio-3455, 850 N.E. 2d 47, 51 ¶ 12. Plaintiff had plainly expressed substantial uncertainty over the pulmonologist's identity and her testimony indicates that she knew him only "to see him."

The majority opinion also remarks that no summons was issued to Defendant containing the words "name unknown[.]" *Erwin*, 2010-Ohio-2202 ¶ 2. This is hardly a fair criticism, since the Clerk's office maintains exclusive control over the preparation of the summons. *Civ. R. 4(A)*. The summons which was personally served upon Defendants on June 29, 2007 did adopt by reference the "name unknown" designation set forth in the Complaint, which had previously been recognized as an acceptable procedure. *Loescher v. Plastipak, Inc.* (3<sup>rd</sup> Dist. 2003), 152 Ohio App. 3d 479, 483-484, 2003-Ohio-1850, 788 N.E. 2d 681, 683-684 ¶ 10-12.

This Court also observed that: "Notably, Caprini, the expert who examined records for [Plaintiff], averred that his review of the medical records supported his opinion that Swoger acted negligently." *Erwin*, 2010-Ohio-2202 ¶ 33. Defendants had first raised this purported *coup-de-grace* in their Reply Brief (p. 9). The reality is that the Affidavit of Merit had been dated July 20, 2007 and thus had been furnished after the original Complaint had been filed, the medical records had been obtained, and Dr. Swoger had been implicated by Dr. Joseph Bryan during his deposition of February 7, 2007. Dr. Caprini's findings with regard to Defendants thus were not available at the time the action was commenced. The decision which was rendered against Plaintiff is thus deserving of careful reconsideration.

**CONCLUSION**

For the foregoing reasons, this Court should reconsider the decision of May 25, 2010 and affirm the determination of the Fifth Judicial District Court of Appeals.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Motion** was served via regular U.S.

Mail on this 4<sup>th</sup> day of June, 2010 upon:

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