ORIGINAL

IN THE SUPREME COURT OF OHIO

James Lee Robinson, et al.,	:	Case No. 12-1310
Plaintiff-Appellee	:	On Appeal from the Jackson County Court of Appeals
vs.	:	Fourth Appellate District
Bob Spurlock, et al.,	:	Court of Appeals Case No. 11 CA4
Defendant-Appellant	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, BOB SPURLOCK

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This appeal presents unique issues of first impression and of public or great general interest: an unprecedented expansion of Ohio Civil Rule 15(C), an evisceration of the statute of limitations, and the alarming denial of the protections afforded by basic agency law to ordinary employers. The Fourth District Court of Appeals' Decision relies upon both legally and factually flawed grounds, conflicts with the decisions of other Courts of Appeal, Federal Courts and its own cited authorities, and is itself internally inconsistent. The Fourth District's Decision misinterprets and misapplies Civil Rule 15 and this Court's precedents, leaving the citizens of this state subject to conflicting and confusing law and disrupting the authority of the legislature. An authoritative interpretation of Ohio Civil Rule 15 and Ohio's agency law will serve the interests of the public at large.

The Fourth District's Decision redefines Civil Rule 15 in a way which conflicts with the rulings of other Ohio Courts of Appeal, Federal court rulings concerning Federal Rule of Civil Procedure 15(c), and the scholarly legal authority cited by the Court of Appeals itself. Specifically, in a case of first impression for this Court, the Fourth District Court of Appeals held that an amendment pursuant to Ohio Civil Rule 15(C) relates back not only to the original pleading in the pending case, but also relates back to a complaint which was previously filed and dismissed pursuant to Ohio Civil Rule 41(A). The Fourth District's ruling truly is virtually unique; the Court could only cite a single case in <u>any</u> jurisdiction which reached the same conclusion. More importantly, the Court of Appeals ignored other Ohio Courts of Appeals' Decisions which hold that a Rule 15(C) amendment in one case cannot be said to "relate back" to a pleading in a separate case. The Fourth District's Decision also is unique in its finding that an individual such as Bob Spurlock and a limited liability company of which he is a member are <u>not</u>

separate parties for purposes of an amendment under Civil Rule 15(C). The Court's holding is unsupported by any previously expressed legal principle and is contrary to the very purpose behind Ohio's laws regarding limited liability companies. Indeed, the Fourth District's ruling has implications for every corporation in this state. If allowed to stand, corporations will, in effect, be held to be identical to their owners for purposes of Civil Rule 15(C).

The Fourth District's Decision also ignores this Court's precedents by utilizing Civil Rule 15(C) to effectively extend the statute of limitations despite Appellee's failure to timely bring suit against a known potential defendant. The Fourth District's Decision promotes gamesmanship by permitting plaintiffs to purposely fail to name a known defendant and thereafter move to amend its pleading to name the defendant and have that amendment relate back to a previously dismissed action which did not name that defendant.

Finally, the Fourth District's Decision fails to afford the protection of Ohio's basic agency law to ordinary employers while reserving those protections for doctors and lawyers. The Court's Decision ignores this Court's precedent holding that there is no legal basis under Ohio law for differentiating between professional defendants such as law firms and physicians and any other principal. The Fourth District's Decision is <u>not</u> unique in this respect, as other Courts of Appeal have struggled with this issue. An authoritative declaration from this Court will serve the public interest by resolving, once and for all, whether doctors and lawyers are afforded special protection under Ohio's agency law.

The issues presented by this appeal have implications far beyond the parties. This Court has an interest in the lower courts performing their institutional duties in accordance with the Civil Rules and precedents of this Court. The legislature has an interest in upholding the public policy choices it has enacted by establishing statutes of limitation. Every civil litigant in this

state is entitled to even-handed application of the Civil Rules and the applicable statute of limitations. The Fourth District's Decision is an "outlier", and should be reversed.

II STATEMENT OF THE CASE AND FACTS

This case arises from a skid-loader accident that occurred in Jackson County, Ohio. Bob Spurlock and his son, Tyson, first formed a partnership known as Spurlock Ag-Lime Fertilizer in 1998. In 2005, they formed a limited liability company known as Spurlock's Ag-Lime Fertilizer, LLC ("the LLC"). Both the partnership and the LLC were sometimes referred to as "Spurlock Fertilizer."

On August 16, 2006, James Robinson was making a delivery of seed to "Spurlock Fertilizer." While he and Tyson Spurlock were attempting to unload the seed from Robinson's trailer using a skid-loader, the skid-loader began to tilt. Mr. Robinson climbed on top of the cab of the skid-loader to act as a counterweight. Mr. Robinson admits he had been told in the past to never ride on this type of machine, that he saw the machine's decals warning against such riders, and that "[i]t probably wasn't the smartest thing I done." As Mr. Robinson stood on the cab, the skid-loader began to tilt again, forcing Tyson to put the load down. When he did so, the skid-loader's boom "powered down" on Robinson's feet, causing him personal injury.

Mr. Robinson made a workers' compensation claim, which was paid by Appellee, The Technology Insurance Group ("TIG"). Mr. Robinson and his wife filed suit on April 11, 2007 against "Bob Spurlock d/b/a Spurlock Fertilizer" and an "unknown employee of Spurlock Fertilizer." Bob Spurlock answered the Complaint. TIG was permitted to intervene as Robinson's subrogee, and TIG filed its Complaint against "Bob Spurlock and his employees" on or about March 20, 2008.

On May 16, 2008, counsel for TIG took the depositions of Bob Spurlock and Tyson Spurlock. The Spurlocks testified they operated the fertilizer business as 50/50 partners beginning in 1998. They testified that they formed the LLC in 2005.

Counsel for TIG did nothing further to follow up on the LLC identified by the Spurlocks. Counsel for the Robinsons informally requested the LLC documents, which were produced to her. The Robinsons' counsel then wrote to Bob Spurlock's and TIG's counsel, indicating she would "of course, be moving to amend the complaint and substitute the correct parties, the LLC for the d/b/a designation, and Mr. Tyson Spurlock as the 'unknown employee'."

The trial was scheduled for January 5, 2010. Neither TIG nor the Robinsons moved to amend their complaint to name the LLC or Tyson Spurlock. Moreover, unprepared to proceed with the January 5, 2010 trial, TIG and the Robinsons voluntarily dismissed their complaint.

Prior to TIG's re-filing of its complaint, counsel for Bob Spurlock discussed the matter with TIG's counsel, provided counsel the LLC's charter number, and informed TIG's counsel the LLC's documents could be found on the Secretary of State's website using the charter number.

On April 6, 2009, TIG re-filed its complaint against "Bob Spurlock d/b/a Spurlock Fertilizer." The re-filed complaint did not name the LLC. TIG then filed a Motion for Joinder or, In the Alternative, Motion to Amend the Re-filed Complaint. TIG argued that the LLC should be added as a new party despite the running of the statute of limitations. TIG never sought to substitute the LLC for Bob Spurlock.

The trial court overruled the Motion to add the LLC since neither the LLC nor an "unknown" defendant had been named in the previously dismissed lawsuit and the statute of limitations expired.

Bob Spurlock subsequently filed a Motion for Summary Judgment, arguing that since he was acting as a member of an LLC, he was immune from suit pursuant to O.R.C. 1705.48(B) and that, in any event, TIG's failure to sue the allegedly actively negligent "employee" of Bob Spurlock within the statute of limitations precluded liability on behalf of any alleged principal pursuant to this Court's decision in Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St.3d 594, 2009-Ohio-3601. TIG submitted evidence that Bob Spurlock was operating "Spurlock Fertilizer" personally and not as an LLC. Finding an issue of fact, the trial court overruled Bob Spurlock's Motion for Summary Judgment.

The Robinsons subsequently settled their claims against Bob Spurlock. TIG's case against Bob Spurlock proceeded to trial on the issue of liability only.

At the beginning of the trial, TIG again moved the Court for leave to amend its complaint "to add Spurlock's Ag-Lime Fertilizer as a party." TIG also sought to amend its complaint to "not only refer to Bob Spurlock doing business as Spurlock Fertilizer as an unincorporated sole proprietorship", but also as a partnership. The trial court overruled the motion, finding TIG was attempting to add new parties.

The trial proceeded and at the close of Plaintiff's case, and at the close of Defendant's case, Bob Spurlock moved for a directed verdict, reiterating the argument set forth in his Motion for Summary Judgment. The trial court overruled the motions.

The case was submitted to the jury, which found that Bob Spurlock was not operating "Spurlock Fertilizer" personally at the time of the accident and entered a verdict in his favor.

TIG moved the Court for a new trial, which was denied. TIG appealed to the Fourth District Court of Appeals, arguing the trial court, inter alia, abused its discretion by denying TIG's Motions for Joinder, or in the Alternative, Motions to Amend. Bob Spurlock cross-

appealed, arguing the trial court erred by overruling his Motion for Summary Judgment and motions for directed verdict.

The Fourth District Court of Appeals found that the trial court abused its discretion in denying TIG's Motions for Joinder, or in the alternative, Motions to Amend. 2012-Ohio-1510 at paragraph 18. The Fourth District also found that "the amendment would not have added a new party." Id. at paragraph 20 (emphasis added). The court reasoned that:

> A new defendant adds a new claim. In the case sub judice, however, the claim remained the same. The only change is that the claim would be asserted against the LLC, rather than Spurlock, personally, "d/b/a Spurlock Fertilizer."

Id.

The Court District did not address TIG's other assignments of error. With respect to Bob Spurlock's cross-appeal, the Fourth District found the trial court properly submitted the issue of Bob Spurlock's personal liability to the jury. The Court further found that TIG's failure to sue the alleged employee of Bob Spurlock did not preclude a finding of liability against Bob Spurlock as the employee's principal.

Bob Spurlock timely moved the Fourth District to Reconsider its Decision or to find its Decision in Conflict with the Eighth District Court of Appeals' decisions in Dietrich v. Widmar, Cuyahoga Case No. 85069, 2005-Ohio-2004 and Griesmer v. Allstate Ins. Co., Cuyahoga Case No. 91194, 2009-Ohio-725, which held that Civil Rule 15(C) cannot be used to relate back to a complaint in another case. The Fourth District overruled the Motions for Reconsideration and to Certify Conflict on June 18, 2012.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NUMBER 1

An amendment pursuant to Ohio Civil Rule 15(C) does not relate

back to a complaint in another case.

Ohio Civil Rule 15(c) provides as follows:

> **(C) Relation back of amendments.**
> 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. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The Fourth District held that "[a] Civ. R. 15(C) amendment relates back not just to the re-filed complaint, but also the complaint in the previous action." 2012-Ohio-1510, paragraph 18. In Dietrich v. Widmar, 8th Dist. No. 91194, 2005-Ohio-2004, the Eighth District held that a plaintiff "cannot use Civ. R. 15(C) to relate back to a complaint in another case." 2005-Ohio-2004, paragraph 12. In Griesmer v. Allstate Ins. Co., 8th Dist. No. 91194, 2009-Ohio-725, the Eighth District re-affirmed its holding in Dietrich, supra, and found that while the "relation back" theory of Civ. R. 15(C) applies when one is seeking to correct a misnomer of a party to the action after the statute of limitations has passed, it may not be used when a case was never "commenced" against a party before the statute expired. 2009-Ohio-725 at paragraph 35. The Eighth District explained that "there is no authority to subject a party in whose favor the statute of limitations has run to liability in a second lawsuit after dismissing an earlier lawsuit in which the party was neither originally named as a defendant nor made so by amendment." Id. at paragraph 38, quoting Dietrich, supra, 2005-Ohio-725 at paragraph 11.

The Federal Courts which have addressed this issue unanimously hold that Fed. Civ. R. 15(c), which is identical to Ohio's Civ. R. 15(C), does not permit amendments to relate back to a

previously filed claim. Benge v. United States of America, 17 F.3d 1286 (10th Cir. 1994); Bui v. IBP, Inc., 205 F.Supp.2d 1181, 1184 (D. Kan. 2002) (Plaintiff cites no cases, and the court has found none, supporting his unusual assertion that Rule 15 should be applied to permit a pleading in one case to "relate back" to a pleading in a separate case); Bailey v. Northern Indiana Public Service Company, 910 F.2d 406, 412-413 (7th Cir. 1990). See also White v. Baylor All Saints Medical Center, Court of Appeals of Texas, 7th Cir. No. 07-08-0023-CV (May 13, 2009) (Plaintiff cites no cases extending the relation back theory to the initiation of subsequent lawsuits).

In United States of American v. Koch, 188 F.R.D. 617 (N.D. Okla. 1999), the District Court was faced with a similar issue under Fed. Civ. R. 15(c). Quoting Benge, supra, the court held that "a separately filed claim, as opposed to an amendment or supplementing pleading, does not relate back to a previously filed claim." 188 F.R.D. at p. 631. The Koch court noted that an amendment to a complaint in a subsequent action "cannot plausibly be construed as an amendment to the already dismissed complaint . . . without altering the plain meaning of Rule 15(c)." Id. at p. 632. The Court noted that since the law considers a previously dismissed lawsuit "to have never in fact existed," it would be impossible to relate an amended complaint in a subsequent action back to the dismissed action. Id. at p. 633; See Zimmie v. Zimmie, 11 Ohio St.3d 94, 95, 464 N.E.2d 142 (1984). The Court noted that a liberal approach to the relation-back doctrine "would do violence to the expectation-settling and conduct-ordering policies behind statutes of limitations." 188 F.R.D. at p. 632.

The Koch Court's reasoning is echoed in this Court's decision in Erwin v. Bryan, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019. In Erwin, the Court addressed amendments under Civil Rule 15(D). After noting plaintiffs have a duty to identify the negligent party once

an injury is discovered, this Court stated it did not promulgate Civil Rule 15(D) to relieve plaintiffs of the duty to identify culpable parties nor to extend the statute of limitations. 2010-Ohio-2202, paragraph 27. This Court recognized that statutes of limitation reflect public policy choices properly made by the legislature and which the Court cannot alter by a court rule. Id. at paragraphs 29-30.

The same is true here. Civil Rule 15(C) does not extend the statute of limitations in cases in which the plaintiff failed to timely identify and name culpable parties. To hold otherwise, as did the Fourth District, effectively imposes the Court's public policy choices on both the legislature and the citizens of this state, and unfairly transfers the consequences of a plaintiff's failure to fulfill its duty to identify culpable parties to the newly named defendant.

The only known case in the country which arguably supports the Fourth District's Decision is Milos v. Doe, 192 Ohio App. 3d 751, 2011-Ohio-849, 950 N.E.2d 592, paragraphs 8-11 (8th Dist.). In Milos, the plaintiff sued a non-existent entity – Nationwide Insurance Company. Nationwide Mutual Insurance Company received and signed for service of process and filed an answer, noting its improper designation in the complaint. 2011-Ohio-849, paragraph 2. The action subsequently was dismissed pursuant to Ohio Civil Rule 41(A) and was re-filed against "Nationwide Insurance Company. Nationwide Mutual Insurance Company again answered, noting its improper designation. Milos then amended his complaint to correctly identify the defendant. The trial court determined the action as amended had not been "commenced" with the statute of limitations because the proper defendant had not been served in the previous case. Id. at paragraph 6.

The Eighth District Court of Appeals reversed, finding:

> Under these circumstances, the correction of the inadvertent misnomer of the defendant relates back to the original complaint in the initial action and

> is not affected by an intervening statute of limitations. See Hardesty [v. Cabotage (1982], 1 Ohio St.3d 114, 10BR 147, 438 N.E.2d 431; Civ. R. 15(c). See also Bentz v. Corter (1988), 55 Ohio App.3d 120, 562 N.E.2d 925 (amendment related back to original complaint that Misidentified defendant's first name).

Id. at paragraph 11. Neither case cited by the court in Milos supports the notion that an amendment in a pending case somehow relates back to a previously dismissed lawsuit, and there was no need for the Court to reach that conclusion in order to preserve Milos' claim against Nationwide. Obviously, Milos attempted to commence an action against Nationwide Mutual in the initial lawsuit such that the provisions of O.R.C. 1705.48, the savings statute, would permit a re-filing of the claim. It appears the Milos court simply confused the savings statute with the "relation back" doctrine under Civil R. 15(C).

The other authorities cited by the Fourth District do not support its conclusion concerning the relations back doctrine. In Bykova v. Szues, 8th Dist. No. 87629, 2006-Ohio-6424, the Court held that 15(C) may not be used to add a new party after the statute of limitations had expired. Id. at paragraph 3. The court specifically held that "[w]hen a new party is added, a new cause of action is created and will not relate back to the date of filing the original action for statute of limitations purposes." Id. at paragraph 4. This pronouncement is 180 degrees opposite the Fourth District's opinion, which held that "the claim remained the same. The only change is that the claim would be asserted against the LLC rather than Spurlock, personally, "d/b/a Spurlock Fertilizer." 2012-Ohio-1510, paragraph 20.

The scholarly legal authority cited by the Fourth District actually supports Appellee's position. Although Bob Spurlock's counsel was unable to locate the 2001 edition of the cited work, the 2006 edition directly contradicts the Fourth District's finding that an amendment in a pending case can be made to relate back to a previously dismissed lawsuit:

> Nor does the Rule apply to a second action against the correct defendant after the statute of limitations has run where the earlier action against an unintended defendant was dismissed.

Fink, Greenbaum & Wilson, Guide to the Ohio Rules of Civil Procedure, Section 15:5 (2006 Edition).

This Court should accept jurisdiction of this matter to prevent the promulgation of the Fourth Districts' flawed analysis to the detriment of the citizens of this state and in contravention of the public policy choices reflected in the statutes of limitations enacted by the legislature.

PROPOSITION OF LAW NUMBER 2

> **A limited liability company and its individual members are separate and distinct parties for purposes of an amendment pursuant to Civil Rule 15(c).**

The Fourth District indulged in a curious fiction that Bob Spurlock and the LLC were the same parties:

> We also conclude the amendment would not have added a new party.

2012-Ohio-1510, paragraph 20. In Estate of Finley v. Cleveland Metroparks 189 Ohio App.3d 139, 937 N.E.2d 645, 2010-Ohio-4013, paragraph 18, the court stated that "[w]hen a new party is added, a new cause of action is created and will not relate back to the date of filing the original action for statute of limitations purposes." Id. To avoid Finley, the Fourth District necessarily must indulge in the fiction that Bob Spurlock, personally, and the LLC are the same parties.[1]

The Fourth District's Decision does not further explain why adding the LLC to the lawsuit would not constitute adding a new party. In Cleveland Bar Ass'n. v. Pearlman, 106 Ohio St. 3d 136, 832 N.E.2d 1193, 2005-Ohio-4012, paragraph 8, this Court held that limited liability companies are separate legal entities. See also O.R.C. Section 1705.01(D)(2)(e).

[1] If this were true, then the verdict in favor of Bob Spurlock would be res judicata to an action against the LLC.

Remarkably, the Fourth District's Decision elsewhere acknowledges that Bob Spurlock and the LLC are separate parties and that TIG had potential claims against both of them:

> Whether the business was, in fact, operated as a limited liability company, or, instead, as a sole proprietorship, this is an issue that the jury must determine.

2012-Ohio-1510, paragraph 31. If either the LLC and Bob Spurlock could be held separately liable to TIG, how can they be the same party?

The Fourth District's refusal to acknowledge that Bob Spurlock and the LLC are different parties for purposes of Civ. R. 15(C) has profound consequences. The Decision permits Plaintiffs to circumvent this Court's ruling in Kraly v. Vannewkirk, 69 Ohio St.3d 627, 635 N.E.2d 323 (1994), which held that 15(C) "may not be employed to assert a claim against an additional party while retaining a party against whom a claim was asserted in the original pleading." Since TIG chose to pursue a claim against Bob Spurlock personally, to now allow TIG to pursue a claim against the LLC is necessarily to allow a different claim against a different, new defendant.

PROPOSITION OF LAW NUMBER 3

> **An amendment to a pleading under Civil Rule 15(C) changing the party against whom a claim is asserted does not relate back to the date of filing of the original complaint when the pleader knows the correct identity of the proper party at the time the original pleading is filed.**

Civil Rule 15(C)(2) requires that the party to be substituted "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (emphasis added). The Fourth District's Decision is inconsistent with respect to whether a "mistake" was made when TIG failed to name the LLC in the re-filed action. The Fourth District specifically found that Bob Spurlock "submitted ample evidence to show, as the trial court aptly noted, that TIG was aware of the existence of the LLC before the

original case was dismissed." 2012-Ohio-1510, paragraph 25, footnote 2. Nevertheless, the Court also concluded that "[t]he Spurlocks knew or should have known that, but for a mistake in the pleadings, the personal injury claim would have been brought against the LLC rather than against Bob Spurlock, personally." The Fourth District's Decision does not explain how TIG made a "mistake" even though TIG had actual knowledge of the LLC.

In Erwin, supra, this Court was confronted with an analogous situation with respect to the application of Civil Rule 15(D). This court held 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." Id. at paragraph 30. The court explained that 15(D) may be used where a plaintiff "does not know the name of that defendant . . . ." Id. (emphasis in original). Since the plaintiff in Erwin knew the defendant's name at the time she filed her original complaint, she did not satisfy the requirements of Civ. R. 15(D). Id. at paragraphs 32-33. See also Difiore v. Pfeister, 5th Dist. No. 11-CA-44, 2012-Ohio-2456, (no "mistake" when plaintiff names a defendant he knows to be deceased).

In this case, since both the trial court and the Fourth District acknowledged TIG knew the name of the LLC before it re-filed its Complaint, there was no "mistake" in failing to name the LLC in the re-filed complaint and the amendment would not have related back if it had been allowed.

The Fourth District's Decision, if permitted to stand, will promote gamesmanship and undermine the purpose of Civil Rule 15. The Fourth District's Decision allows one to purposely omit a known defendant from a complaint and thereafter amend the complaint to name the defendant and have the amendment relate back to a previously dismissed action after expiration

of the statute of limitations. Had TIG simply named the LLC in the re-filed action, it could not make any relation back claim. The Fourth District's Decision thus permits TIG to achieve that which it plainly could not have achieved simply by naming the LLC in its re-filed complaint. The court should accept jurisdiction of this matter to prevent the proliferation of this type of gamesmanship.

PROPOSITION OF LAW NUMBER 4

> **When the statute of limitations has expired as to an allegedly negligent tortfeasor, the alleged tortfeasor's principal may not be held liable upon any theory of vicarious liability.**

In Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St. 3d 594, 913 N.E.2d 939, 2009-Ohio-3601 this court held that "basic agency law" precluded vicarious liability on behalf of a principal whose agent could not be held liable due to the expiration of the statute of limitations. The Wuerth decision noted "this rule applies not only to claims of respondeat superior, but also to other types of vicarious liability." Id. at paragraph 23. "[T]here can be no vicarious liability imputed to a principal if there is no liability on the part of the agent." Comer v. Risko, 106 Ohio St.3d 185, 833 N.E.2d 712, 2005-Ohio-4559, paragraph 21, quoting Losito v. Kruse, 136 Ohio St.183, 24 N.E.2d 705 (1940).

In this case, the alleged "employee" or "agent" of Bob Spurlock, Tyson Spurlock, was never sued. Pursuant to Wuerth, all vicarious liability claims against Bob Spurlock were extinguished following expiration of the two year statute of limitations for claims against Tyson Spurlock. The trial court, however, found that Wuerth was limited to malpractice cases, and the Fourth District's Decision does not even reference Wuerth. Similarly, in Cope v. Miami Valley Hospital 195 Ohio App. 3d 513, 960 N.E.2d 1034, 2011-Ohio-4869 (2nd Dist.) the Court of

Appeals limited Wuerth to only malpractice claims. Id. The Court noted that "[p]hysicians and attorneys must be alone in this category." Id. at paragraph 23.

What the Fourth and Second Districts ignore, however, is the specific language of Wuerth wherein this court commented that "[t]here is no basis for differentiating between a law firm and any other principal to whom Ohio law would apply." 2009-Ohio-3601, paragraph 24. The Courts' decisions below create a special class of employers, doctors and lawyers, who are afforded greater protection from claims of vicarious liability than other employers. There is no legal reason to afford the protection of "basic agency law" to doctors and lawyers, but deny those same protections to ordinary employers. This court recognized this fact in Wuerth when it noted that there is no reason to differentiate amongst different types of employers. All are entitled to the protection of the law, including Bob Spurlock (if he was Tyson Spurlock's principal, which he was not). This court should accept jurisdiction and clarify that the protection of Ohio's law apply equally to all employers.

CONCLUSION

This case presents several issues of significance to the public and of great general interest. Bob Spurlock respectfully requests this court to accept jurisdiction and provide authoritative guidance concerning the application of Civil Rule 15(c) and its decision in Wuerth, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certif0ies that a true and accurate copy of the foregoing instrument was served by facsimile and ordinary U.S. Mail, postage prepaid, on B. Scott Jones, 730 W. Main Street, Suite 300, Louisville, KY 40202 this 24th day of August, 2012.

Mark S. Maddox (0029852)
Attorney for Bob Spurlock

APPENDIX

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

JAMES LEE ROBINSON, et al.,	:	
Plaintiffs-Appellants/Cross-Appellees,	:	Case No. 11CA4
v.	:	DECISION AND JUDGMENT ENTRY
BOB SPURLOCK, et al.,	:	
Defendants-Appellees/Cross-Appellants.	:	

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CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, P.J.

This is an appeal from a Jackson County Common Pleas Court judgment. A jury found in favor of Bob Spurlock, defendant below and cross-appellant herein, on subrogated claims brought against him by Technology Insurance Group (TIG), plaintiff below and appellant herein. TIG assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS-APPELLANTS' MOTIONS FOR JOINDER OR, IN THE ALTERNATIVE, MOTIONS TO

AMEND THE RE-FILED COMPLAINT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN INSTRUCTING THE JURY WITH INTERROGATORY #1."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING PLAINTIFFS-APPELLANTS FROM INTRODUCING EVIDENCE THAT SPURLOCK FERTILIZER WAS AN UNREGISTERED TRADE NAME."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS-APPELLANTS MOTION FOR NEW TRIAL."

Cross-Appellant assigns the following cross-assignments of error:

FIRST CROSS-ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT OVERRULED BOB SPURLOCK'S MOTION FOR SUMMARY JUDGMENT."

SECOND CROSS-ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT OVERRULED BOB SPURLOCK'S MOTION FOR DIRECTED VERDICT."

James Robinson and Agnes Robinson are residents of the Commonwealth of Kentucky. On August 16, 2006, James Robinson, employed by Caudill Seed, a Kentucky company, delivered supplies from his employer to a business owned by Bob Spurlock and his son Tyson Spurlock, in Jackson County, Ohio. When Robinson arrived at the business, Tyson Spurlock used a skid loader to remove the supplies from Caudill's truck. The pallets on the truck were

very heavy and the skid loader began to tip forward. Robinson and another man then climbed onto the back of the skid loader to act as a counter weight. Eventually, the skid loader fell onto Robinson's feet and caused him injury.

On April 11, 2007, the Robinsons filed suit against "Bob Spurlock, d/b/a Spurlock Fertilizer" and an unknown employee of that unincorporated business. TIG filed its own complaint in that case on March 14, 2008, but on December 31, 2008 filed a Civ.R. 41(A) voluntary dismissal.[1]

The Robinsons and TIG re-commenced the action on April 6, 2009 against "Bob Spurlock, d/b/a Spurlock Fertilizer," an unknown employee of Spurlock Fertilizer and "Unknown Owners of Spurlock Fertilizer." The gist of the complaint's allegations were that one or more of the Spurlock defendants negligently instructed him to stand on the skid loader to act as a counterweight and led to his injuries. The Robinsons sought damages in excess of $25,000. TIG alleged that it paid compensation and medical benefits to Robinson and was thus subrogated to his interests and sought compensatory damages exceeding $268,000. Spurlock denied liability.

On May 22, 2009, TIG filed a motion to join, as a new party defendant, "Spurlock's Ag-Lime Fertilizer, LLC." Alternatively,

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[1] It is unclear from the record in this case whether the Robinsons also dismissed their claims against Spurlock in that case.

TIG asked that it be permitted to amend its refiled complaint to name the correct defendant. Spurlock's memorandum contra argued that the statute of limitations to bring an action against the LLC had already expired. Furthermore, Spurlock submitted exhibits to show that Robinson and TIG knew of the existence of the LLC long before the original action was dismissed in 2008.

The trial court subsequently denied the motion. The court cited TIG's knowledge of the LLC before the statute of limitations had expired, and noted that an "unknown" business defendant was never joined as a party, and reasoned that neither Civ.R. 15 nor Civ.R. 19 would permit the LLC to be made a party defendant. When the same motion was renewed at trial, the court emphasized that TIG sought "to add a party" rather than amend the complaint.

Cross-appellants ultimately settled with the Robinsons and the matter proceeded to a jury trial on TIG's subrogated claims over several days in December 2010. A good portion of the evidence dealt with how Spurlock held itself out to the public - either as an LLC or as "Spurlock Fertilizer," an unincorporated business under which Bob Spurlock did business. As to the issue of liability, Tyson Spurlock denied that he told Robinson to stand on the back of the skid loader as a counterweight. Indeed, Spurlock testified that he actually ordered Robinson off the skid loader when he noticed that Robinson had climbed on.

Robinson, however, testified that Spurlock told him to stand on back of the loader to counter the weight of the pallets in the truck. That said, Robinson conceded that he had been told in the past to never ride these machines in that manner and that he saw the decals on this particular machine that warned against such riders. Robinson also admitted that he did not believe that the skid loader could handle the weight of the load. In retrospect, Robinson admitted, "[i]t probably wasn't the smartest thing I done."

The case was given to the jury, along with several interrogatories. The first interrogatory asked if, on the day of the accident, Bob Spurlock was doing business as Spurlock Fertilizer rather than as a member of an LLC. The trial court instructed the jury that if they answered that question in the negative, they must sign a general verdict form for the Spurlocks. Subsequently, the jury did not make such a finding and the trial court entered judgment on that verdict on January 3, 2011.

Eight days later, TIG filed a Civ.R. 59(A) motion for new trial. A portion of the arguments repeated earlier request(s) to add "Spurlock's Ag-Lime Fertilizer, LLC" as a defendant, or to amend its complaint to add the correct party defendant. TIG also made an additional argument that it could recover against the LLC operating under a fictitious name. The trial court denied the

motion. This appeal and cross-appeal followed.

I

Before we address appellant's assignments of error on their merits, we must first resolve a threshold jurisdictional issue. Cross-appellant argues that we do not possess jurisdiction to review appellant's assignments of error because he did not file a notice of appeal from the March 30, 2011 entry that denied his motion for new trial. We disagree.

We recognize that appellant did not file a Notice of Appeal from the entry that denied his motion for new trial. Rather, appellant filed a notice of appeal from the trial court's January 3, 2011 judgment. A motion for new trial tolls time under App.R. 4. Tate v. Adena Regional Med. Ctr., 155 Ohio App.3d 524, 801 N.E.2d 930, 2003-Ohio-7042, at ¶14. Consequently, until a pending Civ.R. 59(A) motion is resolved, no appealable order exists. Id.; also see Geauga Sav. Bank v. Rivera, Geauga App. No. 2011-G-3011, 2011-Ohio-3755, at ¶¶4&9; Wells Fargo Financial Leasing Inc. v. Gilliland, Scioto App. Nos. 05CA2993 & 05CA3006, 2006-Ohio-2756, at ¶24.

Appellant's motion for new trial rendered his January 28, 2011 Notice of Appeal premature. A premature Notice of appeal is treated as being filed immediately after a final appealable order. App.R. 4(C). In this case, that order was the entry that denied the motion for new trial. No need existed to file an

additional notice of appeal after that entry. For these reasons, we thus conclude we possess jurisdiction to consider this appeal.

II

In its first assignment of error, TIG asserts that the trial court erred by denying its 2009 motion to bring the LLC into the action as a party defendant.

We begin our analysis with the recognition that Robinson sustained his injuries on August 16, 2006. Thus, any claim that he may have against the tortfeasor must have been commenced within two years of that date. R.C. 2305.10. The same statute of limitations applies to TIG for any subrogated claim. United States Fidelity & Guaranty Co. v. Buckeye Union Ins. Co. (Sep. 30, 1986) Lucas App. No. L-85- 377; also see Ohio Bur. of Workers' Comp. v. McKinley, ___Ohio St.3d ___, ___N.E.2d ___, 2011-Ohio-4432, at ¶16 (applying principle to statutory subrogee under R.C. 4123.931).

Here, the statute of limitations expired on August 16, 2008. TIG filed its complaint in the original case on March 14, 2008, well within the limitations time period. Although TIG voluntarily dismissed that claim in December 2008, it nevertheless had one year to re-file its action. See R.C. 2305.19(A). TIG commenced the instant action on April 6, 2009 and was within the prescribed time-frame.

Civ.R. 15(C) states in pertinent part:

> "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. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

A Civ.R. 15(C) amendment relates back not just to the re-filed complaint, but also the complaint in the previous action. Milos v. Doe, 192 Ohio App.3d 751, 950 N.E.2d 592, 2011-Ohio-849, at ¶¶8-11; Bykova v. Szucs, Cuyahoga App. No. 87629, 2006-Ohio-6424 at ¶4; also see generally Fink, Greenbaum & Wilson, Guide to the Ohio Rules of Civil Procedure (2001 Ed.) 15-8 to 15-9, Sec. 15-5. We conclude that the rule's requirements were satisfied in this matter.

Several pleadings from the original case were included as exhibits in this case and make clear that Bob Spurlock was served in the original action. The evidence also indicates that he and his son are the owners of the LLC and, thus, it appears that Tyson Spurlock would have had knowledge of the action. The Spurlocks should also have known that, but for a mistake in the pleadings, the personal injury claim would have been brought

against the LLC rather than against Bob Spurlock, personally. Finally, we fail to see how amending the complaint a year before trial could prejudice the Spurlocks or the LLC.

We also conclude that the amendment would not have added a new party. See Estate of Finley v. Cleveland Metroparks, 189 Ohio App.3d 139, 937 N.E.2d 645, 2010-Ohio-4013, at ¶18. A new defendant adds a new claim. In the case sub judice, however, the claim remained the same. The only change is that the claim would be asserted against the LLC rather than Spurlock, personally, "d/b/a Spurlock Fertilizer."

Indeed, the facts in the case sub judice are similar to Milos in which a lawsuit named "Nationwide Insurance Company." "Nationwide Mutual Insurance Company" filed an answer and stating that it had been improperly designated in the complaint. Later, the complaint was voluntary dismissed, but refiled within the R.C. 2305.19 one year period. The re-filed complaint bore the same incorrect party name. Plaintiff later filed an amended complaint with the correct name, but the trial court dismissed the case reasoning that it was not commenced against the correct defendant within the time limit under the statute of limitations. 2011-Ohio-849, at ¶¶2-6. In reversing the trial court, the Eighth District held:

> "It was apparent from the complaint who the intended defendant was, because it identified Nationwide's business address and a Nationwide policy was attached to the complaint. Nationwide received timely service of

> the complaint, was on notice of the claim, and was not prejudiced in defending the case on the merits. Under these circumstances, the correction of the inadvertent misnomer of the defendant relates back to the original complaint in the initial action and is not affected by an intervening statute of limitations. (Citations omitted.) Id. at ¶11.

We believe that the same circumstances exist here. The Spurlocks were on notice of the claim (against Bob Spurlock) who received timely service of the complaint. Also, no prejudice would arise by substituting the LLC as the correct owner of the business where TIG's insured sustained his injury.

We readily acknowledge that the decision whether to allow a Civ.R. 15(C) amendment is committed to the trial court's discretion and will not be reversed absent an abuse of that discretion. See Estate of Finley, supra at ¶16; Roche v. On Time Delivery Servs., Inc., Cuyahoga App. No. No. 94036, 2010-Ohio-2358, at ¶27. An abuse of discretion is generally more than an error of law or judgment; rather, it implies that a trial court's attitude is unreasonable, arbitrary or unconscionable. Landis v. Grange Mut. Ins. Co. (1998), 82 Ohio St.3d 339, 342, 695 N.E.2d 1140; Malone v. Courtyard by Marriott L.P. (1996), 74 Ohio St.3d 440, 448, 659 N.E.2d 1242. Furthermore, when applying the abuse of discretion standard, reviewing courts may not substitute their judgment for that of the trial court. State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 732, 654 N.E.2d 1254.

In the case sub judice, we believe that we must heed the Ohio Supreme Court's admonition that when possible cases should be decided on the merits, rather than pleading technicalities. See State ex rel. Montgomery v. R & D Chem. Co. (1995), 72 Ohio St.3d 202, 204, 648 N.E.2d 821; Perotti v. Ferguson (1983), 7 Ohio St.3d 1, 3, 454 N.E.2d 951; Peterson v. Teodosio (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113. Because the LLC was not a party to the action, the jury did not have the opportunity to consider the LLC's liability for TIG's insured's injuries.

For these reasons, TIG's first assignment of error is hereby sustained.[2]

III

Because our ruling on the TIG's first assignment of error requires a reversal of the trial court's judgment, TIG's three remaining assignments of error have been rendered moot. See App.R. 12(A)(1)(c).

IV

We now proceed to consider the cross-assignments of error.[3]

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[2] We hasten to add that we are not completely unsympathetic to the trial court's frustration with TIG. Cross-appellant submitted ample evidence to show, as the trial court aptly noted, that TIG was aware of the existence of the LLC before the original case was dismissed. TIG could have laid these issues to rest simply by amending the complaint in the original action to include the LLC or, at the least, made the LLC a party defendant to the re-filed complaint.

[3] Cross-appellant's brief sets forth two separate assignments of error, the brief contains only one argument. App.R. 16(A)(7)

V

In the first cross-assignment of error, cross-appellant argues that the trial court erred by overruling his motion for summary judgment. The motion argued that the only person with whom Robinson had contact on the day of the accident was Tyson Spurlock, that Tyson Spurlock was not joined as a party to the case and, therefore, Bob Spurlock could not be held vicariously liable. The trial court overruled the motion without comment on the substantive issues and cross-appellant argues this constitutes error.

To begin, cross-appellant's motion was premised, in part, on the pleading and joinder problems that we discussed in our resolution of appellant's first assignment of error. Amending the complaint to substitute the LLC for Bob Spurlock (individually) would have helped to alleviate the issues cited in the motion for summary judgment. That aside, we also agree that the trial court correctly decided the motion on its merits. Appellate courts review summary judgments de novo. Sutton

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requires a brief to contain an argument "with respect to each assignment of error." (Emphasis added.) Although appellate courts have the option to address two or more assignments of error at once, the parties do not. See Powell v. Vallandingham, Washington App. No. 10CA24, 2011-Ohio-3208, at ¶24; Keffer v. Cent. Mut. Ins. Co., Vinton App. No. 06CA652, 2007-Ohio-3984, at ¶8, fn. 2. App.R. 12(A)(2) would permit us to simply disregard these cross-assignments of error because they are not separately argued. However, we will, in the interest of justice, consider the cross-assignments of error on their merits.

Funding, L.L.C. v. Herres, 188 Ohio App.3d 686, 936 N.E.2d 574, 2010-Ohio-3645, at ¶59; Broadnax v. Greene Credit Service (1997), 118 Ohio App.3d 881, 887, 694 N.E.2d 167. In other words, appellate courts afford no deference whatsoever to trial court decisions, Sampson v. Cuyahoga Metro. Hous. Auth., 188 Ohio App.3d 250, 935 N.E.2d 98, 2010-Ohio-3415, at ¶19; Kalan v. Fox, 187 Ohio App.3d 687, 933 N.E.2d 337, 2010-Ohio-2951, at ¶13; Hicks v. Leffler (1997), 119 Ohio App.3d 424, 427, 695 N.E.2d 777. Rather, appellate courts conduct their own, independent review to determine if summary judgment is appropriate. Woods v. Dutta (1997), 119 Ohio App.3d 228, 233-234, 695 N.E.2d 18, abrogated on other grounds by Marshall v. Ortega, 87 Ohio St.3d 522, 721 N.E.2d 1033, 200-Ohio-481; McGee v. Goodyear Atomic Corp. (1995), 103 Ohio App.3d 236, 241, 659 N.E.2d 317.

Summary judgment under Civ. R. 56(C) is appropriate when a movant shows that (1) no genuine issues of material fact exist, (2) he is entitled to judgment as a matter of law and (3) after the evidence is construed most strongly in favor of the non-movant, reasonable minds can come to one conclusion and that conclusion is adverse to the non-moving party. See Kaminski v. Metal & Wire Prods. Co., 125 Ohio St.3d 250, 927 N.E.2d 1066, 2010-Ohio-1027 at ¶103; Mootispaw v. Eckstein (1996), 76 Ohio St.3d 383, 385, 667 N .E.2d 1197. The moving party bears the initial burden to show that no genuine issue of material fact

exists and that it is entitled to judgment as a matter of law. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. If that burden is satisfied, the onus shifts to the non-moving party to provide rebuttal evidentiary materials. See Trout v. Parker (1991), 72 Ohio App.3d 720, 723, 595 N.E.2d 1015; Campco Distributors, Inc. v.. Fries (1987), 42 Ohio App.3d 200, 201, 537 N.E.2d 661. With these principles in mind, we turn our attention to the case at bar.

Cross-appellant's motion for summary judgment includes Bob Spurlock's affidavit wherein he attested that he and his son, Tyson, operated the fertilizer business as partners and then formed the LLC in 2005. Although the affidavit fails to explicitly state that Tyson Spurlock was not employed by the LLC, of which he was a part owner, this affidavit is sufficient to, at a minimum, carry the burden of showing that the business is an LLC rather than an independent proprietorship. The burden then shifted to TIG which submitted, in rebuttal, an affidavit from Robinson who attested that the business was advertised as "Spurlock Fertilizer" without any indication that it is an LLC. Although the affidavit fails to mention that the business was held out as a sole proprietorship and operated by Bob Spurlock, we agree that this is sufficient to raise a genuine issue of material fact as to corporate form. Whether the business was, in

fact, operated as a limited liability company, or, instead, as a sole proprietorship, this is an issue that the jury must determine.

Cross-appellant also contends that the defendants are entitled to judgment in their favor as a matter of law because Tyson Spurlock was not joined as a party defendant. Cross-appellant cites Comer v. Risko, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, for the proposition that a principal (a hospital) cannot be found liable under the doctrine of agency by estoppel when its agents (physicians working as independent contractors) were not joined in the action and could not be joined after the statute of limitations had expired. Id. at ¶¶3, 5, 25 & 29. Here, reliance on Comer is misplaced.

In Harris v. Mt. Sinai Med. Ctr., 116 Ohio St.3d 139, 876 N.E.2d 1201, 2007-Ohio-5587, the Ohio Supreme Court declined to apply Comer to bar recovery when the complaint alleged that negligence of nurses (employees) who, apparently, were not named as parties to the action. Id. at ¶¶3, 44-45.[4] Our Third District colleagues have also held that Comer did not bar holding a principal liable for an employee's tort because the principle of respondeat superior is different than the doctrine of agency by

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[4] The court of appeals opinion, makes no mention of the nurses (employees) being named as party defendants to the action. See McLeod v. Mt. Sinai Med. Ctr., 166 Ohio App.3d 647, 852 N.E.2d 1235, 2006-Ohio-2206, at ¶3.

estoppel asserted in Comer. See Holland v. Bob Evans Farms, Inc., Shelby App. 17-07-12, 2008-Ohio-1487, at ¶¶10-11. In Holland, as in the case sub judice, an "unknown employee" was joined as a defendant.[5] If the trier of fact concluded that the business operated as a sole proprietorship, rather than an LLC, this would have been enough to impose liability on Spurlock, vicariously, through his son as an employee.

For these reasons, we find no error in the court's ruling that Spurlock is not entitled to judgment in his favor as a matter of law. Thus, we hereby overrule Spurlock's first cross-assignment of error.

VI

Cross-appellant asserts in his final cross-assignment of error that the trial court erred by denying motions for a directed verdict made both at the conclusion of TIG's case and at the conclusion of his own case. Cross-appellant argues that these motions "reiterat[ed] the arguments set forth in his Motion for Summary Judgment."

In considering a motion for directed verdict, a court must construe all the evidence mostly strongly in favor of the non-moving party. Civ.R. 50(A)(4). A directed verdict should be

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[5] We parenthetically note that the complaint named "unknown owners of Spurlock Fertilizer" which is also sufficient to bring Tyson Spurlock into the action (although TIG should have amended the complaint to name that other owner pursuant to Civ.R. 15(D)).

granted when, after so construing that evidence, a court finds that reasonable minds could come to only one conclusion and that conclusion is adverse to the non-moving party. Id. Appellate courts review de novo trial court directed verdict decisions. Mitchell v. Thompson, Gallia App. No. 06CA8, 2007-Ohio-5362, at ¶18.

Robinson and his wife both testified that the business was held out to be a sole proprietorship (Spurlock's Fertilizer), rather than an LLC or other corporate form. In fact, this is the question that the jury was asked to resolve in the first interrogatory. Although the jury rejected Robinsons' testimony, and apparently accepted that of the Spurlocks, the fact remains that the evidence adduced at trial is sufficient to get the matter to the jury.

We again note that much of the confusion surrounding this issue would not have occurred if TIG was permitted to amend the complaint to change the name of the company from "Bob Spurlock, d/b/a Spurlock Fertilizer" to the name of the LLC. Both the motion for summary judgment and the two motions for directed verdict were premised, in one way or another, on the failure to include the correct party as a defendant. Having ruled that it constitutes error to deny TIG's motion to amend the complaint to include that party, these pleading technicalities have now been largely rendered superfluous. The second cross-assignment of

error is thus overruled for these reasons.

Having sustained TIG's first assignment of error, we hereby reverse the judgment on the jury verdict and remand this case for further proceedings. The trial court is directed to allow the amendment to include the correct name of the business and the case may then go to trial.

JUDGMENT REVERSED AND
CASE REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT
WITH THIS OPINION.

Harsha, J., Concurring:

The trial court denied the motion to amend because "neither Spurlock's Ag-Lime Fertilizer, LLC nor an 'unknown' Defendant was named in the original action, for Civ. R. 15 to apply, the Amended Complaint would have to be filed prior to the expiration of the appropriate statute of limitations." This rationale is clearly erroneous. The court apparently decided the motion based upon its mistaken view of whether an amendment would relate back to the original complaint. The proper approach is to first decide whether to allow the amendment under Civ.R. 15(A)'s "freely given when justice so requires(.)" standard. If the court allowed the amendment, it then should have decided whether the amendment related back to the original complaint under Civ.R. 15(C).

Moreover, the analysis used here reflects a misunderstanding of Civ.R. 15(C). Normally, you cannot add a new party after the applicable statute of limitation has run. However, if an amendment meets the requirements of Civ.R. 15(C), it relates back not just to the re-filed complaint but also the complaint in previous action. In other words, if the trial court granted the motion to amend, replacing Spurlock's name with that of the LLC, and if the court found the standard in Civ.R. 15(C) for the relation back of amendments was satisfied, it would be as if the plaintiffs filed their original complaint against the LLC. And the complaint against the LLC would be deemed to have been filed within the appropriate statute of

limitations.

Although the trial court had discretion to decide whether to allow the amendment under Civ.R. 15(A), courts have "no discretion to apply an improper analysis or process in deciding an issue even where they may have discretion in the ultimate decision on the merits." *Rafferty v. CNE Poured Walls, Inc.*, 4th Dist. No. 10CA16, 2011-Ohio-5143, ¶ 12, quoting *State v. Henderson*, 4th Dist. No. 07CA659, 2008-Ohio-2063, ¶ 5. Because the court used an improper approach to reach its decision, I would reverse and remand so that the trial court can decide whether to grant the motion using the proper analysis.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and that the case be remanded for further proceedings consistent with this opinion. Appellants-Cross Appellees to recover costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs with Concurring Opinion
Kline, J.: Concurs in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

6-19-12

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

JAMES LEE ROBINSON, et al., :

Plaintiffs-Appellants
Cross-Appellees, Case No. 11CA4

vs.

BOB SPURLOCK, et al. : ENTRY ON APPLICATION FOR RECONSIDERATION

Defendants-Appellees/
Cross-Appellants. :

FILED
COURT OF APPEALS
JACKSON CO OHIO
JUN 18 2012
SETH I. MICHAEL, CLERK

This matter comes on for review of the application for reconsideration filed herein by Bob Spurlock, appellee and cross-appellant, pursuant to App.R. 26. Appellant requests that we reconsider our March 29, 2012 decision wherein we reversed the trial court's judgment after concluding that the trial court abused its discretion by refusing to allow a Civ.R. 15(C) amendment of the pleadings. See Robinson v. Spurlock, Jackson App. No. 11CA4, 2012-Ohio-1510, at ¶¶17-25.

App.R. 26(A) does not specify an exact standard by which an application for reconsideration should be reviewed. The test generally applied is to determine if the application for reconsideration calls to the court's attention an obvious error in its decision, or raises an issue for consideration that was either not considered or not fully considered when it should have. See e.g. State v. Wong (1994), 97 Ohio App.3d 244, 246,

646 N.E.2d 538; Woerner v. Mentor Exempted Village School Dist. Bd. of Edn. (1993), 84 Ohio App.3d 844, 846, 619 N.E.2d 34; State v. Gabel (1991), 75 Ohio App.3d 675, 676, 600 N.E.2d 394; Skillman v. Browne (1990), 68 Ohio App.3d 615, 617, 589 N.E.2d 407; Columbus v. Hodge (1987), 37 Ohio App.3d 68, 523 N.E.2d 515.

Spurlock's application does not clearly argue either part of that test, but we assume the gist of his argument is that we erred in our decision. For the most part, that argument is couched in such a way as to repeat many of the same points he raised in his briefs. We, however, fully considered, and rejected, those arguments. We do so again here.

To the extent that Spurlock argues that allowing an amendment to the pleadings will result in a new claim, as we stated in our decision, this is not the case. The claim remains the same; it will only be asserted against a defendant who had been improperly named in the first case. 2012-Ohio-1510, at ¶20.

To the extent that Spurlock argues that our decision is internally inconsistent, we disagree. Spurlock cites an early part of the decision in which we held that the court erred by not substituting the LLC for he and his son, individually. Then he cites a later portion of the decision in which we held that it was for the jury to determine whether they as individuals, or the

LLC, was liable for Robinson's injuries.[1] These rulings are not inconsistent. First, the early part of the decision concerns our ruling on the Civ.R. 15 issue and the later part concerned our affirmance of the trial court's denial of Spurlock's Civ.R. 56(C) motion for summary judgment. These are entirely different issues. Second, we direct Spurlock to the portion of our decision wherein we stated that the issues involved with his summary judgment motion would have, largely, been alleviated had the trial court not denied amendment of the pleadings. 2012-Ohio-1510, at ¶29. Our decision on the summary judgment required us to take the state of the pleadings as they were (without the LLC), rather that it should have been (with the LLC).

Finally, as we noted in the opinion, the Ohio Supreme Court has repeatedly stated that when possible cases should be resolved on their merits. See State ex rel. Montgomery v. R & D Chem. Co. (1995), 72 Ohio St.3d 202, 204, 648 N.E.2d 821; Perotti v. Ferguson (1983), 7 Ohio St.3d 1, 3, 454 N.E.2d 951; Peterson v. Teodosio (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113. The Spurlocks were clearly on notice from the outset that there was a

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[1] Spurlock incorrectly cites the written page number of the hardcopy decision filed with the Clerk of Courts. Citations to opinions in electronic format are to be made in accordance with the Manual of Citations adopted by the Supreme Court. Rep.Op. R. 7(A). That manual requires a parallel Webcite citation. Writing Manual R. 2. Pinpoint cites to paragraph (¶) numbers, rather than hard copy page numbers, allows us to more readily find what the party cites.

claim against their LLC. They would have suffered no prejudice in allowing a pre-trial substitution of defendants. 2012-Ohio-1510, at ¶¶21-22. The implicit conclusion of our colleagues in the Eighth Appellate District was that the interests of justice were better served when cases were tried on their merits and not "a mere pleading deficiency" similar to the one at issue in this case. See Milos v. Doe, 192 Ohio App.3d 751, 950 N.E.2d 592, 2011-Ohio-849, at ¶13. In light of the similarities between that case and the case at bar, we come to the same conclusion.

For these reasons, the application for reconsideration is without merit and is accordingly denied.

Harsha, J. & Kline, J.: Concur

Peter B. Abele
Presiding Judge

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

JAMES LEE ROBINSON, et al., :

Plaintiffs-Appellants/
Cross-Appellees, : Case No. 11CA4

vs. :

BOB SPURLOCK, et al., : ENTRY ON MOTION TO CERTIFY A CONFLICT

Defendants-Appellees/
Cross-Appellants. :

FILED
COURT OF APPEALS
JACKSON CO OHIO
JUN 18 2012
SETH I. MICHAEL, CLERK

This matter comes on for the consideration of Bob Spurlock's motion to certify a conflict to the Ohio Supreme Court for final resolution pursuant to App.R. 25 and Ohio Constitution, Article IV, Section 3(B)(4). We reversed a judgment in Spurlock's favor on subrogated claims brought against him because, we concluded, the trial court abused its discretion by not allowing a Civ.R. 15(C) amendment of the proceedings. See Robinson v. Spurlock, Jackson App. No. 11CA4, 2012-Ohio-1510, at ¶¶17-25.

Spurlock argues in his motion that our decision conflicts with two other cases. The first case is Dietrich v. Widmar, Cuyahoga App. No. No. 85069, 2005-Ohio-2004. We, however, find Dietrich factually dissimilar from the case *sub judice*. Dietrich, as Spurlock correctly notes, involved a victim of a motor vehicle accident who filed suit against the vehicle's owner (but not the driver), then later dismissed the case. After the

statute of limitations had expired, the victim refiled the suit but, again, only against the owner of the car, not the driver. Later, he moved to amend the pleadings to add the driver. The trial court initially granted the victim's motion, but later vacated the decision. Id. at ¶¶3-5. The Court of Appeals affirmed the trial court's action and noted Civ.R. 15(C) could not be used to add a new defendant when the statute of limitations had already run against that defendant. Id. at ¶¶11-12.

The reason Dietrich differs from the instant case is that the owner and driver of the motor vehicle were different people and the injured party had different causes of action against each of them with different theories of recovery. In short, as the Eighth District noted, "[t]he actions are not substantially the same . . . when the parties in the original action and those in the new action are different." Id. at ¶11.

In contrast, the action in the case sub judice is substantially the same. TIG never sought to add a completely new party, or a whole new claim, but only to change the name of the party-defendant against which its subrogated claim was asserted. The claim would have remained precisely the same against "Spurlock's Ag-Lime Fertilizer, LLC." as it had against "Bob Spurlock, d/b/a Spurlock Fertilizer." The names would have simply been different.

The second case that Spurlock claims conflict with our decision is Griesmer v. Allstate Ins. Co., Cuyahoga App. No. 91194, 2009-Ohio-725. This argument fails for the same reason that his argument failed with Dietrich. The issue in Griesmer was whether Civ.R. 15(C) could be used to bring a new insurance company into a lawsuit for injuries sustained in an automobile accident after the statute of limitations had run. The Eighth District said no, and, citing Dietrich, held that the addition of a new party meant that the cases were not "substantially the same" for purposes of the relation back principle of Civ.R. 15. 2009-Ohio-725, at ¶¶35-39. The "relation back" principle, the Court noted, was meant to apply only where there was an "inadvertent misnomer" in naming the party. Id. at ¶35. That, of course, is what we have in this case.

In sum, we believe that the two cases that Spurlock claims are in conflict dealt with situations in which plaintiffs sought to bring into a lawsuit wholly new parties and wholly new claims. We would likely have come to the same result as those cases had we been presented with those same facts. For example, had TIG attempted to name Spurlock's insurer to the action, it would have involved an entirely new party with an entirely new claim. This is not permitted after the statute of limitations has run.

Instead, TIG sought to substitute the correct business name for the organization against which its subrogation claim was

brought. Again, we do not believe that a substitution of "Spurlock's Ag-Lime Fertilizer, LLC." as defendant, rather than "Bob Spurlock, d/b/a Spurlock Fertilizer," amounts to a new or different claim being asserted.

To qualify for certification to the Ohio Supreme Court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, a certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be upon the same question of law. See Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594, 596, 613 N.E.2d 1032. Thus, a conflict cannot be based on facts. State v. Parks, Carroll App. No. 08CA857, 2009-Ohio-5284, at ¶4. The factual posture of the cases Spurlock cites are different from the present case. Thus, we cannot conclude any conflict exists on a rule of law sufficient to certify this case to the Ohio Supreme Court for final resolution under Ohio Constitution, Article IV, Section 3(B)(4).

Accordingly, the motion for certification of a conflict is without merit and is, hereby denied.

Harsha, J. & Kline, J.: Concur

Peter B. Abele
Presiding Judge