

IN THE SUPREME COURT OF OHIO
Case No. 2012-1310

JAMES LEE ROBINSON, et al.,)	
)	Court of Appeals Case No: 11CA4
)	
)	
Plaintiffs/Appellees,)	On Appeal from the Fourth
vs.)	Appellate District, Jackson County
)	
BOB SPURLOCK, et al.,)	
)	
Defendants/Appellants.)	
)	

**PLAINTIFFS/APPELLEES' MEMORANDUM IN OPPOSITION TO
DEFENDANTS/APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

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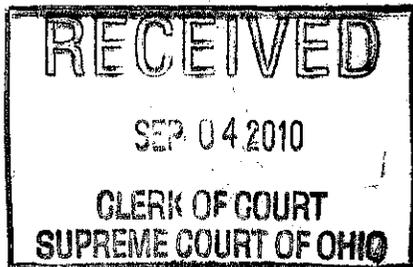


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**EXPLANATION OF WHY THIS CASE IS NOT OF
GREAT GENERAL INTEREST**

This case is not of great or general interest, and this Court should deny discretionary review. The Fourth District correctly found that an amendment to a re-filed complaint relates back to the original filing date of the original case under Civil Rule 15(C). Despite Appellants' argument, the judgment of the Fourth District is consistent with controlling precedent from this Court, decisions from the Court of Appeals, and decisions of the federal courts interpreting Ohio law. As the Fourth District explained, substituting a misnamed party in a re-filed action does not add a new "party" within the meaning of Rule 15(C). Rather, it corrects the name of the party against whom a claim is asserted, and relates back to the filing date of the original complaint in the original case for statute of limitations purposes.

Because the trial court in this case did not understand the controlling law with respect to Rule 15(C), it was impossible for the trial court to properly exercise its discretion to allow an amendment to the pleadings in the re-filed action to correct a misnamed party. Properly balancing the factors specifically enumerated in Rule 15(C), the Court of Appeals correctly determined that the trial court abused its discretion by failing to allow substitution of the correct business entity as a defendant in this case.

Perhaps sensing the weakness with respect to their argument on the Rule 15(C) issue, the Appellants raised several assignments of error before the Court of Appeals, claiming that the trial court erred by not granting judgment as a matter of law to them, both before and during trial. Appellants continue to raise the same the same assignments of error before this court, but fail to recognize two important facts with respect to their arguments. First, as the Court of Appeals noted, reversing the trial court with respect to the 15(C) amendment necessarily moots Appellants' assignments of error on the cross-appeal issues. Second, Appellants continue to

argue that the Court of Appeals' decision on their cross-appeal conflicts with Ohio law with respect to the Rule 15(C) issue. Appellants' claim ignores the fact that the Court of Appeals, to properly address the cross-appeal, had to address the state of the evidence in this case *as it was at trial*, rather than *as it should have been with the Rule 15 amendment*. The Court of Appeals explained this in its decision denying reconsideration, but Appellants nevertheless continue to raise the same irrelevant arguments in support of jurisdiction.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a jury verdict in a re-filed action. The issues on appeal deal with procedural technicalities and errors which allowed Defendants to escape liability without a jury being able to consider the true merits of Plaintiffs-Appellees' claims of negligence against Defendants for injuries sustained by Plaintiffs relating to a skid loader incident.

The original case was timely filed on April 11, 2007 by Plaintiffs James Lee Robinson and Agnes Robinson against Defendants Bob Spurlock d/b/a Spurlock Fertilizer (hereafter "Spurlock Fertilizer"), and unknown employees of Spurlock Fertilizer. *Robinson v. Spurlock*, 4th Dist. No. 11CA4, 2012-Ohio-1510, ¶ 4. Spurlock Fertilizer answered on its own behalf, without claiming that it was a misnamed party in the original case.

The defense moved the trial court, on February 6, 2008, to compel the joinder of Am Trust Group and Caudill Seed Company, the respective parent company and insured of Plaintiffs-Appellees, Technology Insurance Group and Technology Insurance Company (hereafter collectively referred to as "Technology Insurance"). *See id.* at ¶ 4 – 5. Technology Insurance, per the motion of the defense and subsequent Agreed Entry, appeared in the original action on March 14, 2008 by filing its own Complaint. *Id.* Subsequently, Technology Insurance voluntarily dismissed the original case pursuant to Rule 41(A) on December 31, 2008. *Id.*

Technology Insurance re-filed this action on April 6, 2009, within the one year period permitted by R.C. 2305.19. *See id.* at ¶ 5. However, in response to the re-filed complaint, the defense altered its answer from its original answer and now asserted that, in 2005, Defendant Bob Spurlock and Tyson Spurlock formed “Spurlock’s Ag-Lime Fertilizer, LLC” (hereinafter “the LLC” or “Spurlock’s Ag-Lime Fertilizer”), and that Defendant Bob Spurlock had not operated “Spurlock Fertilizer” since January 14, 2005, the date the LLC formed.

On May 22, 2009, Technology Insurance, pursuant to Ohio Rules of Civil Procedure 19 and 21, sought leave of Court to join Spurlock’s Ag-Lime Fertilizer, LLC, an Ohio corporation, as a party defendant, or in the alternative, leave to amend its Re-filed Complaint, naming “Spurlock’s Ag-Lime Fertilizer, LLC” as the correct defendant, instead of Spurlock Fertilizer. *Id.* at ¶ 6. Additionally, Technology Insurance additionally sought leave to amend its re-filed complaint pursuant to Rule 15(C) and have same relate back to the original date of the re-filing, within the applicable statute of limitations and the one year time limit for re-filing set forth by Revised Code § 2305.19. *See id.*

On August 14, 2009, the request was denied by the trial court claiming that it could not add the LCC as a defendant, because it concluded that Technology Insurance knew of the LLC’s existence before the statute of limitations expired. *Id.* The court further noted that Technology Insurance had not named an “unknown” business defendant in the original complaint. *Id.* Thus, the trial court concluded, Technology Insurance was seeking to “add,” rather than “substitute” a party in the suit, which Rule 15 disallows when the statute of limitations has expired. *Id.*

The re-filed suit came on for trial on December 6 and December 7, 2010. *See id.* at ¶ 7. Prior to and during trial, Plaintiffs-Appellants’ counsel made multiple motions to add or substitute the LLC as a defendant to conform to the evidence under Ohio Rules of Civil Procedure

15(B) and (C) and renewed Plaintiff's previous Motion to join the LLC, or amend the re-filed complaint to add Spurlock Ag-Lime Fertilizer, LLC as a party, all of which were denied. *Id.*

Ultimately, the case went to the jury, and the jury returned a verdict in favor of the Defendant on December 7, 2010. *Id.* at ¶ 9. The jury did not determine the matter on the merits, but rather on procedural grounds based upon an erroneous interrogatory. Specifically, Interrogatory No. 1 stated: "At the time of the accident was Bob Spurlock individually doing business as Spurlock's Fertilizer rather than as a partner, or partnership, or was a member of an LLC?" In response to this interrogatory, the jury responded "No." *See id.* The trial court entered judgment on the jury's verdict on January 3, 2011. *Id.* Plaintiffs-Appellees timely appealed, and the Court of Appeals reversed, remanding this matter to the trial court for a new trial, substituting the LLC for Spurlock Fertilizer as a party defendant, pursuant to Rule 15(C).

ARGUMENT

A. Introduction.

Appellants' arguments in favor of jurisdiction fall into three general categories. First, Appellants claim that there is no law interpreting a Rule 15(C) amendment in a re-filed case to "relate back" to the filing date in the original case for statute of limitations purposes. Appellants' claim is directly contradicted by controlling precedent from this Court, the Court of Appeals, and federal courts interpreting Ohio law.

Second, Appellants claim that Rule 15(C) requires that a plaintiff filing a re-filed complaint correctly name a misnamed defendant from the original action at the time of re-filing, assuming the plaintiff has knowledge of the misnomer before filing the re-filed complaint. Again, there is no case law in support of this proposition, and indeed Appellants' argument cuts against an on-point decision of the Court of Appeals.

Third, Appellants variously claim that the Fourth District's judgment runs contrary to Ohio law concerning the legal distinction between corporations and their individual owners, or that the judgment runs contrary to established law concerning *respondeat superior* liability. Appellants raised these same arguments on petition for reconsideration before the Fourth District, and as the Fourth District explained, these arguments are mooted by the reversal on the Rule 15 issue, and were only considered to address Appellants' cross-appeal.

B. An Amendment Substituting a Party in a Re-filed Case under Rule 15(C) Relates Back to the Filing of the Original Complaint in the Original Case, Even if the Original Complaint was Dismissed Pursuant to Rule 41(A).

The focus of this appeal is on the interaction between Ohio's savings statute, R.C. 2305.19, and Ohio's Civil Rule governing amendments to pleadings, Civ. R. 15 (C). R.C. 2305.19 provides, in pertinent part:

In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is re-versed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

R.C. 2305.19(A). Put another way, a voluntary dismissal tolls the statute of limitations by one year if the statute of limitations expires after a Rule 41(A) dismissal. *See id.*

When a cause of action is brought against an improperly named party, the Ohio Civil Rules allow a plaintiff to substitute the proper party after filing the complaint, and further provide that the amended pleading "relates back" to the filing date of the complaint. Civil Rule 15 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.

Civ.R. 15(C). Put slightly differently, a plaintiff can substitute the proper party for an incorrectly named defendant, “relating back” to the original filing date for statute of limitations purposes. *See id.* Substituting an incorrectly named defendant does not “add a party;” rather, it corrects the pleadings to reflect the proper defendant for the same claim. *See id.*

In their first and primary assignment of error, Appellants claim that a Civ.R. 15(C) amendment does not relate back to a complaint in another case. *See* Appellants Br. at 6 – 7. Appellants’ argument is totally incorrect, for at least two reasons. First, Appellants’ argument implicitly assumes that substituting the LLC for Spurlock Fertilizer “adds a new party” to a case – Ohio law is clear that it does not, as the Fourth District explained, *on two occasions*. *See Robinson*, 2012-Ohio-1510, ¶ 20 (“We also conclude that the amendment would not have added a new party The only change is that the claim would be asserted against the LLC rather than Spurlock, personally, “d/b/a Spurlock Fertilizer.”); Entry on Motion for Reconsideration, June 18, 2012 (Appellants’ Appx, 23) (“To the extent that Spurlock argues that allowing an amendment to the pleadings will result in a new claim . . . this is not the case. . . . [I]t will only be asserted against a defendant who had been improperly named in the first case.”).

Second, this Court, the Ohio Court of Appeals, and Federal Courts interpreting Ohio and similar law, have repeatedly interpreted the amendment in a re-filed case as relating back to the filing date of the original complaint in the original case. This Court, as the controlling authority on the matter, has already held that an amended complaint in a re-filed action, substituting a

correct party, relates back to the original complaint in the original case. *Hardesty v. Cabotage*, 1 Ohio St.3d 114, 117, 438 N.E.2d 431 (1982). In *Hardesty*, the plaintiff filed a medical malpractice action against a hospital, naming the “Board of Trustees Blanchard Valley Hospital” as a party defendant. *Id.* at 114 - 115. However, the hospital’s correct name was “Blanchard Valley Hospital Association, Inc.” *Id.* at 115. After the original action was dismissed, the plaintiff re-filed an amended complaint, properly naming the defendant hospital and asserting identical claims. *Id.* at 115 - 116. The amended complaint was filed after the statute of limitations expired but within one year of filing the initial complaint. *See id.* This Court found that the re-filed complaint naming the correct party related back to the original complaint in the original case. *Id.* at 116 – 117. As this Court reasoned: (1) it was clear from the original complaint who the intended defendant was; (2) the plaintiff served the hospital at the hospital’s address and the hospital had notice of the action; and (3) the hospital would not have been prejudiced in maintaining a defense on the merits. *Id.* at 116 - 117.

Consistent with this Court’s decision in *Hardesty*, the Eighth District has also explained that an amendment correcting the party against whom a claim is asserted relates back to the filing date in the previous action. *Milos v. Doe*, 192 Ohio App.3d 751, 2011-Ohio-849. 950 N.E.2d 592, ¶ 8 (8th Dist.). In *Milos*, the plaintiff filed his original case against “Nationwide Insurance Company.” *Id.* at ¶ 2. The insurance company defendant, whose correct name was “Nationwide Mutual Insurance Company,” filed an answer, claiming that it had been improperly named. *See id.* Thereafter, the plaintiff dismissed the case without prejudice pursuant to Civ.R. 41(A). *See id.* at ¶ 3. When the plaintiff timely re-filed the action pursuant to R.C. 2305.19, the plaintiff again asserted the claim against “Nationwide Insurance Company.” *Id.* at ¶ 4. While the trial court allowed the plaintiff to amend the re-filed complaint to correct the mistaken name

designation, it also dismissed the case, concluding that the corrected name did not relate back to the filing date in the original case. *Id.* at ¶ 6. On appeal, the Eighth District reversed, noting that the Nationwide had notice of the suit through proper service in the original case, and that there would be no prejudice to Nationwide by having the name corrected in the re-filed action. *Id.* at ¶ 11. Additionally, the amended complaint in the re-filed action would relate back to the filing date in the original action for statute of limitations purposes. *Id.*

Other Ohio courts have consistently explained that substituting a correct party in a re-filed action relates back to the filing date of the original complaint in the original action for statute of limitations purposes. *See Bykova v. Szucs*, 8th Dist. No. 87629, 2006-Ohio-6424 at ¶ 4 (explaining that “the primary purpose of Civ.R. 15(C) is to substitute a party, not to add a party.”) (internal citations omitted). *Cf. Bentz v. Carter*, 55 Ohio App.3d 120, 122, 562 N.E.2d 925 (1988) (holding that an amended complaint relates back to the filing date of the original complaint, even when the original complaint was served on the misnamed defendant at the correct address); *Estate of Finley v. Cleveland Metroparks*, 189 Ohio App. 3d 139, 2010-Ohio-2358, ¶ 20 - 21 (8th Dist.) (holding that it was error to allow amendment by adding a city as an *additional* defendant, rather than *substituting* it for the city park board).

Not only do claims against corrected defendants in re-filed actions relate back to the filing date of the complaint in the original action, but the Court of Appeals also has held that the addition of a new *claim* against a party in a re-filed action can relate back to the original complaint in the original action. *Cavin v. Smith*, 4th Dist. No. 01CA5, 2001-Ohio-2390, 2001 Ohio App. LEXIS 3845, *9 (Aug. 24, 2001). In *Cavin*, the plaintiff property owners sued the sheriff defendant, alleging that he negligently damaged property held in his care under an order of execution and sale. *Id.* at *1 – 2. Before the trial court could rule on the sheriff’s motion to

dismiss, the plaintiffs dismissed the action pursuant to Civ.R. 41(A).¹ *Id.* at *2. Thereafter, the plaintiffs re-filed the case timely under the savings statute, and then amended their complaint, adding a claim for “willful and wanton” misconduct against the sheriff. *Id.* The Fourth District held that the “willful and wanton” count did not add a new cause of action to the complaint, because it obviously arose from the same transaction or occurrence in the original case. *Id.* at *8 – 9. Therefore, because the original case was filed timely, the savings statute allowed the amended complaint in the re-filed case to relate back to the original filing date in the original case. *See id.* at *9.

The federal courts likewise agree that Ohio’s savings statute and Federal Rule 15(c) allow an amended complaint in a re-filed case to relate back to the original complaint in the original case. *Estate of Smith v. Hamilton Cnty Dept. of Job and Family Servs.*, No. 1:06cv362, 2007 U.S. Dist. LEXIS 64696, *14 (S.D. Ohio Aug. 31, 2007). In *Smith*, the estate of an infant decedent originally brought a 42 U.S.C. § 1983 suit against several government defendants in a dispute over the infant’s death while in the care of Hamilton County. *Id.* at *5. The plaintiffs dismissed the original case, and then timely re-filed it within one year, pursuant to R.C. 2305.19. *See id.* at *5 – 6. After re-filing the case, the plaintiffs filed an amended complaint, changing the name of the administratrix as personal representative of the infant’s estate. *See id.* The defendants claimed that the corrected name of the administratrix plaintiff could not relate back to the filing of the original complaint in the original case, but the court disagreed. *See id.* at *11, 14. The court particularly noted that relation back was appropriate, because: (1) the identity of the proper administratrix was a “technicality;” (2) the defendants had fair and sufficient notice of

¹ The sheriff in *Cavin* twice filed motions to dismiss, claiming sovereign immunity for negligent acts in the course and scope of his employment. Although not explained as such in the decision, the amended pleading claiming “willful or wanton” misconduct was an apparent attempt to plead a viable cause of action against the sheriff, under an exception to sovereign immunity.

the claims; and (3) the changing of the administratrix did not alter the allegations. *See id.* at *14. Thus, the “changing of the representative [did] not change the allegations.” *Id.*

Other federal courts addressing relation back under Federal Rule 15(c) have reached similar results when interpreting the intersection of Rule 15 with state savings statutes. *See, e.g. Larry Brentwood Homes, LLC v. Town of Collierville*, 144 Fed. Appx. 506, 510 (6th Cir. 2005) (holding that Tennessee’s savings statute allowed both state law and new § 1983 claims to relate back to the original filing date in the original case when the new § 1983 claims arose from the same transaction or occurrence as the original state law claims). *Cf. United States ex rel. Conner v. Salina Reg’l Health Center, Inc.*, 543 F.3d 1211, 1226 (10th Cir. 2008) (holding that a plaintiff’s state law claims were time barred even in light of a Kansas savings statute – but only because the plaintiff did not meet a state law service requirement when filing the amended complaint in a re-filed case). Put simply, there is no support in either Ohio law or the federal courts for Appellants’ unique view of Rule 15(C) with respect to whether an amendment in a re-filed action relates back to the filing date of the original complaint in the original case.

C. Rule 15(C) does not Require that a Plaintiff Name the Correct Defendant in a Re-filed Action at the Time of Re-Filing, Even When the Plaintiff has Knowledge that the Correct Defendant Must be Substituted in a Later Amendment.

In their second assignment of error, Appellants’ claim that an amended pleading under Rule 15(C) will not relate back to the original complaint in the original case when the pleader knows of the correct identity of the proper party. Appellant’s Br. at 12. While Appellees do not concede that this is an entirely correct statement of the law, Appellants’ argument is premised on a different set of facts altogether in any event. Appellants do not claim that Technology Insurance knew that the LLC was the proper party before filing the *original* action; instead, they claim that Spurlock “submitted ample evidence to show . . . that TIG was aware of the existence

of the LLC before the original case was dismissed.” *Id.* at 13 – 14 (quoting *Robinson*, 2012-Ohio-1510, ¶ 25 n.2). Therefore, in Appellant’s view, because Technology Insurance allegedly knew of the LLC’s existence before filing the *re-filed* action, the amendment during the re-filed action could not relate back to the filing of the original action. *See id.*

Put simply, there is no case law to support Appellants’ argument, and Appellants do not cite any. In contrast to Appellants’ claims, the Court of Appeals has reached an opposite conclusion on nearly identical facts. *See Milos*, 2011-Ohio-849, ¶ 4. In *Milos*, the incorrectly named defendant filed an answer in the original case, claiming that it was misidentified. *Id.* at ¶ 2. Therefore, after filing the initial action, the plaintiff should have been on notice of the mistake before re-filing the action. *See id.* Nevertheless, the plaintiff re-filed the action against the same mis-named defendant, and only amended the complaint to correct the party name later in the re-filed action. *See id.* at ¶ 4. The Court of Appeals held that the amended complaint in the re-filed action related back under Rule 15(C), focusing not on the plaintiff’s alleged knowledge of the misnomer at the time of the re-filed complaint, but rather on the fact that the misnamed defendant had notice of the action through proper service in the first action and in the re-filed action. *Id.* at ¶ 2, 4. Therefore, *Milos* stands for the proposition that the issue of whether a mistake has been made under Rule 15(C) only relates to whether a mistake has been made about a party’s identity at the time of the original complaint in the original action.

Not only does *Milos* not support Appellants’ argument – Appellants do not even have the argument that the defendants in *Milos* had as to the correction of their mistaken identity. For example, the misnamed defendant in *Milos* at least asserted in its answer to the original complaint that it had been misidentified by the plaintiff. *See* 2011-Ohio-849, ¶ 2. In contrast, Spurlock evasively failed to do so in the instant case. For example, an examination of

Spurlock's answer in the original action fails to disclose any attempt to correct a misnomer with respect to "Spurlock d/b/a Spurlock Fertilizer's" status as a proper defendant.

Perhaps sensing the weakness of their argument with respect to whether Rule 15(C) requires a re-filed action to name the correct defendant at the time of re-filing to relate back, Appellants claim that because Rule 15(D) exhibits such a requirement, that Rule 15(C) should as well. *See* Appellants Br. at 13 (citing *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019 (2010)). Again, Appellants cite no case law in support of this interpretation of *Erwin* to extend to Rule 15(C), and Technology Insurance is not aware of any.

Additionally, *Erwin* is easily distinguishable from the instant case. The focus in *Erwin* was on the fact that the plaintiff never served the allegedly "unknown" defendants, even after the identities of the defendants became known to the plaintiff. 2010-Ohio-2202, ¶ 11. In contrast, not only was Spurlock Fertilizer actually served in this case, Spurlock Fertilizer answered the complaint in the original case and failed to claim that it had been incorrectly identified.

D. Substituting the LLC for Spurlock Fertilizer does not Add a New Claim

In their second assignment of error, Appellants claim that because Spurlock and the LLC are legally distinct entities, that "adding" the LLC is tantamount to "adding a new party" to the case for purposes of Rule 15(C). *See* Appellants' Br. at 11 – 12. Appellants' argument either misunderstands or misrepresents the holding of the Court of Appeals. The Court of Appeals specifically held that the trial court should "substitute" the LLC in place of Spurlock Fertilizer, rather than "add" the LLC in addition to the other defendants. *See Robinson*, 2012-Ohio-1510, ¶ 22 ("[N]o prejudice would arise by substituting the LLC as the correct owner of the business where [Technology Insurance's] insured sustained his injury.") *See also Decision Denying Reconsideration*, (Appx to Appellants' Br. at 23) ("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.”).

Ignoring the straightforward holding from the Court of Appeals, the Appellants further contend that “the Fourth District’s Decision elsewhere acknowledges that Bob Spurlock and the LLC are separate parties and that [Technology Insurance] had potential claims against both of them[.]” Appellants’ Br. at 12. Again, Appellants have either misunderstood or misrepresented the decision of the Court of Appeals. As the Court of Appeals noted in its decision denying reconsideration, there is no internal inconsistency within the court’s decision. Rather, for purposes of addressing Technology Insurance’s appeal, the court considered whether the LLC should be substituted in place of Spurlock fertilizer. However, to address Spurlock’s cross-appeal, which involved the denial of several motions for judgment as a matter of law, the Court of Appeals had to examine whether the evidence showed that Spurlock was operating as an LLC or as a sole proprietor:

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. 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. . . . Our decision on the summary judgment required us to take the state of the pleadings as they were (without the LLC), rather that [sic] it should have been (with the LLC).

Id. at 23 – 24 (internal citation and footnote omitted).

E. Appellees did not Have to Join Tyson Spurlock as a Defendant to Recover Against Spurlock Fertilizer or the LLC Under a *Respondeat Superior* Theory

In their fourth proposition of law, Appellants claim that this Court’s decision in *Wuerth* required Technology Insurance to name Tyson Spurlock as a defendant to impute liability to Spurlock Fertilizer. Appellants’ Br. at 14 – 15 (citing *National Union of Fire Ins. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601). This argument is meritless, for at least two reasons. First, the explicit reasoning of *Wuerth* limits its reach to malpractice actions against attorneys and physicians, which many Ohio courts have used as a basis to distinguish *Wuerth*’s holding in common negligence cases. Second, although Tyson Spurlock was never explicitly named as a party in the Complaint, the Complaint did join “unknown employees and owners” of Spurlock Fertilizer. The Court of Appeals correctly recognized that this formed a sufficient basis to impute respondeat superior liability, even assuming that *Wuerth* somehow applied to this case.

With respect to *Wuerth*, this Court noted that there are special facts relevant to the malpractice cause of action which require a negligent lawyer or doctor to be named as a defendant in order to seek recovery from a law firm or hospital – namely that the doctor or lawyer is the one who is capable of committing malpractice, not the law firm or hospital. *See Wuerth*, 122 Ohio St.3d 594, ¶ 18 (“In this regard, a law firm is a business entity through which one or more individual attorneys practice their profession. . . . Thus, in conformity with our decisions concerning the practice of medicine, we hold that a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice.”).

Consistent with this distinction, the Court of Appeals has repeatedly held post-*Wuerth* that “a negligence claim asserting negligence of an employee for acts undertaken within the scope of his employment that does not constitute a claim in legal or medical malpractice may be brought against the employer without joining the negligent employee as a party.” *Philon v.*

Knerr, 6th Dist. No. E-11-011, 2012-Ohio-2342, ¶ 30. See also *Tisdale v. Toledo Hosp.*, 197 Ohio App. 3d 316, 2012-Ohio-1110, ¶ 29 (6th Dist) (declining to apply *Wuerth* to a common law negligence claim against a hospital where nurses were not individually joined, and noting that “[t]he reach of [*Wuerth*] is thus circumscribed to legal-malpractice actions—or perhaps even more narrowly, as the chief justice implied, to legal-malpractice actions involving the same facts.”); *Henik v. Robinson Mem. Hosp.*, 9th Dist. No. 25701, 2012-Ohio-1169, ¶19 (declining to apply *Wuerth* to prohibit a common law negligence action in *respondeat superior* against a hospital where the employee was not individually joined).

Finally, as the Court of Appeals explained, even assuming that *Wuerth* applied to this case, Tyson Spurlock had effectively been joined in this action as an “unknown owner” defendant in the original action in any event. See *Robinson*, 2012-Ohio-1510, ¶ 33 n. 4 (“We parenthetically note that the complaint named “unknown owners of Spurlock Fertilizer” which is also sufficient to bring Tyson Spurlock into the action . . .”).

CONCLUSION

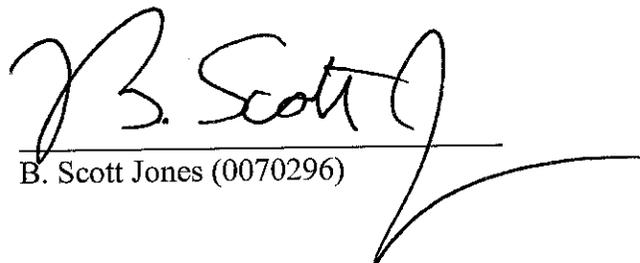
This case does not present any issues of great general or public interest. The Twelfth District Court of Appeals properly followed the law in this matter, holding that Rule 15(C) should have allowed Technology Insurance to substitute the LLC for Spurlock Fertilizer as the appropriate defendant in this case. Appellants’ arguments to the contrary fly in the face of established law, including controlling precedent from this Court. Moreover, to the extent that Appellants’ other assignments of error claim that the Fourth District’s judgment is contrary to law, Appellants have ignored the fact that these assignments of error are mooted by the decision to remand this matter for a new trial, and the Fourth District only addressed them to fully consider Appellants’ cross-appeal.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the following was served via first-class U.S. mail this 28th day of August, 2012, upon the following:

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