

ORIGINAL

IN THE SUPREME COURT OF OHIO

DENNIS CARTER et al.,

Plaintiffs/Appellants

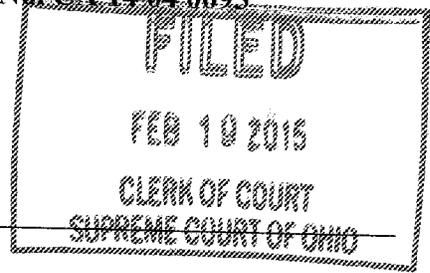
vs.

LARRY REESE, JR.,

Defendant/Appellee

Case No.: 2015-0108
On appeal from the Butler County
Court of Appeals, Twelfth
Appellate District

Court of Appeals
Case No.: CA 14 04 0095



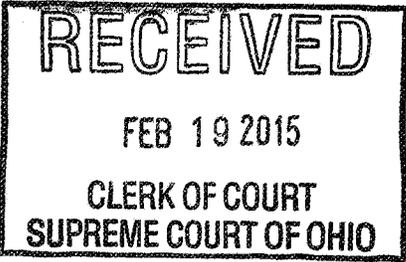
MEMORANDUM OF APPELLEE, LARRY REESE, JR., IN RESPONSE TO
APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

Katherine A. Clemons (0081072) (Counsel of record)
Glenn A. Markesbery (0040204)
Markesbery & Richardson Co. LPA
2368 Victory Parkway, Suite 200
Cincinnati, OH 45206
p: (513) 961-6200
f: (513) 961-6201
Clemons@m-r-law.com
Attorneys for Defendant/Appellee

Stephanie Collins (0089945)
ERIC C. DETERS & PARTNERS, P.S.C.
5247 Madison Pike
Independence, KY 41051
p: (859)363-1900
f: (859)363-1444
scollins@ericdeters.com
Attorney for Plaintiffs/Appellants

Robert A. Winter, Jr. (0038673) (Counsel of record)
PO Box 175883
Ft. Mitchell, KY 41017
p: (859) 250-3337
robertawinterjr@gmail.com
Attorney for Plaintiffs/Appellants

Jackie M. Jewell (0090499) (Counsel of record)
Special Counsel for the Attorney General
612 North Park Street, Suite 300
Columbus, OH 43215
p: (614)465-0181
f: (614)220-7903
Counsel for Ohio Bureau of Workers' Compensation



MEMORANDUM

Defendant/Appellee Larry Reese, Jr., by and through counsel and pursuant to S.Ct.Prac.R. 7.03, states as follows for his Memorandum in Response to Appellants' Memorandum in Support of Jurisdiction.

STATEMENT OF MR. REESE'S POSITION OF WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This Court has stated that, when the grounds for appeal to the Ohio Supreme Court is that the case presents a question of public or great general interest, "*the sole issue for determination*" when the Court decides whether to accept the appeal is "whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties." *Williamson v. Rubich*, 171 Ohio St.3d 253, 254, 168 N.E.2d 876 (1960). Whether the question or questions argued are in fact ones of public or great general interest rests within the discretion of the court. *Id.*

In this case, Mr. Carter urges the Court to accept his appeal and further requests that it read an absent word ("medical") into the Good Samaritan Statute, R.C. 2305.23. Not only is this Court not permitted to read a clearly absent word into an unambiguous statute, but Mr. Carter's request that it do so is the epitome of a "question of interest primarily to the parties" because Mr. Carter wants the absent word put into the statute to help his legal position. As such, under this Court's rule set forth in *Williamson, supra*, this case does not present a question of public or great general interest, and the appeal should be denied.

In addition, if this Court were to accept jurisdiction and contravene its judicial role of enforcing the literal language of statutes by reading an absent word into the Good Samaritan statute, the outcome would actually be detrimental to the public interest. As it stands, the clear

language of the statute absolves good Samaritans from liability for negligence in rendering emergency care to fellow citizens, medical or otherwise. If Mr. Carter has his way, the statute would be considerably narrowed to protect only those providing medical care to fellow citizens, which lessen the public's willingness to help fellow citizens in need. Such a result does not promote the public interest.

Mr. Carter's appeal presents a question of interest to his specific circumstances, as opposed to one of public or great general interest, and his appeal should be denied.

ARGUMENT IN SUPPORT OF MR. REESE'S POSITION REGARDING MR.

CARTER'S PROPOSITION OF LAW

In his Memorandum in Support of Jurisdiction, Mr. Carter cites the common law action of negligent performance of undertaking to render services, and states that the common law was modified by the General Assembly by enacting the Good Samaritan statute. Pp. 6-7 of Carter's Jurisdictional Memorandum. However, Mr. Carter cites no authority for the proposition that the statute was intended to codify the common law—common law that is an entirely distinct legal concept from the statute at issue in this case. Additionally, Mr. Carter raised this argument for the first time in his Jurisdictional Memorandum and never at the trial court or appellate level, and Ohio law precludes raising an argument on appeal that was not raised in the lower court. *Republic Steel Corp. v. Board of Revision of Cuyahoga County*, 175 Ohio St. 179, 184-185, 192 N.E.2d 47 (1963).

Even if the court were to consider this argument, Mr. Carter himself points out that the Good Samaritan statute that he claims embodies the common law concept "must be applied strictly." Carter's Jurisdictional Memorandum, p. 7. And he is correct. Ohio law concerning statutory construction mandates strict construction, and this has been the basis of Mr. Reese's

argument, and of the trial and appellate courts' decisions, throughout this case. The word "medical" is not included in the statute, so it cannot be read into it by this or any other court.

"It is the responsibility of courts to enforce the literal language of a statute whenever possible." *Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St.3d 541, 544, 639 N.E.2d 1154 (1994)(internal citations omitted). "A court's role is to interpret, not legislate." *Id.* (internal citations omitted). "Absent ambiguity, the court must give effect to the plain meaning of a statute even when a court believes that the statute results in an unfavorable outcome." *Id.* "The role of a court is not to decide what the law *should* say; rather, the role of this court is to interpret what the law says *as it has been written by the General Assembly.*" *Clark v. Scarpelli*, 91 Ohio St.3d 271, 291, 744 N.E.2d 719 (2001) (Cook, J., dissenting).

In *Wachendorf v. Shaver*, 149 Ohio St. 231, 236-237, 78 N.E.2d 370 (1948), this Court explained that, if the statute in question is "**couched in plain and unambiguous language, courts are not justified in adding words to such statutes,**" and must instead enforce the plain and literal language of the statute. (Emphasis added).

The lack of the word "medical" in R.C. 2305.23 is, in itself, enough proof that the General Assembly did not intend to limit the Good Samaritan statute to the provision of emergency *medical* care only. However, if further evidence of the Assembly's intent is required, then the fact that the Assembly **did** include the word "medical" in R.C. 2305.231, the very next section of the Ohio Revised Code following the statute in question here, should eliminate any doubt.

To compare R.C. 2305.23 (at issue here) with R.C. 2305.231, the former states, in pertinent part "[n]o person shall be **liable in civil damages for administering emergency care**

or treatment at the scene of an emergency *** unless such acts constitute willful or wanton misconduct.” (Emphasis added.) In comparison, R.C. 2305.231 states, in pertinent part:

No physician who volunteers the physician's services as a team physician or team podiatrist to a school's athletics program, no dentist who volunteers the dentist's services as a team dentist to a school's athletics program, and no registered nurse who volunteers the registered nurse's services as a team nurse to a school's athletics **program is liable in damages in a civil action for administering emergency medical care**, emergency dental care, other emergency professional care, or first aid treatment ***, unless the acts of the physician, dentist, or registered nurse constitute willful or wanton misconduct.

(Emphasis Added).

The General Assembly did not include the word “medical” in the Good Samaritan statute, but it did include it in the very next section of the revised code, which includes substantially similar language and subject matter. If the Assembly intended for the Good Samaritan statute to protect only those providing emergency *medical* care, it would have included the word in that statute. Indeed, it did so in the very next statute in the code. The presence of the word in one section of the code highlights the absence of it in the immediately preceding section of the code. Under the rules of statutory construction, the word “medical” cannot be added, or read into, the statute at issue here, as Mr. Carter urges.

In further support of his argument that this Court should accept jurisdiction and ultimately reverse the Twelfth District’s ruling, Mr. Carter posits that the Twelfth District’s ruling contradicts this Court’s position set forth in *Primes v. Tyler*, 43 Ohio St.2d 195, 331 N.E.2d 723 (1975), as well as the holdings of other Ohio courts of appeals. However, as was set forth in the Twelfth District’s opinion and reiterated by its recent denial of Mr. Carter’s motion to certify a conflict, the Twelfth District’s opinion does not conflict with the holdings of this or any other court. To the contrary, it follows the holding of the only other court of appeal to

definitively rule on the precise issue at hand, and that was the Eighth District's opinion in *Held v. City of Rocky River*, 34 Ohio App.3d 35, 516 N.E.2d 1272 (8th Dist. 1986).

The issue in *Primes v. Tyler*, 43 Ohio St.2d 195, 331 N.E.2d 723 (1975) was the applicability and constitutionality of Ohio's former so-called "guest statute." That case mentioned R.C. 2305.23 in passing in a footnote that was merely dicta. As the Twelfth District Court of Appeals pointed out, the language from *Primes* regarding R.C. 2305.23 "is unquestionably dicta, and therefore is not controlling in this case." *Carter v. Reese*, 12th Dist. Butler No. CA14040095, 2014-Ohio-5395 ¶ 19. Because the *Primes* language was dicta, and because the *Primes* case decided an entirely separate issue from the question of law presented in this matter, there is no conflict between *Primes* and the Twelfth District's decision.

Mr. Carter also claims the Twelfth District's decision conflicts with the First District Court of Appeals' decision in *Hamisfar v. Baker Concrete Constr.*, 1st. Dist., Hamilton No. C-970228, 1998 WL 173238 (Feb. 8, 1998). The *Hamisfar* decision's brief mention of R.C. 2305.23 is also dicta, and is also found in a footnote. The issue decided in *Hamisfar* was whether plaintiff's claim for negligent undertaking was proper. R.C. 2305.23 was mentioned once, in a footnote, and had no bearing on the issue presented or on the First District's decision. Therefore, there is no conflict between *Hamisfar* and the Twelfth District's decision in this case.

Finally, Mr. Carter claims the Twelfth District's decision conflicts with the Ninth District Court of Appeals' decision in *Butler v. Rejon, Jr.*, 9th Dist. Summit No. 19699, 2000 WL 141009 (Feb. 2, 2000). *Butler* does actually address issues regarding R.C. 2305.23; however, it does not decide the same issue presented in this case. The issue in *Butler* was whether R.C. 2305.23 could be used as a defense against third parties. The decision had nothing to do with whether the individual had to be providing emergency medical care to be protected by the Good Samaritan

statute. Although *Butler* included language favorable to Mr. Carter's argument, that language was merely dicta, which the Twelfth District recognized in its decision.

The only case that has squarely decided the same issue presented in this case is *Held v. City of Rocky River*, 34 Ohio App.3d 35, 516 N.E.2d 1272 (8th Dist. 1986). In *Held*, a firefighter who was on the scene of a fire was knocked down and pinned to the ground, but uninjured, by a strong stream of water coming from a hydrant. 34 Ohio App.3d 35, 36. An off-duty firefighter who happened upon the scene helped drag the pinned man out of the water stream to safety. *Id.* The rescued firefighter sued the off-duty firefighter for negligence in the manner in which he pulled him from the rushing water. *Id.*

The Eighth District Court of Appeals found that the off-duty firefighter was immune from civil liability pursuant to R.C. 2305.23 and upheld the trial court's entry of summary judgment in favor of the off-duty firefighter on that basis. *Id.* at 38-39. In arriving at its decision, the Court noted,

[i]t is unrebutted on this record that James Held had been knocked to the ground and pinned there by a continuous stream of rushing water. This was clearly an emergency situation to which Cahill responded by removing Held from the danger. It may thus be said as a matter of law that Cahill rendered emergency care to Held, and is immune under the language of R.C. 2305.23 for any alleged negligence in doing so.

Id. at 39.

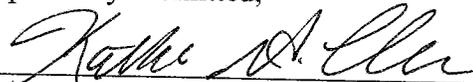
The *Held* decision is on point, and the Twelfth District followed its holding in reaching its decision in this case. The other cases cited by Mr. Carter are entirely distinguishable, largely because they do not reach a holding on the same issue.

CONCLUSION

This Court should decline jurisdiction to hear this appeal because it does not present a question of public or great general interest. Mr. Carter's request for an appeal is tantamount to a

request that this Court disregard the long-standing rules of statutory construction to circumvent the General Assembly's intent in enacting the Good Samaritan statute for the sole purpose of improving Mr. Carter's individual legal position. That is not the purpose of a jurisdictional appeal under S.Ct.Prac.R. 5.02(3).

Respectfully submitted,



Katherine A. Clemons (0081072)(Counsel
of Record)

Glenn A. Markesbery (0040204)

MARKESBERY & RICHARDSON CO., LPA

2368 Victory Parkway – Suite 200

P.O. Box 6491

Cincinnati, OH 45206

Phone: (513) 961-6200, ext. 304

Fax: (513) 961-6201

Email: Clemons@m-r-law.com

Attorneys for Defendant/Appellee,

Larry Reese, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served, via regular U.S. Mail, postage pre-paid, upon:

Robert A. Winter, Jr. (0038673) (Counsel of record)

PO Box 175883

Ft. Mitchell, KY 41017

p: (859) 250-3337

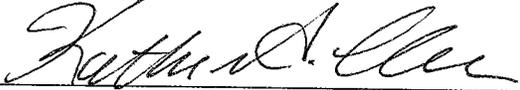
robertawinterjr@gmail.com

Attorney for Plaintiffs/Appellants

Stephanie Collins (0089945)
ERIC C. DETERS & PARTNERS, P.S.C.
5247 Madison Pike
Independence, KY 41051
p: (859)363-1900
f: (859)363-1444
scollins@ericdeters.com
Attorney for Plaintiffs/Appellants

Jackie M. Jewell (0090499)
Special Counsel for the Attorney General
612 North Park Street, Suite 300
Columbus, OH 43215
p: (614)465-0181
f: (614)220-7903
*Counsel for Ohio Bureau of Workers'
Compensation*

on this 17th day of February, 2015.


Katherine A. Clemons (0081072)