IN THE SUPREME COURT OF OHIO

CHRISTINE LEWIS, Plaintiff/Appellee, vs. MEDCENTRAL HEALTH SYSTEM dba OHIOHEALTH MANSFIELD HOSPITAL, et al., Defendants/Appellants.	)	CASE NO. 2024-0451 On Appeal from the Fifth Appellate District Court of Appeals Case No. 2023 CA 0043

MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF DEFENDANTS-APPELLANTS ANAND PATEL, M.D. AND MID-OHIO EMERGENCY PHYSICIANS, LLP

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INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is an organization of attorneys, corporate executives, and managers who devote a substantial portion of their time to the defense of civil lawsuits and the management of claims against individuals, corporations, and governmental entities.

OACTAS's membership is composed of trial lawyers who are frequently confronted with the presentation of claims on behalf of "placeholder" John Doe defendants, named in an effort to avoid the bar of a statute of limitations. The instant appeal threatens an immediate and rapid expansion of the practice as something sanctioned under a mistaken interpretation of R.C. 2323.451.

As trial lawyers, OACTA's membership has an interest in maintaining the integrity of statutes of limitations as a means of assuring the timely presentation of claims, the preservation of essential records for litigation, and deference to the limited memories of fact witnesses. Those factors are all particularly important in the context of disputes involving complicated medical issues.

STATEMENT OF THE CASE AND FACTS

OACTA adopts the statement of the case and facts set forth in the Merit Brief of Appellants.

ARGUMENT

Proposition of Law No. 1: R.C. 2323.451 does not eliminate the requirement for John Doe service found in Civ. R. 15(D).

This case involves a claim of medical negligence arising out of care plaintiff received at a hospital emergency department. Plaintiff included "John Doe" defendants in her complaint whom she described as including physicians who "provided negligent medical care…."

Under Civ. R. 15(D), a plaintiff who names a John Doe defendant must personally serve that defendant. The rule says, "[t]he summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant." Courts have applied the personal-service requirement to hold that service on a John Doe defendant by any other means is insufficient and that the action fails of commencement. See, e.g., *Uihlein v. Gladieux*, 74 Ohio St. 232 (1906); *Cline v. Tecumseh Local Bd. Of Educ.*, 2021-Ohio-1329, ¶20 (2nd Dist.) ("The Clines simply did not know the identity of the party, and that was not enough to satisfy the Rule. Civ. R,. 15(D) does not allow a plaintiff to set up a 'straw man' to facilitate a fishing expedition, and that is what we have here."); Tylee & O'Rourke, *Procedures for Filing of Actions Against Name-Unknown Defendants Under Ohio Civil Rule 15(D)*, 58 Law & Fact 3 (Apr. 1984).[1]

Plaintiff did not make or attempt personal service on the John Doe defendant. After the medical-claim statute of limitations passed, plaintiff filed an amended complaint naming an emergency department physician, Dr. Anand Patel. The trial court dismissed the claim against Dr. Patel as untimely, but the appellate court reversed, holding that the amended complaint was valid despite the lack of personal service on the John Doe defendant.

At paragraph 18 of its opinion, the court excused plaintiff from the personal-service requirement of Civ. R. 15, reasoning, "…it is difficult to comprehend how personal service could be obtained based on the description of the John Doe defendants." To defend its view that

[1] The article explains:
Without these provisions, the opportunity to amend a complaint would pave the way for a plaintiff to abuse the system. One example of such an abuse would be to name a "John Doe" defendant in a complaint filed before the expiration of the applicable statute of limitations without knowing the best or all the permissible parties to the suit. Then, if the plaintiff, prior to having to serve his "John Doe" defendant could discover a "deeper pocket" than he had originally intended to sue, within the one year permitted for service following the filing of the complaint pursuant to Civil Rule 3(A), he could amend the complaint pursuant to Civil R. 15(D). This would have the effect of permitting a plaintiff to bring an action against a defendant up to one year after the expiration of the statute of limitations. Thus, an action could be commenced against a defendant whose existence was not even suspected at the time of the initial filing. The requirement that the plaintiff aver in the complaint that the name of the name-unknown defendant could not be discovered, insures that the plaintiff is aware of the existence of such a defendant when the initial complaint is filed. Thus, the averment requirement helps prevent the abuse of post-filing "fishing expeditions."

personal-service requirement of Civ. R. 15 was unenforceable, the court wrote that the rule "appears to require personal service on an unnamed, ***unidentified*** defendant" (at footnote 2, page 12).

While the rule certainly requires personal service on a defendant whose ***name*** is unknown (and the rule requires that the plaintiff state in the complaint "the fact that he could not discover the ***name***"), the court's conclusion that it would also require personal service on an "unidentified" defendant—someone of whom the plaintiff is unaware—is unreasonable as any such service would be impossible.

This Court has held that principles of statutory construction may be applied in analyzing civil rules. *Thomas v. Freeman,* 79 Ohio St.3d 221, 224 (1997). Civ. R. 15 must be construed in a manner to give effect to every provision. *Ward's Heirs v. McIntosh,* 12 Ohio St. 231, 245 (1861). The personal service requirement of Civ. R. 15 can be given effect only if it applies to defendants who have been identified. The appellate court's suggestion that the personal-service requirement could work an unfairness where the defendant who has not been identified is mistaken and an improper basis on which to deny effect to the plain language of the rule.

As the Court held in *Varno v. Bally Mfg. Co.,* 19 Ohio St.3d 21, 24 (1985), "the application of Civ. R. 15(D) is limited to those cases in which the defendant's *identity* and whereabouts are known to the plaintiff, but the actual name of the defendant is unknown" (Emphasis added).

The implicit requirement that the rule should apply only to defendants who have been identified was discussed in *Vocke v. Dayton,* 36 Ohio App.2d 139 (1973). In that case, the plaintiff was injured in a prison fire. She sued the City of Dayton, which was dismissed based on sovereign immunity. She also named "John Doe" defendants, but those defendants were not

described in the complaint other than as "employees of the defendant" and plaintiff did not personally serve them.

In *Vocke,* after the city was dismissed and the statute of limitations had passed, plaintiff sought to amend the complaint to name individuals in place of the John Doe defendants. The court dismissed the complaint as untimely and the appellate court affirmed, reasoning:

> The fatal weakness of plaintiff's position is that she lacked not only the names, but also any really specific clue as to the identity of those sought to be sued. After the city was dismissed, there was no longer any defendant in the case upon whom a summons could be served, and the case was for all practical purposes at an end for the lack of a defendant.
>
> Civil Rule 3(A)[2] contemplates, as did R.C. 2305.17, that when an action is commenced it should be commenced against *someone.* When the city was dismissed, the action had been commenced against no one.

Vocke, 36 Ohio App.2d 141.

In the instant case, the appellate court stated it was "difficult to comprehend how personal service could be obtained based on the description of the John Doe defendants." *Lewis v. Medcentral Health Sys.,* 2024-Ohio-533 ¶18 (5th Dist.). It is for that very reason that the rule requires the plaintiff to adequately describe any John Doe defendant in the complaint.

This Court addressed the point in *Varno v. Bally Mfg. Co.,* 19 Ohio St.3d at 24, stating that "Civ. R. 15(D) is clear: the complaint must sufficiently identify the unknown defendant so that personal service can be obtained upon filing the lawsuit." As the court explained in *Rodgers v. Genesis Healthcare Sys.,* 2016-Ohio-721, ¶ 37 (5th Dist.), a complaint that fails to sufficiently identify the John Doe defendants so that they may be personally served has failed to commence the action against them:

> "Here, appellant's original complaint does not satisfy the requirements of Civil Rule 15(D). It did not provide a description to sufficiently identify Purdue Pharma

[2] Civ. R. 3(A) says "Commencement. A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing."

> so personal service could be obtained upon the filing of the complaint. Appellant therefore did not identify an entity that could be personally served with the summons as contemplated by Civil Rule 15(D). Accordingly, because appellant failed to comply with Civil Rule 15(D), the February 12, 2015 complaint does not relate back to the timely filed complaint with regards to Purdue Pharma and therefore she did not commence her action before the statute of limitations expired.

In *Erwin v. Bryan*, 2010-Ohio-2202, the Court upheld the principle that Civ. R. 15(D) applies to defendants who are identified but whose names are unknown, barring the use of John Doe defendants as placeholders for the plaintiff to substitute after the statute of limitations has passed. The court below did not discuss the *Erwin* decision or attempt to reconcile its holding with the controlling law in that case.

The Court should affirm the ruling in *Erwin* and uphold the clear and long-standing requirement of Civ. R. 15(D) that a complaint naming a John Doe defendant must be describe that defendant so as to allow personal service and the summons must be personally served on that defendant.

<u>Proposition of Law No. 2</u>: R.C. 2323.451 only affirms addition of a newly discovered claim or defendant within 180 days after the end of the statute of limitations and does not allow the addition of claims or defendants who were known to plaintiffs prior to the expiration of the statute of limitations.

The plain language of the statute alone indicates the trial court's decision should be upheld. If examination of the legislative history is required, it also supports the trial court's decision.

The statute's distinction between 180-day letters and the 180-day extension for newly discovered claims or defendants demonstrates that R.C. 2323.451 is reserved for newly discovered defendants and claims.

The amendment to R.C. 2323.451 under 2018 H.B. No. 7 allows plaintiffs additional time beyond the one-year medical-claim statute of limitations under R.C. 2305.113 to identify new claims or defendants and join them in a pending action that was timely filed. This case arises out

of care rendered to plaintiff in a hospital emergency room, and in her complaint filed eight months later plaintiff included a John Doe defendant. Then, after the statute of limitations passed, she sought to substitute an emergency room physician as a defendant, citing the amendment to R.C. 2323.451.

The court below offered two rationales for interpreting R.C. 2323.451 as allowing plaintiffs to wait until after the statute of limitations has passed to name allegedly responsible defendants who were identified within the statute.

First, the court reasoned that the statute was ambiguous as to whether it allowed a plaintiff to hold off naming as a defendant someone already identified as potentially liable and use the statute to add six months to the statute of limitations to sue them. See *Lewis,* 2024-Ohio-533 at ¶11 ("We find the statute is ambiguous on its face as to whether it applies solely to newly discovered claims or defendants, or also to newly identified but originally contemplated claims and defendants.")

The problem with that reasoning is that it impermissibly assumes the legislature was unaware of judicial decisions *rejecting* any right of a plaintiff to abuse the statute of limitations by deliberately letting the statute pass before naming an allegedly responsible tortfeasor. In *Erwin v. Bryan,* 2010 Ohio 2202, ¶¶29, 30, this Court acknowledged the authority of the legislature to determine "the existence and duration of a statute of limitations" and that the court "cannot, through a court rule, alter the General Assembly's policy preference on matters of substantive law."

The legislature established a one-year statute of limitations on claims for medical negligence at R.C. 2305.113(A). The supposed ambiguity of R.C. 2323.451 that court below read into the statute entailed a discarding of the statute of limitations as it would allow any plaintiff in

every case an additional six months to file suit against responsible parties—parties known to the plaintiff within the statute of limitations.

In deference to the statute of limitations, this Court has repeatedly emphasized the duty of plaintiffs to work diligently in identifying responsible parties. In *Flowers v. Walker,* 63 Ohio St.3d 546, 550 (1992) the Court wrote, "The identity of the practitioner who committed the alleged malpractice is one of the facts that the plaintiff must investigate and discover, once she has reason to believe that she is the victim of medical malpractice." The decision below in holding that R.C. 2323.451 gives every plaintiff an additional six months beyond the statute of limitations to sue responsible parties makes the judicial encouragement of diligence meaningless. In *Wyatt v. DHSC, LLC,* 2018-Ohio-4822, ¶23, the Court noted, "It is well established that the legislature is presumed to have full knowledge or prior judicial decisions." The finding of the court below of an ambiguity in R.C. 2323.451 rests on the mistaken view that the legislature was ignorant of the judicial imperative that medical negligence plaintiffs be diligent in identifying responsible parties.

The second rationale that the court below used in finding that R.C. 2323.451(A) allows plaintiffs to defer naming a defendant who was identified within the statute of limitations is that such use is implied under subsection (A)(2) which says:

> This section may be used in lieu of, and not in addition to, division (B)(1) of Section 2305.113 of the Revised Code.

R.C. 2305.113 allows a plaintiff to give notice "to the person who is the subject" of a medical claim that the plaintiff "is considering bringing an action upon that claim," and that if such notice is provided the action may be commenced within 180 days after the notice. The court wrote that the "in lieu of" language was "an indication the legislature intended R.C. 2323.451 to

not be limited solely to claims and defendants which were not known or contemplated by the plaintiff at the time the complaint was filed." *Lewis,* 2024-Ohio-533, at ¶16.

The court below followed this reasoning:

1. R.C. 2305.113(B)(1) applies only to persons who have identified a defendant and therefore can send a 180-day letter;

2. R.C. 2323.451 which allows plaintiff to name a defendant after the statute of limitations must apply to all persons who could send a 180-day letter because the statute says it "may apply in lieu of 2305.113(B)(1)"; therefore,

3. R.C. 2323.451 must be available to a plaintiff who has identified a defendant because the statute contemplates such a person has the option of using either R.C. 2305.113(B)(1) or 2323.451.

The third point assumes a condition tailored to fit the court's conclusion but one that is clearly mistaken as it negates any value to the 180-day letter provision of R.C. 2305.113. If a medical-claim plaintiff knows the identity of an allegedly liable defendant and can bring the claim within the statute of limitations, that plaintiff has no reason to let the statute pass. Moreover, as discussed earlier, the legislature would not encourage such a delay as it is presumed to know the judicial policy of encouraging the timely filing of actions.

A principle of statutory construction is that statutes pertaining to the same general subject matter are to be read in *pari materia* and any potentially conflicting provisions construed "so as to give effect to both." *Stottlemeyer Hydromulching, Inc. v. Dearlove,* 2015-Ohio-750, ¶23 (5th Dist.). Here, the key to interpreting both statutes as independently effective is in the language of R.C. 2323.451(A)(2) that the extension provided in that statute is "not in addition to division (B)(1) of section 2305.113 of the Revised Code."

The evident aim of the provision is to avoid a "double dipping" abuse whereby a plaintiff who has sent a 180-day notice to a defendant might later seek to claim an additional 180 days

beyond that extension to name that defendant through R.C. 2323.451. The provision closes that option.

The lower court's reading violates a second principle of statutory construction in that statutes are to be construed so as to give effect to the intent of the General Assembly. *Hulsmeyer v. Hospice of Southwest Ohio, Inc.,* 2014-Ohio-5511 ¶21. The record in this case includes sponsor testimony on HB 7 from Representative Robert Cupp as to "what is intended to be accomplished." At numbered paragraph 3 of his testimony, Rep. Cupp gave this purpose for the bill:

> Minimizes shotgunning, which refers to the need to sweep into the lawsuit unnecessary defendants when litigation is commenced. Instead, the bill allows suit to be filed with minimum number of defendants, permits formal discovery to determine other potentially liable parties, and allows them to be joined within the same time fame as the 180-day notice permits.
>
> Enables more precise determination of who should and should not be included in a medical claim lawsuit.

The purpose underlying R.C. 2323.451 is to allow time for a medical claim plaintiff to identify allegedly responsible tortfeasors and, thereby, avoid the broad sweep of naming caregivers who were not involved in the care or whose conduct does not support an allegation of negligence. The 180-day *discovery* period that is explicitly referenced in R.C. 2323.451(C) allows the plaintiff to avoid naming as defendants everyone related to the patient care and, instead, identify through discovery any potentially responsible persons or viable negligence claims. The legislature did not intend for the statute to be used as a tool for discarding the one-year statute of limitations on medical claims or simply delaying suits against allegedly responsible tortfeasors.

CONCLUSION

The decision below squarely violates the requirement of personal service on John Doe defendants and invites a disregard for the statute of limitations in medical claim cases. Amicus OACTA urges the Court to reverse the appellate court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 6, 2024, a true and accurate copy of the foregoing was electronically filed with the Supreme Court of Ohio. Notice of this filing will be delivered to the following by email:

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