IN THE SUPREME COURT OF OHIO

CHRISTINE LEWIS, Plaintiff-Appellee, v. Ohio Emergency Physicians, LLP and Anand Patel, M.D., Defendant-Appellants.	)	Case No. 2024-0451 On Appeal from the Richland County Court of Appeals, Fifth Appellate District

MERIT BRIEF OF *AMICI CURIAE* OHIO ASSOCIATION FOR JUSTICE AND CLEVELAND ACADEMY OF TRIAL ATTORNEYS IN SUPPORT OF PLAINTIFF-APPELLEE, CHRISTINE LEWIS

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AMICI CURIAE'S STATEMENT OF INTEREST

While medical practitioners and organizations have numerous associations to protect their interests, such as Amici Curiae Ohio Hospital Association, Ohio State Medical Association, Ohio Osteopathic Association, and American Medical Association, no such organizations exist to represent, organize, and advocate on behalf of the victims of medical negligence. The Ohio Association for Justice ("OAJ") and Cleveland Academy of Trial Attorneys ("CATA") seek to level the playing field.

OAJ is devoted to strengthening the civil justice system so that deserving individuals may secure fair compensation by holding wrongdoers accountable. The OAJ comprises approximately one thousand five hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and to promote public confidence in the legal system.

The Cleveland Academy of Trial Attorneys is dedicated to helping trial lawyers better represent their clients. CATA membership consists of several hundred attorneys, each of whom represents countless injured citizens in all areas of personal injury law. CATA seeks to protect meaningful access to the civil justice system for all Ohio citizens and preserve their constitutional, statutory, and common law rights under Ohio law.

The OAJ and CATA submit this brief out of concern that Defendants-Appellants are trying to uproot a crucial safe harbor provision that was passed with the shared understanding it has operated under for five years now.

That mutual interpretation included some of the Ohio professional organizations now supporting Defendants-Appellants new interpretation of R.C. 2323.451. These

organizations appear to be making a sudden about-face from their previous position on the record.

It is entirely unclear why the national American Medical Association has jumped into this fray, as this state law will only affect medical professionals in Ohio. The fact that it is an election year makes their questionable involvement all the more dubious.

Regardless, these organizations' propositions of law are not only a sudden betrayal of their position during the creation of R.C. 2323.451, it is also untethered from the very purpose and reality for which the statute was created. OAJ and CATA therefore bring to this record the realities and reasons this statute was created in the first place.

STATEMENT OF THE CASE AND FACTS

These Amici Curiae adopt and incorporate the statement of the case and facts offered in the Merit Brief of Plaintiff-Appellants. For these Amici Curiae and the injured Ohioans they serve, it is the big picture at issue. The new interpretation of this statute put forth by Defendants-Appellants and their Amici Curiae ignores the realities in which the statute operates.

When victims of medical negligence seek to recover for injuries, they have only a layperson's understanding of what has occurred, very little to no information and documentation of the events, and only friends and family for support. Meanwhile, the medical treatment at issue was more often than not performed by an increasingly larger team of specialized medical professionals with requisite degrees of medical training, experience, and expertise that are all working together on a daily basis. Babiker A, El Husseini M, Al Nemri A, Al Frayh A, Al Juryyan N, Faki MO, Assiri A, Al Saadi M, Shaikh F, Al Zamil F. *Health care professional development: Working as a team to improve patient care,* Sudan J Paediatr. (2014; Vol. 14, Issue No. 2).

Despite the crucial skills they provide to the team, many of these team members often remain anonymous throughout a patient's treatment. Karlsberg and Pierce, *Anonymity: An Impediment to Performance in Healthcare*, Health Service Insights (May 26, 2014). Alternatively, if these nurses, technicians, assistants, and caregivers do introduce themselves, their role can be quite ephemeral or they are replaced hours later at shift change, and again, and again. In an extended hospital stay, or residency at an assisted living facility, the patient may well outlast members of the staff, where turnover rates are around fifty-eight percent. Carelistings.com, *Nursing Home Staff Turnover: Ohio*, https://carelistings.com/statistics/snf-staff-turnover/oh (accessed Sep. 3, 2024).

Should a patient need to seek recovery for injuries incurred by the negligence of one of these medical providers, the insurance is typically carried by their employer. But the employment of medical providers is anything but straightforward.

It is well known that larger hospitals are bringing smaller community hospitals and physicians' practices into their fold. Kane, *Policy Research Perspectives: Recent Changes in Physician Practice Arrangements: Shifts Away from Private Practice and Towards Larger Practice Size Continue Through 2022*, American Medical Association Economic and Health Policy Research (July 2023), https://www.ama-assn.org/system/files/2022-prp-practice-arrangement.pdf (accessed Sep. 3, 2024). However the manner and exact nature in which they are incorporated involves a vast labyrinth of corporate entities, shell companies, DBA's and tradenames, scheduling agencies and independent contractors. See e.g. Farber M, Cheng A, Cuff A, *Hospital and Private Practice Partnerships: Which Model Is Right for You?* J Oncol Pract. (2007 May; Vol. 3, Issue No. 3).

University Hospitals is a good example. Employing over thirty thousand people, University Hospitals Health System, Inc. is the eighth largest employer in Ohio. Ohio

Department of Development, *Ohio Major Employers*, https://development.ohio.gov/about-us/research/major-employers (accessed Sep. 3, 2024). The Cleveland Clinic and OhioHealth are the only healthcare providers employing more individuals in Ohio. *Id*. When an injured patient looks to files suit against University Hospitals though, they must decide whether to name University Hospitals Health System, Inc., University Hospitals Medical Group, Inc., University Hospitals Physician Services, Inc., and/or University Primary Care Practices, Inc. dba University Hospitals Medical Practices as the employer(s) of the defendant medical provider(s). The facilities that make up University Hospitals vast network of healthcare providers are likewise separated. Some are their own entity, like University Hospitals Parma Medical Center and University Hospitals Southwest Health Center. Others are merely a DBA or tradename of another entity, such as University Hospitals Cleveland Medical Center dba Seidman Cancer Center.

The number nine employer, Bons Secour, maintains a similar list of separate entities for each of its facilities. Bon Secours, *BSMH Entities*, https://www.bonsecours.com/-/media/bon-secours/patients-and-visitors/corporate/compliance/bsmh-entities.ashx (accessed Sep. 3, 2024).

Other set ups are even more complex. For instance St. Rita's Medical Center is part of Mercy Health but at the same address, within the same building, Kindred has 26 beds for long-term acute care. MercyHealth, *Locations*, https://www.mercy.com/locations/hospitals/lima/st-ritas-medical-center (accessed Sep. 3. 2024); Kindred Hospitals, *Locations*, https://www.kindredhospitals.com/locations/ltac/kindred-hospital-lima (accessed Sep. 3, 2024).

This can all be particularly confusing when a patient's care spans multiple departments, specialties, or facilities, or when a specialist is called in from another department or facility to assist.

And all of that does not include independent contractors. For instance, "travel nursing" is where nurses work as independent contractors on short term contracts. This form of staffing exploded in popularity during the pandemic and has remained more common since. Bernstein, *As covid persists, nurses are leaving staff jobs – and tripling their salaries as travelers*, The Washington Post (Dec. 6, 2021). Emergency medicine physicians have the largest proportion of independent contractors among specialties by a good measure. Carol K. Kane, Ph.D., *Policy Research Perspectives: Recent Changes in Physician Practice Arrangements: Private Practice Dropped to Less than 50 Percent of Physicians in 2020*, American Medical Association Economic and Health Policy Research (May 2021), Exhibit 3. Distribution of physicians by employment status: specialty-level estimates (2020), https://www.ama-assn.org/system/files/2021-05/2020-prp-physician-practice-arrangements.pdf (accessed Sep. 3, 2024).

The relationship between the hospitals and these contractors is not straightforward either. Farber M, Cheng A, Cuff A, *Hospital and Private Practice Partnerships: Which Model Is Right for You?* J Oncol Pract. (2007 May; Vol. 3, Issue No. 3). There are many possible types of relationships, such as development accord; co-management; leasing of equipment, employees, and other resources; and joint ventures. *Id*.

For instance, in an affidavit submitted in *Calanni v. Cleveland Clinic Foundation,* a company executive described one of the relationships commonly used in Ohio hospitals. Cuyahoga C.P. Nos. CV-13-804148. CV-14-822838 (May 12, 2015). TeamHealth, a Tennessee corporation, owns and operates Emergency Professional Services, Inc. (EPS),

a "'proactive management entity' that provides professional staffing services to the hospitals" in Ohio. *Id*. at 5. Physicians separately contract with Emergency Professionals of Ohio, Inc., which then provides staffing to EPS, which in turn provides it to the hospitals. *Id*. at 6. Of course when named as defendants in *Calinni*, all three denied any responsibility for the defendant independent contractor physician. *Id*. at 1.

These distinctions are not usually publicized. In fact, they are more often concealed, with independent contractors and their offices being listed on the website of a larger healthcare network. By way of example, Dr. Benjamin Hu is listed on University Hospitals website a University Hospitals provider. University Hospitals, *Benjamin Hu, MD*, https://www.uhhospitals.org/doctors/Hu-Benjamin-1730109067 (accessed Sep. 3, 2024). The address of his separate ophthalmology office is listed as a University Hospitals facility. *Id*. When a patient came into University Hospitals Southwest General Health Center with an ophthalmologic emergency, they sent the patient straight to Dr. Hu. It was only after filing a lawsuit against Dr. Hu that the patient learned Dr. Hu was not a University Hospitals employee, his office was not a University Hospitals facility, and that University Hospitals was not liable for Dr. Hu's conduct. *Kolach v. Southwest General Health Center,* Cuyahoga C.P. No. CV-20-936180 (July 12, 2022).

In short, it can be quite difficult to determine who is employed by whom. Unlike other corporate litigation, the plaintiff in these cases does not have access or privy to any contracts nor the corporate innerworkings or structure of the defendant-company. The only thing available to these plaintiffs is their medical records, which were created by, and are in the custody of, the potential defendants.

Records provided presuit are notoriously incomplete and arduous. Medical records are now electronically completed and stored. They are not meant to be printed and yet that

is how they are still produced. Trying to print this electronically stored information creates thousands and thousands of pages from different sections of the patient's records. They are rarely in chronological order. It is from these tomes that a plaintiff must determine who to name and serve in litigation.

These records do not identify each provider's employer. They often do not even mention the name of a physician's particular "group" or "practice", especially if it is embedded within a larger network, like the University Hospitals examples above. They also do not distinguish who is an independent contractor. There is no requirement that the records note each and every individual in the room and/or involved in the medical treatment being documented.

Omissions of this sort are even more glaring in cases about what was not done. When critical medical treatment was not provided, the medical records often leave important questions unanswered such as who failed to monitor the patient, who failed to administer the needed medication, or who failed to report a critical test result. Depending on the time frame and scope of care, these failures could very well have been the responsibility of any number of unknown individuals, creating a problem of how many John and Jane Does to name and how to describe them much less serve them.

These are the realities injured Ohioans are faced with when trying to decide who must be named in litigation to be made whole. And it is crucial to get this right. A hospital cannot commit malpractice. *Browning v. Burt*, 66 Ohio St.3d 544, 556, 1993-Ohio-178. If the correct medical provider is not named (and served) however, the hospital cannot be held liable. *Clawson v. Heights Chiropractic Physicians, L.L.C.*, 170 Ohio St.3d 451, 2022-Ohio-4154. Further, "empty chair" and "missing link" defenses can be particularly powerful in these types of cases. Injured patients must get the correct parties involved

and have one of the shortest statute of limitations of any claims in which to do so. R.C. 2305.113.

This Court has historically contemplated the current realities of the healthcare industry of the day when making impactful procedural decisions like this one. *See e.g. Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 441, 628 N.E.2d 46 (1994) ("Because the history surrounding the growth of the hospital liability and strong public policy arguments, we choose to revisit paragraph four of the syllabus of *Albain*."); *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.E.2d 410 (1956) (Considered the history and current status of hospitals as charitable institutions in determining a hospital's possible liability under the doctrine of respondeat superior.); *see also Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 470, 680 N.E.2d 410 (2007) (Considered the history of the many medical claim related tort-reform laws to provide proper context for the decision.). For instance in *Clark*, the Court found that the current reality of healthcare, and the manner in which patients sought and received it, was such that the Court's previous interpretation of the agency by estoppel in hospital setting was wholly untenable. *Clark* at 440. The Court should therefore keep the challenges described above in mind as it deliberates here.

It was because of these realities that R.C. 2323.451 was enacted in the first place, with the expressed understanding that it means any parties or claims can be added within the provided timeframe. Indeed the same professional groups writing otherwise as Amici Curiae here said as much at the time the statute was made Ohio law.

ARGUMENT

I. The proposed interpretation of R.C. 2323.451 does not comport with how the Ohio Hospital Association and Ohio State Medical Association explained the statute to the Ohio Legislature when it was being passed.

The creation of this statute was a collaborative effort including among others the Ohio Association for Justice, the Ohio Hospital Association and Ohio State Medical Association. While being considered in committee, a representative of both the Ohio Hospital Association and the Ohio State Medical Association gave live testimony to the House Civil Justice Committee on June 20, 2023 explaining how this statute would work. The Ohio Channel, *Ohio House Civil Justice Committee*, (June 20, 2023) https://www.ohiochannel.org/video/ohio-house-civil-justice-committee-6-20-2023 (accessed Sep. 3, 2024). In her testimony, the Ohio Hospital Association and Ohio State Medical Association representative says:

> That (R.C. 2323.451) actually allows the same six months [as R.C. 2305.113 – the one hundred and eighty day notice letter], so it's another six months on top of the one year, but in this instance you file a lawsuit against one entity, so sue the hospital, sue the professional corporation, and you then get an additional six months or one hundred and eighty days against anyone else who could have been sued at the time you filed that lawsuit and you can conduct discovery under the Civil Rules during that six months to learn what you need to learn in order to then at the end of the six months include whoever you need to name in order to assert your claims of professional negligence.

Id. at 10:24-11:05.

This understanding is further corroborated by the Sponsor Testimony of Representative, and former Ohio Supreme Court Justice, Robert Cupp. *Sponsor Testimony – H.B. 7*, https://www.legislature.ohio.gov/legislation/132/hb7/committee (accessed Sep. 3, 2024).

This understanding of the law was not only stated to the Legislature and then relayed by the members of the Legislature as their understanding. It also just makes sense. The statute unambiguously states that plaintiff "may join in the action any additional medical claim or defendant". R.C. 2323.451(D)(1) (emphasis added). "It is axiomatic that an unambiguous statute means what it says." *Hakim v. Kosydar*, 49 Ohio St.2d 161, 164 (1977) citing *Chope v. Collins,* 48 Ohio St.2d 297, fn. 2. The statute does not say "any additional medical claim or defendant not known to plaintiff prior to the expiration of the statute of limitations" and words may not be added to a statute through judicial action. *State v. Johnson*, 2008-Ohio-69, ¶ 15.

The ability to add any defendant, known or unknown, also fits the purpose for which this statute was intended.

II. Plaintiff-Appellant's use of this statute fits the realities and reason for which it was enacted.

It is well held that remedial statutes "should be construed liberally so that cases are decided on their merits rather than upon technicalities of procedure. *Internl. Periodical Distrib. v. Bizmart, Inc.* 95 Ohio St.3d 452, 453, 2002-Ohio-2488 citing *Cero Realty Corp. v. Am. Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 85 (1960); *Greulich v. Monnin*, 142 Ohio St. 113, 116 (1943). "Ohio courts have stressed that 'justice abhors the loss of causes of action by pure technicalities.'" *Estate of Crnjak v. Lake Hospital System, Inc.,* 2024-Ohio-1977, ¶ 60 quoting *Bell v. Coen*, 48 Ohio App.2d 325, 327 (9th Dist. 1975). Failing to name a required party can be fatal to a plaintiff's claim. *Clawson*, 2022-Ohio-4154. Plaintiffs must therefore balance between filing suit against everyone and unintentionally omitting a key party.

Few litigants want to name every possible provider and entity in a lawsuit, otherwise known as "shotgunning." Medical providers do not want to be dragged into litigation by the actions of a team member. Hospitals do not want all of their providers tied up in depositions, trials, meetings with outside counsel or continually responding to requests for written Discovery. Most plaintiffs do not want to name more defendants than is necessary either. Each defendant burdens a case further by requiring addition time, expense, service, Discovery, and use of both sides' and the courts' resources. That is why the interested parties, including Amici Curiae herein, agreed to this statute.

This Proposition of Law is the understanding everyone has been operating under for the last five years. Namely, a litigant can eschew naming everyone and instead name only a few obvious parties. Discovery can then begin with the option to add other parties or claims, known or unknown at the time of filing, for up to six months after the statute of limitations.

In light of the challenges described above, this process can literally save a plaintiff's cause of action from judgment otherwise than on the merits by allowing for critical additions pursuant to this safeguard.

It can also save considerable judicial time and resources. The clerk serves far fewer defendants. The scheduling conference involves fewer attorneys and law firms and their corresponding trial schedules. Discovery is propounded to fewer individuals and entities, fewer expert witnesses are required, trials are shorter, and so forth.

It makes no sense to upend a mutually agreed upon system that has worked well for the past five years just to let one defendant-doctor avoid having to defend himself on the merits of this case.

III. The Defendants-Appellants' and their Amici Curiae's propositions of law ignore the realities of today's healthcare industry.

There are a number of problems with the Defendants-Appellants and their Amici Curiae's propositions of law, not the least of which that it directly contradicts their previous position on the record to the Legislature in the efforts to implement this statute. The Ohio Hospital Association and Ohio State Medical Group's own representative told the legislative Committee reviewing this statute that it provides "an additional six months or one hundred and eighty days **against anyone else who could have been sued at the time you filed that lawsuit** AND you can conduct discovery under the Civil Rules during that six months to…include whoever you need to name in order to assert your claims of professional negligence." The Ohio Channel, *Ohio House Civil Justice Committee*, (June 20, 2023) https://www.ohiochannel.org/video/ohio-house-civil-justice-committee-6-20-2023 (accessed Sep. 3, 2024) (emphasis added). These same organizations are now claiming that a plaintiff cannot add as a defendant anyone they knew about and therefore could have sued at the time they filed their initial complaint.

Another problem is that an individual's involvement may not be fully or accurately documented in the patient's medical records. Plaintiffs may therefore be "aware" of the existence and general involvement of this individual and choose not to sue them based on the documentation in the medical records only to then learn the full nature and scope of their involvement in later discovery or depositions. Under the defense's new interpretation, plaintiffs would not be able to add this individual because they "knew" of them at the time of filing.

This scenario and others would also create a sort of trap when using John Does. This designation allows a plaintiff to designate a defendant by any name and designation

when plaintiff does not know the defendant's name. Civ.R. 15; *Erwin v. Bryan*, 2010-Ohio-2202. It requires however that plaintiff "sufficiently identify that party to facilitate obtaining person service," which can be an impossible task in light of the realities described above. *Id.* Moreover, if plaintiffs do name and describe a John Doe, they can no longer name them as a defendant pursuant to this statute under the defense's new interpretation. Plaintiffs are therefore faced with a quandary of how precisely to describe the John Doe parties or maybe whether to forego using them at all lest this process accidently swoop up an unknown party in its description and thereby preclude their addition. There is also the issue of how many John and Jane Does to name, as the role described could very well have been the responsibility of more than one individual. These challenges are further frustrated by the increase of travel nurses, who move on after short term contracts and are long gone by the time litigation begins.

Requiring that the additional party or claim be "newly discovered" raises further issues, like what exactly must be previously unknown. That the individual was present and involved? The exact identity or name of the party? Some or all conduct of the party? It also begs questions as to how this novelty would be proved or determined. Requests for medical records before filing suit often produce thousands of printed pages. They are often incomplete. It is not uncommon for the defense to receive different or additional records. This new interpretation would inevitably incur discovery as to discovery. Trial courts will need to determine what was produced to who and when and whether plaintiff should have pulled the needle of a name from the haystack of medical records and sued that individual or entity just in case. Attorneys may need to be deposed and work product produced to determine whether they knew of a given individual or entity at the time of filing. All of these issues would immediately arise in countless current cases in which this

statute has been utilized in the past five years that are still pending. There would be many long-term, far-reaching problems caused by the Defendants-Appellants' immediate, short-sighted proposition.

CONCLUSION

R.C. 2323.451, as written, created a workable balance for plaintiffs to properly identify and join legitimate defendants and avoid dragging unnecessary parties into litigation. The novel interpretation argued here has rarely, if ever, been raised. This novel interpretation has not been repeatedly raised. There is no divide among Ohio courts. Even the defendant-hospital in this case did not object. It is just the defendant-doctor that has conjured this new interpretation in an attempt to evade liability for his actions.

It is telling that the Amici Curiae lining up behind him must directly contradict the testimony that their own representative made to the Ohio Legislature when working to pass this provision. Their own testimony underscores that Defendants-Appellants' proposition was not the understanding and intent of the Legislature when it implemented this provision. It should therefore be rejected and the ruling of the Fifth District Court of Appeals upheld.

Respectfully submitted,

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