IN THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY, OHIO

SANDRA BANFIELD,	:	COURT OF APPEALS NO. 2006-MA-00008
Plaintiff-Appellee,	:	
v.	:	MAHONING COUNTY COMMON PLEAS COURT CASE NO. 2005CV2725
JAMES DAVID BRODELL, M.D., et al.	:	
Defendant-Appellants.	:	

AMICUS CURIAE BRIEF OF THE OHIO STATE MEDICAL ASSOCIATION, THE AMERICAN MEDICAL ASSOCIATION, AND THE AMERICAN ASSOCIATION OF ORTHOPAEDIC SURGEONS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the Ohio State Medical Association ("OSMA"), is a statewide professional association representing 16,000 Ohio physicians, residents and medical students. The OSMA is dedicated to improving the practice of medicine for physicians, their staffs and patients, by advocating their position, saving them time and money, and promoting the medical profession. The OSMA is affiliated with the AMA on the national level and county medical societies on the local level.[1]

Amicus the American Medical Association ("AMA"), an Illinois nonprofit corporation, is the largest professional association of physicians, residents and medical students in the United States. Its nearly 250,000 members practice in every state and in every medical specialty. The objects of the AMA are to promote the science and art of medicine and the betterment of public health.

Amicus the American Association of Orthopaedic Surgeons ("AAOS") is a nonprofit national professional association founded in 1997 by American Academy of Orthopaedic Surgeons. The Association engages in health policy and advocacy activities on behalf of musculoskeletal patients and the profession of orthopaedic surgery. The Association has about 24,000 members internationally. Members of the Association, are orthopaedists concerned with the diagnosis, care, and treatment of musculoskeletal disorders. The orthopaedist's scope of practice includes disorders of the body's bones, joints, ligaments, muscles, and tendons.

[1] The AMA and the OSMA are participating in this brief in their own persons and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts.

The AMA, the OSMA, the AAOS and their physician members, including Dr. James Brodell, have a direct and important interest which will be affected by the outcome of this case. *Amici* have adopted numerous policies deploring unfounded and excessive litigation against physicians for claims of medical malpractice. One aspect of such excess is the inclusion of clearly blameless physicians as defendants in cases that might otherwise have a core of legitimacy. If a physician has some peripheral connection with the plaintiff's medical care, he or she is likely to be swept into the suit, regardless of his or her individual conduct. Inclusion is supposedly justified under the theory that the physician should have somehow anticipated and prevented the wrongful conduct of others.

Not only does excessive litigation impose a substantial financial expense upon A*mici*'s members, it also burdens the medical profession and the entire health care system in less tangible ways. Malpractice lawsuits induce "defensive medicine," causing physicians, consciously or unconsciously, to order unnecessary tests and emphasize self-protection against possible litigation exposure, at the expense of balanced and economical patient care. Even a lawsuit that ends successfully for the physician can cause extreme stress and wasted effort.

Public awareness of these litigation burdens diminishes the number of applicants to medical school, and it sometimes causes promising medical students to factor in litigation risk avoidance as a significant consideration when choosing a medical specialty or a place to practice. It may even induce practicing Ohio physicians to move to another state, whose malpractice climate they may deem more hospitable, or to quit the practice of medicine altogether.

STATEMENT OF ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR REVIEW

The Ohio State Medical Association, the American Medical Association, and the American Association of Orthopaedic Surgeons hereby adopt the Statement of Assignments of Error and Statement of the Issues Presented as set forth in the Brief of Defendant-Appellants.

STATEMENT OF THE FACTS AND CASE

The Ohio State Medical Association, the American Medical Association, and the American Association of Orthopaedic Surgeons hereby adopt the Statement of Facts and Case as set forth in the Brief of Defendant-Appellants.

ARGUMENT

I. CIVIL RULE 10(D)(2) WAS ENACTED TO INSURE CONTINUED ACCESS TO MEDICAL CARE BY REQUIRING PRE-SUIT DUE DILIGENCE

Because of the medical liability crisis which has existed in Ohio since the late 1990's, the Ohio General Assembly enacted comprehensive medical liability reforms. As part of the multiple legislative reforms, the Ohio General Assembly, enacted HB 215 which requested the Ohio Supreme Court to implement a rule of Civil Procedure requiring an affidavit of merit by the plaintiff's expert at the initial filing of a medical liability case. [2]

Presently as a procedural prerequisite to a medical claimant's right to proceed with his/her medical claims, 24 states require that claimants present in court an Affidavit or Certificate of Merit that verifies, by medical expert review, that in caring for the claimant a defendant physician breached the minimum standard of care and that such breach caused injury to the patient. (See Amicus Appendix E.) Ohio is now one of those states by reason of the Ohio Supreme Court's amendment to Ohio Civil Rules. Civil Rule 10(D)(2) was effective July 1, 2005.

What prompted the Ohio Supreme Court to put this new Affidavit of Merit requirement in place? There is no mystery in this. It was requested to act by the Ohio Legislature. In HB 215 Section 3, effective September 13, 2004, the Ohio House and Senate requested that the Ohio Supreme Court proceed to amend the Civil Rules so as,

[2] In 2003, the Ohio General Assembly created the Ohio Medical Malpractice Commission to analyze the causes of current medical liability crisis and to explore possible solutions. Among the specific findings and recommendations made by the Ohio Medical Malpractice Commission, the Commission addressed non-meritorious lawsuits in HB 215 and as a direct result of the Commission's concerns and recommendations, the Ohio General Assembly passed HB 215. The Commission's request to the General Assembly was based upon extensive hearings and findings which acknowledged that claims, settlements and lawsuits are the driving forces underlying insurance premium increases.

". . . to require a plaintiff filing a medical liability claim to include a certificate of expert review as to each defendant." Such expert review was to be by an expert "from the same specialty as the defendant" physician. Further, the legislature instructed that the expert certificate of review be required to state with particularity the expert's opinion as to how the standard of care was breached as well as how the breach resulted in injury to or death of the plaintiff. (Section 3 of HB 215 is found at p. 5 of Amicus Appendix A.)

A. THE LEGISLATURE FOUND THAT PROCEDURAL SAFEGUARDS WERE NECESSARY TO COMBAT THE COSTS OF MERITLESS MEDICAL MALPRACTICE CLAIMS.

The Ohio Legislature had heard testimony from a wide spectrum of interested groups—groups representing injured patients (the Ohio Academy of Trial Lawyers), groups representing Ohio lawyers (the Ohio State Bar Association), and groups representing physicians (the Ohio State Medical Association)--see Amicus Appendix B--and had concluded that the best interests of all Ohioans, physicians and patients alike, cried out for a new rule that required substantially greater due diligence before a medical claim could be properly filed. The effect of not requiring the level of pre-suit due diligence now incorporated into Civil Rule 10(D)(2) was that the dockets of Ohio courts were being clogged with medical claims two-thirds to 80% of which were being found to be without merit. (See for example Amicus Appendix B, pages 31-32). Indeed, in the preamble to a related bill, SB 281, which dealt with medical liability reform, the Ohio General Assembly had stated:

> Section 3. The General Assembly makes the following statement of findings and intent:
>
> (A) The General Assembly finds:

> (1) Medical malpractice litigation represents an increasing danger to the availability and quality of health care in Ohio.
>
> * * *
>
> (c) As insurers have left the market, physicians, hospitals, and other health care practitioners have had an increasingly difficult time finding affordable medical malpractice insurance. Some health care practitioners, including a large number of specialists, have been forced out of the practice of medicine altogether as a consequence. The Ohio State Medical Association reports fifteen per cent of Ohio's physicians are considering or have already relocated their practices due to rising medical malpractice insurance costs.
>
> (d) As stated in testimony provided by Lawrence E. Smarr, President of the Physician Insurers Association of America, medical malpractice costs have increased even while sixty-one per cent of all claims filed against individual practitioners are dropped or dismissed by the court and even while the defendants win eighty per cent of all claims that are continued through trial to verdict.

(See Amicus Appendix F, page 40). The Ohio Legislature was concerned that the reality of the costs of such meritless suits was posing a direct threat to Ohio patients' access to medical care.[3]

B. THE SUPREME COURT RULE RESPONDS TO THE LEGISLATURE'S FINDINGS BY ESTABLISHING A HIGHER STANDARD OF PRE-SUIT DUE DILIGENCE.

In response to the Legislature's request, the Ohio Supreme Court began a study of the issue. As a result of its study, the Ohio Supreme Court, exercising its rulemaking power given to it by Article IV, Section (5)(B) of the Ohio Constitution (the Modern Courts Amendment)[4] promulgated amendment Civil Rule 10(D)(2). The full language of

[3] The testimony contained in Amicus Appendices B, E and F is additional information constituting "legislative facts" as to the background, intent and purpose of Civil Rule 10(D)(2).

[4] The relevant language of Ohio Constitution Article IV, Section 5(B) is attached hereto as Appendix C.

the amendment, Civil Rule 10(D)(2), together with the Staff Notes thereto are attached hereto as Amicus Appendix D. The Ohio Legislature did not exercise its authority, under Article IV, Section 5(B), to adopt a resolution of disapproval and the amended rule went into effect on July 1, 2005.

The new Affidavit of Merit rule on its face gives both notice and clarity to all litigants that henceforth a new and substantially higher standard of pre-suit due diligence would now be required before a medical claim (as defined by O.R.C. Section 2503.113) would be allowed to go forward in court. Specifically, the rule requires that any complaint containing a medical claim:

> (A) *shall* include an Affidavit of Merit by an expert (who qualifies under Evidence Rule 601 [competency requirements for a physician expert] and 702 [general evidence rules relating to expert testimony];
>
> (B) which Affidavit of Merit *shall* include *all* of the following:
>
> i. a statement that the expert has reviewed all of the medical records reasonably available to the plaintiff as those records concern allegations in the complaint;
>
> ii. a statement that the expert is familiar with the applicable standard of care; and
>
> iii. an opinion of the expert that the standard of care was breached by one or more of the defendants and that the breach caused injury to the plaintiff.

The Supreme Court's use of the word "shall" makes clear that these requirements are mandatory. The precise requirements and mandatory language of the Rule undeniably express and evince a forceful "read my lips" type statement by both the Ohio Legislature and the Ohio Supreme Court that the way things were with respect to filing a medical

claim is no longer acceptable. Compliance with the mandatory nature of the rule is especially serious given that the Ohio Constitution makes clear that with respect to the court's rules, all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Ohio Constitution Article IV, Section 5(B).

Without question Civil Rule 10 (D)(2) requires a medical claimant and their counsel to undertake more work before a medical complaint can be filed. But this additional pre-suit effort is required so as to avoid unfounded claims against blameless physicians and so as to avoid the unfounded costs not only of the litigants but of the entire medical profession and health care system. Both the Ohio Legislature and the Ohio Supreme Court felt that the additional pre-suit due diligence which the Affidavit of Merit requires was extremely important and more than offset by the benefits. Unfounded and excessive litigation against physicians burdens the courts, the medical profession, and the entire health care system. Apart from the substantial litigation and insurance costs that are passed through to the public, it creates a climate that induces physicians to move to other states whose malpractice climate is more hospitable or worse, to quit the practice of medicine altogether. It discourages applicants to medical school. It motivates physicians to practice "defensive medicine" resulting in, consciously or unconsciously, orders of unnecessary tests that emphasize self protection against possible litigation at the expense of balanced and economical patient care.

II. CIVIL RULE 10(D)(2)(b) ALLOWS FOR ADDITIONAL TIME TO FILE AN AFFIDAVIT OF MERIT UPON A SHOWING OF "GOOD CAUSE"

Importantly, the Ohio Supreme Court designed the Affidavit of Merit rule so as to balance the mandatory pre-suit due diligence with the interests of a claimant who, having tried in good faith, was nonetheless unable through no fault of his own, to file an Affidavit of Merit at the time of the filing of the claimant's Complaint. To ameliorate any harshness or unfairness of the rule's mandatory requirements, the Supreme Court defined both the means and circumstances whereby a claimant could go forward with his medical claim even though he did not file an Affidavit of Merit with his complaint. The first step required of a claimant is that he/she file "with the complaint" a Motion to Extend the date by which he/she will file an Affidavit of Merit. Civil Rule 10(D)(2)(b). This step is mandatory. The rule states that the motion to extend, *shall* be filed with the complaint. In considering a timely filed motion to extend, the trial court must find that there is "good cause" to allow more time for the claimant to file his/her Affidavit of Merit. Even when "good cause" is timely shown, the express language tells the trial court that it must limit any extension to a "reasonable period of time." Whether or not "good cause" exists depends upon the facts of each case. It is the responsibility of the trial court to properly apply this rule.

A. "GOOD CAUSE" SHOULD NOT BE FOUND IN SITUATIONS WHERE PROPER FILING WAS WITHIN THE CONTROL OF THE CLAIMANT.

The Staff Notes to Civil Rule 10(D)(2) which are attached in Amicus Appendix D recognize that there may exist unavoidable circumstances which prevent a plaintiff from filing an Affidavit of Merit with his complaint. Thus Civil Rule 10(D)(2)(b) allows a

medical claimant to demonstrate the "good cause" which prevented him from filing an Affidavit of Merit with the complaint. The Staff Notes give three specific examples:

1. When a plaintiff obtains counsel so near the date when the statute of limitation will expire that his counsel does not have sufficient time to identify a medical expert to review the relevant records and prepare the affidavit;
2. When the relevant medical records are not provided to the plaintiff in a timely fashion; or
3. When the records do not reveal the names of the potential defendant doctors such that discovery is required to identify their names.

All of these examples represent situations that were beyond the plaintiff's counsel's control. These examples make clear that in situations that are not beyond the claimant's control, good cause would *not* exist to extend the filing of an Affidavit of Merit. All of these examples represent the court's intent to balance the mandatory pre-suit due diligence requirements so as to give a medical claimant a fair opportunity to meet the rule's obligations and to not deprive the claimant of the right to go forward with a legitimate claim. Following the express language of the rule, if a claimant's Civil Rule 10(D)(2)(b) Motion to Extend did not demonstrate good cause, it should be denied and the complaint should be dismissed.

B. PLAINTIFF'S FAILURE TO TIMELY FILE WAS DUE TO HER ATTORNEY'S FAILURE TO RESEARCH THE LAW

The consequence of failing to comply with the mandatory requirements of Civil Rule 10(D)(2) is that a claimant is not allowed to go forward in court with his medical claim. His/Her complaint is not " legally adequate" which is to say that were a court to be asked to consider a Civil Rule 12(B)(6) Motion to Dismiss a complaint that neither attached a proper Affidavit of Merit nor attached a proper Civil Rule 10(D)(2)(b) Motion to Extend, such court would be required to conclude that, "the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover". See *Bliwas, Inc. dba Beltone Hearing Center v. Bish*, (1996), Ohio App. LEXIS 5847 (Ohio Ct. App. 10th District).

The trial court below initially determined that by failing to file a Motion to Extend with the Complaint, the plaintiff-appellee had failed to comply with the mandatory requirements of Civil Rule 10(D)(2)(b). Because of this failure, the trial court properly dismissed the plaintiff's claims. (See trial court's November 21, 2005, Judgment Entry at Trial Record page 34). In the case presently before the court it appears that counsel for the claimant had had opportunity to have an expert review the claimant's medical records. (See Trial Record no. 41, plaintiff's Supplemental Memorandum at page 2). Rather the plaintiff-appellee merely contended that his research failed to uncover the newly-effective rule which failure caused him to mistakenly believe that no Affidavit of Merit was required. (See Trial Record no. 41 plaintiff's Supplemental Memorandum at record pages 2-3). There can be no doubt that as a matter of law a failure to know the law does not constitute "good cause". Thus, the trial court's December 14, 2005

decision [Trial Record no. 42, Judgment Entry dated December 14, 2005] vacating its prior dismissal is, as a matter of law, directly at odds with Civil Rule 10(D)(2)(b)'s mandate that an extension of time to file an Affidavit of Merit be granted only upon a showing of "good cause".

If the reasons put forth by the claimant do not demonstrate "good cause" sufficient for a court to grant a Civil Rule 10(D)(2)(b) Motion to Extend, it is common sense that the same reasons cannot be used under the guise of another rule to permit what Civil Rule 10(D)(2)(b) expressly bars. Yet that is exactly what the trial court did. That the trial court's December 14, 2005 decision to vacate its prior November 21, 2005 dismissal is inconsistent is obvious. Plain and simple, to adopt and follow the trial court's reasoning would erode the very purpose as well as the express procedures of Civil Rule 10(D)(2)(b).

At the trial level, after the trial court had initially dismissed plaintiff-appellee's Complaint, her counsel argued that since he now, belatedly, had an Affidavit of Merit, that there was no prejudice to anyone in allowing him to file it late in a manner not in compliance with Civil Rule 10(D)(2)(b). (See Trial Record no. 41, December 12, 2005, Supplemental Memorandum at pg. 4) This was a "no harm, no foul" argument. But it is also true that the rule in no way prejudiced the claimant. Civil Rule 10(D)(2)(b) specifically gave the plaintiff-appellee a fair opportunity at the time the Complaint was filed to request additional time, upon a showing of the good cause reasons why her counsel was unable to file an Affidavit of Merit with the Complaint. The sole basis for her failure to follow the rule was her counsel's statement that he was unaware of the rule, that his law student clerk had looked but had found no such requirement. (See

Trial Record no. 41, December 12, 2005, Supplemental Memorandum at pg. 2-3) In no way does this "explanation" constitute or demonstrate the "good cause" required by the rule.

CONCLUSION

The Ohio Supreme Court and the Ohio General Assembly have acted to address the medical malpractice crisis which has existed in the state of Ohio since the late 1990's. By their judicial and legislative initiatives, the Ohio Supreme Court and the Ohio General Assembly have acted to ameliorate the adverse impact of this crisis upon Ohio's patients and physicians. The OSMA, AMA, and AAOS believe that strict adherence to the rule is reasonable and puts into practice the important medical claim pre-suit due diligence and Affidavit of Merit procedures requested by the Ohio Legislature and implemented by the Ohio Supreme Court. *Amici* urge this Court to require strict compliance with Civil Rule 10(D)(2).

Amici believe that the trial court's reversal of its initial November 21, 2005 dismissal was erroneous. In reversing its initial "correct" decision to dismiss, the trial court essentially rewrote Civil Rule 10(D)(2) so as to read into it exceptions that are not in the rule. We support Defendant-Appellants in seeking reversal of the trial court's December 14, 2005, judgment granting to Plaintiff-Appellee relief from the trial court's prior November 21, 2005 dismissal of the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was duly served via regular U.S. Mail on this 20th day of March, 2006 to Patrick C. Fire, Esq., 721 Boardman-Poland Road, Boardman, Ohio 44512 and Joseph W. Gardner, Esq., 4280 Boardman-Canfield Road, Canfield, Ohio 44406, Attorneys for Plaintiff-Appellee Sandra Banfield and Stacy A. Ragon and Michael J. Fuchs, Roetzel & Andress, 222 S. Main Street, Akron, Ohio 44308, Attorneys for Defendant-Appellants, James David Brodell, M.D. and James David Brodell, D., Inc.

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