IN THE SUPREME COURT OF OHIO

MARY J. MANLEY Plaintiff-Appellee	:	**Case No. 2006-1263**
v.	:	
NICHOLAS P. MARSICO, M.D., at al. Defendant-Appellant	:	Discretionary Appeal from the Clinton County Court of Appeals, Twelfth Appellate District
And	:	
	:	(Court of Appeals No. CA2006-04-013)
EYE SPECIALISTS, INC. Defendant-Appellant	:	

BRIEF OF APPELLANT NICHOLAS P. MARSICO, M.D.

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STATEMENT OF FACTS AND OF THE CASE

On October 12, 2004, Plaintiff-Appellee Mary Manley ("plaintiff") filed a complaint against Dr. Marsico and Eye Specialist, Inc. ("ESI") in the Clinton County Common Pleas Court. Plaintiff alleged that Dr. Marsico and ESI negligently treated plaintiff's ophthalmic condition. Notably, plaintiff voluntarily dismissed her complaint on July 11, 2005 pursuant to Civil Rule 41(A).

On January 12, 2006, plaintiff re-filed her complaint against Dr. Marsico and ESI. However, when plaintiff re-filed her complaint, she failed to comply with Civil Rule 10(D)(2). Specifically, plaintiff did not file any affidavit of merit and did not file a motion seeking additional time to file the affidavit of merit. Based on plaintiff's failure to comply with Civil Rule 10(D)(2), Dr. Marsico filed a motion to dismiss plaintiff's re-filed complaint on February 1, 2006. ESI also filed a motion to dismiss.

On February 21, 2006, plaintiff attempted to cure the original defect by filing a motion for leave to file an affidavit of merit instanter. In support of this motion, counsel for plaintiff executed and filed an affidavit stating that he "must have misread Civil Rule of Procedure 10(D)(2) to mean that affidavits of merit must be filed when they are available." However, plaintiff did not even file the purported affidavit of merit at this time. Instead, on February 27, 2006, plaintiff filed a purported affidavit of merit to support her claim against Dr. Marsico. On March 9, 2006, Dr. Marsico filed a motion to strike the tendered affidavit of merit. ESI filed a similar motion to strike on March 13, 2006.

On March 24, 2006, the trial court issued an entry denying Dr. Marsico's and ESI's motions to dismiss and motions to strike and granting plaintiff's motion for leave to file an affidavit of merit instanter. *See* Clinton County C.P. Decision (March 24, 2006) (App. 4). On

April 19, 2006, Dr. Marsico filed a Notice of Appeal with the Clinton County Court of Appeals to seek review of the trial court's decision denying Dr. Marsico's motion to dismiss and motion to strike and granting plaintiff leave to file an affidavit of merit. ESI similarly appealed to the Clinton County Court of Appeals.

On May 17, 2006, the Clinton County Court of Appeals sua sponte dismissed Dr. Marsico's appeal. *See* Entry of Dismissal, Case No. CVA 2006-04-013 (May 17, 2006) (App. 5). The court of appeals also sua sponte dismissed ESI's appeal. The court of appeals' dismissal entry stated that the court of appeals was without jurisdiction to consider Dr. Marsico's appeal because the trial court's entry was not a final, appealable order and noted that the trial court's order did not include Civil Rule 54(B) language. (App. 5).

Dr. Marsico timely appealed to this Court, and this Court accepted discretionary jurisdiction.

ARGUMENT

PROPOSITION OF LAW 1:

A decision granting or denying a motion to dismiss for failure to comply with Civil Rule 10(D)(2) is a final order for purposes of R.C. 2505.02.

This Court should hold that a litigant may seek immediate appellate review of an order denying a motion to dismiss for failure to comply with Civil Rule 10(D)(2)'s affidavit of merit requirement because any such order is a "final order" as defined by R.C. 2505.02. Civil Rule 10(D)(2) requires any complaint that asserts a "medical claim" to include an "affidavit of merit." Civ. 10(D)(2)(a). Rule 10(D)(2) requires the affidavit of merit "solely to establish the adequacy of the complaint." Civ. R. 10(D)(2)(c). These Rule 10(D)(2) affidavit of merit requirements fall squarely within the definition of "final order" under R.C. 2505.02

R.C. 2505.02 defines a final order in pertinent part as follows:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: ...
>
> > (4) An order that grants or denies a provisional remedy and to which both of the following apply:
> >
> > > (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
> > >
> > > (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B)(4) (emphasis added). A decision denying a motion to dismiss for failure to comply with the affidavit of merit requirements of Civil Rule 10(D)(2) satisfies each element of R.C. 2505.02(B)(4) because: (1) the order denies a provisional remedy; (2) the order in effect determines the action with respect to the provisional remedy and prevents judgment with respect to the provisional remedy; and (3) the appealing party has no meaningful or effective remedy by an appeal following final judgment as to all proceedings in the action. Accordingly, this Court should conclude that the court of appeals erred as a matter of law when it held that the trial court's decision denying Dr. Marsico's motion to dismiss for plaintiff's failure to file an affidavit of merit was not a final order subject to immediate appellate review and should, thus, reverse the decision of the court of appeals.

A. An Order Denying A Motion To Dismiss For Failure To Comply With The Affidavit Of Merit Requirement Is An Order That Denies A Provisional Remedy.

The affidavit of merit requirement outlined by Civil Rule 10(D)(2) is a provisional remedy because it is a proceeding ancillary to the main medical claim. R.C. 2505.02 defines "provisional remedy" as:

> (A) As used in this section: ...

> (3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

R.C. 2505.02(A)(3) (emphasis added).

The General Assembly most recently amended R.C. 2505.02, via 2004 H 292, §§ 6 and 7, effective September 2, 2004. Importantly, the General Assembly did not define "provisional remedy" inclusively. Rather, the General Assembly defined "provisional remedy" generally as "a proceeding ancillary to the main action" but included certain examples of things that would meet that definition, including the "prima facie" showing required for asbestos claims, *see* R.C. 2307.93.

An action challenging fulfillment of the affidavit of merit requirement of Civil Rule 10(D)(2) falls within the definition of "provisional remedy" because such action is a proceeding ancillary to the main action (the medical claim) and is substantially the same as the prima facie showing requirement for asbestos claims that the General Assembly specifically included in the list of provisional remedies.

Rule 10(D)(2)(a) provides, in pertinent part that:

> [A] complaint that contains a medical claim, ... as defined in section 2305.113 of revised code, shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit of merit shall be provided by an expert witness pursuant to Rules 601(d) and 702 of the Ohio Rules of Evidence.

Civil Rule 10(D)(2). This Court amended Civil Rule 10 to include the affidavit of merit requirement effective July 1, 2005. This amendment followed the General Assembly's request contained in section 3 of House Bill 215. Section 3 of House Bill 215 stated:

> SECTION 3. The General Assembly respectfully requests the Supreme Court to amend the Rules of Civil Procedure to require a plaintiff filing a medical liability claim to include a certificate of expert review as to each defendant. The General Assembly respectfully requests that the certificate of expert review require the signature of an expert witness from the same specialty as the defendant; said witness shall be required to meet the statutory evidentiary and case law requirements of a medical expert capable of testifying at trial. A certificate of expert review should be required to state with particularity the expert's familiarity with the applicable standard of care, the expert's qualifications, the expert's opinion as to how the applicable standard of care was breached, and the expert's opinion as to how the breach resulted in the injury or death.

150 v H 215, § 3 (effective September 13, 2004).

This history, together with the text of Rule 10(D), confirms that an action involving the affidavit of merit is a "provisional remedy" for purposes of 2505.02. Rule 10(D)(2)(c) states:

> An affidavit of merit is required solely to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment.

Civil Rule 10(D)(2)(c) (emphasis added). By adopting Rule 10(D)(2)(c), this Court made clear that the purpose of the affidavit of merit was solely to establish the adequacy of the complaint. Civil Rule 10(D)(2), thus, accomplishes the same end as a prima facie showing requirement embodied in the Revised Code. Because the General Assembly defined "provisional remedy" to include prima facie showing requirements, Civil Rule 10(D)(2), which accomplishes by Rule the same thing, also qualifies as a provisional remedy. Thus, under the plain language of R.C. 2505.02(A), Civil Rule 10(D)(2) falls within the definition of "provisional remedy."

This Court's decisions also support the conclusion that the affidavit of merit requirement qualifies as a provisional remedy. This Court, consistent with the language of R.C. 2505.02, has held that "for an order to qualify as a final appealable order, the following conditions must be met: (a) the order must grant or deny a provisional remedy, as defined in R.C. 2505.02(a)(3), (b) the order must determine the action with respect to the provisional remedy so as to prevent

judgment in favor of the party prosecuting the appeal, and (c) a delay in review of the order until after final judgment would deprive the appellant of any meaningful or effective relief." *State v. Upshaw,* 110 Ohio St. 3d 189, 192, 2006-Ohio-4253, ¶ 15.

This Court has acknowledged that R.C. 2505.02 does not separately define "ancillary proceeding" in its definition of "provisional remedy." *Community First Bank & Trust v. Dafoe,* 108 Ohio St. 3d 472, 475, 2006-Ohio-1503, ¶ 24. This Court, however, has consistently held that an "ancillary proceeding" is a proceeding "'that is attendant upon or aids another proceeding.'" *Id.* at 475, ¶ 24 (citation omitted). This Court, in *Upshaw,* recently explained this concept when it determined that an order finding a criminal defendant incompetent and compelling treatment was a provisional remedy. This Court explained that this proceeding was a provisional remedy because it aids and is subordinate to the underlying criminal action. *State v. Upshaw*, 110 Ohio St.3d 189, 192-93, 2006-Ohio-4253, ¶ 16. Unless and until competency is established, the criminal matter must be halted. *Id.* And, the very purpose of treatment is to aid the defendant in gaining competency to stand trial. *Id.* Thus, in *Upshaw,* this Court recognized that without a competent defendant, the criminal action cannot proceed. Accordingly, an action that aided the defendant in attaining competency was ancillary to the main action.

Rule 10(D)(2) meets this same definition of "ancillary to the main action" because it aids and is subordinate to the main medical claim. The purpose of the affidavit of merit is to assist the Court in determining the adequacy of the complaint. Its purpose is to halt the proceedings unless and until the adequacy of the complaint can be established through fulfillment of the Rule 10(D)(2) requirements. Thus, like the criminal competency hearing addressed in *Upshaw,* the affidavit of merit is ancillary to the main action. Because the affidavit of merit requirement aids

and is subordinate to the main medical claim, it constitutes a provisional remedy as defined by R.C. 2505.02(A).

B. An Order Denying A Motion To Dismiss For Failure To Comply With Rule 10(D)(2) In Effect Determines The Action With Respect To The Provisional Remedy.

An order denying a motion to dismiss for failure to comply with the affidavit of merit requirement also in effect determines the action with respect to the provisional remedy and prevents judgment in favor of the appealing party as required by R.C. 2505.02(B)(4)(a). Because the affidavit of merit tests the sufficiency of a medical claim complaint, the outcome of a denial of a motion to dismiss for failure to comply with Rule 10(D)(2) is that the medical claim is permitted to proceed. The order denying the motion to dismiss thus determines with the finality the Rule 10(D)(2) issue and prevents a judgment on the Rule 10(D)(2) issue in favor of the appealing party—because the trial court has permitted the medical claim to proceed on its merits. Because an order denying a motion to dismiss for failure to comply with Rule 10(D)(2) determines the action with respect to the provisional remedy, R.C. 2505.02(B)(4)(a) is met.

C. The Party Moving To Dismiss For Failure To Comply With Rule 10(D)(2) Would Not Be Afforded A Meaningful Or Effective Remedy By Appeal Following Final Judgment.

An order denying a motion to dismiss for failure to comply with Rule 10(D)(2) is a final order, most importantly, because the party seeking dismissal has no meaningful or effective remedy following final judgment. *See* R.C. 2505.02(B)(4)(b). The very purpose of requiring an affidavit of merit is to prevent defendants named in medical claims from having to incur the defense costs associated with claims not properly supported by the required affidavit of merit. The brief of *amici curiae,* the Ohio Hospital Association, the Ohio State Medical Association, and the Ohio Osteopathic Association cogently sets forth the history of Rule 10(D)(2), the

staggering litigation costs associated with frivolous medical claims, and the prejudice medical providers will suffer if unable to take an immediate appeal from Rule 10(D)(2) decisions.

Indeed, if a party is precluded from taking an immediate appeal from an order denying a motion to dismiss based on failure to comply with Rule 10(D)(2), Rule 10(D)(2) is stripped of all effectiveness. If a party challenging compliance with Rule 10(D)(2) is forced to litigate the entire medical case before appealing, the very purpose of the affidavit of merit—to ensure the adequacy of the complaint—is subverted. Requiring medical providers, like Dr. Marsico, to defend the medical case, rather than seek an appeal, deprives them of the remedy the affidavit of merit serves. Accordingly, an order denying a motion to dismiss for failure to comply with Rule 10(D)(2) is a final order because it deprives the moving party of an effective or meaningful remedy by appeal following judgment.

CONCLUSION

An order denying a motion to dismiss for failure to comply with the affidavit of merit requirement of Civil Rule 10(D)(2) is a final order, subject to immediate appeal, as defined by R.C. 2505.02. Such an order is a provisional remedy because it is ancillary to the medical claim in that it aids and is subordinate to the medical claim. The order denying the motion to dismiss also determines the action with respect to the provisional remedy. Most importantly, an order denying a motion to dismiss for failure to comply with Rule 10(D)(2) is a final order because the party moving to dismiss has no effective or meaningful remedy by appeal following judgment.

This Court should find that a decision denying a motion to dismiss for failure to comply with the Civil Rule 10(D)(2) affidavit of merit requirement is a final order under R.C. 2505.02 and, thus, subject to immediate appellate review. Accordingly, this Court should reverse the decision of the court of appeals that dismissed Dr. Marsico's appeal.

Respectfully submitted,

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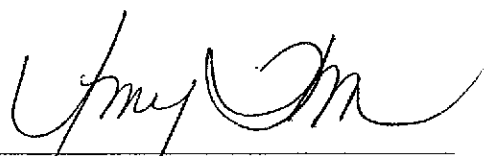

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APPENDIX

IN THE SUPREME COURT OF OHIO

MARY J. MANLEY Plaintiff-Appellee	:	Case No. 06-1263
v.	:	
NICHOLAS P. MARSICO, M.D., at al. Defendant-Appellant	:	Discretionary Appeal from the Clinton County Court of Appeals, Twelfth Appellate District
and	:	
	:	(Court of Appeals No. CA2006-04-013)
EYE SPECIALISTS, INC. Defendant	:	

DEFENDANT-APPELLANT NICHOLAS P. MARSICO, M.D.'S NOTICE OF APPEAL

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APPENDIX 1

Notice of Appeal of Defendant-Appellant Nicholas P. Marsico, M.D.

Defendant-Appellant Nicholas P. Marsico, M.D. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Clinton County Court of Appeals, Twelfth Appellate District, entered in the Court of Appeals Case *Mary J. Manley v. Nicholas P. Marsico, M.D. et al.*, Clinton App. CA2006-04-014 (entered on May 17, 2006). A copy is attached.

This case raises issues of public and great general interest.

Respectfully submitted,

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APPENDIX 2

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APPENDIX 3

IN THE COURT OF COMMON PLEAS
CLINTON COUNTY, OHIO

FILED-COMM. PLEAS
06 MAR 24 PM 2:44
JOANN M. CHAMBERLIN, CLERK

Mary J. Manley,
Plaintiff,

CASE NO. CVA 20060028

-vs-

ENTRY

Nicholas P. Marisco, M.D.,
Defendants.

After careful review of all briefs and memoranda the following motions are denied.

1) Defendant Eye Specialists, Inc.'s January 26, 2006 Motion to Dismiss Plaintiff's Complaint for Failure to Comply with Civ. R. 10(D);

2) Defendant Nicholas P. Marisco, M.D.'s February 1, 2006 Motion to Dismiss Plaintiff's Complaint.

3) Defendant Nicholas P. Marisco, M.D.'s March 9, 2006 Motion to Strike Plaintiff's Notice of Filing Affidavit of Merit and Tendered Affidavit of Merit.

4) Defendant Eye Specialists, Inc.'s March 13, 2006 Motion to Strike Plaintiff's Tendered Affidavit of Merit.

After careful review of all briefs and memoranda the following Motion is granted.

1) Plaintiff's February 21, 2006 Motion for Leave to File Affidavits of Merit Instanter.

ENTER this 16th day of March 2006.

Judge John W. Rudduck

APPENDIX 4

IN THE COURT OF APPEALS FOR CLINTON COUNTY, OHIO

MARY J. MANLEY,	:	CASE NO. CA2006-04-013
Appellee,	:	
vs.	:	ENTRY OF DISMISSAL
NICHOLAS P. MARSICO, M.D., et al.,	:	
Appellants.	:	

The above cause is before the court pursuant to a notice of appeal filed by counsel for appellant, Nicholas P. Marsico, M.D., on April 19, 2006.

The language contained in the judgment entry appealed from indicates that there are outstanding issues remaining in this matter. The record does not indicate that the outstanding issues have ever been resolved.

An order of a court is a final, appealable order only if the requirements of Civ.R. 54(B), if applicable, and R.C. 2505.02 are met. Chef Italiano Corp. v. Kent State University (1989), 44 Ohio St.3d 86. If an order is not a final appealable order, a court of appeals has no subject matter jurisdiction to consider the appeal. Logue v. Wilson (1975), 45 Ohio App.2d 132.

As there are outstanding issues in this action and there is no Civ.R. 54(B) language contained in the order appealed from, the court concludes that the order is not a final appealable order, and that the court is without jurisdiction to consider this appeal.

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Accordingly, this appeal is hereby DISMISSED, costs to appellant.

IT IS SO ORDERED.

Stephen W. Powell
Presiding Judge

James E. Walsh, Judge

William W. Young, Judge

OHIO CIVIL PROCEDURE RULE 10

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Civil Procedure (Refs & Annos)
Title III. Pleadings and Motions

➡Civ R 10 Form of pleadings

(A) Caption; names of parties

Every pleading shall contain a caption setting forth the name of the court, the title of the action, the case number, and a designation as in Rule 7(A). In the complaint the title of the action shall include the names and addresses of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(B) Paragraphs; separate statements

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(C) Adoption by reference; exhibits

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.

(D) Attachments to pleadings.

(1) *Account or written instrument.* When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

(2) *Affidavit of merit; medical liability claim.*

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. The affidavit of merit shall include all of the following:

APPENDIX 7

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit.

(c) An affidavit of merit is required solely to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment.

(E) Size of paper filed

All pleadings, motions, briefs, and other papers filed with the clerk, including those filed by electronic means, shall be on paper not exceeding 8 1/2 x 11 inches in size without backing or cover.

(Adopted eff. 7-1-70; amended eff. 7-1-85, 7-1-91, 7-1-05)

OHIO REVISED CODE § 2505.02

Baldwin's Ohio Revised Code Annotated Currentness
Title XXV. Courts--Appellate
Chapter 2505. Procedure on Appeal (Refs & Annos)
Final Order

➡2505.02 Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

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(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305. 234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

(2004 H 516, eff. 12-30-04; 2004 S 80, eff. 4-7-05; 2004 S 187, eff. 9-13-04; 2004 H 292, eff. 9-2-04; 2004 H 342, eff. 9-1-04; 1998 H 394, eff. 7-22-98; 1986 H 412, eff. 3-17-87; 1953 H 1; GC 12223-2)

UNCODIFIED LAW

2004 H 292, § 6 and § 7, eff. 9-2-04, read:

SECTION 6. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the sections contained in this act are composed, and their applications, are independent and severable.

SECTION 7. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law contained in this act, is held to be preempted by federal law, the preemption of the item of law or its application does not affect other items of law or applications that can be given affect. The items of law of which the sections of this act are composed, and their applications, are independent and severable.

2004 H 342, § 5 and § 6, eff. 9-1-04, reads:

SECTION 5. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the sections contained in this act are composed, and their applications, are independent and severable.

SECTION 6. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law contained in this act, is held to be preempted by federal law, the preemption of the item of law or its application does not affect other items of law or applications that can be given affect. The items of law of which the sections of this act are composed, and their applications, are independent and severable.

HISTORICAL AND STATUTORY NOTES

Ed. Note: The legal review and technical services staff of the Legislative Service Commission has issued an opinion regarding the treatment of multiple amendments. The opinions are neither legally authoritative nor binding, but are provided as a general indication that the amendments of the several acts [2004 H 516, eff. 12-30-04 and 2004 S 80, eff. 4-7-05] may be harmonized pursuant to the rule of construction contained in RC 1.52(B) requiring all amendments be given effect if they can reasonably be put into simultaneous operation. See *Baldwin's Ohio Legislative Service Annotated*, 2004, pages 11/L-1767 and 11/L-1952, or the OH-LEGIS or OH-LEGIS-OLD database on Westlaw, for original versions of these Acts

(125th General Assembly)
(Substitute House Bill Number 215)

AN ACT

To amend section 2743.43, to enact sections 2317.43, 2323.421, 2323.45, and 3929.302, and to repeal section 2303.23 of the Revised Code to prohibit the use of a defendant's statement of sympathy as evidence in a medical liability action, establish qualifications for expert witnesses in medical liability actions, regulate the use of affidavits of noninvolvement in medical claims, and regulate the collection and disclosure of medical claims data.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 2743.43 be amended and sections 2317.43, 2323.421, 2323.45, and 3929.302 of the Revised Code be enacted to read as follows:

Sec. 2317.43. (A) In any civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

(B) For purposes of this section, unless the context otherwise requires:

(1) "Health care provider" has the same meaning as in division (B)(5) of section 2317.02 of the Revised Code.

(2) "Relative" means a victim's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half brother, half sister, or spouse's parents. The term includes said relationships that are created as a result of adoption. In addition, "relative" includes any person who has a

family-type relationship with a victim.

(3) "Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney, or any person recognized in law or custom as a patient's agent.

(4) "Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected result.

Sec. 2323.421. A person licensed in another state to practice medicine, who testifies as an expert witness on behalf of any party in this state in any action against a physician for injury or death, whether in contract or tort, arising out of the provision of or failure to provide health care services, shall be deemed to have a temporary license to practice medicine in this state solely for the purpose of providing such testimony and is subject to the authority of the state medical board and the provisions of Chapter 4731. of the Revised Code. The conclusion of an action against a physician shall not be construed to have any effect on the board's authority to take action against a physician who testifies as an expert witness under this section.

Sec. 2323.45. (A)(1) A health care provider named as a defendant in a civil action based upon a medical claim is permitted to file a motion with the court for dismissal of the claim accompanied by an affidavit of noninvolvement. The defendant shall notify all parties in writing of the filing of the motion. Prior to ruling on the motion, the court shall allow the parties not less than thirty days from the date that the parties were served with the notice to respond to the motion.

(2) An affidavit of noninvolvement shall set forth, with particularity, the facts that demonstrate that the defendant was misidentified or otherwise not involved individually or through the action of the defendant's agents or employees in the care and treatment of the plaintiff, was not obligated individually or through the defendant's agents or employees to provide for the care and treatment of the plaintiff, and could not have caused the alleged malpractice individually or through the defendant's agents or employees in any way.

(B)(1) The parties shall have the right to challenge the affidavit of noninvolvement by filing a motion and submitting an affidavit with the court that contradicts the assertions of noninvolvement made in the defendant's affidavit of noninvolvement.

(2) If the affidavit of noninvolvement is challenged, any party may request an oral hearing on the motion for dismissal. If requested, the court shall hold a hearing to determine if the defendant was involved, directly or indirectly, in the care and treatment of the plaintiff, or was obligated, directly or indirectly, for the care and treatment of the plaintiff.

(3) The court shall consider all evidence submitted by the parties and the parties' arguments and may dismiss the civil action based upon the defendant's lack of involvement in the elements of the plaintiff's medical claim. The court shall rule on all challenges to the affidavit of noninvolvement within seventy-five days after the filing of the affidavit of noninvolvement.

(4) A court's dismissal of a claim against a defendant pursuant to this section shall be deemed otherwise than upon the merits and without prejudice pursuant to Civil Rule 41.

(C) If the court determines that a health care provider named as a defendant has falsely filed or made false or inaccurate statements in an affidavit of noninvolvement, the court, upon a motion or upon its own initiative, shall immediately reinstate the claim against that defendant, if previously dismissed. Reinstatement of a party pursuant to this division shall not be barred by any statute of limitations defense that was not valid at the time the original affidavit was filed.

(D) In any action in which the defendant is found by the court to have knowingly filed a false or inaccurate affidavit of noninvolvement, the court shall impose upon the person who signed the affidavit or represented the defendant, or both, an appropriate sanction, including, but not limited to, an order to pay to other parties to the claim the amount of the reasonable expenses that the parties incurred as a result of the filing of the false or inaccurate affidavit, including reasonable attorney's fees.

(E) In any action in which the court determines that a party falsely objected to a defendant's affidavit of noninvolvement, or knowingly provided an inaccurate statement regarding a defendant's affidavit, the court shall impose upon the party or the party's counsel, or both, an appropriate sanction, including, but not limited to, an order to pay to the other parties to the claim the amount of the reasonable expenses that the parties incurred as a result of the submission of the false objection or inaccurate statement, including reasonable attorney's fees.

(F) As used in this section:

(1) "Health care provider" has the same meaning as in division (B)(5) of section 2317.02 of the Revised Code.

(2) "Medical claim" means any claim that is asserted in any civil action against a health care provider and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes derivative claims for relief.

Sec. 2743.43. (A) No person shall be deemed competent to give expert testimony on the liability issues in a medical claim, as defined in section

2305.113 of the Revised Code, unless:

(1) Such person is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state;

(2) Such person devotes three-fourths of the person's professional time to the active clinical practice of medicine or surgery, osteopathic medicine and surgery, or podiatric medicine and surgery, or to its instruction in an accredited university;

(3) The person practices in the same or a substantially similar specialty as the defendant. The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties.

(4) If the person is certified in a specialty, the person must be certified by a board recognized by the American board of medical specialties or the American board of osteopathic specialties in a specialty having acknowledged expertise and training directly related to the particular health care matter at issue.

(B) Nothing in division (A) of this section shall be construed to limit the power of the trial court to adjudge the testimony of any expert witness incompetent on any other ground.

(C) Nothing in division (A) of this section shall be construed to limit the power of the trial court to allow the testimony of any other ~~expert~~ witness, on a matter unrelated to the liability issues in the medical claim, when that testimony is relevant to the medical claim involved.

Sec. 3929.302. (A) The superintendent of insurance, by rule adopted in accordance with Chapter 119. of the Revised Code, shall require each authorized insurer, surplus lines insurer, risk retention group, self-insurer, captive insurer, the medical liability underwriting association if created under section 3929.63 of the Revised Code, and any other entity that provides medical malpractice insurance to risks located in this state, to report information to the department of insurance at least annually regarding any medical, dental, optometric, or chiropractic claim asserted against a risk located in this state, if the claim resulted in any of the following results:

(1) A final judgment in any amount;

(2) A settlement in any amount;

(3) A final disposition of the claim resulting in no indemnity payment on behalf of the insured.

(B) The report required by division (A) of this section shall contain such

information as the superintendent prescribes by rule adopted in accordance with Chapter 119. of the Revised Code, including, but not limited to, the following information:

(1) The name, address, and specialty coverage of the insured;

(2) The insured's policy number;

(3) The date of the occurrence that created the claim;

(4) The name and address of the injured person;

(5) The date and amount of the judgment, if any, including a description of the portion of the judgment that represents economic loss, noneconomic loss and, if applicable, punitive damages;

(6) In the case of a settlement, the date and amount of the settlement;

(7) Any allocated loss adjustment expenses;

(8) Any other information required by the superintendent pursuant to rules adopted in accordance with Chapter 119. of the Revised Code.

(C) The superintendent may prescribe the format and the manner in which the information described in division (B) of this section is reported. The superintendent may, by rule adopted in accordance with Chapter 119. of the Revised Code, prescribe the frequency that the information described in division (B) of this section is reported.

(D) The superintendent may designate one or more rating organizations licensed pursuant to section 3937.05 of the Revised Code or other agencies to assist the superintendent in gathering the information, and making compilations thereof, required by this section.

(E) There shall be no liability on the part of, and no cause of action of any nature shall arise against, any person or entity reporting under this section or its agents or employees, or the department of insurance or its employees, for any action taken that is authorized under this section.

(F) The superintendent may impose a fine not to exceed five hundred dollars against any person designated in division (A) of this section that fails to timely submit the report required under this section. Fines imposed under this section shall be paid into the state treasury to the credit of the department of insurance operating fund created under section 3901.021 of the Revised Code.

(G) Except as specifically provided in division (H) of this section, the information required by this section shall be confidential and privileged and is not a public record as defined in section 149.43 of the Revised Code. The information provided under this section is not subject to discovery or subpoena and shall not be made public by the superintendent or any other person.

(H) The department of insurance shall prepare an annual report that

summarizes the closed claims reported under this section. The annual report shall summarize the closed claim reports on a statewide basis, and also by specialty and geographic region. Individual claims data shall not be released in the annual report. Copies of the report shall be provided to the members of the general assembly.

(I) As used in this section, medical, dental, optometric, and chiropractic claims include those claims asserted against a risk located in this state that either:

(1) Meet the definition of a "medical claim," "dental claim," "optometric claim," or "chiropractic claim" under section 2305.113 of the Revised Code;

(2) Have not been asserted in any civil action, but that otherwise meet the definition of a "medical claim," "dental claim," "optometric claim," or "chiropractic claim" under section 2305.113 of the Revised Code.

SECTION 2. That existing section 2743.43 and section 2303.23 of the Revised Code are hereby repealed.

SECTION 3. The General Assembly respectfully requests the Supreme Court to amend the Rules of Civil Procedure to require a plaintiff filing a medical liability claim to include a certificate of expert review as to each defendant. The General Assembly respectfully requests that the certificate of expert review require the signature of an expert witness from the same specialty as the defendant; said witness shall be required to meet the statutory evidentiary and case law requirements of a medical expert capable of testifying at trial. A certificate of expert review should be required to state with particularity the expert's familiarity with the applicable standard of care, the expert's qualifications, the expert's opinion as to how the applicable standard of care was breached, and the expert's opinion as to how the breach resulted in the injury or death.

SECTION 4. The General Assembly respectfully requests the Supreme Court to amend the Rules of Civil Procedure to establish an expedited discovery process in medical liability claims to provide for the timely resolution of the disputes.

_____

Speaker _____ *of the House of Representatives.*

_____

President _____ *of the Senate.*

Passed _____, 20____

Approved _____, 20____

_____

Governor.

APPENDIX 18

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

_____

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the ____ day of _____, A. D. 20____.

_____

Secretary of State.

File No. _____ Effective Date _____

APPENDIX 19