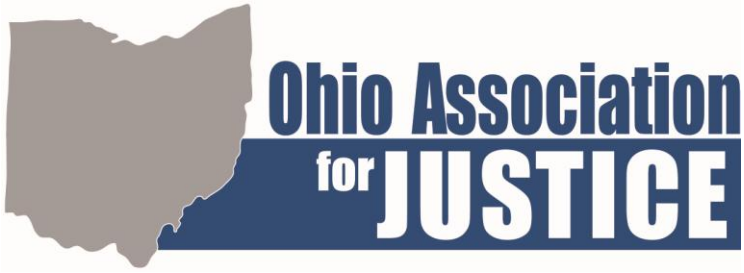

Calculating Statute of Limitations

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CALCULATING STATUTE OF LIMITATIONS

A. Introduction

The definition of "cold sweat" is waking up in the middle of the night wondering whether you properly calculated the statute of limitations in any given case. If the case is one involving medical malpractice, the sensation is only heightened. Therefore, having a systemic approach to calculate the statute of limitations can ease, if not altogether alleviate, the above condition.

B. Determination of the statute of limitations in a medical malpractice case requires a five-part analysis

1. Accrual date determination

2. Tolling of the statute of limitations

3. *Theobald* analysis

4. *Comer/Wuerth* analysis

5. Statute of repose analysis

C. Accrual date determination

1. R.C. 2305.113 (A) provides that "except as otherwise provided in this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the cause of action **accrued**." (emphasis added)

2. A medical claim is defined in R.C. 2305.113(E) as ". . . any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, residential facility, or against a licensed practical nurse, registered nurse, advanced practice nurse, physical therapist, physical assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency technician-paramedic, and **that arises out of the medical diagnosis, care or treatment of any person**." (emphasis added)

3. The accrual date of the medical claim is the date of the malpractice, date of discovery of the malpractice and resulting injury while exercising due diligence, or the date of last treatment for the condition that is the subject of the medical claim, whichever is later.

a. Date of malpractice

The safest (earliest) accrual date to calculate is the date of the malpractice (emphasis added).

b. Discovery rule

The discovery rule for determining when a cause of action accrues in medical malpractice actions was first set forth in *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 11. Later in *Frysinger v. Leech* (1987), 42 Ohio St.3d 38, the court affirmed the discovery rule and further clarified that either it or the termination rule could set the accrual date of the medical malpractice action and the latter date was the one to apply. *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St.3d 1, set forth the following three-prong test to determine the accrual date of a medical malpractice case under the discovery rule:

> (1) When the injured party became aware, or should have become aware, the extent and seriousness of the condition, (2) whether the injured party was aware, or should have been aware, if the condition was related to a specific professional service previously received, and (3) whether such condition would put a reasonable person on notice of the need to inquire into the cause of the condition. *Id.* at 5-6.

Thereafter, in *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 133, the court further clarified the *Hershberger* prongs by requiring that the occurrence of a "cognizable event" should have put the patient on notice that an injury was sustained that was related to a medical procedure. Further, the court determined that the patient need not be fully aware of the extent of the injury in order for there to be a cognizable event. *Id.* at 133-134. Then, in *Flowers v. Walker* (1992), 63 Ohio St.3d 546, the court determined that the occurrence of a cognizable event imposed upon the patient to ascertain the identity of the tortfeasor or tortfeasors. Other recent cases addressing the above points are set forth below.

i. *Mardis v. Meadowwood Nursing Home*, 12th Dist. No. CA 2010-04-007, 2010-Ohio-4800

This is a medical negligence case arising out of a claim that a nursing home patient's Coumadin level had not been properly monitored, and as a result, he fell out of bed, hit his head and suffered a subdural hematoma and later died. The nursing home was sued, along with several John Doe defendants. When an amended complaint was filed which included a specific nurse who

participated in the patient's care, a motion to dismiss was filed on behalf of the nurse, and the trial court granted it determining that the statute of limitations had already passed. The court rejected the argument that the statute of limitations was tolled until the identity of the specific nurse was discovered (emphasis added). The court determined that once the negligent act upon which the complaint was premised was discovered, the plaintiff must act diligently to identify the person or persons responsible in order to sue them individually. The court determined that Civ.R. 15(D) cannot be used as a "ceaseless placeholder" to get around statute of limitations requirements.

ii. *Erwin v. Bryan* (2010), 125 Ohio St.3d 519

The plaintiff's decedent (51-year old male) was hospitalized for just over a week after becoming unresponsive. Approximately a week after his discharge from the hospital the plaintiff's decedent collapsed and died. An autopsy revealed the death was the result of a massive thromboembolism.

A wrongful-death action was brought against Dr. Bryan and Union Hospital Association ("Union Hospital"), as well as five John Doe, M.D. defendants. The claim was based upon an allegation that the pulmonary embolism was neither timely diagnosed nor treated.

The significant dates are as follows:

- 7/15/04 – death
- 7/13/06 – original complaint mailed by certified mail and served upon defendants Dr. Bryan and Union Hospital
- 2/7/07 – deposition of Dr. Bryan was taken and then it became known Dr. Swoger was a potential culpable party (emphasis added) and he and Union Internal Medicine Specialties Inc. ("UIMS") were not named as defendants in the lawsuit
- 6/27/07 – the original complaint was personally served on the two new parties (Dr. Swoger and Union Internal Medicine Specialties Inc. [UIMS])
- 7/13/07 – Amended Complaint filed naming the two new defendants

The two new defendants, Dr. Swoger and UIMS filed a motion for summary judgment, which was granted by the lower Court and plaintiff's decedent appealed. The Fifth District Court of Appeals reversed on the basis that plaintiff's decedent complied with the plain language of Civ.R. 15(C) and (D), and Civ.R. 3 (A), by personally serving the newly identified John Doe defendants with a copy of the original Summons and Complaint within one year of the filing of the original Complaint thereby allowing the Amended Complaint to relate back to the original Complaint.

The Supreme Court of Ohio reversed the Court of Appeals and determined that Civ.R. 15(D) could not have been used to prosecute the action against the doctor and the professional corporation because the name of the doctor was known to the administrator. The Court also determined that even if the administrator did not know the name the requirements of Civ.R. 15(D) were not met because there was insufficient information to permit a copy of the summons containing the words (name unknown) to be served on the doctor or the professional corporation. Therefore, the amended complaint did not relate back to the time of the filing of the original complaint.

iii. *Malcolm v. Duckett*, 6th Dist. No. L-10-1110, 2011-Ohio-865

This case was originally filed as a medical negligence case against the surgeon and his employer. The complaint was dismissed without prejudice and when it was refiled it also included a negligent credentialing claim against the hospital where the surgery took place. The hospital then filed a motion for summary judgment on the basis that the claim against him was barred by the two-year statutory limitation period for non-medical bodily-injury claims. The hospital argued that its care of the plaintiff terminated on November 30, 2005, and that the claim against it was not filed until April 22, 2009.

The plaintiff argued that she was seeking documentation of the surgeon's laparoscopic procedures from the hospital to investigate the possibility of a negligent credentialing claim, but the hospital was not cooperating in providing the information. However, the trial court reasoned that plaintiff's counsel was aware of an "alerting event" (emphasis added) that should raise the possibility of wrongdoing on the part of the hospital prior to the expiration of the statute of limitations. The court of appeals affirmed and determined while the plaintiff may not have had actual facts to support a claim of negligent credentialing, she had constructive

> knowledge that was adequate to put her on notice of the need to conduct further investigation.

c. Date of last treatment (*i.e.*, the termination rule)

The final method of calculating the accrual date of a medical-malpractice action is the termination rule. Specifically, "the statute of limitations in a medical malpractice action does not begin to run until the physician-patient relationship is terminated." *Ishler v. Miller* (1978), 56 Ohio St.2d 447, 448-49, citing *Bowers v. Santee* (1919), 99 Ohio St. 361, paragraph two of the syllabus. The purpose of this rule has been acknowledged by the Ohio Supreme Court:

> The justification for the termination rule is that it strengthens the physician-patient relationship. The patient may rely upon the doctor's ability until the relationship is terminated and the physician has the opportunity to give full treatment, including the immediate correction of any errors in judgment on his part. In short, it was thought that the termination rule is conducive to that mutual confidence which is essential to the physician-patient relationship.

Id. at 449, quoting *Wyler v. Tripi* (1971), 25 Ohio St.2d 164, 167-68.

When the discovery rule was adopted in *Oliver, supra.*, many courts saw this as an abandonment of the termination rule. See Messina v. Gabriel (S.D. Ohio 1983), 573 F. Supp. 364, 365 ("In [*Oliver*], the court abandoned the 'termination rule' and adopted the 'discovery rule' for medical malpractice claims."). However, a few years later, the Court reiterated in *Frysinger, supra.*, that the termination rule was alive and well:

> [A] cause of action for medical malpractice accrues and the one-year statute of limitations commences to run (a) when the patient discovers or, in the exercise of reasonable care and diligence should have discovered, the resulting injury, or (b) *when the physician-patient relationship for that condition terminates*, whichever occurs later.

(Emphasis added.) *Frysinger*, paragraph one of the syllabus. Thus, in *Frysinger* the Court acknowledged that the termination rule was still in effect, and further clarified that the cause of action accrues on the date "when the physician-patient relationship *for that condition*" is terminated.

The issue of whether the physician-patient relationship has been terminated is generally an issue of fact, and courts will consider "whether the physician has an 'opportunity to give full treatment.'" *Baker v. Mervis* (1989), 63 Ohio App.3d 819, 824, quoting *Frysinger*, 32 Ohio St.3d at 41. For example, in *Graham v. Riverside Methodist Hosp.* (Aug. 9, 1979), 10th Dist. No. 79AP-169, 1979 Ohio App. LEXIS 11211, at *6-*7, the Tenth District held that follow-up office visits after a course of radiation treatment "can reasonably be considered as part of a medical relationship parcel relating to the same purpose." Further, in *Baker*, the defendant physician testified that after July 1985, there was no ongoing treatment for the plaintiff patient's condition. The plaintiff, in his deposition, stated that he visited the defendant in the summer of 1986 for the combined purpose of (a) following up, and (b) filling out disability forms. The court held that a genuine issue of material fact existed as to the date of termination of the physician-patient relationship, because "nothing suggests that [the defendant] did not have the opportunity to give full treatment or provide additional treatment to [the plaintiff] until the summer of 1986 when, according to [the plaintiff], his appointments with [the defendant] ended.

D. Tolling of the statute of limitations

1. R.C. 2305.16 – minority and unsound mind

2. R.C. 2305.15 – out of state defendant

E. *Theobald v. University of Cincinnati* (2006), 111 Ohio St.3d 541 analysis

1. Although the *Theobald* case was decided in 2006 it continues to send aftershocks throughout the lower courts, including the Ohio Court of Claims. In *Theobald* the Ohio Supreme Court determined that a physician who is a state employee and is acting on behalf of the state, when the negligent care to a patient allegedly occurred, is immune from civil liability and the only remedy to the injured patient is a claim against the state in the Ohio Court of Claims. In the *Theobald* case the defendants had the dual capacity of being both private physicians and state employees and even though the physicians privately billed for their services and the patient was treated at a private hospital, they did have a contract with the state of Ohio to teach residents.

   Since this case was decided a number of questions have arisen including when the *Theobald* defense can be raised and what constitutes a physician being a state employee and acting on behalf of the state.

2. Determine whether any of the medical providers were physicians, residents, or medical students who were state employees acting in furtherance of state interest at the time of the malpractice. The courts have broadly interpreted this provision to provide the individual providers personal immunity thus requiring the case to

be filed in the Ohio Court of Claims. But, see *Sawicki v. Lucas County Court of Common Pleas*. Recent cases are set forth below.

a. *Engel v. University of Toledo College of Medicine* (July 13, 2011), Slip Opinion No. 2011-Ohio-3375

This case arises from a determination by the Ohio Court of Claims that the treating physician in a medical malpractice case was a state employee. This physician had initially been sued in the Common Pleas Court and the defendant-physician filed a motion to dismiss claiming that he had personal immunity under R.C. 9.86, and that only the Ohio Court of Claims had jurisdiction to decide the issue of immunity. The plaintiff then sought such a determination by the Ohio Court of Claims that was determined in the physician's favor. The Court of Appeals affirmed. The parties stipulated that the physician was appointed by the University of Toledo Board of Trustees as a clinical assistant professor of surgery so that third year students could rotate through his practice. At the time of the surgery in question it was agreed that a third year medical student was present in the operating room.

In reversing the Court of Appeals, the Supreme Court of Ohio determined that immunity was not afforded to a volunteer clinical assistant professor of the "College of Medicine," where the college did not pay him, did not have a contract of employment with him, and did not exercise control over him. The court determined that in such a situation, the doctor was not an employee of the College of Medicine and did not hold an appointed office or position with the state.

b. *Schultz v. University of Cincinnati College of Medicine* (Sept. 1, 2009), Ct. of Claims No. 2008-06431

This case addresses the issue of when the immunity defense can be raised. In *Schultz* the plaintiff-patient was operated on by Dr. Dunfker on January 13, 1997. It appears that a case was filed in Common Pleas Court as the deposition of Dr. Dunfker was taken in 1999, at which time plaintiff's counsel asserted that Dr. Dunfker had waived the defense of immunity during an exchange that occurred between counsel at the time of the deposition. Apparently counsel for plaintiff relied upon this representation, and did not file a complaint in the Ohio Court of Claims against University of Cincinnati, College of Medicine (Dr. Dunfker's employer) until May 22, 2008.

On June 17, 2008, the defendant, University of Cincinnati, College of Medicine, filed a motion to dismiss plaintiff's complaint on the bases that it was time-barred by the statute of limitations. On August 13, 2009, the Court conducted an evidentiary hearing to determine whether Dr. Dunfker

was entitled to immunity pursuant to R.C. 2743.02(F) and 9.86. The Court determined that Dr. Dunfker was entitled to immunity based upon his testimony and the record of operation reflecting that a resident was present for the purpose of education and that Dr. Dunfker was furthering the interest of the state in his care and treatment of the plaintiff when the alleged negligence occurred. With respect to the claim that Dr. Dunfker's counsel waived his immunity defense at his deposition, the Court found that the evidence was insufficient to support a finding that the plaintiff communicated his intent to waive the defense of immunity. The case is on appeal to the Tenth District Court of Appeals.

c. *Clevenger v. University of Cincinnati College of Medicine*, Ct. of Claims No. 2008-10323, 2009-Ohio-2829

This case arises from a medical malpractice claim against Dr. Tew that came before the Ohio Court of Claims on the issue of whether Dr. Tew was entitled to personal immunity from liability pursuant to R.C. 9.86 and 2748.02(F). Dr. Tew was a University of Cincinnati employee and the issue before the Court was whether he was acting on behalf of the state at the time the alleged negligence occurred and specifically whether he was educating residents at the time of the alleged negligence.

Since the allegations of negligence allegedly took place both at a clinic and the University Hospital, the situations were addressed separately by the Court. With respect to the clinic there was no documentation of a resident being present, but Dr. Tew insisted that the "normal procedure" was for at least one resident to be present even though he did not recall who it was. Based upon this evidence the Court was persuaded that a resident was present for the purpose of education and that Dr. Tew was "… furthering the interest of the state in his care and treatment of plaintiff at the facility." Id. at ¶12.

As to the surgery itself, there was documentation of two residents involvement. One resident was documented as being present during surgery, but it was not clear when he arrived or how long he stayed and he did not assist Dr. Tew in the procedure. The other resident was present during the pre-operative phase, but it was not clear whether Dr. Tew was present at that same time. The Court concluded that "because the state's interest in promoting the matter how the education of the student or resident occurs, a practitioner is acting within the scope of his employment if he educates a student or resident by or simple observation of medical procedures." Therefore, the Court provided immunity to Dr. Tew.

d. *Yurkowski v. University of Cincinnati*, Ct. of Claims No. 2007-04311, 2008-Ohio-6483

This case arises from a medical malpractice claim against Dr. Curell, that came before the Ohio Court of Claims on the issue of whether Dr. Curell was entitled to personal immunity and that he was an employee of the University of Cincinnati.

The issue in this case focused upon out-patient services provided by Dr. Curell at his faculty office where no residents or students attended out-patient sessions with him. However, Dr. Curell stated that out-patient services can become the subject of subsequent lectures and that in more than one occasion Dr. Curell used the *Yurkowski* case (anonymously) in connection with lectures in class discussion. The court found this sufficient to grant personal immunity.

e. *Meredith v. Ohio State University Medical Center*, Ct. of Claims No. 2006-04946, 2007-Ohio-3867

This case arises from a medical malpractice claim. In this case there was a cardiologist and two radiologists present during an angioplasty procedure. The cardiologist had students in attendance, but the radiologist did not. The plaintiffs focused upon Justice Pfeifer's dissent in *Theobold* and argued that "there is a difference between 'teaching' and 'learning' and that the mere presence of a student does not establish that teaching is taking place." The defendants responded with testimony that the majority of teaching in the clinical departments was done with patient care. The Court determined that "… regardless of whether there were any students present from their own specialty area, the procedure performed by [the radiologist] was relevant to the [cardiology students]. Id. at ¶17. Accordingly, the court granted personal immunity to the radiologists as well as the cardiologist.

f. *Sawicki v. Lucas County Court of Common Pleas* (2010), 126 Ohio St.3d 198

This is a medical negligence case where the doctor who is claimed to be at fault was determined to be a "dual status employee" of a state hospital and a private corporation. The Supreme Court of Ohio determined that it was okay for the patient to sue a private corporation alleging that its physician employee was negligent under a theory of respondeat superior. No action was brought in the Ohio Court of Claims against the state hospital. The court rejected the argument that the private employer cannot be liable under the doctrine of respondeat superior because the employee doctor is immune from personal liability. The court declined to extend *Comer v. Risko* to this case, and stated that it was "decided narrowly and turned on the theory of agency by estoppel."

In her dissent, Justice Lundberg Stratton objected the majority's position that because the lawsuit was against the doctor's private employer and not the state or the doctor, that it was unnecessary to determine whether the doctor's conduct was outside the scope of his employment with the state, citing *Theobald*. Justice Lundberg Stratton also relied upon *Wuerth* and *Comer* to argue for dismissal of the case because the employee doctor was not named. The dissent goes on to reason that ". . . whether the claim against the agent is extinguished by the expiration of the statute of limitations or by the agent's immunity, the result is that the agent may not be liable. When no liability may be imposed on the agent, there is no liability to flow through to the principal . . ." Id. at ¶48. The dissent also posed the question whether the Court of Claims now needs to make an initial determination of immunity if dual agency is recognized.

F. *Comer v. Risko* (2005), 106 Ohio St.3d 185 and *National Union Fire Insurance Company of Pittsburgh, PA v. Wuerth* (2009), 122 Ohio St.3d 594 analysis

1. Although the *Comer* case has been around for just over five years it is referenced in connection with *National Union Fire Insurance Company of Pittsburgh, PA v. Wuerth, et al.* and it is important to look at the cases in conjunction with each other. *Comer* is a medical malpractice case and *Wuerth* is a legal malpractice case. In *Comer* the court determined that the *Clark v. Southview* agency by estoppel theory would not allow liability to be imposed upon the hospital where the independent contractor physician was not named as a defendant and the statute of limitations against him had expired. The court seemed to limit its opinion to cases involving *Clark v. Southview* agency by estoppel.

However, in *Wuerth* the court had an opportunity to revisit *Comer* in the context of a legal malpractice case. In *Wuerth* the court addressed:

> …[W]hether a law firm may be *directly* liable for legal malpractice – i.e., whether a law firm, as an entity, can commit legal malpractice – and two, whether a law firm may be held *vicariously* liable for malpractice when none of its principals or employees are liable for malpractice or have been named as defendants. Id. at ¶12.

The court answered both questions in the negative and drew upon an analogy to medical malpractice claims in stating that a hospital cannot commit medical malpractice as only individuals practice medicine. Further, *Comer* was cited with approval for the principle that a law firm may not be vicariously liable for legal malpractice when no individual attorneys are liable or have been named.

After *Comer* and *Wuerth*, the question arises as to whether an employee (not just an agent) of a hospital must be named in a medical malpractice case in order to maintain an action against the hospital. Additionally, is *Comer* limited to medical

malpractice cases involving agency by estoppel. Finally, can *Comer* and *Wuerth* be applied to address respondent superior outside of medical and legal malpractice claims?

2. Recent cases addressing *Comer* or *Wuerth*

   a. *Taylor v. Belmont Community Hosp.*, 7th Dist. No. 09 BE 30, 2010-Ohio-3986

      The Seventh District Court of Appeals reversed a trial court grant of summary judgment to Belmont Community Hospital, which was based upon the trial court's extension of the Ohio Supreme Court's *Wuerth* decision to a hospital in a medical negligence case. In *Taylor*, the plaintiff sued the hospital but did not name individual employees. The court in *Taylor* distinguished *Wuerth* as being inapplicable because *Wuerth* dealt with the relationship between a law firm and its partners and not an employer-employee relationship that existed in the case before it. The court also noted that Justice Moyer twice stressed in his concurrence in *Wuerth* that it was a narrow holding. Therefore, the court in *Taylor* refused to extend the *Wuerth* case ". . . regarding law firm liability for the acts of partners and associates to the arena of hospital liability for the acts of its employees." *Id.* at ¶18.

   b. *Stanley v. Community Hosp.*, 2nd Dist. No. 2010 CA 53, 2011-Ohio-1290

      In *Stanley*, the Second District Court of Appeals reversed a trial court decision granting summary judgment to Community Hospital in a medical negligence case where there were allegations of negligence against the hospital and its employee nurses. Jane and John Doe nurses and physicians were named as defendants in the lawsuit but the complaint was never amended to specifically name any specific nurse, physician, or other hospital employee as an individual defendant. The court in *Stanley* decided *Taylor v. Belmont Community Hosp*. with approval and determined that *Wuerth* was inapplicable to the case, and there was no dispute that the plaintiff's suit was timely filed against the hospital for the alleged negligence of its employee nurses under respondeat superior law.

   c. *Henry v. Mandell-Brown*, 1st Dist. No. C-090752, 2010-Ohio-3822, Discretionary Appeal to Ohio Supreme Court Denied, 2011-Ohio-376

      While this case resulted in a victory for the medical defendant based in part on the *Wuerth* case, it is also a bit factually distinct because of pleading issues. The plaintiff in this case initially filed a *pro se* action against Mandell-Brown Plastic Surgery Center. The trial court dismissed the complaint without prejudice because an affidavit of merit was not attached as required by Civ.R. 10(D). When the case was re-filed by

counsel, both Mandell-Brown and The Plastic Surgery Experts (the corporation) were renamed as defendants. However, the court determined that the savings statute did not apply with respect to maintaining a medical negligence action against Mandell-Brown, as he was not initially named separately as a defendant and service was not attempted upon him individually within one year from the filing of the action. The court went on to dismiss The Plastic Surgery Experts as a corporate defendant as the respondeat superior claim against it could not survive the dismissal of the claims against Mandell-Brown.

d. *Barnes v. St. Luke's Hosp.*, Lucas County Court of Common Pleas, Case No. CI-2008-08249; Judge Ruth Ann Franks, Decided January 4, 2010

In this case, there was a medical negligence claim against St. Luke's Hospital alleging that its agents or employees were liable for medical malpractice but no individual agent or employee was named. Defendant hospital sought summary judgment based upon *Wuerth* and *Comer v. Risko*, which was denied by the trial court. The trial court relied upon three other decisions that declined to extend *Wuerth* and *Comer* where there was an employer-employee relationship and the claim was based upon respondeat superior. The cases relied upon were *Van Doros v. Marymount Hosp*., 2007-Ohio-1140, *Orebaugh v. Walmart Stores, Inc.*, 2007-Ohio-4969, and *Holland v. Bob Evans, Inc.*, 2008-Ohio-147.

e. *Tisdale v. The Toledo Hosp*., Lucas County Court of Common Pleas, Case No. CI-2003-4247, Judge James E. Jensen, Decided December 14, 2010

The trial court applied the *Wuerth* decision to grant summary judgment to defendant The Toledo Hospital in a medical negligence case where no employee or agent of the hospital had been named as a party in the litigation. The court noted that "…plaintiffs do find themselves in an untenable predicament. At the time their initial suit was filed, it was presumed that a cause of action could be maintained against a hospital alone when one or more of its employees were alleged to have been negligent performing duties within their scope of employment. However, a decision by the Supreme Court of Ohio on July 29, 2009, turned that presumption on its head," referencing the *Wuerth* decision. Notice of Appeal filed January 10, 2011.

f. *Dinges v. St. Luke's Hosp*., Lucas County Court of Common Pleas, Case No. CI-2008-8715, Judge Dean Mandros, Decided February 15, 2011

The trial court applied the *Wuerth* decision in granting defendants St. Luke's Hospital and Intermed Associates, Inc.'s motion for summary judgment on the basis that defendants had not been sued for respondeat superior. The trial court noted that "Nowhere does the complaint mention

respondeat superior nor does it anywhere allege that defendants were negligent 'acting by and through its employees/agents.'" Notice of Appeal filed March 4, 2011.

G. Statute of repose

1. *Ruther v. Kaiser*, 12th Dist. No. CA 2010-07-066, 2011-Ohio-1723

This is a medical-malpractice/wrongful death case arising out of a claim that the doctor failed to properly evaluate laboratory results, including elevated liver enzymes, and the patient was later diagnosed with liver cancer. The case was initially filed as a medical malpractice claim, but later amended within two years from the date of the patient's death to include a wrongful death claim.

As to the medical malpractice claim, defendants contended that it was not filed within four years of the act or occurrence that was the alleged basis of the medical claim, as required by the statute of repose, R.C. 2305.113(C). The trial court determined that the statute was unconstitutional and violated the right to a remedy provision of section 16, Article 1 of the Ohio Constitution because the claim could not have been discovered within four years of the date of the occurrence. The tests at issue were conducted from 1995 to 1998, and the plaintiff's decedent suffered no symptoms leading to his diagnosis of liver cancer until 2008.

The trial court determined that with respect to the wrongful death claim it was separate and distinct from the medical malpractice claim and it was timely filed within two years from the date of the death as required by R.C. 2125.02. The Court distinguished the statutory wrongful death claim from the common law medical claim and determined that they were different even though they may have arisen out of the same wrongful act.

The Court of Appeals affirmed the trial court's determination that the statute of repose contained in R.C. 2305.113(C) was unconstitutional as applied to the plaintiff. The appellate court determined that the application of the statute of repose barred the claim after it had vested, but before the plaintiff or her decedent knew or could have reasonably known about it.

H. 180-day letters

1. *Tausch v. Riverview Health Institute LLC,* 2nd Dist. No. 22921, 2010-Ohio-502

This case addresses the issue of whether a 180-day letter served upon a doctor also tolls the statute of limitations for a vicarious liability claim against a hospital arising out of the doctor's alleged negligence. Dr. Rothstein operated on Mr. Tausch at a facility owned and operated by Riverview Health Institute, L.L.C. ("Riverview"). Mr. Tausch developed foot drop post-operatively.

The significant dates are as follows:

- 8-18-05 Surgery
- 1-23-06 Physician-Patient Relationship with Dr. Rothstein terminated
- 11-16-06 180-day letters sent to Dr. Rothstein and Riverview and the letter was received by Riverview on the following day
- 5-14-07 Complaint filed against Dr. Rothstein and Riverview

Riverview moved for summary judgment on Mr. Tausch's claims alleging lack of informed consent and vicarious liability and the trial court granted the motion on the basis that more than one year had passed between the August 18, 2005 surgery and the dates from which Riverview received the 180-day letter, November 17, 2006. The Court of Appeals reversed holding that "… when the statute of limitations applicable to a physician is tolled pursuant to *Frysinger v. Leech*, a related claim against a hospital on the theory of vicarious liability arising out of physician's negligence is likewise tolled. Indeed, to do otherwise could require the patient to commence an action against the hospital while the physician-patient relationship continues, undermining the values *Frysinger* identified and relied on in adopting the termination rule." Id. at ¶36.
Discretionary appeal to the Supreme Court of Ohio was denied.

2. *Smith v. Gill*, 8th Dist. No. 93985, 2010-Ohio-4012

It was determined that a 180-day letter sent to the doctor's personal address was not received by the doctor until three days after the statute of limitations expired was not effective to toll the statute of limitations. Also, while a 180-day letter sent to the hospital was not effective at extending the statute of limitations as the letter was signed for by a third-party and there was not evidence that the doctor actually received the letter in a timely fashion. Finally, a 180-day letter sent to the doctor's employer was not effective because it only generally referred to the employer's employees and not to the doctor specifically.

I. Affidavit of merit

1. See *Henry v. Mandell-Brown*, 1st Dist. No. C-090752, 2010-Ohio-3822, Discretionary Appeal to Ohio Supreme Court Denied, 2011-Ohio-376

2. *Schulte v. Wilkey, M.D.*, 12th Dist. No. CA 2010-02-035, 2010-Ohio-5668

The Twelfth District Court of Appeals upheld the dismissal of a medical malpractice complaint because of the patient's failure to include in the complaint an affidavit of merit for a motion to extend the time to file an affidavit as required

by Civ.R. 10(D)(2)(a). The court rejected the patient's argument that the affidavit rule should be interpreted to allow a motion to extend the time for filing the affidavit even after the complaint has been filed. It was significant that the case had previously been dismissed without prejudice and was re-filed in February of 2009 but service was not obtained on the defendant doctor until September of 2009. In October 2009, the doctor filed a motion to dismiss based upon the grounds that an affidavit of merit was not attached to the complaint and, in response, the patient filed a motion for an extension of time to file the requisite affidavit. While the court's dismissal notice was determined to be without prejudice, in its last sentence, it acknowledged the potential dilemma for the patient by acknowledging that if the patient chooses to re-file the saving-statute issue may be raised.

J. John Doe defendants

See *Erwin v. Bryan* (2010), 125 Ohio St.3d 519 and *Mardis v. Meadowwood Nursing Home*, 12th Dist. No. CA 2010-04-007, 2010-Ohio-4800

K. Double dismissal rule

Ohio Civ.R. 41(A) and Ohio Savings Statute (R.C. 2305.19)

While Ohio Civ.R. 41(A) has been a savior to many Ohio plaintiff attorneys who are faced with unexpected litigation problems, one should be cautious about its use. There are certain circumstances where a case can be dismissed without prejudice more than once under this rule, i.e., by stipulation of the parties or by court order. Even though the action may be dismissed otherwise than on the merits more than once, the Ohio Savings Statute (R.C. 2305.19) can only be used once thereby substantially limiting the significance of a double or triple dismissal. *Hancock v. Kroger Co.* (1995), 103 Ohio App.3d 266; *Romine v. Ohio State Highway Patrol* (2000), 136 Ohio App.3d 650, 654; *Columbus Bar Ass'n v. Finneran* (1997), 80 Ohio St.3d 428, 430.

Therefore, it is important to not to blur the distinction between a voluntary dismissal and the savings statute. While the voluntary dismissal rule seems to contemplate the ability to re-file more than once, a strict reading of the savings statue does not allow it. It would seem that the ability to re-file a case that has been dismissed more than once otherwise than on the merits would be limited to a situation where the plaintiff is still within the original statute of limitations.

L. Advising client or potential client of statute of limitations

To advise or not to advise: that is the question when determining whether to inform a client or potential client of the statute of limitations when the attorney has decided not to pursue the case. The danger in providing a specific date is that without obtaining all of the medical records, the calculation of the accrual date could be quite problematic.

However, even with the applicable medical records, the determination of the discovery date and/or termination date may not be precise.

If the attorney has determined to provide some specific information regarding the statute of limitations to the client or potential client, it may be advisable to do so in general terms by providing the rule with respect to the accrual date and not attempting to make a complete application of the facts to this rule. Another approach is to state that the earliest date could be when the malpractice actually occurred. The minimalist approach would be to simply state that there is generally a short time period in which to file a medical malpractice case and if the person intends on proceeding further, that person should contact an attorney immediately so a precise determination of the statute of limitations can be made.

M. Wrongful death distinguished from survival claim

See *Ruther v. Kaiser*, 12th Dist. No. CA 2010-07-066, 2011-Ohio-1723.

N. Conclusion

The five-party analysis as set forth above may not provide the certainty one would like in determining the statute of limitations for a medical claim, but it is a reasonable and prudent approach that should provide some level of comfort for the medical malpractice victim's attorney.