No. 08-0392

In the Supreme Court of Ohio

ON APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
RICHLAND COUNTY, OHIO
CASE NO. 2006CA0095

ESTATE OF DONALD STEVIC, by Betty A. Stevic, Executrix,

Plaintiff-Appellee,

v.

BIO-MEDICAL APPLICATION OF OHIO, INC., d/b/a FMC RICHLAND COUNTY DIALYSIS SERVICES, et al.,

Defendants-Appellants.

REPLY BRIEF OF APPELLANT BIO-MEDICAL APPLICATIONS OF OHIO, INC. d/b/a FMC DIALYSIS SERVICES OF RICHLAND COUNTY

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I. INTRODUCTION

Despite Appellee Betty Stevic's transparent attempt to obfuscate the issue on appeal, this Court is asked to resolve only one question: Whether Stevic presents a medical claim under R.C. 2305.113(E)(3)(b) such that it is barred by the one-year statute of limitations contained in R.C. 2305.113(A). The clear and unambiguous language of the statute provides that it is.

Nowhere in her brief, however, does Stevic discuss the plain-and-unambiguous standard as it applies to R.C. 2305.113(E)(3)(b)—the statute that is the focal point of this appeal. In fact, Stevic's Merit Brief is completely devoid of any mention of R.C. 2305.113(E)(3)(b). It fails to discuss the history behind the enactment of this statute or the General Assembly's purpose for doing so. Instead, to support her position that a "medical claim" must be filed against a specific person or entity, Stevic relies solely upon the first sentence set forth in R.C. 2305.113(E)(3)—as if it existed in a vacuum. But R.C. 2305.113(E)(3) does not. In the sentence that immediately follows, the statute states: "Medical claims *include*...," which is then followed by multiple subsections that define other types of claims that present "medical claims." It is the entire statute, and not just the first sentence, that must be given effect.

Irrespective of her lack of statutory analysis, Stevic interjects arguments and issues that are *not* part of this appeal. She claims that the appeal is premature because there has been no discovery as to the identity of the health-care worker who cared for decedent or whether the decedent was actually receiving "medical care." But discovery is unnecessary. The plain language of the statute does not require a court to identify the "kind of employee" that was involved in decedent's care. Nor does it require a "medical care" analysis—an inquiry that is governed by this Court's previous decisions in *Browning v. Burt* (1993), 66 Ohio St.3d 544, and *Rome v. Flower Mem. Hosp.* (1994), 70 Ohio St.3d 14. Consequently, Stevic's arguments about

the status of discovery and definition of "medical care" are immaterial and irrelevant to this appeal.

The *only* issue before this Court is whether the plain language of R.C. 2305.113(E)(3)(b) requires a complaint to be filed against one of the medical providers or entities enumerated in subsection (E)(3) to be considered a medical claim. It does not.

II. LAW AND ARGUMENT

A. Stevic's analysis effectively deletes language from R.C. 2305.113(E)(3).

By limiting her "medical claim" analysis to only a part of the definition of "medical claim"—the statute's first sentence—Stevic completely ignores the rest of the statutory definition as if it does not exist. The sentence immediately following, however, is unrestricted and includes within the definition of "medical claim" three distinct subsets of claims, including "[c]laims that arise out of the medical diagnosis, care or treatment of any person" that "results from acts or omissions in providing medical care * * * ." R.C. 2305.113(E)(3)(b)(i).

Stevic cannot simply ignore this language. By disregarding this language and "adding" the requirement that medical claims can only be asserted against certain categories of health-care providers and entities, Stevic is urging this Court to delete language from a statute that the General Assembly intended to be there, and add language that it did not. A court, however, can do neither. It cannot delete words that *are* part of a statute, nor can it add words that *are not* there. Instead, it must give effect to the words used by the General Assembly. *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, paragraph three of the syllabus. And the effect of the words used in the *entire* statute is that a "medical claim" includes a claim that arises out of the medical care or treatment of any person because of the "acts or omissions" in providing that care or treatment. Plainly, Stevic's claim is a medical one. Her decedent was receiving a kidney

dialysis treatment as treatment for kidney disease and has since brought a claim based on that treatment.

B. The statute does not require an inquiry into the "kind of employee" providing care.

The appropriate "two-prong" test for determining whether a claim is a medical claim under subsection (b) is (1) whether the claim arose out of medical diagnosis, care or treatment. And, if so, as applies here (2) whether the claim resulted from acts or omissions in providing medical care. There is nothing in the plain language of R.C. 2305.113(E)(3)(b) that requires an analysis of the "kind of employee" involved or the location at which care was rendered. Accordingly, Stevic's kind-of-employee argument is meritless.

C. The General Assembly's intended a broad definition of "medical claim."

A statute's intent is determined by the words used in the statute. *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections* (2000), 88 Ohio St.3d 182, 184. Here, the words, "Medical claims include," unequivocally manifests the intent of the General Assembly to supply a broad and expansive definition of "medical claim"—use of the word "include" could mean no less. Had it not intended to expand the definition of medical claim beyond the classes or categories of entities or individuals specifically enumerated in the first sentence of R.C. 2305.113(E)(3), it would not have needed to add subsection (b). But, the General Assembly did, and therefore, the plain language contained in subsection (b) must be given effect as the legislative's expression that it intended to expand the definition of "medical claim."

D. Stevic's reliance on *Sliger* is misplaced.

Stevic urges this Court to adopt *Sliger v. Stark Cty. Visiting Nurses Serv. & Hospice,* 5th Dist. No. 2005CA00207, 2006-Ohio-852. But much like the Fifth District did in the court below, the *Sliger* court undertook no statutory analysis, nor did it consider the legislative history

underlying tort reform. In short, following *Sliger* would effectively render the second sentence of the definition of "medical claim" entirely meaningless and would eviscerate tort reform.

But the General Assembly enacted tort reform to assist health-care entities and health-care providers in dealing with an insurance crisis while at the same time preserving the rights of parties injured by medical malpractice to seek legal redress. Striking this "balance" not only stabilize the cost of health care and insurance premiums, but allows plaintiffs to "hold negligent health care providers" accountable for their actions. Section 3(B), Am.Sub.S.B. No. 281 (R.C. 2305.113 and 2323.43, uncodifed law), Appx. at 30-31, 41.

To achieve these objectives, the General Assembly limited the period of time in which a plaintiff has to file a medical claim, and it subjected "medical claims" to limitations on non-economic damages so as to bring some degree of certainty to the insurance market. Id. Under *Sliger,* however, entities that are not specifically mentioned in the first sentence to R.C. 2305.113(E)(3), but which provide health care services are left without tort reform protection. As a result, these entities, which must still procure liability insurance and charge for services rendered, remain subject to unlimited damage exposure, excessive jury verdicts, and expensive insurance premiums—all of which the General Assembly identified as factors that reduce the consumers' ability to obtain affordable health care. Section 3(A)(1), Am.Sub.S.B. No. 281 (R.C. 2305.113 and 2323.43, uncodifed law), Appx. 28-30.

Sliger does not promote the laudatory goals of tort reform. This Court should not be persuaded by *Sliger's* reasoning.

E. Donald Stevic's alleged injury occurred while receiving medical care.

Although not governed by the definition of "medical claim," there can be no question that Donald Stevic received "medical care" while at FMC Dialysis. By raising this non-issue here,

Stevic has inartfully attempted to obfuscate the issue on appeal. Be that as it may, FMC Dialysis will briefly address the issue to establish that the trial court did not engage in any presumptive reasoning in dismissing Stevic's complaint.

This Court has previously construed the phrase "medical diagnosis, care or treatment" in *Browning v. Burt* (1993), 66 Ohio St.3d 544, and *Rome v. Flower Mem. Hosp.* (1994), 70 Ohio St.3d 14. In *Browning,* this Court construed the word "care" to mean "the prevention or alleviation of a physical or mental defect or illness." In *Rome,* this Court expanded the definition of "care" to include procedures that are ancillary to and an inherently necessary part of the identification or alleviation of a disease or defect. Id. As a result, claims that arise from procedures that are ancillary to and an inherently necessary part of a person's "care" are "medical claims" subject to the one year statute of limitations. Id.

The allegations in Stevic's complaint, construed in her favor, establish that Donald Stevic was injured when he fell from a Hoyer lift—a medical device used to transfer patients with impaired mobility. The Hoyer lift was operated by one of FMC Dialysis' employees. Mr. Stevic was in the Hoyer lift because he was being moved into position for dialysis. Appx. pp. 3-4. According to the complaint, he was injured because FMC Dialysis' employees "failed to properly apply the harness straps and parts of the Hoyer lift before raising the decedent from his wheelchair." Id. These acts and omissions to act allowed the decedent to fall resulting in his injury. Id.

As pled, therefore, Stevic's complaint arises from acts or omissions that occurred during the receipt of services that were ancillary to and an inherently necessary part of his medical care. Stevic's allegations constitute "care" as that term has been defined under *Browning* and *Rome.* Because Stevic's complaint as pled arises from acts or omissions in providing "medical care,"

this Court does not have to engage in any presumptions to conclude that Stevic's complaint is barred by the one-year statute of limitations that applies to medical claims.

III. CONCLUSION

R.C. 2305.113(E)(3)(b) is clear and unambiguous. Use of the word "include" expressly gives an expansive definition to the term "medical claim" so as to include claims that arise from acts and omissions in providing medical care. Nothing in the plain language of this statute requires a claim meeting either of theses express requirements to be filed against one of the specifically-enumerated categories of health-care providers listed in R.C. 2305.113(E)(3).

Appellee Betty Stevic's complaint, as pled, plainly presents a "medical claim" under this statute. And because it does, Appellant Bio-Medical Applications of Ohio, Inc. d/b/a FMC Dialysis Services of Richland County respectfully asks this Court to reverse the decision of the Fifth Appellate District and reinstate the order of the trial court granting judgment on the pleadings because Appellee Betty Stevic's failed to file her medical claim within the one-year statute of limitations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by regular U.S. Mail, postage prepaid, this 2nd day of October, 2008, on the following:

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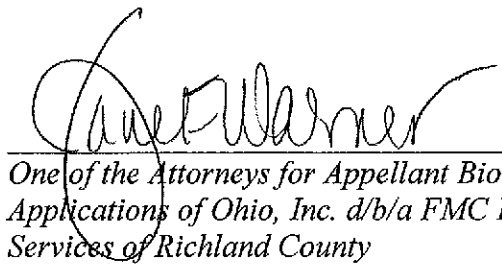

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