No. 2009-1908

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 92567

VICTOR MONTANEZ; NELSA MONTANEZ,
Plaintiffs-Appellants,

v.

METROHEALTH MEDICAL CENTER; CLEVELAND CLINIC FOUNDATION;
R. THOMAS TEMES, M.D.
Defendants-Appellees.

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEES CLEVELAND CLINIC FOUNDATION AND R. THOMAS TEMES, M.D.

RICHARD J. BERRIS (0000682)
WEISMAN KENNEDY & BERRIS CO.
1600 Midland Building
101 Prospect Avenue, West
Cleveland, OH 44115
Tel: 216.781.1111
Fax: 216.781.6747

PAUL W. FLOWERS (0046625)
(COUNSEL OF RECORD)
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113
Tel: 216.344.9393
Fax: 216.344.9395

Attorneys for Plaintiffs-Appellants Victor Montanez and Nelsa Montanez

SUSAN M. AUDEY (0062818)
(COUNSEL OF RECORD)
EDWARD E. TABER (0066707)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
Tel: 216.592.5000
Fax: 216.592.5009
E-mail: susan.audey@tuckerellis.com
edward.taber@tuckerellis.com

Attorneys for Defendants-Appellees Cleveland Clinic Foundation and R. Thomas Temes, M.D.

JAMES L. MALONE (0019178)
BRIAN D. SULLIVAN (0063536)
REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, OH 44115
Tel: 216.687.1311
Fax: 216.687.1841
E-mail: jmalone@reminger.com
bsullivan@reminger.com

Attorneys for Defendant-Appellee
MetroHealth Medical Center

TABLE OF CONTENTS

I. This case does not involve questions of public and great general interest that would warrant this Court's discretionary review.

No public or great general interest is at stake in this appeal. On the contrary, Plaintiffs-Appellants Victor Montanez and Nelsa Montanez forthrightly state that their First Proposition of Law—the only proposition of law that pertains to Defendants-Appellees Cleveland Clinic Foundation and R. Thomas Temes, M.D.—involves nothing more than mere error in that the Eighth Appellate District "improperly applied" the termination rule. See Pls.' Mem. in Support at 1. Even if true (and it is not), this Court is not an error-correcting court. Instead, its discretionary review is limited to cases involving issues of "public and great general interest." S.Ct.Prac.R. II(1)(A)(3). The Montanezes do not articulate any such issues. They merely argue that the trial and appellate courts erred in finding that the physician-patient relationship between Victor Montanez and Dr. Temes terminated (and the one-year statute of limitations began to run) when Dr. Temes—a surgeon—last provided post-surgical follow-up care for Montanez's lung surgery.

Nor does the Montanezes' one-sentence argument that this case presents "perplexing" statute-of-limitations issues satisfy the public-and-great-general-interest standard of discretionary review. There is nothing perplexing about the termination rule, or how the lower courts here applied that rule. Indeed, the Eighth District and other courts around the state have applied that rule without difficulty since 1987 when this Court, in *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, modified *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, to clarify that the one-year statute of limitations for medical malpractice claims begins to run upon the discovery of the injury (cognizable-event inquiry) or "when the physician-patient relationship for that condition terminates, whichever is later." *Frysinger*, 32 Ohio St.3d 38, at paragraph one of the syllabus.

As *Frysinger* makes clear, applying the termination rule generally involves a *factual* inquiry that concerns only the parties in a particular case. And it is this factual inquiry that the Montanezes claim the lower courts misapplied. But this Court does not act as "an additional court of appeals on review," but rather clarifies "rules of law arising in courts of appeals that are matters of public or great general interest." *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, at ¶31 (O'Donnell, J., dissenting). Indeed, discretionary review is only warranted when it involves "principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Williamson v. Rubich* (1960), 171 Ohio St. 253, 259.

No unsettled rule of law is at issue in this appeal. There is no issue of great general interest or one involving the public. The Montanezes' claim is particular to them and is limited to applying the well-settled termination rule to the facts of *this* case. Applying that well-settled rule here, the trial court found that Dr. Temes' relationship with Montanez terminated with the last post-surgical follow-up care for Montanez's lung surgery. Engaging in that same factual inquiry on appellate review, the Eighth District agreed and affirmed the trial court's judgments. There is nothing "perplexing" about this purely factual inquiry that would invoke this Court's discretionary review. Jurisdiction should be declined.

II. Counter-statement of the case and facts

A. Victor Montanez was a surgical patient of Cleveland Clinic physician R. Thomas Temes, M.D.

R. Thomas Temes, M.D., is a surgeon, board-certified in both general and thoracic surgery. Although he is an employee of the Clinic, he provides surgical services primarily at MetroHealth as part of a joint surgery program between the Clinic and MetroHealth.

In September 2005, Victor Montanez—a welder and metal grinder for more than 30 years—sought treatment at MetroHealth Medical Center after being struck by a four-by-four

board while doing some construction work at his home. While hospitalized, several nodules and other findings suspicious for cancer were discovered on Montanez's right lung. Dr. Temes was called in on a thoracic surgical consult.

Numerous tests were conducted to evaluate the suspicious findings. Positron emission tomography (PET) test results yielded findings "suspicious for a lung neoplasm with metastatic disease to the mediastinum," while CT scans continued to show a "pretracheal lymph node" over one centimeter in size as well as a "speculated right upper lobe lung mass with additional smaller nodular densities adjacent * * *." These findings, combined with Montanez's past history of smoking one and a half packs of cigarettes per day for 25 years, did nothing to abate Dr. Temes' suspicions of lung cancer. Because of the numerous abnormal lesions, a less-invasive biopsy was not an alternative and Dr. Temes therefore recommended surgery. Montanez agreed with the recommendation and thereafter specifically consented in writing to have "part or all of [his] right lung" removed. Surgery took place on December 21, 2005.

B. Montanez underwent successful lung surgery in December 2005—lung lesions were found to be non-cancerous; post-surgical follow-up care ended in January 2006.

During the uneventful surgery, Dr. Temes removed the diseased part of Montanez's right lung—a portion of the upper lobe of the right lung.[1] No significant complications ensued and the surgery was a success.

Although post-surgical tissue testing of the removed lung supported evidence of disease, it did not indicate that the lesions were cancerous—a surprising, but welcome, finding in light of the worrisome preoperative test results and Montanez's occupational and smoking history.

[1] Because the lung is a five-lobe organ—three lobes on the right and two on the left—the portion of the right upper lung removed represents only 15 per cent or less of Montanez's lung volume.

Contrary to Montanez's brief supporting jurisdiction (Mem. at 5), Dr. Temes informed Montanez of these findings during post-operative follow-up visits, the latest of which took place on January 13, 2006—the last time Dr. Temes saw Montanez.

C. Dr. Temes referred Montanez back to the care of pulmonary medicine in January 2006 and never saw Montanez again.

Because surgery was successfully completed without complication, no further care from Dr. Temes—again, a surgeon—was planned or necessary. This was noted in Montanez's chart for the January 13 visit. After documenting several pulmonary-related conditions as part of the final diagnosis, the progress notes state:

> The plan for this patient is to refer him back to pulmonary medicine for evaluation and potential treatment of the above listed pathology. He was instructed to use OTC [over-the-counter] analgesic for his remaining discomfort. We will see him back on a PRN[2] basis.

Dr. Temes' subsequent review of a chest x-ray taken during the January 13, 2006 post-operative visit did not change this plan. Instead, this review, which took place on January 16, 2006, merely confirmed his preliminary "satisfactory" reading noted during the January 13 post-operative visit. Dr. Temes' instructions for Montanez to return to pulmonary medicine for further evaluation and treatment remained unchanged. Montanez neither called to consult with Dr. Temes, nor did he schedule any further appointments with him. With Montanez's lung surgery and post-surgical follow-up care complete, Dr. Temes' care and treatment of Montanez ended and he never saw Montanez again.

---

[2] "PRN" is an acronym for the Latin term pro re nata, meaning "as circumstances may require; as necessary." Taber's Cyclopedic Medical Dictionary (18th Ed. 1997) 1562.

D. Montanez sends an untimely 180-day letter in March 2007, and then sues the Clinic, Dr. Temes, and MetroHealth in August 2007; the Clinic and Dr. Temes request summary judgment on statute-of-limitations grounds.

It was not until March 13, 2007—considerably more than one year after Dr. Temes last provided care and treatment to Montanez for his lung surgery—that Dr. Temes received a 180-day letter from Montanez's counsel. Montanez and his wife thereafter filed a complaint for medical malpractice against the Clinic, Dr. Temes, and MetroHealth Medical Center on August 27, 2007, alleging that Dr. Temes was negligent in removing a portion of his right lung. The Clinic and Dr. Temes answered the Complaint, denied the allegations of negligence pertaining to them, and asserted a statute-of-limitations defense. MetroHealth separately answered.

Because Montanez filed his medical claim beyond the one-year statute of limitations, the Clinic and Dr. Temes moved for summary judgment. They argued that Montanez had one year from the time he last followed up with Dr. Temes—on January 13, 2006—to file his claims and did not do so. Supporting the motion was an affidavit from Dr. Temes, Montanez's medical records, and the untimely March 2007 180-day letter, among other documents.

Montanez opposed the motion. He argued that no "affirmative steps" were taken to end the physician-patient relationship and, in an affidavit, stated that he anticipated further care from Dr. Temes. The Clinic and Dr. Temes countered in reply that Montanez's "subjective belief" of continuing care is unsupported and that "affirmative steps" were unnecessary when no further follow-up care is scheduled or provided.

E. The trial court grants summary judgment to Clinic and Dr. Temes, and shortly thereafter grants summary judgment to MetroHealth.

Finding the March 2007 180-day letter untimely, the trial court granted the motion for summary judgment filed by Clinic and Dr. Temes. See 5/30/08 J. Entry, Apx. 00011. Montanez

thereafter moved for reconsideration, which the trial court denied. See 7/16/08 J. Entry, Apx. 00013.[3] Once the claims against the Clinic and Dr. Temes were dismissed by summary judgment, MetroHealth moved for summary judgment based on *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559. The trial court granted the motion (see 11/24/08 J. Entry, Apx. 00012) and Montanez appealed.

F. The Eighth Appellate District affirms.

After first discussing the termination rule's purpose and the effect of continuing treatment on an existing physician-patient relationship, the Eighth District found that the relationship between Montanez and Dr. Temes ended in January 2006 when Dr. Temes neither prescribed "ongoing medication nor additional treatment." 10/15/09 J. Entry and Op., Apx. 0008; see, also, *Montanez v. MetroHealth Med. Ctr.*, 8th Dist. No. 92567, 2009-Ohio-3881, at ¶16. Montanez's subjective belief of continued care by Dr. Temes was found to be unsupported and his affidavit self-serving. Id. The appellate court thereafter upheld the trial court's judgment as to Dr. Temes and the Clinic and did the same as to MetroHealth. Id. at Apx. 0008-09; see, also, 2009-Ohio-3881, at ¶17, 20. Montanez applied for reconsideration of the appellate court's judgment as to MetroHealth, which the court ultimately denied. The Eighth District thereafter journalized its judgment affirming the trial court.

Montanez now seeks this Court's discretionary review.

---

[3] The trial court, however, corrected a clerical error contained in its May 30 summary-judgment order—an error stating that the physician-patient relationship terminated on January 17, 2007. The court corrected the date to reflect that the relationship ended on January 16, 2006, not January 17, 2007. See 7/16/08 J. Entry, Apx. 00013.

III. Argument

Counter-Proposition of Law No. 1

> A plaintiff pursuing a medical malpractice claim against a surgeon under the termination rule must bring that claim within one year after the surgeon last provides care for the surgical condition.

This counter proposition of law is precisely the same rule of law this Court announced in *Frysinger v. Leech*, when this Court, modifying *Oliver v. Kaiser Community Health Found.*, 5 Ohio St.3d 111, held that a medical malpractice action accrues—and the one-year statute of limitations begins to run—when the patient discovers, or should have discovered, the injury or "when the physician-patient relationship for that condition terminates, whichever occurs later." *Frysinger*, 32 Ohio St.3d 38, at paragraph one of the syllabus. As plainly stated by the *Frysinger* court in syllabus law, it is when treatment for a *particular condition* is complete that the one-year period is triggered under the termination rule.

A. The *Frysinger* termination rule is well settled law.

Courts have had no difficulty in applying this well-settled rule to the facts of a particular case. In *Grandillo v. Montesclaros* (2000), 137 Ohio App.3d 691, for example, the Third Appellate District engaged in the "particular condition" analysis under the termination rule and found treatment for the particular condition—surgical removal of an umbilical hernia—was complete when the plaintiff sought no further care and treatment as to the umbilical hernia condition after October 1997. Consequently, the court found plaintiff's complaint filed more than one year later to be untimely. The court refused to rely on the plaintiff's self-serving affidavit about an unidentified and allegedly misremembered appointment when the record indicated otherwise. It likewise refused to consider the plaintiff's subsequent contact with the physician about a "compensation" issue because compensation was not related to the umbilical

hernia condition for which she had sought the surgeon's treatment. Id. at 700; see, also, *Anderson v. Bohl* (Mar. 23, 1993), 2d Dist. No. 92-CA-11, 1993 WL 81806 at *3 (subsequent telephone contacts with dentist were for compensation, not treatment).

Nor did the Eighth District have any difficulty applying the particular-condition requirement of the termination rule in *Klein v. Marsolais* (Mar. 15, 1993), 8th Dist. No. 61494, 1993 WL 332215. The plaintiff in that case fractured his elbow in September 1976 when he was six years old and the physician treated the fracture with a cast. Once the physician removed the cast, the physician informed the plaintiff's mother that the plaintiff would probably only regain 80 percent movement in his arm. The plaintiff last saw the physician *for this condition* in May 1977. Although a follow-up appointment was scheduled for three months later, the plaintiff did not return. Eleven years later—in February 1988—the plaintiff returned to the physician complaining of pain in the elbow after playing sports and the physician referred the plaintiff to a surgeon. The surgery was ultimately unsuccessful and the plaintiff sued not only the surgeon, but the physician who had originally set the cast more than 11 years earlier.

Relying on *Wells v. Johenning* (1989), 63 Ohio App.3d 364, the Eighth District concluded that the plaintiff's relationship with the cast-setting physician terminated in 1977, when the plaintiff failed to keep a scheduled follow-up appointment or schedule another. The court found that the 1988 treatment was not for the "setting of his broken arm so as to begin a new period of limitations." The appellate court noted, however, that even if it were to find that the February 1988 visit was for the same elbow-related condition, plaintiff's medical claim filed in October 1989—more than one year later—was still untimely. *Klein*, at *2; accord *Adams v. Van Wert Cty. Hosp.*, 3d Dist. No. 15-05-01, 2005-Ohio-3078, at ¶21 (physician-patient

relationship was terminated at the point where there was no further follow-up care and treatment for the plaintiff's breast cancer condition).

These cases make clear that courts around the state have had no difficulty in conducting the necessary "particular-condition" inquiry when applying the termination rule to the facts of a specific case. Instead, they have consistently applied *Frysinger* to find that a physician's relationship with the patient is directly tied to the physician's treatment for a particular condition. And once treatment for that condition is over and no further treatment is sought, rendered, or scheduled, the physician's relationship with the patient as to that condition ends and the one-year limitations period begins to run. *Grandillo*, 137 Ohio App.3d at 700; *Adams*, 2005-Ohio-3078, at ¶21; *Klein*, 1993 WL 332215, at *2.

B. The lower courts applied the well-settled termination rule and found Dr. Temes' professional relationship with Montanez ended in January 2006 when surgical follow-up care ended.

The "particular condition" in this case is Montanez's lung surgery, and related post-surgical follow-up. Dr. Temes surgically treated Montanez and removed part of his lung in December 2005 based on test results that were highly suspicions for cancer. Post-surgical follow-up visits in January 2006 indicated a successful surgery, with no complications that required further post-surgical follow up care. Indeed, no further follow-up appointments were necessary or scheduled. And because he was not seen for follow-up again and no further appointments were scheduled that could be "missed," Dr. Temes' treatment as to Montanez's lung surgery was therefore complete and the physician-patient relationship as to the lung surgery ended.

Yet Montanez claims that the termination rule requires that Dr. Temes give him some sort of "notice" or otherwise take "affirmative steps" to terminate his surgical relationship with

him because he subjectively believed "that future office visits were going to be scheduled as needed." Mem. at 8, 9. He claims that he "confirmed in a sworn statement" that Dr. Temes continued as his "thoracic specialist well past August 27, 2006." Id. at 10. Montanez cites no authority for this "subjective belief" argument because there is none. To the contrary, courts—like the appellate court here—have routinely dismissed a plaintiff's subjective beliefs as self-serving. See, e.g., *Grandillo*, 137 Ohio App.3d at 700 (court unpersuaded by plaintiff's self-serving affidavit stating that she had scheduled another appointment but couldn't remember when); see, also, J. Entry and Op. at Apx. 0008; *Montanez*, 2009-Ohio-3881, at ¶16.

Montanez's "hindsight" argument fares no better. He argues that "hindsight" knowledge that no further treatment was needed does not trump his subjective belief that future care may have been needed and therefore "affirmative steps" had to be taken to end the relationship. Relying on *Wells v. Johenning*, among others, he claims he had to refuse treatment, miss a scheduled appointment, or otherwise affirmatively terminate the relationship.

But the "affirmative steps" are only necessary when the physician's treatment for the particular condition is ongoing. Indeed, the cases relied upon by Montanez to support his "affirmative steps" argument involved patients who continued to treat with the respective physician, either because further follow-up care was scheduled or treatment otherwise continued. See *Wells*, 63 Ohio App.3d at 367 (physician-patient relationship did not terminate until surgery patient failed to keep a scheduled post-operative visit); *Smales v. Portman* (Nov. 5, 1981), 10th

Dist. No. 81AP-522, 1981 WL 3576 at *1 (plaintiff canceled scheduled follow-up appointment; physician-patient relationship continued until scheduled, albeit canceled, appointment); see, also, *Hammonds v. Aetna Cas. & Sur. Co.* (N.D.Ohio 1965), 237 F.Supp. 96 (in context of recognizing claim for insurer's interference with an ongoing physician-patient relationship, court noted that physician cannot withdraw from case and "leave his patient without medical attendance," but must give patient notice and opportunity to procure another physician to continue treatment). Unlike *Wells*, *Smales*, and *Hammonds*, Montanez had no ongoing relationship with Dr. Temes after the post-operative visits ended in January 2006. No further treatment was required and no appointments were scheduled that could be missed.

Nor does Montanez's reliance on *Hause v. Leimbach* (Oct. 31, 1991), 10th Dist. No. 90AP-1008, 1991 WL 228861, aid his "affirmative steps" argument. The Tenth Appellate District in *Hause* was asked to certify a conflict between its judgment and that of two other appellate courts—one of which was the Eighth District's judgment in *Wells*, 63 Ohio App.3d 364. In finding its decision factually distinguishable from *Wells* and therefore certification inappropriate, the Tenth District found "affirmative steps" unnecessary in *Hause* because the plaintiff-patient never treated with or scheduled further follow-up care with the physician. Indeed, similar to Dr. Temes' "PRN" instruction here, the physician in *Hause* told the plaintiff that she "would not need to see [the physician] again unless there were further complications." Id. at *1. No "affirmative steps" were necessary to end the relationship because the plaintiff neither saw the physician again nor scheduled any further follow-up visits with the physician.

Montanez's reliance on *Kiser v. Rubin* (Sept. 8, 1995), 2d Dist. No. 15254, 1995 WL 526380, is equally misplaced. The plaintiff in *Kiser* sought treatment from a dentist who, in the course of treatment, perforated a tooth's root, requiring an oral surgeon to ultimately extract the tooth in March 1993. The appellate court found a complaint brought in April 1994 untimely not because of the lack of "affirmative steps" taken to end the relationship, but because the relationship had terminated when the condition upon which the relationship was based (root canal) no longer existed once the tooth was extracted in March 1993. No "affirmative steps" to end the relationship were necessary.

These cases demonstrate that courts have consistently applied the termination rule and required "affirmative steps" only in those cases where there exists an ongoing relationship for a particular condition. No such ongoing relationship between Montanez and Dr. Temes existed here that would require "affirmative steps" to end the relationship. Unlike *Wells* and *Smales*, Montanez had no ongoing professional relationship with Dr. Temes after the lung surgery. Like the plaintiff-patient in *Hause*, Montanez had no post-surgical complications that required further intervention from Dr. Temes. Under well-settled termination-rule law, Montanez's relationship with Dr. Temes ended when no further treatment was needed, scheduled, or rendered after the successful surgery and post-surgical care.

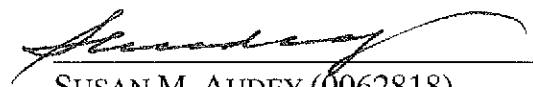
IV. Conclusion

Nothing in this case warrants further review by this Court. The Montanezes' dissatisfaction with the Eighth Appellate District's judgment does not create a public and great general interest where none exists. On the contrary, the appellate court applied well-settled law in finding that, under the facts of this case, Victor Montanez's professional relationship with Dr. Temes ended when Dr. Temes' care and treatment of Montanez's surgical lung condition was

complete. Without any public or great general interest at stake that would change that well-settled rule of law, this Court's discretionary review is unwarranted.

Defendants-Appellees the Cleveland Clinic Foundation and R. Thomas Temes, M.D., therefore respectfully request that this Court deny Plaintiff-Appellants Victor Montanez's and Nelsa Montanez's request for discretionary review.

Respectfully submitted,



SUSAN M. AUDEY (0062818)
(COUNSEL OF RECORD)
EDWARD E. TABER (0066707)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
Tel: 216.592.5000
Fax: 216.592.5009
E-mail: susan.audey@tuckerellis.com
edward.taber@tuckerellis.com

Attorneys for Defendants-Appellees Cleveland Clinic Foundation and R. Thomas Temes, M.D.

CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 18th day of November, 2009, by U.S. Mail, postage prepaid, upon the following:

RICHARD J. BERRIS
WEISMAN KENNEDY & BERRIS CO.
1600 Midland Building
101 Prospect Avenue, West
Cleveland, OH 44115

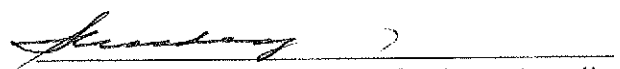
Attorney for Plaintiffs-Appellants Victor Montanez and Nelsa Montanez

PAUL W. FLOWERS
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113

Attorney for Plaintiffs-Appellants Victor Montanez and Nelsa Montanez

JAMES L. MALONE
BRIAN D. SULLIVAN
REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, OH 44115

Attorneys for Defendant-Appellee MetroHealth Medical Center



One of the Attorneys for Defendants-Appellees Cleveland Clinic Foundation and R. Thomas Temes, M.D.