No. 18-3874

In The United States Court of Appeals
For the Sixth Circuit

James Gallivan,

Plaintiff-Appellant

– vs –

United States of America,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Ohio, Eastern Division, Case No. 4:18–cv–00545

AMICUS BRIEF IN SUPPORT OF REVERSAL
SUBMITTED BY AMICUS CURIAE TABATHA BROWN

JOEL LEVIN
Ohio Bar No. 0010671
GREG GIPSON
Ohio Bar No. 0089340
LEVIN & ASSOCIATES
1301 East Ninth Street
1100 Erieview Tower
Cleveland, Oho 44114-1844
Telephone | 216.928.0600
Email • jl@levinandassociates.com
Email • gg@levinandassociates.com
Telecopier | 216.928.0016

RAYMOND V. VASVARI, JR.
Ohio Bar No. 0055538
VASVARI & ZIMMERMAN
1301 East Ninth Street
1100 Erieview Tower
Cleveland, Oho 44114-1844
Telephone | 216.458.5880
Email • vasvari@vasvarilaw.com
Telecopier | 216.928.0016

Counsel for Amicus Curiae

– STATEMENT REGARDING CORPORATE DISCLOSURE –

Amicus Curiae Tabatha Brown is a natural person, and not a corporation, and pursuant to Fed. R. App. P. 29 (a)(4)(A) is not required to file a Corporate Disclosure Statement pursuant to Fed. R. App. P. 26.1.

———

– TABLE OF CONTENTS –

– TABLE OF AUTHORITIES –

- CASES -

- STATUTES –

- RULES OF PROCEDURE –

– STATEMENT REGARDING AMICUS CURIAE –

Amicus Curiae Tabatha Brown is the Administratrix of the Estate of Alfred Duane Estis, deceased, and the mother of and next friend to his minor children, A.E. and D.E. On May 14, 2016, Mr. Estis, a pretrial detainee, died in the custody of the Lucas County Sheriff while being held in the Lucas County Jail in Toledo, Ohio.

On April 10, 2018, Ms. Brown, on behalf of his estate and his minor children, and together with other relatives suing in their own right, sued the Lucas County Sheriff and various individual defendants in the United States District Court for the Northern District of Ohio, in an action styled Brown, et al. v. Lucas County Sheriff's Office, et al., Case No. 3:18-cv-00812 ("the Brown case"). The Complaint in that action alleged five claims: (a) a deliberate indifference to serious medical needs, brought pursuant to 42 U.S.C. § 1983; (b) a culpable failure to train and supervise employees, under Section 1983; (c) and intentional infliction of emotional distress claim; (d) a wrongful death claim arising from the amicus, bad faith or ill will of the defendants, and; (e) claims for loss of consortium. The latter three claims were pled under Ohio law. (Complaint, ECF No. 1 in the Brown case, passim).

Two defendants later moved to dismiss on the basis that the Brown complaint was not accompanied by the Certificate of Merit required to attend medical claims under Ohio R. Civ. P. 10(D)(2), rendering all the state law claims deficient as a matter of law. (Brown Case, ECF No. 20, Motion to Dismiss, at 2–3).

The District Court ordered, and the parties submitted simultaneous briefing on the question of whether the requirements of Rule 10(D)(2) were substantive or procedural, and whether they applied to complaints in the federal courts asserting ancillary medical claims under Ohio law.[1]

Noting a conflict of persuasive authority in the Northern District of Ohio, and the pendency of this appeal, the District Court ordered the Brown case stayed until this Court issues a decision in the *Gallivan* appeal. (Brown Case, ECF No. 23, Order Staying Case, November 9, 2018).

The interests of Amicus Curiae are straightforward and simple. Whether Ohio law requires plaintiffs asserting ancillary state medical claims, sounding in Ohio law, in conjunction with deliberate indifference claims brought under 42 U.S.C. § 1983, will determine whether involuntary dismissal, without prejudice, in appropriate in both this – the *Gallivan* case – and in Brown.

While Mr. Gallivan has submitted a brief in his own right, he suffers under the limitations of an inmate proceeding *pro se*. Amicus respectfully submits that the Court would benefit from the presentation of both written and (if the Court sees fit) oral argument by experience litigation counsel, and therefore submits this brief.

---

[1] See: Order, Brown Case, ECF No. 20, October 18, 2018, Motion to Dismiss of Defendants Hetrick and Fisher, ECF No. 22, and Response in Opposition, ECF No. 21, both filed October 31, 2018.

– STATEMENTS REGARDING AUTHORSHIP –

Amicus Curiae seeks leave to file this brief in the Motion for Leave with which it is being submitted, in accordance with to FED. R. APP. P. 29 (a)(3). Pursuant to FED. R. APP. P. 29 (a)(4), Amicus Curiae states as follows:

1. This brief was authored by Raymond V. Vasvari, Jr., one of the counsel for Ms. Brown and the other plaintiffs in the Brown case, and neither by nor in consultation with counsel for any party in this action;

2. No money was contributed in connection with this brief by any party to this action, nor by counsel for any party, and;

3. No person or entity and the contributed money intended to fund the preparation of this brief, which was undertaken by counsel solely in connection with and as a part of their ongoing representation agreement with the plaintiffs in the Brown case.

———

– LAW AND ARGUMENT –

The Appellant (Brief at 3) raises a single question

> whether OHIO R. CIV. P. 10 (D)(2) is substantive or procedural for purposes of filing a claim under the Federal Tort Claims Act in Federal Court?

The question, as posed by the Appellant, captures the essence of the matter at bar, but understates its scope. Whether the rule is substantive or procedural dictates the answer to another query, which for a decade has resulted in conflicting decisions among the judges in the Northern District of Ohio:

> must a district court, exercising supplemental or diversity jurisdiction over state law medical claims, as that term is defined by Ohio Rev. Code § 2305.113 (E)(3), dismiss those claims when the complaint is not accompanied by the affidavit of merit required when those claims are asserted in state courts, pursuant to Ohio R. Civ. P. 10 (D)(2) ?

Appellant, an inmate in custody at the Federal Correction Institution at Elkton, in Columbiana County, Ohio, sued under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., in the Northern District of Ohio, alleging negligence in connection with surgery performed on his left hand. (R.1, Complaint, ¶¶ 19–21, Page ID # 3).

Under Ohio Civil Rule 10 (D)(2), every complaint alleging a "medical claim" must be filed with a supporting affidavit of merit, in which an expert states that he has reviewed the available medical record, is familiar with the applicable standard of care, and that in the opinion of the affiant, the standard of care was breached by the defendant(s) named in the complaint.

Medical claims are defined by Ohio law to include any actions arising out of the diagnosis, care or treatment of a patient. OHIO REV. CODE § 2305.113 (E)(3).

The Appellant did not attach a certificate of merit to his complaint, and the United States moved to dismiss. The District Court (Pearson, J.) dismissed his complaint without prejudice, holding that: (a) Ohio Civil Rule 10 (D)(2) imposes a substantive, and not a procedural requirement on pleadings asserting state law medical claims in District Courts sitting in Ohio, and (b): that absent an affidavit, such complains fail to include sufficient factual matter to state a plausible claim under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). (R.7, Memorandum Opinion, at Page ID # 30, 32).

Whether Rule 10(D)(2) imposes a substantive state law obligation that federal courts are bound to enforce, or a procedural rule that must yield to the Federal Rules of Civil Procedure, is an unsettled question in the Northern District of Ohio – as Judge Pearson noted below. This case, the thirteen cases collected in the opinion below (R.7, Memorandum Opinion, at Page ID # 32–33) and Note 1) and two others have addressed the question in the last decade.[2] "Substantive" decisions outnumber "procedural" decisions, by our count, eleven to six.

---

[2] The addition cases are *Nicholson v. Catholic Health Partners*, No. 4:08-cv-2410, 2009 WL 700768 at * 3 (N.D.Ohio, Mar. 13, 2009); *Perotti v. Medlin*, No. 4:05CV2739, 2009 WL 723230, at * 8 (N.D.Ohio, Mar. 16, 2009).

The decisions finding Ohio Civil Rule 10 (D)(2) substantive have reasoned that – because it requires a complaint filed without an affidavit of merit to be dismissed – the Rule is outcome determinative, and therefore substantive. [3]

Those who have held that Rule 10 (D) (2) **does not** apply have reasoned that, because the affidavit-of-merit question can be completely resolved by applying the Federal Civil Rules, and an outcome-based analysis is neither necessary nor proper.[4]

That said, the decisions which hold the requirement to be a matter of state procedure are more thorough and by far better reasoned than the others, and provide strong reasons for this Court to hold that the requirement is merely procedural.

---

[3] *See*: *Daniel v. United States*, 716 F.Supp.2d 694, 698 (N.D.Ohio 2010); *Flonery v. United States*, No. 4:17-cv-1068, 2018 WL 3537139, at * 2 (N.D.Ohio, Jul. 23, 2018); *Fonseca v. United States*, N.D.Ohio No. 1:13-cv-1710, 2013 WL 6797736, at *4 (N.D.Ohio, Jul. 23, 2015); *Bennafield v. United States*, No. 4:12-cv-3010, 2013 WL 5173221 at *1–2 (N.D.Ohio, Sep. 12, 2013); *Kollin v. City of Cleveland*, No. 1:11-cv-2605, 2013 WL 10914611, at * 2–3 (N.D.Ohio, May 24, 2013); *Nicholson v. Catholic Health Partners*, No. 4:08-cv-2410, 2009 WL 700768 at * 3 (N.D.Ohio, Mar. 13, 2009); *Perotti v. Medlin*, No. 4:05CV2739, 2009 WL 723230, at * 8 (N.D.Ohio, Mar. 16, 2009).

[4] *See: Beair v. Ohio Dept. of Rehabilitation,* 156 F.Supp. 898, 905–06 (N.D.Ohio 2016); *Larca v. United States*, 302 F.R.D. 148, 151, 155–59 (N.D.Ohio 2014); *Gold. v. City of Sandusky*, No. 3:15-cv-2001, 2016 WL 5462970, at * 3–4 (N.D.Ohio, Sep. 29, 2016); *Rodriguez v. United States*, No. 1:14-cv-02526, 2015 WL 4496279, at * 3–5 (N.D.Ohio, Jul. 23, 2015); *Thompson v. United States*, No. 1:13-cv-0550, 2013 WL 3480347 (N.D.Ohio, Jul. 10, 2013); *Muncy v. Siefker*, No. 3:12-cv-2301, 2013 WL 1284233, at * 5–7 (N.D.Ohio, Mar. 26, 2013).

Uniformly, the decisions which hold Rule 10 (D) (2) to be substantive have done so because, under Ohio law, the failure to file an affidavit of merit is grounds to dismiss a medical claim, an argument summarized concisely in the opinion below.

> A substantive state law is a law that "gives rise to 'state-created rights and obligations' or is otherwise 'bound up with these rights and obligations in such a way that its application to federal court is required.' "

(R.7, Memorandum, at Page ID # 33) (quoting *Shropshire v. Laidlaw Transit, Inc.*, 550 F.3d 570, 574 (6th Cir. 2008) (quoting *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 535 (1958)). State

> law is substantive if it would "significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court."

(R.7, Memorandum, at Page ID # 33) (quoting *Daniel*, 716 F. Supp. 2d at 697 (in turn citing *Hanna v. Plummer*, 380 U.S. 460, 466 (1965))). [5]

The approach taken in most of these decisions may beg a question that need not be answered. As Senior District Judge Carr reasoned in *Beair*, a court need not decide whether a requirement is substantive or procedural if it first determines that the Federal Rules of Civil Procedure directly address the manner in which a party must plead, and state law requirements "directly collide" with those Rules.

---

[5] The decisions in *Flonery*, *supra* at * 2, *Bennafield*, *supra*, at * 2 and *Kollin*, *supra* at * 2 reasoned likewise, relying on *Daniel* in part to reach their conclusion.

> "Where a Federal Rule of Civil Procedure provides a resolution of an issue, that rule must be applied by a federal court sitting in diversity to the exclusion of a conflicting state rule so long as the federal rule is authorized by the Rules Enabling Act and consistent with the Constitution." Only if there is no applicable federal rule does "the court determine whether the state rule ought to apply pursuant to the doctrine announced in *Erie* [.]"

Beair, 156 F.Supp.23 at 906 (quoting *Larca*, 302 F.R.D. at 155). District Judge Lioi applied the same analysis in *Larca*, as did District Judge Gwin in both *Rodriguez*, *supra*, at * 3–4 and *Thompson*, *supra* at * 3, and District Judge Helmick in both *Gold*, *supra* at * 3–3 and *Muncy*, *supra* at * 5–6.

Each of those decisions was grounded in the concurring opinion of Justice Stevens in *Shady Grove Orthopoedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), in which the Court considered whether a state-law claim that could not be brought on behalf of a class, as a matter of New York law could none-the-less proceed as a class action in district court under FED. R. CIV. P. 23.

Each decision foregoes the outcome-determinative analysis employed by the court below, because the problem of Rule 10 (D) (2) can be resolved by applying Federal Civil Rules 8 and 9 in a manner consistent with the Rules Enabling Act.

> Those rules tell a federal court litigant how to plead. Applying Ohio Rule 10(D)(2) would make Plaintiff's claim subject to requirements beyond what is required by Rule 8–because that Rule requires nothing more than a statement of the court's jurisdiction, a short and plain statement showing entitlement to relief, and a demand – and Rule 9 – because that Rule specifies a heightened pleading standard that only applies in certain types of cases, such as those involving fraud or mistake.

See: Rodriguez, *supra* at * 3 (citing *Larca*, 302 F.R.D. at 155-60, *Thompson*, *supra*, *Muncy*, *supra* at * 3–4 and *Shady Grove*, 559 U.S. at 421–22). *Accord*: *Beair*, 156 F.Supp. at 905–06.

The decisions finding Rule 10 (D)(2) procedural do not address the *Shady Grove* concurrence at all. [6] The decision below does not address the question of whether – consistent with the Rules Enabling Act – Federal Civil Rules 8 and 9 preclude contrary state regulation of how a complaint in federal court must be plead.

And while the decision below cites, in passing, the Northern District of Ohio cases which have employed the *Shady Grove* analysis to hold that Ohio may not add to the pleading requirements imposed by the Federal Rules of Civil Procedure, it neither cites *Shady Grove* nor grapples with the analysis of its sister courts. [7]

---

[6] A text search of the eight cases cited in Note 3, *supra*, reveals that *Shady Grove* is cited in none of them, despite having been decided in March 2010, and thus prior to five of them. District Judge Lioi, who previously found the affidavit of merit requirement to be substantive in *Bierbauer v. Maneti*, No.4:09-cv-2142, 2010 WL 4008835, at 9-10 (N.D.Ohio, Oct. 1, 2010) **changed her position** regarding the affidavit requirement based upon the holding in *Shady Grove,* finding the *Stevens* concurrence to be controlling. *Larca*, 302 F.R.D. at 155–56.

[7] *See, e.g.*, *Gallivan*, *supra* at * 3 and n.1 (citing *Larca*, *Beair*, *Gold*, *Rodriguez*, *Muncy* and *Thompson* while addressing neither their *Shady Grove* analysis nor engaging with their analysis of Rule 10 (D) (2) as directed at procedure and not the merits of a claim); *Flonery*, *supra* at * 3 (citing no contrary authority); *Fonseca*, *supra* at * 3 (citing contrary authority from other districts but none in this judicial district); *Bennafield*, *supra* at * 2 (same); *Kolin*, *supra* at * 3 (same, but noting that the plaintiff in that case presented no authority on the contested question of Rule 10 (D) (2)).

If the analysis employed by those judges is correct, there is no reason to reach the substantive-procedural question at all.

If it is not, however, there remain persuasive reasons to find that requirements imposed by Rule 10 (D)(2) are, in fact, procedural after all.

It bears emphasis that the dismissal below was without prejudice. As it stands, Appellant may refile his claim, with an affidavit of merit (should this Court hold that it is required) and without prejudice to the merits of his case.

Rule 10 (D)(2) dictates only the form a complaint must take, as a matter of pleading under Ohio law, something that is plainly – and only – procedural. Claims dismissed because a plaintiff has not attached an affidavit of merit are dismissed, as a matter of Ohio law, without prejudice. *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 171 (2008). **That such adjudications are other than on the merits is specified in the Rule itself**. OHIO R. CIV. P. 10 (D)(2)(D). *Accord: Troyer v. Janis*, 132 Ohio St.3d 229, 232 (2012). Failure to attach an affidavit of merit thus affects only the "'sufficiency of the complaint' but not 'the merits of [the] claim." M*uncy*, *supra* at * 7 (citing *Fletcher*, *supra* at 148).

In this light the court below (R.7, Memorandum,, at Page ID # 33) erred to find that disregarding Rule 10 (D)(2) "would significantly affect the outcome of . . . litigation" because the result mandated by that Rule deals the non-compliant party a procedural setback, but never a substantive loss. The Rule does not – cannot – affect the substantive outcome of a case, but rather only the course of litigation.

The Rule itself twice removes the affidavit of merit from any determination **on the merits**. Ohio Civil Rule 10(D)(2)(d) both requires that dismissals for failure to abide the Rule must be without prejudice, and further limits the role of the affidavit required to assessing the sufficiency of the complaint, and nothing more.

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

Ohio R. Civ. P. 10(D)(2)(d).

The affidavit plays no role in the substantive outcome of a medical claim, as a matter of Ohio law. This is the essence of procedure and the antithesis of substance.

– CONCLUSION –

The court below both erred to hold otherwise, and to reach the question of outcome determinativeness in light of the clear conflict between the Ohio Rule and Federal Civil Rules 8 and 9. The decision of the District Court should be reversed.

Respectfully submitted,

/s/ Raymond V. Vasvari, Jr.

RAYMOND V. VASVARI, JR.
Ohio Bar No. 0055538
VASVARI & ZIMMERMAN
1301 East Ninth Street
1100 Erieview Tower
Cleveland, Oho 44114-1844
Telephone | 216.458.5880
Email | vasvari@vasvarilaw.com
Telecopier | 216.928.0016

and

JOEL LEVIN
Ohio Bar No. 0010671
GREG GIPSON
Ohio Bar No. 0089340
LEVIN & ASSOCIATES
1301 East Ninth Street
1100 Erieview Tower
Cleveland, Oho 44114-1844
Telephone | 216.928.0600
Email • jl@levinandassociates.com
Email • gg@levinandassociates.com
Telecopier | 216.928.0016

Counsel for Amicus Curiae
Tabatha Brown

– CERTIFICATE OF COMPLIANCE –

Undersigned counsel hereby certifies, pursuant to FED. R. APP. P. 32 (g)(1), that this Amicus Brief, which is set in Times 14 point type, and was composed using Microsoft Word for Mac v. 16.17, contains 2,848 words, as calculated by that software, including footnotes but excluding tables and parts of the brief not to be counted under FED. R. APP. P. 32 (F), and thus fewer that 6,500 words, in compliance with the type volume limitation imposed by FED. R. APP. P. 29 (A)(5).

Respectfully submitted,

/s/ Raymond V. Vasvari, Jr.

RAYMOND V. VASVARI, JR.
Ohio Bar No. 0055538
VASVARI & ZIMMERMAN
1301 East Ninth Street
1100 Erieview Tower
Cleveland, Oho 44114-1844
Telephone | 216.458.5880
Email | vasvari@vasvarilaw.com
Telecopier | 216.928.0016

One of the Attorneys for
Amicus Curiae Tabatha Brown

– CERTIFICATE OF SERVICE –

This Brief of Amicus Curiae was submitted to the Clerk and lodged for filing, contingent on leave being granted, as an exhibit to the Motion for Leave to file the same filed via the Court Electronic Filing System, on Wednesday, January 9, 2019. Copies will be provided to counsel for the United States via operation of the CM | ECF system. A paper copy was mailed this day to Appellant Dennis Gallivan, Fed. Reg. No. 18969-025, F.C.I. Elkton, Post Office Box 10, Lisbon, Ohio 44432.

Respectfully submitted,

/s/ Raymond V. Vasvari, Jr.

RAYMOND V. VASVARI, JR.
Ohio Bar No. 0055538
VASVARI & ZIMMERMAN
1301 East Ninth Street
1100 Erieview Tower
Cleveland, Oho 44114-1844
Telephone | 216.458.5880
Email | vasvari@vasvarilaw.com
Telecopier | 216.928.0016

One of the Attorneys for
Amicus Curiae Tabatha Brown