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In The Supreme Court of the United States

JAHMIR CHRISTOPHER FRANK,
Petitioner

v.

GOOD SAMARITAN HOSPITAL OF CINCINNATI, OHIO; JOHN DOE, PHYSICIANS 1–5; JOHN DOE CORPORATIONS 1–5; JOHN DOE EMPLOYEES 1–5; JOHN DOE NURSES 1–10,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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February, 2024

QUESTION PRESENTED

Should the United States Court of Appeals for the Sixth Circuit have reversed the United States District Court for the Southern District of Ohio for failure to exercise its broad equitable powers under Federal Civil Rule 60(b)(6) to remedy the tortious conduct of Respondent, Good Samaritan Hospital of Cincinnati, that harmed Petitioner's lawsuit and to protect the important public interest in the maintenance of complete and accurate medical records harmed by Respondent's ongoing nonfeasance in relation to this duty.

PARTIES

1. Petitioner, Jahmir C. Frank, was born at Respondent, Good Samaritan Hospital in Cincinnati, Ohio, on July 30, 1998. Mr. Frank suffers from periventricular leukomalacia (hereinafter "PVL") as a result of medical malpractice that occurred during his delivery at Respondent Hospital.

2. Respondent, Good Samaritan Hospital, is a private teaching and specificalty health care facility in Cincinnati, Ohio.

CORPORATE DISCLOSURE STATEMENT

Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit which affirmed the district court's refusal to reopen Petitioner's medical malpractice case on equitable grounds under Federal Rule of Civil Procedure 60(b)(6) as requested by Petitioner.

OPINIONS BELOW

December 9, 2019 Opinion of the United States District Court for the Southern District of Ohio.

April 8, 2020 Opinion of the United States District Court for the Southern District of Ohio.

August 16, 2021 Opinion of the United States District Court for the Southern District of Ohio.

February 28, 2023 Opinion of the United States District Court of the Southern District of Ohio.

March 15, 2023 Opinion of the United States Court of Appeals for the Sixth Circuit.

October 11, 2023 Opinion of the United States Court of Appeals for the Sixth Circuit.

November 15, 2023 Order denying Petitioner's Request for Panel Rehearing and Rehearing En Banc Sixth Circuit Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit denying Petitioner's Request for Rehearing was entered November 15, 2023. Jurisdiction here is based on 28 U.S.C. 1254.

STATEMENT OF THE FACTS

Petitioner, Jahmir Christopher Frank, was born at Respondent, Good Samaritan Hospital on July 30, 1998. Petitioner suffers from periventricular leukomalacia ("PVL"), a permanent and debilitating brain injury caused by the malpractice of Respondent, during Petitioner's delivery. According to the deposition testimony of Respondent's General Counsel, Stephen Gracey, in 1999, Respondent adopted a twenty-one year birth record retention policy (Reproduced in Appendix I of this Petition, I7-I9) in recognition of its duty to preserve newborn medical records. Deposition of Respondent General Counsel Shephen Gracey, S.D. Ohio Case No. 1:18-cv-618-MRB, ECF DOC #61-1, PAGEID# 1024. (Emphasis added.)

Respondent knew when it adopted the above records retention policy in October 1999 that certain of Respondent's patients may have a need for birth records until 21 years following their delivery at Respondent's facility.

On April 24, 2012, Respondent learned that its independent records storage contractor, Cintas, had negligently destroyed over 20,000 newborn records in violation of Respondent's maternity and newborn

medical record retention policy. Cintas sent correspondence to Mr. Gracey and Respondent. (Reproduced in Appendix I of this petition, I5-I6). The testimony of Mr. Gracey about the events is also reproduced in Appendix I of this petition. (I3-I5).

Respondent became aware in 2012 that the maternity and newborn records of individuals born at Respondent's hospital during 1997, 1998 and 1999, had been destroyed through the negligence of Respondent and its independent contractor Cintas[1].

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[1]The negligence of Cintas was imputable to Respondent under Ohio the nondelegable duty doctrine Nondelegable duties arise in various situations that generallyfall into two categories: (1) affirmative duties that are imposed on the employer by statute, contract, franchise, charter, or common law and (2) duties imposed on the employer that arise out of the work itself because its performance creates dangers to others, i.e., inherently dangerous work. *Prosser & Keeton, The Law of Torts* (5 Ed.1984) 51 1-512, Section 71); *Main v. Flower Hosp.* (1990), 50 Ohio St.3d 251, 260-261 , 553 N.E.2d 1038, 1047-1048. If the work to be performed fits into one of these two categories, the employer may delegate the work to an independent contractor, but he cannot

However contrary to the testimony of Mr. Gracey, during his deposition testimony that "what we did do is if someone requested the records from this time frame, then we would explain we didn't have the records anymore." *Id*. (emphasis added). PAGEID #1003, on October 29, 2014.

Petitioner's parents requested Petitioner's records, records from what Mr. Gracey described "as from that timeframe." They were not advised that the records had been destroyed through the negligence of Respondent's independent contractor, Cintas. Instead Petitioner's parents were told repeatedly by Respondent that Petitioner was not born at Respondent's hospital. *See*, Affidavit of Denise R. Crawford, Case No. 1:18-cv-0618, Docket No. 61-4 PAGEID#1038.

Due to Petitioner's condition and symptoms, a medical malpractice action against Respondent was

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delegate the duty. In other words, the employer is not insulated from liability if the independent contractor's negligence results in breach of duty. See, *Pusey v. Bator,* 94 Ohio 88 3d. 275 (2002).Here, the duty to retain maternity records for 21 years arising under Ohio law and Respondent's own policy

filed initially in the Court of Common Pleas in Hamilton County, Ohio on August 12, 2026. Following extensive litigation, fomented by Respondent's hard-balled defense based on the argument that Petitioner in the absence of the medical records from his birth at Respondent's hospital, could not produce an affidavit of merit Ohio Rule of Civil Procedure 10(D)(2) requires in connection with the filing of an action for medical malpractice. Petitioner dismissed the Hamilton County case, without prejudice, and refiled in the United States District Court for the Southern District of Ohio following the decision in *Gallivan v. United States*, Case No. 18-3874, which determined Ohio R. Civ. P. 10(D)(2) affidavit of merit requirement, was not applicable in federal court.

On February 25, 2020, Petitioner moved for partial summary judgment. RE 61 Page ID #962. Petitioner sought partial summary judgment on the issue of liability. Specifically, Petitioner requested a discovery sanction due to the fact Petitioner's birth records, evidence critical to his malpractice case, through no fault of Petitioner had been destroyed due to Respondent's negligence.

Following Respondents admission that the birth records of Petitioner had been destroyed

through negligence, Respondent advised Petitioner that fetal monitoring strips related to his delivery remained available. However, upon Petitioner's request for these fetal monitoring strips, Respondent disclosed that despite the 21 year period required for retention of birth records, not only had they destroyed Petitioner's birth records, Respondent also failed to retain the proprietary software required to gain access to the Petitioner's fetal monitoring strips. RE 61-5 Page ID #1054. Upon learning that Respondent could not access the optical disc upon which the relevant fetal monitoring strips were retained, Petitioner contracted with a third party to obtain access to the fetal monitoring strips. Unfortunately, the third party also advised that by reason the nature of the disc upon which the fetal monitoring strips were located, accessing the strips is not possible. RE 61-6 Page ID #1055, Declaration of Allan Buxton.

Petitioner was advised by Dr. Augustus Parker, III a renowned physician in the realm of obstetrics and gynecology that, in the absence of either Petitioner's birth records or fetal monitoring strips, it was not possible for him to render a valid opinion concerning whether the standard of care was breached by Respondent during the delivery of

Petitioner. RE 61-7 Page ID #1058, Affidavit of Dr. August Parker, III.

Given Petitioner's total lack of culpability in relation to the destruction of his medical records or the inaccessibility of the fetal monitoring strip optical disc, as stated, Petitioner moved, as a discovery sanction, for partial summary judgment concerning the issue of whether Respondent violated the applicable standard of care during Petitioner's birth causing his periventricular leukomalacia The trial court denied the motion. RE 64 Page ID #1112. The trial court stated Respondent lacked the requisite culpable state of mind to support a discovery sanction and would not issue an adverse inference jury instruction or impose a lesser sanction of any nature.

Under Ohio law, a medical malpractice claim must satisfy four elements. A plaintiff must prove 1) the existence of a duty owed by defendant to plaintiff; 2) a breach of duty by defendant; 3) causation based on probability; and 4) damages. Galloway v. Fed. Tort Claims Act, No. 4:17-CV-1314, 2019 WL 3500935, at *3 (N.D. Ohio July 31, 2019) (quoting *Loudin v. Radiology & Imaging Servs., Inc.*, 185 Ohio App. 3d 438, 447, 2009-Ohio-6947, 924 N.E. 2d 433, at 45 (Ohio App. 9th Dist. 2009) (citing *Stinson v. England*,

69 Ohio St. 3d 451, 455, 1994-Ohio-35, 633 N.E.2d 532 (Ohio 1994))). "Proof of the recognized standards must necessarily be provided through expert testimony." *Bruni v. Tatsumi*, 46 Ohio St. 2d 127, 131-32, 346 N.E.2d 673, 677 (Ohio 1976).

Following additional discovery, Respondent moved for summary judgment. Respondent alleged that Petitioner could not satisfy the second and third medical malpractice elements. Petitioner opposed Respondent's motion with the affidavit of Dr. Jennifer Jones Hollings as to the standard of care during labor and delivery and Dr. Michael Katz as to causation. Respondent moved to strike Dr. Hollings as an expert witness (and, in turn, Dr. Katz, because Dr. Katz based his opinion on the opinion of Dr. Hollings). Respondent argued Dr. Hollings was not competent to provide an expert medical opinion, because she did not satisfy the "active-clinical-practice" requirement set forth in

Ohio[2] Evid. R. 601(B)(5)(b).(Rule is Reproduced in its entirety in Appendix H of this petition, H1-H4).

When deposed in July 2020, Dr. Hollings was employed as a Physician Clinical Reviewer for Magellan Health Care ("Magellan"), where she had been working since October 2018. (Doc. 86-1, Hollings Dep. PAGEID 1533 (11:14-25), 1542 (20:10-19); Doc. 76-1, Hollings Curriculum Vitae PAGEID 1389). Agreeing with the Hospital, the district court concluded that her then-current work did not constitute active clinical practice:

> Dr. Hollings's current work for Magellan does not constitute active clinical practice. **She does not examine or diagnose patients, order tests, or develop treatment plans. Nor does she supervise physicians who are providing direct patient care**. Rather, Dr. Hollings "consults" with medical *providers* for the purpose of either

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[2]See Fed. R. Evid. 601 ("Every person is competent to be a witness unless these rules provide otherwise. **But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.**") (emphasis added).

> approving or denying payment for testing that the providers recommend. While a financial consideration, the cost of a test-and whether a patient's health insurance will pay for it-is not "adjunctive" to its therapeutic value. Thus, Dr. Hollings's work is not an "essential link" in the "chain of services" that constitutes the "comprehensive treatment" of patients. Goldstein [v. Kean], 100 Ohio App. 3d [255,] 257, 461 N.E.2d [1350,] 1353 [Ohio App. 10th Dist. 1983)]. And, even if it were, only twenty (20%) percent of her consultations involve obstetrics and gynecology, far below the required "at least one-half" in her "field of licensure."

The district court found that the only standard-of-care (and causation) evidence properly before it was the testimony of Respondent's experts . The district court stated:

> Because Plaintiff has not produced a competent expert who will offer an admissible opinion at trial that the Hospital breached the applicable standard of care during Plaintiff's delivery-rendering unopposed Dr. Farb's opinion that the standard of care was not breached-there is no genuine dispute as to the second element that Plaintiff is required to prove. And

> because Plaintiff has not produced a competent expert who will offer an admissible opinion at trial that any alleged deviation from the standard of care actually caused Plaintiffs brain injury-rendering unopposed the opinions of Drs. Farb, Bedrick, and Chalhub that Plaintiffs brain injury is unrelated to his delivery-there is no genuine dispute as to the third element that Plaintiff is required to prove. Accordingly, the Hospital is entitled to judgment as a matter of law as to Plaintiff's medical malpractice claim.

(Doc. 106 PAGEID #1879 (emphasis added)).

The district Court dismissed Petitioner's medical malpractice action. The dismissal was affirmed by the Court of Appeals relying largely on the pretext that Petitioner's counsel had failed to employ sound litigation strategy. The Circuit totally exculpated Respondent by making Petitioner's counsel a scapegoat despite the years of litigation ,expense and effort expended to combat the deep-pocketed Respondent. No action has been taken against Respondent despite its loss of 20,000 patient records and failure to advise the patient even until this day.

STATEMENT OF THE CASE

A motion to vacate the district court's grant of summary judgment to Respondent, Good Samaritan Hospital ("Respondent"), was filed by Petitioner under Fed. R. Civ. P. 60(b)(6). ECF Docket No. 110. The motion alleged the district court misapplied Ohio R. Evid. 601 in connection with a determination that Petitioner's standard of care expert Dr. Jennifer Hollings, was not competent under Ohio law to testify in opposition to Respondent's motion for summary judgment. The district Court denied the motions. The Court of Appeals affirmed the district Court.

REASONS FOR GRANT OF PETITION

Subsequent to the district court's ruling the Ohio Supreme Court addopted the following position concerning Ohio Evidence Rule 601.

> Expert Qualifications: Active Clinical Practice Requirement
> (Evid.R. 601)
>
> A witness for whom expert designation is sought must have satisfied the active-clinical-practice requirement at the time the claim accrued, as opposed

> to at the time of trial. Considering Ohio's "discovery rule," under which a negligence claim does not "accrue" until the patient becomes aware of the alleged negligence, the Commission recommends adding that the active-clinical-practice requirement also can be satisfied at the time of the alleged negligent act.

In this case, Petitioner's claim accrued on August 12, 2016, when Plaintiff's original medical malpractice Complaint was filed against Defendant, a point in time when Dr. Hollings was engaged in active clinical practice.

Petitioner moved here for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), the catch-all provision. It is well settled, Rule 60(b)(6) "vests courts with a deep reservoir of equitable power to vacate judgments 'to achieve substantial justice' in the most 'unusual and extreme situations.'" *Zagorski v. Mays*, 907 F.3d 901, 904 (6th Cir. 2018) (quoting *Stokes v. Williams*, 475 F.3d 732, 735 (6thCir. 2007). A court presented with a Rule 60(b)(6) motion should "intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Id*. (quoting

McGuire v. Warden, 738 F.3d 741, 750 (6th Cir. 2013).

The Circuit Court Opinion failed to apply the case-by-case analysis required under Rule 60(b)(6).

1. RULE 60(b)(6) STANDARD

It was stated in *Rose v. Oakland County*:

> A district court's denial of a Rule 60(b)(6) motion is reviewed for an abuse of discretion. *Browder v. Dir., Dept of Corr. of Ill.*, 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978); *Blue Diamond Coal Co. v. Trs. of UMWA Combined Ben. Fund*, 249 F.3d 519, 524 (6th Cir. 2001). That standard is met when we are left with "a definite and firm conviction that the trial court committed a clear error of judgment." *Blue Diamond*, 249 F.3d at 524 (quoting *Davis v. Jellico Cmty. Hosp., Inc.*, 912 F.2d 129, 133 (6th Cir. 1990)). Importantly, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder*, 434 U.S. at 263 n.7.
>
> Rule 60(b) permits a court to "relieve a party or its legal representative from a final judgment, order, or proceeding" for

> enumerated reasons, including a catchall provision that encompasses "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). A party may qualify for Rule 60(b)(6) relief by demonstrating "an applicable change in decisional law, coupled with some [*11] other special circumstance[.]" *Blue Diamond*, 249 F.3d at 524. Relief is appropriate "where the interest in finality is somehow abrogated," or "when a dispositive change in decisional law occurs while a timely appeal is still pending." Id. at 528

See, *Rose*, p. 8334.

The United States Supreme Court has stated:

> The Rule's catchall category, subdivision (b)(6), permits a court to reopen a judgment for "any other reason that justifies relief." Rule 60(b) vests wide discretion in courts, but we have held that relief under Rule 60(b)(6) is available only in "extraordinary circumstances." *Gonzalez*, [**778] 545 U. S., at 535, 125 S. Ct. 2641, 162 L. Ed. 2d 480. In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to the parties" and "the risk of

> undermining the public's confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U. S. 847, 864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

Buck, P. 123.

Here there is very significant risk of undermining the public's confidence in the judicial process. Here the district court precluded the testimony of two qualified standard of care experts. The Court took no action to provide relief to Petitioner for Respondent's contractor's negligent destruction of Petitioner's birth records and Respondent's failure to retain proprietary software required to obtain access to Petitioner's fetal monitoring tracings. The Circuit Panel also ignored these important equitable considerations.

2. <u>RULE 60(b)(6) EXTRAORDINARY CIRCUMSTANCES</u>

The Sixth Circuit has stated:

> The "whole purpose" of Rule 60(b) "is to make an exception to finality:' *Gonzalez*, 545 U. S., at 529, 125 S. Ct. 2641, 162 L. Ed. 2d 480.

Under this Rule, a court may vacate a judgment for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6). This Court has stated that Rule 60(b)(6) provides relief "only in exceptional and extraordinary circumstances," which are defined as those "unusual and extreme situations where principles of equity mandate relief." *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 387 (6th Cir. 2001) (citations and emphases omitted). In addition to the requirement of exceptional circumstances, a Rule 60(b)(6) movant must also satisfy the three equitable factors required for Rule 55 relief: (1) lack of prejudice to the plaintiff; (2) a meritorious defense; and (3) whether the defendant's culpable conduct led to the judgment. *Thompson v. Am. Home Assur. Co.*, 95 F.3d 429, 433 (6th Cir. 1996). We review a district court's denial of a Rule 60(b) motion for abuse of discretion. *Jinks*, 250 F.3d at 385.

Federal Rule of Civil Procedure 60(b)(6) is a "catchall provision" providing relief from a final judgment for any reason not otherwise captured in Rule 60(b). *West v. Carpenter*, 790 F.3d 693, 696-97 (6th Cir. 2015) (citing *McGuire*, 738 F.3d at 750). Rule 60(b)(6) applies only

> in "exceptional or extraordinary circumstances where principles of equity mandate relief," id., but such circumstances "rarely occur" in the habeas context. *Sheppard v. Robinson*, 807 F.3d 815, 820 (6th Cir. 2015) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)).
>
> Rule 60(b)(6) motions necessitate "a case-by-case inquiry" in which the district court "intensively balance[s] numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *West*, 790 F.3d at 697 (quoting *McGuire*, 738 F.3d at 750).

See, *Miller v. Mays*, 879 F. 3d 691 (6th Cir. 2018).

Here the district Court misapplied Ohio law, but the Circuit Court Panel affirmed the district court nonetheless.

3. <u>OHIO LAW</u>

The district court incorrectly stated Ohio R. Evid. 601 (B)(5)(b) was not a basis for relief to Petitioner. The district court stated that Petitioner's

"claim accrued on July 30, 1998, the date of his labor and delivery." This is contrary to Ohio law.

The district court opinion wrongfully conflated when a claim "accrues" with the time that a "cause of action" accrues. The active clinical practice requirement focuses on the date the "claim" accrues, which is not as the district court suggests the same point in time when the cause of action accrues.

Under Ohio law:

> A "cause of action" is the ground which one has for relief-the substantive or positive right that has been violated-while "right of action" is the adjective or remedial right to invoke the court for redress; l or as sometimes said "the right to bring suit." In other words, a right of action is a remedial right affording redress .,for the infringement of a legal right belonging to some definite person, whereas a cause of action is the operative facts which give rise to such right of action. "Cause of action" may be defined therefore as the fact, or combination of facts, which gives rise to a right of action, and the existence of which affords a party a right to judicial interference in his behalf. Again, "cause of action" may be defined as the thing for which an action may be brought, embracing the facts

> necessary for a plaintiff to establish in order to sustain a claim for judicial relief.

See, *Travelers' Ins. Co. v. Nyers*, 59 Ohio St. 332, 52 N.E. 831 (1900) by contrast.

A "claim" accrues when it is stated in a Complaint. *Ryan v. Glenn*, 52 F.R.D. 185 (N.D. Miss 1971) defined the term claim as the aggregate of operative facts giving rise to aright enforceable in the courts. The test was followed in *Uniroyal, Inc. v. Sperberg*, 63 F.R.D. 55 S.D. New York (1973). *Id*. Petitioner's claim accrued when he first sued Respondent not when he was born as the district court suggests. R.C. 2305.113(A) refers to "the time the cause of action accrues." The clarification of Rule 601(B)(5)(b) refers to when the "claim" accrued, which is not the point in time focused upon by the district court.

Aside from wrongfully precluding the standard of care testimony of Dr. Hollings, the district court also wrongfully prohibited the testimony of Dr. August Parker III an eminently qualified standard of care expert.

An earlier Order from the Panel issued March 15, 2023 Order summarizes actions Petitioner could have taken to salvage the "expert-witness" problem.

Petitioner took some of those actions . For instance, Petitioner requested that the district court accept the testimony of another standard of care expert, eminently qualified expert Dr. Augustus Parker to testify.

Dr. Parker is a graduate of the University of Cincinnati College of Medicine. He has delivered over 8000 babies. He has testified for both plaintiffs and defendants in medical malpractice cases. He was recognized as physician of the year at Mount Carmel Hospital in Columbus in 2008.

The District Court refused to let Dr. Parker testify or file opposition to Respondent's motion for summary judgment because Dr. Parker had stated that without Petitioner's birth records or fetal monitoring tracings a standard of care opinion could not be formulated. ECF Docket # 105, PAGEID # 1852. However Petitioner later and separately requested that Dr Parker be permitted to opine as to the validity of Dr Hollings' testimony. See, ECF Docket # 92-2 . PAGEID#1744 The district court refused despite the fact Parker's testimony was probative of Hollings' correctness which Petitioner offered as an alternative to Dr Hollings. In light of the preclusion of Petitioner's eminently qualified liability expert Dr. Parker and Dr. Jennifer Hollings,

who the District Court wrongfully precluded on grounds she could not satisfy the requirements of Ohio R. Evid. 601(B)(5), relief should be accorded under Fed R. 60 because the district Court's 601(B)(5) determination was erroneous.

Dr. Parker's testimony is "other expert" testimony that the Circuit Court stated in its March 2023 Opinion that in this appeal this Court has stated "For all we know its possible that Frank's claim of medical malpractice [has] merit." The Court's statement that Mr. Frank's claim may have merit conduces in favor of equitable considerations supporting relief under Rule 60 for Mr. Frank.

Rule 60(b)(6)'s catch-all clause, which covers "any other reason that justifies relief," similarly reaches legal errors and later developments that impugn a judgment. Rule 60(b)(6) only reaches the most serious defects by requiring "extraordinary circumstances." *Gonzalez*, 545 U.S. at 536. Here, the Ohio Supreme Court has clearly articulated the proper operation of Rule 601. When a Court articulates a legal rule "the underlying right necessarily pre-exists the Court's articulation of the new rule. See, *Danforth v. Minnesota*, 552 U.S. 265, 271 (2008). Accordingly, the district court's application of Rule 601 was erroneous.

4. CHANGE IN DECISIONAL LAW ALONE NOT GROUNDS FOR RELIEF

Petitioner does not dispute the Court's statement that a change in decisional law alone may not be grounds for Rule 60(b)(6) relief, however at issue here is not a "change" in decisional law. Ohio R. Evid. 601(B)(5)(b) has not been changed. What has occurred here is information has now come to the attention of the public and Ohio judicial system that the understanding of *Celmer v. Rodgers*, 114 Ohio St. 3d 221 226, 871 N.E. 2d 557 (2007) relied upon by the district Court when it issued its ruling concerning Dr. Hollings' testimony, was simply incorrect. Decisional law has not changed. The district court failed to apply existing law correctly.

As discussed below, under the facts here, the extraordinary circumstances standard for relief under Fed. R. Civ. P. 60(b)(6) is satisfied.

In this case like *Overbee v. Van Watters & Rogers*, 765 F.2d 578 (6th Cir. 1985), you have the following additional equitable considerations:

1. Respondent admittedly destroyed Petitioner's medical records;

2. An unquestionably competent liability expert, Dr. Augustus Parker, III was precluded by the district court from providing an opinion because he stated he required Petitioner's medical records; and

3. The elimination of Dr. Hollings as a witness wrongfully deprived Petitioner of the right to have his case decided by a jury.

The above considerations qualify as "special circumstances." When added to the clarification of Rule 601 establishes that it was an abuse of discretion for the district Court to deny Petitioner's motion to vacate.

Rule 60(b)(6) "vests courts with a deep reservoir of equitable power to vacate judgments 'to achieve substantial justice' in the most 'unusual and extreme situations.'" *Zagorski v. Mays*, 907 F.3d 901, 904 (6th Cir. 2018) (quoting *Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007). A court presented with a Rule 60(b)(6) motion should "intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Id*. (quoting *McGuire v. Warden*, 738 F.3d 741, 750 (6th Cir. 2013). It was a denial of justice for the trial court to disregard the expert

testimony of Dr. Hollings given the combined impact of Respondent's loss of Petitioner's medical records and fetal monitoring strips and those losses interference with Petitioner's ability to prosecute his case against Respondent.

The Circuit Court incorrectly cites a purported lack of diligence as the basis for denying relief under Fed. R. Civ. P. 60(b)(6). The record here establishes Mr. Frank has spent over seven years fighting Respondent's use of its negligent destruction of medical records and fetal monitoring tracings and loss of over 20,000 individual medical records to increase the expense and burden of this litigation. Rather than focus on the use by Respondent of violation of its record keeping obligations to deny relief to Mr. Frank, the Circuit cites a purported lack of diligence as justification to deny 60(b)(6) relief.

Courts are vested with broad equitable powers to remedy unlawful conduct. The Supreme Court has repeatedly emphasized that courts are vested with extensive equitable powers to fashion appropriate remedies to redress unlawful conduct, such as the conduct of Respondent's here. For example, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the Supreme Court stated: Once a right and a violation have been shown, the scope of a district

court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as before impeding private claims. *Hecht Co. v. Bowles*, 321-US-321. Moreover, the Supreme Court has pointedly ruled that where "the public interest is involved. . . those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter v. Warner Holding, Co.*, 328 U.S. 395, 398 (1946). *Accord Virginian Ry. Co. v. Sys. Fed'n.* No. 40, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.") (collecting cases); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179-80 (1973) (same).

Important public interests are implicated by Respondent's unscathed status despite the violation

of the rights of thousands of patients. Respondent did not follow its own policy, failed to advise the public of its error, denied Petitioner was a patient, and adopted scorched earth litigation tactics in response to Petitioner's claim.

The district court and Circuit Court failed to apply their equitable power in the broad context necessary to further the public interest in the maintenance and integrity of accurate medical records as required under *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973)

The United States Supreme Court has stated:

> Rule 60(b)(6), is available to reopen a judgment in extraordinary circumstances, including a change in controlling law. See, *Buck v. Davis*, 580 U. S. 100, 126, 128 (2017) (concluding that the petitioner was "entitle[d] to relief under Rule 60(h)(6)" because of a change in law and intervening developments of fact); *Gonzalez v. Crosby*, 545 U. S. 524, 531 (2005) ("[A] motion might contend that a subsequent change in substantive law is a 'reason justifying relief,' Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim"); *Polites v. United States*, 364 U. S. 426, 433 (1960)

> (leaving open that a "clear and authoritative change" in the law governing judgment in a case may present extraordinary circumstances).

In this case the district court erred in its application of Ohio Evid R. 601(b)(5). The Panel's claim that appropriate diligence was not exercised is belied by the lengthy contentions and expensive litigation that Respondent has forced Mr. Frank to endure, from Respondent's 2014 denial that Mr. Frank was ever a Respondent patient, to its repeated use of its negligent destruction of medical records and fetal monitoring tracings to defeat Mr. Frank's action.

The circumstances here bring Mr. Frank's request within the ambit of Rule 60(b)(6) and traverse the unfair allegation that counsel for Mr. Frank failed to exercise appropriate diligence.

CONCLUSION

For these reasons it is respectfully requested that a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

No. 23-3275

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 15, 2023
KELLY L. STEPHENS, Clerk

JAHMIR CHRISTOPHER FRANK,
Plaintiff-Appellant,

v. ORDER

GOOD SAMARITAN HOSPITAL OF CINCINNATI, OHIO; JOHN DOE PHYSICIANS 1-5; JOHN DOE CORPORATIONS 1–5; JOHN DOE EMPLOYEES 1–5; JOHN DOE NURSES 1–10,DOCTOR HARRY NGUYEN; DOCTOR RYAN FRYMAN,
Defendants-Appellees.

BEFORE: MOORE, THAPAR, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has

requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Kelly L. Stephens
Kelly L. Stephens, Clerk

No. 23-3275

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct. 11, 2023
DEBORAH S. HUNT, Clerk

JAHMIR CHRISTOPHER FRANK, Plaintiff-Appellant, v. GOOD SAMARITAN HOSPITAL OF CINCINNATI, OHIO; JOHN DOE PHYSICIANS 1-5; JOHN DOE CORPORATIONS 1–5; JOHN DOE EMPLOYEES 1–5; JOHN DOE NURSES 1–10,DOCTOR HARRY NGUYEN; DOCTOR RYAN FRYMAN, Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO OPINION

Before: MOORE, THAPAR, and NALBANDIAN, Circuit Judges.

THAPAR, Circuit Judge. Jahmir Frank asked the district court to reopen his medical malpractice case based on a change in Ohio law. The district court declined, and Frank appeals. Because the district court didn't abuse its discretion, we affirm.

I.

Jahmir Frank suffers from a permanent brain injury. He claims that Good Samaritan, the hospital where he was born, is to blame. So, Frank sued Good Samaritan for medical malpractice under Ohio law.

To proceed with his medical-malpractice claim, Frank needed an expert to testify about the standard of care that Good Samaritan was required, but failed, to follow. *See Bruni v. Tatsumi*, 346 N.E.2d 673, 677 (Ohio 1976). To meet this requirement, Frank turned to Dr.Jennifer Hollings. But the district court held that Dr. Hollings wasn't competent to testify. Then-existing Ohio law required experts in medical-malpractice suits to devote half their professional time to clinical practice "at the time the testimony is offered at trial." *Johnson v. Abdullah*, 187 N.E.3d 463, 468 (Ohio 2021); *see* Ohio Evid. R. 601(B)(5)(b) (2021 ed.) (requiring the proposed expert to devote "at least one-half of his or her provisional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school."); *see also* Fed. R. Evid. 601 (Ohio law applies). Dr. Hollings gave up her medical practice years before Frank introduced her testimony. Thus, the district court found that she wasn't competent to testify as an expert. And because Frank didn't have another expert to testify about Good Samaritan's standard of care, the district court granted summary judgment against him.

Frank appealed, and we affirmed. *Frank v. Good Samaritan Hosp. of Cincinnati*, No. 21-3795, 2023 WL 2523297 (6th Cir. Mar. 15, 2023). Importantly, we held that

Frank forfeited any challenges to the district court's summary judgment decision, based on his "utter lack of argument" on appeal. *Id*. at *3. But while his appeal was pending, Ohio proposed a change to its law: rather than require experts to have an active clinical practice "at the time the testimony is offered," the new law would allow witnesses to testify as experts based whether they meet the active clinical practice requirement "at either the time the negligent act is alleged to have occurred or the date the claim accrued." Ohio Evid. R. 601(B)(5)(b).

In light of the proposed change, Frank asked the district court to revisit its judgment. *See* Fed. R. Civ. P. 60(b)(6). The district court declined, and Frank appeals. Ohio's proposed law has since taken effect. Ohio Evid. R. 1102(Y); *see Miles v. Cleveland Clinic Health Sys.-E. Region*, No. 112025, 2023 WL 4781308, at *3 n.4 (Ohio Ct. App. July 27, 2023).

II.

Frank faces a high bar on appeal. Civil Rule 60(b)(6) authorizes a district court to set aside its own judgments. But because finality is important, this rule applies "only in exceptional or extraordinary circumstances" where "principles of equity mandate relief." *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (citation omitted). The district court has "especially broad" discretion to deny Rule 60(b)(6) relief, so our review is limited and deferential. *See Hopper v. Euclid*

Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989).

Ohio's rule change doesn't meet this standard. Indeed, "[i]t is well established" that a change in law "is usually not, by itself, an 'extraordinary circumstance'" under Rule 60(b)(6). *Blue Diamond*, 249 F.3d at 524 (citing *Agostini v. Felton*, 521 U.S. 203, 239 (1997)); *see Gonzalez v. Crosby*, 545 U.S. 524, 537 (2005). As the district court recognized, that principle resolves Frank's request.

Frank offers two responses. First, he argues that Ohio law hasn't changed—the district court just misapplied the law. But this claim "is not cognizable under [Rule] 60(b)(6) absent exceptional circumstances." *Hopper*, 867 F.2d at 294. That's because Rule 60(b)(6) authorizes relief only for reasons that aren't addressed elsewhere in Rule 60. *Id*. And a different subsection of Rule 60—Rule 60(b)(1)—addresses mistakes of law. *Id*.

To raise his claim under Rule 60(b)(1), Frank would need to show the district court "made a substantive mistake of law" in its summary judgment order. *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002). On the record before us, Frank can't make that showing.

To begin, the district court correctly applied Ohio law. Under Ohio law then in force, Dr. Hollings couldn't testify as an expert unless she had an active clinical practice "at the time [her]testimony [wa]s offered at trial." *Johnson*, 187 N.E.3d at 468. The only exception isn't relevant here: if defendants delay trial, the trial court can find a non-practicing

witness competent if the witness maintained an active practice on the date trial was originally scheduled. *Celmer v. Rodgers*, 871 N.E.2d 557, 562 (Ohio 2007). Dr. Hollings didn't have an active clinical practice, and she hadn't for years. Thus, the district court correctly excluded her expert testimony.[1]

True, Ohio now gauges whether medical experts meet the active clinical practice requirement based on an analysis of earlier points in time. Ohio Evid. R. 601(B)(5)(b). Frank argues that this isn't a *change*, but rather confirmation that the district court's interpretation of Ohio law has been wrong all along. Yet, Ohio courts have recognized that the new law is just that: "a change." *Miles*, 2023 WL 4781308, at *3 n.4. Moreover, the district court wasn't required to predict that Ohio's law would change, and it didn't make a "substantive

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[1] To be clear, certain Ohio courts have disagreed with the district court's reasoning, finding that the rule of *Johnson* and *Celmer* was limited to the exclusion of testimony *at trial*. *See Miles*, 2023 WL 4781308, at *4 ("Essentially, the trial court prematurely determined [on summary judgment] that Dr. Harris would not be qualified or competent to testify as an expert under Evid. R. 601 'at the time of trial.' This determination was not a proper understanding or application of the rule or law as it read at the time, and thus, constitutes reversible error."). Still, we previously held that Frank forfeited any challenge to the district court's reasoning, based on his failure to argue the issue. *See, e.g., GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373–74 (6th Cir. 2007) ("[A] Rule 60(b)(6) motion is not a substitute for an appeal and, it follows, may not be invoked to resurrect a waived argument.").

mistake" by enforcing Ohio law as it then existed. *See Reyes*, 307 F.3d at 455.

Second, Frank argues that, even if the change in Ohio law isn't itself unusual, it becomes extraordinary when combined with the other facts of his case. After suing Good Samaritan, Frank discovered that a third party had destroyed his birth records years earlier. The destruction of those records prevented a competent expert from testifying in Frank's favor, so Frank argues he should get the benefit of the new rule.

For support, Frank cites *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985). There, after the plaintiffs sued, a state-court decision foreclosed one of their arguments on appeal. *Id*. at 579–80. The plaintiffs conceded the issue, but soon after, the state court overruled itself and resurrected the issue. *Id*. at 579–80. Noting it was unusual for a state court to overrule itself within a year, we granted Rule 60(b)(6) relief. *Id*. at 580. But even the rapid legal change wasn't enough: we emphasized that "the judgment was not final" when the plaintiffs moved for relief. *Id*.

No similar grounds for relief exist here. For one, we've elsewhere refused to apply *Overbee* to judgments that are already final. *Stokes v. Williams*, 475 F.3d 732, 736–37 (6th Cir. 2007) (per curiam). And here, the district court's judgment was final when Frank moved for relief.

Moreover, the last time this case was before us, we noted that Frank had several options to challenge the district court's ruling. *Frank*, 2023 WL 2523297, at *3. He didn't act

on any of them. "This lack of diligence confirms" that Rule 60(b)(6) relief isn't warranted. *See Gonzalez*, 545 U.S. at 537. Because Frank didn't act diligently to resolve his expert-witness problem, principles of equity don't "mandate" relief. *See id.; see also Blue Diamond*, 249 F.3d at 529 (noting a court should consider "all the facts" (citation omitted)). Certainly, the district court didn't abuse its discretion in declining relief.

We affirm.

No. 21-3795

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar. 15, 2023
DEBORAH S. HUNT, Clerk

JAHMIR CHRISTOPHER FRANK, Plaintiff-Appellant, v. GOOD SAMARITAN HOSPITAL OF CINCINNATI, OHIO; JOHN DOE PHYSICIANS 1-5; JOHN DOE CORPORATIONS 1–5; JOHN DOE EMPLOYEES 1–5; JOHN DOE NURSES 1–10,DOCTOR HARRY NGUYEN; DOCTOR RYAN FRYMAN, Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO OPINION

Before: MOORE, THAPAR, and NALBANDIAN, Circuit Judges.

THAPAR, Circuit Judge. Jahmir Frank sued Good Samaritan Hospital for medical malpractice. But because Good Samaritan's contractor destroyed his medical records, Frank's claim was arguably more difficult to prove. The district court denied Frank's

motion for spoliation sanctions and granted summary judgment for Good Samaritan. We affirm.

I.

Jahmir Frank suffers from a permanent and debilitating brain injury. Believing that Good Samaritan caused his injury during his birth, Frank sued Good Samaritan for medical malpractice in state court. During litigation, Frank learned that Cintas—a Good Samaritan contractor—had stored his birth records improperly and destroyed them prematurely, leaving only outdated and unreadable fetal monitoring strips.

Frank later voluntarily dismissed the state suit and filed this federal diversity action against Good Samaritan and several unnamed physicians and nurses, alleging medical malpractice, respondeat superior liability, and negligent destruction of medical records. The district court dismissed the negligence claim, since there's no tort for negligent destruction of medical records under Ohio law. *Frank v. Good Samaritan Hosp.*, No. 1:18-cv-00618 (MRB), 2019 WL 6698363 (S.D. Ohio Dec. 9, 2019). Frank appealed the dismissal under Federal Rule of Civil Procedure 54(b), and we affirmed because the "striking legal emptiness" of Frank's brief amounted to forfeiture. *Frank v. Good Samaritan Hosp.*, 843 F.

App'x 781, 782 (6th Cir. 2021). In a separate order, we also sanctioned Frank's attorney for his grossly underdeveloped briefing, which "fell short of the obligations owed by a member of the bar." *Frank v. Good Samaritan Hosp.*, 848 F. App'x 191, 192 (6th Cir. 2021) (cleaned up).

Back in the district court, Frank moved for partial summary judgment on the issue of liability in the malpractice claim. He argued that summary judgment was appropriate "as a sanction for Defendants' negligent destruction of Plaintiff's birth records and failure to preserve access to fetal monitoring strips." R. 61, Pg. ID 962. The district court denied the motion, concluding Frank failed to show that such a radical sanction was warranted. *Frank v. Good Samaritan Hosp.*, No. 1:18-cv-00618 (MRB), 2020 WL 1703596 (S.D. Ohio Apr. 8, 2020). Ultimately, the district court granted summary judgment to Good Samaritan, determining that Frank's expert witnesses' opinions weren't adequately supported, and that without them, Frank couldn'tsupport a malpractice claim. *Frank v. Good Samaritan Hosp.*, No. 1:18-cv-00618 (MRB), 2021 WL 4034173 (S.D. Ohio Sept. 3, 2021). Frank appealed, challenging both orders.

II.

A.

Frank first asks us to review the district court's denial of his motion for spoliation sanctions.[1] We review for abuse of discretion. *See Beaven v. U.S. Dep't of Just.*, 622 F.3d 540, 553 (6th Cir. 2010).

To establish spoliation, a party must prove: (1) "the party having control over the evidence had an obligation to preserve it at the time it was destroyed"; (2) the party that destroyed the evidence acted with a "culpable state of mind"; and (3) the evidence was relevant to a claim or defense. *Id.* (citation omitted). The severity of spoliation sanctions varies widely, and district courts possess wide discretion to tailor the sanction based on the degree of culpability attributed to the culpable party. *Adkins v. Wolever*, 554 F.3d 650, 652–53 (6th Cir. 2009) (en banc). Exercising that discretion, courts typically impose harsh sanctions only on those with culpability

[1] Frank's motion for partial summary judgment also stated that it challenged Good Samaritan's failure to preserve access to his fetal monitoring strips. The district court denied that part of his motion as well. *Frank*, 2020 WL 1703596 at *5. But Frank hasn't raised that issue here, so we decline to consider it. *See Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018).

greater than negligence. *Stocker v. United States*, 705 F.3d 225, 236 (6th Cir. 2013).

Here, Frank requested only the "most severe sanction possible"—partial summary judgment. *See Byrd v. Alpha Alliance Ins. Corp.*, 518 F. App'x 380, 385 (6th Cir. 2013). But the district court concluded that the defendants didn't deserve such an extreme sanction even if Frank could prove spoliation. *See Adkins*, 554 F.3d at 652.

The district court was correct. First of all, Cintas—not Good Samaritan—destroyed Frank's medical records. And the record indicated it did so as the result of improper storage, not malice. What's more, the destruction occurred four years before Frank first requested his records and six years before he filed his first lawsuit. That timeline hardly suggests a coverup. After all, if Cintas didn't even know Frank was eventually going to sue, how could it have known what evidence he would need, let alone intentionally destroy it? *See Beaven*, 622 F.3d at 553.

In the face of these facts, Frank must show that (1) Good Samaritan should have prevented Cintas from destroying his records, and (2) Good Samaritan's failure to do so justifies the gravest of all sanctions, summary judgment. He hasn't come close to carrying that burden. Frank asserted that Good Samaritan recklessly failed to instruct Cintas

properly. But Frank didn't develop any evidence of Good Samaritan's alleged recklessness before the district court, and, in turn, he couldn't cite any evidence to us. He could have, for instance, deposed Good Samaritan and Cintas workers to attempt to show Good Samaritan told Cintas to destroy the records or produced documents in which Good Samaritan instructed Cintas to store them improperly. He didn't. That left him with a bald assertion of recklessness, devoid of record support. So the district court correctly denied Frank's motion for this extremely harsh sanction.

Recognizing the radical nature of summary judgment as a sanction, prudent attorneys often request less harsh measures as alternatives. Frank's attorney didn't take that strategic step. On appeal, he claims that he requested "an adverse[-]inference jury instruction." Appellant Br. at 3. Frank's motion below didn't mention such an instruction, instead asking only "for partial summary judgment based upon an adverse inference concerning liability." R. 61, Pg. ID 965. Of course, a request for a jury instruction might have met the same fate as his motion for summary judgment since he failed to develop any evidence, other than the loss of records, supporting a sanction. *See Stocker*, 705 F.3d at 236. But, at the very least, he should have requested the full panoply of

sanctions. He didn't. Combine that with his failure to develop the record, and the district court's conclusion looks obvious: there's no basis for sanctioning Good Samaritan.

In sum, the district court didn't abuse its discretion in denying Frank's motion for spoliation sanctions. Frank asked only for the most extreme spoliation sanction available, yet he didn't provide evidence of the level of culpability needed to justify it. And though he now tries to reconstrue his motion, he didn't request any more proportionate measures, even as alternatives.

B.

Frank also challenges the district court's grant of summary judgment for Good Samaritan. The district court concluded that Frank couldn't support his malpractice claim because he presented no competent and qualified experts. It noted that Ohio law requires a plaintiff to present expert medical testimony to establish the elements of a malpractice claim. *Bruni v. Tatsumi*, 346 N.E.2d 673, 676 (Ohio 1976). To be competent, an expert must, among other things, have an active medical practice or instruct in an accredited school. Ohio Evid. R. 601(B)(5)(b). And to be qualified, an expert must base his opinion on "reliable principles and methods." Fed. R. Evid. 702(c). But Frank only produced two experts. One did

not have an active clinical practice or instruct in an accredited school, and thus, was not competent under Ohio law. See Ohio Evid. R. 601(B)(5); Fed. R. Evid. 601. The second based his opinion partly on speculation and partly on the first expert's opinion, which aren't "reliable principles and methods." Fed. R. Evid. 702(c). So neither of Frank's experts met the minimum requirements; thus, the district court properlyexcluded their testimony.

Without that testimony, Frank couldn't sustain a malpractice claim. He didn't present any other experts that could help prove his case, so the district court concluded that Good Samaritan was "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); R. 106, Pg. ID 1879.

On appeal, Frank could have challenged the district court's judgment by claiming it misstated or misapplied the law about either Ohio malpractice claims or expert competence and qualification. He could have argued that the district court should have made an exception to the normal expert rule. Or he could have argued that despite the exclusion of the two experts, he could still have proven Ohio malpractice using other expert testimony. But he did none of those things, nor did he present any other argument that the district court erred. In fact, though his statement of issues says he challenges the

summary-judgment order, neither his opening brief nor his reply brief ever mentions it again. That's true even though Good Samaritan's brief notes Frank's omission and presents a fourteen-page defense of the district court's order. To make matters worse, Frank's brief states that he is "without evidence to prove his [malpractice] claim[]," effectively conceding that summary judgment was proper. Appellant Br. at 30. As a result of the utter lack of argument about the summary-judgment order, Frank's briefing forfeits the issue. *See Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018). For this reason, we affirm the district court's summary-judgment order.

* * *

In our adversarial system, judges rely on the parties' attorneys to present evidence, develop the record, and make arguments in favor of their clients' positions. For all we know, it's possible that Frank's claims of medical malpractice and spoliation have some merit. And it's possible that—had Frank's attorney done more below and on appeal—he might have achieved a more favorable outcome for Frank. As it is, we're faced with a shocking lack of evidence, record development, and argument in favor of Frank's position. So like the district court, we don't have enough to say whether Frank's claims are meritorious. As a result, we affirm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Jahmir Christopher Frank,
Plaintiff,

vs. **Case No. 1:18-cv-00618**

Judge Michael R Barrett

The Good Samaritan Hospital
of Cincinnati, Ohio,
Defendants.

ORDER

This matter is before the Court on Plaintiff's Motion to Vacate (pursuant to Fed. R. Civ. P. 60(b)(6)) the September 3, 2021 Opinion and Order (Doc. 106) in which the undersigned: construed Defendant's Motion to Strike Dr. Jennifer Jones Hollings and Dr. Michael Katz as Plaintiff's Expert Witnesses (Doc. 87) as objections to Plaintiff's evidence under Fed. R. Civ. P. 56(c)(2); sustained Defendant's objections; and granted Defendant's Motion for Summary Judgment (Doc. 88) as to Plaintiff's medical malpractice claim. (Doc. 110, filed 02/22/2023). Defendant has filed a memorandum in

opposition (Doc. 111, filed 02/24/2023)), to which Plaintiff has replied (Doc. 113, filed 02/27/2023).[1]

Background. Plaintiff Jahmir Christopher Frank was born at Defendant Good Samaritan Hospital on July 30, 1998. (Doc. 1 PAGEID 2 (¶ 1)). Plaintiff suffers from periventricular leukomalacia ("PVL"), a permanent and debilitating brain injury that he attributes to trauma in utero during his delivery. (Id. at PAGEID 2 (¶ 2), PAGEID 7 (¶¶ 23–26)).

Under Ohio law, a medical malpractice claim must satisfy four elements. A plaintiff must prove 1) the existence of a duty owed by defendant to plaintiff; 2) a breach of duty by defendant; 3) causation based on probability; and 4) damages. *Galloway v. Fed. Tort Claims Act*, No. 4:17-CV-1314, 2019 WL 3500935, at *3 (N.D. Ohio July 31, 2019) (quoting *Loudin v. Radiology & Imaging Servs., Inc.*, 185 Ohio App. 3d 438, 447, 2009-Ohio-6947, 924 N.E. 2d 433, at ¶ 45 (Ohio App. 9th Dist. 2009) (citing *Stinson v. England*, 69 Ohio St. 3d 451, 455, 1994-Ohio-35, 633 N.E.2d 532 (Ohio 1994))). "Proof of the recognized standards

[1] Plaintiff also requested (pursuant to Fed. R. Civ. P. 6(c)(1)(C)) that the Court require Defendant to respond to his Motion to Vacate within three days and allow him one day to reply. (See Doc. 110 PAGEID 1886). Because the parties did so on their own volition, this aspect of Plaintiff's motion is **DENIED as moot**.

must necessarily be provided through expert testimony." *Bruni v. Tatsumi*, 46 Ohio St. 2d 127, 131–32, 346 N.E.2d 673, 677 (Ohio 1976).

In its summary judgment motion, the Hospital maintained that Plaintiff could not satisfy the second and third elements. Plaintiff countered with the testimony of Dr. Hollings as to the standard of care during labor and delivery and Dr. Katz as to causation. But the Hospital moved to strike Dr. Hollings as an expert witness (and, in turn, Dr. Katz, because Dr. Katz based his opinion on the opinion of Dr. Hollings). Dr. Hollings was not competent to provide an expert medical opinion, the Hospital argued, because she did not satisfy the "active-clinical-practice" requirement set forth in Ohio[2] Evid. R. 601(B)(5)(b).[3]

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[2] *See* Fed. R. Evid. 601 ("Every person is competent to be a witness unless these rules provide otherwise. But **in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.**") (emphasis added).

[3]Rule 601—titled "General Rule of Competency"—was revised most recently on July 1, 2021. As currently configured and regarding expert testimony, the rule provides:

(B) **Disqualification of witness in general**. A person is disqualified to testify as a witness when the court determines that the person is:

(5) A person giving expert testimony on the issue of liability in

any medical claim, as defined in R.C. 2305.113, asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care or treatment of any person by a physician or podiatrist, unless:

> (a) The person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state;
>
> (b) **The person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure**, or to its instruction in an accredited school and
>
> (c) The person practices in the same or a substantially similar specialty as the defendant. The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the
>
> > expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties.

Ohio Evid. R. 601(B)(5) (text emphasis added). Its purpose is "to prohibit a physician who makes [her] living as a professional witness from testifying on the liability of physicians who devote their professional time to the treatment of patients." *Celmer v. Rodgers*, 114 Ohio St. 3d 221, 226, 2007-Ohio-3697, 871 N.E.2d 557, at ¶ 23 (citing *McCrory v. State*, 67 Ohio St. 2d 99, 103–04,

When deposed in July 2020, Dr. Hollings was employed as a Physician Clinical Reviewer for Magellan Health Care ("Magellan"), where she had been working since October 2018. (Doc. 86-1, Hollings Dep. PAGEID 1533 (11:14–25), 1542 (20:10–19); Doc. 76-1, Hollings Curriculum Vitae PAGEID 1389). Agreeing with the Hospital, the undersigned concluded that her then current[4] work did not constitute active clinical practice:

> Dr. Hollings's current work for Magellan does not constitute active

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423 N.E.2d 156 (Ohio 1981)); *Johnson v. Abdullah*, 2019-Ohio-4861, 136 N.E.3d 581, at ¶ 1 (Ohio App. 1st Dist. 2019) ("Evid. R. 601[(B)(5)(b)] stems from a salutary purpose—preventing 'hired gun' professional witnesses who do not actually treat patients from pontificating on how treating doctors should have performed their jobs in medical malpractice cases."), *aff'd*, 166 Ohio St. 3d 427, 2021-Ohio 3304, 187 N.E.3d 463 (Ohio 2021).

[4] Rule 601's active-clinical-practice requirement is couched in the present tense ("devotes") and, "[g]enerally, an expert witness in a medical malpractice action must meet the requirements of Evid. R. 601[(B)(5)(b)] **at the time the testimony is offered** at trial." *Celmer v. Rodgers*, 114 Ohio St. 3d 221, 226, 2007-Ohio-3697, 871 N.E.2d 557, at ¶ 27 (Ohio 2007) (emphasis added).

clinical practice. **She does not examine or diagnose patients, order tests, or develop treatment plans. Nor does she supervise physicians who are providing direct patient care.** Rather, Dr. Hollings "consults" with medical providers for the purpose of either approving or denying payment for testing that the *providers* recommend. While a financial consideration, the cost of a test—and whether a patient's health insurance will pay for it—is not "adjunctive" to its *therapeutic* value. Thus, Dr. Hollings's work is not an "essential link" in the "chain of services" that constitutes the "comprehensive treatment" of patients. *Goldstein [v. Kean]*, 100 Ohio App. 3d [255,] 257, 461 N.E.2d [1350,] 1353 [Ohio App. 10th Dist. 1983)]. And, even if it were, only twenty (20%) percent of her consultations involve obstetrics and gynecology, far below the required "at least one-half" in her "field of licensure."

(Doc. 106 PAGEID 1868 (italics in original, bold emphasis added)). As such, she was not competent to testify as a standard-of-care expert on Plaintiff's behalf. And because Dr. Katz relied "particularly" on Dr. Hollings for his opinion on causation, it was not "the product of reliable principles and methods[]" and thus warranted exclusion under Fed. R. Evid. 702(c).

In light of these rulings, and with regard to the Hospital's summary judgment motion, the undersigned noted that the only standard-of-care (and causation) evidence properly before the Court was the testimony of the Hospital's experts:

> Because Plaintiff has not produced a competent expert who will offer an admissible opinion at trial that the Hospital breached the applicable standard of care during Plaintiff's delivery—rendering unopposed Dr. Farb's opinion that the standard of care was *not* breached—there is no genuine dispute as to the second element that Plaintiff is required to prove. And because Plaintiff has not produced a competent expert who will offer an admissible opinion at trial that any alleged deviation from the standard of care actually caused Plaintiff's brain

> injury—rendering unopposed the opinions of Drs. Farb, Bedrick, and Chalhub that Plaintiff's brain injury is *unrelated* to his delivery—there is no genuine dispute as to the third element that Plaintiff is required to prove. **Accordingly, the Hospital is entitled to judgment as a matter of law as to Plaintiff's medical malpractice claim.**

(Doc. 106 PAGEID1879 (emphasis added)). Plaintiff's notice of appeal (Doc. 107) was docketed in the United States Court of Appeals for the Sixth Circuit on September 9, 2021. *Jahmir Christopher Frank v. Good Samaritan Hospital of Cincinnati, OH, et al.*, No. 21-3795 (ECF #1). The Sixth Circuit has set the case for submission to the Court on the briefs of the parties on March 15, 2023. *Id.* (ECF #45).

The Ohio Supreme Court's decision in *Johnson v. Abdullah*. The undersigned relied (in part) on the First District Court of Appeals opinion in rendering the Court's decision that Dr. Hollings was not competent to testify under Rule 601. The Ohio Supreme Court has since affirmed the First District, holding that "a physician employed in an executive position who does not directly oversee physicians who treat patients does not satisfy the

active-clinical-practice requirement of Evid.R. 601." 166 Ohio St. 3d 427, 2021-Ohio-3304, 187 N.E.3d 463, at ¶ 1 (Ohio 2021). Particularly pertinent here, the Ohio Supreme Court (as a preliminary matter) declined to expand the *Celmer*[5] exception, which it described as "clearly confined to the particular facts of that case." *Id*. at ¶ 20. Instead, it applied the general rule identified in *Celmer* that "the witness must meet the active-clinical-practice requirement of Evid. R. 601 **at the time the testimony is offered** at trial." *Id*. at ¶ 27 (emphasis added).

Plaintiff's Rule 60(b)(6) Motion to Vacate. Because Plaintiff has filed a notice of appeal, this Court lacks jurisdiction to grant his Rule 60(b)(6) motion. *Pickens v. Howes*, 549 F.3d 377, 383 (6th Cir. 2008) (citing *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 345 n.1 (6th Cir. 1976)); *Adams v. Kijakazi*, No. 7:19-88-KKC, 2022 WL 987337, at *1 (E.D. Ky. Mar. 31, 2022). Even though divested of jurisdiction, however, the district court may "aid the appellate process" by indicating that it would grant the motion if it could. *Pickens*, 549 F.3d at 383 ("Even though the district court is without jurisdiction, it can be involved."). This "indicative ruling procedure" has since been codified (in 2009) in the Rules of Civil

[5] See supra note 4.

Procedure. Fed. R. Civ. P. 62.1(a) allows the district court three options: defer considering the Rule 60(b)(6) motion; deny it; or "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Although Plaintiff's motion fails to mention Rule 62.1, he clearly asks this Court to advise that it would be inclined to grant his Rule 60(b)(6) motion upon remand. The undersigned will continue, therefore, as if Plaintiff had followed the proper procedure.

"Federal Rule of Civil Procedure 60(b)(6) is a catchall provision that provides relief from a final judgment for any reason justifying relief not captured in the other provisions of Rule 60(b)." *West v. Carpenter*, 790 F.3d 693, 696 (6th Cir. 2015) (citing *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013)). It applies "only in exceptional or extraordinary circumstances where principles of equity **mandate** relief." *Id*. (citing *McGuire* (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990))). "Relief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. This is especially true in an application of subsection (6) of Rule 60(b)," the catchall provision. *Jones v. Bradshaw*, 46 F.4th 459, 482 (6th Cir. 2022).

Plaintiff bases his motion on "clarification" of Ohio R. Evid. 601(B)(5)(b) that the Ohio Commission on the Rules of Practice and Procedure in Ohio Courts has proposed in response to the Ohio Supreme Court's ruling in Johnson v. Abdullah.[6] An initial proposal was published on September 12, 2022, with public comment ending October 27, 2022; a revised proposal was published on January 3, 2023, with public comment ending February 17, 2023.[7] As currently drafted, that clarification provides that an expert witness must be in active clinical practice "at either the time the negligent act is alleged to have occurred or the date the claim accrued[.]"[8] Plaintiff asserts that his claim accrued on August 12, 2016—the date he filed his medical malpractice claim

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[6] The Supreme Court of Ohio & The Ohio Judicial System, Proposed Rule Amendments, Ohio Rules of Civil Procedure (1, 1.1, 4.1, 4.6, 10, 26, 30, 33, 36, 37, 39, 43, 65.1, 73, 75 and Civil Form 20), Criminal Procedure (1, 2, 10, 12, 15, 40, and 43), Evidence (101, 601, and 609), and Juvenile Procedure (1, 2, 8, 27, 34, 35, and 41) (As published for public comment (second round)), at *48–49 (https://www.supremecourt.ohio.gov/RuleAmendments/Default.aspx) (last visited 2/27/2023).

[7] Id. at *1.

[8] *Id.* at *49.

against the Hospital in the Court of Common Pleas for Hamilton County, Ohio[9]—a point in time when Dr. Hollings was engaged in active clinical practice. (Doc. 110 PAGEID 1889).

The Court is unpersuaded. First, "a change in decisional law is usually not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief." *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (citing *Agostini v. Felton*, 521 U.S. 203, 239 (1997)); *Adams*, 2022 WL 987337, at *2 (quoting *Segrist v. Bank of N.Y. Mellon*, 797 F. App'x 909, 911 (6th Cir. 2019) (citing *Blue Diamond*)). Second, there has been no change in law. There is only a *proposed* change.

The Ohio Supreme Court's decision to authorize proposed amendments for public comment "is neither an endorsement of, nor a declaration of intent to approve the proposed amendments. The purpose of the publication is to invite the judiciary, the practicing bar, and the public at large to provide thoughtful and meaningful feedback on the legal and

[9] On June 8, 2018, Plaintiff filed a notice of voluntary dismissal without prejudice pursuant to Ohio R. Civ. P. 41(a). (*See* Doc. 17-7). This civil action followed on August 31, 2018. (*See* Doc. 1).

practical effect of the proposed amendments."[10] The same is true when the court authorizes a second round of publication for public comment.[11] And, "[o]nce the second round of public comments is ended, the comments are reviewed by the Commission, which may withdraw, amend, or resubmit all or any provision of the proposed amendments to the Supreme Court for final consideration."[12] The second period for public comment ended less than two weeks ago. The undersigned has no way to know whether the Commission will choose to "withdraw, amend, or resubmit." But assuming the Commission resubmits the 601(B)(5)(b) amendment, the Ohio Supreme Court has until April 30 to decide whether to accept

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[10] The Supreme Court of Ohio & The Ohio Judicial System, Proposed Rule Amendments, Ohio Rules of Civil Procedure (1, 1.1, 4.1, 4.6, 10, 26, 30, 33, 36, 37, 39, 43, 65.1, 73, 75 and Civil Form 20), Criminal Procedure (1, 2, 10, 12, 15, 40, and 43), Evidence (101, 601, and 609), and Juvenile Procedure (1, 2, 8, 27, 34, 35, and 41) (As published for public comment (second round)), at *2 (https://www.supremecourt.ohio.gov/RuleAmendments/Default.aspx) (last visited 2/27/2023).

[11] *Id.* at *3.

[12] *Id.*

it and file with the Ohio General Assembly.[13] The General Assembly then has until June 30 "to issue a concurrent resolution of disapproval."[14] If no such resolution is issued, then, and only then, does the proposed amendment become effective on July 1, [15] which is *five months hence.*

Third, and notably, as proposed the amendment is not retroactive. Whether it becomes effective on July 1, then, is irrelevant to Plaintiff's dismissed malpractice claim. Finally, in the Court's view, Plaintiff's claim accrued on July 30, 1998, the date of his labor and delivery. Dr. Hollings wasn't yet in medical school then, much less in licensed and in active clinical practice. (See Doc. 76-1 Hollings Curriculum Vitae PAGEID 1390). Given this fact, Plaintiff's focus on August 12, 2016, while understandable, is misplaced. As a minor, of course, he received the benefit of tolling the one-year statute of limitations[16] (for medical malpractice) until he turned 18 years old (the age of majority). Ohio Rev. Code § 2305.16. But this does not change when his

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[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] Ohio Rev. Code § 2305.113(A).

claim *accrued*. "[I]f a person entitled to bring an[ ] action [under Ohio Rev. Code § 2305.113(A)] . . . is, **at the time the cause of action accrues**, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed." *Id*. (emphasis added).

As noted, Rule 62.1 gives the undersigned the option to defer Plaintiff's Rule 60(b)(6) motion, deny it, or make an indicative ruling. For the reasons just discussed, the Court will not make an indicative ruling. Nor will the Court defer ruling. Plaintiff did not argue in his appellate briefs[17] the issue of Dr. Hollings' competency but focused instead on the issue of spoliation; and the Sixth Circuit has denied[18] his recent request to reopen briefing for this purpose. Thus, Plaintiff has not "placed the same issue in

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[17] No. 21-3795 (ECF #8, #44); *see id.* (Civil Appeal Statement of Parties and Issues, ECF #6 ("**This appeal is from the district court decision that denied Appellant's motion for an adverse inference jury instruction on the issue of liability in a medical malpractice action** against Appellee Good Samaritan Hospital where the Appellee hospital negligently destroyed Appellant's medical records. The appeal is taken against the hospital and physicians.") (emphasis added)).

[18] *Id*. (ECF #52).

front of two courts at the same time" such that a deferred ruling is appropriate. *See Adams*, 2022 WL 987337, at *2 (quotations and citations omitted).

One option remains. The reasons that support the Court's decision to not make an indicative ruling also support denial of Plaintiff's Rule 60(b)(6) motion. Accordingly, Plaintiff Jahmir C. Frank's Motion to Vacate (Doc. 110) the Court's September 3, 2021 Opinion and Order (Doc. 106) is hereby **DENIED**.

IT IS SO ORDERED.

/s/ *Michael R. Barrett*
Michael R. Barrett, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Jahmir Christopher Frank,
Plaintiff,

vs. **Case No. 1:18-cv-00618**

Judge Michael R Barrett

The Good Samaritan Hospital
of Cincinnati, Ohio,
Defendants.

OPINION AND ORDER

This matter is before the Court on Defendant's Motion to Strike the Opinions of Dr. Augustus G. Parker, III, M.D. (Docs. 97, 99, 102).

I. BACKGROUND

Allegations within the Complaint. Plaintiff Jahmir Christopher Frank was born at Defendant Good Samaritan Hospital on July 30, 1998. (Doc. 1 PAGEID 2 (¶ 1)). Plaintiff suffers from periventricular leukomalacia ("PVL"), a permanent and debilitating brain injury that he attributes to

trauma in utero during his delivery. (*Id*. at PAGEID 2 (¶ 2), PAGEID 7 (¶¶ 23–26)). His "Medical Malpractice Complaint with Class Allegations for Negligent Destruction of Medical Records" set forth three causes of action: medical malpractice, respondeat superior, and negligence, specifically the negligent destruction of medical records. (Id.).[1]

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[1] Plaintiff originally filed suit in the Court of Common Pleas for Hamilton County, Ohio on August 12, 2016, suing the Hospital for medical malpractice. (*See* Doc. 17-3). Upon learning that his birth records were negligently destroyed by a third party—Cintas—he amended his complaint in state court to add an additional cause of action for "spoliation of evidence." (*See* Doc. 17-4). Specifically, Plaintiff alleged that, following his "improper delivery," the Hospital was "aware that litigation for medical malpractice was probable." (*Id*. PAGEID 172). He further alleged that his birth records were "lost or destroyed due to the willful acts of [the Hospital] in not assuring retention of these crucial documents despite actual knowledge that litigation was probable" and that the Hospital's failure to retain the records "was calculated to disrupt" his suit for medical malpractice. (*Id*. PAGEID 173 (¶¶ 32, 33)). The Hospital filed a motion for partial summary judgment with respect to this new cause of action, which the state court judge granted on May 16, 2018. (*See* Doc. 17-5). The court found that Plaintiff "failed to provide any evidence showing that: 1) Defendants had any knowledge of pending or probable litigation; 2) Defendants willfully destroyed documents; or 3) that there was willful destruction of evidence designed to disrupt Plaintiff's case." (*Id*.).

Motion practice to date. This Court granted the Hospital's motion to dismiss Plaintiff's negligence cause of action on December 9, 2019. (Doc. 52). And

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Defendant represents that, on June 7, 2018, the state court judge ordered the remainder of Plaintiff's amended complaint be dismissed "[i]n light of Plaintiff's failure to identify an expert who would testify, or was qualified to testify, that anyone at the Defendant hospital breached any applicable standard of care during the labor and delivery of the Plaintiff[.]" (Doc. 17 PAGEID 141; *see* Doc. 42 PAGEID 783–84, Doc. 63 PAGEID 1067–68, Doc. 88 PAGEID 1657–58). But before the court journalized its ruling, the next day, June 8, 2018, Plaintiff filed a notice of voluntary dismissal without prejudice pursuant to Ohio Civ. R. 41(a). (*See* Doc. 17-7). Plaintiff's counsel confirms this sequence of events. (*See* Doc. 25 PAGEID 580 ("In the litigation in the Court of Common Pleas, Hamilton County, negotiations between Plaintiff and Defendants resulted in the creation of the Agreed Protective Order. In fact, in anticipation to engaging in the procedures set forth in the Agreed Protective Order, Defendants brought the disc to a hearing, preparing to turn it over to undersigned counsel. However, **at the hearing, Judge Jodi Luebbers** ("Judge Luebbers") **granted Defendants' Motion for Summary [J]udgment on the basis that no adequate affidavit of merit had been filed** (because Plaintiff had no delivery records and no fetal monitor strips). **Prior to the order being journalized, the undersigned counsel filed a Rule 41(a) notice of dismissal without prejudice.**") (emphases added)).

Invoking diversity jurisdiction, (*see* Doc. 1 PAGEID 5 (¶ 11)), Plaintiff filed suit in the Southern District of Ohio on August 31, 2018.

because Plaintiff's class action allegations were supported solely by the dismissed negligence cause of action, the undersigned *sua sponte* denied Plaintiff's pending motion for class certification on December 17, 2019. (*See* Doc. 53).[2]

This Court also denied Plaintiff's motion for partial summary judgment (Doc. 61) against the Hospital on the issue of liability on April 8, 2020. (*See* Doc. 64). In support of his motion, Plaintiff offered the opinion testimony of Augustus G. Parker III, M.D., a practicing physician in the field of Obstetrics and Gynecology, who stated, "It is not possible to render a standard of care opinion without reviewing either the birth records of the delivery, fetal monitoring strips, or both." (Doc. 61-7, Parker Aff. PAGEID 1057 (¶ 1), 1058 (¶ 7)).[3] Because he played

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[2] At Plaintiff's request, the Court concomitantly directed entry of a final judgment as to his negligence cause of action pursuant to Fed. R. Civ. P. 54(b). (Doc. 52 PAGEID 933–35). Plaintiff's appeal was dismissed for want of prosecution by the Sixth Circuit Court of Appeals on January 24, 2020 (Doc. 59) and his motion to reinstate was later denied on February 27, 2020 (Doc. 62). Plaintiff's second motion to reinstate was granted on July 10, 2020. (Doc. 81). The Sixth Circuit eventually affirmed the dismissal of Plaintiff's negligence cause of action on April 15, 2021. (Doc. 103).

[3] An electronic copy of Plaintiff's fetal monitoring strips remains, but the data cannot be accessed because the technology

no role in the destruction of his medical records, and because his expert testified that a standard of care opinion could not be rendered without them, Plaintiff argued that he was entitled to judgment as a matter of law on the issue of liability. That is, Plaintiff asked the Court for judgment as a matter of law that the Hospital violated the applicable standard of care during his birth, causing his brain injury, leaving only damages to be decided by a jury. The Court concluded that this relief was inappropriate. A spoliation sanction was not warranted because Plaintiff failed to establish either that the Hospital had an obligation to preserve his medical records or a culpable state of mind. (Doc. 64 PAGEID 1115–21). And because Plaintiff offered no proof of intent, a sanction under Fed. R. Civ. P. 37(e) was not warranted either. (*Id*. PAGEID 1121–22).

Remaining for resolution is Plaintiff's individual medical malpractice claim against the Hospital.

Plaintiff's expert disclosures. In compliance with the Court's April 17, 2020 Amended Calendar Order (Doc. 66), Plaintiff disclosed four experts on May 29, 2020: Jennifer Jones Hollings, M.D.

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is outdated. (*See* Doc. 61-5, Greenberg Aff. PAGEID 1054 (¶ 5); Doc. 61-6, Buxton Aff. at PAGEID 1057 (¶ 18)).

(standard of care); Michael D. Katz, M.D. (causation); William T. Baldwin, Jr., Ph.D. (economist regarding damages); and Sharon Brown Lane, MRC, CRC, QRC (vocational rehabilitation consultant regarding employability). (*See* Doc. 76). Augustus G. Parker III, M.D. was not disclosed as an expert.

Summary of pending motions. Three separate but related defense motions are pending in this case. Defendant has moved to strike the testimony of two of Plaintiff's expert witnesses, Drs. Hollings and Katz, under federal and state evidence rules. (Docs. 87, 96). Defendant also has moved for summary judgment on Plaintiff's medical malpractice claim, maintaining that Plaintiff cannot produce a competent expert witness who will offer an admissible opinion at trialthat it breached the applicable standard of care during Plaintiff's delivery or that any alleged deviation from the standard of care actually caused Plaintiff's claimed injury (PVL). (Docs. 88, 95). Plaintiff opposes both of these motions (Docs. 92, 93) and counters with a second affidavit from Dr. Parker (Docs. 92-2, 93-2), who opines, among other things, that Dr. Hollings is a competent expert. In response, Defendant has moved to strike these most recent opinions of Dr. Parker, especially as to Dr. Hollings. (Docs. 97, 102). Plaintiff opposes this motion as well. (Doc. 99). For the reasons that

follow, the Court will grant Defendant's motion regarding Dr. Parker.

II. LAW AND ANALYSIS

Ohio Evid. R. 601. Rule 601 was revised on July 1, 2020 and most recently on July 1, 2021. As currently configured and regarding expert testimony,[4] the rule provides:

> A person giving expert testimony on the issue of liability in any medical claim, as defined in R.C. 2305.113, asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care or treatment of any

[4] Prior to the July 1, 2020 amendment, expert witness competency requirements were set forth in subdivision (D) of Ohio Evid. R. 601. After the July 1, 2020 amendment, they appeared in subdivision (E). After the most recent amendment on July 1, 2021, they appear in subdivision (B). *See* https://www.supremecourt.ohio.gov/ruleamendments/documents/Online%20Posting%20-%20Final%20Rules%20(7.1.21).pdf ("Following the enactment of amended Evid.R. 601, it was discovered that the rule was organized in such a way as to be confusing. This proposed amendment is intended to clarify and simplify the numbering and lettering of the rule's subsections.") (last visited 8/13/2021).

person by a physician or podiatrist, unless:

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

(b) The person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school and

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

Ohio Evid. R. 601(B)(5) (emphasis added). Rule 601 does not define "active clinical practice." This omission "leav[es] courts to struggle with this somewhat elusive requirement when evaluating the competency of medical experts." *Johnson v. Abdullah*, 2019-Ohio-4861, 136 N.E.3d 581, 587, at ¶ 12 (Ohio Ct. App. 2019), *appeal accepted for review*, 158 Ohio St. 3d 1511, 2020-Ohio-2815, 144 N.E.3d 462. Dr. Parker's September 23, 2020 affidavit. Two affidavits from Dr. Parker are now in the record. The first, dated May 17, 2018, was originally tendered by Plaintiff in the state court litigation[5] in support of his opposition to Defendant's renewed motion to dismiss. (See, e.g., Doc. 61-7 PAGEID 1058 (caption)). Plaintiff has since relied on Dr. Parker's May 17, 2018 affidavit in at least six separate filings in this case, including, as previously noted, in support of his motion for partial summary judgment.[6] In it, recall,

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[5] (*See supra* n.1).

[6] (See Motion of Plaintiff to Enlarge Time for Filing an Affidavit of Merit (Doc. 3 PAGEID 44 & Doc. 3-3); (Second) Motion of Plaintiff to Enlarge Time for Filing an Affidavit of Merit (Doc. 11 PAGEID 92 & Doc. 11-3); (Third) Motion of Plaintiff to Enlarge Time for Filing an Affidavit of Merit (Doc. 22 PAGEID 552 & Doc. 22-4); Plaintiff's Motion to Compel Defendants to Comply with Agreed Protective Order and Reply to Defendants Good Samaritan Hospital Foundation of

Dr. Parker testifies that it is "not possible" to render a standard of care opinion "without reviewing either the birth records of the delivery, fetal monitoring strips, or both." (*Id*. PAGEID 1057 (¶ 1), 1058 (¶ 7)). Two years later, however, Plaintiff located an expert—Dr. Hollings—willing to do just that.

As noted, Defendant has moved to strike Dr. Hollings's expert report and exclude her testimony. Defendant argues, in part,[7] that Dr. Hollings is not competent to provide an expert medical opinion

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Cincinnati, Inc. and the Good Samaritan Hospital of Cincinnati's Memorandum in Opposition to Plaintiff's (Third) Motion for an Enlargement of Time for Filing an Affidavit of Merit (Doc. 25 PAGEID 580–81 & Doc. 25-2); Response to May 10, 2019 Order (Doc. 41 PAGEID 740 & Doc. 41-6); Motion of Plaintiff Jahmir C. Frank for Partial Summary Judgment (Doc. 61 PAGEID 964, 975 & Doc. 61-7)).

To place these filings in context, Ohio Civ. R. 10(D)(2) requires a plaintiff alleging medical negligence to include a medical professional's affidavit stating that the claim has merit. An "affidavit of merit" typically accompanies the complaint, but, upon motion, the time for filing one may be extended. During the course of this litigation, the Sixth Circuit ruled that Ohio Civ. R. 10(D)(2) does not apply to malpractice claims filed in federal court. *Gallivan v. United States*, 943 F.3d 291 (6th Cir. 2019).

[7] Defendant also argues that Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) preclude admission of her opinion because it is unreliable. (*See* Doc. 87 PAGEID 1649–51).

because she does not satisfy the "active clinical practice" requirement set forth in Ohio Evid. R. 601(B)(5)(b). (*See* Doc. 87 PAGEID 1642–49). Dr. Parker's second affidavit, dated September 23, 2020, speaks to this issue:

> To begin, **the current activity of Dr. Hollings in her role as a physician clinical reviewer for Magellan Health Care is the active practice of medicine**. Physicians actively engaged in the treatment of patients rely heavily on the advice and judgment provided by organizations such as Magellan. This is particularly true in relation to physicians located in remote areas.

(Doc. 92-2, Parker Aff. PAGEID 1744–45 (¶ 8) (emphasis added)).[8] Defendant moves to strike Dr.

[8] Although captioned as in opposition to Defendant's summary judgment motion, Dr. Parker's affidavit was first filed as an attachment to Plaintiff's memorandum opposing Defendant's motion to strike Drs. Hollings and Katz as expert witnesses. (*See* Doc. 92-2). As noted, it is also filed as an attachment to Plaintiff's memorandum opposing summary judgment. (*See* Doc. 93-2).

Parker's second affidavit for two reasons. First, Plaintiff did not disclose Dr. Parker as an expert (either as to Dr. Hollings's professional qualifications or as to the standard of care)[9] in violation of Fed. R. Civ. P. 26(a)(2)(B). (Doc. 97). Second, Dr. Parker's opinion, as to whether Dr. Hollings satisfies the "active clinical practice" requirement set forth in Ohio Evid. R. 601(B)(5)(b), is a legal conclusion without foundation. (*Id*.).

Plaintiff concedes, as he must, that he did not designate Dr. Parker as an expert. (Doc. 99 PAGEID 1833). But he argues that "it was [Defendant], not Plaintiff that introduced and thereby opened the door to Dr. Parker's testimony." (*Id*.). "[Defendant] brought Dr. Parker's opinion into this dispute and relied upon [its] interpretation of his testimony in support of [its pending summary judgment] motion." (*Id*.). It would be "illogical and unfair" for Defendant to introduce Dr. Parker's 2018 affidavit and then "endeavor to strike" Dr. Parker's 2020 affidavit, which provides an "explanation" of his 2018 testimony. (*Id*.). "Plaintiff did not bring Dr. Parker [ ] into this stage of the dispute until it because necessary to rebut [Defendant's] perversion of Dr. Parker's views." (*Id*. PAGEID 1834). Alternatively,

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[9] (*See* Doc. 76).

Plaintiff moves to add Dr. Parker as an expert "inasmuch as [Defendant] itself has attested to his qualifications in [its] motion." (*Id.*).

Plaintiff's fairness argument rings hollow given the multiple times he himself has relied on Dr. Parker's May 17, 2018 affidavit.[10] And, at this summary judgment "stage" of the dispute, Defendant has every reason to favorably cite Dr. Parker's 2018 testimony for the same succinct proposition that Plaintiff has all along: without reviewing the birth records of the delivery and/or the fetal monitoring strips, it is *not possible to render an obstetrics standard of care opinion*. Plaintiff's accusation notwithstanding, Defendant has not distorted Dr. Parker's 2018 testimony. Supposing it had, however, the civil rules allow Plaintiff the opportunity to argue the point, but not to walk back the testimony with a second affidavit.[11]

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[10] (*See supra* n.7).

[11] What Plaintiff calls an "explanation" is an obvious about-face. Dr. Parker effectively recants his 2018 testimony:

> I have [ ] reviewed the opinions of [experts] Drs. Bedrick, Chalhub, Farb and Hollings. Although I have stated previously that under ideal circumstances I would prefer to have the ability to review the birth records and fetal monitoring strips in connection with

Because Plaintiff did not timely designate Dr. Parker as an expert under Fed. R. Civ. P. 26(a)(2)(A), (D) or provide a written report that complies with the requirements set forth in Fed. R. Civ. P. 26(a)(2)(B), Defendant's motion to strike the September 23, 2020 affidavit, as a sanction under Fed. R. Civ. P. 37(a)(3)(A)[12] will be granted. Further, the Court will not permit Plaintiff to belatedly add Dr. Parker, known to him since at least 2018, as an expert; his

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> Jahmir Frank's birth in order to render an opinion concerning whether negligence occurred during Jamir's delivery, given the unavailability of these records, the opinion of Dr. Hollings is more likely than that of Drs. Bedrick, Chalhub and Farb.
>
> In the absence of medical records, given that the medical records were destroyed through no fault of the patient, it is my view based on the entire record listed above that it is more likely than not that Mr. Frank's periventricular leukomalacia occurred as described by Dr. Hollings than in the manner described by Drs. Bedrick, Chalhub or Farb.

(Doc. 92-2, Parker Aff. PAGEID 1745 (¶¶ 9, 10)).

[12] "If a party fails to make a disclosure required by Rule 26(a), any other party may move . . . for appropriate sanctions." Fed. R. Civ. P. 37(a)(3)(A).

"alternative" motion to do so is therefore denied.

Plaintiff does not answer Defendant's second argument, equally valid, that Dr. Parker's "active clinical practice" opinion is a legal conclusion without foundation. It is not predicated on a discussion with Dr. Hollings about the tasks she performs as a physician clinical reviewer for Magellan Health. Also, Dr. Parker does not testify that he regularly holds himself out as an expert who renders opinions regarding physicians meeting the requirements of Ohio Evid. R. 601(B)(5)(b) or who regularly engages in the practice of credentialing or reviewing the qualifications of those physicians who may provide expert testimony. (*See* Doc. 97 PAGEID 1827–28, Doc. 102 PAGEID 1841). Further, it is well-settled that the Court bears ultimate responsibility to decide witness competency under Fed. R. Evid. 601, *see Bock v. Univ. of Tenn. Med. Group, Inc.*, 471 F. App'x 459, 461–62 (6th Cir. 2012) (following *Legg v. Chopra*, 286 F.3d 286, 291 (6th Cir. 2002)), and Plaintiff offers no authority for the proposition that Dr. Parker can appropriate this role.

III. CONCLUSION

Defendant's Motion to Strike Opinions of Dr. Augustus G. Parker, III, M.D. (Doc. 97) is hereby **GRANTED**. The Court will not consider Dr. Parker's September 23, 2020 affidavit when deciding Defendant's motion to strike Drs. Hollings and Katz as Plaintiff's expert witnesses or Defendant's summary judgment[13] motion.

IT IS SO ORDERED.

/s/ *Michael R. Barrett*
Michael R. Barrett, Judge
United States District Court

[13] *See* Fed. R. Civ. P. 56(c)(2), (4).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Jahmir Christopher Frank,
Plaintiff,

vs. **Case No. 1:18-cv-00618**

Judge Michael R Barrett

The Good Samaritan Hospital of Cincinnati, Ohio,
Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the Court on the Motion of Plaintiff Jahmir C. Frank for Partial Summary Judgment. (Doc. 61). Remaining Defendant The Good Samaritan Hospital of Cincinnati, Ohio[1] has filed a

[1] The memorandum in opposition actually is filed on behalf of both the Hospital and Defendant Good Samaritan Hospital Foundation of Cincinnati, Inc. Plaintiff has abandoned his claims against the Foundation, however. (See Minute Entry dated 11/14/2019). The Court notes that, regarding his remaining medical malpractice claim, Plaintiff also sues John

memorandum in opposition.[2] (Doc. 63). Plaintiff did not file a reply. For the reasons that follow, Plaintiff's Motion will be DENIED.

I. BACKGROUND

For purposes of deciding the questions presented, the Court understands the following facts to be uncontested. The parties will recognize that they are largely the same facts that the Court accepted as true for purposes of deciding the Hospital's motion to dismiss Plaintiff's third cause of action for negligence. (*See* 12/09/2019 Order, Doc. 52 at PageID 925–27).

A. Plaintiff's State Court Litigation

Plaintiff was born at Good Samaritan Hospital on July 30, 1998. (Doc. 1 at PageID 2 (¶ 1)). He suffers from periventricular leukomalacia ("PVL"), a

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Doe Physicians Numbers 1-5, John Doe Corporations Numbers 1-5, John Doe Employees Numbers 1-5, and John Doe Nurses Numbers 1-5. (See Doc. 1 at PageID 1–2 (Caption)).

[2] Although requested by the Hospital, the Court determines that oral argument would not be helpful in resolving the questions presented in Plaintiff's Motion. See S.D. Ohio Civ. R. 7.1(b)(2).

permanent and debilitating brain injury that he attributes to trauma in utero during his delivery. (*Id*. at PageID 2 (¶ 2), PageID 7 (¶¶ 23–26)). Plaintiff filed suit in the Court of Common Pleas for Hamilton County, Ohio on August 12, 2016—presumably once he turned 18 years old—suing the Hospital for medical malpractice. (*See* Doc. 17-3). Upon learning that his birth records were negligently destroyed by a third party—Cintas[3]—he amended his complaint in state court on November 2, 2017 to add an additional cause of action for "spoliation of evidence." (*See* Doc. 17-4). Specifically, Plaintiff alleged that, following his "improper delivery," the Hospital was "aware that litigation for medical malpractice was probable." (*Id*. at PageID 172). He further alleged that his birth records were "lost or destroyed due to the willful acts of [the Hospital] in not assuring retention of these crucial documents despite actual knowledge that litigation was probable" and that the Hospital's failure to retain the records "was calculated to disrupt" his suit for medical malpractice. (*Id*. at PageID 173 (¶¶ 32, 33)). The Hospital filed a motion for partial summary judgment with respect to this new cause of action, which the state court judge

[3] Plaintiff's birth records were negligently destroyed in 2010 by Cintas Corporation No. 2, a contractor hired by the Hospital to store medical records. (Doc. 1 at PageID 2 (¶ 1); Doc. 61-2).

granted on May 16, 2018. (*See* Doc. 17-5). The court found that Plaintiff "failed to provide any evidence showing that: 1) Defendants had any knowledge of pending or probable litigation; 2) Defendants willfully destroyed documents; or 3) that there was willful destruction of evidence designed to disrupt Plaintiff's case." (*Id.*). Not long thereafter, on June 8, 2018, Plaintiff filed a notice of voluntary dismissal without prejudice pursuant to Ohio R. Civ. P. 41(a). (S*ee* Doc. 17-7).

B. Plaintiff's Federal Court Litigation

Plaintiff filed his "Medical Malpractice Complaint with Class Allegations for Negligent Destruction of Medical Records" here in the Southern District of Ohio on August 31, 2018. (Doc. 1). In it, he set forth three causes of action: medical malpractice, respondeat superior, and negligence. (*Id.*). Specific to his third cause of action, he contended that the Hospital "was subject under the American Medical Association Code of Ethics to a nondelegable duty to manage medical records appropriately." (*Id.* at PageID 9 (¶ 38)). He contended further that it is "a violation of Ohio law for any physician to violate any provision" of said Code of Ethics, citing Ohio Rev. Code § 4731.22(B)(18). (*Id.* (¶ 39)). The "provision"

violated, according to Plaintiff, is Opinion 3.3.1, which states that a physician must "retain[ ] old records against possible future need" and to "[u]se medical considerations to determine how long to keep records." (Doc. 1 at PageID 10 (¶ 40)). Plaintiff also quoted from the Hospital's record retention policy, which states that "[m]aternity and newborn records will be kept for a period of twenty-one (21) years[,]" and that all records will be "retained for a period of time consistent with the state and federal laws and the standards of the health care industry." (*Id*. at PageID 11 (¶ 41)).

With this as background, Plaintiff alleged that the Hospital had a duty under Ohio law to retain birth records "for at least the length of time of the statute of limitations for medical malpractice claims, 21 years in the case of a minor." (*Id*. at PageID 13 (¶ 46)). And, because its contractor Cintas "unintentionally" destroyed the records in 2010, when Plaintiff would have been only 12 years old, the Hospital "is liable to Plaintiff, and members of the putative class, in compensatory damages, punitive damages, interest and attorneys fees." (*Id*. at PageID 14 (¶ 52)).

1. Plaintiff's Third Cause of Action is Dismissed

This Court granted the Hospital's motion to dismiss Plaintiff's third cause of action on December 9, 2019. (Doc. 52). The analysis was straightforward. The Court noted that Plaintiff's third cause of action specifically alleged negligent destruction of medical records, which was fatal to Plaintiff proceeding further. (*Id*. at PageID 928). Ohio clearly recognizes the tort of spoliation of evidence, which, as an essential element, requires proof of intent. (*Id*. (*citing McGuire v. Draper, Hollenbaugh and Briscoe Co., L.P.A.*, No. 01CA21, 2002-Ohio-6170, at ¶¶ 75–77, 2002 WL 31521750, at *12 (Ohio App. 4th Dist. Nov. 4, 2002)). But all of Plaintiff's references in his class action complaint were to the Hospital's—or third-party Cintas'—negligence. (*Id*. at 929). Dismissal, accordingly, was warranted for failure to state a claim under which relief can be granted under Ohio law. (*Id*. at PageID 930). And because Plaintiff's class action allegations were supported solely by his third cause of action, now dismissed, the undersigned

sua sponte denied Plaintiff's pending motion for class certification on December 17, 2019. (See Doc. 53).[4]

2. Plaintiff's Pending Motion for Partial Summary Judgment

As indicated, there is no factual dispute regarding the destruction of the birth records. Plaintiff's birth records, along with all the Mom and Baby charts for the period 1997-1999,[5] were unintentionally destroyed in 2010, because they were housed in the same cartons with adult in-patient charts. (See Doc. 61-2 at PageID 1036; Doc. 17-2 at PageID 155). The Hospital learned in April 2012 that the records had been destroyed. (*Id*.) Plaintiff's stepmother first requested the records on October 29, 2014, when Plaintiff was a minor. (*See* Doc. 61-4 at

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[4] At Plaintiff's request, the Court concomitantly directed entry of a final judgment as to his third cause of action pursuant to Fed. R. Civ. P. 54(b). (Doc. 52 at PageID 933–35). Plaintiff's appeal was dismissed for want of prosecution by the Sixth Circuit Court of Appeals on January 24, 2020 (Doc. 59), and his motion to reinstate was later denied on February 27, 2020 (Doc. 62).

[5] On "average" the Hospital performs 8,500 to 9,000 deliveries per year. (Doc. 61-1, Gracey Dep. at PageID 1002 (26:17–24)).

PageID 1038 (¶¶ 1,7); Doc. 41-1 at PageID 744 (¶¶ 1, 7)). Plaintiff's counsel was notified on January 25, 2017—in the course of the state court litigation—that the records had been destroyed and under what circumstances. (Docs. 61-3, 41-2).

There is also no factual dispute regarding the inaccessibility of the fetal monitoring strips related to Plaintiff's birth. An electronic copy remains, but the Hospital "no longer maintains the proprietary software/technology compatible with the data written on this disk and all efforts to retrieve the data have been unsuccessful as a result." (Doc. 61-5, Greenberg Aff. at PageID 1054 (¶ 5)). Plaintiff contracted with a third-party forensic examiner, SecureData, which ultimately advised, "it is unlikely that these files can be successfully viewed or converted into a modern format." (Doc. 61-6, Buxton Aff. at PageID 1057 (¶ 18)).[6]

Plaintiff offers the opinion testimony of Augustus G. Parker III, M.D., a practicing physician in the field of Obstetrics and Gynecology, who states, "It is not possible to render a standard of care opinion without reviewing either the birth records of the

[6] To date, SecureData retains possession of this electronic copy. (Doc. 63-6).

delivery, fetal monitoring strips, or both." (Doc. 61-7, Parker Aff. at PageID 1057 (¶ 1), 1058 (¶ 7)). Hence, given his "total lack of culpability in relation to the destruction of his medical records or the inaccessibility of the fetal monitoring strip optical disc," Plaintiff asks this Court—as a discovery sanction—for partial summary judgment on the issue of liability. That is, Plaintiff asks this Court for judgment as a matter of law that the Hospital violated the applicable standard of care during his birth, causing his brain injury.

II. LEGAL STANDARD

Although a grant of summary judgment is not a substitute for trial, it is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see LaPointe v. United Autoworkers Loc. 600*, 8 F.3d 376, 378 (6th Cir. 1993).

The parties, and this Court, are well-familiar with the standard for summary judgment. As previously noted, the material facts at bar—surrounding the destruction of Plaintiff's medical records and the inaccessibility of the electronic copy of his fetal monitoring strips—are not in dispute. What is in dispute is whether these facts merit a sanction of spoliation against the Hospital as to the ultimate issue of liability, leaving only damages to be decided by a jury.

III. ANALYSIS

The parties agree that federal law governs the issue of spoliation of evidence. *See Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009). They further agree that a spoliation sanction is warranted only when "(1) [ ] the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) [ ] the records were destroyed 'with a culpable state of mind'; and (3) [ ] the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 553 (6th Cir. 2010) (citation and quotation omitted). The party seeking the sanction bears the burden of proof. (*Id.*).

An obligation to preserve evidence may arise "when a party should have known that the evidence may be relevant to future litigation." *Id*. "[B]ut, if there was 'no notice of pending litigation, the destruction of evidence does not point to consciousness of a weak case' and intentional destruction." *Id*. at 553–54 (citing *Joostberns v. United Parcel Servs., Inc.*, 166 F. App'x 783, 797 (6th Cir. 2006)). Here the records were destroyed by contractor Cintas in 2010, nearly 12 years after Plaintiff was born, four years before his stepmother first requested them in 2014, and *six years before* being served with the August 12, 2016 complaint filed in state court. (*See* Doc. 61-1, Gracey Dep. at PageID 1008 (32:10–15) ("Q. Okay. When was the first time the hospital received notice of a potential lawsuit relative to the 1998 delivery and birth of Jahmir Frank? A. When we received the lawsuit in 2016.")). This timeline does *not* suggest an obligation to preserve. *See Ross v. Am. Red Cross*, 567 F. App'x 296, 302–03 (6th Cir. 2014) (obligation element not met when Red Cross lost relevant medical record two months before notice of potential litigation); *see also Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 568–69 (6th Cir. 2015) (obligation element not met when public employer either intentionally destroyed or negligently lost documents some five

years prior to receiving notice of potential litigation) (citing *Ross*).

Reminiscent of the facts that underpinned his since-dismissed third cause of action, Plaintiff maintains that the Hospital was under a statutory obligation to adhere to the American Medical Association Code of Ethics, which, in Opinion 3.3.1, states that "physicians have an ethical obligation to manage medical records appropriately." (Doc. 61 at PageID 970–74 (citing Ohio Rev. Code § 4731.22(B)(18)). This argument is unavailing. Section 4731.22(B)(18)[7] entitles the Ohio State Medical Board

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[7] That statutory provision reads as follows:

> (B) The [state medical] board, by an affirmative vote of not fewer than six members, shall, to the extent permitted by law, limit, revoke, or suspend a license or certificate to practice or certificate to recommend, refuse to review a license or certificate, refuse to reinstate a license or certificate, or reprimand or place on probation the holder of a license or certificate for one or more of the following reasons:
>
> . . . .
>
> (18) Subject to section 4731.226 of the Revised Code, violation of any provision of a code of ethics of the American medical association, the American osteopathic association, the American podiatric medical association, or any other national professional organizations that the board specifies by rule. . . .

to take various actions against a health care provider for failing to adhere to, among others, the American Medical Association Code of Ethics, but it does not create a private right of action. And Plaintiff cites only to an ethics *opinion* that neither requires nor recommends how long medical records should be retained. So, clearly, no ethics violation has occurred. The Hospital points out that Ohio Admin. Code § 3701-83-11(F) requires licensed health care facilities to maintain medical records "for at least six years from the date of discharge[.]"[8] Inasmuch as Plaintiff's birth records were not destroyed until nearly 12 years after his date of discharge, no state regulatory violation has occurred either. And without a regulatory violation, a discovery sanction is not justified. *Henry v. Abbott Laboratories*, No. 2:12-cv-841, 2015 WL 5729344, at *9 (S.D. Ohio Sept. 30, 2015) (acknowledging that a failure to preserve

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. . . .

Ohio Rev. Code § 4731.22(B)(18). Section 4731.226 allows physicians to render their professional services through corporations, limited liability companies, partnerships, and professional associations.

[8] Also, to prevent fraud, the records of Medicaid-eligible patients must be retained "for a period of at least six years" after a provider has received reimbursement. *See* Ohio Rev. Code § 2913.40(D).

records in violation of a regulation requiring retention can give rise to an inference of spoliation, but finding no such violation), *rev'd on other grounds*, 651 F. App'x 494 (6th Cir. 2016).

Plaintiff also relies, again, on the Hospital's failure to follow its own record retention policy, which states that "[m]aternity and newborn records will be kept for a period of twenty one (21) years[,]" and that all records will be "retained for a period of time consistent with the state and federal laws and the standards of the health care industry." (Doc. 61 at PageID 970–74). Plaintiff ties the period to the length of time necessary to allow a minor to bring a medical malpractice claim arising out of the circumstances of his birth. A suit for medical malpractice must be brought within one year after the cause of action accrues. Ohio Rev. Code § 2305.113(A). In the case of a minor, however, the statute of limitations does not begin to run until the minor has reached the age of 18. *Id*. § 2305.16. The savings statute allows a plaintiff to voluntarily dismiss his suit without prejudice ("if the plaintiff fails otherwise than upon the merits") and then refile "within one year." *Id*. § 2305.19(A). In Plaintiff's

mind, this scenario adds up to 21 years.[9] (Doc. 61 at PageID 973–74; Doc. 1 at PageID 13 (¶ 46)).

Plaintiff simply offers argument—and no evidence—that the retention policy was drafted for this purpose. (See Doc. 61-1, Gracey Dep. at PageID 988 (12:4–8) ("Q. Okay. And why do you retain birth records for 21 years? A. I don't know the answer to that because the policy was put in place before I started."); 1004 (28:15–19 ("Q. Where does the 21-year standard come from? A. I don't know when the decision was made at the time the policy was developed, why 21 years was selected.")). Regardless, there is no denying that the policy was violated. (*Id*. at PageID 999 (23:11–14 ("[Cintas] failed to follow the contract and our retention period and requirements in our policy, so we [the Hospital] addressed that with them at the time.")). But even if the Court were to find that this violation created a self-imposed obligation to preserve, *see generally Stocker v. United States*, 705 F.3d 225, 235 (6th Cir.

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[9] As the Court already has observed, Plaintiff's count isn't completely accurate vis-à-vis application of the savings statute. (Doc. 52 at PageID 927 n.5). A suit can pend for multiple years before a decision on the merits results from either motion practice or a jury verdict, and Ohio R. Civ. P. 41(A) allows a plaintiff to dismiss without prejudice "at any time before commencement of trial." (*Id*.).

2013),[10] Plaintiff still cannot prove that the records were destroyed "with a culpable state of mind." *Beaven*, 622 F.3d at 553. What amounts to a dispositive adverse inference should be awarded only when a party "acted with a degree of culpability beyond mere negligence." *Stocker*, 705 F.3d at 236. "[T]he choice of an appropriate sanction should be linked to the degree of culpability, with more severe sanctions reserved for the knowing or intentional destruction of material evidence. Here, the record discloses no culpable conduct beyond the negligent failure to preserve an envelope in accordance with internal agency regulations." *Id*.

Faced with the undisputed fact that third-party Cintas negligently destroyed thousands of Mom and Baby charts only because they were

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[10] At issue in *Stocker* was whether married taxpayers timely filed an amended tax return. 705 F.3d at 227. The taxpayers sought an adverse inference against the Government because the Internal Revenue Service failed to retain the envelope in which they mailed their return—as required by an internal policy manual—that purportedly would bear a postmark confirming a timely filing. *Id*. at 235. On appeal, and noting no objection by the Government, the Sixth Circuit agreed that this failure gave rise to an obligation to preserve the envelope, and that "the first factor cited in Beaven has been established here." *Id*.

housed in the same cartons with adult in-patient charts, Plaintiff urges the Court to find the Hospital reckless because Cintas "was not instructed by Good Samaritan Hospital to separate patient medical records from mom and baby records when the records were given to Cintas by Good Samaritan Hospital." (Doc. 61 at PageID 973). Indeed, Plaintiff definitively states, "Cintas has no record of any instructions it was given by Good Samaritan Hospital concerning separation of mom and baby records." (*Id.*). Neither statement, however, is supported by citation to the record. Thus, there is no basis upon which the Court can find "culpability beyond mere negligence." *See Stocker*, 705 F.3d at 236.

Finally, although mindful of the medical evidence filed under seal that may undercut Plaintiff's claim that his brain injury was caused at birth (*see* Doc. 45), the Court nonetheless agrees that the birth records destroyed are relevant to Plaintiff's malpractice claim. Yet without establishing an obligation to preserve and a culpable state of mind, Plaintiff is not entitled to a spoliation sanction.

Regarding the fetal monitoring strips, Plaintiff seeks a sanction under Rule 37(e). This route, too, is a dead end.

Fed. R. Civ. P. 37(e) provides as follows:

If electronically stored information that should have been preserved in the anticipation of conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

(Emphases added). Fatal to Plaintiff's case once again is a lack of "intent." The Hospital attempted to both copy the disk and redact data from it without success. (Doc. 61-5, Greenberg Aff. at PageID 1054 (¶ ¶ 5, 7)). The Hospital provided the disk to Plaintiff's forensic expert, SecureData, which, after significant effort, was equally unsuccessful. (Doc. 61-6, Buxton Aff.). Here, the inability to access the fetal monitoring strips is a casualty of outdated technology, and nothing more. (*Id*. at PageID 1055 (¶ 3) ("Despite commercial viability in the mid-90s, the media design did not receive many commercial iterations, prompting driver support to also be discarded in future operation systems.")). A sanction under Rule 37(e), therefore, is not warranted either.

IV. CONCLUSION

For the reasons set forth above, the Motion of Plaintiff Jahmir C. Frank for Partial Summary Judgment (Doc. 61) is hereby **DENIED**.

IT IS SO ORDERED.

/s/ *Michael R. Barrett*
Michael R. Barrett, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

Jahmir Christopher Frank,
Plaintiff,

vs. **Case No. 1:18-cv-00618**

Judge Michael R Barrett

The Good Samaritan Hospital of Cincinnati, Ohio, *et al.*,
Defendants.

ORDER

This matter is before the Court on the Motion to Dismiss, or alternatively, for Partial Summary Judgment filed by Defendants Good Samaritan Hospital Foundation of Cincinnati, Inc. and The Good Samaritan Hospital of Cincinnati, Ohio. (Doc. 17).

I. BACKGROUND

Plaintiff's class action complaint sets forth three causes of action: medical malpractice, respondeat superior, and negligence. (See Doc. 1). Its introductory first paragraph reads as follows:

This is an action for medical malpractice. By reason of the negligence of Defendants Good Samaritan Hospital Foundation, Inc., Good Samaritan Hospital, and John Doe nurses and physicians (hereinafter "The Good Samaritan Defendants") during the delivery of Plaintiff, Jahmir C. Frank, at Good Samaritan Hospital on July 30, 1998, Mr. Frank now suffers from periventricular leukomalacia, a permanent and debilitating brain injury. The birth records of Mr. Frank were destroyed in 2010, due to the negligence of Defendants Good Samaritan Hospital (hereinafter "GSH") and its contractor, Cintas. It was not learned until June 22, 2017, that the birth records had been destroyed despite Defendants' actual knowledge of the destruction since 2012. Mr. Frank's family requested the records in 2014. It was not until a previous lawsuit, voluntarily dismissed without prejudice on June 8, 2018, was filed in Hamilton County, Ohio that Defendants finally admitted Mr. Frank's birth records had

> been destroyed due to the negligence of Cintas Corporation No. 2, a third party hired by Defendants to store and, when lawful, destroy medical records.

(*Id*. at PageID 2 (¶ 1)). Defendants' Motion asks the Court to dismiss the case in its entirety for lack of subject matter jurisdiction, contending that the parties are all citizens of Ohio and, therefore, not diverse. Alternatively, Defendants urge the Court to dismiss Plaintiff's third cause of action—negligence—because the statute of limitations has expired and because a cause of action for negligent destruction of medical records does not exist in Ohio. Additionally, Defendants maintain that all claims against Good Samaritan Hospital Foundation should be dismissed, again asserting a statute of limitations defense.

Defendants filed their Motion on October 3, 2018. Since then, Plaintiff produced a Florida driver's license and voter registration card, prompting Defendants to concede their challenge to subject matter jurisdiction. (Doc. 37 at PageID 717). Accordingly, on May 10, 2019, the Court denied Defendants' Motion to this extent and reserved ruling on the alternative grounds. (Doc. 40). Plaintiff's submission of "the required affidavit of merit" was to

prompt the undersigned to consider the balance of Defendants' arguments. Then, on November 7, 2019, the Sixth Circuit ruled that Ohio Civ. R. 10(D)(2)—which requires that an affidavit of merit accompany a complaint for medical malpractice—does not apply to such claims filed in federal court. *Gallivan v. United States*, No. 18-3874, 2019 WL 5793013, — F.3d — (6th Cir. Nov. 7, 2019). With that trigger removed, the Court then set a status conference to discuss steps forward. During said conference, Plaintiff's counsel advised that this case will proceed only against the Hospital, and not against the Hospital Foundation. (*See* Minute Entry dated 11/14/2019). Thus, the single issue left for decision with respect to the pending Motion concerns Plaintiff's third cause of action for negligence against the only remaining named Defendant, The Good Samaritan Hospital of Cincinnati, Ohio.[1] To this end, the Court will consider, in addition to the original memorandum in support, Plaintiff's memorandum in opposition (Doc. 28), Defendants' reply (Doc. 29), and Defendants' supplemental reply (Doc. 37).

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[1] Plaintiff also sues John Doe Physicians Numbers 1-5, John Doe Corporations Numbers 1-5, John Doe Employees Numbers 1-5, and John Doe Nurses Numbers 1-5. (See Doc. 1 at PageID 1–2 (Caption)).

II. LEGAL STANDARD

Before proceeding, the Court must decide the appropriate legal standard by which to evaluate the balance of the Hospital's Motion. Reference is made to both Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure regarding Plaintiff's negligence cause of action. The caption of the Motion is styled in the alternative ("Motion to Dismiss or, alternatively, for Partial Summary Judgment"), and the phrases "failure to state a claim," "dismiss with prejudice," and "partial summary judgment" are used interchangeably throughout the briefing.[2] Upon review, the Court concludes that a Rule 12(b)(6) analysis is the correct measure.

Federal Rule of Civil Procedure 12(b)(6) allows a party to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To withstand a dismissal motion, a complaint must contain "more than labels and

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[2] (See Doc. 17 at PageID 137 ("failure to state a claim"), 139 ("dismiss with prejudice"), 142 ("partial summary judgment"), 143 ("fail[ure] to state a claim"), 150 ("failure to state a claim"), 151 ("partial summary judgment" and "fail[ure] to state a claim"); Doc. 29 at PageID 618 ("failure to state a claim"); and Doc. 37 at PageID 717 ("dismissed under Fed. R. Civ. P. 12(b)(6)")).

conclusions [or] a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Courts do not require "heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." *Id*. at 570 (emphasis added). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A district court examining the sufficiency of a complaint must accept the well-pleaded allegations of the complaint as true. *Id.; DiGeronimo Aggregates*, *LLC v. Zemla*, 763 F.3d 506, 509 (6th Cir. 2014).

On a Rule 12(b)(6) motion, a district court "may consider exhibits attached [to the complaint], public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein, without converting the motion to one for summary judgment." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 681 (6th Cir. 2011) (internal quotation and citation omitted). The ability of the court to consider supplementary documentation has limits, however, in that it must be

"clear that there exist no material disputed issues of fact concerning the relevance of the document." *Mediacom Se. LLC v. BellSouth Telecomms., Inc.*, 672 F.3d 396, 400 (6th Cir. 2012) (internal quotation and citation omitted).

As earlier recited, Plaintiff's class action complaint refers to "a previous lawsuit, voluntarily dismissed without prejudice on June 8, 2018, [ ] filed in Hamilton County, Ohio" in which the Hospital "finally admitted Mr. Frank's birth records had been destroyed due to the negligence of Cintas Corporation No. 2, a third party hired by Defendants to store and, when lawful, destroy medical records." (*See* Doc. 1 at PageID 2 (¶1)). The filings in the state court lawsuit certainly qualify as public records and they are plainly "central" to the questions presented here. Thus, the undersigned may consider them in the Rule 12(b)(6) context.

III. ANALYSIS

For purposes of deciding the outstanding issue before the Court, the following facts are accepted as true.

Plaintiff was born at Good Samaritan Hospital on July 30, 1998. (Doc. 1 at PageID 2 (¶ 1)). He suffers from periventricular leukomalacia, a

permanent and debilitating brain injury that he attributes to trauma in utero during his delivery. (*Id*. at PageID 2 (¶ 2), PageID 7 (¶¶ 23–26)). Plaintiff filed suit in the Court of Common Pleas for Hamilton County, Ohio on August 12, 2016—presumably once he turned 18 years old—suing the Hospital for medical malpractice. (*See* Doc. 17-3). Upon learning that his birth records were negligently destroyed by a third party—Cintas[3]—he amended his complaint in state court on November 2, 2017 to add an additional cause of action for "spoliation of evidence." (*See* Doc. 17-4). Specifically, Plaintiff alleged that, following his "improper delivery," the Hospital was "aware that litigation for medical malpractice was probable." (*Id*. at PageID 172). He further alleged that his birth records were "lost or destroyed due to the willful acts of [the Hospital] in not assuring retention of these crucial documents despite actual knowledge that litigation was probable" and that the Hospital's failure to retain the records "was calculated to disrupt" his suit for medical malpractice. (*Id*. at PageID 173 (¶¶ 32, 33)). The Hospital filed a motion

[3] Plaintiff's birth records were negligently destroyed in 2010 by Cintas Corporation No. 2, a third party hired by the Hospital to store medical records. The Hospital learned in 2012 that the records were destroyed. Plaintiff discovered that the records were destroyed on June 22, 2017. (Doc. 1 at PageID 2 (¶ 1)).

for partial summary judgment with respect to this new cause of action, which the state court judge granted on May 16, 2018. (*See* Doc. 17-5). The court found that Plaintiff "failed to provide any evidence showing that: 1) Defendants had any knowledge of pending or probable litigation; 2) Defendants willfully destroyed documents; or 3) that there was willful destruction of evidence designed to disrupt Plaintiff's case." (Id.). Not long thereafter, on June 8, 2018, Plaintiff filed a notice of voluntary dismissal without prejudice pursuant to Ohio R. Civ. P. 41(a). (*See* Doc. 17-7).

Plaintiff filed his "Medical Malpractice Complaint with Class Allegations for Negligent Destruction of Medical Records" here in the Southern District of Ohio on August 31, 2018. (Doc. 1). Specific to his third cause of action, he contends that the Hospital "was subject under the American Medical Association Code of Ethics to a nondelegable duty to manage medical records appropriately." (*Id*. at PageID 9 (¶ 38)). He contends further that it is "a violation of Ohio law for any physician to violate any provision" of said Code of Ethics, citing Ohio Revised Code § 4731.22(B)(18). (*Id*. (¶ 39)). The "provision" violated, according to Plaintiff, is Ethics Opinion 3.3.1, which states that a physician must "retain[ ] old records against possible future need" and to "[u]se

medical considerations to determine how long to keep records." (Doc. 1 at PageID 10 (¶ 40)).[4] With this as background, Plaintiff alleges that the Hospital had a duty under Ohio law to retain birth records "for at least the length of time of the statute of limitations for medical malpractice claims, 21 years in the case of a minor." (*Id*. at PageID 13 (¶ 46)).[5] And, because

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[4] Plaintiff also quotes from the Hospital's record retention policy, which states that "[m]aternity and newborn records will be kept for a period of twenty-one (21) years[,]" and that all records will be "retained for a period of time consistent with the state and federal laws and the standards of the health care industry." (*Id*. at PageID 11 (¶ 41)). Use of a third-party "commercial record destruction company" is allowed under the terms of the policy, with obligations to notice "intent" to destroy records and complete "certificates of destruction." (*Id*. at PageID 11–12 (¶ 41)). "After destruction, persons requesting records can be informed that the records have been destroyed." (*Id*. at PageID 12 (¶ 41)).

[5] A suit for medical malpractice must be brought within one year after the cause of action accrues. Ohio Rev. Code § 2305.113(A). In the case of a minor, however, the statute of limitations does not begin to run until the minor has reached the age of 18. *Id*. § 2305.16. The savings statute allows a plaintiff to voluntarily dismiss his suit without prejudice ("if the plaintiff fails otherwise than upon the merits") and then refile "within one year." *Id*. § 2305.19(A). In Plaintiff's mind, this scenario adds up to 21 years. (Doc. 1 at PageID 13 (¶ 46)). The Hospital puts the count at 20. (Doc. 17 at PageID 148–49). In the Court's view,

its contractor Cintas "unintentionally" destroyed the records in 2010, when Plaintiff would have been only 12 years old, the Hospital "is liable to Plaintiff, and members of the putative class, in compensatory damages, punitive damages, interest and attorneys fees." (*Id*. at PageID 14 (¶ 52)).

The Hospital argues that Plaintiff's third cause of action should be dismissed pursuant to Rule 12(b)(6) because: (1) it is time-barred; (2) there is no legal duty to retain birth records for 21 years; and (3) Ohio does not recognize a tort for negligent destruction of medical records. The Hospital's third argument is dispositive.

Plaintiff's third cause of action specifically alleges negligent destruction of medical records, which is fatal to Plaintiff proceeding further. Ohio clearly recognizes the tort of spoliation of evidence, which, as an essential element, requires proof of intent. *See McGuire v. Draper*, *Hollenbaugh and Briscoe Co., L.P.A.*, No. 01CA21, 2002-Ohio-6170, at

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neither sum is absolutely correct vis-à-vis application of the savings statute. A suit can pend for multiple years before a decision on the merits results from either motion practice or a jury verdict, and Ohio R. Civ. P. 41(A) allows a plaintiff to dismiss without prejudice "at any time before commencement of trial."

¶¶ 75–77, 2002 WL 31521750, at *12 (Ohio App. 4th Dist. Nov. 4, 2002). *McGuire* cites *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St. 3d 28, 1993-Ohio-229, 615 N.E.2d 1037, 1038 (1993), in which the issue of whether Ohio recognized a claim for "intentional or negligent spoliation of evidence and/or tortious interference with prospective litigation" was certified to the Supreme Court of Ohio. The court also was asked to answer, if such a claim exists, "may such a claim be brought at the same time as the primary claim, or must the victim of spoliation await an adverse judgment?" *Id*. In response, the court answered:

> A cause of action exists in tort for interference with or destruction of evidence; [ ] the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff,
> (2) knowledge on the part of defendant that litigation exists or is probable,
> (3) willful destruction of evidence by defendant designed to disrupt plaintiff's case, and (5) damages proximately caused by the defendant's acts;

> [ ] such a claim should be recognized between the parties to the primary actions and against third parties; and [ ] such a claim may be brought at the same time as the primary action.

Id. (emphasis added). "In a spoliation case, 'willful' reflects an intentional and wrongful commission of the act." *White v. Ford Motor Co.*, 142 Ohio App. 3d 384, 755 N.E.2d 954, 957 (2001) (citing *Drawl v. Conrnicelli*, 124 Ohio App. 3d 562, 706 N.E.2d 849 (1997)). *See Cuttill v. Pickney*, No. C2-04-375, 2005 WL 3216578 (S.D. Ohio Nov. 28, 2005) (Ohio appellate courts have "consistently" rejected arguments that *Smith v. Howard Johnson's* definition of "willful destruction" has been broadened by any subsequent Supreme Court of Ohio pronouncement).

In the state court litigation, Defendants successfully moved for summary judgment on the spoliation of evidence claim added by Plaintiff in his amended complaint. That same claim was not included in the class action complaint before this Court, though. Rather, *all* references are to the Hospital's—or third-party Cintas'—*negligence*.[6] Yet

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[6] Indeed, Plaintiff introduces his class action complaint with the following allegation: "The birth records of Mr. Frank were

negligence, like the "carelessness" alleged in *McGuire*, is patently "insufficient to establish willfulness." 2002-Ohio-6170, at ¶ 77, 2002 WL 31521750, at *13.

Plaintiff's memorandum in opposition is silent on whether Ohio recognizes a tort of negligent destruction of medical records. But in addressing the statute of limitations argument raised by the Hospital, Plaintiff urges the Court to apply what he labels "the general negligence statute of limitations." (Doc. 28 at PageID 610 (quoting Ohio Rev. Code 2305.09)). This description confirms the obvious—Plaintiff's third cause of action is negligence-based and, as such, warrants dismissal. And, with this determination, the Court need not address the Hospital's alternative arguments.

IV. CONCLUSION

With all outstanding issues resolved, the pending Motion to Dismiss (Doc. 17) is—as previously noted in the Court's Order dated May 10, 2019—**DENIED** to the extent it seeks dismissal

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destroyed in 2010, due to the negligence of Defendants Good Samaritan Hospital [ ] and its contractor, Cintas." (*See* Doc. 1 at PageID 2 (¶ 1) (emphasis added)).

based on lack of subject matter jurisdiction; **DENIED AS MOOT** as to any and all claims once asserted against terminated Defendant Good Samaritan Hospital Foundation of Cincinnati, Inc.; and **GRANTED** with regard Plaintiff's third cause of action for negligence against the only remaining named Defendant, The Good Samaritan Hospital of Cincinnati, Ohio. During the upcoming status conference by telephone set for December 10, 2019, the Court will discuss with counsel the viability of Plaintiff's pending Corrected Motion for Class Certification (Doc. 47) in light of this ruling.

IT IS SO ORDERED.

/s/ *Michael R. Barrett*
Michael R. Barrett, Judge
United States District Court

OHIO RULE OF EVIDENCE 601

Rule 601 - General Rule of Competency

(**A)General rule** Every person is competent to be a witness except as otherwise provided in these rules.

(B)Disqualification of witness in general A person is disqualified to testify as a witness when the court determines that the person is any of the following:

(1) Incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her;

(2) Incapable of understanding the duty of a witness to tell the truth;

(3) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

(a) A crime against the testifying spouse or a child of either spouse is charged;

(b) The testifying spouse elects to testify.

(4) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person

charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute;

(5) A person giving expert testimony on the issue of liability in any medical claim, as defined in R.C. 2305.113, asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless all the following apply:

> (a) The person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state;
>
> (b) The person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school, at either the time the negligent act is alleged to have occurred or the date the claim accrued;
>
> (c) The person practices in the same or a substantially similar specialty as the defendant. The court shall not permit

an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties.

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

Nothing in this division shall be construed to limit the power of the trial court to adjudge the testimony of any expert witness incompetent on any other ground, or to limit the power of the trial court to allow the testimony of any other witness, on a matter unrelated to the liability issues in the medical claim, when that testimony is relevant to the medical claim involved.

This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules

from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

(6) As otherwise provided in these rules.

APPENDIX I INCLUDES EXCERPTS OF THE MARCH 27, 2018 DEPOSITION OF STEPHEN GRACEY AND ATTACHED PLAINTIFF'S EXHIBIT 2 (*4/24/12 LETTER To: Leslie Markesbery From: Cintas Document Management; Cincinnati Records Center*) AND ATTACHED PLAINTIFF'S EXHIBIT 3 *(TRIHEALTH INC. CORPORATE POLICY Medical Records Retention*)

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
* * *

JAHMIR CHRISTOPHER FRANK,
Plaintiff,

vs. CASE NO. A1604526

GOOD SAMARITAN HOSPITAL FOUNDATION OF CINCINNATI, INC., et al.,
Defendants.

* * *

Deposition of STEPHEN GRACEY, a witness herein, called by the plaintiff for examination pursuant to the Rules of Civil Procedure, taken before me, Patti Stachler, RMR, CRR, a Notary Public within and for the State of Ohio, at the Offices of TriHealth, 619 Oak Street, 7th Floor Boardroom, Cincinnati, Ohio, on March 27, 2018, at 12:24 p.m.

* * *

I N D E X

STEPHEN GRACEY PAGE

EXHIBITS MARKED REFERENCED

* * *

APPEARANCES:

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Also present:
Sherrie Boggio

* * *

PAGES 25-27 of STEPHEN GRACEY DEPOSITION, QUESTIONED BY PLAINTIFF COUNSEL, PERCY SQUIRE

A. [Cintas] wrote the letter to explain what had happened to the medical records for mom/baby charts from 1997 to 1999.

Q. Was there any particular event that you are aware of that caused her to write this letter?

A. I am.

Q. What was that event?

A. We had had a request for mom/baby records from that time frame that was given to Good Samaritan Hospital and we asked Cintas to produce the records. They were unable to do so and said they had been destroyed.

Q. Can you tell me where you received the request for records that led to this letter from?

A. It would have been Good Samaritan Hospital medical records office.

Q. I mean, who submitted the request?

A. I don't know the answer to that.
Q. You don't know. Now, at the time that Good Samaritan became aware that these mom and baby charts had been destroyed, did Good Samaritan take any steps to notify the patients whose records were affected?

A. We did not.
Q. Why did you not do that?
MS. PRATT: I'm sorry. Just to clarify the question, are you referring to after the records were destroyed?
MR. SQUIRE: Once they became aware of the fact that the records were destroyed.
MS. PRATT: Okay.
BY MR. SQUIRE:
Q. My question is, did you reach out or make contact with the patients whose records were affected?
A. No.
Q. Why not?
A. The sheer volume of records that would have been destroyed.
Q. Do you know how many records were destroyed?
A. I don't know the exact number. I know that around -- you know, we did, on average, 8,500 to 9,000 deliveries a year, and so if the mom/baby charts from these years were all destroyed, then it would have been notifying that number of people.

25 Q. Thousands?

1 A. Yeah. What we did do is if
2 someone requested the records from this time
3 frame, then we would explain we didn't have the
4 records anymore.

ATTACHED PLAINTIFF'S EXHIBIT 2
(*4/24/12 LETTER To: Leslie Markesbery From: Cintas Document Management; Cincinnati Records Center*)

CINTAS

4/24/12

To: Leslie Markesbery

CC: Steve Gracey

From: Cintas Document Management; Cincinnati Records Center

Regarding; 1997-1999 Mom and Baby charts:

On or about April of 2010, Cintas destroyed medical records for TriHealth - Good Samaritan Hospital. As part of this destruction, Mom and Baby Charts were unintentionally destroyed. Neither

Cintas nor TriHealth was aware that Mom and Baby charts were housed in the same cartons with adult In-Patient charts.

To ensure that this will not happen in the future, Cintas will retrieve all medical records and remove Mom and Baby charts so that they are stored separately from inpatient charts. Also, Cintas will box Inpatient charts and Mom and Baby charts separately while purging them from Good Samaritan Hospital or any TriHealth Medical Records group for storage at Cintas. The Inpatient boxes will house only Inpatient charts and be labeled that way and the Mom and Baby boxes will only house Mom and Baby charts and be labeled that way. With this process, each type of chart will be able to be destroyed according to the chart type's retention schedule as provided by TriHealth.

Thank you,
s/Lori Stammen
Lori Stammen
Account Executive

ATTACHED PLAINTIFF'S EXHIBIT 3
(*TRIHEALTH INC. CORPORATE POLICY*
***Medical Records Retention*)**

TRIHEALTH, INC.
CORPORATE POLICY

TITLE: Medical Records Retention (#05_MR0.400)

SUPERSEDES: Same, 3/2004

AFFECTED AREAS
All TriHealth Entities.

This policy acknowledges that other relevant and applicable policies and procedures exist that have been drafted, approved, and adopted by entities (and departments) within TriHealth and are specific to those departments or entities. Interpretation of these policies must comply with the principles adopted by Corporate Policy #12_01.00, "Corporate Policies, Development & Implementation".

PURPOSE
To specify retention and destruction practices for TriHealth medical records.
BACKGROUND

✓JCAHO Std: JM .2.1-2.3, .6.1	□ Licensure
✓Regulatory Agencies:	
Federal Laws 42 CFR (Medicare)	□ Other

POLICY/PROCEDURE.

Retention:

TriHealth will retain the medical records of patients (except maternity and newborn and those under age of 11)or a period of ten (10) years. Maternity and newborn records will be kept for a period of twenty-one (21) years as will records of patients under 11 years of age. Records will be maintained in such a manner that their security and integrity are safeguarded, that they are reasonably available for authorized users, and that they are retained for period of time consistent with the state and federal laws and the standards of the health care industry. A patient's medical record may be kept for a longer period of time if specifically requested by the patient, the patient's physician or attorney, or by the hospital's legal counsel.

Destruction:

Declaration of the intent to destroy records will be made publicly by a notice placed in local newspapers thirty

(30) days prior to scheduled destruction date. The notice will include instructions to patients on how to request the record in writing prior to that date.