

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

CARETOLIVE,	)	
	)	Case No. 2:07cv00729
Plaintiff,	)	
	)	JUDGE FROST
v.	)	
	)	MAGISTRATE JUDGE KING
	)	
ANDREW von ESCHENBACH, et al.	)	
	)	
Defendants.	)	

**NOTICE OF SUBSTITUTION**

Please take notice that pursuant to 28 U.S.C. § 2679(d), the United States of America is hereby substituted for the individual Defendant Howard Scher, M.D. (“Dr. Scher”) with respect to the state law torts alleged by Plaintiff CareToLive. The grounds for this substitution are:

1. Care to Live alleges claims of interfering with the rescue efforts of third parties (Amended Complaint Count III), wrongful death (Count IV) and failure to exercise care to aid patients (Count V) against Dr. Scher.

2. The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680, as amended by the Federal Employees Liability Reform and Tort Compensation Act of 1988 § 5, Pub. L. No. 100-694, 102 Stat. 1463 (1988), provides that a suit against the United States shall be the exclusive remedy for persons with claims for damages resulting from the negligent or wrongful acts or omissions of federal employees taken within the scope of their office or employment. 28 U.S.C. § 2679(b)(1). The state law causes of action that CareToLive alleges against Dr. Scher fall within this provision.

3. Section 6 of the Federal Employees Liability Reform and Tort Compensation Act provides that upon certification by the Attorney General that a federal employee was acting within the scope of his office or employment at the time of the incident out of which a state law claim arises, any civil action arising out of the incident shall be deemed an action against the United States, and the United States shall be substituted as sole defendant with respect to those claims. 28 U.S.C. § 2679(d)(1), (2). Certification authority has been delegated to United States Attorneys. 28 C.F.R. § 15.4.

4. Gregory G. Lockhart, the United States Attorney for the Southern District of Ohio, certified on September 14, 2007 that Dr. Scher was acting within the scope of his employment as a Special Government Employee of the Food and Drug Administration at the time of the incidents out of which CareToLive's claims arose. The Court is referred to the United States Attorney's Certification of Scope of Employment, attached as Exhibit A.

5. For the foregoing reasons, the United States has, by operation of law, been substituted as the sole defendant with respect to the state law causes of action alleged in the complaint against Dr. Scher. There are two exceptions to the exclusivity provisions. These two exceptions are codified at 28 U.S.C. § 2679(b)(2). Neither exception applies to CareToLive's state law causes of action.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on October 5, 2007, I electronically filed a copy of the foregoing Notice of Substitution. Notice of this filing will be sent to counsel by operation of the Court's electronic filing system.

s/John J. Stark  
John J. Stark  
Assistant United States Attorney