

In the Supreme Court of Ohio

ON APPEAL FROM THE
COURT OF APPEALS EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-05-086009

SARAH ANASTASIA OLYNYK
Plaintiff/Appellee,

v.

JACK T. ANDRISH, M.D.,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT JACK T. ANDRISH, M.D.

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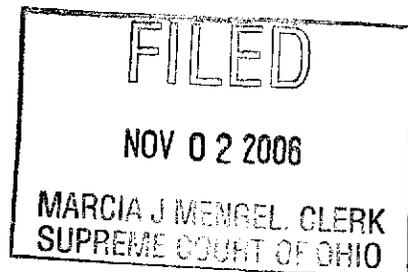


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REPLY BRIEF

PROPOSITION OF LAW NO. I

The double dismissal rule contained in Rule 41(A) of the Ohio Rules of Civil Procedure applies to a Plaintiff's voluntary dismissal of claims pursuant to Rule 41(A)(2) of the Ohio Rules of Civil Procedure.

Appellee cites to every interpretation of the double dismissal rule or "last dismissal" rule except the rule itself. The "last dismissal" rule unequivocally provides that a notice of dismissal is with prejudice if the claims were previously dismissed by Plaintiff. Specifically, Rule 41(A) of the Ohio Rules of Civil Procedure provides in relevant part:

...a notice of dismissal operates as an adjudication upon the merits of any claim that the Plaintiff has once dismissed in any court. (Emphasis added).

The rule requires a notice of dismissal to be with prejudice for any claims that a Plaintiff had previously requested to be dismissed. The intent of the rule is to allow a Plaintiff to only dismiss his/her claims one time. Courts in Ohio have circumvented this rule by interpreting the rule to mean that a Plaintiff must have previously filed a notice of dismissal pursuant to Rule 41(A)(1) of the Ohio Rules of Civil Procedure in order for a subsequent notice of dismissal to be with prejudice. However, that is not what the "last dismissal" rule provides. It does not state that a Plaintiff must have previously filed a notice of dismissal. It only requires that the Plaintiff previously requested the claim to be dismissed.

This court has not had an opportunity to correct the misinterpretation of the "last dismissal" rule. Appellee's citation to *Fryssinger v. Leech* (1987), 32 Ohio St. 3d 38, 512 N.E. 2d 337 and *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St. 2d 222, 431 N.E. 2d 660 are misplaced. *Fryssinger, supra* and *Chadwick, supra* focus on the savings statute and address

whether a Plaintiff that dismisses his/her claims pursuant to Rule 41(A)(2) of the Ohio Rules of Civil Procedure may refile the claims pursuant to the savings statute. In fact, in *Chadwick, supra*, Justice Krupansky properly noted in the dissent that a Plaintiff's request to the court to dismiss a case is a "voluntary" dismissal by Plaintiff. *Id.* at 232.

The Court in *Van Buesecum v. Continental Builders* (5th Dist.). 2004-Ohio-7261¹ correctly noted that a Plaintiff can voluntarily dismiss a case three ways pursuant to Rule 41(A) of the Ohio Rules of Civil Procedure: by notice, stipulation or request to the court. *See also International Computing and Electronic Engineering Corp. v. Ohio Dept. of Admin. Services* (May 19, 1996), 10th App. No. 95API11-1475. Any one of the three dismissals qualifies as a dismissal pursuant to the "last dismissal" rule. The rationale is to limit Plaintiff to one dismissal per case -- a tactical advantage not available to defendants. *Chadwick, supra* at 231. (Krupansky's dissent). Appellee's "interpretation" of the "last dismissal" rule circumvents the rationale for this rule and allows Plaintiffs to repeatedly dismiss and refile claims. Therefore, Appellant Jack T. Andrish M.D. requests this Court to enforce Rule 41(A) of the Ohio Rules of Civil Procedure as written and hold that Appellee's second dismissal of her claims is with prejudice in this case.

PROPOSITION OF LAW NO. II

The last dismissal rule applies to any claim the Plaintiff previously dismissed involving the same parties or their privies.

According to Rule 41(A) of the Ohio Rules of Civil Procedure, a notice of dismissal of a second lawsuit operates as an "adjudication on the merits." Once there is an adjudication on the merits, the doctrine of *res judicata* bars subsequent suits on the

¹ Whether *Van Buesecum* is a reported or unreported decision is irrelevant as Ohio no longer distinguishes between reported and unreported decisions. See Ohio Supreme Court Revisions to the Manual of Citations, May 1, 2002.

same cause of action. *Cincinnati Ins. Co. v. Oancea* (Ohio App.6 Dist.), 2005-Ohio-4872. As Appellee concedes, Ohio courts do not limit the application of the doctrine of *res judicata* to cases where the parties to the later action are identical to those in the earlier action. Rather, *res judicata* also applies where there is a privity between the parties in the two cases. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226; *Johnson's Island v. Bd. of Twp. Trustees* (1982), 69 Ohio St.2d 241, 244, 431 N.E. 2d 672; *Microvote v. Casey*, (1995), 57 F.3d 1070 (C.A. 6 (Ohio)).

In *Microvote*, the Sixth Circuit Court of Appeals, applying Ohio law struggled with whether the “last dismissal” rule applied when the defendant in the first dismissed lawsuit was the Board of Elections and the defendant in the second dismissed lawsuit was the Board of County Commissioners. The Court in *Microvote* held that “the existence of privity, in this context, turns on whether there is a ‘sufficient mutuality of interest’ between the parties in the first case and the parties in the second one”. *Id.* at *3 citing *Johnson's Island* at 245. The Court held that the two defendants shared a sufficient “mutuality of interest” to warrant the application of the “last dismissal” rule. The Court held:

We are satisfied that the Ohio courts would find a sufficient mutuality of interest between the Board of Elections and the Board of County Commissioners to warrant application of the two dismissal rule in the case at bar. . . . Under the statutory scheme, both the Board of Elections and the Board of County Commissioners were essential actors: neither could complete the acquisition without the other. But for this essential nexus between the two bodies, the cause of action would not have arisen at all. *Id.*

See also *Johnson's Island* at 245 (“we hold that there is sufficient mutuality of the interest between the appellees in this action and the landowners in the former”); *EMC Mortgage Corporation v. Jenkins* 164 Ohio App.3d 240, 250, 2005-Ohio-5799 (“An

assignee of an interest in a promissory note and mortgage is in privity with its assignor for purposes of res judicata.”).

It is well settled that an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of respondeat superior. *Clark v. Southview Hospital & Family Health Center* 68 Ohio St.3d 435, 438, 1994-Ohio-519; *McLeod v. Mt. Sinai Medical Center*, 166 Ohio App.3d 647, 2006-Ohio-2206. Thus a hospital is vicariously liable for the torts of its employee physicians and the two entities share a mutual interest in the treatment of its patients.

In this case, Appellee alleged in her first lawsuit that “at all times pertinent hereto, the medical treatment provided to Plaintiff, Sarah A. Olynyk, was done through various agents and/or employees of the Defendant The Cleveland Clinic Foundation”. See Appellant’s Court of Appeal’s Appellee Brief at Exhibit “A”. Appellee alleged in her refiled complaint that Appellant Jack T. Andrish, M.D. “a physician duly licensed and engaged in the practice of medicine at the Cleveland Clinic Foundation . . .” deviated from the standard of care. (R. 5, Amended Complaint at para. 4). It is undisputed that both lawsuits allege an employee of the Cleveland Clinic Foundation deviated from the standard of care. As The Cleveland Clinic Foundation and its employee Jack T. Andrish, M.D. acted in privity with the care and treatment of Appellee, they share a “mutuality of interest” that requires the application of the “last dismissal” rule and the doctrine of *res judicata* to the facts of this case. Therefore, Appellant Jack T. Andrish respectfully requests this Court to determine that Appellee’s second dismissal of her claims against Appellant Jack T. Andrish, M.D. is an “adjudication on the merits” that bars subsequent lawsuits involving the same medical malpractice claims.

CONCLUSION

Rule 41(A) of the Ohio Rules of Civil Procedure requires that a notice of dismissal is an adjudication upon the merits of any claim a plaintiff had previously requested to be dismissed. Civil Rule 41(A) does not mandate how a plaintiff is required to have previously requested his/her claims be dismissed. To interpret Civil Rule 41(A) to only apply to claims dismissed by a notice pleading interprets additional language in the rule that does not exist. As this case involves Appellee voluntarily dismissing her medical malpractice claims against The Cleveland Clinic Foundation and its employee on two occasions, Appellant requests this Court to determine that Appellee's second dismissal is with prejudice pursuant to the "last dismissal" rule.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by Regular U.S. Mail this 2nd day of November,

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