

IN THE OHIO SUPREME COURT

MARY J. MANLEY, :
 :
 Plaintiff, :
 v. :
 :
 :
 :
 NICHOLAS P. MARSICO, M.D., et al. :
 :
 :
 Defendants. :

S. Ct. Case No. 06-1263
C.A. Case No. CA2006-04-13
On Appeal from the 12th District
Court of Appeals, Clinton County

REPLY BRIEF OF DEFENDANT/APPELLANT EYE SPECIALISTS, INC.

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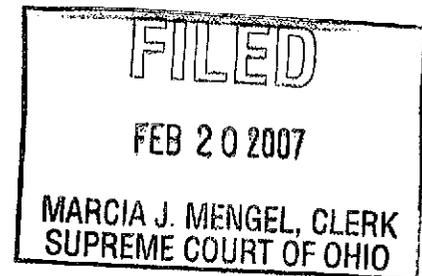


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ARGUMENT

Plaintiff/Appellee Mary J. Manley's merit brief states two propositions of law, even though this court only accepted one proposition of law for briefing and argument. Moreover, Plaintiff's first proposition of law simply discusses the propriety of the trial court's decision to grant Plaintiff leave to file an affidavit of merit outside of rule. Since the propriety of the trial court's decision is not currently pending before this court, Defendant/Appellant Eye Specialists, Inc., will not address any of the arguments raised by Plaintiff in her first proposition of law.

I. PLAINTIFF FAILS TO CITE A SINGLE CASE WHICH SUPPORTS HER POSITION.

With regard to Plaintiff's second proposition of law, Plaintiff makes multiple assertions, many of which are conclusory in nature and lack any citation to case law to support such assertions. Furthermore, of the assertions supported by case law, many of those assertions actually support Defendants' position in this case.

A. OHIO RULE OF CIVIL PROCEDURE 54(B) DOES NOT APPLY TO THIS CASE.

Plaintiff begins her argument by correctly noting that whether a particular order is appealable requires a two step process. See General Acc. Ins. Co., v. Insurance Co. Of North America (1989), 44 Ohio St. 3d 17, 21. However, Plaintiff fails to note that this court also stated that "the absence of Civ. R. 54(B) language will not render an otherwise final order not final." Id. Plaintiff then seems to attach significance to the lack of any Rule 54(B) language, but fails to undertake any analysis as to the alleged significance of the omission. Of course, in the instant case, since the trial court's decision applied to all parties, Rule 54(B) language was not necessary. As this Court has opined "Civ. R. 54(B) applies in multiple claim or multiple-party actions where fewer than all the claims or fewer than all the parties are adjudicated." Id. at 22.

In the instant case, all of the parties were adjudicated, therefore, Rule 54 does not apply.

B. OHIO RULE OF CIVIL PROCEDURE 10(D)(2) IS A PROVISIONAL REMEDY.

Plaintiff then asserts that Ohio Rule of Civil Procedure 10(D)(2) was not intended to be a provisional remedy. Yet, other than this conclusory assertion, Plaintiff cites no case law, statute, or rule which would support this assertion. In fact, Plaintiff undertakes no analysis of any kind which would support this assertion. Given this, Defendant specifically relies upon the analysis as contained in Defendant's merit brief at page 4. Defendant reincorporates that analysis here as if fully rewritten.¹

II THE RULES OF STATUTORY CONSTRUCTION SUPPORT DEFENDANTS' POSITION THAT THE TRIAL COURT'S ORDER IS FINAL AND APPEALABLE.

Plaintiff then attempts to utilize the rules of statutory construction to argue that Ohio Revised Code §2505.02(A)(3) does not apply to a trial court decision under Ohio Rule of Civil Procedure 10(D)(2). While Plaintiff does accurately cite the various rules of statutory interpretation, Plaintiff fails to undertake any analysis whatsoever as to the applicability of those rules to the facts of the instant case. Moreover, Plaintiff's concession that the doctrine *ejusdem generis* applies to "trade secrets, disputes in zoning and construction, wrongful confinement and the like[,]" actually supports Defendant's position that the trial court's order in the instant case is a final appealable order.

In one of the cases expressly relied upon by Plaintiff, the Court of Appeals noted that the Plaintiff in that case had requested a temporary restraining order and not a preliminary injunction.

¹ Again, Plaintiff's argument dwells more on the correctness of the trial court's order rather than the appealability of the trial court's order. However, since the correctness of the trial court's order is not currently pending before this Court, Defendant will not respond to Plaintiff's assertions here.

Neighbors For Responsible Land Use v. Akron, 2006-Ohio-6966 at ¶ 7. Ohio Revised Code §2505.02 does not reference a temporary restraining order in the list of orders meeting the definition of a provisional remedy. Ohio Rev. Code Ann. §2505.02(A)(3) (Anderson 2006). Yet, the court in Neighbors For Responsible Land Use recognized that the request for a temporary restraining order met the definition of a provisional remedy. Neighbors for Responsible Land Use at ¶ 7. Furthermore, as that court explained:

[I]n a dispute over construction and zoning, there is no meaningful ability to appeal the decision if a provisional remedy is denied because after construction begins, the damage has already been done; the land has been permanently altered.

Id. at ¶ 11. Likewise, in the instant case, a decision forcing Defendant to defend a medical malpractice complaint which did not meet the requirements of Ohio Rule of Civil Procedure 10(D)(2) and precluding an appeal on this issue until after a trial on the merits means that the damage has already been done; Defendants have been forced to defend a medical malpractice action which they otherwise would not have been forced to defend had the complaint been dismissed for failing to comply with the civil rules. Given this, an order which forces a defendant to defend a case which otherwise should have been dismissed constitutes a final, appealable order.

Plaintiff next attempts to argue that the 2004 amendments to Ohio Revised Code §2505.02 somehow prevent this court from applying the statutory phrase “including, but not limited to” to the facts of this case. But in so arguing, Plaintiff ignores several different rules of statutory construction.

Ohio law has long noted:

[W]ords in a statute do not exist in a vacuum. We must presume that in enacting a

statute, the general assembly intended for the entire statute to be effective. R.C. 1.47(B). Thus, all words should have effect and no part should be disregarded.

D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health, 2002-Ohio-4172 at ¶ 19. Furthermore, “[t]he body enacting the amendment will be presumed to have had in mind existing constitutional or statutory provisions and their judicial construction, touching the subject dealt with.” State ex rel. Engle v. Indus. Comm. (1944), 142 Ohio St. 425-432.

Of course, this Court has had a prior opportunity to construe Ohio Revised Code 2505.02. See State v. Muncie (2001), 91 Ohio St. 3d 440, 2001-Ohio-93. In Muncie, the Court specifically noted “the fact that the statutory phrase ‘including, but not limited to’ precedes a **non-exhaustive** list of examples.” Id. at 448 (emphasis added), citing State v. Lozano (2001), 90 Ohio St. 3d 560, 562. By so noting, the Supreme Court specifically rejected an argument by the State that since the statute’s only reference to a criminal proceeding was the “proceeding for the suppression of evidence”, that this was the only criminal proceeding subject to the definition of a provisional remedy. Id. This Court then held that a forced medication order also met the definition of a final, appealable order; even though it was not specifically included in the list of examples. Id. at 450.

Since the legislature amended Ohio Revised Code §2505.02 in 2004, the legislature is presumed to have knowledge of the Muncie Court’s prior construction of that statute. Given that knowledge, and given the lack of any attempt by the legislature to limit what has already been judicially determined to be “a non-exhaustive list of examples”, Id. at 448, it can only be concluded that the legislature intended to broaden the definition of provisional remedies rather than restrict it.

In fact, Plaintiff's argument that the amendment to include a trial court's order relating to a judicial determination of a *prima facie* case for various respiratory ailments, somehow restricts the application of Ohio Revised Code §2505.02 can only be supported if this Court were to simply ignore the statutory phrase "including, but not limited to". Since this Court has, on numerous occasions, held that courts are not free to simply ignore words in a statute, Plaintiff's argument as to this issue must be rejected.

III. THERE IS NO LEGAL SIGNIFICANCE TO THE LEGISLATURE'S INCLUSION OF TWO TYPES OF *PRIMA FACIE* CASES TO THE LIST OF EXAMPLES IN R.C. 2505.02.

Plaintiff does attempt to make much out of the fact that the legislature specifically included two different *prima facie* case statutes as somehow being probative of the legislative intent to limit, rather than expand, those orders which constitute a provisional remedy. What Plaintiff forgets, however, is that the legislature could not be certain that both bills would ultimately become law.² Since the legislature did not know whether both bills would become law, it was forced to include orders relating to the existence of a *prima facie* case as to both types of respiratory ailments. The legislature simply could not assume that both bills would pass and be signed into law by the Governor, therefore, the legislature had to provide for the eventuality that only one of the two bills would actually pass and be signed into law.³

Plaintiff also flatly misstates the law when she asserts on page 18 of her brief that Plaintiffs may not file respiratory cases without meeting the *prima facie* requirements.

² It should be noted that the effective dates of both bills are only one day apart.

³ For some reason, Plaintiff delves into an extensive analysis of the legislature's reasoning in enacting statutes as to various breathing ailments, apparently failing to recognize that the legislature's reasoning for enacting these statutes has no relevance to the legislature's determination to make a trial court order on the issue of *prima facie* case an appealable order.

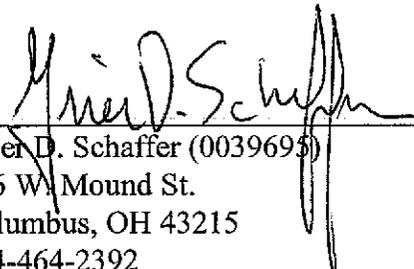
Obviously, there is nothing preventing a plaintiff from filing a respiratory illness case without meeting the *prima facie* requirements so long as the plaintiff ultimately produces *prima facie* evidence as required by statute. Likewise, there is nothing preventing a plaintiff from filing a medical malpractice action without meeting the requirements of the civil rules. However, in both cases, the failure to produce the appropriate evidence subjects the complaint to being dismissed. Thus, there is no real difference between a medical malpractice action and a respiratory disease case from a procedural point of view.

CONCLUSION

Plaintiff has failed to cite this Court to a single case which supports her opinion that the trial court order in the instant case fails to meet the definition of a provisional remedy. If anything, the case law cited by Plaintiff actually supports Defendant's position that this is a final, appealable order. Given this, Defendant respectfully requests that this Court adopt Defendant's proposition of law and remand this case to the Court of Appeals for briefing and arguing on the merits of Defendants' appeal.

Respectfully submitted,

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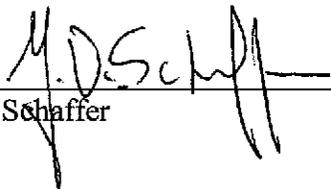
CERTIFICATE OF SERVICE

This is to certify that the foregoing was served regular U.S. mail on this 20th day of

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