

IN THE SUPREME COURT OF OHIO

MONICA FLETCHER, INDIVIDUALLY  
AND AS ADMINISTRATRIX OF THE  
ESTATE OF VICTOR SHAW, DECEASED

Appellee,

vs.

UNIVERSITY HOSPITALS OF  
CLEVELAND, et al.,

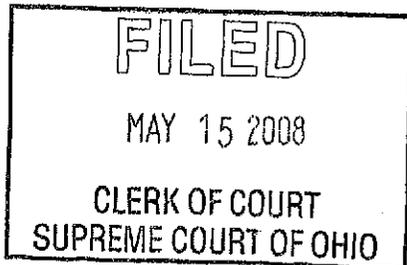
Appellants.

: Supreme Court Case No. 07-1529  
:  
: Appeal from the Cuyahoga County  
: Court of Appeals, Eighth Appellate  
: District  
:  
:  
: Court of Appeals  
: Case No. CA-06-088573  
:  
:

REPLY BRIEF OF APPELLANT UNIVERSITY HOSPITALS OF CLEVELAND

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## INTRODUCTION

Neither the Opposing Brief filed by Appellee Monica Fletcher (“Fletcher”) nor the amicus brief filed by the Ohio Alliance of Justice (“OAJ”) provides a workable interpretation of Civ.R.10(D)(2) that accords with the language and intent of that rule. The very trial court discretion that this Court recognized and confirmed in *Manley v. Marsico*, 116 Ohio St.3d 85, 2007-Ohio-5543, ¶ 13 (affirming that trial court’s allowance of an untimely affidavit of merit) requires the opposite result in this case, where Fletcher has proved unable to offer any expert testimony in two lawsuits spanning almost four years. The Trial Court’s dismissal of the Complaint for failure to comply with Civ.R. 10(D)(2) was appropriate. Determining that the dismissal was with prejudice, given that the Complaint could not be refiled, was also appropriate.

Fletcher’s Opposition Brief argues that, in those cases where “it is unclear from the face of the Complaint whether its allegations constitute a medical claim” (Opposition Brief, Proposition 1), this Court should require Defendants to file a motion for more definite statement to give Plaintiff adequate “notice” of the possibility of a dismissal. The argument makes no sense. When Defendants filed motions for Civ.R. 12(B)(6) dismissal, Plaintiff was most assuredly on notice of the possibility of a dismissal based on the application of Civ.R. 10(D)(2). And when Plaintiff had already voluntarily dismissed her suit once before, and the statute of limitations had long since passed and the saving statute had expired, Plaintiff was charged with knowledge that a second dismissal – even one “without prejudice” – will have the effect of a dismissal with prejudice. Fletcher was on notice that dismissal was a possibility.

OAJ’s amicus brief asks this Court to “steer clear of the notion” that a dismissal under Civ.R. 10(D)(2) could “ever” be with prejudice, and argues that a motion for more definite statement is “more compatible” with a rule specifying that dismissals are without prejudice

(Opposition Brief, p. 3). OAJ's arguments do not accord with the specific language of Civ.R. 10(D)(2) which creates a remedy of dismissal otherwise than on the merits for the particular failure to state a claim set forth in the rule, but does not preclude the operation of the statute of limitations on potential re-filings.

As Fletcher and OAJ both concede, the 2007 rule amendment that clarifies that a dismissal under Civ.R. 10(D)(2) "shall operate as a failure otherwise than on the merits" also states that the affidavit "is required to establish the adequacy of the complaint." The Staff Note also specifies that the purpose of the amendment is to clarify "that the affidavit is necessary to establish the sufficiency of the complaint." There can be no dispute that the more appropriate filing to challenge the adequacy and sufficiency of a Complaint is a Civ.R. 12(B)(6) motion to dismiss. The rule amendment simply created a "dismissal otherwise than on the merits" remedy for that failing. Further, given the facts of *this* case, the trial court acted well within its broad discretion when it determined that dismissal was appropriate. *Manley, supra*. Finally, under the facts of *this* case – where Plaintiff had voluntarily dismissed her case previously – the trial court correctly concluded that the dismissal had the effect of a dismissal with prejudice.

### **ARGUMENT**

**Proposition of Law: A Motion For Failure To State A Claim Upon Which Relief Can Be Granted Pursuant To Civil Rule 12(B)(6) Is The Proper Procedure For Challenging The Failure To File An Affidavit Of Merit In Accordance With Civil Rule 10(D)(2).**

**I. The Facts Upon Which Appellee Relies In Her Merit Brief Are Incomplete And Misleading.**

Contrary to Fletcher's characterization, this case *is* a "typical, mainstream medical negligence case." (Merit Brief of Appellee, p. 4). The original Complaint filed on March 31, 2004, at ¶ 12, and the refiled Complaint filed on March 29, 2006, at ¶ 7, allege that the medical

care rendered by defendants "...was performed in negligent and substandard fashion, and was outside the standard of care for reasonable medical treatment." There is no doubt that the refiled Complaint contains a medical claim which thereby mandates the application of Civ.R. 10(D)(2). Without the predicate medical claim, there would be no wrongful death action. The alleged medical negligence is the predicate for Fletcher's wrongful death claim.<sup>1</sup> Fletcher's lawsuit is "a typical, mainstream medical negligence claim."

Civ.R. 10(D)(2) was in effect for almost nine months before Fletcher refiled her Complaint. During the years before the refiled, the constant bar to Fletcher making any progress with her lawsuit was her failure to identify expert medical witnesses to support her claims. This action was filed in 2003, dismissed voluntarily in 2005 to avoid an adverse ruling on summary judgment motions filed after the deadline for expert disclosure had passed, and refiled in 2006 to assert "the same claims" – *i.e.*, "that defendants University Hospitals of Cleveland and Dr. Raymond Onders provided negligent medical care to Victor Shaw" and "seeking damages for both medical malpractice and wrongful death." (Opposing Brief, p. 1). But when University Hospitals of Cleveland filed a Civ.R. 12(B)(6) motion in this case – a motion that indisputably gives notice of an intent to seek a dismissal – Fletcher did not seek to amend her complaint or "show good cause" for yet an additional time period to file an expert affidavit. Rather, she made the patently insupportable argument that nothing in her refiled Complaint asserted a medical claim subject to the requirements of Civ.R. 10(D)(2). Fletcher

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<sup>1</sup> In order to maintain her wrongful death action based upon alleged medical malpractice, she is required to follow well-established legal criteria and must satisfy, by a preponderance of the evidence, four elements: (1) the physician owed a duty to the injured party; (2) the physician breached this duty; (3) a demonstration of the probability that the breach was a proximate cause of the harm to the plaintiff; and (4) damages. *Trevena v. Primehealth, Inc.*, 171 Ohio App.3d 501, 2006-Ohio-6535, ¶ 52 (citation omitted); *see also Berdyck v. Shinde* (1993), 66 Ohio St.3d 573, 579. Proof of the recognized standard of care in the medical community must be established by expert testimony. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 131-132.

now offers that a motion for more definite statement is the appropriate procedural mechanism for defendants faced with plaintiffs who insist on not filing an affidavit of merit. But this procedural scheme was not available until after the Eighth District Court of Appeals fashioned such a process in this case, without any argument or discussion on the issue. What was known before the appellate court developed its new procedural mechanism was that, as Fletcher points out, the very common pleas court case that Fletcher claims misled her into believing that her refiled Complaint did not state a medical claim, *granted* a Civ.R. 12(B)(6) motion to dismiss the “independent” medical malpractice claim asserted in that case for failure to support claims with an affidavit of merit. *See McClellan v. Clermont Mercy Hospital* (Jan. 3, 2006), Clermont County Common Pleas Court, Case No. 2005 CVH 1264 (Appx. 1).

Fletcher improperly solicits this Court to infer that expert medical support had been secured against some Defendants at the time of the re-filing of the lawsuit (Opposition Brief, p. 4). The re-filing of the lawsuit suggests, however, that the opposite inference should be drawn. The Defendants named in the first Complaint, but not named in the second Complaint, St. Elizabeth Health Center and Mahoning Valley Emergency Specialist, Inc., filed counterclaims against Fletcher contending that her decedent, Victor Shaw, left the hospital against medical advice and signed a Release and Indemnity Agreement, a copy of which was attached to the Counterclaim pursuant to Civ.R. 10(D)(1). The reasonable inference that can be drawn is that the Mahoning County defendants were not named in the refiled complaint because they had meritorious counterclaims. For Fletcher to state that “the inference could be drawn that expert medical support had been secured...” is really without any value except to establish, with certainty, that Fletcher was aware of the need for expert testimony to support her medical claim which was the predicate for the survivorship action and the wrongful death action. It also begs

the question, if such experts were readily available, why Fletcher did not identify them and submit affidavits during the three months that the Motion to Dismiss was pending before the trial court.

A more reasonable inference for Fletcher's inability to produce an affidavit of merit is that she did not have medical expert support for her claims. The fact, and not an inference, is that Fletcher never identified an expert witness even when confronted by a motion for summary judgment and then a motion to dismiss. The basis for Fletcher's first voluntary dismissal was that she was confronted by motions for summary judgment for failure to identify expert witnesses to support her claims. The expert disclosure date had passed without the identification of any expert witness. With her voluntary dismissal, Fletcher invoked the Savings Statute and, in fact, used every day available before re-filing the case. Fletcher asserted "the same claims" as in her first Complaint knowing that Defendants had filed motions for summary judgment for lack of expert medical testimony, which confirms that she knew that she would need expert medical testimony to establish her refiled claims. The Trial Court was aware of these facts.

In the Statement of Facts in her Opposing Brief, p. 4, at ¶ 3, Fletcher offers a false characterization of the Trial Court's actions. The Trial Court had the Motion to Dismiss pending for almost three months. The Trial Judge conducted a Case Management Conference with counsel for the parties. Fletcher never requested an extension of time to produce an affidavit. Instead, Fletcher chose a course of action which was either right or wrong and she would have to live with the consequences. The onus had been on Fletcher to produce expert witness support for her allegations for three years. The effect of Civ.R. 10(D)(2), as appropriately implemented by the Trial Court, was to end otherwise endless litigation by dismissing the case for failure to comply and produce an affidavit of merit supporting the allegations of professional negligence.

**II. The Trial Court's Dismissal With Prejudice Of Appellee's Complaint For Failure To Comply With Civ.R. 10(D)(2) Was Appropriate.**

The recent amendment to Civ.R. 10(D)(2) provides direction for this Court in two regards. First, the amendment specifically provides for *dismissal* for a failure to file an affidavit of merit. Second, while the amendment provides that the dismissal is a failure otherwise than on the merits,<sup>2</sup> it does not preclude a trial court from dismissing an action with prejudice when warranted.

The amendments and Staff Notes and the language of Civ.R. 10(D)(2) provide a *uniform rule of law* and the *proper motion* to be made by Defendants. Fletcher's suggestion that a special class of cases – those where the nature of the claim is not clear on the face of the complaint – should be subject to a motion for more definite statement is unworkable. The hypothetical scenarios offered by Fletcher and the OAJ have to do with the *results* of the motion, not with the motion to be filed. The resolution of the motion will depend on the individual facts of the case and falls within the broad discretion of the trial judge. A trial court should, as stated in *Manley, supra*, have discretion on how to rule on the motion depending on the nature of the failing alleged. Applying that to our case results in affirmance of the dismissal below.

It is important to note that Civ.R. 10(D)(2) does not provide for an extension of the underlying statute of limitations or permit a second use of the Savings Statute found in R.C. § 2305.19. (Appx. 13). In the case at bar, the Trial Court properly dismissed the Complaint with prejudice. The underlying statute of limitations on the wrongful death claim expired on September 1, 2004. With the voluntary dismissal of the original lawsuit, the Savings Statute expired on March 30, 2006. Therefore, a second dismissal on July 13, 2006, even otherwise than

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<sup>2</sup> Amended Civ.R. 10(D)(2)(d) states, in part: "...Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits."

on the merits, appropriately resulted in a dismissal with prejudice because Fletcher could not refile or amend her Complaint.

**A. A Motion To Dismiss Is The Appropriate Challenge To A Civ.R. 10(D)(2) Violation.**

The application of Civ.R. 12(B)(6) is not a mere “procedural preference” as suggested in the OAJ Amicus Brief at p. 3. It is the appropriate avenue to follow to maintain the integrity and effect of Civ.R. 10(D)(2). An obvious starting point in this analysis is Civ.R. 10(D)(2) itself, which anticipates a *dismissal* for failure to comply, and the Staff Notes for the 2007 Amendments which state that the rule “is intended to make clear that the affidavit is necessary to establish the sufficiency of the complaint” and that the failure to comply can result in the dismissal of the complaint. The language of the Civil Rule is supported by established case law providing that a motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545.

A party seeking to challenge the sufficiency of a complaint would not move for more definite statement, pursuant to Civ.R. 12(E), and follow the onerous and time-consuming two-step process outlined in the Amicus Brief of OACTA, at pp. 4-5.<sup>3</sup> Nor would it be reasonable for Civ.R. 10(D)(2) to require such an onerous path if the purpose of the rule is to reduce frivolous litigation and reduce costs. The procedural challenge should focus directly on the allegations which are unsupported by expert testimony as required by Civ.R. 10(D)(2). While the factual allegations of the Complaint are taken as true, “[u]nsupported conclusions of a complaint are not

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<sup>3</sup> The Appellee Brief and the OAJ Amicus Brief are silent with respect to the procedural steps which must be taken where a party fails to comply with Civ.R. 10(D)(1).

considered admitted ... and are not sufficient to withstand a motion to dismiss.” *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324.

In a recent case, the Fifth Appellate District rejected the applicability of Civ.R. 12(E) to “medical claims” and upheld the dismissal of a complaint filed without the required Affidavit of Merit. *Holbein v. Genesis Healthcare System*, 5<sup>th</sup> Dist. No. CT2006-0048, 2007-Ohio-5550.<sup>4</sup> Faced with facts similar to the present case, the *Holbein* court found that ordering a more definite statement pursuant to Civ.R. 12(E) or permitting an amendment pursuant to Civ.R. 15(A) would be contrary to the intended purpose of Civ.R. 10(D)(2) in guarding against frivolous lawsuits – especially when (as in the present case) the offending party had been placed on notice of the pleading defect. *Holbein*, ¶¶ 47-48, 50. The court held that “[g]iven the specific facts of this case, the re-filing and the extension granted to appellants, we find the rule would have no meaning or effect if it was not enforced.” *Id.* at ¶ 51. The *Holbein* court also recognized that “[t]he trial court was clearly within its discretion to fashion the appropriate remedy” to address the failure to comply with Civ.R. 10(D)(2). *Id.* at ¶ 50.

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<sup>4</sup> On March 12, 2008, this Court accepted appeal in *Holbein* (Case No. 2007-2198) on the following Propositions of Law:

Civil Rule 10(D)(2) does not provide for dismissal of the action or claims, when the affidavit of merit is not attached to a complaint. (Proposition of Law No. III)

When a party fails to attach an Affidavit of Merit and good cause is shown for the failure, the trial court should permit amendment to the complaint by addition of the affidavit or other similar evidence, order a more definite statement, or other action to comply with the spirit of Civil Rule 10(D)(2). (Proposition of Law No. VI)

This Court then ordered, “*sua sponte*, that this cause is held for the decision in Supreme Court Case No. 2007-1529, *Fletcher v. University Hospitals of Cleveland*, and the briefing schedule is stayed.” See Entry (Appx. 7).

A motion to dismiss is the appropriate vehicle to test the sufficiency of a medical claim unsupported by an affidavit of merit.

**B. A Dismissal For Failure to Comply With Civ.R. 10(D)(2) Operates As A Dismissal With Prejudice When Plaintiff Previously Utilized The Savings Statute.**

In its Order granting the Motion to Dismiss, the Trial Court stated that the “[c]ase is dismissed with prejudice” and that “[t]here is no just reason for delay.” The Trial Court’s ruling is consistent with amended Civ.R. 10(D)(2) because, once dismissed, Appellee could not have refiled her Complaint again. The Complaint was initially filed on September 2, 2003, and then voluntarily dismissed on March 30, 2005, pursuant to Civ.R. 41(A)(1). The Complaint was refiled on March 29, 2006, within the one-year savings statute set forth in R.C. § 2305.19(A)<sup>5</sup>. The dismissal issued by the trial court on July 13, 2006, even if “otherwise than on the merits,” is effectively a final dismissal with prejudice because Fletcher did not have any right to invoke another savings statute extension.

An adjudication otherwise than on the merits is a dismissal without prejudice. *Thomas v. Freeman*, 79 Ohio St.3d 221, 225, 1997-Ohio-395, fn. 2. “This is because a dismissal without prejudice places the parties in the same position they were in before they filed the action.” *Johnson v. H & M Auto Service*, 10th Dist. No. 07AP-123, 2007-Ohio-5794, ¶ 7. However, a

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<sup>5</sup> Specifically, R.C. 2305.19(A) provides:

(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff’s representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff’s failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

dismissal otherwise than on the merits does not toll the statute of limitations or the savings statute. As this Court recently held, a dismissal otherwise than on the merits which prevents refile in the trial court is a final, appealable order. *Natl. City Commercial Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, ¶ 8.

The Trial Court's ruling did not address a mere failure to abide by Civ.R. 10(D)(2), but rather addressed the litigation in its entirety. Appellee could not refile or amend her Complaint because the savings statute had expired. In order to be permitted to refile the Complaint, a plaintiff must still refile her case within the applicable statute of limitations, or otherwise refile in a manner permitted by the savings statute. See *Brubaker v. Ross*, 10<sup>th</sup> Dist. No. 01AP-1431, 2002-Ohio-4396, ¶ 13. The savings statute is to be used only once and cannot be repeatedly invoked to permit repeated filings of the same lawsuit. *Dargart v. Ohio Dept. of Transp.*, 171 Ohio App.3d 439, 2006-Ohio-6179.<sup>6</sup> The savings statute is not designed to keep actions alive indefinitely. *Id.* at ¶ 21, citing *Romine v. Ohio State Hwy. Patrol* (2000), 136 Ohio App.3d 650, 654. "To allow a plaintiff to use R.C. § 2305.19 more than once would 'frustrate the purpose of the civil rules which are intended to prevent indefinite filings.'" *Dargart*, ¶ 21, quoting *Hancock v. Kroger Co.* (1995), 103 Ohio App.3d 266, 269.

Motions to dismiss allow trial courts wide discretion in managing litigation in which a dismissal otherwise than on the merits may result in a dismissal with prejudice. The OAJ Amicus Brief cites *Briggs*<sup>7</sup> and *Kastl*<sup>8</sup> for the inference that motions to dismiss can operate as adjudications upon the merits only. (OAJ Amicus Brief, pp. 5-6). In those cases, the courts

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<sup>6</sup> See also *Estate of Carlson v. Tippet* (1997), 122 Ohio App.3d 489; *Triplett v. Beachwood Village, Inc.*, 158 Ohio App.3d 465, 2004-Ohio-4905; *Gruber v. Kopf Builders, Inc.* (2001), 147 Ohio App.3d 305, 2001-Ohio-4361.

<sup>7</sup> *Briggs v. Cincinnati Rec. Commn.* (1998), 132 Ohio App.3d 610, 611.

<sup>8</sup> *Kastl v. McPherson*, 2d Dist. No. 8389, 1984 WL 4423. (Appx. 8).

wrestled with scenarios distinguishable from the case at bar. In *Briggs*, where the phrase “motion to dismiss” is not mentioned, the decision refers to a motion for summary judgment resulting in a dismissal which is entitled to the preclusive effect of *res judicata*. *Id.* at 611. In *Kastl*, the court stated that a motion to dismiss granted pursuant to Civ.R. 12(B)(6) is an involuntary dismissal and operates as an adjudication upon the merits *unless the court otherwise specifies*. *Id.* at \* 3, *citing* 32 O.Jur. 2d Judgments Section 223 (1975) (emphasis added). Thus, trial courts do have discretion to specify the form and effect of the dismissal.

Dismissal pursuant to Civ.R. 10(D)(2), although otherwise than on the merits, does not suspend the effect of other bars to further relitigation. Therefore, in order to avoid abuse of Civ.R. 10(D)(2), this Court should hold that a plaintiff whose Complaint has been previously dismissed through a notice of voluntary dismissal or for failure to comply with Civ.R. 10(D)(2) and who has utilized the savings statute to refile their Complaint, is subject to dismissal with prejudice if their Complaint does not contain an Affidavit of Merit.

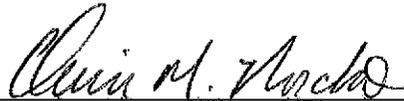
### CONCLUSION

Civ.R. 10(D)(2) offers a uniform rule of law and the appropriate procedural mechanism to address a problem of unsupported conclusions of medical negligence that previously went uncontested until significant cost had been expended in defending against such claims. Maintaining the integrity and purpose of the Rule will be ensured by following the direction of the Rule and its Staff Notes in which a violation of the Rule is to be challenged by a motion to dismiss. The Rule states that such a dismissal is otherwise than on the merits. But it does not mandate the suspension of other rules and statutes that would otherwise put an end to litigation.

Appellant submits that this Court should reverse the decision of the Eighth District Court of Appeals and hold that a Motion to Dismiss pursuant to Civ.R. 12(B)(6) constitutes the appropriate

procedural remedy for a failure to comply with Civ.R. 10(D)(2) and that a dismissal in the circumstance where the applicable statute of limitations expired and the savings statute has been utilized shall be considered “with prejudice.” Appellant requests this Court to affirm the Trial Court decision based on the specific facts of this case.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

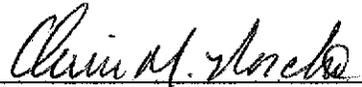
A copy of the foregoing Reply Brief of Appellant University Hospitals of Cleveland has been sent via regular U.S. mail, postage prepaid, this 14th day of May, 2008 to:

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FILED

IN THE COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO

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BEVERLY S. MCLELLAN, et al.,

CASE NO. 2005 CV 1264  
VERA A. WIEDENBEIN  
CLERK OF COMMON PLEAS COURT  
CLERMONT COUNTY, OH

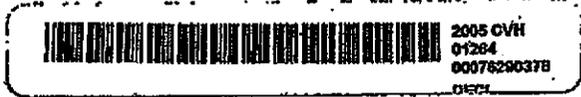
Plaintiffs,

vs.

CLERMONT MERCY HOSPITAL,  
et al.,

DECISION

Defendants.



James A. Hunt, Attorney for Plaintiff, Hunt, Nichols & Schwartz, 285 E. Main Street, Batavia, OH 45103

David S. Lockemeyer, Attorney for Defendants Linda Welder, M.D. and Brian Schiff, M.D., Triona & Lockemeyer, 2909 Vernon Place, Cincinnati, OH 45219

James P. Triona, Attorney for Defendant John Heindl, M.D., Triona & Lockemeyer, 2909 Vernon Place, Cincinnati, OH 45219

Thomas E. Evans, Attorney for Defendants Cheryl Linda Lee, M.D., Gary Huber, M.D., and Venu Reddy, M.D., Rendigs, Fry, Kiely & Dennis, One West Fourth Street, Suite 900, Cincinnati, OH 45202-3688

Karen A. Carroll, Attorney for Defendant Clermont Mercy Hospital, Kohnen and Patton, PNC Center, Suite 800, 210 East Fifth Street, Cincinnati, OH 45202-4190

This matter came before the Court on Plaintiff's motion to enlarge the time to file an affidavit of merit filed on October 4, 2005. Certain defendants filed a memorandum in opposition as well as a motion to dismiss the complaint under Civ.R. 12(B)(6) on October 20, 2005.

Thereafter, each of the remaining defendants filed similar motions and memoranda adopting the arguments set forth in the October 20 memorandum. The Court has considered the memoranda,

oral argument of December 12, 2005, and the relevant legal authority and renders the following decision.

Plaintiff filed a complaint as the administratrix of the estate of her husband, Gary Lee McClellan, on August 31, 2005. The complaint contains two claims. The first claim alleges that each of the defendants was negligent in the medical treatment of Mr. McClellan. The second claim is made under R.C. 2125.02 for wrongful death. There were no attachments to the complaint.

#### Legal Standard

In order for a complaint to be dismissed pursuant to Civ.R. 12(B)(6), "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. Furthermore, "in construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. "As long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063.

#### Legal Analysis

The parties' motions require the Court to consider the Ohio Supreme Court's recent amendment to Civ.R. 10. Effective July 1, 2005, Civ.R. 10(D)(2) provides,

*(2) Affidavit of merit; medical liability claim.*

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim \* \* \* as defined in section 2305.113 of the Revised Code, shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. \* \* \*

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit.

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

Civ.R. 10(D)(2) applies only to "medical claims." Plaintiff's second claim is made for wrongful death under R.C. Chapter 2125. Counsel for some of the defendants argued at the hearing that this claim should be considered a medical claim to which the rule applies because it is derivative of the medical malpractice claim. However, the Ohio Supreme Court has held that wrongful death actions brought under R.C. Chapter 2125 are independent causes of action and do not depend on the existence of separate cause of action held by the injured person immediately before his death. *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183, 637 N.E.2d 917. Further, R.C. 2305.113 lists numerous claims as coming within the terms "medical claim" and "derivative claim for relief." See R.C. 2305.113(E)(3); R.C. 2305.113(E)(7). Wrongful death claims do not appear on the list, which instead is comprised of traditionally derivative claims such as loss of consortium, loss of support, loss of companionship, and loss of training and education. *Id.* In light of the Supreme Court's holding that wrongful death actions are independent causes of action, and absent explicit authority reversing that determination, this Court will not include a wrongful death action within the purview of Civ.R. 10(D)(2). Thus, the motion of the defendants to dismiss is denied as to Plaintiff's wrongful death claim.

Plaintiff's first claim is most certainly a "medical claim" as that term is defined in R.C. 2305.113(E)(3) because it is a "claim that is asserted in any civil action against a physician, \* \* \* hospital, [or] against any employee or agent of a physician \* \* \* [or] hospital, \* \* \* that arises out of the medical diagnosis, care, or treatment of any person." Thus, in issue is the effect of Plaintiff's failure to comply with Civ.R. 10(D)(2) on her medical claim.

Plaintiff has styled her motion as a motion to extend the time allowed for the filing of the affidavit. However, as the plain language of the rule makes clear, such a motion must be filed with the complaint. Civ.R. 10(D)(2)(b). Plaintiff's motion was filed on October 4, 2005, more than a month after the complaint. The Court interprets the mandatory language of Civ.R. 10(D)(2)(b) as precluding Plaintiff's motion to extend the period of time to file the affidavit. Her motion is therefore denied.

The defendants have moved for dismissal under Civ.R. 12(B)(6) arguing that, by failing to provide an affidavit of merit, Plaintiff has failed to state a claim upon which relief can be granted. The text of Civ.R. 10(D)(2)(c) supports this contention. Under that subsection, an affidavit of merit is required to establish the adequacy of the complaint. In the Court's view, this subsection of the rule manifests the intention by the Supreme Court that a failure to attach an affidavit of merit is fatal to a medical claim. Support for this conclusion appears when Civ.R. 10(D)(2) is contrasted with Civ.R. 10(D)(1). That rule requires the attachment of a writing on which any claim or defense is based and does not include the "adequacy of the complaint" language. Under Civ.R. 10(D)(1), a failure of a party to attach the writing does not subject the claim to dismissal under Civ.R. 12(B)(6). Instead, the proper procedure is for the adverse party to move for a more definite statement under Civ.R. 12(E). See, *McCamon Hunt Ins. Agency Inc. v.*

*Medical Mutual of Ohio*, Seventh App. No. 02 CA 23, 2003-Ohio-1221; *Point Rental Co. v. Posani* (1976), 52 Ohio App.2d 183, 185-186, 368 N.E.2d 1267. By failing to so move under Civ.R. 12(B), a party waives his right to assert Civ.R. 10(D) as a basis for dismissing the complaint. See, *id.* The Court therefore finds that, pursuant to Civ.R. 10(D)(2)(c), a complaint containing a medical claim which is unaccompanied by an affidavit of merit is insufficient to state a claim for relief and is properly dismissed under Civ.R. 12(B)(6).

The Court is mindful that this remedy is a harsh one. A dismissal under Civ.R. 12(B)(6) is a dismissal with prejudice or on the merits unless the dismissal order states otherwise. Civ.R. 41(B)(1); Civ.R. 41(B)(3); see, also, *Customized Solutions, Inc. v. Yurchyk & Davis CPA's, Inc.*, Seventh App. No. 03 MA 38, 2003-Ohio-4881. The amendment to Civ.R. 10 appears aimed toward dismissing those claims which are without expert support at an early stage of litigation, a purpose not served where a legitimate claim is dismissed because of a failure to adhere to the Civil Rules. Dismissal with prejudice of claims which otherwise appear legitimate before a Court can review an affidavit of merit would frustrate a Plaintiff with a legitimate claim and the administration of justice. In light of Civ.R. 1(B) which directs that the Civil Rules be construed so as to effect just results, the Court is of the opinion that, in most situations, a plaintiff's medical claim should be dismissed without prejudice. This way, the medical claim and supporting affidavit could be evaluated after refiling. However, in this case, counsel for Plaintiff conceded at the hearing that the one-year statute of limitations has run on the medical claim, and thus refiling of that claim would be fruitless. The Court therefore grants the defendants' motions as to Plaintiff's first claim with prejudice.

#### Conclusion

For the reasons stated above, Plaintiff's motion to extend time for filing of the affidavit of merit under Civ.R. 10 is denied. The motions of the defendants to dismiss under Civ.R. 12(B)(6) are granted as to Plaintiff's medical claims and denied as to the wrongful death claim.

A handwritten signature in black ink, appearing to read 'R. Ringland', written over a horizontal line.

Judge Robert P. Ringland

Rita Holbein, Co-Executor of the Estate of  
Ruth Holbein, et al.

Case No. 2007-2198

ENTRY

v.

Genesis Healthcare System et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal on Proposition of Law Nos. III and VI.

It is ordered by the Court, sua sponte, that this cause is held for the decision in Supreme Court Case No. 2007-1529, *Fletcher v. University Hospital of Cleveland*, and the briefing schedule is stayed.

(Muskingum County Court of Appeals, No. CT20060048)

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THOMAS J. MOYER  
Chief Justice

**CKASTL v. McPHERSON.**

Ohio App., 1984.

Only the Westlaw citation is currently available.

**CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF  
LEGAL AUTHORITY.**

Court of Appeals of Ohio, Second District,  
Montgomery County.

ROBERT K. KASTL, et al., Plaintiffs-Appellants

v.

WILLIAM D. McPHERSON, et al., Defendants-  
Appellees

CASE NO. 8389, (C. P. No. 82-2655).

8389, 82-2655

March 23, 1984.

CRAIG N. PROCARIO, 2525 State Route 725,  
Centerville, Ohio 45459 Attorney for Plaintiffs-  
Appellants.

STEPHEN C. FINDLEY, Suite 550, 100 Tri County  
Parkway, Cincinnati, Ohio 45246 Attorney for  
Defendants-Appellees Trustees of Butler Township.

OPINION

WEBER, J.

\*1 This appeal arises from a judgment of the Montgomery County Common Pleas Court wherein the defendants-appellees were dismissed from Case No. 82-2655 on the grounds of res judicata. Plaintiffs-appellants have appealed this dismissal.

The following facts are not in dispute. On August 13, 1980, plaintiffs-appellants filed a complaint, Case No. 80-2165, against William D. McPherson; Louis A. Waldsmith; Kenneth Moore; Patricia Moore; the Trustees of Butler Township, including Donald Moore, Dean Loomis, and Taryl Swigart; the City of Vandalia, including Michael Ratcliff, City Manager; Michael Robinette, Mayor; Jack Shirley, Vice-Mayor; James Robinette, Councilman; Marvin Collins, Councilman; Joy Clark, Councilwoman; William J. Harrah, Councilman; and Donald Schlein, Councilman. In that complaint, appellants alleged

that the City of Vandalia entered into an agreement with certain co-defendants to construct improvements on and to develop certain real property. Appellants further alleged that the City of Vandalia and the Trustees of Butler Township negligently failed to require the co-defendants to install and complete necessary improvements to the land being developed and as a direct result therefrom, appellant's property became flooded, causing damage to such property.

The defendants-appellees City of Vandalia and the Butler Township Trustees thereafter filed motions to dismiss plaintiffs' complaint pursuant to Civ. Rule 12(B)(6) or in the alternative for summary judgment pursuant to Civ. Rule 56. Both the City of Vandalia and the Butler Township Trustees raised the doctrine of governmental immunity in support of their motions.

Upon receiving defendants' motions for summary judgment and dismissal, plaintiffs moved the Trial Court for permission to amend their complaint to add the allegation that the defendants have created, and are permitting to exist, a continuing nuisance which is the cause of damage to plaintiffs' property. On October 6, 1980, the Trial Court granted plaintiffs' motion to file an amended complaint thereby overruling defendants' motions for summary judgment and dismissal. On October 20, 1980, plaintiffs filed their amended complaint which alleged both negligence and nuisance actions against the defendants and requested judgment against the defendants "in the amount of \$32,000 plus any damages suffered from the date of their complaint."

Both the Butler Township Trustees and the City of Vandalia filed motions to dismiss plaintiffs' amended complaint or, in the alternative, for summary judgment pursuant to Civ. Rules 12(B)(6) and 56. Defendants again alleged that based upon the doctrine of governmental immunity, both the City of Vandalia and the Butler Township Trustees are immune from tort liability in the exercise of their governmental actions.

On June 3, 1981, the Trial Court sustained the Butler Township Trustees' motion for dismissal on the basis of the application of the doctrine of governmental

immunity. On September 4, 1981, the Trial Court sustained the City of Vandalia's motion to dismiss or, in the alternative, for summary judgment again basing its decision on the doctrine of governmental immunity. In sustaining that motion, the Trial Court stated: "The doctrine of sovereign immunity bars Plaintiffs' cause of action against these Defendants because even if Plaintiffs' allegations are true, Plaintiffs can prove no set of facts entitling them to recovery." Kastl v. McPherson, (September 4, 1981), Mont. Co. C. P. No. 80-2165, unreported.

\*2 Approximately one year later, plaintiffs-appellants filed a second complaint, Case No. 82-2655, against William D. McPherson; Louis A. Waldsmith; Kenneth Moore; Patricia Moore; the Trustees of Butler Township, including Donald Moore; Dean Loomis, and Taryl Swigart; the City of Vandalia, including Michael Ratcliff, City Manager; Michael Robinette, Mayor; Jack Shirley, Vice-Mayor; James Robinette, Councilman; Marvin Collins, Councilman; Joy Clark, Councilwoman; William J. Harrah, Councilman; and Donald Schlein, Councilman. In this complaint, filed September 22, 1982, plaintiffs-appellants charged the defendants-appellees, the City of Vandalia and the Butler Township Trustees, with nuisance, trespass, conversion and an appropriation of property. These new allegations were based upon the same facts and circumstances which formed the basis of plaintiffs' previous negligence and nuisance action, Case No. 80-2165, from which the defendants-appellees were dismissed.

After the filing of the second complaint, both the City of Vandalia and the Butler Township Trustees requested the Trial Court to dismiss the action or in the alternative for summary judgment pursuant to Civ. Rules 12(B)(6) and 56. Both defendants brought to the Trial Court's attention Case No. 80-2165 wherein the Court entered judgment in favor of the defendants. Based on this previous decision, defendants-appellees alleged that the second claim by plaintiffs against them was barred by the doctrine of res judicata and therefore should be dismissed.

In a Decision and Order filed November 26, 1982, the Trial Court dismissed all the defendants-appellees on the grounds of res judicata. It is from this decision that appellants have appealed raising the following assignment of error:

The Trial Court erred as a matter of law in its Decision and Order of November 26, 1982 by holding that the prior dismissal of Defendants-Appellees acted as a bar to the present action under the doctrine of res judicata, thereby requiring the dismissal from the present action of Defendants-Appellees, Butler Township, Montgomery County, Ohio, including Donald Moore, Trustee; Dean Loomis, Trustee; and Daryl Swigart, Trustee; City of Vandalia, Ohio; Michael Ratcliff, City Manager; Michael Robinette, Mayor of City of Vandalia, Ohio; Jack Shirley, Vice-Mayor of City of Vandalia, Ohio; James Robinette, Councilman of City of Vandalia, Ohio; Marvin Collins, Councilman of City of Vandalia, Ohio; Joy Clark, Councilwoman of City of Vandalia, Ohio; William J. Harrah, Councilman of City of Vandalia, Ohio; and Donald Schlein, Councilman of City of Vandalia, Ohio.

The doctrine of res judicata provides that an existing, final judgment or decree, rendered upon the merits by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue as to the parties or their privies in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction. 32 O. Jur. 2d Judgments Section 194 (1975). The Supreme Court of Ohio has stated that the policy basis of res judicata is to assure an end to litigation and to prevent a party from being vexed twice for the same cause. LaBarbera v. Batsch (1967), 10 Ohio St. 2d 106, 113.

\*3 In the case at bar, it is appellants' position that the Trial Court's prior decision, dismissing appellants' original complaint filed against the appellees, does not preclude appellants from filing their second cause of action against appellees for nuisance, trespass, conversion and appropriation of property. Appellants support their position with two arguments. First, appellants allege that appellees' prior dismissal was not a final judgment rendered upon the merits as required for the application of the doctrine of res judicata. Second, appellants allege that the prior decision of the Trial Court addressed only the issue of appellees' liability for negligence and that the second complaint filed by appellants raises the issue of appellees' subsequent liability for nuisance, trespass, conversion and appropriation of property.

It is a fundamental requisite to the application of res judicata that there be a prior final determination of

the rights of the parties upon the merits. Harding v. Talbott (1938), 60 Ohio App. 523; See generally 32 O. Jur. 2d Judgments Section 217 (1975). A judgment rendered on any grounds which do not involve the merits of the action cannot be used as a basis for the operation of the doctrine of res judicata.

In the present case, both the Butler Township Trustees and the City of Vandalia moved for dismissal pursuant to Civ. R. 12(B)(6) or in the alternative summary judgment pursuant to Civ. R. 56 upon the filing of appellants' complaint in Case No. 80-2165. Both defendants based their motions upon the application of the doctrine of governmental immunity. In dismissing the action as against both defendants, the Trial Court concluded that the doctrine of governmental immunity, as it existed at that time, was an absolute defense to plaintiffs' cause of action for negligence.

To support the application of governmental immunity to both defendants-appellees, the Trial Court relied upon the Supreme Court's decision in Thacker v. Bd. of Trustees of Ohio State University (1973), 35 Ohio St. 2d 49, wherein it was held that the state of Ohio, and instrumentalities of the state of Ohio, are not subject to suits in tort without the consent of the General Assembly. In addition, the Court determined that the doctrine of sovereign immunity barred plaintiffs' cause of action against these defendants because "even if Plaintiffs' allegations were true, Plaintiffs could prove no set of facts entitling them to recovery." Kastl v. McPherson, supra.

A motion to dismiss granted pursuant to Civ. R. 12(B)(6) is an involuntary dismissal and operates as an adjudication upon the merits unless the court otherwise specifies. 32 O. Jur. 2d Judgments Section 223 (1975). Civ. R. 41(B)(3) states:

Adjudication on the merits; exception. A dismissal under this subdivision and any dismissal not provided for in this rule, except as provided in subsection (4) of this subdivision, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies. (Emphasis added).

\*4 Civil Rule 41(B)(4) states:

Failure other than on the merits. A dismissal (a) for lack of jurisdiction over the person or the subject

matter, or (b) for failure to join a party under Rule 19 or 19.1 shall operate as a failure otherwise than upon the merits.

In granting defendants-appellees' motions to dismiss, the Trial Court in Case No. 80-2165 maintained jurisdiction over the parties and the subject matter of the cause of action. The doctrine of governmental immunity is a defense to tort liability and does not operate to bar recovery due to lack of jurisdiction. Therefore, pursuant to Civ. R. 41(B)(3) and (4), the Trial Court's dismissal of both the City of Vandalia and the Butler Township Trustees granted pursuant to Civ. R. 12(B)(6) was an adjudication upon the merits in Case No. 80-2165.

The dismissal of an action pursuant to Civ. R. 12(B)(6) operates as an adjudication on the merits and accordingly is res judicata and a bar to another action on the same claim. The doctrine of res judicata is separated into two distinct principles as explained by the Ohio Supreme Court in Whitehead v. General Telephone Co. (1969), 20 Ohio St. 2d 108, 112:

"The doctrine of res judicata involves two basic concepts. Norwood v. McDonald (1943), 142 Ohio St. 299, 52 N.E. 2d 67. First, it refers to the effect a judgment in a prior action has in a second action based upon the same cause of action. The Restatement of the Law, Judgments, Section 45, uses the terms 'merger' and 'bar'. If the plaintiff in the prior action is successful, the entire cause of action is 'merged' in the judgment. The merger means that a successful plaintiff cannot recover again on the same cause of action, although he may maintain an action to enforce the judgment. If the defendant is successful in the prior action, the plaintiff is 'barred' from suing, in a subsequent action, on the same cause of action. The bar aspect of the doctrine of res judicata is sometimes called 'estoppel by judgment.' Restatement of the Law, Judgments, Section 45, comment (b).

"The second aspect of the doctrine of res judicata is 'collateral estoppel.' While the merger and bar aspects of res judicata have the effect of precluding a plaintiff from relitigating the same cause of action against the same defendant, the collateral estoppel aspect precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action which was based on

a different cause of action. Restatement of the Law, Judgments, Section 45, comment (c), and Section 68(2); Cromwell v. County of Sac (1976), 94 U.S. 351, 24 L. Ed. 195. In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit."

See also North Dayton Truck Service v. Terrell (March 15, 1982), Montgomery App. No. 7447, unreported.

In order to determine whether either aspect of res judicata applies to the facts before us, it is necessary to examine the parties, issues and relevant facts placed before the court in both actions commenced by plaintiffs-appellants. In the first lawsuit filed by plaintiffs, Case No. 80-2165, the defendants included, among others, the City of Vandalia and the Butler Township Trustees. The amended complaint alleged that property of the plaintiffs had been, and continued to be, damaged by flooding caused by improper and inadequate installation of proper means to provide for run-off water and drainage.

\*5 Specifically, plaintiffs alleged that defendant Louis Waldsmith entered into an agreement with the City of Vandalia to construct and develop certain property owned by Waldsmith and located in Butler Township, Montgomery County. Defendant William McPherson then contracted with Waldsmith to jointly develop the property in issue for residential use. The plaintiffs, who subsequently became the owners of property developed by Waldsmith and McPherson, alleged that Waldsmith and McPherson negligently failed to provide adequate means for run-off water and drainage and as a result, the plaintiffs continued to incur damage to their property by flooding.

As to the City of Vandalia and the Butler Township Trustees, plaintiffs alleged both parties were negligent in permitting the defendants Waldsmith and McPherson to develop the property in issue without proper safeguards to prevent flooding. In addition, the complaint alleged that all the defendants by their acts and omissions, created a nuisance and are permitting it to exist to the damage of the plaintiffs. In total, plaintiffs requested damages in the amount of \$32,000 (later amended to \$50,000), plus any damages suffered from the date of their complaint

and amounts ordered to be paid for improvements by the Montgomery County Commissioners. It is from this case that both the City of Vandalia and the Butler Township Trustees were eventually dismissed as defendants on the basis of the application of governmental immunity.

In the second lawsuit filed by the plaintiffs against the same defendants, Case No. 82-2655, plaintiffs again alleged that their property had been, and continued to be, damaged by flooding caused by improper and inadequate installation of proper means to provide for run-off water and drainage. Plaintiffs' allegations against defendants Waldsmith, McPherson, the City of Vandalia and the Butler Township Trustees were based upon the same set of facts and circumstances which were outlined in their previous cause of action. However, instead of negligence and nuisance, plaintiffs alleged the acts and omission of McPherson and Waldsmith resulted in creating a nuisance and a continuing trespass upon plaintiffs' property. As to the City of Vandalia and the Butler Township Trustees, plaintiffs again alleged that both defendants failed to require McPherson and Waldsmith to develop the property in issue with the proper safeguards to prevent flooding of plaintiffs' property. Instead of alleging negligence however, plaintiffs alleged such acts and omissions on the part of the City of Vandalia and the Butler Township Trustees resulted in an ongoing nuisance, trespass, conversion and appropriation of plaintiffs' property. In damages, plaintiffs requested \$550,000.00, plus a writ of restitution directing all party-defendants to determine the best solution to plaintiffs' ongoing flooding problems.

Upon an analysis of the applicable law and the facts as presented before us, we agree with the Trial Court that the plaintiffs are barred by res judicata from relitigating the material issue of the tort liability of the City of Vandalia and the Butler Township Trustees for damages incurred on plaintiffs' property by flooding. This identical issue, based upon the identical acts and omissions of both defendants, was decided in the prior action commenced by the plaintiffs against these defendants. A point of law or a fact which was directly in issue in a former action, and was there passed upon, may not be drawn into issue in a subsequent action between the same parties. Trautwein v. Sorgenfrei (1979), 58 Ohio St. 2d 493; Whitehead v. General Telephone Co. (1969),

20 Ohio St. 2d 108, 115.

\*6 Although plaintiffs' second cause of action alleges different theories of tort liability on the part of the City of Vandalia and the Butler Township Trustees, this change in theory is not enough to escape the application of res judicata to the issue of the defendants' liability for the flooding of plaintiffs' property. There has been no change in facts as to either the City of Vandalia or the Butler Township Trustees' role in the development of plaintiffs' property. A party cannot, by varying the form of action or adopting a different method of presenting his case, escape the operation of the principle that one and the same causes of action shall not be twice litigated. A mere change in the theory of a cause of action is not sufficient to prevent the application of res judicata. 32 O. Jr. 2d Judgments Section 225 (1975). In addition, we note that where more than one remedy is available to a plaintiff to vindicate the same right, a judgment in an action employing one of them will bar a subsequent resort to the others. Id.

Based upon the foregoing, we conclude that the judgment of the Trial Court dismissing both the City of Vandalia and the Butler Township Trustees as defendants in Case No. 82-2655 on the basis of the application of res judicata is correct. The facts and circumstances before us demonstrate that the material issue of the liability of both the City of Vandalia and the Butler Township Trustees for the flooding of appellants' property was previously ruled upon and is barred by res judicata from relitigation.

Appellants' sole assignment of error is denied.

The judgment of the Trial Court is affirmed.

KERNS, J., and WILSON, J., concur.

Ohio App., 1984.

Kastl v. McPherson

Not Reported in N.E.2d, 1984 WL 4423 (Ohio App. 2 Dist.)

END OF DOCUMENT

## **2305.19 Saving in case of reversal.**

(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

(B) If the defendant in an action described in division (A) of this section is a foreign or domestic corporation, and whether its charter prescribes the manner or place of service of process on the defendant, and if it passes into the hands of a receiver before the expiration of the one year period or the period of the original applicable statute of limitations, whichever is applicable, as described in that division, then service to be made within one year following the original service or attempt to begin the action may be made upon that receiver or the receiver's cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of any of those agents or officers of the receiver with the person having charge of the office or place of business. If that corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no regular ticket or freight agent of the receiver, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on that defendant corporation.

Effective Date: 03-02-2004