

IN THE SUPREME COURT OF OHIO

11-1162

DONALD P. TROYER, et al., :

Plaintiffs-Appellants, :

vs. :

LEONARD J. JANIS, DPM :

Defendant-Appellee. :

ON APPEAL FROM THE
TENTH APPELLATE DISTRICT

COURT OF APPEALS
CASE NO. 10AP-434

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS DONALD P. TROYER AND TAMRA TROYER

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SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>PAGE</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	3
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	7
<u>PROPOSITION OF LAW NO. I:</u> By operation of law, a dismissal of a medical malpractice action for failure to attach an affidavit of merit is an adjudication otherwise than on the merits and thus without prejudice.....	7
CONCLUSION.....	8
PROOF OF SERVICE.....	9
APPENDIX	<u>TAB NO.</u>
Entry of the Franklin County Common Pleas Court (November 18, 2009)	1
Opinion of the Franklin County Common Pleas Court (April 13, 2010)	2
Opinion of the Fairfield County Court of Appeals (May 26, 2011)	3

**EXPLANATION OF WHY THIS CASE IS OF
PUBLIC OR GREAT GENERAL INTEREST**

This cause presents an issue that is of public or great general interest: whether by operation of law, a dismissal of a medical malpractice action for failure to attach an affidavit of merit is an adjudication otherwise than on the merits and therefore without prejudice.

Despite acknowledging the trial court incorrectly applied the holding of a case to the detriment of Appellants, the Tenth District Court of Appeals reached the conclusion that res judicata applies and that the Appellants cannot continue to prosecute their medical malpractice action. In reaching this decision, the appellate court did not properly apply this Court's holding in *Fletcher v. Univ. Hosp. of Cleveland*¹, in which this Court definitively held a failure to attach an affidavit of merit to a medical malpractice complaint warranted a dismissal that was otherwise than on the merits. Instead, the appellate court held the trial court's entry – which did not specifically state the dismissal was without prejudice – was binding.

If allowed to stand, the appellate court's ruling will affect many innocent injured parties, and would be contrary to the precedence set by this Court. Unless the court of appeals' decision is overturned in this case, Appellants and other similarly situated individuals will be precluded from pursuing a medical malpractice action.

¹ 120 Ohio St.3d 167, 2008-Ohio-5379.

STATEMENT OF THE CASE AND FACTS

Appellant Donald Troyer was a patient of Appellee Leonard Janis, DPM, and presented to Appellee on December 1, 2005 with complaints of chronic right ankle pain. Appellee diagnosed Appellant with severe degenerative changes in the ankle, as well as a significant leg-length difference. Appellee recommended, and then performed, a total right ankle replacement and tendo-Achilles lengthening on November 15, 2006.

After Appellant continued to have issues with his ankle, Appellee removed the existing implant and performed a second replacement without consent; Appellant was under the impression the second surgery was to fuse his ankle. Appellant eventually sought the opinion and treatment of an orthopedic surgeon, who noted that the second implant had also failed and that there was significant malpositioning of the implant. The orthopedic surgeon initially treated the condition conservatively in hopes that the bones would eventually fuse properly. Surgery to fuse the ankle was later performed, which also was unsuccessful due to the extensive damage that had already occurred in the ankle. After all other options had failed, Appellant underwent a below the knee amputation of his right leg on November 30, 2009.

On February 26, 2009, former counsel for Appellants Donald and Tamara Troyer filed a medical malpractice action in Franklin County Common Pleas Court against Appellee. No affidavit of merit was attached to the complaint. Consequently, on April 6, 2009, counsel for Appellee filed a Motion to Dismiss for failure to comply with Civil Rule 10(D)(2)(b). Former counsel for Appellants filed a response to the Motion to Dismiss, and requested, among other things, additional time to provide an affidavit of merit. After the issue was fully briefed, the trial court granted Appellee's Motion to Dismiss, and ordered Appellee's counsel to prepare the entry. Appellee's counsel did as ordered, and the Judgment Entry was filed on November 18,

2009. Appendix Tab 1. The Entry, as prepared by Appellee's counsel, was silent as to whether the dismissal was with or without prejudice.

Shortly after the dismissal, on December 9, 2009, former counsel for Appellants re-filed the medical malpractice action against Appellee, this time with the requisite affidavit of merit. Current counsel for Appellants entered an appearance by filing a Notice of Substitution of Counsel on January 22, 2010. Then, on February 12, 2010, Appellee filed a Motion for Summary Judgment. Appellee argued that because the Dismissal Entry was silent, the dismissal was by default an adjudication on the merits, *i.e.* with prejudice, and Appellants were precluded from re-filing the complaint under the doctrine of *res judicata*.

Appellants in their response to Appellee's Motion for Summary Judgment cited to the Ohio Supreme Court's holding in *Fletcher*, and argued that the Court has specifically held that dismissals for failure to include an affidavit of merit was a dismissal without prejudice. Therefore, Civil Rule 41(B)(3) does not apply.

After the parties briefed the matter, the newly assigned trial judge agreed with Appellee that the dismissal was with prejudice through an incorrect reading of *Nicely v. Ohio Dept. of Rehab. and Correct.*², and granted his Motion for Summary Judgment in a decision filed on April 13, 2010. Appendix Tab 2. Specifically, the trial court held *Nicely* supported Appellee's contention that an Entry dismissing an action for failure to include an affidavit of merit nevertheless is an adjudication on the merits.

Appellants subsequently appealed to the Tenth District appellate court, pointing out the trial court's error. The appellate court, however, did not rule on whether the trial court erred, but instead held that the dismissal was proper due to *res judicata*. In short, the appellate court held

Appellants should have appealed the first trial court's Entry prepared by the Appellee. The failure to do so made the Entry final and binding, despite the clear error.

The sole issue that this Court should take on appeal is whether, by operation of law, a dismissal of a medical malpractice action for failure to attach an affidavit of merit is an adjudication otherwise than on the merits and therefore without prejudice.

² 10th Dist. No. 09AP-187, 2009-Ohio-4386, unreported.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I: By operation of law, a dismissal of a medical malpractice action for failure to attach an affidavit of merit is an adjudication otherwise than on the merits and thus without prejudice.

The sole issue that should be accepted by this Court for review is whether, by operation of law, the previous dismissal for failure to attach an affidavit of merit is without prejudice. If the dismissal is with prejudice, as Appellee argues, the re-filing of the action is improper. However, if the dismissal is without prejudice by operation of law, then Appellants permissibly re-filed the action through the use of Ohio's savings clause. This Court has previously held the dismissal on the basis of failure to submit an affidavit of merit is an adjudication otherwise than on the merits. However, the decision was silent as to whether the dismissal is without prejudice by operation of law, and despite what the entry may state.

Appellants do not dispute that the original complaint was properly dismissed by the trial court due to a failure to attach an affidavit of merit as required by Civil Rule 10(D)(2). Nor do Appellants dispute that the Entry granting the dismissal was silent as to whether the dismissal was with or without prejudice. However, the issue of whether such a dismissal is otherwise than on the merits, and thus without prejudice, has been unequivocally resolved by this Court.

In *Fletcher*, the Court was presented with the following issues of first impression: (1) what is the proper responsive pleading to a plaintiff's failure to file an affidavit of merit with a medical malpractice complaint, and (2) is a dismissal of a medical malpractice claim based on the plaintiff's failure to file an affidavit of merit with or without prejudice. As to the latter question – which was the only issue in Appellee's motion – the Court held a “dismissal of a complaint for failure to file with the affidavit required by Civ.R. 10(D)(2) is an adjudication

otherwise than on the merits. The dismissal, therefore, is without prejudice. *Fletcher* at ¶2 of syllabus.

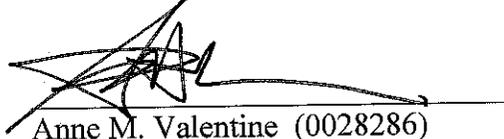
Despite this pronouncement by the Court, the decision is silent as to whether a dismissal by a trial court is, by operation of law, an adjudication other than on the merits. In this case, despite acknowledging the error of the trial court's interpretation of *Nicely* and the precedence provided by this Court's ruling in *Fletcher*, the appellate court ruled that it was not. Accordingly, an injustice will result if the appellate court's ruling is not overturned. By accepting this appeal, the Court will have an opportunity to revisit the issue, and rule in the affirmative on Appellants' proposition of law.

The issue of whether a dismissal for failure to attach an affidavit of merit is without prejudice by operation of law potentially affects many medical malpractice filings. Accepting this appeal will provide needed clarification, and establish consistency in lower courts on this issue. Finally, it would remedy an obvious harm that has occurred to Appellants, and which has the potential to harm other Ohio citizens.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellants request that this Court grant jurisdiction and allow this appeal so that the important issues presented in this case will be reviewed on the merits.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'Anne M. Valentine', written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following this 7th day of July, 2011, by regular U.S. Mail, postage prepaid:

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Anne M. Valentine

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

DONALD P. TROYER, ET AL.,

Plaintiffs,

vs.

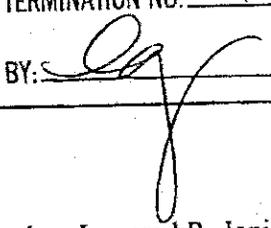
LEONARD J. JANIS, DPM,

Defendant.

FINAL APPEALABLE ORDER

Case No. 09CVA02-2976

JUDGE BESSEY

TERMINATION NO. <u>18</u>
BY: 

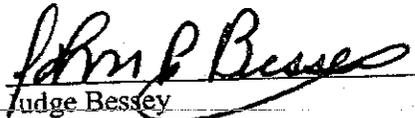
JUDGMENT ENTRY

This matter came for consideration on Motion to Dismiss of Defendant Leonard R. Janis, DPM d/b/a/ Total Foot & Ankle of Ohio on April 8, 2009. The Court finds Defendant's Motion to be well-taken and hereby grants same.

Accordingly, Defendant's Motion to Dismiss is hereby **GRANTED** and Plaintiffs' claim is hereby **DISMISSED IN ITS ENTIRETY**. Therefore, Plaintiffs' Motion to Extend Time To File Affidavit of Merit or Alternatively, Leave to File Amended Complaint, filed April 13, 2009, is hereby **DENIED** and Plaintiffs' Motion for Leave to File Amended Complaint, or in the Alternative, Leave to File Supplemental Complaint, filed April 30, 2009, is hereby **DENIED**. Judgment is entered in favor of Defendant Leonard R. Janis, DPM d/b/a/ Total Foot & Ankle of Ohio.

This is a final appealable order. There is no just cause for delay. Court costs to be paid by Plaintiffs.

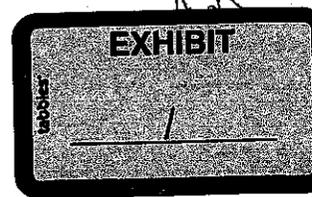
IT IS SO ORDERED.



Judge Bessey

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CLERK OF COURTS-CV

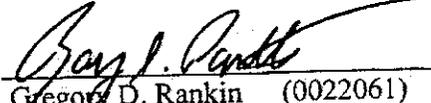
(2)



APPROVED:

Submitted but not approved.

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2010 APR 13 PM 4:03
CLERK OF COURTS

Donald P. Troyer, et al., :
 :
 Plaintiffs, : Case No. 09CVA12-18259
 :
 -v- : JUDGE PFEIFFER
 :
 Leonard J. Janis, DPM, et al., :
 :
 Defendants. :

DECISION AND ENTRY GRANTING DEFENDANT LEONARD J. JANIS' MOTION
FOR SUMMARY JUDGMENT FILED FEBRUARY 12, 2010
AND
NOTICE OF FINAL APPEALABLE ORDER

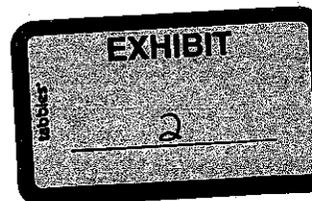
Rendered this 13th day of April, 2010

PFEIFFER, J.

This matter is before the Court¹ on Defendant Leonard J. Janis, DPM's Motion for Summary Judgment filed February 12, 2010. The Motion is opposed.

The relevant facts are as follows. On February 26, 2009, Plaintiffs initiated a medical malpractice action against Defendant Janis, Donald P. Troyer, et al., v. Leonard J. Janis, DPM, Case No. 09CVA02-2976. (Defendant Janis' Ex. A). Their Complaint was not accompanied by an Affidavit of Merit as required by Civ. R. 10(D)(2), prompting Defendant Janis to file a Motion to Dismiss. (Defendant Janis' Ex. B). In response, Plaintiffs sought leave to extend the time to file an Affidavit of Merit or, alternatively, requested leave to file an amended or supplemental complaint. On November 10, 2009, the trial court issued a Decision granting Defendant Janis' Motion to Dismiss and denying all of Plaintiffs' requests. (Id.). A Judgment Entry was filed on

¹ This action was recently transferred to the Court's docket upon the recusal of the originally assigned Judge.



November 18, 2009 indicating that "Plaintiffs' claim is hereby DISMISSED IN ITS ENTIRETY," and further that "[t]his is a final appealable order. There is no just cause for delay." (Defendant Janis' Ex. C). The Judgment Entry, which was prepared by Defendant Janis' counsel, was submitted to but not approved by Plaintiffs' then counsel. The Entry was silent as to whether the dismissal was to be with or without prejudice. (Id.). On December 9, 2009, Plaintiffs re-filed their claims against Defendant Janis.

Defendant Janis now moves the Court for summary judgment on the grounds that the Judgment Entry issued in Case No. 09CVA02-2976, being silent as to whether the dismissal was with or without prejudice, effectively operated as a dismissal with prejudice, and therefore, Plaintiffs' claims are barred by the doctrine of res judicata. Plaintiffs oppose the Motion arguing that, under Ohio law, a dismissal for failure to file an Affidavit of Merit is not a dismissal on the merits. Thus, they contend that such a dismissal is without prejudice regardless of whether the entry so specifies.

Under Civ. R. 56, summary judgment is proper when "(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327. Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. Murphy v. Reynoldsburg (1992), 65 Ohio St.3d 356, 360. Nevertheless, summary judgment is appropriate where a party fails to produce evidence

supporting the essentials of its claim. Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108 at paragraph three of the syllabus.

Under the doctrine of res judicata, “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” Grava v. Parkman Township, 73 Ohio St.3d 379, syllabus, 1995-Ohio-331. “[A] dismissal with prejudice is said to be ‘on the merits’ and a dismissal without prejudice is said to be ‘otherwise than on the merits.’” Customized Solutions, Inc. v. Yurchyk & Davis, CPA’s Inc., Mahoning App. No. 03 MA 38, 2003-Ohio-4881, at ¶20 (citing Staff Notes (1970) to Civ. R. 41(B)(3)). The Ohio Supreme Court has succinctly stated that a dismissal “[w]ith prejudice’ means the case is over, unless appealed.” Briggs v. Cincinnati Recreation Comm’n Office (1998), 132 Ohio App.3d 610, 611. Therefore, a “trial court properly grant[s] summary judgment to the defendant on the basis of res judicata, when an earlier suit brought by the plaintiff, with identical allegations, ha[s] been dismissed with prejudice, and when that dismissal ha[s] become final due to the plaintiff’s failure to pursue a timely appeal.” *Id.* at syllabus.

Civ. R. 41(B)(3) states that “[a] dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4)² of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.” Therefore, Defendant Janis argues that as the Judgment Entry does not state that the dismissal was otherwise than upon the merits, then it operates as a

² The exceptions set forth in subsection (B)(4) are for dismissals for lack of personal or subject matter jurisdiction and for failure to join a proper party under Civ. R. 19 or Civ. R. 19.1.

dismissal upon the merits, with prejudice, and subject to the affirmative defense of res judicata.

In arguing that the doctrine of res judicata is not applicable, Plaintiffs rely upon Fletcher v. Univ. Hosps. of Cleveland, 120 Ohio St.3d 167, 2008-Ohio-5379, to support their position that the dismissal was not on the merits. There, the Ohio Supreme Court concluded that “the proper response to a failure to comply with Civ. R. 10(D)(2) is a motion to dismiss filed under Civ. R. 12(B)(6). However, a dismissal for failure to comply with Civ. R. 10(D)(2) is an adjudication otherwise than on the merits. The dismissal, therefore, is without prejudice.” *Id.* at ¶21. From this holding, Plaintiffs contend that the Judgment Entry’s silence as to whether the dismissal was with or without prejudice is of no consequence. They posit that the dismissal was automatically without prejudice and that to hold to the contrary would be ignoring the binding authority of Fletcher.

The Tenth District Court of Appeal’s decision in Nicely v. Ohio Dept. of Rehab. & Corr., Franklin App. No. 09AP-187, 2009-Ohio-4386, is directly on point. There, the Court of Claims dismissed a medical malpractice action for failure to provide an Affidavit of Merit, and the dismissal entry was also silent as to whether the dismissal was with or without prejudice. On appeal, the appellant asserted that his case had been erroneously dismissed with prejudice. The Tenth District agreed, stating:

[a] dismissal with prejudice operates as an adjudication on the merits; a dismissal otherwise than ~~on the merits is without prejudice.~~ Fletcher at ¶16. The Court of Claims dismissed appellant’s complaint for lack of a Civ. R. 10(D)(2) affidavit of merit, and the dismissal was pursuant to Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted. See Fletcher at ¶¶14, 21. Generally, pursuant to Civ.

R. 41(B)(3), a dismissal is with prejudice unless the court specifies otherwise. Thus, a dismissal under Civ. R. 12(B)(6) is with prejudice if the court fails to specify that the dismissal is without prejudice. Reasoner v. Columbus, 10th Dist. No. 04AP-800, 2005-Ohio-468, at ¶¶7-8. Consequently, the Court of Claims' dismissal of appellant's complaint was with prejudice because the court did not specify otherwise.

As appellant argues, however, a court must dismiss without prejudice a complaint for lack of a Civ. R. 10(D)(2) affidavit of merit. Fletcher at ¶20. See also Civ. R. 10(D)(2)(d) (stating that a dismissal for failure to file a Civ. R. 10(D)(2) affidavit "shall operate as a failure otherwise than on the merits"). Therefore, the Court of Claims erred by dismissing appellant's complaint with prejudice.

Id. at ¶¶13, 14. (Emphasis added).

Therefore, according to the Tenth District, if an entry dismissing a case for lack of an Affidavit of Merit fails to specify that the dismissal is without prejudice, then, by operation of Civ. R. 41(B)(3), the dismissal is with prejudice. Plaintiffs argue that any "half-way careful reader" would see that Nicely's holding is actually aligned with their position. They rely on the Tenth District's statement that "a court must dismiss without prejudice a complaint for lack of a Civ. R. 10(D)(2) affidavit of merit," the appellate court's finding that the lower court had erred in dismissing the complaint with prejudice, and the fact that the matter was remanded to the lower court for purposes of entering a dismissal without prejudice. Id. at ¶¶14, 16.

However, unlike the Tenth District, this Court does not have any authority to ~~modify or vacate a final judgment absent certain procedural vehicles not applicable~~ here. See Yavitch & Palmer Co., L.P.A. v. U.S.Four, Inc., Franklin App. No. 05AP-294, 2005-Ohio-5800, at ¶10. This Court is bound to follow Nicely's holding and find that the

Judgment Entry's silence as to the effect of the dismissal means that the dismissal was with prejudice. As recognized by Defendant Janis, the Court's review cannot delve into what should have been done, but is limited to what was actually done. Again, based on Nicely, the prior dismissal was with prejudice. As such, the dismissal was a final judgment, and the doctrine of res judicata bars Plaintiffs from pursuing their claims against Defendant Janis. Accordingly, Defendant Janis' Motion for Summary Judgment is well-taken and GRANTED, and judgment is hereby entered in his favor as a matter of law.

Pursuant to Civ. R. 54(B), the Court finds that there is no just reason for delay. Thus, pursuant to Civ. R. 58(B), the Clerk of Courts is hereby directed to serve upon all parties notice and the date of this judgment. However, this action remains pending as to Plaintiffs' claims against the additional Defendants named in their Amended Complaint.


BEVERLY Y. PFEIFFER, JUDGE

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Gregory D. Rankin
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Counsel for Defendant Leonard J. Janis, D.P.M.

IN THE COURT OF APPEALS OF OHIO

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

TENTH APPELLATE DISTRICT

2011 MAY 26 PM 1:02

CLERK OF COURTS

Donald P. Troyer et al.,

Plaintiffs-Appellants,

v.

Leonard J. Janis, DPM,

Defendant-Appellee.

No. 10AP-434
(C.P.C. No. 09CVA-12-18259)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on May 26, 2011

Leeseberg & Valentine, Anne M. Valentine and Susie L. Hahn, for appellants.

Lane, Alton & Horst, LLC, Gregory D. Rankin and Ray S. Pantle, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiffs-appellants, Donald P. and Tamra Troyer ("the Troyers"), appeal from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Leonard J. Janis, DPM ("Dr. Janis").

{¶2} The Troyers began this medical malpractice action against Dr. Janis with a complaint filed on February 26, 2009. Dr. Janis moved to dismiss the complaint because it failed to include an affidavit of merit required by Civ.R. 10(D)(2)(b). The trial court

EXHIBIT

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granted the motion to dismiss by judgment entry filed on November 18, 2009. This entry does not specify whether the dismissal is with or without prejudice.

{¶3} The Troyers then refiled their claims in a new complaint on December 9, 2009, this time attaching the requisite Civ.R. 10(D)(2)(b) affidavit. Dr. Janis moved for summary judgment, asserting that the prior entry dismissing the first complaint had constituted an adjudication on the merits and, pursuant to the doctrine of res judicata, the Troyers could not refile the same action.

{¶4} Citing to this court's decision in *Nicely v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-187, 2009-Ohio-4386, the trial court found that an entry dismissing a medical malpractice action for failure to include an affidavit of merit constitutes a dismissal with prejudice and therefore an adjudication on the merits, even if the entry fails to specify that it is a dismissal with prejudice. The trial court accordingly granted Dr. Janis's motion for summary judgment and dismissed the refiled complaint.

{¶5} The Troyers bring the following sole assignment of error on appeal:

I. THE TRIAL COURT ERRED IN HOLDING THAT THE DISMISSAL OF A COMPLAINT FOR FAILURE TO ATTACH AN AFFIDAVIT OF MERIT IS A DISMISSAL WITH PREJUDICE.

{¶6} We initially note this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by

making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. *Id.*

{¶7} An appellate court's review of summary judgment is *de novo*. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Soc. Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶8} The narrow issue before us is whether the trial court's disposition of the first complaint filed in this case, culminating in a dismissal under Civ.R. 12(B)(6), was a final disposition of the matter on the merits which, absent reversal or modification on appeal from that judgment, stands as the law of the case and preclude relitigation of the matter in a subsequently-filed complaint.

{¶9} The trial court's first judgment in this matter did not specify whether the dismissal was entered with or without prejudice to refiling. Civ.R. 41(B)(1), however, provides that "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." A related subsection of the rule, Civ.R. 41(B)(3), provides that "[a] dismissal under division (B) of this rule and any dismissal not provided for in this rule * * * operates as an adjudication upon the merits unless the court,

in its order for dismissal, otherwise specifies." Pursuant to these rules, therefore, when the trial court dismissed the case without indicating that it was done without prejudice to refiling, the dismissal functioned as a dismissal on the merits, that is to say, with prejudice. More specifically, we have held that a dismissal under Civ.R. 12(B)(6) is with prejudice if the court fails to specify that the dismissal is without prejudice. *Reasoner v. Columbus*, 10th Dist. No. 04AP-800, 2005-Ohio-468, ¶7. A dismissal entered with prejudice will, by application of the doctrine of res judicata, bar a subsequent attempt to refile the same action. *Tower City Properties v. Cuyahoga Cty. Bd. of Revision* (1990), 49 Ohio St.3d 67, 69.

{¶10} The Troyers, however, argue that based upon Ohio Supreme Court case law, the dismissal for failure to provide a Civ.R. 10(D)(2)(b) affidavit of merit constitutes a dismissal without prejudice, without regard to the above-cited rules of civil procedure. Specifically, the Troyers cite to the Ohio Supreme Court's holding in the *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379: "A dismissal of a complaint for failure to file the affidavit required by Civ.R. 10(D)(2) is an adjudication otherwise than on the merits. The dismissal, therefore, is without prejudice." *Id.* at paragraph two of the syllabus. The Troyers argue that, by application of *Fletcher* and operation of law, a medical malpractice action for failure to provide the required affidavit of merit would constitute an adjudication otherwise than on the merits and stand as without prejudice to refiling, regardless of the presence or absence of specific language on the question.

{¶11} The question is whether such a dismissal, pursuant to *Fletcher*, ought to be without prejudice otherwise than on the merits, or whether the trial court's judgment is, by operation of law, an adjudication otherwise than on the merits.

{¶12} We confronted and decided this question in *Nicely*, supra. We concluded that the trial court in *Nicely* had, in effect, entered a judgment with prejudice, but had erred in doing so. Upon direct appeal from that judgment, we recognized the error and remanded the matter for modification of the trial court's entry to reflect that it was without prejudice.

{¶13} The distinction in the present case from *Nicely* arises in the posture of the appeal. In *Nicely*, we considered an appeal from the trial court's initial judgment erroneously characterizing a dismissal for failure to file an affidavit of merit as with prejudice. We were in a position to correct that error. In the present case, the Troyers did not prosecute their appeal from the trial court's initial judgment which, pursuant to *Nicely*, was both entered with prejudice and erroneous in this respect. However, in the absence of an appeal, the trial court's initial judgment stood as the law of the case. We cannot recognize error in that initial judgment by means of the appeal now before us, which is taken from the trial court's second judgment in the matter, dismissing the second complaint on grounds of res judicata. It is not an impediment to a finding of res judicata that the initial judgment upon which the bar of relitigation stands was itself in error; the trial court's second judgment in this case, which we now consider in this appeal, correctly relied on res judicata and must be affirmed in that respect.

{¶14} In the case before us, the Troyers initial appeal from the trial court's first judgment was dismissed before any comparable issues were briefed and this court had an opportunity to review the character of the trial court's initial judgment. The Troyers are, arguably, correct in asserting that *Fletcher* mandates that the trial court's initial judgment in this case was erroneously entered in that it was entered with prejudice. The judgment

before us for consideration in this appeal, however, is not a *Fletcher* case, but a case concerning the proper application of res judicata and law of the case, and is not in error. The Troyers' assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas granting summary judgment to Dr. Janis, is affirmed.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.
