

ORIGINAL

**IN THE SUPREME COURT OF OHIO
APPEAL FROM THE TENTH DISTRICT COURT OF APPEALS**

DONALD P. TROYER, et al., :
 :
 Plaintiffs-Appellants, : **Case No. 11-1162**
 :
 -vs- :
 : **Court of Appeals**
 LEONARD J. JANIS, DPM, : **Case No. 10APE-05-434**
 :
 Defendant-Appellee. :

**MEMORANDUM OF DEFENDANT-APPELLEE LEONARD J. JANIS, DPM
IN OPPOSITION TO JURISDICTION**

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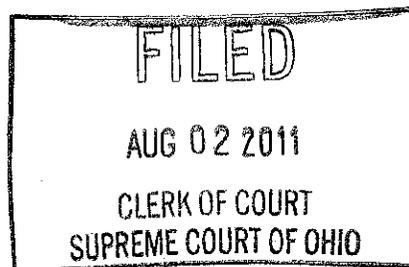


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**EXPLANATION OF WHY THIS CASE IS NOT A
CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This is not a case of public or great general interest. This is a fact-specific case in which Appellants' lawsuit was dismissed because they failed to follow the proper procedure for amending the trial court's judgment entry in the original action. If the November 18, 2009 Judgment Entry in the original action did not properly reflect the Supreme Court of Ohio's decision in *Fletcher v. University Hospital of Cleveland*, then the proper remedy was for Appellants to appeal the judgment entry in the original action such that it could be amended to include the phrase "without prejudice." Appellants committed a procedural blunder by failing to pursue an appeal in the first action, and the consequence of this failure is that the second cause of action was subject to dismissal based on the doctrine of *res judicata*.

This case arises from the procedural peculiarities regarding Appellants' failure to properly pursue an appeal. Thus, the outcome of this matter has no relevance to medical malpractice cases in general and is of no importance to anyone other than the parties in this lawsuit. As far as Defendants are aware, the Troyers are the only plaintiffs who have had their case dismissed under *res judicata* because they failed to appeal an erroneous judgment entry in the original action. Thus, if this Court did accept jurisdiction, this Court's decision on this issue would not create law that would be applicable to other cases.

Contrary to Appellants' assertion, there was nothing improper about the way the lower courts in the second action applied *Fletcher* to this case. Both the trial court decision dismissing this action based on *res judicata* and the Tenth District Court of Appeals decision affirming the dismissal recognized that under *Fletcher*, a dismissal in a medical malpractice case for failure to attach an affidavit of merit to the complaint *should be* a dismissal without prejudice. See *Fletcher v. Univ. Hosp. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, at ¶

18. However, in deciding whether the second action was barred by the doctrine of *res judicata*, the courts could not base their decision on whether the original action *should have been* dismissed without prejudice. The courts were required to base their decision on whether the original action was *actually* dismissed without prejudice—which it was not. Thus, there was no improper application of *Fletcher* here because, as the Tenth District Court of Appeals stated, “[t]he judgment before us for consideration in this appeal . . . 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.” *Troyer v. Janis*, 10th Dist. No. 10AP-434, 2011-Ohio-2538, at ¶ 14. Thus, the trial court and Tenth District Court of Appeal decisions are not contrary to *Fletcher* and do not warrant reversal.

In short, this case turns on a procedural issue that is unique to these parties. There are no “similarly situated” individuals who will be negatively affected if the lower court decisions stand. Appellants have failed to present a matter of public or great general interest in the dismissal of their claim. This Court should decline to accept jurisdiction of this appeal.

STATEMENT OF THE CASE AND FACTS

On February 26, 2009, Plaintiffs-Appellants Donald P. Troyer and Tamara Troyer filed a Complaint in Case No. 09 CV 2976 (“the original action”) against Defendant Leonard R. Janis, DPM, d/b/a/ Total Foot & Ankle of Ohio in the Franklin County Court of Common Pleas. In this Complaint, Appellants alleged that Dr. Janis fell below the standard of care in performing an agility ankle implant procedure on Mr. Troyer and that additional repair surgeries were needed as a result, including an in-bone total ankle replacement. In his responsive pleading, Dr. Janis denied that he fell below the standard of care and denied that his actions caused damage to Mr. Troyer.

On April 8, 2009, Defendant Dr. Janis filed a Motion to Dismiss the claims against him based on Appellants' failure to file an Affidavit of Merit. The parties fully briefed the issue, and the trial court in the original action granted Dr. Janis's Motion to Dismiss on November 10, 2009.

On that same date, counsel for Dr. Janis sent to Appellants' former counsel a proposed Judgment Entry for his review and approval, in compliance with Local Rule 25. Two days later, Appellants' former counsel responded with the following: "Your entry needs to indicate that the dismissal is without prejudice." Counsel for Dr. Janis explained that the proposed Entry that he was submitting to the court did not address the issue of prejudice because the November 10, 2009 Decision was silent as to whether the dismissal was with or without prejudice. At that time, Appellants' former counsel had the opportunity to submit a different version of the proposed entry, one which specified that the dismissal was without prejudice. Appellants' former counsel did not do so. Dr. Janis's counsel submitted the proposed Judgment Entry to the court with "submitted but not approved" placed on the signature block of Appellants' counsel, and the trial court subsequently signed that Judgment Entry.

On December 7, 2009, Appellants filed a Motion for Reconsideration of the trial court's dismissal of the original action. Appellants did not take the opportunity to address the issue of whether the November 18, 2009 Judgment Entry was a dismissal with or without prejudice. At no time in this Motion for Reconsideration did Appellants indicate that the November 18, 2009 Judgment Entry was flawed or incomplete because it did not contain the phrase "without prejudice."

On December 9, 2009, Appellants filed a Notice of Appeal that appealed the trial court's dismissal of the original action. *See Troyer v. Janis*, 10th Dist. No. 09 AP 1150. Also on

December 9, 2009, Appellants re-filed the Complaint against Dr. Janis in the Franklin County Court of Common Pleas. This new Complaint was almost identical to the Complaint that was filed in the previously-dismissed case. As in his original responsive pleading, Dr. Janis denied all wrongdoing in the re-filed Answer. Appellants subsequently dismissed the appeal in the original case, but continued to pursue the re-filed action.

Dr. Janis filed his Motion for Summary Judgment in the re-filed case on February 12, 2010. Dr. Janis argued that, pursuant to Ohio Rule of Civil Procedure 41(B)(3), the trial court's November 18, 2009 Judgment Entry in the original action, which was silent as to whether the dismissal was with or without prejudice, operated as an adjudication on the merits and was thus a dismissal with prejudice. The matter was fully briefed. The trial court agreed with Appellee and granted Dr. Janis's Motion for Summary Judgment on April 13, 2010, dismissing all claims against him.

On May 6, 2010, Appellants filed a Notice of Appeal of the trial court's April 13, 2010 Decision and Entry. On May 26, 2011, after the matter was fully briefed and oral argument was heard, the Tenth District Court of Appeals affirmed the April 13, 2010 decision dismissing Appellants' claims. This appeal followed.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A dismissal of a medical malpractice action for failure to attach an affidavit of merit where the entry is silent as to whether the dismissal is with or without prejudice operates as an adjudication on the merits and thus with prejudice.

Ohio Rule of Civil Procedure 41(B)(1) states: "Where 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." *Id.* (emphasis added). Ohio Rule of Civil Procedure 41(B)(3) states: "A dismissal under division (B) of this

rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as **an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.**” *Id.* (emphasis added).

As the Staff Notes to the rule indicate, “Rule 41(B)(3) clearly states that a dismissal under Rule 41(B) is a dismissal with prejudice (i.e., on the merits) unless the order of dismissal provides otherwise or unless Rule 41(B)(4) is applicable, as where the dismissal is based on a lack of jurisdiction over the person of the defendant.” Civ.R. 41(B)(3), Staff Notes. Thus, a dismissal under Ohio Rule of Civil Procedure 12(B)(6) is with prejudice if the court fails to specify that the dismissal is without prejudice. *Nicely v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. No. 09AP-187, 2009-Ohio-4386, at ¶ 13, citing *Reasoner v. Columbus*, 10th Dist. No. 04AP-800, 2005-Ohio-468, at ¶¶ 7-8. Where a dismissal is with prejudice, a subsequent action is barred by the doctrine of *res judicata*. *Customized Solutions, Inc. v. Yurchyk & Davis, CPA's, Inc.*, 7th Dist. No. 03 MA 38, 2003-Ohio-4881, at ¶ 20, citing *Tower City Prop. v. Cuyahoga Cty. Bd. of Rev.* (1990), 49 Ohio St.3d 67, 69, 551 N.E.2d 122.

On November 10, 2009, the trial court in the original action issued a Decision granting Dr. Janis’s Motion to Dismiss because Appellants failed to file an Affidavit of Merit with the Complaint, which is required by Ohio Rule of Civil Procedure 10(D)(2). This dismissal constitutes an involuntary dismissal pursuant to Ohio Rule of Civil Procedure 41(B)(1) for failure to “comply with these rules[.]” *Id.* Due to the language used in the Judgment Entry, this dismissal was a dismissal with prejudice. Ohio Rule of Civil Procedure 41(B)(3) states that an involuntary dismissal is a dismissal with prejudice unless the judgment entry or order specifically states that the dismissal was without prejudice. The November 18, 2009 Judgment Entry dismissing the original action does not specify whether the case was dismissed “with

prejudice” or “without prejudice.” Thus, this dismissal operates as an adjudication on the merits or a dismissal “with prejudice.” The fact that the November 18, 2009 Judgment Entry dismissing the original action states that the judgment is a final appealable order and that there is no just cause for delay also indicates that the dismissal of the initial Complaint was a dismissal with prejudice, because generally, “[a] dismissal without prejudice is not a final, appealable order.” See *Ward v. Summa Health Sys.*, 9th Dist. No. 24567, 2009-Ohio-4859, at ¶ 7, quoting *Denham v. City of New Carlisle* (1999), 86 Ohio St.3d 594, 597, 1999-Ohio-128, 716 N.E.2d 184. Because the original action was dismissed with prejudice, the second action was barred by the doctrine of *res judicata*.

Appellants argue that by operation of law, a dismissal of a medical malpractice case for failure to attach an affidavit of merit is an adjudication otherwise than on the merits and therefore without prejudice. Appellants have failed to reconcile their position with the law in Ohio that silence in a judgment entry as to whether the claim is dismissed with or without prejudice reflects that the dismissal was with prejudice. Civ.R. 41(B)(3). They have also failed to reconcile their position with the Tenth District Court of Appeals’ decision in *Nicely v. Ohio Department of Rehabilitation & Corrections*, which held that where a trial court dismisses a plaintiff’s claim for failure to file an affidavit of merit, but fails to specify whether that dismissal is with or without prejudice, the dismissal is deemed to have been with prejudice. See *Nicely*, 10th Dist. No. 09AP-187, 2009-Ohio-4386, at ¶ 13, citing *Reasoner*, 10th Dist. No. 04AP-800, 2005-Ohio-468, at ¶¶ 7-8.

The Tenth District Court of Appeals’ conclusion in the case at bar (that the trial court’s dismissal operates as a dismissal with prejudice) is consistent with its prior decision in *Nicely v. Ohio Department of Rehabilitation and Correction*. See *Nicely*, 10th Dist. No. 09AP-187, 2009-

Ohio-4386. In *Nicely*, the trial court granted the defendants/appellees' motion to dismiss due to the plaintiff's failure to file an affidavit of merit. *Id.* at ¶ 3. The trial court did not specify whether the dismissal was with or without prejudice. *Id.* On appeal, the plaintiff submitted the following assignment of error to the Tenth District Court of Appeals: "The Court of Claims erred in dismissing case without the notation or determination of dismissing without prejudice as in *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 897 N.E.2d 147." *Id.* at ¶ 4.

In deciding the issue, the Tenth District Court of Appeals recognized that "[a] dismissal with prejudice operates as an adjudication on the merits; a dismissal otherwise than on the merits is without prejudice." *Id.* at ¶ 13, quoting *Fletcher*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, at ¶ 16. The Tenth District noted that the appellant's complaint was dismissed "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." *Id.*, citing *Fletcher*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, at ¶¶ 14, 21. The court also noted that "[g]enerally, pursuant to Civ.R. 41(B)(3), a dismissal is with prejudice unless the court specifies otherwise." *Id.*

Applying these civil rules, the Tenth District Court of Appeals concluded 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, ¶ 7-8. Consequently, the Court of Claims' dismissal of appellant's complaint was with prejudice because the court did not specify otherwise." *Id.* (emphasis added). The appellate court then concluded that because *Fletcher* held that a dismissal for failure to file an affidavit of merit *should be* without prejudice, the Court of Claims erred by dismissing the complaint with prejudice. *Id.* at ¶ 14.

As the Tenth District pointed out, “the distinction in the present case from *Nicely* arises in the posture of the appeal.” *Troyer v. Janis*, 10th Dist. No. 10AP-434, 2011-Ohio-2538, at ¶ 13. The *Nicely* court recognized that the Court of Claims’ dismissal, which was silent as to whether the dismissal was with or without prejudice, was a dismissal with prejudice. However, because the Tenth District 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, the court was in a position to correct that error. *See id*

Like the Court of Claims’ decision in *Nicely*, the November 18, 2009 Judgment Entry in the original action was a dismissal with prejudice because it did not specify whether the dismissal was with or without prejudice. However, “[i]n 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.” *Id.* Although Appellants did file an appeal in the original action, “this appeal 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.” *Id.* at ¶ 14. As the Tenth District recognized, “in the absence of an appeal, the trial court’s initial judgment stood as the law of the case.” *Id.* The appellate court in the second appeal could not recognize and correct error in the initial judgment entry. *See id.* As the Tenth District stated, “[i]t 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.” *Id.*

If Appellants believed that the trial court erred by dismissing the original action with prejudice, Appellants had several remedies available to them through which they could have

sought to correct the Judgment Entry. The most obvious remedy that was available to Appellants was an appeal of the November 18, 2009 Judgment Entry in which they could have requested that the Tenth District Court of Appeals reverse the judgment such that the dismissal would be without prejudice, which is exactly what the plaintiffs did in *Nicely*. Also, when Appellants disagreed with the language in Appellee's proposed Judgment Entry, Appellants had the opportunity to submit their own proposed judgment entry to the court which contained the phrase "without prejudice." Finally, Appellants could have raised the issue in the Motion for Reconsideration that they filed in the original action. Despite having ample opportunity to do so, at no time did Appellants argue in the original action that the Judgment Entry was improper because it failed to include the phrase "without prejudice."

This November 18, 2009 Judgment Entry is now final and cannot be appealed or amended. The trial court in the re-filed action dismissed Appellants' claims because their counsel did not take the proper step in seeking to amend the November 18, 2009 Judgment Entry—pursuing an appeal in the original case. The trial court in this case was required to give effect to what the Judgment Entry *actually said*. See the April 13, 2010 Decision of the Franklin County Court of Common Pleas, Appellant Exhibit 2, at 6. The trial court did not have the power to modify, vacate, or reverse the Judgment Entry in the original action or to give effect to what the Judgment Entry *should have said*. See *id.* at 5-6, citing *Yavitch & Palmer Co., LPA v. U.S. Four, Inc.*, 10th Dist. No. 05AP-294, 2005-Ohio-5800, at ¶ 10.

Although Appellants may argue that it is harsh to dismiss their case because they failed to take the appropriate steps in appealing the Judgment Entry in the original action, there are many instances in which the law mandates that a court dismiss a complaint where a party has failed to comply with procedural requirements. Courts routinely dismiss medical malpractice cases that

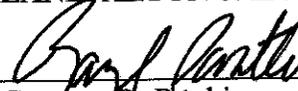
are filed outside of the statute of limitations; in fact, at least one court has dismissed a medical malpractice complaint filed one day late. *See Locke v. Gibson* (Dec. 10, 1986), 5th Dist. No. CA-2413, at *2. Similarly, courts in Ohio have uniformly applied a strict approach to the time requirement for filing an appeal under Appellate Rule 4 and have dismissed appeals where the notice of appeal was filed beyond the period provided by the rule. *See Harvey v. Hwang*, 103 Ohio St.3d 16, 2004-Ohio-4112, 812 N.E.2d 1275, at ¶¶ 5-7, 19; *Bluso v. Moon Rd. Dev.*, 11th Dist. No. 2008-G-2864, 2008-Ohio-6777, at ¶¶ 3-10; *M. Friedman Management Co. v. Malek* (Dec. 3, 1993), 11th Dist. No. 93-L-022, at *2. Just as if they had missed the statute of limitations or the deadline for filing a timely appeal, Appellants' failure to follow the proper procedure—appealing the November 18, 2009 Judgment Entry—results in a dismissal of their claims against Dr. Janis.

CONCLUSION

Defendant-Appellee Leonard J. Janis, DPM has demonstrated that this case is not a matter of public or great general interest. Defendant-Appellee respectfully requests that this Court decline jurisdiction in this case and dismiss the appeal filed by Plaintiffs-Appellants Donald P. Troyer and Tamara Troyer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served by placing the same in the regular U.S. Mail, postage prepaid, on this 2nd day of August, 2011, to the following:

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