

11-1457

RECORD NO.

IN THE OHIO SUPREME COURT

RENE MAYS, Individually and as
Fiduciary of the Estate of Galon Howard,
Deceased, et al.,

Plaintiffs-Appellants,

-vs-

TOLEDO HOSPITAL, et al.,

and

Mercy St. Anne's Hospital, et al.

Defendants-Appellees.

Case No. CI0201102848
Court of Appeals No. 11-1145

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT RENE MAYS

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FILED
AUG 24 2011
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
AUG 24 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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JURISDICTIONAL STATEMENT

Jurisdiction over this appeal is proper pursuant to Ohio Revised Code §§2505.02(B), 2505.03(A): the Supreme Court has jurisdiction to review on appeal “Every final order...by a court of common pleas...”

I. **EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case is of great public and general interest because the Sixth District has ignored the unambiguous language of Appellate Rule 26(A) by misinterpreting and misapplying the test requirement in *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140, where paragraph two of the syllabus states:

“The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not consider at all or was not fully considered by the court when it should have been. (App. R. 26, construed.)”

Appellant noted that her medical malpractice complaint was dismissed by the trial court on July 27, 2011, without prejudice subsequent to the Court of Appeals July 20, 2011 dismissal. Appellant argued on reconsideration that the June 7, 2011 judgment by the trial court which denied appellant’s motion for extension of time to file an affidavit of merit constituted a final appealable order under R.C. §2505.02(B)(4).

The Court of Appeals made no finding as to whether the June 7, 2011 judgment by the trial court which denied appellant’s motion for extension of time to file an affidavit of merit constituted a final appealable order under R.C. §2505.02(B)(4). Therefore, the August 18, 2011 judgment was improper because the appellant had called

to the attention of the Court of Appeals an obvious error in its decision and raised an issue for their consideration that was either not considered at all or was not fully considered by the court when it should have been. Accordingly, the motion to reconsider should have been granted. More importantly, resolution of the issues presented in this case is important to the public and is of great general interest to litigants who have an expectation that the Ohio Rules of Appellate Procedure and this Court's precedents will be followed and applied consistently and fairly.

The issues presented herein have implications far beyond the parties to this case and resolution of the issues will guarantee all litigants in Ohio with fair and equitable treatment under the Ohio Rules of Appellate Procedure. The Court now has the opportunity to provide all Ohio courts with guidance and clarification of Appellate Rule 26(A) and test requirement in *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140, where paragraph two of the syllabus. Accordingly, this Court should accept jurisdiction of this case in order to correct the Sixth District's legally flawed Majority decision.

II. STATEMENT OF THE CASE AND FACTS

Appellant filed a pro se medical malpractice complaint. Appellant did not attach a Civil Rule 10(D) affidavit of merit to her complaint but she filed a motion for extension of time to file an affidavit of merit. In response, appellees filed a motion to dismiss and a motion for summary judgment. Those motions remained pending before the trial court. On June 15, 2011, appellant filed a pro se notice of appeal from the June 7, 2011 judgment of the trial court, which denied appellant's motion for extension of time to file an affidavit of merit, under R.C. 2505.02(B)(4).

On July 20, 2011, the Court of Appeals dismissed appellant's appeal for lack of

final appealable order. Appellant also filed a timely pro se application for reconsideration of the Court of Appeals decision and judgment, journalized on July 20, 2011, in which it dismissed her appeal for lack of a final appealable order. Also Appellant filed an amended notice of appeal on July 28, 2011, without leave of court, and an amended motion for reconsideration on August 2, 2011.

By the Court of Appeals decision and judgment, journalized on August 18, 2011, it struck from the record appellant's amended notice of appeal and the amended motion for reconsideration but treated appellant's July 29, 2011 motion for stay of the appellate court's July 20, 2011 Judgment pending amended notice of appeal and motion to vacate filed in the trial court on July 28, 2011 as a timely motion for reconsideration. (A copy of that Decision and Judgment is attached hereto as Exhibit 1 for this Court's review).

By the same decision and judgment, journalized on August 18, 2011, the Court of Appeals denied the said motion that it had previously treated as a timely motion for reconsideration. Appellant claimed in a motion for reconsideration in Case No. 11-1145, that the trial court issued such order delaying her lawful amended suit made against Toledo Hospital and Mercy St. Anne Hospital or otherwise dismissing Appellant's Rene Mays lawful Amended Complaint without prejudice in violation of the provisions contained in Section 16, Article 1 of the Ohio Constitution; and denying as moot all of her pending meritorious motions that argument including all other arguments, statement of the case and facts, propositions of law made in the motion to reconsider is incorporated herein by reference. In support of her position on these issues, the appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: The test requirement in *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140, wherein paragraph two of the syllabus (App. R. 26, construed) pertains to motions for reconsideration only and, thus, the Sixth District's decision holding that the July 20, 2011 dismissal was proper, and appellant has not called to the attention of the Court of Appeals an obvious error in its decision or raised an issue for their consideration that was either not considered at all or was not fully considered by the court when it should have been is in direct conflict with R.C. 2505.02 and *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140.

Appellant notes that her medical malpractice complaint was dismissed by the trial court on July 27, 2011, without prejudice subsequent to the Court of Appeals July 20, 2011 dismissal. It is respectfully submitted that the trial court July 27, 2011, dismissal transformed the interlocutory judgment of July 20, 2011 into a final appealable order. It is respectfully submitted that the Sixth District Court of appeals decided the issue incorrectly. On the facts of the case at bar, the Court of Appeals should have determined that the July 27, 2011 judgment by the trial court dismissing appellant's medical malpractice complaint without prejudice constituted a final appealable order under R.C. 2505.02. For this reason the matter is of public and great general interests. Accordingly, this Court should accept jurisdiction of this case in order to correct the Sixth District's legally flawed Majority decision.

Appellant further notes that her Ohio Civil Rule 62(A) Motion for Stay of the (Appellate) Court's July 20, 2011 Judgment Pending Amended Notice of Appeal that was filed without leave of court and Motion to Vacate Filed in the Trial Court on July 28, 2011 that deprived the appellant's rights under Article 1, Section 16 of the Ohio Constitution, which was properly construed as a timely motion for reconsideration by the Court of Appeals was denied by the Court of Appeals on August 18, 2011 subsequent to the trial court's July 27, 2011 improper dismissal without prejudice.

It is respectfully submitted that when the court of appeals denied appellant's motion for reconsideration on August 18, 2011, there were still pending post-judgment motions in the underlying case before the trial court. Therefore, the August 18, 2011 denial was improper, and the appellant has called to the attention of this Court an obvious error in the Court of Appeals decision or raised an issue for this Court's consideration that was either not considered at all or was not fully considered by it when it should have been. Appellant urges for reconsideration that in fact, the Appellant is of opinion that the Appellate Decision creates confusion.

It is respectfully submitted that the Sixth District Court of Appeals decided the issue of reconsideration incorrectly. This matter is of public and great general interests. The Appellate Decision does not uphold the literal language of Appellate Rule 26(A). For this reason the matter is of public and great general interests. Accordingly, this Court should accept jurisdiction of this case in order to correct the Sixth District's legally flawed Majority decision.

The issues presented herein have implications far beyond the parties to this case and resolution of the issues will guarantee all litigants in Ohio with fair and equitable treatment under the Ohio Rules of Appellate Procedure. The Court now has the opportunity to provide all Ohio courts with guidance and clarification of Appellate Rule 26(A) and test requirement in *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140, where paragraph two of the syllabus. Accordingly, this Court should accept jurisdiction of this case in order to correct the Sixth District's legally flawed Majority decision.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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Plaintiff-Appellant-pro-se

PROOF OF SERVICE

This is to certify that a copy of the foregoing of Rene Mays was sent via ordinary U.S. Mail or via facsimile this 23rd day of August, 2011 to:

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Dated: 08/22/2011



Plaintiff's René Mays, Pro-se

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2011 AUG 18 P 1:11
COMMON PLEAS COURT
BERNIE QUILTER
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**IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY**

**Rene Mays, Individually and as
Fiduciary of the Estate of
Galon Howard, Deceased, et al.**

Court of Appeals No. L-11-1145

Trial Court No. CI0201102848

Appellant

v.

Toledo Hospital, et al.

DECISION AND JUDGMENT

Appellees

Decided: AUG 18 2011

Appellant, Rene Mays, filed a timely pro se application for reconsideration¹ of this court's decision and judgment, journalized on July 20, 2011, in which we dismissed her appeal for lack of a final appealable order.

Additional Miscellaneous Filings

Appellant also filed an amended notice of appeal on July 28, 2011, without leave of court, and an amended motion for reconsideration on August 2, 2011. Because the

¹The court will treat appellant's July 29, 2011 "Ohio Civil Rule 62(A) Motion for Stay of the [Appellate] Court's July 20, 2011 Judgment Pending Amended Notice of Appeal and Motion to Vacate Filed in the Trial Court on July 28, 2011" as a timely motion for reconsideration.

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APPELLANT'S
EXHIBIT 1

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amended notice of appeal was filed without leave of court and was filed after this court issued its July 21 dismissal, the July 28 amended notice of appeal is stricken from the record. See App.R. 3(F) and 6th Dist.Loc.App.R. 3(A)(2). Also, App.R. 26 does not provide for the filing of an amended motion for reconsideration. Therefore, the August 1 amended motion for reconsideration is also stricken from the record.

Reconsideration Test

In ruling on a motion to reconsider, this court follows *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, where paragraph two of the syllabus states:

"The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. (App.R. 26, construed.)"

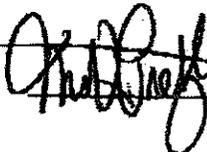
Appellant notes that her medical malpractice complaint was dismissed by the trial court on July 27, 2011, without prejudice subsequent to this court's July 20, 2011 dismissal. Appellant argues that this transformed the interlocutory judgment into a final appealable order. However, when this court dismissed appellant's appeal on July 20, 2011, the underlying matter was still pending before the trial court. Therefore, the July 20, 2011 dismissal was proper, and appellant has not called to the attention of the court an obvious error in its decision or raised an issue for consideration that was either

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not considered at all or was not fully considered by the court when it should have been.²

All pending motions are denied as moot. The motion to reconsider is denied.

Mark L. Pietrykowski, J.



JUDGE

Thomas J. Osowik, P.J.



JUDGE

Stephen A. Yarbrough, J.
CONCUR.



JUDGE

²This court makes no finding as to whether the July 27, 2011 judgment by the trial court dismissing appellant's medical malpractice complaint *without prejudice* constitutes a final appealable order under R.C. 2505.02. See, e.g., *Hughley v. Southeastern Correctional Inst.*, 8th Dist. No. 10CA43, 2010-Ohio-5497, ¶ 46-47.

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Rene Mays, Individually and as
Fiduciary of the Estate of
Galon Howard, Deceased, et al.

Court of Appeals No. L-11-1145
Trial Court No. CI0201102848

Appellant.

v.

Toledo Hospital, et al.

DECISION AND JUDGMENT

Appellees

Decided: JUL 20 2011

This case is before the court sua sponte. It has come to the court's attention that plaintiff-appellant, Rene Mays, has filed an appeal from an order that is not final and appealable.

Appellant filed a pro se medical malpractice complaint. Appellant did not attach a Civ.R. 10(D) affidavit of merit to her complaint. In response, defendants-appellees, Toledo Hospital and Mercy St. Anne Hospital, filed a motion to dismiss and a motion for summary judgment. Those motions remain pending before the trial court. On June 15, 2011, appellant filed a pro se notice of appeal from the June 7, 2011 judgment of the

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1. JUL 20 2011

APPELLANT'S
EXHIBIT 2

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Lucas County Court of Common Pleas, which denied appellant's motion for an extension of time to file an affidavit of merit.

This court only has jurisdiction to hear appeals from final orders. See Section 3(B)(2), Article IV of the Ohio Constitution. "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals * * *."

R.C. 2505.02 defines what a final, appealable order is, and states in pertinent part:

"(A) As used in this section:

"(1) 'Substantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

"(2) 'Special proceeding' means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

"(3) 'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, * * *.

"(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

"(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

"(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

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"(4) An order that grants or denies a provisional remedy and to which both of the following apply:

"(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

"(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

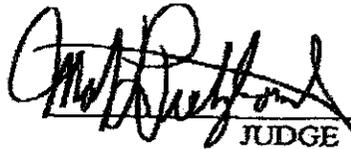
The June 7 judgment denying appellant's motion for an extension of time to file her Civ.R. 10(D) affidavit of merit does not fit into any of the categories of this statute. The court hereby dismisses this appeal. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. All pending motions are moot and denied. It is so ordered.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

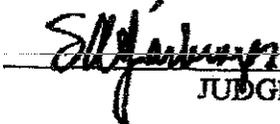
Mark L. Pietrykowski, J.

Thomas J. Osowik, P.J.

Stephen A. Yarbrough, J.
CONCUR.


JUDGE


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COMMON PLEAS COURT
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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Rene Mays, Individually and as Fiduciary
of the Estate of Galon Howard, Deceased,
et al.

Court of Appeals No. L-11-1145

Trial Court No. CI0201102848

Appellant

v.

Toledo Hospital, et al.

DECISION AND JUDGMENT

Appellees

Decided: JUN 29 2011

This civil appeal is before the court on appellant's pro se motions for appointment of counsel and to waive costs of appeal. Appellant has also filed a statement of her finances to support these requests.

Since this is a civil matter, there is no right to appointed counsel. Therefore, appellant's motion for appointment of counsel is found not well-taken and denied.

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1. JUN 29 2011

APPELLANT'S
EXHIBIT 3

Appellant's motion to waive appellate costs is premature. 6th Dist.Loc.App.R. 7 allows an indigent party to proceed with her appeal without paying the *deposit for costs*, it does not relieve her of the responsibility of paying the costs when the case is over.

App.R. 24 states, in pertinent part:

"(A) Except as otherwise provided by law or as the court may order, the party liable for costs is as follows:

"(1) * * *

"(2) If the judgment is affirmed, the appellant."

Thus, if the judgment Mays is appealing is affirmed, this court may assess appellate costs to her. However, since no costs have yet been assessed to Mays, her motion to waive appellate costs altogether is premature and denied.

Thomas J. Osowik, P.J.

Thomas J. Osowik, P.J.
JUDGE (FX)

FAXED