

IN THE SUPREME COURT OF OHIO

ORIGINAL

DONALD TROYER, et al.,

Appellants,

v.

LEONARD J. JANIS, DPM,

Appellee.

ON APPEAL FROM THE
TENTH APPELLATE DISTRICT

Case No. 11-1162

MERIT BRIEF OF
APPELLANTS DONALD TROYER AND TAMRA TROYER

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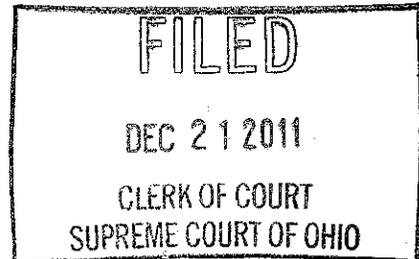


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STATEMENT OF FACTS

Appellant Donald Troyer ("Appellant Troyer") was a patient of Appellee Leonard Janis, DPM ("Appellee"), and presented to him on December 1, 2005 with complaints of chronic right ankle pain. Appellee diagnosed Appellant Troyer 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.

Appellant Troyer continued to suffer problems with his ankle and over the next 18 months underwent four additional, unsuccessful, surgeries with Appellee that left Appellant in chronic pain and debilitated. Appellant Troyer eventually sought the opinion and treatment of a foot and ankle specialty orthopedic surgeon, who noted that the multiple surgeries had 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 Troyer underwent a below the knee amputation of his right leg on November 30, 2009.

On February 26, 2009, former counsel for Appellants 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, 2009.¹ 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 v. Univ. Hosp. of Cleveland*², and argued that this Court has specifically held that a dismissal for failure to include an affidavit of merit is a dismissal without prejudice. As such, the general default rule set forth in 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.*³, and granted the Motion for Summary Judgment in a decision filed on April 13, 2010.⁴ Specifically, the trial court held *Nicely* supported Appellee's contention that an Entry dismissing an action for failure to include an affidavit of merit is an adjudication on the merits.

¹ Appendix Tab 1.

² 120 Ohio St.3d 167, 2008-Ohio-5379.

³ 10th Dist. No. 09AP-187, 2009-Ohio-4386, unreported.

⁴ Appendix Tab 2.

Appellants subsequently appealed to the Tenth District appellate court, pointing out the trial court's erroneous interpretation of *Nicely*. The appellate court did not rule on the question of whether the trial court erred, but instead held that the dismissal was proper due to *res judicata*.⁵ In short, the appellate court held Appellants should have appealed the first trial court's Entry prepared by the Appellee, and the failure to do so made the Entry final and binding, despite the clear error in such a position.

Appellants filed a Notice of Appeal to the Ohio Supreme Court on July 7, 2011.⁶ The sole issue before this Court is whether, by operation of law and the Ohio Civil Rules, 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.

ARGUMENT

I. BY OPERATION OF LAW AND THE OHIO CIVIL RULES, 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 for this Court to review is whether the previous dismissal for failure to attach an affidavit of merit is without prejudice by operation of law and the Ohio Civil Rules. If the dismissal is with prejudice, as Appellee argues, the re-filing of the action is improper. However, if the dismissal is without prejudice, then Appellants permissibly re-filed the action through the use of Ohio's savings clause.

⁵ Appendix Tab 3.

⁶ Appendix Tab 4.

Appellants do not dispute that the original complaint, filed by former counsel, 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. Finally, Appellants do not dispute Civ.R. 41(B)(3) states that a dismissal entry, which is silent, by default operates as an adjudication upon the merits generally. However, the issue of whether the instant dismissal is otherwise than on the merits, and thus without prejudice, has been unequivocally resolved by this Court. Moreover, in the case of a medical malpractice action, there is a specific Civil Rule that trumps the general default rule set forth in Civ.R. 41(B)(3). Therefore, it was not proper for the trial court to dismiss the properly re-filed medical malpractice action.

A. *Fletcher v. University Hospital of Cleveland*

The lower courts' rulings should be reversed given the holding in *Fletcher v. Univ. Hosp. of Cleveland*. In *Fletcher*, the administrator of a patient's estate brought a wrongful death and medical malpractice action against health care providers. The complaint, however, did not include an affidavit of merit, and the trial court consequently dismissed the action with prejudice. In *Fletcher*, this 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.⁷

As to the latter question, 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.”⁸ Despite this clear pronouncement by the Supreme Court, the trial court misinterpreted *Nicely v. Ohio Dept. of Rehab. and Corrections*, a Tenth District appellate court case, as stating the opposite. On pages 5-6 of its decision, the trial court quoted the following language from *Nicely* (emphasis are as supplied by the trial court):

“[a] dismissal with prejudice operates as an adjudication on the merit; 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) 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).”

Although the trial court correctly quoted *Nicely*, it erred by concluding the case stands for the proposition that a dismissal of this nature is with prejudice because the Entry did not specify otherwise. However, *Nicely* (and by extension *Fletcher*) held the exact opposite.

⁷ *Id.* at ¶¶1, 3.

In *Nicely*, the appellant's second assignment of error was that the Court of Claims improperly dismissed his complaint with prejudice for failure to append an affidavit of merit.⁹ As noted by the trial court, the general rule is a dismissal is with prejudice if the Entry does not specify otherwise.¹⁰ As the appellate court held, there is an exception in the case of a dismissal for failure to attach an affidavit of merit.¹¹ Under those circumstances, it is of no consequence whether the Entry is silent or not.¹² Rather, the Tenth District appellate court remanded the case back to the lower court when it held that "a court *must dismiss without prejudice* a complaint for lack of a Civ.R. 10(D)(2) affidavit of merit."¹³

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 there was no error because Appellants failed to appeal the silent Entry, therefore, the doctrine of *res judicata* applied. What the appellate court failed to recognize, however, was that the default rule set forth in Civ.R. 41(B)(3) was not triggered, and as such there was no error to appeal.

B. Civil Rule 10(D)(2) and R.C. 1.51

The 2005 amendment to Civ.R. 10(D) required that every complaint containing a medical claim as defined in R.C. 2305.113 must be accompanied by an affidavit of merit. The affidavit has to be from an expert qualified under Evid.R. 601(D) and 702, and must include statements that the affiant: (1) "has reviewed all medical records reasonably available," (2) "is familiar with

⁸ *Id.* at ¶2 of syllabus.

⁹ *Nicely* at ¶12.

¹⁰ *Id.* at ¶13.

¹¹ *Id.* at ¶14.

¹² *Id.*

the applicable standard of care,” and (3) is of the opinion that the defendants breached the standard of care and caused the plaintiff’s injury.¹⁴

Civil Rule 10(D) was subsequently amended, with the amendments becoming effective on July 1, 2007. The amendments effectuated the following changes: (1) placed a limit on the extension of time a trial court may grant to a party who does not file an affidavit of merit with his complaint¹⁵; (2) defined what constitutes good cause for such an extension¹⁶; (3) allowed a party to correct a defective affidavit of merit¹⁷; and, most important to this case, (4) specified that “[a]ny dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.”¹⁸

Accordingly, it cannot be clearer that a dismissal for failure to submit an affidavit of merit in a medical malpractice action is without prejudice and otherwise than on the merits. But, Appellees and the lower courts have placed great weight on the fact the instant dismissal entry was silent as to whether the dismissal was with or without prejudice. The result, according to those parties, is that the default rule set forth in Civil Rule 41(B)(3) applies, transforming it into a dismissal with prejudice.

¹³ *Id.*, emphasis added.

¹⁴ Civ.R. 10(D)(2)(a).

¹⁵ Civ.R. 10(D)(2)(b).

¹⁶ Civ.R. 10(D)(2)(c).

¹⁷ Civ.R. 10(D)(2)(e).

¹⁸ Civ.R. 10(D)(2)(d).

The lower courts' rulings were erroneous, however, because they are in contravention of R.C. 1.51, which stands for the principle that a general rule or provision is negated by a specific, irreconcilable rule or provision. While R.C. 1.51 generally pertains to the treatment of conflicting statutes, it has been extended to include conflicting Civil Rules.¹⁹

R.C. 1.51 is controlling on the issue of whether to apply a general provision, such as Civ.R. 41(B)(3), or a specific provision, such as Civ.R. 10(D)(2)(d). R.C. 1.51 states:

“If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.”

This Court has repeatedly applied R.C. 1.51 to override an older, general provision, while giving effect to a newer, conflicting specific one.²⁰

Civ.R. 10(D)(2)(d) is both the more specific and more recent provision. As stated above, Civ.R. 10(D)(2)(d) was originally enacted in 2005, and the pertinent section of the Rule was added in 2007. The pertinent portion of Civ.R. 41(B)(3), by contrast, was adopted over three decades earlier. Second, Civ.R. 41(B)(3) generally states that dismissals are with prejudice unless otherwise specified, whereas Civ.R. 10(D)(2)(d) specifically provides that a dismissal for failure to provide an affidavit of merit is a dismissal without prejudice. Therefore, pursuant to R.C. 1.51, as the more recent and specific Rule, Civ.R. 10(D)(2)(d) prevails if there is a conflict.

¹⁹ See, *Eddie v. Veterinary Systems, Inc.* (Feb. 25, 1994), 11th Dist. No. 93-T-4886, unreported.

²⁰ *Davis v. State Personnel Bd. of Review* (1980), 64 Ohio St.2d 102, 105. See also, *Summerville v. City of Forest Park*, 128 Ohio St. 3d 221, 226-228, 2010-Ohio-6280.

A conflict clearly exists between the two Civil Rules such that the Rules cannot be reconciled and effect be given to both in this case. Specifically, if the default rule applies, then the dismissal would be with prejudice, which is entirely opposite of Civ.R. 10(D)(2)(d). Instead, in keeping with the intent of that Civil Rule and the Supreme Court's interpretation of same, the more recent and specific provision set forth in Civ.R. 10(D)(2)(d) must be applied. Despite the silence in the Entry, the appropriate result is that the dismissal for failure to provide an affidavit of merit in compliance with Civ.R. 10(D) is without prejudice and otherwise than on the merits.

Appellee will contend that the proper action for Appellants was to appeal the Entry to the appellate court, but because they failed to do so, *res judicata* now applied. However, as pointed out above, given R.C. 1.51 and the treatment of specific versus general provisions, the trial court committed no error by approving an Entry that was silent. The silence of the dismissal entry has no effect because Civ.R. 10(D)(2)(d) clearly states such a dismissal is without prejudice. If Appellants were to appeal at that point they would have been seeking an advisory opinion and clarification of the Entry, which an appellate court is not permitted to provide.

If instead of leaving the Entry silent, the trial court had approved an Entry explicitly stating the dismissal was *with* prejudice, Appellants would then be required to appeal because an error had occurred. An error did not arise in this case though until after the trial court granted Appellee's motion for summary judgment.

This Court in *Fletcher* instructed that courts are to construe the Civil Rules to achieve a "just result."²¹ The lower courts' interpretation and application of the Civil Rules would not achieve a just result. If the trial court's decision were permitted to stand, there would be

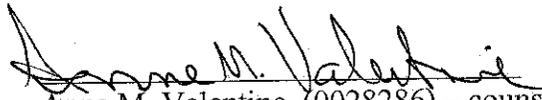
illogically disparate outcomes in the application of Civ.R. 10(D)(2)(d), depending on whether the dismissal entry was silent or not. In other words, it would be error, pursuant to *Fletcher* and Civ.R. 10(D)(2)(d), if the trial court's dismissal entry specifically stated the dismissal for failure to include an affidavit of merit was *with* prejudice. However, if the trial court's Entry was silent, under the lower courts' reasoning, it would be proper for the dismissal to be with prejudice because Civ.R. 41(B)(3) would apply. As recognized by the Tenth District appellate court in *Nicely*, such a divergent treatment is not correct. Instead, that court, in accord with this Court in *Fletcher*, plainly held that a dismissal for failure to attach an affidavit of merit is an adjudication otherwise than on the merits and without prejudice.

CONCLUSION

For the foregoing reasons, Appellants Donald and Tamra Troyer respectfully request that this Court reverse the erroneous decisions of the lower courts, overturn the granting of the Appellee's Motion for Summary Judgment, and remand this case for further proceedings. The dismissal entry, prepared by Appellee and as approved by the trial court, despite remaining silent, was nevertheless an adjudication other than on the merits. Accordingly, Appellants must be permitted to proceed with their medical malpractice action in the trial court.

²¹ *Fletcher* at ¶20.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following
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EXHIBITS

Eddie v. Veterinary Systems, Inc. (Feb. 25, 1994), 11th Dist. No. 93-T-4886, unreported.....1-4

Not Reported in N.E.2d, 1994 WL 110911 (Ohio App. 11 Dist.)
(Cite as: 1994 WL 110911 (Ohio App. 11 Dist.))

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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, Eleventh District, Trumbull County.

Dianne C. EDDIE, d.b.a. Lordstown Veterinary
Clinic, Plaintiff-Appellee,

v.

VETERINARY SYSTEMS, INC., Defendant,
Roger W. Hunter, et al., Defendants-Appellants.

No. 93-T-4886.
Feb. 25, 1994.

Civil Appeal from the Court of Common Pleas, No.
90 CV 1610.

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Patrick A.T. West, Columbus, for defendant-appellant,
Hunter Computer Systems, Inc.

William M. Roux, Warren, for plaintiff-appellee.

OPINION

NADER, Judge.

*1 This is an accelerated calendar appeal which has been submitted for consideration upon the briefs of the parties.

On September 24, 1990, appellee, Dianne C. Eddie, d.b.a. Lordstown Veterinary, Clinic, filed a complaint against Veterinary Systems, Inc. ("Veterinary Systems"), Roger W. Hunter ("Roger Hunter") and Hunter Computer Systems, Inc. ("Hunter Computer"). The complaint alleged claims sounding in breach of contract, fraud, misrepresentation, breach of warranty, deceptive consumer sales practices, quantum meruit and unjust enrichment,

which arose from appellee's purchase of computer equipment and services from appellants. Appellee alleged compensatory damages of \$18,500 and treble damages in the amount of \$55,500. Appellee further requested punitive damages and attorney fees. Appellants, Roger Hunter and Hunter Computer, filed an answer on December 3, 1990.

Service of the complaint upon Veterinary Systems was attempted by certified mail but was returned marked "Moved, left no address." On October 31, 1991, proof of publication of notice in the Trumbull County Legal News regarding the complaint filed against Veterinary Systems was filed with the court. On December 2, 1991, the trial court filed a judgment entry which held that appellee had perfected service by publication upon Veterinary Systems and entered a default judgment against Veterinary Systems in the amount of \$74,000.

On August 6, 1991, the court assigned this action to compulsory arbitration. Appellant Roger Hunter filed an amended answer on February 11, 1992, which included a cross-claim for indemnification against Veterinary Systems and a third party complaint against CV Systems, Inc. and Idaprizo, Inc. Appellant Roger Hunter alleged in his complaint that CV Systems, Inc. and Idaprizo, Inc. were the successors to Veterinary Systems. An amended answer was also filed by appellant Hunter Computer on February 19, 1992, which contained no pertinent modifications. On August 25, 1992, a default judgment in favor of third-party plaintiff Roger Hunter was entered against third-party-defendants CV Systems, Inc. and Idaprizo, Inc. The default judgment did not specify the amount of damages awarded but provided that the third-party defendants' liability for the damages was joint and severable.

An arbitration hearing was held on August 17, 1992. In an entry dated October 30, 1992, the arbitrator found that appellants made material misrepresentations to appellee and awarded appellee

Not Reported in N.E.2d, 1994 WL 110911 (Ohio App. 11 Dist.)
 (Cite as: 1994 WL 110911 (Ohio App. 11 Dist.))

\$19,500 in damages. On November 23, 1992, appellants Roger Hunter and Hunter Computer filed a notice of appeal of the arbitration award in the Trumbull County Court of Common Pleas. On December 16, 1992, appellee filed a motion to dismiss appellants' appeal to the common pleas court for failure to comply with the local rules of the court of common pleas. This motion was granted in a judgment entry dated April 29, 1993. Appellants Roger Hunter and Hunter Computer filed the instant appeal. Veterinary Systems, CV Systems, Inc., and Idaprizze have not participated in this appeal.

*2 Appellants assign the following as error:

"1. Local Rule 13.17 of the Trumbull County Court of Common Pleas requires neither a deposit nor an affidavit to perfect appeal of an arbitrator's award.

"2. Trumbull County Court of Common Pleas Local Rule 13. 18 is unconstitutional as violative of Ohio Const. Art. IV § 5 because it is inconsistent with Civil Rule 11.

"3. Even if Local Rule 13.18 is constitutional, dismissal by the court below of the appeal of the arbitration award constituted an abuse of that court's discretion.

"4. The Trumbull County Court of Common Pleas erred and abused its discretion in awarding interest to the arbitrator's award.

In appellants' first assignment of error, it is argued that the Trumbull County Court of Common Pleas Local Rules do not set forth any conditions which must be followed to perfect an appeal from the decision of an arbitrator. We disagree. Loc. R. 13.17 of the Court of Common Pleas of Trumbull County, General Division, provides:

"Any party may appeal, from the award of the Arbitrator(s), to the Common Pleas Court. The right of appeal is subject to the following conditions, all of which shall be complied with within thirty (30) days after the award of the Arbitrat-

or(s) is filed and time-stamped in the office of the Clerk of Courts."

Loc.R. 13.18 provides:

"A) The appellant shall pay Thirty Dollars (\$30.00) to the Clerk of Courts and shall file, with the Clerk, a notice of appeal, together with an affidavit that the appeal is not taken for delay, but because he believes an injustice has been done. A copy of such notice and affidavit shall be served upon opposing parties or their counsel.

"B) The appellant shall first repay to Trumbull County, Ohio, by depositing, with the Clerk of Courts, all fees received by the Arbitrator(s) in the case in which the appeal is taken.

"C) If the appeal results in a judgment different from that determined by Arbitrator(s), the court shall assess costs, including the reimbursement of amounts required to be paid by the appellant to effect the appeal, against either or both of the parties as it determine [*sic*] to be just."

Appellants argue that there are no conditions contained in Loc.R. 13.17, and therefore, no conditions must be met to perfect an appeal. However, appellants' interpretation would have this court ignore the conditions set forth in Loc.R. 13.18. When interpreting statutory language, interpretation "is not limited to the words alone, because the whole context of the enactment must be considered." *State v. Cravens* (1988), 42 Ohio App.3d 69, 72. Although more precise language could have been utilized in Loc.R. 13.17, it is clear that there are conditions imposed upon appeal from the award of an arbitrator. The provisions of Loc.R. 13.18 clearly set forth those conditions. Thus, appellants' argument is meritless.

In appellants' second assignment of error, it is argued that Loc.R. 13.18 is unconstitutional as violative of Section 5(B), Article W, Ohio Constitution which grants the Supreme Court of Ohio power to "prescribe rules governing practice and procedure in all courts of the state," and allows courts to

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"adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. Appellants contend that Loc.R. 13.18 conflicts with the provisions of Civ.R. 11. Civ.R. 11 provides, in part:

*3 "Except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit. The signature of the attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. * * *"

Appellant contends that the affidavit requirement contained in Loc.R. 13.18, as required by C.P.Sup.R. 15(A)(1)(d) conflicts with the requirements of Civ.R. 11. We disagree.

Civ.R. 11 provides the pleadings need not be verified by affidavit, unless specifically excepted by the Civil Rules. There is no provision in the Civil Rules requiring that an appeal of an arbitrator's award be verified by an affidavit. The affidavit requirement is contained in C.P.Sup.R. 15(A)(1)(d), which was promulgated by the Supreme Court of Ohio pursuant to Section 5, Article IV, Ohio Constitution. It provides:

"Any party may appeal the award to the court if, within thirty days after the filing of the award with the clerk of court, the party does both of the following:

"(i) Files a notice of appeal with the clerk of courts and serves a copy on the adverse party or parties accompanied by an affidavit that the appeal is not being taken for delay;

"(ii) Reimburses the county for all fees paid to

the arbitrators in the case."

R.C. 1.51 provides guidance in construing two apparently conflicting provisions. It provides:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption, and the manifest intent is that the general provision prevail." See, also, *State v. Volpe* (1988), 38 Ohio St.3d 191.

Civ.R. 11 was adopted in 1970. The Rules of Superintendence for the courts of common pleas were adopted in 1971, and C.P.Sup.R. 15 was amended in 1992. The Trumbull County Court of Common Pleas Local Rules were adopted in 1991. Thus, the local, specific rule constitutes the later addition, and we hold that C.P.Sup.R. 15(A)(1)(d) is an exception to the general provision contained in Civ.R. 11. Loc.R. 13.18 of the Court of Common Pleas of Trumbull County, General Division, does not violate the Ohio Constitution because it represents an exception to Civ.R. 11. Appellants' second assignment of error is meritless.

In appellants' third assignment of error, it is contended that the trial court abused its discretion by dismissing appellants' appeal for noncompliance with Loc.R. 13.18. As the trial court correctly noted, it is within the trial court's discretion to dismiss an action for noncompliance with local rules where there is a "flagrant substantial disregard for the court rules." *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193. As further noted in *Vonsek v. North Randall* (1980), 64 Ohio St.2d 62, 65:

*4 "While the sanction of dismissal is an extreme measure, not to be indiscriminately applied, the line must be drawn so that Local Rules continue to be respected and the threat of sanctions continues to be an effective deterrent to the rampant

Not Reported in N.E.2d, 1994 WL 110911 (Ohio App. 11 Dist.)
 (Cite as: 1994 WL 110911 (Ohio App. 11 Dist.))

disregard of those rules.”

When considering the dismissal of an action for failure to comply with local rules adopted pursuant to C.P.Sup.R. 15(A)(1)(d), the Medina County Court of Appeals stated:

“To completely ignore the affidavit requirement could impair the effectiveness of arbitration proceedings. We conclude, therefore, that the court may, in its discretion, dismiss an appeal from arbitration proceedings for the appellant's failure to provide the necessary affidavit with his notice of appeal.” *Richardson Bros., Inc. v. Dave's Towing Service* (1983), 14 Ohio App.3d 1, 2.

Appellants failed to timely file the required fee and failed to file the required affidavit. Furthermore, our review of the record indicates that appellant also failed to repay the arbitrator's fee, as required by Loc.R. 13.18(B). As a result, we hold that the trial court properly exercised its discretion by dismissing appellants' appeal for failure to comply with the local rules. Appellants' third assignment of error is meritless.

In appellants' fourth assignment of error, it is argued that the trial court abused its discretion in awarding interest to the arbitrator's decision. We hold that the addition of language concerning interest to the arbitrator's award was, at most, harmless error.

R.C. 1343.03 provides, in part:

“[W]hen money becomes due and payable upon any bond, bill, note or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate of ten per cent per annum, and no more, unless a written contract provides a different rate of interest in relation to the money that

becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.”

We hold that this provision entitles appellee to interest on the award of the arbitrator, regardless of whether the award specifically mentioned interest. *Testa v. Roberts* (1988), 44 Ohio App.3d 161; *Smith v. Miller* (1938), 61 Ohio App. 514 (construing analogous section 8305 of the General Code). Thus, the inclusion by the trial court of language referring to interest on the award of the arbitrator was of no effect and constituted, at the most, harmless error. Appellants' fourth assignment of error is meritless.

In accordance with the foregoing analysis, the judgment of the trial court is hereby affirmed.

CHRISTLEY, P.J., and JOSEPH E. MAHONEY, J., concur.

Ohio App. 11 Dist., 1994.

Eddie v. Veterinary Systems, Inc.

Not Reported in N.E.2d, 1994 WL 110911 (Ohio App. 11 Dist.)

END OF DOCUMENT

APPENDIX

1. Franklin County Common Pleas Case # 09CVA02-2976 Judgment Entry.....1-2
(Appendix A)

2. Franklin County Common Pleas Case # 09CVA12-18259 Decision and Entry.....3-8
(Appendix B)

3. 10th District Court of Appeals Decision.....9-14
(Appendix C)

4. Notice of Appeal to the Ohio Supreme Court.....15-17
(Appendix D)

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

DONALD P. TROYER, ET AL.,

Plaintiffs,

vs.

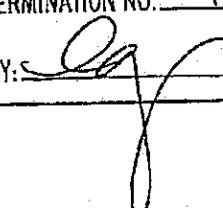
LEONARD J. JANIS, DPM,

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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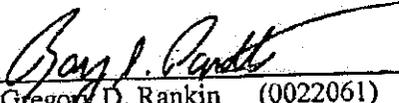


D9495 - C61

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 COUNTY, OHIO
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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.

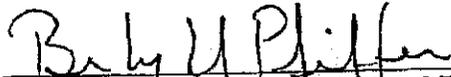
Id. at ¶¶13, 14. (Emphasis added).

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

Copies to:

Anne M. Valentine
Susie L. Hahn
Counsel for Plaintiff

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

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

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 refile. 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.

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

NOTICE OF APPEAL
 OF APPELLANTS DONALD P. TROYER AND TAMRA TROYER

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FILED
 JUL 07 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANTS DONALD P. TROYER AND TAMRA TROYER

Appellants Donald P. Troyer and Tamra Troyer hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in the Court of Appeals case number 10AP-434 on May 26, 2011.

This case is one of public or great general interest.

Respectfully Submitted,



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Susie L. Hahn (0070191)

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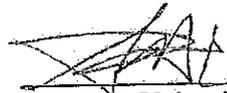
shahn@leesebergvalentine.com

Attorneys for Appellants

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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LANE ALTON & HORST
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Columbus, Ohio 43215



Anne M. Valentine

CIVIL RULES AND STATUTES

Civ.R.10(D)(2).....1-4

RULE 10. Form of Pleadings

(A) Caption; names of parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the case number, and a designation as in Rule 7(A). In the complaint the title of the action shall include the names and addresses of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(B) Paragraphs; separate statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(C) Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.

(D) Attachments to pleadings.

(1) *Account or written instrument.* When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

(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, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. Affidavits of merit shall include all of the following:

- (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
- (ii) A statement that the affiant is familiar with the applicable standard of care;
- (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(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 and in accordance with division (c) of this rule, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit, not to exceed ninety days, except the time may be extended beyond ninety days if the court determines that a defendant or non-party has failed to cooperate with discovery or that other circumstances warrant extension.

(c) In determining whether good cause exists to extend the period of time to file an affidavit of merit, the court shall consider the following:

- (i) A description of any information necessary in order to obtain an affidavit of merit;
- (ii) Whether the information is in the possession or control of a defendant or third party;
- (iii) The scope and type of discovery necessary to obtain the information;
- (iv) What efforts, if any, were taken to obtain the information;
- (v) Any other facts or circumstances relevant to the ability of the plaintiff to obtain an affidavit of merit.

(d) An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment. Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.

(e) If an affidavit of merit as required by this rule has been filed as to any defendant along with the complaint or amended complaint in which claims are first asserted against that defendant, and the affidavit of merit is determined by the court to be defective pursuant to the provisions of division (D)(2)(a) of this rule, the court shall grant the plaintiff a reasonable time, not to exceed sixty days, to file an affidavit of merit intended to cure the defect.

(E) Size of paper filed. All pleadings, motions, briefs, and other papers filed with the clerk, including those filed by electronic means, shall be on paper not exceeding 8 1/2 x 11 inches in size without backing or cover.

[Effective: July 1, 1970; amended effective July 1, 1985; July 1, 1991; July 1, 2005; July 1, 2007.]

Staff Note (July 1, 2007 Amendments)

Rule 10(D). Attachment to pleadings

Civ. R. 10 is amended to clarify what constitutes "good cause" to permit the plaintiff an extension of time to file an affidavit of merit and to define the effect of dismissal for failure to comply with the affidavit of merit requirement.

Rule 10(D) Attachments to pleadings

The language of division (D)(2)(a) is amended in recognition of the fact that more than one affidavit may be required as to a particular defendant due to the number of defendants or other circumstances.

Because there may be circumstances in which the plaintiff is unable to provide an affidavit of merit when the complaint is filed, division (D)(2)(b) of the rule requires the trial court, when good cause is shown, to provide a reasonable period of time for the plaintiff to obtain and file the affidavit. Division (D)(2)(c) details the circumstances and factors which the Court should consider in determining whether good cause exists to grant the plaintiff an extension of time to file the affidavit of merit. For example, "good cause" may exist in a circumstance where the plaintiff obtains counsel near the expiration of the statute of limitations, and counsel does not have sufficient time to identify a qualified health care provider to conduct the necessary review of applicable medical records and prepare an affidavit. Similarly, the relevant medical records may not have been provided to the plaintiff in a timely fashion by the defendant or a nonparty to the litigation who possesses the records. Further, there may be situations where the medical records do not reveal the names of all of the potential defendants and so until discovery reveals those names, it may be necessary to name a "John Doe" defendant. Once discovery has revealed the name of a defendant previously designated as John Doe and that person is added as a party, the affidavit of merit is required as to that newly named defendant. The medical records might also fail to reveal how or whether medical providers who are identified in the records were involved in the care that led to the malpractice. Under these and other circumstances not described here, the court must afford the plaintiff a reasonable period of time to submit an affidavit that satisfies the requirements set forth in the rule.

It is intended that the granting of an extension of time to file an affidavit of merit should be liberally applied, but within the parameters of the "good cause" requirement. The court should also exercise its discretion to aid plaintiff in obtaining the requisite information. To accomplish these goals, the plaintiff must specifically inform the Court of the nature of the information needed as opposed to a general averment that more information is needed. The plaintiff should apprise the court, to the extent that it is known, the identity of the person who has the information and the means necessary to obtain the information, to allow the court to grant an appropriate extension of time. If medical records in the possession of a defendant or non-party must be obtained, the court may issue an order compelling the production of the records. If medical records are non-existent, incomplete, or otherwise inadequate to permit an expert to evaluate the care, the court may, in appropriate circumstances, permit a plaintiff to conduct depositions of parties or non-parties to obtain the information necessary for an expert to complete such a review and provide an affidavit.

Division (D)(2)(b) of the rule sets an outside limit of 90 days to extend the time for the filing of an affidavit of merit, unless the court determines that the defendant or a nonparty in possession of the records has failed to cooperate with discovery, and in that circumstance the court may grant an extension beyond 90 days. This division also vests the trial court with the discretion to determine whether any other circumstances justify granting an extension beyond the 90 days.

The rule is intended to make clear that the affidavit is necessary to establish the sufficiency of the complaint. The failure to comply with the rule can result in the dismissal of the complaint, and this dismissal is considered to be a dismissal otherwise than upon the merits pursuant to Civ. R. 10(D)(2)(d).

Finally, new Civ. R. 10(D)(2)(e) allows a plaintiff a reasonable time, not to exceed sixty days, to cure any defects identified by the court in any affidavit filed with a complaint.

Staff Note (July 1, 2005 Amendment)

Civ. R. 10 is amended in response to a request from the General Assembly contained in Section 3 of Sub. H.B. 215 of the 125th General Assembly, effective September 13, 2004. The act amends and enacts provisions relative to medical, dental, optometric, and chiropractic malpractice actions, and Section 3 contains a request that the Supreme Court adopt a rule that "require[s] a plaintiff filing a medical liability claim to include a certificate of expert review as to each defendant."

Rule 10(D) Attachments to pleadings

Civ. R. 10(D) is retitled and reorganized to reflect the inclusion of a requirement in division (D)(2) that a medical liability complaint include an affidavit of merit concerning the alleged breach of the standard of care by each defendant to the action. Division (D)(2)(a) specifies three items that must be included in the affidavit and sets forth the qualifications of the person providing the affidavit of merit.

There may be instances in which multiple affidavits of merit are required as to a particular plaintiff. For example, the plaintiff may find it necessary to provide one affidavit that addresses only the issue of "standard of care" and a separate affidavit that addresses only the issue of injury caused by the breach of the standard of care.

Because there may be circumstances in which the plaintiff is unable to provide an affidavit of merit when the complaint is filed, division (D)(2)(b) of the rule requires the trial court, when good cause is shown, to provide a reasonable period of time for the plaintiff to obtain and file the affidavit. For example, "good cause" may exist in a circumstance where the plaintiff obtains counsel near the expiration of the statute of limitations, and counsel does not have sufficient time to identify a qualified health care provider to conduct the necessary review of applicable medical records and prepare an affidavit. Similarly, the relevant medical records may not have been provided to the plaintiff in a timely fashion. Further, there may be situations where the medical records do not reveal the names of all of the potential defendants and so until discovery reveals those names, it may be necessary to name a "John Doe" defendant. Once discovery has revealed the name of a previously unknown defendant and that person is added as a party, the affidavit of merit would then be required as to that newly named defendant. Under these or similar circumstances, the court must afford the plaintiff a reasonable period of time, once a qualified health care provider is identified, to have the records reviewed and submit an affidavit that satisfies the requirements set forth in the rule.

Division (D)(2)(c) provides that an affidavit of merit is intended to establish the sufficiency of the complaint filed in a medical liability action and specifies that an affidavit of merit is not otherwise admissible as evidence or for purposes of impeachment.

The amendments to Rule 10 also include nonsubstantive changes.