

**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 R. JANIS, DPM, : **Case No. 10APE-05-434**
 :
 Defendant-Appellee. :

MERIT BRIEF OF DEFENDANT-APPELLEE LEONARD R. JANIS, DPM

Anne M. Valentine (0028286)
Susie L. Hahn (0070191)
Leeseberg & Valentine
175 South Third Street, PH 1
Columbus, Ohio 43215
614-221-2223
614-221-3106 fax
avalentine@leesebergvalentine.com
shahn@leesebergvalentine.com
Counsel for Plaintiffs-Appellants

Gregory D. Rankin (0022061)
(Counsel of record)
Ray S. Pantle (0082395)
Lane, Alton & Horst, LLC
Two Miranova Place, Suite 500
Columbus, Ohio 43215-7052
614-228-6885
614-228-0146 fax
grankin@lanealton.com
rpantle@lanealton.com
*Counsel for Defendant-Appellee
Leonard R. Janis, DPM*

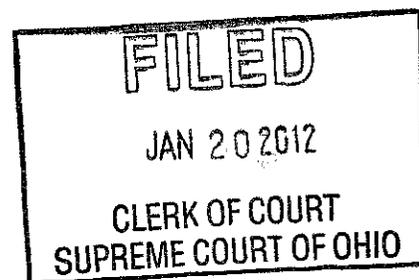


TABLE OF CONTENTS

Table of Authorities.....3

Statement of Facts.....5

Argument.....7

1. DISMISSAL OF A MEDICAL MALPRACTICE ACTION FOR FAILURE TO ATTACH AN AFFIDAVIT OF MERIT WHERE THE JUDGMENT ENTRY IS SILENT AS TO WHETHER THE DISMISSAL IS WITH OR WITHOUT PREJUDICE OPERATES AS AN ADJUDICATION ON THE MERITS.

Conclusion.....15

Certificate of Service.....16

Exhibits

A. *Locke v. Gibson* (Dec. 10, 1986), 5th Dist. No. CA-2413.....1-3

B. *M. Friedman Management Co. v. Malek* (Dec. 3, 1993), 11th Dist. No. 93-L-022.....4-6

Appendix

A. November 10, 2009 Decision in Case No. 09 CV 2976.....1-5

B. November 2009 Email Exchange Regarding Proposed Entry.....6-9

C. December 7, 2009 Motion for Reconsideration in Case No. 09 CV 2976.....10-11

D. January 26, 2010 Notice of Voluntary Dismissal.....12-13

E. Ohio Revised Code Section 1.51.....14

F. Ohio Revised Code Section 1.41.....15

G. OH Const. IV, Sec. 5.....16-17

TABLE OF AUTHORITIES

Cases

<i>Bluso v. Moon Rd. Dev.</i> , 11 th Dist. No. 2008-G-2864, 2008-Ohio-6777.....	15
<i>Customized Solutions, Inc. v. Yurchyk & Davis, CPA's, Inc.</i> , 7 th Dist. No. 03 MA 38, 2003-Ohio-4881	8
<i>Eddie v. Veterinary Systems, Inc.</i> (Feb. 25, 1994), 11 th Dist. No. 93-T-4886	12
<i>Fletcher v. Univ. Hosps. of Cleveland</i> , 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147.....	7, 10
<i>Gahanna-Jefferson Loc. School Dist. Bd. of Edn. v. Zaino</i> (2001), 93 Ohio St.3d 231, 754 N.E.2d 789	12
<i>Harvey v. Hwang</i> , 103 Ohio St.3d 16, 2004-Ohio-4112, 812 N.E.2d 1275	15
<i>Locke v. Gibson</i> (Dec. 10, 1986), 5 th Dist. No. CA-2413	14
<i>M. Friedman Management Co. v. Malek</i> (Dec. 3, 1993), 11 th Dist. No. 93-L-022.....	15
<i>Nicely v. Ohio Dep't of Rehab. & Corr.</i> , 10 th Dist. No. 09AP-187, 2009-Ohio-4386.....	8, 9-10, 14
<i>Niskanen v. Giant Eagle, Inc.</i> , 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595	11
<i>Reasoner v. Columbus</i> , 10th Dist. No. 04AP-800, 2005-Ohio-468.....	8, 10
<i>Rockey v. 84 Lumber Co.</i> , 66 Ohio St.3d 221, 1993-Ohio-174, 611 N.E.2d 789	12
<i>Schindler Elevator Corp. v. Tracy</i> (1999), 84 Ohio St.3d 496, 705 N.E.2d 672	12
<i>Schlenker Ents., LP v. Reese</i> , 3rd. Dist. Nos. 2-10-16, 2-10-19, 2010-Ohio-5308.....	8, 10, 14
<i>Sutherland-Wagner v. Brook Park Civil Service Comm.</i> (1987), 32 Ohio St.3d 323, 512 N.E.2d 1170	12

<i>State ex rel. Industrial Commission v. Day</i> (1940), 136 Ohio St. 477, 26 N.E.2d 1014	9
<i>State ex rel. Zollner v. Indus. Comm.</i> (1993), 66 Ohio St.3d 276, 611 N.E.2d 830	11
<i>Tower City Prop. v. Cuyahoga Cty. Bd. of Rev.</i> (1990), 49 Ohio St.3d 67, 551 N.E.2d 122	8
<i>United Tel. Co. of Ohio v. Limbach</i> (1994), 71 Ohio St.3d 369, 643 N.E.2d 1129.....	12
<i>Yavitch & Palmer Co., LPA v. U.S. Four, Inc.</i> , 10 th Dist. No. 05AP-294, 2005-Ohio-5800.....	14

Constitutional Provisions, Statutes, And Civil Rules

OH Const. IV, Sec. 5	12
Ohio Revised Code Section 1.41	11-12
Ohio Revised Code Section 1.51	11-13
Ohio Rule of Civil Procedure 10(D)(2)(a).....	8
Ohio Rule of Civil Procedure 10(D)(2)(d).....	12-13
Ohio Rule of Civil Procedure 12(B)(6)	8-10
Ohio Rule of Civil Procedure 41(B)(1)	8
Ohio Rule of Civil Procedure 41(B)(3)	6, 8-10, 13

STATEMENT OF 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 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. 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, 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’ motion on November 10, 2009. (Appendix A). The court’s decision did not include a statement that the dismissal was without prejudice. *See id.* 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 Franklin County Local Rule 25. (Appendix B-7). Two days later, Appellants’ former counsel responded with the following: “Your entry needs to indicate that the dismissal is without prejudice.” (Appendix B-6). Counsel for Dr. Janis explained that the proposed entry did not address the issue of prejudice because the court’s decision was silent as to whether the dismissal was with or without prejudice. *See id.* At that time, Appellants’ former counsel had the opportunity to submit a different version of the proposed entry specifying that the dismissal was without prejudice. Appellants’ former counsel did not do so. Dr. Janis’ 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. *See* Appellants’ Appendix 1.

On December 7, 2009, Appellants filed a motion for reconsideration. Appellants did not address the issue of whether the November 18, 2009 judgment entry was a dismissal with or without prejudice. (Appendix C). At no time in this motion did Appellants indicate that the judgment entry was flawed because the phrase “without prejudice” was absent.

On December 9, 2009, Appellants filed a notice of appeal of the trial court’s dismissal of the original action. Also on December 9, 2009, Appellants re-filed the complaint against Dr. Janis in the Franklin County Court of Common Pleas (“the refiled action”), which was almost identical to the original complaint. Again, Dr. Janis denied all wrongdoing. Appellants subsequently dismissed the appeal in the original action, but continued to pursue the refiled action. (Appendix D).

Dr. Janis filed his motion for summary judgment in the refiled action on February 12, 2010. Dr. Janis argued that, pursuant to Ohio Rule of Civil Procedure 41(B)(3), the trial court’s 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. On April 13, 2010, the trial court granted Dr. Janis’ motion, dismissing the claims against him but acknowledging that the claims asserted against the other named defendants remained pending. *See* Appellants’ Appendix 2-8.

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 decision dismissing Appellants’ claims. *See* Appellants’ Appendix 3. This appeal followed.

ARGUMENT

I. DISMISSAL OF A MEDICAL MALPRACTICE ACTION FOR FAILURE TO ATTACH AN AFFIDAVIT OF MERIT WHERE THE JUDGMENT ENTRY IS SILENT AS TO WHETHER THE DISMISSAL IS WITH OR WITHOUT PREJUDICE OPERATES AS AN ADJUDICATION ON THE MERITS.

The issue in this case is whether *res judicata* bars a subsequent action where the first action was dismissed, albeit improperly, with prejudice. Appellants failed to follow the proper procedure for amending the trial court's judgment entry in the original action to include the phrase "without prejudice", and the consequence of this failure is that the second cause of action was subject to dismissal based on the doctrine of *res judicata*.

The lower courts in the refiled action properly applied *Fletcher*, recognizing 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, because the entry dismissing the case did not include this designation, 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." Appellants' Appendix 3-13, 3-14.

A. **The Lower Courts, Applying Ohio Rule Of Civil Procedure 41(B)(3) And Nicely v. Ohio Department Of Rehabilitation And Corrections, Correctly Concluded That The Refiled Action Was Barred By The Doctrine Of Res Judicata.**

Ohio Rule of Civil Procedure 41(B)(1) states: “Where the plaintiff fails to . . . comply with these rules . . . , 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.* Ohio Rule of Civil Procedure 41(B)(3) states in relevant part: “A dismissal under division (B) 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.” *Id.* 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; *see also Schlenker Ents., LP v. Reese*, 3rd Dist. Nos. 2-10-16, 2-10-19, 2010-Ohio-5308, at ¶¶ 41-46. 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.

The trial court in the original action dismissed the claims under Rule 12(B)(6) because Appellants failed to file an affidavit of merit with the complaint, which is required by Ohio Rule of Civil Procedure 10(D)(2)(a). Pursuant to Ohio Rule of Civil Procedure 41(B)(3), the

judgment entry dismissing the original action, which does not specify whether the case was dismissed “with prejudice” or “without prejudice”, operates as an adjudication on the merits or as a dismissal “with prejudice.” Although improper, the trial court dismissed the original action with prejudice. Because the original action was dismissed with prejudice, the second action was barred by the doctrine of *res judicata*.

It is Appellants’ position that, despite the clear language of Ohio Rule of Civil Procedure 41(B)(3), a dismissal of a medical malpractice action for failure to attach an affidavit of merit is an adjudication otherwise than on the merits *by operation of law*. It is well-settled that a court of record speaks through its journal. *State ex rel. Industrial Commission v. Day* (1940), 136 Ohio St. 477, 26 N.E.2d 1014, at paragraph one of the syllabus. Applying Ohio Rule of Civil Procedure 41(B)(3), one must conclude that the trial court spoke through its judgment entry and dismissed the claims with prejudice. Yet Appellants argue that when interpreting a judgment entry, one should ignore the language in the entry and instead look to applicable case law, in this case *Fletcher*. If this were the case, a court interpreting the judgment entry would not be required to follow what the judge in the original action actually did; the reviewing court would be able to exercise independent judgment as to what that judge *should* have done. Thus, the decision of the dismissing judge would be deemed irrelevant.

This position cannot be reconciled with Ohio Rule of Civil Procedure 41(B)(3), *State ex rel. Industrial Commission v. Day*, or with the Tenth District Court of Appeals’ decision in *Nicely v. Ohio Department of Rehabilitation & Corrections*, which interpreted the interplay between Ohio Rules of Civil Procedure 10(D)(2), 12(B)(6), and 41(B)(3) (and which Appellants admitted was correctly decided). In *Nicely*, the trial court granted the defendants/appellees’ motion to dismiss due to the plaintiff’s failure to file an affidavit of merit. *Nicely*, 10th Dist. No.

09AP-187, 2009-Ohio-4386, at ¶ 3. The trial court did not specify whether the dismissal was with or without prejudice. *Id.* On appeal, the plaintiff recognized the error in the trial court's judgment entry and 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.

The Tenth District noted that "[g]enerally, pursuant to Civ.R. 41(B)(3), a dismissal is with prejudice unless the court specifies otherwise." *Id.* at ¶ 13. Applying this rule to a Rule 12(B)(6) dismissal for failure to file an affidavit of merit, 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.* 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.

The lower courts' decisions in the case at bar are consistent with *Nicely* (a decision which Appellants concedes is proper) as well as other decisions addressing the same issue. *See Schlenker Ents., LP v. Reese*, 3rd. Dist. Nos. 2-10-16, 2-10-19, 2010-Ohio-5308, at ¶¶ 41-46. As the Tenth District pointed out in this matter, "the distinction in the present case from *Nicely* arises in the posture of the appeal." Appellants' Appendix 3-13. *Nicely* was an appeal from an original action. It was not a refiled action. The Tenth District 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. Because the Tenth District considered an appeal from the trial court's erroneous judgment entry, the court was in a position to correct that error.

Like the Court of Claims' decision in *Nicely*, the judgment entry in the original action was a dismissal with prejudice because it did not specify whether the dismissal was with or without prejudice. But “[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.* 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 refiled action could not recognize and correct error in the original judgment entry. 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.*

B. The Lower Court Decisions Are Not Contrary To Ohio Revised Code Section 1.51.

First and foremost, Appellants' newly adopted argument that Ohio Revised Code Section 1.51 applies to this matter should be discarded because it was raised for the first time in their Merit Brief and it is well settled that “[a] party who fails to raise an argument in the court below waives his or her right to raise it here.” *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, at ¶ 34, quoting *State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d 276, 278, 611 N.E.2d 830. Moreover, Ohio Revised Code Section 1.51 is inapplicable. This statute appears in Chapter One of the Ohio Revised Code under the section titled “Statutory Construction.” (Appendix E). Ohio Revised Code Section 1.41 explicitly states that “Sections 1.41 to 1.59, inclusive, of the Revised Code apply to all statutes, subject to the

conditions stated in section 1.51 of the Revised Code, and to rules adopted under them.” O.R.C. § 1.41. (Appendix F) (emphasis added). Thus, Ohio Revised Code Section 1.51 applies to statutes. This section has no applicability when interpreting the Ohio Rules of Civil Procedure. While statutes are promulgated by the Ohio legislature, the Supreme Court has the power, under Section 5(B), Article IV of the Ohio Constitution (Appendix G), to promulgate the Ohio Rules of Civil Procedure. *Rockey v. 84 Lumber Co.*, 66 Ohio St.3d 221, 224-225, 1993-Ohio-174, 611 N.E.2d 789. Applying a statute to interpret a civil rule would interfere with the power of this Court to enact and interpret the rules governing procedure in Ohio. To the extent that the single unreported Eleventh District decision contradicts the statute clearly defining the scope of Ohio Revised Code Section 1.51, this case should not be followed. *See Eddie v. Veterinary Systems, Inc.* (Feb. 25, 1994), 11th Dist. No. 93-T-4886.

Assuming arguendo that Ohio Revised Code Section 1.51 does apply to the interpretation of civil rules, it governs only where a conflict exists between two provisions. *Sutherland-Wagner v. Brook Park Civil Service Comm.* (1987), 32 Ohio St.3d 323, 325, 512 N.E.2d 1170. “When two statutory provisions are alleged to be in conflict, R.C. 1.51 requires [a court] to construe them, where possible, to *give effect to both.*” *Gahanna-Jefferson Loc. School Dist. Bd. of Edn. v. Zaino* (2001), 93 Ohio St.3d 231, 234, 754 N.E.2d 789, quoting *Schindler Elevator Corp. v. Tracy* (1999), 84 Ohio St.3d 496, 499, 705 N.E.2d 672. “Only where the conflict is deemed *irreconcilable* does R.C. 1.51 mandate that one provision shall prevail over the other.” *Id.*, quoting *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129.

Rule 10(D)(2)(d) deals with a court’s dismissal of a medical malpractice action for failure to file an affidavit of merit and provides that such a dismissal should be without prejudice. Ohio

Rule of Civil Procedure 41(B)(3) provides guidelines for what language should be included in a judgment entry to indicate whether the dismissal is to be deemed with or without prejudice. If a court is dismissing a medical claim for failure to file an affidavit of merit, a court need only include the phrase “without prejudice” in the entry to comply with the requirement of Rule 10(D)(2)(d) that such a dismissal be without prejudice and with the requirement of Rule 41(B)(3) that dismissals without prejudice be indicated as such in the judgment entry. Ohio Rule of Civil Procedure 10(D)(2)(d) is not in conflict with Rule 41(B)(3), as a court can comply with both of those rules. Thus, Ohio Revised Code Section 1.51 does not apply.

C. **Appellants Failed To Follow The Proper Procedure For Amending The Trial Court’s Decision In The Original Action.**

If the judgment entry in the original action was contrary to the Supreme Court of Ohio's decision in *Fletcher*, Appellants had several remedies available to them for correcting the entry to include the phrase “without prejudice.” The most obvious remedy was pursuing an appeal in the original action to amend the judgment entry such that it would be a dismissal without prejudice, which is exactly what the plaintiff did in *Nicely*. When Appellants disagreed with the language in Appellee’s proposed judgment entry, they had the opportunity to submit their own entry to the court which contained the phrase “without prejudice.” Appellants could have raised the issue in the motion for reconsideration filed in the original action. They also could have filed a motion for relief from judgment under Rule 60(B)(1). 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.”

The judgment in the original action is now final and cannot be appealed or amended. The trial court in the refiled action dismissed Appellants’ claims because, as the judgment in the first action stood, the second action was barred by the doctrine of *res judicata*. The trial court in the

refiled action was required to give effect to what the original judgment entry *actually said*. 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*. Appellants' Appendix 2-7, citing *Yavitch & Palmer Co., LPA v. U.S. Four, Inc.*, 10th Dist. No. 05AP-294, 2005-Ohio-5800, at ¶ 10.

Appellants attempt to minimize their failure to appeal the decision in the original action by arguing that, because the entry was silent, an error had not occurred until after the trial court in the refiled action granted summary judgment, and thus, any attempt to appeal the original judgment entry would have been rejected. *Nicely* and *Schlenker Enterprises* demonstrate otherwise. Both cases involved original, not refiled, actions. Both involve dismissals silent as to whether the dismissal was with or without prejudice. Rather than dismiss the appeal as advisory, the appellate courts in both cases heard the appeals, held that the dismissals were with prejudice but should have been without prejudice, and reversed the trial court decisions. *See Nicely*, 10th Dist. No. 09AP-187, 2009-Ohio-4386, at ¶¶ 12-16; *see also Schlenker Ents.*, 3rd. Dist. Nos. 2-10-16, 2-10-19, 2010-Ohio-5308, at ¶¶ 41-46. If Appellants had done the same in the original action, the Tenth District would mostly likely have sustained their assignment of error.

Although it may appear harsh for the trial court to dismiss this action because Appellants failed to take the appropriate steps to correct 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 filed outside of the statute of limitations; 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 (Exhibit A). 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 (Exhibit B). 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 original judgment entry—resulted in a dismissal of their claims against Dr. Janis.

CONCLUSION

For the foregoing reasons, Defendant-Appellee Leonard R. Janis, DPM respectfully requests that this Court affirm the decision dismissing the claims against him.

Respectfully submitted,

LANE, ALTON & HORST LLC



Gregory D. Rankin (0022061) (counsel of record)

Ray S. Pantle (0082395)

Two Miranova Place, Suite 500

Columbus, Ohio 43215-7052

614-228-6885/614-228-0146 fax

grankin@lanealton.com

rpantle@lanealton.com

***Counsel for Defendant/Appellee Leonard R. Janis,
DPM***

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **MERIT BRIEF OF DEFENDANT-APPELLEE LEONARD R. JANIS, DPM** was served by placing the same in the regular U.S. Mail, postage prepaid, on this 20th day of January, 2012, to the following:

Anne M. Valentine
Susie L. Hahn
Leeseberg & Valentine
175 South Third Street, PH
Columbus, Ohio 43215
Counsel for Plaintiffs-Appellants



Gregory D. Rankin (0022061) (counsel of record)
Ray S. Pantle (0082395)

Not Reported in N.E.2d, 1986 WL 14692 (Ohio App. 5 Dist.)
(Cite as: 1986 WL 14692 (Ohio App. 5 Dist.))

C

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, Fifth District, Richland
County.

Earl W. LOCKE, et al., Plaintiffs-Appellants,
v.

L.L. GIBSON, M.D., Defendant-Appellee.

No. CA-2413.
Dec. 10, 1986.

Civil Appeal from Common Pleas Court, Case No.
84-80-C.

Arthur C. Graves, Columbus, for plaintiffs-appel-
lants.

William M. Todd, Columbus, Wayne Hohenberger,
Mansfield, for defendant-appellee.

OPINION

HOFFMAN, Judge.

*1 Plaintiffs-appellants, Earl W. Locke and Joy Locke (appellants), appeal from a Richland County Court of Common Pleas decision granting summary judgment in favor of defendant-appellee, Lawrence L. Gibson, M.D. (appellee or Dr. Gibson), on their respective claims for medical malpractice and loss of consortium.

This cause arises out of a medical malpractice claim by plaintiff-appellant Earl W. Locke for personal injuries and by his wife plaintiff-appellant Joy Locke for loss of consortium as a result of medical treatment rendered to appellant Earl Locke by defendant-appellee Dr. Lawrence L. Gibson. The physician-patient relationship between appellant Earl W. Locke and appellee Dr. Gibson terminated on February 17, 1979.

The claims of appellants were originally filed on August 5, 1980, under Case No. 80-463-L but were dismissed without prejudice by judgment entry dated February 8, 1983.

On February 8, 1984, appellants refiled their respective causes of action. Thereafter, separate motions for summary judgment against both appellants were sustained by the trial court on February 12, 1985, and on May 9, 1986.

On February 12, 1985, the trial court granted appellee's motion for summary judgment against appellant Earl W. Locke and ordered his claim dismissed, finding that "Mr. Locke's claims against Dr. Gibson are time-barred by R.C. Section 2305.11(A)." (Judgment Entry 2/12/85.)

Thereafter, on May 9, 1986, the trial court granted summary judgment in favor of appellee Dr. Gibson against appellant Joy Locke, finding that "Joy Locke's claims against Dr. Gibson are barred by the applicable statute of limitations, Ohio Rev.Code § 2305.09(B), and that defendant is entitled to judgment as a matter of law as to the claims asserted against him by Joy Locke." (Judgment Entry 5/9/86.)

It is from the judgment entries of February 12, 1985, and May 9, 1986, that appellants have timely filed their appeal to this court, raising the following two assignments of error:

I. THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT FOR SUMMARY JUDGMENT AGAINST PLAINTIFF, EARL W. LOCKE.

II. THE TRIAL COURT ERRED IN GRANTING THE MOTION OF DEFENDANT FOR SUMMARY JUDGMENT AGAINST PLAINTIFF, JOY LOCKE.

We overrule both assignments of error raised by plaintiffs-appellants and affirm the judgment of

Not Reported in N.E.2d, 1986 WL 14692 (Ohio App. 5 Dist.)
(Cite as: 1986 WL 14692 (Ohio App. 5 Dist.))

the Court of Common Pleas of Richland County, Ohio. Our reasons follow.

I

The issue presented by this assignment of error is whether the complaint originally filed by appellants on August 5, 1980, was filed within the time period set forth in R.C. 2305.11(A).

It is uncontroverted that appellants' claim for medical malpractice and loss of consortium accrued on February 17, 1979, when the physician-patient relationship between physician and patient terminated. Section 2305.11(A) of the Ohio Revised Code provides that an action for malpractice against a physician shall be brought within one year after the cause of action arose (in the case *sub judice*, 2/17/80).

However, a statutory exception to the one year limitation is provided in said section where notice if given to a physician prior to expiration of the one year period of time.

*2 If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within 180 days after that notice is given.

R.C. 2305.11(A)

Thus, appellant Earl W. Locke's original action for medical malpractice as well as his refiled action were timely only if the original action was brought within 180 days after appellant gave notice to appellee of his intent to file the action.

It is uncontroverted that appellants mailed the notice of intent to sue to Dr. Gibson on February 6, 1980; that Dr. Gibson received such notice on February 7, 1980; and, that the original complaint was filed on August 5, 1980.

In order to extend the one year period of limitations, potential medical malpractice plaintiffs who seek to take advantage of the 180 day extension of time provided by R.C. 2305.11(A) must comply with the requirements thereof.

This court need not address the issue raised as to whether the 180 day extension of time provided by the statute begins to run with the date of mailing of the notice by the plaintiff or the date of receipt of the notice by the defendant for the reason that said cause of action was not filed within the 180 day requirement of the statute, computed either way.

The court takes judicial notice that 1980 was a leap year; there were, therefore, 29 days in February, 1980. The 180th day from February 7, 1980 was August 4, 1980.

The complaint filed by appellant on August 5, 1980, was time-barred irrespective of when the 180 days commenced, i.e. with the date of mailing or the date of filing. In either event, the complaint was required to be filed on August 4, 1980. It was not filed until August 5, 1980, one day late in any event.

This assignment of error is overruled.

II

Appellants' second assignment of error is not well taken and is overruled. R.C. 2305.09(D) provides that an action for an injury to the right of the plaintiff not arising on contract nor enumerated in R.C. 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code, shall be brought within four years after the cause of action accrued.

A claim for loss of consortium arising out of alleged acts of medical negligence is governed by the four year time limitations set forth in 2305.09(D). *Ames v. Akron City Schools* (1976), 47 Ohio St.2d 85.

Appellant Joy Locke's cause of action for loss of consortium accrued on February 17, 1979, when the physician-patient relationship between Earl

Exhibit A-2

Not Reported in N.E.2d, 1986 WL 14692 (Ohio App. 5 Dist.)
 (Cite as: 1986 WL 14692 (Ohio App. 5 Dist.))

Locke and Dr. Gibson terminated. The four year statute of limitations for commencing her cause of action expired on February 17, 1983.

Although appellant Joy Locke's original claim for loss of consortium was originally filed on August 5, 1980, it was dismissed on February 8, 1983. At the time the original action was discharged on February 8, 1983, the four year statute of limitations set forth in R.C. 2305.09(D) had not expired.

*3 Appellant Joy Locke had up to and including February 17, 1983, to refile her cause of action for loss of services, consortium and medical expenses. She failed to do so and her claim is therefore barred unless the "savings clause" of R.C. 2305.19 provides for an extension of the four year statute of limitations set forth in 2305.09(D). It does not.

R.C. 2305.19 provides in pertinent part:

In an action commenced, or attempted to be commenced ... if plaintiff fails otherwise than upon the merits, and the time limited for commencement of such action at the date of reversal or failure *has expired*, the plaintiff may commence a new action within one year after such date.

(Emphasis ours.)

One of the express prerequisites of R.C. 2305.19 is that at the time a case is reversed or otherwise terminated, the time for commencement of the action must have already expired. *Cero Realty v. American Manufacturers Mutual Ins. Co.* (1960), 171 Ohio St. 82. *Snyder v. Paquelet* (June 30, 1982), Stark App. No. CA-5822, unreported.

This assignment of error is overruled.

For the above reasons, both assignments of error raised by plaintiffs-appellants are overruled, and the judgment of the Court of Common Pleas of Richland County is affirmed.

MILLIGAN and WISE, JJ., concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

JOHN R. MILLIGAN, P.J.

JOHN R. HOFFMAN, J.

EARLE E. WISE, J.

Ohio App., 1986.

Locke v. Gibson

Not Reported in N.E.2d, 1986 WL 14692 (Ohio App. 5 Dist.)

END OF DOCUMENT

Exhibit A-3

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Not Reported in N.E.2d, 1993 WL 548091 (Ohio App. 11 Dist.)
(Cite as: 1993 WL 548091 (Ohio App. 11 Dist.))

C

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, Lake
County.

M. FRIEDMAN MANAGEMENT COMPANY,
Plaintiff-Appellant,

v.

Dorothy J. MALEK, Defendant-Appellee.

No. 93-L-022.
Dec. 3, 1993.

Civil Appeal from the Willoughby Municipal Court
Case No. 92 CVF 00873
Dorothy J. Malek, Marc N. Silberman, Eastlake, OH

CHRISTLEY, P.J., and MAHONEY and NADER,
JJ,

OPINION

NADER.

*1 This appeal is from the Willoughby Municipal Court, Lake County, Ohio. Plaintiff-appellant, M. Friedman Management Company, appeals the order of the court which entered judgment for appellant in a lesser amount than recommended by the referee before whom this matter was tried.

The instant action was commenced on May 14, 1992. Trial was conducted by a referee on October 29, 1992. Appellee appeared *pro se*. On November 6, 1992, the referee issued a report containing findings of fact, conclusions of law, and a recommendation that judgment be entered in favor of appellant in the amount of \$475.

The referee's report set forth the following

findings of fact. Appellee, Dorothy Malek, was the lessee upon a written residential lease agreement between herself and appellant. Monthly rent was \$475. The written lease expired on November 1, 1991, and appellee held over. Appellee paid the monthly rental amount for the months of November and December. She vacated the premises around December 14, 1991, on which date appellant first received notice of appellee's intent to quit the premises. Appellee subsequently stopped payment on the December rent payment. Appellant retained appellee's security deposit of \$475. Appellant entered into a lease agreement of the premises with a new tenant beginning February 1, 1992.

The referee concluded from these facts that appellee became a month-to-month tenant on November 1, 1991. Pursuant to this tenancy, appellee was required to give appellant notice of her intent to vacate at least thirty days in advance. Because notice was not effectively made until the middle of December 1991, appellee was found responsible for the January 1992 rent. Appellee had paid the rent for the month of November 1991. The security deposit was applied to the December 1991 rent. Appellee was accordingly found liable for the unpaid January 1992 rent of \$475.

On November 23, 1992, appellee filed an "objection" letter to the referee's report. The letter made reference only to the appellee's moderate income and to her dependent children, who it was said would "be the ones to suffer" should the referee's report be adopted.

On January 12, 1993, the trial court's judgment was entered upon the court's journal. The journal entry indicates that copies of the entry were sent to appellee and appellant's counsel on that date. The judgment reads in its entirety:

The matter came on for consideration on the Report of the Referee, together with the findings and recommendations contained therein, on the

Exhibit B-4

Not Reported in N.E.2d, 1993 WL 548091 (Ohio App. 11 Dist.)
 (Cite as: 1993 WL 548091 (Ohio App. 11 Dist.))

pleadings and exhibits and on the objections of defendant.

"The court finds, on review and consideration of the above that, it is able to make an independent determination as follows.

"Judgment for plaintiff against defendant in the sum \$237.50 together with interest at the rate of ten percent (10%) from date of judgment and costs herein."

The judgment of the court was rendered without the benefit of a transcript of the proceedings before the referee, and without additional evidentiary intake. Neither party moved the court for findings of fact or conclusions of law under Civ.R. 58.

*2 On February 1, 1993, appellant filed a motion for new trial or for relief from judgment. On February 9, 1993, appellant filed its notice of appeal. On March 17, 1993, the trial court filed an entry in which it ordered appellant's motions of February 1, 1993 continued pending resolution of the instant appeal.

Appellant presents two assignments of error:

"1. THE TRIAL COURT ABUSED ITS

DISCRETION IN FAILING TO ADOPT THE REFEREE'S REPORT WHEN IT WAS SUPPORTED BY THE EVIDENCE AND NO OBJECTIONS WERE FILED BY EITHER PARTY.

"2. THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF-APPELLANT'S MOTION FOR A NEW TRIAL OR FOR RELIEF FROM JUDGMENT."

The substantive arguments contained in appellant's second assignment of error shall not be addressed as it is clear from the record that the motion for new trial was not timely made.

Civ.R. 59(B) provides that a motion for a new

trial shall be served within fourteen days of the entry of judgment. Entry of judgment in this case occurred on January 12, 1993. Proof of service of appellant's motion, filed with the trial court, indicates that service of the motion for new trial was made on January 28, 1993, beyond the fourteen day period. Civ.R. 6(B) states that a trial court may not extend the time for filing a motion for new trial under Civ.R. 59(B). An untimely motion may not be considered by the trial court. *Town & Country Drive-In Shopping Centers Inc. v. Abraham* (1975), 46 Ohio App.2d 262.

A timely filed motion under Civ.R. 59(B) tolls the time in which to file a notice of appeal from a final judgment. App.R. 4(B)(2). Such a motion filed sixteen days after entry of judgment is untimely and does not toll the time period. *R-H-L Advertising Co. v. Americo Wholesale Plumbing Supply Co.* (1980), 69 Ohio App.2d 61. See, also, *Wolery v. Portsmouth* (1990), 67 Ohio App.3d 16, 24-25. Also, a motion for relief from judgment filed pursuant to Civ.R. 60(B) does not toll the appeal time. *Town & Country; Bowen v. Precarious Enterprises* (Feb. 16, 1990), Lake App. No. 88-L-13-206, unreported.

Since the motions filed on February 1, 1993 did not toll the period for filing a notice of appeal with this court, the notice of appeal filed on February 9, 1993 deprived the trial court of jurisdiction to proceed with the Civ.R. 60(B) motion. See *Majnaric v. Majnaric* (1975), 46 Ohio App.2d 157; *State v. Rogers* (1985), 17 Ohio St.3d 174, 183-184. Thus, the trial court is without jurisdiction to entertain the Civ.R. 60(B) motion, and the trial court properly delayed consideration of it for the duration of this appeal.

For the foregoing reasons, appellant's second assignment of error is without merit.

In its first assignment of error, appellant claims the trial court abused its discretion in not adopting the referee's report. Appellant argues that appellee's "objection" filed with the court was of no legal consequence, and that the referee's findings and re-

Exhibit B-5

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Not Reported in N.E.2d, 1993 WL 548091 (Ohio App. 11 Dist.)
(Cite as: 1993 WL 548091 (Ohio App. 11 Dist.))

commendations were supported by the evidence.

*3 Civ.R. 53(E)(5) states that

“ * * * the court shall determine whether there is any error of law or other defect on the face of the referee's report even if no party objects to such an error or defect.”

Thus, even in the absence of a valid objection to the referee's report, the trial court had the responsibility to critically review and verify to its own satisfaction the correctness of the report. *Normandy Place Assoc. v. Beyer* (1982), 2 Ohio St.3d 102, syllabus at 2. A trial court has the ultimate authority and responsibility to determine the outcome of a case; a referee's report should be merely an additional resource at the court's disposal in determining the issues before it. *In re Michael* (1991), 71 Ohio App.3d 727, 729. The court below was required to undertake an independent review of the referee's report to determine any errors. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 5. See, also, *Timperio v. Ameri-Con Concord, Inc.* (Jan. 8, 1993), Lake App. No. 91-L-172, unreported at 8.

We agree with the trial court's conclusion that the referee's findings of fact were sufficient for the court to make an independent analysis of the issues and to apply appropriate rules of law in reaching a judgment order. See Civ.R. 53(E)(5). We must now determine whether the trial court abused its discretion in diverging from the award of damages recommended by the referee. See *Peppercorn v. Figer* (March 22, 1991), Lake App. No. 90-L-14-067, unreported at 7.

The trial court was bound to the findings of fact contained in the referee's report, as the record reflects that no additional evidence was taken by the court. See *Crown Carpet Centre Co. v. Gibbs* (Feb. 26, 1993), Lake App. No. 92-L-087, unreported at 5; *Coup v. Harmon* (March 29, 1991), Lake App. No. 90-L-14-014, unreported at 4.

The referee's findings of fact indicate that ap-

pellee held-over after the expiration of the written lease agreement on November 1, 1991. An oral month-to-month tenancy was established beginning on that date. Appellant received notice of termination of the tenancy on or around December 14, 1991. R.C. 5321.17(B) provides that notice to terminate a month-to-month tenancy must be given at least thirty days prior to the periodic rental date.

This court concludes from the above that the trial court abused its discretion in awarding appellant a half-month's rental amount. There is no basis in fact or in law for awarding this amount. As the periodic rental date pursuant to the parties' parole agreement was the first of each month, an application of R.C. 5321.17(B) to the facts of this case unequivocally compels the conclusion that appellee is liable to appellant for the rent for the entire month of January 1992.

Accordingly, appellant's first assignment of error has merit. The trial court committed error prejudicial to the appellant, and appellant is entitled to have judgment rendered in its favor as a matter of law. Cf. *Cork v. Bray* (1990), 52 Ohio St.3d 35, 39; *Normandy Place* at 656.

*4 The judgment below is reversed and the cause remanded for the trial court to enter final judgment in accordance with this opinion.

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

Ohio App. 11 Dist., 1994.
M. Friedman Management Co. v. Malek
Not Reported in N.E.2d, 1993 WL 548091 (Ohio App. 11 Dist.)

END OF DOCUMENT

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

DONALD P. TROYER, ET AL.,	:	
Plaintiffs,	:	Case No. 09CVA02-2976
vs.	:	JUDGE BESSEY
LEONARD J. JANIS, DPM,	:	
Defendant.	:	

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2009 NOV 10 AM 10:47
CLERK OF COURTS

**DECISION GRANTING DEFENDANT'S
MOTION TO DISMISS,
FILED APRIL 8, 2009**

AND

**DECISION AND ENTRY DENYING PLAINTIFFS' MOTION TO EXTEND
TIME TO FILE AFFIDAVIT OF MERIT OR ALTERNATIVELY LEAVE TO
FILE AMENDED COMPLAINT,
FILED APRIL 13, 2009**

AND

**DECISION AND ENTRY DENYING PLAINTIFFS' MOTION FOR LEAVE TO
FILE AMENDED COMPLAINT, OR IN THE ALTERNATIVE, LEAVE TO FILE
SUPPLEMENTAL COMPLAINT,
FILED APRIL 30, 2009**

These matters are before the Court upon the Motion to Dismiss, filed by Defendant, Leonard R. Janis, DPM, dba Total Foot & Ankle of Ohio (hereinafter "Defendant"), on April 8, 2009. On April 13, 2009, Plaintiffs, Donald P. Troyer and Tamara Troyer (hereinafter "Plaintiffs"), filed a Response to Defendant's Motion to Dismiss, and a Motion to Extend Time to File Affidavit of Merit, or Alternatively, Leave to File Amended Complaint. On April 13, 2009, Defendant filed a Reply in Further Support of Motion to Dismiss, and a Memorandum Contra to Plaintiffs' Motion for Extension of Time to File Affidavit of Merit or Leave to File Amended Complaint. On April 30, 2009, Plaintiffs filed a Supplemental Response to Defendant's Motion to Dismiss, and a Motion for Leave to File Amended Complaint, or in the Alternative,

Leave to File Supplemental Complaint. On May 14, 2009, Defendant filed a Memorandum Contra Plaintiffs' Motion for Leave to File Supplemental Complaint.

I. Background

On February 26, 2009, Plaintiffs filed their Complaint against Defendant alleging claims for personal injury caused by Defendant's alleged medical negligence. Plaintiffs failed to file an Affidavit of Merit with their Complaint, as required by Civ.R. 10(D)(2).

On April 8, 2009, Defendant filed his Answer along with the Motion to Dismiss, which is now before the Court.

II. Standard of Review

"A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *Powell v. Vorys* (C.A.10 1998), 131 Ohio App.3d 681, 684, quoting, *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St. 545, 548, 605 N.E.2d 378. "In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, 'it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.'" *Powell*, at 684, quoting, *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. "In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings, and may not consider or rely on evidence outside the complaint." *Powell*, at 684, citing, *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617, 662 N.E.2d 1098, 1100. "When a court rules on a motion to dismiss for failure to state a claim, the complaint's factual allegations must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Sharon Ent.*,

Inc. v. Kenworth of Cincinnati, Inc. (1998), 131 Ohio App.3d 746, 749, citing, *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 182, *Mitchell v. Lawson Milk Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 753, 756. "A motion to dismiss can be granted only where the party opposing the motion, here, the [Plaintiff], is unable to prove any set of facts which would entitle it to the relief requested." *Sharon*, citing, *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 418, 650 N.E.2d 863, 865-866, *York v. Ohio St. Highway Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063.

III. Discussion

Pursuant to Civ.R. 12(B)(6), Defendant requests the Court for an Order dismissing Plaintiffs' Complaint for failure to comply with the requirements set forth in Civ.R. 10(D)(2), which states in pertinent part as follows:

(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 an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. The affidavit 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, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit. [Emphasis provided].

Defendant contends that because Plaintiffs failed to submit the required Affidavit of Merit at the time they filed their Complaint, and failed to request an extension of time when they filed their Complaint, they have, in fact, failed to state a claim upon which relief can be granted. The Court agrees.

On April 13, 2009, Plaintiffs filed a "Response to Motion to Dismiss and Motion to Extend Time to File Affidavit of Merit or Alternatively, Leave to File Amended Complaint", which requested the Court for an additional 90 days, i.e. until May 26, 2009 to file their Affidavit of Merit. In addition, the Court notes that in Plaintiffs' April 30, 2009 filing, Plaintiffs attached a copy of their Amended Complaint, which included an Affidavit of Merit.

However, the Court finds, as Defendant argues, that Civ.R. 10(D)(2)(b), required Plaintiffs to file a motion requesting additional time *with the Complaint*. In the case at hand, Plaintiffs did not file their motion until April 13, 2009, two months after the filing of their Complaint. In addition, the Court finds that Plaintiffs failed to explain what additional information or discovery was needed in order to file the Affidavit of Merit, or even if they had exercised due diligence in attempting to procure the Affidavit of Merit. As such, the Court finds that they have not presented good cause for the Court to grant their motion.

Furthermore, the Court agrees that Civ.R. 15(A) and 15(E) are not the proper vehicles through which Plaintiffs can be granted additional time to file their Affidavit of Merit. As Defendant argues, if the Court were to allow Plaintiffs to file an Affidavit of Merit by calling it an "amendment" or "supplement" to the Complaint, it would be nullifying the requirements set forth by Civ.R. 10(D)(2).

IV. Conclusion

Based on the foregoing, the Court accordingly hereby GRANTS Defendant's Motion to Dismiss, and DENIES Plaintiffs' Motion to Extend Time to File Affidavit of Merit or Alternatively, Leave to File Amended Complaint, and DENIES Plaintiffs' Motion for Leave to File Amended Complaint, or in the Alternative, Leave to File Supplemental Complaint.

Counsel for Defendant shall submit the appropriate judgment entry pursuant to Loc.Rs. 25.01 and 25.02.

IT IS SO ORDERED.


JOHN P. BESSEY, JUDGE

Copies to:

Ray A. Cox, Esq.
ray.a.cox@sbcglobal.net
Counsel for Plaintiffs, Donald P. Troyer and Tamara Troyer

Gregory D. Rankin, Esq.
grankin@lanealton.com
Ray s. Pantle, Esq.
rpantle@lanealton.com
Counsel for Defendant, Leonard R. Janis, DPM

Any attorney or party *pro se* whose e-mail address is noted above has received this document electronically. The original will be filed within 24 hours of the time noted on the e-mail transmittal message.

Ray S
Pantle/ASSOC/LGLSTAFF/L
AH4LAW

11/12/2009 10:13 AM

To <ray.a.cox@sbcglobal.net>

cc

bcc

Subject RE: Troyer v. Janis

I believe the judge's decision does not specify whether the dismissal is with or without prejudice and so that is why I did not make any indication either way in the proposed Entry. If I am incorrect and the decision does state it is without prejudice, refer me to the part of the decision where it says this and I will make the change to the proposed Entry.

Ray S. Pantle
LANE, ALTON & HORST LLC
Two Miranova Place | Suite 500 | Columbus, Ohio 43215
(614) 228-6885 - phone
(614) 228-0146 - fax
(614) 233-4756- direct dial
rpantle@lanealton.com

Confidentiality Notice: This e-mail message is intended by Lane, Alton & Horst for use only by the individual or entity to which it is addressed. This message may contain information that is privileged or confidential. It is not intended for transmission to, or receipt by, anyone other than the named addressee (or a person authorized to receive and deliver it to the named addressee). If you have received this transmission in error, please delete it from your system without copying or forwarding it and notify the sender of the error by reply e-mail or by calling (614) 228-6885. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with new requirements of the Internal Revenue Service, we inform you that, to the extent any advice relating to a Federal tax issue is contained in this communication, including in any attachments, it is not written or intended to be used, and cannot be used, for the purpose of (a) avoiding any tax-related penalties that may be imposed on you or any other person under the Internal Revenue Code, or (b) promoting, marketing or recommending to any other person any transaction or matter addressed in this communication. The firm provides reliance opinions only in formal opinion letters that specifically state that the letter meets the standards of IRS Circular 230 and contain the signature of a partner.

"Ray A. Cox" <ray.a.cox@sbcglobal.net>



"Ray A. Cox"
<ray.a.cox@sbcglobal.net>

11/12/2009 10:01 AM

Please respond to
<ray.a.cox@sbcglobal.net>

To <RPantle@lanealton.com>

cc

Subject RE: Troyer v. Janis

Your entry needs to indicate that the dismissal is without prejudice.

Ray Cox

-----Original Message-----

From: RPantle@lanealton.com [mailto:RPantle@lanealton.com]

Sent: Tuesday, November 10, 2009 8:37 AM

To: ray.a.cox@sbcglobal.net

Subject: Troyer v. Janis

Appendix B-6

Mr. Cox:

As you know, the trial court has granted our Motion to Dismiss. Attached please find a proposed Judgment Entry, pursuant to Local Rule 25. If you approve of the language, please sign it and return it to me so that we can file it with the court. Let us know if you do not approve so that we can file it without your signature.

Feel free to call if you wish to discuss.

(See attached file: Proposed Judgment Entry.doc)

Ray S. Pantle
LANE, ALTON & HORST LLC
Two Miranova Place | Suite 500 | Columbus, Ohio 43215
(614) 228-6885 - phone
(614) 228-0146 - fax
(614) 233-4756- direct dial
rpantle@lanealton.com

Confidentiality Notice: This e-mail message is intended by Lane, Alton & Horst for use only by the individual or entity to which it is addressed. This message may contain information that is privileged or confidential. It is not intended for transmission to, or receipt by, anyone other than the named addressee (or a person authorized to receive and deliver it to the named addressee). If you have received this transmission in error, please delete it from your system without copying or forwarding it and notify the sender of the error by reply e-mail or by calling (614) 228-6885. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with new requirements of the Internal Revenue Service, we inform you that, to the extent any advice relating to a Federal tax issue is contained in this communication, including in any attachments, it is not written or intended to be used, and cannot be used, for the purpose of (a) avoiding any tax-related penalties that may be imposed on you or any other person under the Internal Revenue Code, or (b) promoting, marketing or recommending to any other person any transaction or matter addressed in this communication. The firm provides reliance opinions only in formal opinion letters that specifically state that the letter meets the standards of IRS Circular 230 and contain the signature of a partner.

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

DONALD P. TROYER, ET AL., :

Plaintiffs, : **Case No. 09CVA02-2976**

vs. : **JUDGE BESSEY**

LEONARD J. JANIS, DPM, :

Defendant. :

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

APPROVED:

Submitted but not approved.

Ray A. Cox (0011711)
265 Regency Ridge Drive
Dayton, Ohio 45459
937-291-3119
Counsel for Plaintiffs

Gregory D. Rankin (0022061)
Ray S. Pantle (0082395)
Lane, Alton & Horst LLC
Two Miranova Place, Suite 500
Columbus, OH 43215
614-228-6885/614-228-0146-fax
Counsel for Defendant

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
2009 DEC -7 PM 2:38
CLERK OF COURTS-CV

MOTION

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

DONALD P. TROYER, et al

* CASE NO: 09 CVA 02 2976

JUDGE J. BESSEY

Plaintiff

*

-VS-

*

LEONARD J. JANIS, D.P.M.

*

*

Defendant.

*

MOTION FOR RECONSIDERATION

The Court entered its decision granting Defendant's Motion to Dismiss under Civ. R. 12(B). We request the Court to reconsider its decision. Defendant had filed his answer before he filed his Motion to Dismiss. A Motion to Dismiss under Civ. R. 12(B) must be filed before an answer was filed.

"A motion making any if these defenses shall be made before pleading if a further pleading is permitted" Civ. R. 12(B).
(Underlining ours)

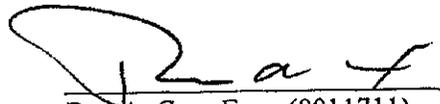
RAY A. COX
ATTORNEY AT LAW
5 REGENCY RIDGE DRIVE
DAYTON, OHIO 45459-4221

POST OFFICE BOX 751292
DAYTON, OHIO 45475-1292
937-291-3119
FAX 937-291-3229

Appendix C-10

An answer was not only "permitted" but was necessary. Hence the Motion to Dismiss was not timely and the Court should reconsider its decision. The word "shall" we believe means just that. (See attached docket)

Respectfully submitted,

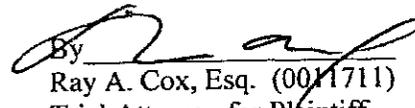


Ray A. Cox, Esq. (0011711)
Trial Attorney for Plaintiff
265 Regency Ridge Drive
Dayton, OH 45459
Telephone: 937 291-3119
Facsimile: 937 291-3229
ray.a.cox@sbcglobal.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served this 25 day of November 2009, by electronic means upon the following parties:

Gregory D. Rankin
Ray S. Pantle
Two Miranova Place, Suite 500
Columbus, Ohio 43215
Fax: 614-228-0146



By
Ray A. Cox, Esq. (0011711)
Trial Attorney for Plaintiff
265 Regency Ridge Drive
Dayton OH 45459
Telephone: 937-291-3119
Facsimile: 937-291-3229
ray.a.cox@sbcglobal.net

RAY A. COX
ATTORNEY AT LAW
265 REGENCY RIDGE DRIVE
DAYTON, OHIO 45459-4221

POST OFFICE BOX 751292
DAYTON, OHIO 45475-1292
937-291-3119
FAX 937-291-3229

RECEIVED JAN 20 2010

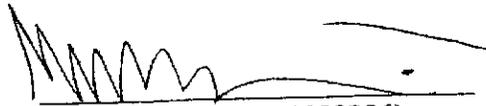
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

DONALD P. TROYER, et al., :
 :
 Plaintiffs, : Case No.: 09ap-1150
 :
 vs. :
 :
 LEONARD J. JANIS, D.P.M., :
 :
 Defendant. :

PLAINTIFF'S NOTICE OF VOLUNTARY DISMISSAL

Pursuant to Civil Rule 41(A)(1)(a), Plaintiff hereby voluntarily dismisses the above-captioned claim. Such dismissal is without prejudice and otherwise than on the merits.

Respectfully submitted,



Anne M. Valentine (0028286)
Leeseberg & Valentine
175 South Third Street, PH-1
Columbus, Ohio 43215
(614) 221-2223 - telephone
(614) 221-3106 - fax
email: avalentine@leesebergvalentine.com
Attorney for Plaintiffs

COURT

2010 JAN 26 PM 12:45

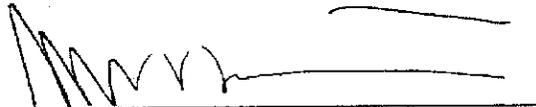
CLERK OF COURTS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document has been served upon the following by regular U.S. Mail, postage prepaid, this 26th day of January, 2010.

Gregory D. Rankin
Ray S. Pantle
Lane, Alton & Horst, LLC
Two Miranova Place, Suite 500
Columbus, OH 43215-7052

Ray A. Cox
265 Regency Ridge Drive
Dayton, OH 45459



Anne M. Valentine

C

Baldwin's Ohio Revised Code Annotated Currentness

General Provisions

▣ Chapter 1. Definitions; Rules of Construction (Refs & Annos)

▣ Statutory Provisions (Refs & Annos)

→ → **1.51 Special or local provision prevails over general; exception**

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.

CREDIT(S)

(1971 H 607, eff. 1-3-72)

Current through 2011 Files 1 to 49, 52, 55 to 60, and 62 of the 129th GA (2011-2012) and November 8, 2011 election results.

(c) 2012 Thomson Reuters

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness

General Provisions

▣ Chapter 1. Definitions; Rules of Construction (Refs & Annos)

▣ Statutory Provisions (Refs & Annos)

→→ **1.41 Statutory construction, applicability**

Sections 1.41 to 1.59, inclusive, of the Revised Code apply to all statutes, subject to the conditions stated in section 1.51 of the Revised Code, and to rules adopted under them.

CREDIT(S)

(1971 H 607, eff. 1-3-72)

CROSS REFERENCES

General assembly to enact laws by bill; contents; procedure, see O Const Art II §15

RESEARCH REFERENCES

Encyclopedias

OH Jur. 3d Statutes § 119, Statutory Rules of Interpretation.

LAW REVIEW AND JOURNAL COMMENTARIES

Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation, Bernard W. Bell. 60 Ohio St L J 1 (1999).

R.C. § 1.41, OH ST § 1.41

Current through 2011 Files 1 to 49, 52, 55 to 60, and 62 of the 129th GA (2011-2012) and November 8, 2011 election results.

(c) 2012 Thomson Reuters

END OF DOCUMENT

C

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

▣ Article IV. Judicial (Refs & Annos)

→→ **O Const IV Sec. 5 Powers and duties of supreme court; superintendence of courts; rules**

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

CREDIT(S)

(1973 SJR 30, am. eff. 11-6-73; 132 v HJR 42, adopted eff. 5-7-68)

Current through 2011 Files 1 to 49, 52, 55 to 60, and 62 of the 129th GA (2011-2012) and November 8, 2011 election results.

(c) 2012 Thomson Reuters

END OF DOCUMENT