ORIGINAL

IN THE SUPREME COURT OF OHIO

DONALD TROYER, et al.,	:	ON APPEAL FROM THE TENTH APPELLATE DISTRICT
Appellants,	:	
v.	:	Case No. 11-1162
LEONARD J. JANIS, DPM,	:	
Appellee.	:	

REPLY BRIEF OF APPELLANTS DONALD TROYER AND TAMRA TROYER

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SUPREME COURT OF OHIO

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.

Appellee urges the Court to frame the appeal as an issue of res judicata. However, the proper issue for this Court to review is whether a dismissal for failure to attach an affidavit of merit is without prejudice by operation of law and the Ohio Civil Rules. Pursuant to Ohio Rule of Civil Procedure 10(D)(2)(d), *any* dismissal for failure to include an affidavit of merit is otherwise than on the merits. The language of the Rules does not state that it is without prejudice "at the discretion of the trial court" or "under certain circumstances." Instead, the Civil Rule dictates that such a dismissal, by operation of law, is without prejudice.

Although the appellants in *Nicely v. Ohio Dept. of Rehab. and Correct.*, 10th Dist. No. 09AP-187, 2009-Ohio-4386, chose to appeal an entry, and the appellate court agreed to hear it, an appeal is not the lone remedy. While Appellants could have appealed the silent Entry or filed a motion for reconsideration, failing to do so is not fatal. None of the above procedures are necessary given the clear pronouncements by this Court in *Fletcher v. Univ. Hosp. of* Cleveland, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, Civ.R. 10(D)(2)(d), and R.C. 1.51. In fact, as Appellants contended in their Brief, there was nothing to appeal, given the silence of the Dismissal Entry, until the trial court granted summary judgment in contravention of Civ.R. 10(D)(2)(d) and *Fletcher*.

The silence of the dismissal entry has no effect because Civ.R. 10(D)(2)(d) 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.

Appellee also argues in his Brief that Appellants waived the right to argue R.C. 1.51 applies, because it was not specifically raised in the lower courts. However, Appellee takes a very narrow view of the appropriate review of a summary judgment motion. An appellate court considers an appeal from a summary judgment under a de novo standard of review, which requires a review without any deference to the trial court's determination. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

The issue before the lower courts and this Court are identical – whether the trial court's dismissal was without prejudice by operation of law. Appellants are not introducing new assignments of error or attempting to introduce new evidence to this Court, which a reviewing court is permitted to ignore. Instead, Appellants are presenting another argument in support of their contention that the dismissal entry was without prejudice by operation of law. Given the fact this is a de novo review by this Court of all evidence on the record, Appellants are not precluded from doing so.

Appellee does agree that where there are conflicting statutes, attempts must be made to reconcile and give effect to both. But, if that is not possible, the most recent, specific statute would control. There is also no dispute that Civ.R. 10(D)(2)(d) is more specific and more recently enacted as compared to Civ.R. 41(B)(3). There is, however, a dispute between the parties as to whether R.C. 1.51 also applies to conflicting Civil Rules, and whether Civ.R.

10(D)(2)(d) and Civ.R. 41(B)(3) are conflicting in this instance.

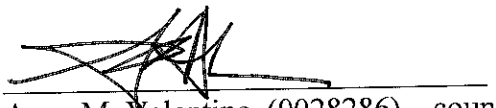
First, while R.C. 1.51 generally pertains to the treatment of conflicting statutes, it has been extended by an appellate court to include conflicting Civil Rules. *Eddie v. Veterinary Systems, Inc.*, 11th Dist. No. 93-T-4886, 1994 WL 110911 (Feb. 25, 1994). Although this is the only reported case in which R.C. 1.51 was extended to include conflicting Civil Rules, the principles and analysis behind doing so is sound. Appellants have conducted a search for cases holding that R.C. 1.51 should not be extended to conflicting Civil Rules, but none were found. And, Appellee has not directed the Court to any such cases either.

In this case, a conflict clearly exists between Civ.R. 10(D)(2)(d) and Civ.R. 41(B)(3) such that the Rules cannot be reconciled and effect be given to both in this case. Specifically, if Civ.R. 41(B)(3) applies, the dismissal would be with prejudice, which is contrary to 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.

CONCLUSION

For the foregoing reasons as well as those set forth in Appellants' Merit Brief, Appellants Donald and Tamra Troyer respectfully request that this Court reverse the erroneous decisions of 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.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following this 9th day of February, 2012, by regular U.S. Mail, postage prepaid:

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