

CASE NO. 14-1055

In the Supreme Court of Ohio

ON APPEAL FROM THE STARK COUNTY COURT OF APPEALS,
FIFTH APPELLATE DISTRICT
CASE NO. 2013 CA 00142

GENE'A GRIFFITH, EXECUTRIX FOR THE ESTATE
OF HOWARD E. GRIFFITH, DECEASED,
Plaintiff-Appellant,
v.
AULTMAN HOSPITAL.
Defendant-Appellee.

APPELLEE AULTMAN HOSPITAL'S MOTION TO DISMISS APPEAL AS IMPROVIDENTLY ACCEPTED

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Now comes appellee, Aultman Hospital, and moves to dismiss this appeal as improvidently granted since there is no justiciable controversy. In support of the motion, appellee submits the attached memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION

By a 4-3 vote, this Court accepted plaintiff's discretionary appeal last year.¹ After accepting an appeal, however, the Court may later find there is no substantial constitutional question or question of public or great general interest, and dismiss the appeal as improvidently granted.

The argument appellant has presented on appeal, combined with recent developments concerning the companion medical negligence case that connects appellant to the policy arguments she makes in her merit brief, show that the case does not warrant this Court's review. The action has become moot for lack of a controversy, and the Court should dismiss this appeal as improvidently granted. See *State v. Sutton*, 132 Ohio St.3d 1529, 2012-Ohio-4381 (granting dismissal on appellee's motion); *CSAHS/UHHS-Canton, Inc. d/b/a Mercy Medical Center v. Aultman Health Foundation*, Case No. 2012-0665, judgment entry of March 13, 2013, granting dismissal on appellee's motion.

Appellant is the executrix of the estate of Howard Griffith, deceased. Mr. Griffith died while hospitalized at Aultman Hospital. Appellant brought this action against appellee Aultman Hospital to compel the production of her decedent's medical record. While this action was pending, appellant brought a second, separate action against Aultman Hospital and others for medical negligence and wrongful death.² That action was pending when appellant filed her notice of appeal and jurisdictional motion to this Court.

The medical negligence/wrongful death case has now been settled and dismissed.³ The proposition of law appellant submitted for this appeal has become, at most, an

¹ Justices Pfeiffer, O'Donnell, and French voted not to accept the appeal. Chief Justice O'Conner voted to accept the appeal, along with Justices Lanzinger, Kennedy, and O'Neill.

² Stark County Court of Common Pleas, Case No. 2013CV01234.

³ A copy of the January 14, 2015 judgment entry of dismissal is attached. This Court has held that when an event occurs that renders moot a case on appeal, the appellate court may consider extrinsic evidence of the event although the evidence is outside the record. *State ex*

academic concern for appellant. Appellant's merit brief consists of arguments on how her version of the medical record statute would affect persons who are either seeking their records for further medical treatment or in connection with plans to bring a medical negligence claim. She never connects either point to her own circumstance, however.

For example, at page 18 of her merit brief, she presents a section discussing the "patients' rights to a complete medical record....," and writes that "...patients may require access to their medical records for purposes other than further medical treatment," and she cites to case law discussing the value of medical records for such use. And at page 25, she argues that the medical record is necessary to allow a patient to identify all responsible tortfeasors when contemplating a medical negligence claim.

Appellant, however, already brought and settled her medical negligence claim. Conspicuously missing from her merit brief is any discussion as to how the outcome of this case would have any effect on her. She has no further need for her decedent's medical records, either for any future care or to support a medical negligence claim.

This appeal is from a summary judgment, and appellant concludes her merit brief with a request that the court "reverse the Fifth District Court of Appeals," which had affirmed summary judgment for Aultman Hospital. If this Court grants the requested judgment, and reverses the Court of Appeals, the case would be remanded to the trial court for further proceedings on appellant's complaint that Aultman Hospital produce the medical record. The point Appellant never discusses in her merit brief is how such a ruling would have any effect on her.

rel. Cincinnati Inquirer v. Dupuis, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶8 ("An event that causes a case to become moot may be proved by extrinsic evidence outside the record," [citing] *State ex rel. Nelson v. Russo*, 89 OhioSt.3d 227, 228, 729 N.E.2d 1181 (2000)). See also, *Sanders v. Hudson*, 5th Dist. No. 2008CA0105, 2009-Ohio-2907, ¶3; *Bellamy v. Bellamy*, Athens App. No.10CA45, 2012-Ohio-2780, ¶7.

As this Court has held, “[a]ppeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purposes of settling abstract questions, but only to correct errors injuriously affecting the appellant.” *Ohio Contract Carriers Assn. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 42 N.E.2d 758, at syllabus. See, also, *Ohio Domestic Violence Network v. Pub. Util. Comm.* (1992), 65 Ohio St.3d 438, 439, 605 N.E.2d 13, 14; *State ex rel. Gabriel v. Youngstown*, 75 Ohio St.3d 618, 619, 665 N.E.2d 209 (1996). Appellant has settled her tort claim, and the outcome of this case will not affect her. Accordingly, she lacks standing as an aggrieved party to bring this appeal.

When the appellant executrix appealed the summary judgment to the Stark County Court of Appeals, Aultman Hospital moved to dismiss the appeal on the ground that there was no justiciable controversy, since appellant had already commenced her action for medical negligence and had, at that point, conducted extensive discovery, which was ongoing. Aultman Hospital argued that since appellant had another action against this defendant in progress, the medical records case added nothing to her pursuit of records.

In response to the dismissal motion, appellant offered various arguments as to how the medical records case might affect her medical negligence claim, e.g., that there were depositions her counsel wanted to take in the medical records case that she could be precluded from taking in the negligence action, and that the summary judgment would preclude her counsel “from arguing that Aultman failed to produce Mr. Griffith’s entire medical record.” (See appellant’s “Response in Opposition to Appellee’s Motion to Dismiss,” at p.5, filed in the Fifth District Court of Appeals on October 15, 2013.)

In short, appellant argued that the medical records case presented a viable controversy that should not be dismissed because it had value in the medical negligence case. The negligence case has now been settled, and appellant’s arguments to maintain this records case are now gone.

Further, under R.C. 2109.02, appellant, as executrix of a decedent's estate, has authority "to protect, preserve, and pay out the assets of the estate according to law..." *Hecker v. Schuler*, 12 Ohio St.2d 58, 231 N.E.2d 877, 879. The letters of authority in her appointment (attached to her complaint) give appellant "the power conferred by law to fully administer decedent's estate." Appellant has no authority to maintain an action unconnected to the estate.

Finally, the case is barred under res judicata. This Court has stated the doctrine of res judicata as follows:

A valid final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the same transaction or occurrence that was the subject matter of the previous action. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, at paragraph one of the syllabus.

The Court defined a "transaction" to be a "common nucleus of operative facts." *Grava*, 73 Ohio St.3d 382; Restatement of the Law 2d, Judgments (1982) 198-99, Section 24, Comment B. As explained in the Restatement:

When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar ***, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Section 24(1) of the Restatement of Judgments, supra, at 196. See, also, 46 American Jurisprudence 2d, supra, at Sections 516 and 533; *Gwen v. Reg'l Transit Auth.* (Cuyahoga App.), 2004 Ohio 628.

Appellant's medical-record complaint and her medical negligence complaint arose out of the same nucleus of operative facts, i.e., the care given to Howard Griffith at Aultman Hospital. The fact that appellant sought different relief in the medical-record complaint from that which she seeks in this action does not affect the application of the doctrine. As this court explained in *Grava*:

The rule applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action ... to seek remedies ... not demanded in the first action. *Grava*, at 383, quoting Restatement section 25.

The fact that the medical negligence claim was resolved by settlement does not affect the application of res judicata. *Coe v. Grange*, 6th Dist. E-06-057, E-06-058, 2007-Ohio-2823, para. 28; *Beaver Excavating v. Bd. of Perry Twp.*, Stark App. No. CA 8220, 1990 Ohio App. LEXIS 5879, at *5 (“The fact that the original action brought by appellant was resolved by settlement agreement, rather than judgment on the merits by the court, does not preclude application of res judicata.”)

Appellant brought two separate actions against the same defendant. She has settled one of them. The second action is now barred by res judicata.

In summary, this appeal is moot because the judgment from which appellant appeals no longer affects her. She is no longer an aggrieved party, because the purpose for which she brought the action initially has been resolved. The Court has no authority to decide academic questions. Further, this action is no longer connected to any interest of the decedent’s estate, and appellant has no authority to use her position as fiduciary to litigate a medical records claim. Finally, appellant brought two actions against Aultman Hospital arising out of the same operative facts, and has settled one. The second action is barred by res judicata.

The Court should dismiss this appeal as improvidently granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Appellee Aultman Hospital's Motion to Dismiss Appeal as Improvidently Accepted* was sent by regular U.S. mail this 29th day of January, 2015 to the following:

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**IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO**

GENE'A GRIFFITH, Individually)
and as Executrix for the Estate of)
Howard E. Griffith,)
Plaintiff,)

Case No.: 2013 CV 01234

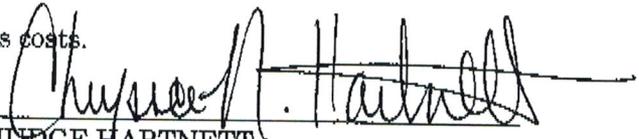
JUDGE HARTNETT

v.)

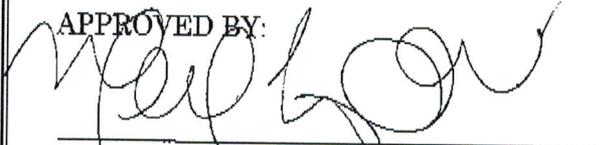
AULTMAN HOSPITAL, et al.)
Defendants.)

JUDGMENT ENTRY OF DISMISSAL

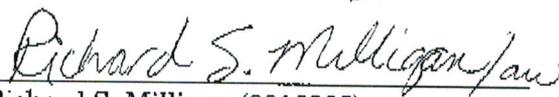
This matter having been settled by and between the parties, it is hereby dismissed with prejudice at defendant Aultman Hospital's costs.

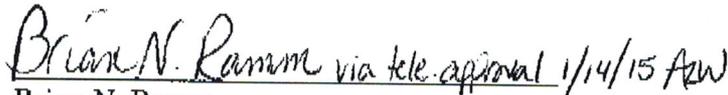

JUDGE HARTNETT

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