**[Cite as *Gambino v. Pugh*, 2016-Ohio-7217.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| DAVID GAMBINO,<br><br>PLAINTIFF-APPELLANT,<br><br>V.<br><br>MICHAEL PUGH, et al.,<br><br>DEFENDANTS-APPELLEES. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | CASE NO. 15 MA 0138<br><br>OPINION |

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| CHARACTER OF PROCEEDINGS: | Civil Appeal from Court of Common Pleas of Mahoning County, Ohio<br>Case No. 14 CV 3227 |
| JUDGMENT: | Affirmed in part<br>Reversed in part<br>Remanded |
| APPEARANCES:<br>For Plaintiff-Appellant | David Gambino<br>#19757055<br>P.O. Box 2000<br>Joint Base MDL, NJ 08640 |
| For Defendants-Appellees | Attorney Timothy J. Bojanowski<br>3100 West Ray Road, Suite 300<br>Chandler, Arizona 85226 |

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: September 26, 2016

**[Cite as *Gambino v. Pugh*, 2016-Ohio-7217.]**
DONOFRIO, P.J.

**{¶1}** Pro se Plaintiff-appellant, David A. Gambino, appeals the judgment of the Mahoning County Court of Common Pleas dismissing his complaint for failure to state a claim upon which relief can be granted and for being barred by the doctrine of res judicata and the statute of limitations.

**{¶2}** On December 17, 2014, Appellant filed a complaint in Mahoning County Common Pleas Court against Defendants-appellees Michael Pugh, Captain Austin, Officer Stump, Officer Bruno, Officer Johnson, Officer Sean Daugherty, and "Medical Proxy for David A. Gambino." His complaint arises out of his incarceration in the Eastern Ohio Correction Center (EOCC), a private prison. The Appellees are all employees at the EOCC. Appellant's complaint includes six claims which relate to the treatment or lack of treatment he received from Appellees.

**{¶3}** Prior to filing his complaint in the Mahoning County Common Pleas Court, Appellant filed what is styled as a civil rights complaint in the United States District Court for the Northern District of Ohio. *Gambino v. Pugh et al.*, N.D. Ohio No. 4:13 CV 817, 2013 WL 5519719 (Oct. 1, 2013). All of the defendants in Appellant's complaint were also named as defendants in his civil rights complaint. *Id.* The civil rights complaint included five claims, the first three of which are virtually identical to the first three claims in his state complaint. Appellant's federal claims were dismissed by the federal district court after a review pursuant to 28 U.S.C. 1915(e), (proceedings in forma pauperis). In its dismissal of Appellant's federal complaint, the federal court specifically states that the dismissal is without prejudice to any state claims.

**{¶4}** On March 3, 2015, Appellees filed a motion to dismiss the Appellant's complaint arguing all six claims therein were either barred by the doctrine of res judicata, failed to state a claim upon which relief could be granted, or were barred by the statute of limitations. On July 29, 2015, the trial court granted Appellees' motion to dismiss. The trial court did not state in its judgment entry which of the six claims were dismissed for which of three reasons argued as the basis for dismissal. Appellant filed a timely notice of appeal.

*First Claim*

**{¶5}** In the first claim in his complaint, Appellant alleges that from January 25, 2013, through August 1, 2013, his requests for additional toilet paper were denied, sometimes for days. Appellant claims that he was allotted two rolls at the beginning of each week but that he needed additional toilet paper. He claims he was told to borrow from other inmates or purchase additional toilet paper. As a result, according to Appellant, he suffered an injury to his rectum, including a tear, and had to endure unsanitary conditions as a result of being forced to use his hands and other paper instead of toilet paper. He claims that this activity constituted cruel and unusual punishment. These acts, Appellant indicates, were perpetrated by Appellees Bruno, Stump, and two unknown officers.

**{¶6}** Appellant's first claim in his civil rights case in federal court appears similar to this claim except for his handwritten notes extending the dates of alleged mistreatment. The federal court dismissed this claim for two reasons. First, the court treated this claim as a claim of cruel and unusual punishment in violation of the Eighth Amendment. *Gambino* at *2. Thus, according to the federal court, Appellant had to demonstrate that Appellees acted with deliberate indifference characterized by obduracy and wantonness, not simply inadvertence or good faith error. *Id.* Liability could not be predicated solely upon negligence. *Id.* Thus, the court concluded that Appellant failed to set forth in his complaint facts which reasonably suggested this level of indifference. *Id.*

**{¶7}** Second, the federal court explained that, even if Appellant had pled sufficient facts to meet the above criteria, his claim was nonetheless not cognizable pursuant to *Minneci v. Pollard,* 132 S.Ct. 617, 181 L.Ed.2d 606 (2012). *Gambino* at *2. Citing *Minneci,* the federal court explained that where a federal prisoner seeks damages from privately employed personnel working for a privately operated federal prison, and the conduct alleged amounts to an Eighth Amendment violation, if the conduct "is of a kind that typically falls within the scope of traditional state tort law * * * the prisoner must seek a remedy under state tort law." *Gambino* at *2 citing

*Minneci* at 625. This rule applies to privately operated prisons in Ohio. *Minneci* at 624-625.

**{¶8}** With regard to the three possible reasons the trial court dismissed this claim, we first consider the doctrine of res judicata. The doctrine of res judicata involves two concepts: claim preclusion and issue preclusion. *Wagner v. Heavlin,* 136 Ohio App.3d 719, 738, 737 N.E.2d 989 (7th Dist. 2000), citing *Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1988). Claim preclusion is also called estoppel by judgment. Issue preclusion is also referred to as collateral estoppel. *Grava v. Parkman Twp.,* 73 Ohio St.3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226. Claim preclusion is applicable where a valid, final judgment on the merits has been rendered. Where this has occurred it bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 11, citing *Grava* at syllabus. Issue preclusion provides that "a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Holt* at ¶ 11 quoting *Ft. Frye Teachers Assn. v. State Emp. Relations Bd.,* 81 Ohio St.3d 392, 395, 1998–Ohio–435, 692 N.E.2d 140. Claim preclusion precludes relitigation of the same cause of action. Issue preclusion precludes relitigation of an issue actually and necessarily litigated and determined in the prior action. *Holt* at ¶ 11. Issue preclusion (collateral estoppel) applies when the fact or issue was actually and directly litigated in the prior action, was passed upon and determined by a court of competent jurisdiction, and when the party against whom collateral estoppel is asserted was a party in privity with a party in the prior action. *Holt* at ¶ 11-12, citing *Thompson v. Wing,* 70 Ohio St.3d 176, 183, 1994-Ohio-358, 637 N.E.2d 917.

**{¶9}** Appellant argues that res judicata should not apply since he did not make any state claim in federal court and "the District Court had given specific

directions to the Plaintiff to file VALID STATE CLAIMS in OHIO STATE COURT." (Appellant's Brief, p. 26, emphasis in original). Appellees agree that Appellant did not file any state claim in federal court but contend that since Appellant could have filed his state claims in his federal complaint, the doctrine of res judicata is nevertheless applicable as a bar to Appellant's first claim. As noted above, other than the extension of the dates of the wrongdoing, the factual allegations in the two complaints are nearly identical.

**{¶10}** Appellees suggest a comparison of the case sub judice with *Saha v. Research Inst. at Nationwide Children's Hosp.,* 10th Dist. No. 12AP-590, 2013-Ohio-4203. In *Saha,* like here, the state action was preceded by an action in federal court. The underlying facts were essentially the same in both actions. The Tenth District began its analysis by noting that the doctrine of res judicata applies between federal court and state court holdings and thus a federal court judgment or decree can operate as a bar to a subsequent state court proceeding. *Id.* at ¶ 23, 26, citing *Lambert v. City of Miamisburg,* 2d Dist. No. 12031, 1991 WL 47534, *1 (March 29, 1991). The *Saha* court further explained, citing *Holt* at ¶ 13, *Marrie v. Internatl. Local 717,* 11th Dist. No. 2001-T-0046, 2002-Ohio-3148, ¶ 34, and *Vaughn v. Looney,* 9th Dist. No. 12985, 1987 WL 15065 *2 (July 22, 1987), that res judicata barred not only claims actually brought in federal court, but also claims that could have been, but were not, brought in the federal action. *Saha* at ¶ 26-28. Comparing two Ninth District Court of Appeals cases, the Tenth District reasoned that the manner of disposition of state law claims by a federal court could affect how the doctrine of res judicata is applied. In *Deryck v. Akron City School Dist.,* 9th Dist. No. 13442, 1988 WL 87229 (Aug. 17, 1988), the court concluded that a subsequent state action was not barred by res judicata where plaintiffs attempted to litigate a state claim in federal court but the federal court did not exercise pendent jurisdiction over the common pleas claim. In *Plazzo v. Nationwide Mut. Ins. Co.*, 9th Dist. No. 17022, 1996 WL 62110, (Feb. 14, 1996), plaintiff could have attempted to raise his state law claim in federal court but failed to do so. In this set of facts, res judicata acted as a bar to a subsequent action

in state court. *Saha* at 28. The court in *Plazzo* explained:

> *Deryck,* is distinguishable from this case. In *Deryck,* the plaintiff attempted to litigate his state law claim in his federal action. The district court granted the defendant summary judgment on the plaintiff's federal claims and refused to exercise pendent jurisdiction over the plaintiff's state law claim. This Court determined that, since the plaintiff had attempted to bring his state law cause of action in his federal lawsuit, "it would work an injustice * * * to [subsequently] bar the [plaintiff's] state claim in state court." *Id.* at 4. In this case, however, plaintiff failed to attempt to bring his state law breach of contract claim in his 1987 federal lawsuit. Inasmuch as plaintiff could have attempted to raise his state law claim in his previous federal lawsuit but failed to do so, he is precluded from raising it in a subsequent state proceeding. See *Vaughn v. Looney* (July 22, 1987), Summit App. No. 12985, unreported.

*Plazzo at* *11. The *Saha* court notes that a similar result was reached in *Johnson v. Cleveland City School District,* 8th Dist. No. 94214, 2011-Ohio-2778. According to *Saha,* "Ohio appellate courts have held that the res judicata doctrine bars subsequent state law claims where the claims might have been litigated in a first lawsuit, but it does not bar subsequent state law claims where the federal court clearly would have declined to exercise jurisdiction over those claims." *Saha* at 35, citing *Natl. Amusements, Inc. v. Springdale,* 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990) and *Johnson* at ¶ 42.

**{¶11}** In *Saha,* the federal district court dismissed Saha's federal claims for failure to state a claim and dismissed his state law claims without prejudice after declining to exercise pendent jurisdiction over the claims. Reversing the trial court's dismissal of the subsequent state lawsuit as barred by the doctrine res judicata, the *Saha* court held that since the state claims were dismissed by the federal court without prejudice, there was no judgment on the merits. Furthermore, with regard to a

contract claim which was not asserted in the federal court, the *Saha* court declined to bar that claim on res judicata grounds. The *Saha* court reasoned that in light of the federal court's desire to avoid an inappropriate exercise of pendent jurisdiction with regard to the state claims which were brought in the federal lawsuit, the contract claims not asserted "do not represent claims which he [Saha] might have 'actually litigated' in his federal case." *Saha* at ¶ 36.

**{¶12}** From a different perspective, this court has held that res judicata should not bar a subsequent state claim where the evidence necessary to sustain the federal claim is different than the evidence necessary to sustain the subsequent state claim. *Wagner* at 739. This is applicable here.

**{¶13}** Appellees agree that in *Gambino* the federal district court "expressly limited its rulings to the federal constitutional and *Bivens* claims raised." (Appellee's Brief, p. 10). The federal court states that its dismissal of Appellant's federal claims was without prejudice to any state claim Appellant might have based on the alleged facts. *Gambino* at *4. Perhaps most importantly, the federal district court, in addition to concluding that Appellant failed to allege sufficient facts to support an Eighth Amendment claim against private individuals working in a private prison, expressly dismissed Appellant's claim one because, per *Minneci,* Appellant's allegations about the conduct of Appellees "is of a kind that typically falls within the scope of traditional state tort law." *Gambino* at *2.

**{¶14}** It seems that Appellees make a distinction based upon whether the federal court specifically declined pendent jurisdiction over any alleged state claims, as in *Deryck,* or whether it simply dismissed the federal claims without any reference to its ability to exercise pendent jurisdiction over state claims alleged in the federal lawsuit, as in *Plazzo.* If the federal court declined an opportunity to exercise pendent jurisdiction over state claims, then res judicata would not bar a subsequent state action for state claims whether or not they were alleged in the federal action. If the federal court disposed of the federal claims without expressly declining pendent jurisdiction, then res judicata would bar a subsequent state claim whether or not the

state claim was asserted in the federal action. It should be noted that none of the cases cited by Appellees involve a *Minneci* dismissal as here.

**{¶15}** The most judicious resolution of the res judicata issue is a conclusion that Appellant's first claim is not barred by the doctrine of res judicata. The federal court declined supplemental jurisdiction based on *Minneci*, although the court did not expressly state this intent. *Gambino* at *2. In addition, while declining to exercise jurisdiction where there were sufficient state tort law remedies available, the federal court stated that its dismissal was without prejudice to any state tort claims that might exist. *Id.* at *4. To bar Appellant's first state claim under these circumstances is not only unfair but a "catch-22" scenario. The federal court dismissed Appellant's first claim, in part, because Appellant had sufficient state tort remedies available. *Id.* at *2. His claims were dismissed without prejudice. *Id.* at *4. To now bar a state tort claim he might have is circuitous. Thus, we conclude that the trial court erred when it concluded that Appellant's first claim is barred by the doctrine of res judicata.

**{¶16}** We next turn to the issue of whether or not Appellant stated a claim upon which relief could be granted. A motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint. *Youngstown Edn. Assn. v. Kimble,* 7th Dist. Nos. 16 MA 0013 and 16 MA 0014, 2016-Ohio-1481, ¶ 11, citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.,* 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). Before dismissing for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Kimble* at ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc.,* 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. All factual allegations must be accepted as true and all reasonable inferences drawn from these facts must be drawn in favor of the plaintiff. *Kimble* at ¶ 11, citing *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). In reviewing a trial court's determination to dismiss for failure to state a claim, we apply a de novo standard of review. *Kimble* at ¶ 11, citing *Perrysburg Twp. v. Rossford,* 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

**{¶17}** In *Minneci,* the U.S. Supreme Court stated that it found specific authority indicating that state law imposed general tort duties of reasonable care on prison employees in every one of the eight states where there were privately managed secure federal facilities. *Minneci* at 624-625. It determined that Ohio was in this category citing *Clemets v. Heston,* 20 Ohio App.3d 132, 135-136, 485 N.E.2d 287 (1985). In *Clemets,* the court explained that when one is in custody as required by law, a special relationship exists and while the special relationship exists, the custodial officer has a duty to exercise reasonable care under the circumstances. *Id.* Further, certain circumstances may heighten the need for a higher degree of care than would others. *Id.* To prevail on a negligence claim, a plaintiff must establish that: (1) defendant owed plaintiff a duty, (2) defendant breached that duty, and (3) the breach proximately caused his injuries. *Snider v. Ohio Dept. of Rehab. & Corr.,* 10th Dist. No. 11AP-965, 2012-Ohio-1665, ¶ 11, citing *Chambers v. St. Mary's School,* 82 Ohio St.3d 563, 565, 1998-Ohio-184, 607 N.E.2d 198. Where the state is the custodial agent, an inmate is owed a common-law duty of reasonable care and protection from unreasonable risks of physical harm. *McElfresh v.Ohio Department of Rehabilitation and Correction,* 10th Dist. No. 04AP-177, 2004-Ohio-5545, ¶ 16.

**{¶18}** In his first claim, Appellant alleges that he was denied issuance of needed additional toilet paper for four-day stretches (Complaint, p. 6); that he was told to "hold it" for up to six hours causing injury to his rectum (Complaint, p. 6); that he was forced to use pieces of used paper and his hand to clean fecal matter from himself after defecation (Complaint, p. 7); that he experienced pain in his stomach and rectum and expelled blood (Complaint, p. 8); and that as a result of the foregoing he suffered an injury to his rectum. (Complaint, p. 6). Ohio is a notice-pleading state. *Javorsky v. Sterling Med.* 7th Dist. No. 14 MA 0087, 2015-Ohio-2113, ¶ 17, citing *York v. Ohio State Highway Patrol,* 60 Ohio St.3d 143,144, 573 N.E.2d 1063 (1991). Pursuant to Civ.R. 8(A), the complaint need only contain a short and plain statement of the claim showing that the party is entitled to relief and a demand for judgment for the relief to which the party claims to be entitled. *Id.* The complaint is sufficient as

long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover. *Id.* Appellant has stated a claim, a duty that was breached, and an injury as a result thereof.

**{¶19}** Appellees argue that the Appellant's first claim fails to state a claim because it attempts to establish a tort action based upon the Ohio Constitution. Appellees assert that there is no private constitutional remedy provided by the law in Ohio. For this proposition, Appellees cite *Provens v. Stark County Board of Mental Retardation & Developmental Disabilities,* 64 Ohio St.3d 252, 594 N.E.2d 959 (1992). Although Appellant repeatedly uses terms like "cruel and unusual punishment", as demonstrated by the interpretation of his claim by the federal court in *Gambino* and its dismissal of Appellant's action pursuant to *Minneci,* the better interpretation of Appellant's first claim in state court is that it is akin to a common law tort claim in negligence. Thus, based upon our above discussion, Appellant has, at minimum, stated a claim upon which relief can be granted.

**{¶20}** Last, we address the issue of the statute of limitations. The trial court did not make it clear whether this was a reason for dismissing Appellant's first claim. Appellees do not suggest or argue that Appellant's first claim was barred by the statute of limitations. Nonetheless, we note that the first date of the complained of conduct was on January 14, 2013. His complaint was filed on December 17, 2014. The statute of limitations for a negligence action is two years. R.C. 2305.10. Thus, Appellant's first claim is not barred by the statute of limitations.

**{¶21}** Appellant's first claim is not barred by the doctrine of res judicata or by the statute of limitations and Appellant's complaint at least minimally states a claim upon which relief could be granted. Thus, Appellant's first claim has merit and is sustained.

*Second Claim*

**{¶22}** In his second claim, Appellant alleges that Officer Stump and Captain Austin attacked him on February 9, 2013. (Complaint, pp. 10-11). He claims that they squeezed his genitals resulting in an injury to his testicles and long term

psychological degeneration. This claim is essentially the same as Appellant's second claim in his civil rights complaint in federal court.

**{¶23}** The federal court treated this claim as a claim for "retaliation." *Gambino* at *2-*3. The federal court concluded that Appellant failed to state a claim for retaliation under federal law and dismissed Appellant's second claim.

**{¶24}** Appellees argue that this claim is for assault and battery (Appellees' Brief, p. 11). Appellant refers to this claim as a "STATE battery" claim. (Appellant's Brief, pp. 41; 47). Despite various legal propositions set forth by Appellant in his brief as well as a multitude of excuses offered as to why this claim should be treated differently than other civil assault and battery claims, a fair reading of Appellant's complaint reveals that none of these additional facts were alleged in his complaint and the allegations in the complaint set forth an assault and battery claim.

**{¶25}** R.C. 2305.111 provides that claims for assault and battery must be filed within one year of the date the cause of action accrues. The cause of action accrues on the date on which the alleged assault or battery occurred unless the plaintiff did not know the identity of the person committing the assault or battery, which is not the case here. Appellant alleges that the complained of conduct happened on February 9, 2013. His complaint was filed on December 17, 2014. Thus, his second claim is barred by the statute of limitations.

**{¶26}** Appellant, in his brief, argues that his late filing should be excused because he was concerned about retaliation (Appellant's Brief, p. 48); the conduct did not cease until August 1, 2013 (Appellant's Brief, p. 48); he was unable to properly litigate his claims from June 14, 2013, to March 3, 2013 [sic], because he was denied a medical cane (Appellant's Brief, pp. 48-49); the clerk of court delayed in providing him information (Appellant's Brief, p. 49); he did not have access to state laws (Appellant's Brief, p. 49); and his ability to exhaust other remedies was interrupted by Appellees conduct (Appellant's Brief, p. 50).

**{¶27}** All of the reasons offered by Appellant are difficult to reconcile with the fact that he filed virtually the identical complaint in his federal court action on April 11,

2013. (Appellees Brief at Appendix, Complaint, pp. 10-11). *Gambino* at *1. It would appear that fears about retaliation, any ongoing conduct (which is not asserted in his Complaint), the unavailability of a medical cane, information sought from the clerk of court's office, and access to state law are without merit since essentially the same claim was filed in federal court on April 11, 2013. Appellant does not demonstrate that anything more was needed to file his state action. Further, Appellant fails to explain what remedies he had to exhaust before he could file this claim and how he was prevented from pursuing those remedies. This claim is barred by the statute of limitations. As a result of this conclusion, the issues of res judicata and failure to state a claim are not discussed with regard to Appellant's second claim.

**{¶28}** Appellant's second claim has no merit and is overruled.

*Third Claim*

**{¶29}** In the third claim in his complaint, Appellant asserts that he was wrongfully denied the ability to "communicate and document abuses and violations as a form of retaliation and censorship of ongoing crimes and violations being done to me and other inmates." (Complaint, p. 12). This misconduct, according to Appellant, was perpetrated by Appellees Pugh, Officer Sean Daugherty, Officer Johnson, Officer Stump, Captain Austin, and Officer Bruno. Apparently, Appellant's ability to file prison grievances was suspended because of the number of complaints he was filing. Appellant asserts that this resulted in his inability to fulfill the requirements of the Prison Litigation Reform Act.

**{¶30}** Other than repeating Appellant's complaints of alleged injury discussed in his first and second claims, Appellant's complaint does not identify how he has been injured or harmed as a result of this activity, who the other inmates are, what is being censored, or what crimes are being committed.

**{¶31}** Many of the paragraphs in this claim are identical to and the substance of this complaint is essentially the same as Appellant's third claim in his federal civil rights complaint. (Appellee's Brief at Appendix). The federal district court dismissed this claim for failure to state a claim explaining that Appellant failed to allege any

actual injury. *Gambino* at *3.

**{¶32}** Appellant's brief with regard to his third claim does not provide an assignment of error. In his brief, Appellant adds additional factual allegations not contained in his complaint. With regard to the issue of a failure to state a claim, Appellant wrongfully asserts that the federal court gave him permission to file this claim as a valid state claim. Although he asserts that he "has provided ample evidence to show there is claims [sic] to be reviewed by TRIAL", he does not allege or explain any actual injury. (Appellant's Brief, pp. 56-58).

**{¶33}** Thus, even assuming that all of the allegations are true, Appellant has failed to state a claim upon which relief can be granted. *Clemets; Snider;* and *Chambers.* Appellant's third claim has no merit and is overruled. (Per the above discussion, since it is unnecessary, the issues of res judicata and the statute of limitations are not discussed).

*Fourth, Fifth, and Sixth Claims*

**{¶34}** Appellant's claims four, five, and six were not asserted in his action in federal district court. Each is against Appellee "Medical Proxy for David A. Gambino." In claim four, Appellant asserts that he was denied a medical cane and suffered an injury as a result. In claim five, he asserts that his medical proxy failed to properly examine his rectum thus denying him a proper diagnosis and treatment for an injury to his rectum. In claim six, Appellant alleges that his medical proxy denied him a needed follow-up visit to a dermatologist resulting in a scar on Appellant's face.

**{¶35}** In their motion to dismiss in the trial court, Appellees characterize these claims as medical malpractice claims. In their motion to dismiss, Appellees argue that these claims are medical claims as defined in R.C. 2305.113(E)(3), which provides, in pertinent part:

> ""Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse,

> registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person.

**{¶36}** In his Opposition to Defendants [sic] Motion for Dismissal ("Opp."), Appellant does not dispute Appellees' characterization of these claims. In fact, Appellant seems to confirm this characterization. In his Opposition, he generally refers to being denied proper medical attention, and uses terms and phrases such as gross malpractice (Opp. 11), malpractice (Opp. 11), and gross medical negligence (Opp. 10, 13, 18). Furthermore, Appellant alleges that defendants made efforts to make the medical attention provided look legitimate (Opp. 11), and that codes and regulations prohibit malpractice and allow for recovery for malpractice (Opp. 46). With regard to his fourth claim, he states that the medical department refused to supply him his needed medical cane (Opp. 30), that his injuries were manifested by prison doctors (Opp. 30), and that his claim includes medical negligence, gross medical negligence, and malpractice (Opp. 32). With regard to his fifth claim, Appellant again describes the wrongful acts as medical negligence, gross medical negligence, and malpractice (Opp. 34), states that the medical staff denied him an examination of the tear to his rectum to determine the length, depth, and severity of the injury (Opp. 35), that the medical personnel had prior notice of his problems (Opp. 36), that the medical personnel purposely neglected to perform an examination despite the fact that he had reported the tear to the medical staff (Opp. 36-37), and that the medical staff refused to examine Appellant to see if he needed stitches (Opp. 37). With regard to his sixth claim, Appellant again uses the words medical negligence, gross medical negligence, and malpractice (Opp. 40), asserts that the medical staff told him that there were no after care instructions needed other than to keep his surgical area clean (Opp. 41), that the medical defendants denied him his known need for a follow-up appointment (Opp. 42), and that he has been scarred by purposeful medical

neglect and malpractice (Opp. 42).

**{¶37}** In his brief here, Appellant does not dispute the above or the characterization of these claims as medical claims. He does not argue that this characterization is error or prejudicial error. With regard to claim number four, Appellant calls this claim "Medical neglect of serious medical condition" (Appellant's Brief, p. 59) and medical negligence (Appellant's Brief, p. 61, 66). Similarly, he refers to claim five as a claim for medical neglect of a serious medical condition (Appellant's Brief, p. 69), and asserts that the medical nurse refused to examine the tear to his anus (Appellant's Brief, p. 70). Appellant describes his fifth claim as a claim for gross medical negligence (Appellant's Brief, p. 71, 76, 78). Appellant asserts that his sixth claim is one for medical neglect (Appellant's Brief, p. 81, 83, 87), and malpractice (Appellant's Brief, p. 86). Thus, it appears that the correct characterization of claims four, five, and six is that they are medical claims as defined by R.C. 2305.113(E)(3).

**{¶38}** In their motion to dismiss, one of the arguments made by Appellees is that Appellant failed to attach an affidavit of merit to his complaint as required by Civ.R. 10(D)(2). (Defendants' Motion to Dismiss, pp. 8-10). That Rule provides, in pertinent part:

> (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.

**{¶39}** In his Opposition to Defendants Motion to Dismiss, Appellant does not reply to or otherwise mention this issue. In its Defendants' Reply in Support of Motion to Dismiss, Appellees point out to the trial court that Appellant failed to respond to this argument and assert that this failure alone is sufficient ground for dismissal. (Reply in Support of Motion to Dismiss, p. 2).

**{¶40}** Similarly, in his brief here, Appellant does not assign as error or otherwise discuss the dismissal of his complaint for the failure to attach an affidavit of merit to his complaint. In *Fletcher v. Univ. Hosps. Of Cleveland,* 120 Ohio St.3d 167, 2008-Ohio-5397, 897 N.E.2d 147, ¶ 13, the Ohio Supreme Court explained that the standard imposed by Civ.R. 10(D)(2)(d) goes to the sufficiency of the complaint and that a motion to dismiss for failure to state a claim upon which relief can be granted is the proper remedy when a plaintiff fails to include an affidavit of merit. Thus, the trial court was correct to dismiss Appellant's claims four, five, and six for failure to state a claim upon which relief can be granted as a result of Appellant's failure to attach an affidavit of merit. As discussed above, in light of this conclusion, any issues regarding the doctrine of res judicata, the statute of limitations, or other issues regarding a failure to state a claim upon which relief can be granted are not discussed with regard to claims four, five, and six. Appellant's claims four, five, and six have no merit and are overruled.

**{¶41}** The trial court's dismissal of Appellant's claims two through six is affirmed, but its decision with regard to Appellant's first claim is reversed and remanded for further proceedings according to law and consistent with this Court's

opinion.

Waite, J., concurs.
Robb, J., concurs in part and dissents in part with attached opinion.

Robb, J., concurring in part and dissenting in part.

**{¶42}** I agree with the majority's decision to affirm the trial court's dismissal of Appellant's second through sixth claims. On the fourth, fifth, and sixth claims, I would add that the statute of limitations for medical claims was expired by the time Appellant filed his complaint. *See* R.C. 2305.113(A). This issue is not moot as a dismissal for lack of an affidavit of merit "shall operate as a failure otherwise than on the merits." Civ. R. 10(D)(2)(d).

**{¶43}** As for the Appellant's first claim, I would affirm the trial court's dismissal for failure to state a claim upon which relief can be granted. In accordance, I respectfully dissent to the portion of the opinion reversing and remanding for further proceedings. I agree that where there is nonfeasance for the failure to affirmatively act in the face of a special relationship, such as a jailer to an inmate, there is a duty of reasonable care. If the omitted act is not reasonably encompassed in such a duty, then a claim for relief has not been stated. Breach of duty and proximate cause of injury must also be alleged in the complaint.

**{¶44}** The allegations under the first claim in the complaint do not set forth a claim upon which relief can be granted. Appellant's brief asserts a medical need for toilet paper above the two rolls per week allotted to every inmate; he states he had a stomach condition and a spinal condition which affected his bowels. However, this is not expressed in the complaint. There is no allegation in the complaint that his request for extra toilet paper was based upon a medical condition. Nor is there an allegation that the individual defendants had knowledge of a medical condition.

**{¶45}** An allegation of proximate cause is also lacking. Notably, the failure to provide additional toilet paper was not a discretionary act by these individual

defendants, but was a standard policy of the prison. As acknowledged in Appellant's complaint, extra toilet paper was available at the commissary where he had money in his account; appellant was not in isolation.

**{¶46}** The mere assertion that an individual officer complied with a prison policy of two rolls of toilet paper per inmate per week does not allege unreasonable nonfeasance. The failure of a corrections officer to obtain, upon an inmate's demand, more than the allotted two rolls of toilet paper per week is not actionable under the allegations stated in Appellant's complaint.