

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Donald P. Troyer et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 10AP-434
Leonard J. Janis, DPM,	:	(C.P.C. No. 09CVA-12-18259)
Defendant-Appellee.	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on May 26, 2011

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*Leeseberg & Valentine, Anne M. Valentine and Susie L. Hahn*, for appellants.

*Lane, Alton & Horst, LLC, Gregory D. Rankin and Ray S. Pantle*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiffs-appellants, Donald P. and Tamra Troyer ("the Troyers"), appeal from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Leonard J. Janis, DPM ("Dr. Janis").

{¶2} The Troyers began this medical malpractice action against Dr. Janis with a complaint filed on February 26, 2009. Dr. Janis moved to dismiss the complaint because it failed to include an affidavit of merit required by Civ.R. 10(D)(2)(b). The trial court

granted the motion to dismiss by judgment entry filed on November 18, 2009. This entry does not specify whether the dismissal is with or without prejudice.

{¶3} The Troyers then refiled their claims in a new complaint on December 9, 2009, this time attaching the requisite Civ.R. 10(D)(2)(b) affidavit. Dr. Janis moved for summary judgment, asserting that the prior entry dismissing the first complaint had constituted an adjudication on the merits and, pursuant to the doctrine of res judicata, the Troyers could not refile the same action.

{¶4} Citing to this court's decision in *Nicely v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-187, 2009-Ohio-4386, the trial court found that an entry dismissing a medical malpractice action for failure to include an affidavit of merit constitutes a dismissal with prejudice and therefore an adjudication on the merits, even if the entry fails to specify that it is a dismissal with prejudice. The trial court accordingly granted Dr. Janis's motion for summary judgment and dismissed the refiled complaint.

{¶5} The Troyers bring the following sole assignment of error on appeal:

I. THE TRIAL COURT ERRED IN HOLDING THAT THE DISMISSAL OF A COMPLAINT FOR FAILURE TO ATTACH AN AFFIDAVIT OF MERIT IS A DISMISSAL WITH PREJUDICE.

{¶6} We initially note this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by

making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. *Id.*

{¶7} An appellate court's review of summary judgment is *de novo*. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Soc. Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶8} The narrow issue before us is whether the trial court's disposition of the first complaint filed in this case, culminating in a dismissal under Civ.R. 12(B)(6), was a final disposition of the matter on the merits which, absent reversal or modification on appeal from that judgment, stands as the law of the case and preclude relitigation of the matter in a subsequently-filed complaint.

{¶9} The trial court's first judgment in this matter did not specify whether the dismissal was entered with or without prejudice to refiling. Civ.R. 41(B)(1), however, provides that "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." A related subsection of the rule, Civ.R. 41(B)(3), provides that "[a] dismissal under division (B) of this rule and any dismissal not provided for in this rule \* \* \* operates as an adjudication upon the merits unless the court,

in its order for dismissal, otherwise specifies." Pursuant to these rules, therefore, when the trial court dismissed the case without indicating that it was done without prejudice to refiling, the dismissal functioned as a dismissal on the merits, that is to say, with prejudice. More specifically, we have held that a dismissal under Civ.R. 12(B)(6) is with prejudice if the court fails to specify that the dismissal is without prejudice. *Reasoner v. Columbus*, 10th Dist. No. 04AP-800, 2005-Ohio-468, ¶7. A dismissal entered with prejudice will, by application of the doctrine of res judicata, bar a subsequent attempt to refile the same action. *Tower City Properties v. Cuyahoga Cty. Bd. of Revision* (1990), 49 Ohio St.3d 67, 69.

{¶10} The Troyers, however, argue that based upon Ohio Supreme Court case law, the dismissal for failure to provide a Civ.R. 10(D)(2)(b) affidavit of merit constitutes a dismissal without prejudice, without regard to the above-cited rules of civil procedure. Specifically, the Troyers cite to the Ohio Supreme Court's holding in the *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379: "A dismissal of a complaint for failure to file the affidavit required by Civ.R. 10(D)(2) is an adjudication otherwise than on the merits. The dismissal, therefore, is without prejudice." *Id.* at paragraph two of the syllabus. The Troyers argue that, by application of *Fletcher* and operation of law, a medical malpractice action for failure to provide the required affidavit of merit would constitute an adjudication otherwise than on the merits and stand as without prejudice to refiling, regardless of the presence or absence of specific language on the question.

{¶11} The question is whether such a dismissal, pursuant to *Fletcher*, ought to be without prejudice otherwise than on the merits, or whether the trial court's judgment is, by operation of law, an adjudication otherwise than on the merits.

{¶12} We confronted and decided this question in *Nicely*, supra. We concluded that the trial court in *Nicely* had, in effect, entered a judgment with prejudice, but had erred in doing so. Upon direct appeal from that judgment, we recognized the error and remanded the matter for modification of the trial court's entry to reflect that it was without prejudice.

{¶13} The distinction in the present case from *Nicely* arises in the posture of the appeal. In *Nicely*, we considered an appeal from the trial court's initial judgment erroneously characterizing a dismissal for failure to file an affidavit of merit as with prejudice. We were in a position to correct that error. In the present case, the Troyers did not prosecute their appeal from the trial court's initial judgment which, pursuant to *Nicely*, was both entered with prejudice and erroneous in this respect. However, in the absence of an appeal, the trial court's initial judgment stood as the law of the case. We cannot recognize error in that initial judgment by means of the appeal now before us, which is taken from the trial court's second judgment in the matter, dismissing the second complaint on grounds of res judicata. It is not an impediment to a finding of res judicata that the initial judgment upon which the bar of relitigation stands was itself in error; the trial court's second judgment in this case, which we now consider in this appeal, correctly relied on res judicata and must be affirmed in that respect.

{¶14} In the case before us, the Troyers initial appeal from the trial court's first judgment was dismissed before any comparable issues were briefed and this court had an opportunity to review the character of the trial court's initial judgment. The Troyers are, arguably, correct in asserting that *Fletcher* mandates that the trial court's initial judgment in this case was erroneously entered in that it was entered with prejudice. The judgment

before us for consideration in this appeal, however, is not a *Fletcher* case, but a case concerning the proper application of res judicata and law of the case, and is not in error. The Troyers' assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas granting summary judgment to Dr. Janis, is affirmed.

*Judgment affirmed.*

BRYANT, P.J., and BROWN, J., concur.

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