[Cite as *Straquadine v. Crowne Pointe Care Ctr.*, 2012-Ohio-1152.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Samuel J. Straquadine et al.,	:	
Plaintiffs-Appellants,	:	Nos. 10AP-607 and 11AP-785
v.	:	(C.P.C. No. 09CVC-10-15417)
Crowne Pointe Care Center et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 20, 2012

Robert C. Paxton & Associates, and *Robert C. Paxton, II; G. Rand Smith Company, L.P.A.*, and *G. Rand Smith*, for appellants.

Tucker Ellis & West LLP, Susan M. Audey, Ernest W. Auciello and *Jane F. Warner*, for appellees.

APPEALS from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Plaintiffs-appellants, the Estate of Samuel J. Straquadine[1] and Edith L. Straquadine ("appellants"), appeal from judgments of the Franklin County Court of Common Pleas dismissing appellants' complaint for failure to include an affidavit of merit as required under Civ.R. 10(D)(2) and denying appellants' motion for relief from judgment under Civ.R. 60(B). For the reasons that follow, we dismiss these appeals for lack of final appealable orders.

[1] This action was initially filed by Samuel J. Straquadine and his wife, Edith L. Straquadine, each in their individual capacities. Following the death of Samuel J. Straquadine on January 23, 2010, the trial court granted a motion to substitute the Estate of Samuel J. Straquadine, with Edith L. Straquadine as the Estate's fiduciary, as a party plaintiff.

{¶ 2} Samuel J. Straquadine ("Samuel"), was a resident of defendant-appellee, Crowne Pointe Care Center ("appellee"). On October 16, 2008, appellee took Samuel and other residents to lunch at a restaurant off the premises of appellee's facility. Upon returning to appellee's facility, Samuel fell while exiting the bus used to transport the residents. Samuel suffered a fractured left femur as a result of the fall. At the time of the incident, Samuel had been a resident of appellee's facility for more than two years.

{¶ 3} On October 15, 2009, appellants filed a complaint against appellee and several John Doe defendants asserting claims for negligence and loss of consortium. Appellee moved to dismiss appellants' complaint because appellants did not provide an affidavit of merit pursuant to Civ.R. 10(D)(2). Appellants responded that they were not required to provide an affidavit of merit because their complaint did not assert medical claims. On June 3, 2010, the trial court granted appellee's motion to dismiss, concluding that appellants had raised medical claims and were required to provide an affidavit of merit. The trial court entered a final judgment dismissing appellants' complaint without prejudice. Appellants appealed the trial court's judgment to this court on June 29, 2010, and the appeal was assigned case No. 10AP-607.

{¶ 4} On June 9, 2010, appellants filed a motion in the trial court seeking to amend their complaint. The trial court dismissed the motion to amend, concluding that it lacked jurisdiction over the case due to appellants' pending appeal. Appellants then filed a motion in this court requesting a remand to the trial court for the purpose of ruling on their motion to amend the complaint. Appellee argued that, because the trial court entered a final judgment dismissing appellants' complaint, appellants should have filed a motion for relief from judgment under Civ.R. 60(B) before the complaint could be amended. In response, appellants filed a motion in the trial court for relief from judgment under Civ.R. 60(B). This court granted appellants' motion and ordered the matter remanded to the trial court for the purposes of addressing appellants' Civ.R. 60(B) motion. On remand, the trial court denied appellants' motion for relief from judgment under Civ.R. 60(B), concluding that appellants failed to meet the standards for relief from a final judgment. Appellants appealed the trial court's judgment to this court on September 14, 2011, and the appeal was assigned case No. 11AP-785.

{¶ 5} On October 11, 2011, this court sua sponte consolidated the appeals in case Nos. 10AP-607 and 11AP-785. In this consolidated appeal, appellants assign two errors for this court's review:

> ASSIGNMENT OF ERROR NUMBER ONE
>
> THE TRIAL COURT ERRED WHEN IT HELD, BY OPERATION OF LAW, THAT AN AFFIDAVIT OF MERIT WAS REQUIRED FROM AN EXPERT WITNESS IN ALL CASES WHERE AN ALZHEIMER'S PATIENT ALLEGES NEGLIGENT CARE AND SUPERVISION.
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> ASSIGNMENT OF ERROR NUMBER [TWO][2]
>
> THE TRIAL COURT ERRED WHEN IT HELD, BY OPERATION OF LAW, THAT APPELLANTS FAILED TO MEET THE TEST OF CIV. R. 60(B), SEEKING LEAVE TO AMEND THEIR COMPLAINT, PURSUANT TO CIV. R. 15(A).

{¶ 6} Before considering the merits of appellants' arguments, we must determine whether the judgment entries from which they appeal are final, appealable orders. Although the parties did not raise this issue, "[w]hen neither party raises the question of whether an order is final and appealable, an appellate court may address the issue sua sponte." *Staley v. Allstate Property Cas. Ins. Co.*, 10th Dist. No. 11AP-279, 2011-Ohio-6171, ¶ 12, citing *Whitaker-Merrell Co. v. Geupel Constr. Co.*, 29 Ohio St.2d 184, 186 (1972).

{¶ 7} Appellants first appealed from the trial court's order dismissing their complaint for failure to provide an affidavit of merit in compliance with Civ.R. 10(D)(2). Civ.R. 10(D)(2) requires that "a complaint that contains a medical 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

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[2] As explained above, on October 11, 2011, this court sua sponte consolidated appellants' appeal of the order dismissing their complaint and the appeal of the order denying appellants' motion for relief from judgment. Appellants filed their first brief with this court on September 27, 2011, containing a single assignment of error related to the trial court order dismissing their complaint, designated as "assignment of error number one." Following the consolidation order, on October 17, 2011, appellants filed a second brief, containing a single assignment of error related to the trial court order denying their motion for relief from judgment, also designated as "assignment of error number one." For purposes of this decision, we will refer to the assignment of error in appellants' second brief as their second assignment of error.

establish liability." "[P]ursuant to Civ.R. 10(D)(2), an affidavit of merit is required to establish the adequacy of a medical complaint, and the failure to file an affidavit of merit renders it subject to dismissal for failure to state a claim upon which relief can be granted." *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, ¶ 19.

{¶ 8} A dismissal for failure to comply with Civ.R. 10(D)(2) "operate[s] as a failure otherwise than on the merits" and is without prejudice. Civ.R. 10(D)(2)(d). *See also Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, paragraph two of the syllabus ("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."); *Canady v. Taylor*, 10th Dist. No. 07AP-982, 2008-Ohio-2801, ¶ 8 ("Pursuant to the explicit language of Civ.R. 10(D)(2)(d), any dismissal, pursuant to Civ.R. 10(D)(2), operates as a failure otherwise than on the merits."). In the judgment entry dismissing appellants' complaint, the trial court expressly stated that the dismissal was without prejudice.[3]

{¶ 9} An involuntary dismissal without prejudice is generally not a final, appealable order. *See White v. Unknown*, 10th Dist. No. 09AP-1120, 2010-Ohio-3031, ¶ 6; *Residential Fin. Corp. v. Greenpoint Mtge. Funding, Inc.*, 10th Dist. No. 09AP-497, 2010-Ohio-1322, ¶ 12. Further, we have previously held a dismissal for failure to comply with Civ.R. 10(D)(2) that does not prevent the party from refiling his claims is not a final appealable order. *Canady* at ¶ 8. In *Canady*, the plaintiff did not file an affidavit of merit with his complaint and did not seek an extension of time to file an affidavit of merit as permitted by the civil rules. *Id.* at ¶ 2. The trial court subsequently granted the defendants' motions to dismiss the plaintiff's complaint for failure to file the affidavit of merit. *Id.* at ¶ 3. On appeal, this court concluded that the trial court's dismissal was "otherwise than on the merits" and that the plaintiff could refile his case pursuant to the savings statute, R.C. 2305.19. *Id.* at ¶ 8. Accordingly, we concluded that the dismissal order was not a final, appealable order and dismissed the appeal on that basis. *Id.* at ¶ 8-10.

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[3] We acknowledge that the trial court also stated that the order dismissing the complaint was a final order. However, we are not bound by a trial court's determination as to whether an order is a final, appealable order. *Epic Properties v. OSU LaBamba, Inc.*, 10th Dist. No. 07AP-44, 2007-Ohio-5021, ¶ 19.

{¶ 10} In the present case, the dismissal order explicitly provided that the complaint was dismissed without prejudice. Therefore, we must consider whether appellants could have refiled their claims following the dismissal of their complaint. Under the savings statute, a plaintiff who fails otherwise than on the merits may commence a new action within one year of the failure otherwise than on the merits or within the original statute of limitations, whichever is later. R.C. 2305.19(A). The incident giving rise to appellants' claims occurred on October 16, 2008, and they filed their original complaint on October 15, 2009. Under Ohio law, medical claims are subject to a one-year statute of limitations after the cause of action accrues. R.C. 2305.113(A); *Rose v. Zyniewicz*, 10th Dist. No. 10AP-91, 2011-Ohio-3702, ¶ 25. Although the original statute of limitations had expired by the time the trial court dismissed the complaint, appellants could have refiled their claims pursuant to the savings statute. Because the complaint was dismissed without prejudice and because appellants could have refiled under the savings statute, we conclude that the order dismissing appellants' complaint was not a final, appealable order.

{¶ 11} Appellants also appealed from the order denying their motion under Civ.R. 60(B) for relief from the judgment entry dismissing their complaint. Under Civ.R. 60(B), a party may seek relief from a "final judgment, order or proceeding" for certain reasons. Generally, a decision denying a Civ.R. 60(B) motion is a final, appealable order. *Smith v. Williams*, 10th Dist. No. 09AP-732, 2010-Ohio-1381, ¶ 29. " 'However, this rule presumes that the underlying order under challenge by a movant's Civ.R. 60(B) motion is, itself, a final appealable order.' " *Safe Auto Ins. Co. v. Perry*, 10th Dist. No. 00AP-722, 2001 WL 58738, *1 (Jan. 25, 2001), quoting *Wolf v. Associated Materials*, 5th Dist. No. 00C0A01350, 2000 WL 1262540, *2 (Aug. 15, 2000). *See also Butler, Cincione, DiCuccio & Dritz v. Werner*, 10th Dist. No. 88AP-142, 1988 WL 54272, *1 (May 19, 1988) ("Filing a Civ.R. 60(B) motion cannot create a right of appeal unless the order to which the motion is directed was itself a final appealable order."); *Genhart v. David*, 7th Dist. No. 10 MA 144, 2011-Ohio-6732, ¶ 12 ("Nor can a trial court consider a Civ.R. 60(B) motion for relief from judgment unless the party is seeking relief from a final appealable order."). As explained above, we conclude that the trial court order dismissing appellants' complaint was not a final, appealable order. Therefore, the trial court's subsequent denial of

appellants' motion for relief from the order dismissing their complaint also was not a final, appealable order.

{¶ 12} Based on the foregoing reasons, these appeals are sua sponte dismissed for lack of final, appealable orders.

Appeals dismissed.

BROWN, P.J., and TYACK, J., concur.

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