[Cite as *Frazier v. Fairfield Med. Ctr.*, 2009-Ohio-4869.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
TERESA FRAZIER, ADM. OF THE ESTATE OF HER HUSBAND, ROBERT FRAZIER	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellant	:	
	:	Case No. 08CA90
-vs-	:	
FAIRFIELD MEDICAL CENTER	:	O P I N I O N
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil appeal from the Fairfield County Court of Common Pleas, No. 2008-CV-1124
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 11, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
RAYMOND DELEVIE 81 S. 4th Street, #310 Columbus, OH 43215	RICHARD LOVERING BOBBIE SPRADER ERIC BRAVO 100 South Third Street Columbus, OH 43215

Gwin, P.J.

{¶1} Plaintiff-appellant Teresa Frazier, Administrator of the Estate of her husband, Robert Frazier, deceased, appeals a summary judgment of the Court of Common Pleas of Fairfield County, Ohio, which held her complaint against defendant-appellee Fairfield Medical Center was barred by statute of limitations. Appellant assigns three errors to the trial court:

{¶2} "I. THE GRANTING OF SUMMARY JUDGMENT IS REVERSIBLE ERROR BECAUSE THE TRIAL COURT FAILED TO DETERMINE WHETHER AN OBVIOUS ISSUE OF FACT, REVEALED BY TWO OPPOSING AFFIDAVITS, WAS 'MATERIAL'.

{¶3} "II. THE GRANTING OF SUMMARY JUDGMENT IS REVERSIBLE ERROR, BECAUSE THE TRIAL COURT FAILED TO ADDRESS PLAINTIFF-APPELLANT'S ARGUMENT AS TO ESTOPPEL AND THE SAVINGS STATUE; THUS, THE TRIAL COURT FAILED TO DETERMINE WHETHER APPELLANT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

{¶4} "III. THE GRANTING OF SUMMARY JUDGMENT IS REVERSIBLE ERROR BECAUSE THE TRIAL COURT'S JUDGMENT ENTRY DOES NOT DISTINGUISH BETWEEN (1) INVOLUNTARY AND UNILATERAL DISMISSALS, AND (2) STIPULATION AGREEMENTS UNDER CIV. R. 41 (A)(1)(b)."

{¶5} The record indicates appellant's decedent died at Hocking Valley Community Hospital on May 7, 2002. Hours earlier, he had been sent home from appellee Fairfield Medical Center where he had sought medical care for chest discomfort.

{¶6} On March 18, 2004, appellant filed her first complaint, Fairfield Common Pleas No. 2004CV00268. On March 24, 2005, the parties filed a Civ. R. 41 (A)(1)(b) stipulation of dismissal, which stated it was "without prejudice to re-filing within one year of the date of this Notice". The two-year statute of limitations contained in R.C. 2125.02 expired on May 7, 2004, while *Frazier I* was pending.

{¶7} On March 17, 2006, appellant re-filed her complaint, designated Case No. 2006CV00285. On September 25, 2007, appellant dismissed the case, hereinafter referred to as *Frazier II*, by means of a Civ. R. 41 (A)(1)(a) notice of dismissal.

{¶8} On September 12, 2008, appellant re-filed her case as Case No. 2008CV1124. On October 7, 2008, appellee Medical Center moved for summary judgment alleging *Frazier III* was untimely based on the statute of limitations, and appellant could not use the savings statute, R.C. 2125.04, because she had used it in filing *Frazier II*. In response, appellant submitted an affidavit of counsel arguing the stipulation was based on the parties' agreement the *Frazier I* dismissal would have the effect of putting the parties in the position they would have been if she had never filed suit. In effect, appellant argues, she could file *Frazier II*, and later, if necessary, *Frazier III*, and *Frazier III* would be treated as her first use of the savings statute. Appellee Medical Center responded with an affidavit of counsel denying any discussion of the savings statute when it entered into the stipulated dismissal of *Frazier I*.

{¶9} The trial court held *Frazier III* was barred by the statute of limitations and appellant had already once used the savings statute, but the court did not address the issue raised by the two affidavits.

{¶10} Appellant urges summary judgment was inappropriate because the conflicting affidavits raised a genuine issue of material fact.

{¶11} Civ. R. 56 states in pertinent part:

{¶12} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶13} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶14} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v*. *Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶15} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

I, II, & III

{¶16} The case requires interpretation of two separate provisions, Civ. R. 41, and R.C. 2125.04, the wrongful death savings statute. We will address all three assignments of error together for purposes of clarity.

{¶17} Civ. R. 41 states in pertinent part:

{¶18} "(A) Voluntary dismissal: effect thereof

{¶19} "*(1)* By plaintiff; by stipulation. Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

{¶20} "(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

{¶21} "(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

{¶22} "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

{¶23} "(2) By order of court. Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice."

{¶24} In *Olynyk v. Scoles,* 114 Ohio St. 3d 56, 2007-Ohio-2878, 868 N.E. 254, the Ohio Supreme Court explained the operation of Civ. R. 41. The rule contains three different ways a case may be dismissed, and each has its own unique effect on subsequent re-filings. First, a plaintiff may submit a stipulation signed by all the parties who have appeared in the action. A second alternative is for a plaintiff to file a notice of

dismissal. Thirdly, a plaintiff may move the court to dismiss the action. *Olynyk*, paragraph 25.

{¶25} A notice of dismissal pursuant to Civ. R. 41 (A)(1)(a) is a unilateral dismissal and is only available to a plaintiff once, without prejudice. A second notice dismissal is with prejudice to the case, Id.

{¶26} The other two avenues for dismissal without prejudice under Civ. R. 41 are made at the plaintiff's instigation, but neither can be unilaterally accomplished because they contain significant limitations. A stipulated dismissal under Civ. R. 41 (A)(1)(b) requires the cooperation and consent of the opposing party or parties. A motion for dismissal under Civ. R. 41 (A)(2) requires the court to approve the dismissal. Because only Civ. R. 41 (A)(1)(a) dismissals are totally within the plaintiff's control, the so-called "double dismissal rule" targets only notices of dismissal; the other two types of Civ. R. 41 (A) dismissals do not implicate the double-dismissal rule. Id., paragraphs 25-26.

{¶27} Applying the above to the case at bar, the stipulated dismissal of *Frazier I* was not a unilateral dismissal. This means appellant still had the option to use her one-time Civ. R. 41 (A)(1) (a) unilateral notice of dismissal in *Frazier II*, which would not be with prejudice and would not be an adjudication on the merits. *Olynyk,* paragraph 27.

{¶28} We conclude the two-dismissal rule did not bar the filing of *Frazier III*.

{¶29} However, the double-dismissal rule is only one half of the equation here. Appellant is still faced with the statute of limitations. A dismissal without prejudice means the dismissal has no res judicata effect, but it does not toll the statute of limitations or otherwise extend the time for refilling. *Wolfe v. Priano*, Perry App. No.

2008-CA-8, 2009-Ohio-2208, citing *Brubaker v. Ross*, Franklin App. No. 01-AP-1431, 2002-Ohio-4396.

{¶30} R.C. 2125.02 provides a two-year statute of limitations for wrongful death actions. Appellant's decedent died on May 7, 2002, so the statute of limitations expired on May 7, 2004, while *Frazier I* was pending. *Frazier I* was dismissed by stipulation on March 24, 2005. Appellant had one year to re-file her action, which she did on March 17, 2006, with *Frazier II*.

{¶31} After voluntarily dismissing *Frazier II* on September 25, 2007, appellant filed *Frazier III* on September 12, 2008. Appellant's decedent had been dead over six years, and the statute of limitations had expired over four years previously.

{¶32} The savings statute, R.C. 2305.19 provides in part:

{¶33} "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date." * * *

{¶34} Appellant argues the affidavit of counsel she submitted in response to the Medical Center's motion for summary judgment stated the parties had agreed as part of the stipulated dismissal in *Frazier I* that appellant would be going back to "square one", and both parties would be in the same position as if there had never been any litigation. Appellant argues she relied on the agreement, and the Medical Center should be estopped from now arguing there was no such agreement. Appellant argues based on this agreement the savings statute is available for *Frazier III*.

{¶35} In *McGowan v. Family Medicine, Inc.,* Stark App. No. 2001-CA-00385, 2002-Ohio-4071, this court found in order to employ the savings statute, a plaintiff must commence an action before the statute of limitations has expired, and the first action must fail other than on the merits after the statute of limitations has expired. We found if a plaintiff has already used the savings statute once, it means she has re-filed an action after the statute of limitations ran, and accordingly, an attempt to use the savings statute a second time constitutes an attempt to re-file an action that was not commenced before the statute of limitations expired. If courts permitted parties to use the savings statute more than once, a plaintiff could use the savings statute to keep her cause of action alive long past the time the statute of limitations had expired.

{¶36} Thus, the savings statute can be used only once to re-file a case. *Thomas v. Freeman*, 79 Ohio St. 3d 221, 197-Ohio-395.

{¶37} The stipulated dismissal from *Frazier I* stated it was "without prejudice to re-filing within one year of the date of this Notice". It does not state the parties agreed *Frazier I* somehow had no significance, and the parties intended to be left as though no action had ever been filed. Appellant argues the language is ambiguous, but we find it is not.

{¶38} A party cannot create an ambiguity in a written document by submitting an affidavit regarding the parties' intent in drafting the document. *Covington v. Lucia,* 151 Ohio App. 3d 409, 2003-Ohio-346, 784 N.E. 2d 186, at paragraph 19. A court may not use extrinsic evidence to create an ambiguity, but rather, the ambiguity must be apparent on the face of the writing, Id. at paragraph 14, citing *Schachner v. Blue Cross & Blue Shield of Ohio* (C.A. 6 1996), 77 F. 3d 889, 893.

{¶39} Appellee Medical Center argues while the stipulation in the dismissal in *Frazier I* stated the dismissal was without prejudice to re-filing within one year of the date of notice, but the voluntary dismissal appellant unilaterally filed in *Frazier II* contained no reference of any kind regarding the savings statute.

{¶40} We find the trial court did not err in determining reasonable minds could not differ on the issue of whether the statute of limitations barred appellant's re-filing of her case for the third time.

{¶41} Each of appellant's assignments is overruled.

{¶42} For the foregoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

By Gwin, P.J.,

Hofffman, J., and

Edwards, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JULIE A. EDWARDS

WSG:clw 0820

[Cite as *Frazier v. Fairfield Med. Ctr.*, 2009-Ohio-4869.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

TERESA FRAZIER, ADM. OF THE ESTATE OF HER HUSBAND, ROBERT FRAZIER	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
FAIRFIELD MEDICAL CENTER	:	
Defendant-Appellee	:	CASE NO. 08CA90

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JULIE A. EDWARDS