[Cite as *Pullins v. Harmer,* 2010-Ohio-2590.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
KATHRYN ELLIOTT PULLINS, ET AL	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiffs-Appellants	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 09-CA-40
JEFF HARMER, ET AL	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Knox County Court of Common Pleas, Case No. 07OT12-0697
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 9, 2010

APPEARANCES:

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Gwin, P.J.

{¶1} Plaintiffs-appellants Kathryn Elliott Pullins, Steven M. Elliott and Judy A. Fagert appeal a judgment of the Court of Common Pleas of Knox County, Ohio, entered in favor of appellees defendant Apple Valley Property Owners Association and sixteen individual defendants named in their individual capacities and as representatives of the members of Apply Valley Property Owners Association. Appellants assign seven errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED WHEN IT DISMISSED COUNTS 1, 2, 3, AND 5 THROUGH 15 OF THE PLAINTIFF-APPELLANTS (sic) FIRST AMENDED COMPLAINT AND STRUCK THE ALLEGATIONS IN PARAGRAPHS 7 THROUGH 127 ON THE GROUNDS THAT THEY WERE BARRED BY RES JUDICATA AND THE LAW OF THE CASE.

{¶3} "II. THE TRIAL COURT ERRED WHEN IT RULED THAT COUNTS 1 AND 2 FOR LEGAL MALPRACTICE ARE BARRED BY THE STATUTE OF LIMITATIONS AS A MATTER OF LAW.

{¶4} "III. THE TRIAL COURT ERRED WHEN IT CONSIDERED MATTERS OUTSIDE THE FOUR CORNERS OF THE COMPLAINT ON A MOTION TO DISMISS PURSUANT TO OHO CIVIL RULE 12 (B)6 WITHOUT FIRST CONVERTING IT TO A MOTION FOR SUMMARY JUDGMENT PURSUANT TO OHIO CIVIL RULE 56.

{¶5} "IV. THE TRIAL COURT ERRED WHEN IT DISMISSED THIS COMPLAINT A SECOND TIME UNDER THE ASSUMPTION THAT ITS (sic) FIRST DISMISSAL WAS MADE WITH PREJUDICE.

{¶6} "V. IF THE TRIAL COURT'S FIRST DISMISSAL OF THE ACTION, IN ITS ENTIRETY, WAS WITH PREJUDICE, THEN THE TRIAL COURT ERRED BY FAILING TO GIVE NOTICE TO THE PLAINTIFF PRIOR TO THE FIRST DISMISSAL.

{¶7} "VI. IF THE TRIAL COURT'S FIRST DISMISSAL OF THE ACTION, IN ITS ENTIRETY, WAS WITH PREJUDICE, THEN THE TRIAL COURT ERRED BY FAILING TO RULE ON PLAINTIFFS' MOTION TO VACATE THE DISMISSAL ON THE MERITS AND ALLOW CONSIDERATION OF PLAINTIFFS' FIRST AMENDED COMPLAINT.

{¶8} "VII. THE TRIAL COURT ERRED WHEN IT ENTERED AN ORDER TO HOLD THE ISSUE OF SANCTIONS IN ABEYANCE UNTIL AFTER A RULING FROM THE APPELLATE COURT."

{¶9} Apple Valley Property Owners' Association is a non-profit Ohio Corporation created in 1972 which includes members who own property in Apple Valley, a residential community located in Knox County, Ohio. Apple Valley Property Owners' Association is governed by a Board of Directors. At the time the incidents which gave rise to this case occurred, the Board had nine non-paid members, each serving a three-year term. The Board holds monthly meetings open to all members of Apply Valley and a monthly closed work session.

{¶10} In June of 2005, appellant Kathryn Elliott Pullins was elected to serve on the board. In August 2005, Pullins' father, appellant Steven Elliott, filed a lawsuit against the Property Owners' Association. Pullins' husband, Scott Pullins, was Elliott's attorney.

{¶11} Pullins refused to recuse herself from board discussions concerning her father's lawsuit, arguing there was no conflict of interest. At approximately the same time, Pullins was also a member of the Reform Apply Valley Group, a non-profit unincorporated association created in 2006 which was critical of the leadership and management of the Homeowners Association.

{¶12} The Board sent Pullins a letter indicating it was considering removing her from the board, and inviting her to submit any information on her behalf by April 6, 2006. On April 3, 2006, Elliott and the Reform Apply Valley Group filed a complaint against Apple Valley Property Owners' Association, its general manager, and its board of directors, alleging, among other things, that the board of directors had violated Ohio law and its own bylaws in acting to remove her from the board. On April 6, 2006, the Board voted unanimously to remove her from the board of directors. Elliott and the Reform Apple Valley Group filed an amended complaint on June 27, 2006.

{¶13} In October 2006, the trial court granted the defendants' motion for summary judgment in part, but found Pullins could proceed on her claim she had been unlawfully removed from the Board, and on the claim she had been improperly denied access to the Property Owners' Association's financial records. After a bench trial, the trial court found Pullins' removal from the Board of Directors was invalid, and found she was entitled to have access to the financial records.

{¶14} The matter was appealed to this court, and we affirmed. *Pullins v. Holmes,* Knox App. No. 06CA000037, 2007-Ohio-4603. On August 30, 2006, appellant Fagert requested a copy of the employment contract for the association's general manager, appellee Jeff Harmer. The Board refused the request, stating the employment

information was confidential. Several more demands and denials were exchanged, and the Board passed a resolution to keep such information confidential. On December 20, 2007, appellants filed a complaint against the Property Owners' Association, all current and some former members of the Board of Directors, and some non-board members. The complaint was filed under Civ. R. 23.1, which authorizes derivative actions by one or more shareholders of a corporation when the corporation fails to enforce its own rights. The trial court granted appellees' motions to dismiss the complaint for failure to comply with the procedural requirements of Civ. R. 23.

{¶15} The matter was appealed to us, and in *Pullins v. Harmer,* Knox App. No. 08-CA-00007, 2008-Ohio-4528, [*Pullins II*] this court affirmed in part. We found to comply with Civ. R. 23.1, the complaint must allege the plaintiff fairly and adequately represents the interests of similarly situated shareholders, and must allege sufficient facts to show either that the plaintiff made a demand to the Board and/or shareholders to take the desired action, or demonstrate why it would have been futile to do so. The trial court found appellants had not satisfied the pre-suit demand requirements, had not stated satisfactory reasons for not complying with the pre-suit demands, and had not satisfied the representation requirements.

{¶16} On appeal, we found the appellants had satisfied the representative requirement, and had demonstrated a proper pre-suit demand as to count two, alleging the Board denied appellants access to corporate records. However, we found appellants had failed to demonstrate it would have been futile to pursue the other eight claims. We concluded the trial court correctly dismissed all counts except for count two, and we remanded count two for further proceedings.

{¶17} When the case returned to the trial court, appellants filed an amended complaint setting out sixteen counts, in forty-eight pages, three hundred and nine paragraphs, with fifty-six exhibits. In addition to the claims from their original count two, appellants brought claims similar to the previous ones that had been dismissed, and added two counts of legal malpractice, one against each of the attorneys who represent Apple Valley Property Owners Association in the on-going controversies.

{¶18} The trial court dismissed all counts of the amended complaint except count four, a reiteration of the original count two alleging denial of corporate records. The court found as to the legal malpractice claims, appellants had made no allegation of a violation of any association rules, had not alleged fraud, could not state individual claims for malpractice, and found the statute of limitations had run. The court also found the claims against the attorneys were barred by res judicata and law of the case.

{¶19} The trial court dismissed counts three and five through sixteen of the amended complaint, finding the claims were insufficient, but deferring the defendant's request for sanctions.

{¶20} The matter was appealed to this court, but we found it was not a final appealable order because count four remained pending. At some point in the proceedings, appellants sought extraordinary relief from this court, in the form of writs of mandamus and prohibition, to prohibit the court from dismissing a portion of the amended complaint, and prevent it from ruling on the motion for sanctions. In *State ex rel. Pullins v. Eyster*, Knox App. No. 2009-CA-09 2009 -Ohio- 2846, we refused to issue the writs, finding appellants had an adequate remedy at law, by pursuing an appeal after the court entered a final order.

{¶21} Thereafter, the parties settled count four, and this appeal ensued.

I, III, IV, V, & VI

{¶22} The trial court dismissed counts three and five through sixteen of the amended complaint upon the property owners association's motion for partial dismissal and motion to strike insufficient claims. The trial court's dismissal did not expressly find these matters were barred by res judicta and law of the case.

{¶23} Appellants' earlier complaint was dismissed pursuant to Civ. R. 12 (B)(6) and Civ. R. 23.1. Civ. R. 12 (B)(6) is procedural in nature and does not adjudicate the merits of the case. In the prior appeal, we reviewed the original complaint in light of Civ. R. 12 (B)(6), and found "none of these averments establish that the issues raised by the remaining counts in the complaint have been requested or unreasonably withheld." *Pullins II*, paragraph 31.

{¶24} A complaint dismissed as insufficient as a matter of law pursuant to Civ. R. 12 (B)(6) can be re-filed, either if the statute of limitations has not run or the savings statute applies. If appellants included in their amended complaint sufficient allegations to satisfy Civ. R. 23.1, then the matter may proceed. However, for the following reasons, we find the amended complaint is insufficient as a matter of law to satisfy the specificity requirement of Civ. R. 23.1.

{¶25} Civ. R. 23.1 states: "In a derivative action brought by one or more legal or equitable owners of shares to enforce a right of a corporation, the corporation having failed to enforce a right which may be properly asserted by it, the complaint shall be verified and shall allege * * * with particularity the efforts, if any, made by the plaintiff to

obtain the action he desires from the directors and, if necessary, from the shareholders and the reasons for his failure to obtain the action or for not making the effort."

{¶26} In *Drage v. Proctor & Gamble* (1997), 119 Ohio App. 3d 19, 694 N.E. 2d 479, the Court of Appeals for the First District explained futility means that the directors' minds are closed to argument and they cannot properly exercise their business judgment. It is not enough to show that the directors simply disagree with the shareholder. *Drage* at 19, citing *Kamen v. Kemper Financial Services, Inc.* (C.A.7, 1991), 939 F. 2d 458, 462 citing *Heineman v. Datapoint Corporation* (Del. 1992), 611 A. 2d 950.

{¶27} The fact there is opposition or hostility towards the plaintiffs after the filing of the complaint is inevitable. Thus, the futility of a demand must be determined by viewing the positions of the parties before and at the time the derivative suit is initially filed, Id. Ohio law presumes the directors can make an unbiased and independent business decision about the corporation's best interest, Id. However, demand is presumptively futile if the directors are antagonistic, adversely interested, or involved in the transaction under attack, *Bonacci v. Ohio Highway Express* (July 30, 1992), Franklin App. No. 60825.

{¶28} If a plaintiff does not show a majority of the directors are unable to make an unbiased and independent business decision, the demand cannot be said to be futile. See *In re: Kauffman Mutual Fund Actions* (C.A.1, 1973), 479 F.2d 257, 263. Mere acquiescence by some of the directors, even if true, would not excuse the plaintiff from making a demand upon them. See *In re: General. Tire & Rubber Company Securities*

Litigation (C.A.6, 1984), 726 F.2d 1075, 1081, citing *Roderick v. Canton Hog Ranch Co*. (1933), 46 Ohio App. 475, 189 N.E. 669.

{¶29} Appellants' amended complaint sets out an extensive array of facts with exhibits to illustrate the futility of making a demand. Two persons the complaint discusses were not named as defendants and were not directors before or at the time the action was filed. Of the parties who were directors at the time, appellants list several who authorized the filing of a complaint against appellants' counsel, Pullins' husband, with the Ohio Disciplinary Counsel, and also issued a statement critical of him. In addition, appellee Bentz made one negative comment couched in general terms, not specifically naming appellants, as did Appellee Patton. The other incidents to which the complaint refers were made after the complaint was filed.

{¶30} Likewise, the allegation against appellee Holmes referred to the statement regarding appellants' counsel, and Holmes joined in the complaint with Disciplinary Counsel. The remainder of the allegations referred to incidents after the complaint was filed. The sole allegation against appellee Dumaree which occurred prior to the filing of the complaint was that he joined in the filing of the complaint with Disciplinary Counsel. The sole incident alleged about appellee Gordon prior to the filing of the original complaint is the allegation she joined in the filing of the complaint of Disciplinary Counsel against appellants' counsel.

{¶31} The allegations against appellee Zarbaugh are more extensive, and most occurred before the filing of the original complaint in this action. By and large the comments Zarbaugh made were highly critical of appellants, and most referred to the prior litigation over the removal of appellant Pullins from the Board.

{¶32} We conclude appellants have failed to allege sufficient facts showing a majority of the directors serving during the pertinent time demonstrated such animosity that they could not properly exercise their business judgment in the Association's dealings.

{¶33} We conclude the trial court was correct in finding the complaint was insufficient to comply with Civ. R. 23.1. For this reason, we conclude the trial court correctly dismissed causes of action three and five through sixteen of the amended complaint.

{¶34} We further find the trial court did not err in failing to convert the motion to dismiss to a motion for summary judgment, because the amended complaint within the four corners did not comply with Civ. R. 23.1 sufficiently. It was not necessary for the court to look beyond the amended complaint.

{¶35} Assignments of Error three, four, and five are overruled, and Assignment of Error one as it addresses counts three and five through fifteen are overruled.

VI.

{¶36} In their sixth assignment of error, appellants argue the trial court erred in failing to rule on their motion to vacate the prior dismissal. Appellants filed their first notice of appeal on January 28, 2009, and then filed their motion to vacate on February 6, 2009. A trial court lacks jurisdiction to rule on the motion to vacate while an appeal is pending. *Beck v. Jones,* Cuyahoga App. No. 91056, 2008-Ohio-5343. Accordingly, we find the trial court did not err in refraining from ruling on the motion.

{¶37} The sixth assignment of error is overruled.

VII

{¶38} In their seventh assignment of error, appellants argue the trial court erred when it decided to hold the issue of sanctions in abeyance until after this court ruled on the merits of the appeal. Appellants claim the trial court will not have jurisdiction over the motion after this court has ruled on the merits of the appeal. Appellants are incorrect. Trial courts retain jurisdiction to resolve collateral matters, such as motions for sanctions, pursuant to Civ.R. 11 or R.C. 2323.51. *Ayad v. Radio One, Inc.*, Cuyahoga App. No. 90638, 2008-Ohio-5487, citation deleted.

{¶39} The seventh assignment of error is overruled.

I & II

{¶40} In their first and second assignments of error, appellants argue the trial court erred in finding counts one and two, sounding in legal malpractice, are barred by the statute of limitations as a matter of law, and by res judicata and law of the case.

{¶41} In order to establish a claim for legal malpractice, a plaintiff must demonstrate: (1) the existence of an attorney-client relationship giving rise to a duty; (2) breach of the duty; and (3) damages proximately caused by the breach. *Krahn v. Kinney* (1989), 43 Ohio St. 3d 103 538 N.E. 2d 1058. The statute of limitations for legal malpractice is codified in R.C. 2305.11, and provides the claim must be brought within one year. The year begins to run when there is a cognizable event whereby the client discovers or should have discovered the malpractice, or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later. *Zimmie v. Calfee*, *Halter & Griswold* (1989), 43 Ohio St. 3d 54, at syllabus.

{¶42} The gravamen of appellants' claim is that counsel improperly advised the Board to remove appellant Pullins from her position, occasioned the litigation, and pursued an appeal unsuccessfully. Our decision on the appeal in the case was filed August 31, 2007, and that particular transaction concluded. Appellants' complaint for legal malpractice was filed on November 10, 2008.

{¶43} We find as a matter of law the attorney-client relationship between the Property Owners' Association and counsel for that transaction terminated with our decision on August 31, 2007. We conclude the trial court was correct in finding the statute of limitations had run on the claim prior to the filing of the amended complaint.

{¶44} We agree with appellants the claim was not barred by the principles of res judicata and law of the case, because there was no prior adjudication on the merits of the claim.

{¶45} Finally, we find the trial court was correct in finding appellants could not bring an action against counsel on their own behalf, but only in their status as plaintiffs on behalf of the association in the shareholder derivative action.

{¶46} Although the trial court was incorrect in finding res judicata and law of the case applied, we find this error was not prejudicial because there are independent reasons why appellants cannot pursue this claim.

{¶47} The first and second assignments of error are overruled.

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

By Gwin, P.J., and

Wise, J., concur;

Hoffman, J., concurs

separately

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

WSG:clw 0513

Hoffman, J., concurring

{¶49} I concur in the majority's' analysis and disposition of Appellants' second, sixth and seventh assignments of error.

{¶50} I concur in judgment only with the majority's disposition of Appellants' first, third, fourth and fifth assignments of error.

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HON. WILLIAM B. HOFFMAN

[Cite as *Pullins v. Harmer,* 2010-Ohio-2590.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

KATHRYN ELLIOTT PULLINS, ET AL	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
JEFF HARMER, ET AL	:	
Defendants-Appellees	:	CASE NO. 09-CA-40

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

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE