

[Cite as *Mullins v. Comprehensive Pediatric*, 2015-Ohio-1773.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

LISA MULLINS, ADMINISTRATOR OF )  
THE ESTATE OF CHARLES MULLINS )

PLAINTIFF-APPELLANT )

VS. )

COMPREHENSIVE PEDIATRIC and )  
ADULT MEDICINE, INC., et al. )

DEFENDANTS-APPELLEES )

CASE NO. 12 MA 190

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common  
Pleas of Mahoning County, Ohio  
Case No. 04 CV 1597

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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For Defendants-Appellees:

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JUDGES:

Hon. Cheryl L. Waite  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: May 7, 2015

[Cite as *Mullins v. Comprehensive Pediatric*, 2015-Ohio-1773.]  
WAITE, J.

{¶1} Appellant Lisa Mullins, Administratrix of the Estate of Charles Mullins, appeals a September 21, 2012 Mahoning County Common Pleas Court judgment entry in favor of Appellees Dr. Gregory McDaniel and Comprehensive Pediatric and Adult Medicine, Inc. Appellant argues that the trial court improperly retried the issue of liability after we remanded the matter solely on the issue of contributory negligence. Appellant contends that we clearly remanded only the issue of contributory negligence in our March 19, 2009 Opinion, *Mullins v. Comprehensive Pediatric and Adult Medicine, Inc.*, 7th Dist. No. 07 MA 144, 2009-Ohio-1310 (“*Mullins I*”). Further, Appellant argues that Appellees failed to name her as a party defendant, thus she cannot be found liable and the estate is not barred from recovery.

{¶2} In response, Appellees assert that the trial court correctly found that liability and comparative negligence are so intertwined that one cannot be heard without the other. Further, Appellees urge that the Ohio Supreme Court found in its February 23, 2012 opinion, *State ex rel. Mullins, Admr. v. Curran et al.*, 131 Ohio St.3d 441, 2012-Ohio-685, 966 N.E.2d 267 (“*Mullins III*”) that we clearly did not order a limited remand, thus, the trial court did not violate the law of the case doctrine. For the following reasons, the judgment of the trial court is affirmed.

#### Factual and Procedural History

{¶3} The decedent, Charles Jeffrey Mullins (“Mr. Mullins”), admitted to his wife, Appellant, that he was addicted to drugs. *Mullins I*, ¶5. After a discussion with Appellant, Mr. Mullins agreed to seek treatment for his addiction. *Id.* at ¶6. He first

sought treatment from his primary care physician, Dr. Maged Awadalla, who referred him to Dr. Nefertitti Labib. *Id.* at ¶8. Dr. Labib determined that Mr. Mullins' case was too complicated and referred him to Psycare. However, Mr. Mullins refused inpatient treatment. *Id.*

{¶4} Mr. Mullins' mother encouraged him to see her primary physician, Dr. Christopher Economus. *Id.* at ¶10. After determining that Mr. Mullins' case was too complicated, Dr. Economus referred him to Dr. Gregory McDaniel. *Id.* at ¶11. There was a dispute at trial as to whether Mr. Mullins sought treatment from Dr. McDaniel solely for his addiction or whether he additionally sought treatment for chronic pain. *Id.* at ¶15-16. Only the addiction was recorded in Dr. McDaniel's notes. *Id.* at ¶16. Dr. McDaniel did not request copies of the previous treating physicians' records nor did he order a toxicology screen. *Id.* at ¶17. Dr. McDaniel instructed Mr. Mullins to take 20mg of Methadone four times a day for seven days and then to return for an evaluation. *Id.* at ¶20, 26.

{¶5} Dr. McDaniel agreed to treat Mr. Mullins at their initial meeting because he believed that this might have been his only opportunity to treat Mr. Mullins before he changed his mind. *Id.* at ¶29. Further, he felt comfortable treating Mr. Mullins as an outpatient because Appellant was "willing to participate and take control of the medications so that even if he was tempted to he couldn't take more than he was supposed to \* \* \*." *Id.*

{¶6} After Mr. Mullins took his first 20mg dosage of Methadone he became ill and vomited. *Id.* at ¶31. Appellant contacted Dr. McDaniel's office and a nurse

instructed her to give Mr. Mullins 30mg of Methadone, instead of the prescribed 20mg. *Id.* at ¶32. After Appellant gave Mr. Mullins a 30mg dose, he again vomited. Appellant again contacted Dr. McDaniel's office and the nurse instructed her to give Mr. Mullins 20mg of Phenergan to relieve the nausea and another 30mg dose of Methadone. *Id.* at ¶33.

{¶7} Dr. McDaniel went out of town and received a message that Mr. Mullins had vomited the third dose of Methadone and that the Phenergan had caused him to move his bowels. *Id.* at ¶34. Dr. McDaniel called Appellant and instructed her to give Mr. Mullins another dose of Phenergan and then wait one hour. He further instructed her to give Mr. Mullins another 30mg dose of Methadone after one hour if he was able to hold down water. *Id.* at ¶35.

{¶8} Mr. Mullins held down the final dose of Methadone before falling asleep. *Id.* at ¶36. Dr. McDaniel contacted Appellant to see if Mr. Mullins had tolerated the final dose and he told her that he would prescribe more Methadone for Mr. Mullins. *Id.* at ¶37. However, the pharmacist informed Dr. McDaniel that he could not prescribe more Methadone without seeing Mr. Mullins as it is a regulated drug. *Id.* at ¶38.

{¶9} Dr. McDaniel called Appellant again and she told him that Mr. Mullins was sleeping soundly, but his breathing was a little fast and he was difficult to arouse. *Id.* at ¶39. Dr. McDaniel called again later that day and Appellant stated that she was still unable to arouse him. *Id.* at ¶40. Dr. McDaniel testified that he informed Appellant to take Mr. Mullins to the hospital in an hour if there was no change, but

Appellant disputed that he had given her this instruction. *Id.* Later that night, Appellant attempted to wake Mr. Mullins but he was unresponsive. *Id.* at ¶43. When she turned him, she found that he had vomited. *Id.* Emergency services were unable to revive him. *Id.*

{¶10} During the first trial, the trial court denied Appellees' request for jury instructions as to comparative negligence on the part of Appellant. *Id.* at ¶74. The jury subsequently returned a verdict in Appellant's favor. *Id.* at ¶1. On appeal, we found that the trial court erred in failing to provide comparative negligence instructions for Appellant, but affirmed on all other assignments of errors, including the decision to preclude comparative negligence instruction on the part of the deceased. *Id.* at ¶102. We specifically stated "[b]ecause we have sustained Appellants' first assignment of error in part and their second assignment of error in full, we hereby remand this matter to the trial court for further proceedings according to law and consistent with this Opinion." *Id.*

{¶11} Despite this instruction, on remand the trial court ordered a new trial on all issues: both liability and contributory negligence. Appellant sought a writ of prohibition to prevent the trial court from retrying the issue of liability, since the jury had already determined that Appellees were liable. We granted the writ and noted that:

Our opinion clearly states that the trial court's failure to instruct the jury on the alleged comparative negligence of Lisa Mullins constituted error, and, accordingly, the matter was remanded for the purpose of a new

trial on that issue. It is also apparent in the Opinion that we affirmed the trial court's refusal to instruct the jury on Charles Mullins' alleged comparative negligence, as well as the trial court's decision to disqualify the expert whose testimony was offered by Comprehensive and Dr. McDaniel.

*Mullins v. Comprehensive Pediatric and Adult Medicine, Inc.*, 7th Dist. No. 10 MA 76, 2011-Ohio-1312, ¶11 ("*Mullins II*").

{¶12} Appellees appealed to the Ohio Supreme Court. The Court determined it was not entirely clear from our decision that we ordered only a limited remand, and overturned our decision in the prohibition action. Accordingly, a second trial was held on both the issues of liability and comparative negligence. On September 21, 2012, a second jury found that Appellees were not negligent and judgment was entered in Appellees' favor. Appellant filed a motion for a new trial in the trial court, which was denied. Appellant filed a timely appeal.

#### ASSIGNMENT OF ERROR NO. 1

The trial court erred when it ordered that the Plaintiffs reprove the negligence of the Defendant, Gregory McDaniel and Comprehensive Pediatric and Adult Medicine.

ASSIGNMENT OF ERROR NO. 2

The trial court erred when it ordered that the Plaintiff reprove or reestablish the verdict amount in the subject case.

ASSIGNMENT OF ERROR NO. 3

The trial court erred when it disregarded the holding of the Appellate Court's Writ of Prohibition of March 14, 2011, State ex rel. Mullins v. Curran, 7th Dist. No. 10 MA 76, 2011-Ohio-1312, 2011 WL 977047.

ASSIGNMENT OF ERROR NO. 4

The trial court erred when it instructed the jury that they were to consider whether or not the Plaintiffs had proven the Defendant's negligence.

ASSIGNMENT OF ERROR NO. 5

The trial court erred when it instructed the jury that they were to establish a new verdict in the subject case.

{¶13} In Appellant's first, second, third, fourth, and fifth assignments of error, she asserts that we remanded only the issue of contributory negligence, not liability or the amount of damages. As we further clarified our intentions through our 2011 *Mullins II* opinion in the prohibition action, Appellant contends that the trial court erred in retrying the liability issues. Accordingly, Appellant urges that the trial court's actions were contrary to the law of the case doctrine. Appellant also argues that

issue preclusion barred the relitigation of Appellant's negligence and the damage award.

{¶14} Appellees respond by arguing that the issues of negligence and contributory negligence are so intertwined that one cannot be tried without the other. Appellees assert that the Ohio Supreme Court disagreed with our determination that the issue of comparative negligence can be remanded without retrial on the issue of underlying negligence. In furtherance of this proposition, Appellees highlight the possibility that Appellant was solely responsible for the decedent's death, which would completely absolve Appellees' responsibility. Accordingly, Appellees assert that the trial court did not err in finding that retrial should involve all of the allegations in the complaint and not simply limited to comparative negligence issues.

{¶15} Under the law of the case doctrine, a trial court must follow the mandate of an appellate court and cannot extend or vary the mandate. *Hammon v. Ohio Edison Co.*, 7th Dist. No. 00 CO 51, 2002-Ohio-2287, ¶20. However, in the event of extraordinary circumstances, such as an intervening decision by the Supreme Court, the trial court need not follow such mandate. *Id.* citing *State ex rel. Sharif v. McDonnell*, 91 Ohio St.3d 46, 48, 741 N.E.2d 127 (2001).

{¶16} Although we remanded this case to the trial court for a determination solely as to comparative negligence, the trial court did not find our instruction sufficiently clear and ordered a full trial on all issues, including liability. On review of our writ, the Ohio Supreme Court argued that our remand order was unclear. Accordingly, the Supreme Court held that the trial court did not patently and



unambiguously disregard our mandate and possessed the discretion to order a full retrial. In accordance with the Supreme Court's ruling, the trial court exercised its discretion and held a full retrial on all issues. As the trial court acted in accordance with the Ohio Supreme Court's decision in *Mullin III*, the trial court did not err in retrying all issues. Further, as the jury in the second trial specifically found that Appellees were not negligent, all other issues are moot.

{¶17} We note that we are disturbed, based on the record presented to us in the first appeal of this issue, that the second jury found that Appellees were not negligent, particularly in light of the fact that the jury in the first trial clearly found that Appellees were negligent. However, the transcripts from the second trial were not on appeal and the only issue in this appeal is the propriety of the trial court's decision to fully retry the matter. No other issues as to the validity of the second trial were raised, here. Thus, we are limited in our review only to the issue as to the trial court's discretion to conduct a full retrial following the Supreme Court's determination allowing this use of discretion. Accordingly, Appellant's first, second, third, fourth and fifth assignments of error are without merit and are overruled.

#### ASSIGNMENT OF ERROR NO. 6

It was error to consider the contributory negligence [sic] Lisa Mullins who was never joined as a party by Defendants as she can never be held liable to the Estate.

{¶18} Appellant asserts that since Appellees failed to join her as a party defendant, she cannot be held contributorily negligent. As such, she argues that the

trial court properly denied Appellees' request for instructions on contributory negligence in the original trial. Appellant also claims that the Ohio Supreme Court held that regardless of any comparative negligence on her part, she cannot be liable to the estate for damages. Thus, Appellant argues that a finding that she was contributorily negligent would improperly leave non-negligent members of the estate without a verdict.

{¶19} Based on the jury's determination on retrial of this matter that Appellees were not negligent, this issue is moot and will not be addressed.

#### ASSIGNMENT OF ERROR NO. 7

It was error by the trial court to deny the Plaintiffs Motion for a New Trial.

{¶20} As Appellant believes that the previous six assignments of error are meritorious, she argues that she is entitled to another new trial. Appellant argues that the original determination of negligence on the part of Appellees should be reinstated along with the earlier damage award. The only issue left to determine is her own possible contributory negligence, which Appellant argues will only affect her right to recovery, not the estate.

{¶21} Again, as the Ohio Supreme Court held that the trial court did not patently and unambiguously disregard our mandate by exercising his discretion to set the matter for a retrial of all issues, the trial court did not err in denying Appellant's motion for a new trial. Appellant's seventh assignment of error is without merit and is overruled.

Conclusion

{¶22} As the Ohio Supreme Court found that our opinion and directive in *Mullins I* was unclear and that the trial court did not patently and unambiguously disregard our mandate in setting the matter for a complete retrial, we find that the trial court did not err. Since the jury on retrial found that Appellees were not negligent, all others issues are moot. The judgment of the trial court is hereby affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs in part; see concurring in part opinion.

DeGenaro, J., concurring in part.

{¶23} While I concur in most of the majority's analysis, I cannot join in the dicta in ¶17 with respect to the record from the first trial. The finding of negligence was addressed in *Mullins I* and any commentary regarding that finding here is wholly inappropriate as the issue of negligence was retried. This conclusion is reinforced by the following observation in the concurring opinion in *State ex rel. Mullins v. Curran*, 131 Ohio St.3d 441, 445, 2012-Ohio-685, 966 N.E.2d 267, 271:

It was reasonable for Judge Curran to conclude that it was necessary to hold a new trial on the entire case because it would be impossible to conduct a trial on only the contributory-negligence claim. Contributory negligence is a defense to a claim for negligence. *Seeley v. Rahe*, 16 Ohio St.3d 25, 27, 475 N.E.2d 1271 (1985). In order to reach a verdict that is consistent with all the evidence, the jury must consider and compare the negligence of the different parties, including any evidence of contributory negligence. A jury is unable to assess comparative fault of all parties without reviewing all the factors that comprise a negligence claim or contributory-negligence claim. The court's failure to instruct the jury on contributory negligence was prejudicial to the defendants because the jury was unable to consider whether Mrs. Mullins's alleged negligence contributed to the decedent's death.

Judge Curran may also have relied on existing case law that supports the view that a new trial on both negligence and contributory negligence is necessary. In *Marshall v. Gibson*, 19 Ohio St.3d 10, 482 N.E.2d 583 (1985), this court concluded that the trial judge had committed prejudicial error in refusing to instruct the jury on comparative negligence. Evidence had been presented during trial to support a charge. Thus, this court reversed the judgment and

remanded for a new trial because the original verdict had been based on incomplete and misleading jury instructions. We held that when there is sufficient evidence to support a comparative-negligence charge and the charge is not given, the jury is misled and a retrial of both the negligence claim and the contributory-negligence claim is necessary. See also *Feeney v. Eshack*, 129 Ohio App.3d 489, 494, 718 N.E.2d 462 (9th Dist.1998) (trial court failed to instruct the jury on comparative negligence, making the jury charge as a whole misleading. As a result, the verdict was not responsive to the issues, because jury instructions were incomplete and misleading, and resulting prejudice warranted a new trial); *State Farm Fire & Cas. Co. v. Scandinavian Health Spa, Inc.*, 104 Ohio App.3d 582, 662 N.E.2d 890 (1st Dist.1995).

*Id.*, (Lundberg Stratton, J., concurring) ¶ 17-18.

{¶24} While I agree that the trial court did not abuse its discretion in retrying the whole matter, I must respectfully disagree with the majority's reference to the record and finding of negligence from the first trial. Thus, I concur in part.