Supreme Court of Ohio Clerk of Court - Filed March 29, 2019 - Case No. 2019-0305

IN THE SUPREME COURT OF OHIO

Bernard Joseph Rose	:	
Appellant,	:	Supreme Court Case No. 2019-0305
v.	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
Andrew Tievsky, M.D., et al.	:	Court of Appeals Case No. 28184
Appellees.	:	

APPELLEES' MEMORANDUM IN OPPOSITION TO JURISDICTION

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APPENDIX 1: Decision, Order and Entry Granting Defendants' Motion to Dismiss of the Court of Common Pleas, Montgomery County, Ohio (August 22, 2018)

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[1] Appellant, in his Notice of Appeal and Memorandum in Support of Jurisdiction, fails to identify any propositions of law for this Court's review. Appellees submit what they believe are the issues on which Appellant seeks review.

THIS CASE IS NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST

This case is not a case of great public or general interest. To the contrary, this case is quite simple. This case involves the routine dismissal by a trial court of a complaint for medical negligence without prejudice as the result of a plaintiff's failure to follow the Rules of Civil Procedure, specifically Civ. R 10(D)(2). When a complaint for medical negligence is dismissed without prejudice as the result of a plaintiff's failure to follow the Rules of Civil Procedure, and the plaintiff has the opportunity to re-file her complaint for medical negligence—as is the case presented here—there is no final order from which an appeal can be taken. This case involves the routine dismissal of an appeal by a court of appeals for lack of a final appealable order.

Appellant offers to reason—let alone any good reason—as to why review by this Court is required. No good reason can be offered. This Court has interpreted the applicability of Civ. R. 10(D)(2) and has held that a dismissal of a claim for medical malpractice when a plaintiff fails to comply with Civ. R. 10(D)(2) is a dismissal other than upon the merits, i.e., without prejudice.

A court of appeals can only hear cases arising out of a final order. R.C. § 2505.02 Ohio Const. art. IV § 3(B)(2). A dismissal without prejudice of a complaint for medical negligence is not a final order from which an appeal can be taken when the plaintiff has the opportunity to re-file her claim for medical negligence.

For the reasons that follow, this Court should decline review. No issue of great public or great general interest is at stake.

STATEMENT OF THE CASE AND FACTS

Appellant filed his complaint for medical negligence against Appellees on June 15, 2018. Along with his complaint, Appellant filed an "affidavit of merit," allegedly authored by David G. Penney, Ph.D. The "affidavit of merit" does not bear the signature of Dr. Penney.

In filing his complaint for medical negligence, Appellant alleged that Appellees deviated from the requisite standard of care with regard to an MRI study that was read and interpreted by Dr. Tievsky in June 2013. See Decision, Order and Entry, p. 1. Appellant alleged that Dr. Tievsky failed to compare the June 2013 MRI study to previous MRI studies and that he failed to detect changes in Appellant's brain. Id.

Appellees filed a motion to dismiss the complaint for medical malpractice filed by Appellant on July 17, 2018, based upon Appellant's failure to comply with Civ. R. 10(D)(2). Appellant opposed the motion on July 31, 2018 and Appellees filed their reply in support of their motion on August 14, 2018. The trial court appropriately dismissed the complaint for medical negligence without prejudice on August 22, 2018 based upon Appellant's failure to comply with Civ. R. 10(D)(2). See Decision, Order and Entry. Dr. Penney's affidavit was not signed and a Ph.D. is not qualified to testify regarding the standard of care that applies to a radiologist—let alone that a radiologist deviated from the requisite standard of care.

Appellant appealed the decision of the trial court by filing a "notice of appeal" on October 26, 2018. Appellees moved to dismiss the appeal for lack of a final appealable order—and untimeliness—on November 29, 2018. Appellant responded to the motion to dismiss on December 7, 2018. The Second District dismissed the appeal on January 16, 2019 for lack of a final appealable order. See Decision and Final Judgment Entry. This is the decision of which Appellant seeks review by this Court.

ARGUMENTS IN OPPOSITION TO PROPOSITIONS OF LAW

The trial court appropriately dismissed, without prejudice, Appellant's complaint for medical negligence. The complaint failed to include an affidavit of merit that satisfied the requirements of Civ. R. 10(D)(2). The trial court's dismissal—without prejudice and otherwise than upon the merits—was not a final, appealable order. The court of appeals appropriately dismissed Appellant's appeal for lack of a final, appealable order. The dismissal by the trial court and by the court of appeals is in accord with well-established Ohio law. There is neither reason nor need for this Court to accept jurisdiction.

> Proposition of Law No. 1: A trial court appropriately dismisses a complaint for medical negligence without prejudice when the complaint fails to comply with the requirements of the Civil Rules.

This Court has ruled with regard to the applicability of Civ. R. 10(D)(2) to medical claims, claims for medical negligence. There is no dispute in this case that Appellant's claims against Appellees were medical claims. In relevant part, Civ. R. (D)(2) provides:

> (a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in R.C. 2305.113, shall be accompanied by one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness meeting the requirements of Evid. R. 702 and, if applicable, also meeting the requirements of Evid. R. 601(D). Affidavits of merit shall include all of the following:
>
> (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
>
> (ii) A statement that the affiant is familiar with the applicable standard of care;
>
> (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

* * *

> (d) An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment. *Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.* (Emphasis added).

Dr. Penney's "affidavit of merit" failed to meet the requirements of the Rule. In *Fletcher v. Univ. Hosps. of Cleveland,* this Court held that the purpose behind Civ. R. 10(D)(2) is to deter the filing of frivolous medical malpractice claims. This Court further noted that this Rule "is designed to ease the burden on the dockets of Ohio's courts and to ensure that only those plaintiffs truly aggrieved at the hands of the medical profession have their day in court." 120 Ohio St.3d 167, 2008-Ohio-5379, ¶ 10.

This Court further held in *Fletcher* that a motion to dismiss for failure to state a claim upon which relief can be granted is the proper remedy when the plaintiff fails to include an affidavit of merit that complies with Civ. R. 10(D)(2) with their complaint for medical negligence. *Fletcher,* 2008-Ohio-5379, ¶ 13. Finally, this Court held in *Fletcher* that a dismissal for failure to comply with Civ. R. 10(D)(2) "is an adjudication otherwise than on the merits" and, therefore, is without prejudice. *Fletcher,* 2008-Ohio-5379, ¶ 21; see also *Troyer v. Janis,* 132 Ohio St.3d 229, 2012-Ohio-2406, ¶ 10 (holding that the proper remedy in circumstances where a plaintiff does not attach an affidavit of merit that complies with Civ. R. 10(D)(2) to her complaint for medical malpractice is a motion to dismiss for failure to state a claim and holding that a dismissal for failure to comply with Civ. R. 10(D)(2) is without prejudice).

The trial court appropriately dismissed, without prejudice, appellant's complaint for medical negligence as the result of appellant's failure to comply with Civ. R. 10(D)(2). The complaint alleged claims against Appellee, Dr. Tievsky—a neuroradiologist. See Compl. Dr. Penney is not a neuroradiologist or anything close to it. He has a "Ph.D." in physiology and

biochemistry—he is not a physician licensed to practice medicine anywhere in the world. See Aff. of D. Penney. Nowhere in Dr. Penney's "affidavit of merit" does he aver that Dr. Tievsky deviated from the requisite standard of care. Id. Nowhere in Dr. Penney's "affidavit of merit" does he aver that he is familiar with the standard of care applicable to a neuroradiologist. Id. Dr. Penney's "affidavit of merit" failed to satisfy the requirement of Civ. R. 10(D)(2)(a)(i)-(iii). The trial court appropriately dismissed Appellant's complaint for medical negligence without prejudice. Review by this Court is unwarranted.

> Proposition of Law No. 2: A trial court's dismissal of a complaint for medical negligence without prejudice when the complaint fails to comply with the requirements of the Civil Rules is not a final appealable order when the plaintiff has the opportunity to re-file her claim for medical negligence.

In *Straquadine v. Crowne Pointe Care Ctr.*, the Tenth District was presented with a case wherein the plaintiff failed to attach a Civ. R. 10(D)(2) compliant affidavit of merit to her complaint for medical negligence. 2012-Ohio-1152 (10th Dist.). In *Straquadine*, like here, the decision of the trial court dismissing the complaint indicated that the dismissal was without prejudice. *Straquadine,* 2012-Ohio-1152, ¶ 10. In *Straquadine,* like here, the saving statute (R.C. § 2305.19(A)) allowed the plaintiff to re-file her claim for medical negligence within one year (assuming that the original complaint was not barred by the statute of limitations and assuming that the re-filed complaint was not barred by the statute of repose). The Tenth District reached an identical conclusion in *Canady v. Taylor.* 2008-Ohio-2801 (10th Dist.) (holding that because the plaintiff was not prevented from re-filing, the dismissal of her complaint for medical negligence for failure to comply with Civ. R. 10(D)(2) was not a final, appealable order).

Appellant has not taken the position that he is precluded from re-filing his complaint for medical negligence under the saving statute, R.C. § 2305.19(A). Appellant has not taken the

position that the trial court's decision dismissing his complaint for medical negligence was an adjudication otherwise than on the merits.

R.C. § 2305.19(A), in relevant part, provides:

> In any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

Because Appellant has not taken a position to the contrary, this Court can conclude only that Appellant has the opportunity to re-file his complaint for medical negligence in accordance with the saving statute. R.C. § 2305.19(A). Because Appellant may re-file, there was no final, appealable order. This Court must decline jurisdiction.

> Proposition of Law No. 3: A court of appeals appropriately dismisses an appeal when the order from which the appeal is taken is not a final appealable order.

This Court has repeatedly held that an action that is dismissed without prejudice is not a final, appealable order when the dismissal does not prevent a party from re-filing. *State ex. rel. De Donno v. Mason,* 128 Ohio St.3d 412, 2011-Ohio-1445, ¶ 2; *Thornton v. Montville Plastics & Rubber, Inc.,* 121 Ohio St.3d 124, 2009-Ohio-360, ¶ 24 (a dismissal that does not operate as an adjudication on the merits is not a final, appealable order); *Nat'l City Commer. Capital Corp. v. AAAA at Your Serv., Inc.,* 114 Ohio St.3d 82, 2007-Ohio-2942, ¶ 8 ("[o]rdinarily, a dismissal other than on the merits does not prevent a party from re-filing and, therefore, ordinarily, such a dismissal is not a final, appealable order").

Ohio's appellate courts have reached similar conclusion. *Selmon v. Crestview Nursing & Rehab. Ctr., Inc.,* 184 Ohio App.3d 317, 2009-Ohio-5078, ¶ 10 (9th Dist.) (a dismissal without prejudice is not a final, appealable order as it ordinarily constitutes a dismissal other than on the merits which allows the plaintiff to re-file the complaint); *Hughley v. Southeastern Corr. Inst.,*

2010-Ohio-5497, ¶¶ 46-47 (5th Dist.); *Thomas v. Target Stores*, 2010-Ohio-1158, ¶¶ 18, 20 (11th Dist.); *Smirz v. Smirz*, 2014-Ohio-3869, ¶ 10 (9th Dist.).

The court of appeals appropriately dismissed Appellant's appeal for lack of a final, appealable order. The Second District—because there was no final, appealable order—lacked jurisdiction. R.C. § 2505.02; Ohio Const. art. IV § 3(B)(2). Further review by this Court is needless.

CONCLUSION

For all of the foregoing reasons, this case is not a case of great public or general interest. There is no reason for this Court to accept jurisdiction of it. The trial court appropriately dismissed the medical negligence complaint filed by Appellant based upon his failure to comply with the requirements of Civ. R. 10(D)(2). Pursuant to the precedent of this Court, that dismissal, without prejudice, was required.

A court of appeals can only hear appeals from orders that are final. Based upon this Court's precedent, a dismissal without prejudice is not a final order from which an appeal can be taken. The Second District's dismissal of Appellant's appeal for lack of a final, appealable order was required. There are no issues of great public or great general interest for this Court's review. Jurisdiction must be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served upon:

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Appellant

On the 29th day of March, 2019, via ordinary United States mail.

/s/ Matthew L. Schrader

Matthew L. Schrader (0074230)

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APPENDIX 1

Montgomery County Common Pleas Court
General Division

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

BERNARD JOSEPH ROSE,

Plaintiff,

-vs-

ANDREW TIEVSKY, M.D., et al.,

Defendants.

CASE NO.: 2018 CV 02727

JUDGE MARY WISEMAN

DECISION, ORDER AND ENTRY GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Defendant Andrew Tievsky, M.D.'s ("Dr. Tievsky") *Motion to Dismiss* ("*Motion to Dismiss*"), filed on July 17, 2018. On July 31, 2018, Plaintiff Bernard Rose ("Mr. Rose") filed a *Memorandum in Opposition to Defendants' Motion to Dismiss* ("*Memo Opp.*"), and finally, on August 14, 2018, Defendant filed a *Reply in Support of Motion to Dismiss* ["*Reply*"].

For the reasons that follow, Defendants Andrew Tievsky M.D.'s *Motion Dismiss* is GRANTED.

FACTUAL & PROCEDURAL BACKGROUND/THE PARTIES' CLAIMS

This case arises out of allegations by Mr. Rose that he was a victim of negligent medical care and treatment at the hands of Dr. Tievsky. Plaintiff claims that he received substandard medical care in relation to an MRI that was read and interpreted by Dr. Tievsky in June of 2013 (*Complaint*). More specifically, Mr. Rose alleges that Dr. Tievsky misdiagnosed changes in his brain and failed to compare the June 2013 MRI to previous ones (*Id.*).

LAW & ANALYSIS

Law re Civ.R. 12(B)(6) Motions to Dismiss

A motion to dismiss pursuant to Civ.R. 12(B)(6) "tests the sufficiency of a complaint." *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St. 2d 242, 327 N.E.2d 753 (1975) (syllabus); see also *State ex rel. Hanson v. Guernsey County Bd. of Comm'rs*, 65 Ohio St. 3d 545, 548, 605 N.E.2d 378 (1992)). In general, relief under that provision for failure to state a claim upon which relief can be granted is appropriate "only where the party opposing the motion is unable to prove any set of facts which would entitle him to the relief requested." *ABN AMRO Mtge. Group, Inc. v. Arnold*, 2nd Dist. No. 20530, 2005-Ohio-925, ¶20. When reviewing a case under this standard, the reviewing court must take all of the complaint's factual allegations as true, and "must construe all material allegations of the complaint and all reasonable inferences drawn therefrom in favor of the nonmoving party." *Id.* (citing *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St. 3d 415, 418, 650 N.E.2d 863 (1995)). The court will look to the complaint to determine whether the allegations are legally sufficient to state a claim. *Id.* (citing *Hanson*, 65 Ohio St. 3d at 548).

In considering a motion to dismiss, however, the court also must be cognizant that "[a] plaintiff is not required to prove his or her case at the pleading stage." See *Sacksteder v. Senney*, 2nd Dist. No. 24993, 2012-Ohio-4452, ¶50 (quoting *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991)). Both such courts then continued:

> Very often, the evidence necessary for a plaintiff to prevail is not obtained until the plaintiff is able to discover materials in the defendant's possession. If the plaintiff were required to prove his or her case in the complaint, many valid claims would be dismissed because of the plaintiff's lack of access to relevant evidence. Consequently, *as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.*

Id. (quoting same) (emphasis added).

Law re Affidavits of Merit in Medical Malpractice Cases

In accordance with Civ. R. 10(D)(2), a complaint that alleges a medical malpractice claim must be made pursuant to heightened pleading requirements. Specifically, Civ. R. 10(D)(2) requires the following: (1) one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability; (2) the expert witness must comply with Evid. R. 601(D) and Evid. R. 702; (3) the affidavit must include a statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint; (4) the affidavit must include a statement that the affiant is familiar with the applicable standard of care; and (5) the affidavit must include the opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff. See Civ. R. 10(D)(2); see also *Troyer v. Janis*, 132 Ohio St.3d 229, 2012-Ohio-2406, 971 N.E.2d 862, ¶ 12. Simply put, Civ. R. 10(D)(2) mandates that a complaint containing a medical malpractice claim as defined in R.C. 2305.113 include an affidavit of merit from an expert witness.

The purpose of such an affidavit of merit is to establish the adequacy of a plaintiff's complaint, and therefore, deter the filing of frivolous medical malpractice claims. *Fletcher v. Univ. Hosp. of Cleveland*, 120 Ohio St. 3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 10. Civil Rule 10(D)(2) is further designed to ease the burden on the dockets of Ohio's courts and to ensure that only those plaintiffs truly aggrieved at the hands of the medical profession have their day in court. *Id.*

R.C. 2743.43 states that in regards to expert testimony on liability issues, ✌[n]o person shall be deemed competent to give expert testimony on the liability issues in a medical claim, as defined in section 2305.113 of the Revised Code, unless:

> (1) Such person is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state; (2) Such person devotes three-fourths of the person's professional time to the active clinical practice of medicine or surgery, osteopathic medicine and surgery, or podiatric medicine and surgery, or to its instruction in an accredited university; (3) The person practices in the same or a substantially similar specialty as the defendant. The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties. (4) If the person is certified in a specialty, the person must be certified by a board recognized by the American board of medical specialties or the American board of osteopathic specialties in a specialty having acknowledged expertise and training directly related to the particular health care matter at issue.

R.C. 2743.43(A)

According to the Ohio Supreme Court, a dismissal for failure to state a claim based on a deficient or non-existent affidavit of merit should be without prejudice. *Id*.

Defendant's Motion To Dismiss

Dr. Tievsky argues that this case should be dismissed because Mr. Rose attached an invalid Affidavit of Merit. The proper Affidavit of Merit in this case must be authored by a *physician,* licensed to practice medicine, who is familiar with the standard of care for radiologists. *R.C. 2743.43*, *Civ. R. 10(D)(2).* The affidavit submitted by Mr. Rose was authored by David G. Penney, a Ph.D. While Dr. Penney has had a long and esteemed career in the fields of physiology and biochemistry, he is not a medical doctor practicing in the same field as the defendant, with a familiarity of the standard of care for radiologists. His affidavit does not satisfy the requirements of R.C. 2743.43. There are also references in Mr. Rose's Complaint to criticisms of physicians with whom he has purportedly consulted. There are, however, no sworn statements from those doctors attached that would comply with Civ. R. 10(D)(2).

Without an appropriate Affidavit of Merit, Mr. Rose cannot establish the adequacy of his claims against Dr. Tievsky. Therefore, his claims are DISMISSED without prejudice.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED.

SO ORDERED:

JUDGE MARY WISEMAN

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Type: Decision

Case Number: 2018 CV 02727

Case Title: BERNARD JOSEPH ROSE vs ANDREW TIEVSKY

So Ordered

Mary Wiseman

APPENDIX 2

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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

BERNARD JOSEPH ROSE *Plaintiff-Appellant* v. ANDREW TIEVSKY, M.D., et al. *Defendants-Appellee(s)*	Appellate Case No. 28184 Trial Court Case No. 2018 CV 02727 [Civil Appeal from Common Pleas Court]

DECISION AND FINAL JUDGMENT ENTRY
January 16, 2019

PER CURIAM:

{¶ 1} This matter is before the court on appellees' motion to dismiss the appeal. Upon consideration, we agree that the appeal must be dismissed.

{¶ 2} Bernard Joseph Rose ("Dr. Rose") filed a complaint on June 15, 2018 in the Montgomery County Court of Common Pleas. In the caption, he named a single defendant: "Dr. Andrew Tievsky M.D." ("Dr. Tievsky"). In the body of his complaint, he indicated that "The Cleveland clinic health network" was also negligent. Dr. Rose instructed the Clerk to serve the complaint on Dr. Tievsky as well as on Cleveland Clinic Health Systems. The Cleveland Clinic Foundation appeared and participated in the case.

{¶ 3} According to the order on appeal, Dr. Rose asserted "that he was a victim of negligent medical care and treatment at the hands of Dr. Tievsky * * * in relation to an MRI that was read and interpreted by Dr. Tievsky in June of 2013." August 22, 2018 Decision. However, because Dr. Rose did not attach an appropriate affidavit of merit to his complaint, the court held that he "cannot establish the adequacy of his claims against Dr. Tievsky." *Id.* The claim(s) against Dr. Tievsky were dismissed without prejudice.

{¶ 4} Dr. Rose appealed the trial court's August 22 Decision granting the motion to dismiss. Appellees, which we presume to include Dr. Tievsky and one of the Cleveland Clinic entities, moved to dismiss Dr. Rose's appeal on November 29, 2018. They argue that the order on appeal is not final and appealable, and that the appeal was untimely filed. We address the first of these arguments, as it is dispositive.

{¶ 5} It is axiomatic that an appellate court has jurisdiction to review only final orders or judgments of the lower courts in its district. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. We have no jurisdiction to review an order or judgment that is not final, and an appeal therefrom must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶ 6} To be final and appealable, a judgment must satisfy the requirements of R.C. 2505.02 (the statute defining final orders) and, if applicable, Civ.R. 54(B) (concerning partial final orders that may be appealed with proper certification). *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). Normally, the dismissal of a claim or action on the merits satisfies R.C. 2505.02(B)(1), in that it is "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." The Supreme Court of Ohio has held that "[f]or an order to determine the action and prevent

a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *National City Commercial Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶ 7 (internal citation and quotation omitted). However, a dismissal without prejudice "does not prevent the party from refiling." *Wells Fargo Bank, Natl. Assn. v. Wick*, 8th Dist. Cuyahoga Nos. 99373, 99840, 2013-Ohio-5422, ¶ 6, citing *National City*. It "does not determine the action or prevent a judgment and therefore is not a final appealable order under R.C. 2505.02(B)(1)." *Century Business Services, Inc. v. Bryant*, 8th Dist. Cuyahoga No. 80507, 2002-Ohio-2967, ¶ 15.

{¶ 7} "Under exceptional circumstances, however, a dismissal without prejudice may be a final, appealable order." *In re A.E.*, 10th Dist. Franklin No. 08AP-59, 2008-Ohio-4552, ¶ 25 (internal citations and quotations omitted). It is "final and appealable where the appellant is precluded from refiling as a result of the dismissal." *Wick* at ¶ 6. A dismissal without prejudice for failing to file an affidavit of merit has been held not to be a final appealable order because a plaintiff can refile his case with an appropriate affidavit. *See Straquadine v. Crowne Pointe Care Ctr.*, 10th Dist. Franklin No. 10AP-607, 2012-Ohio-1152, ¶ 11.

{¶ 8} Appellees argue that the appeal should be dismissed for this reason. Dr. Rose filed what may be a response to the motion to dismiss on December 7, 2018. This filing contains argument about the merits of the decision on appeal, but does not address the jurisdictional question currently before us. Notably, Dr. Rose does not argue that he is

precluded from refiling his complaint.[1] In the absence of such a showing, we apply the general rule and conclude that the August 22 Decision dismissing Dr. Rose's claim(s) against Dr. Tievsky without prejudice is not a final appealable order.

{¶ 9} In light of this determination, we need not address whether the appeal was timely filed. The motion to dismiss for lack of a final appealable order is well-taken and is SUSTAINED. This matter, Montgomery Appellate Case No. 28184, is DISMISSED.

{¶ 10} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing. Costs taxed pursuant to App.R. 24.

SO ORDERED.

JEFFREY M. WELBAUM, Presiding Judge

JEFFREY E. FROELICH, Judge

MICHAEL L. TUCKER, Judge

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Appellant

[1] Appellees argue that Dr. Rose "may commence a new action within one year of the Trial Court's Decision, Order and Entry. R.C. 2305.19(A); see also *Straquadine*, 2012-Ohio-1152, ¶ 10." *Appellees' Motion to Dismiss Appeal* (Nov. 29, 2018).

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