**[Cite as *Fisher v. Mallik*, 2015-Ohio-1008.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|---|---|---|
| James E. Fisher, individually and as the Administrator of the Estate of Delores G. Fisher, deceased, | : | |
| Plaintiff-Appellant, | : | No. 14AP-140 (C.P.C. No. 13CV-8764) |
| v. | : | (REGULAR CALENDAR) |
| Gunwant Mallik, M.D. et al., | : | |
| Defendants-Appellees. | : | |

D E C I S I O N

Rendered on March 19, 2015

*Paul W. Flowers Co., L.P.A.*, and *Paul W. Flowers*, for appellant.

*Arnold Todaro & Welch, Co., L.P.A.*, and *Karen L. Clouse* for appellees Thomas F. Brady, M.D., and Columbus Inpatient Care, Inc.

*Hammond Sewards & Williams*, and *Frederick A. Sewards*, for appellees James Sinard, M.D., and Mid Ohio Surgical Associates, Inc.

*Adkinson Law Office*, and *Patrick K. Adkinson*, for appellees Jeffrey E. Salon, M.D., and Columbus Pulmonary and Critical Care, L.L.C.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

**{¶ 1}** James E. Fisher, individually, and as the administrator of the estate of Delores G. Fisher, deceased, plaintiff-appellant, appeals from a judgment of the Franklin

County Court of Common Pleas, in which the trial court dismissed appellant's complaint for medical negligence.

**{¶ 2}** On April 13, 2011, appellant filed a medical negligence action against Gunwant Mallik, M.D.; James Sinard, M.D.; Mid-Ohio Surgical Associates, Inc. ("Mid-Ohio"); Thomas F. Brady, M.D.; Columbus Inpatient Care, Inc. ("Columbus Inpatient"); Jeffrey E. Salon, M.D.; Columbus Pulmonary and Critical Care, L.L.C. ("Columbus Pulmonary"); Mt. Carmel Health and Mt. Carmel Health Systems (collectively "Mt. Carmel"); Roy C. St. John, M.D.; Columbus Neurosurgery and Neurology ("Columbus Neurosurgery"); and Trinity Health Systems ("Trinity").

**{¶ 3}** On May 18, 2011, appellant voluntarily dismissed his claims against Columbus Neurosurgery and Trinity without prejudice. On June 2, 2011, appellant dismissed the claims against Dr. St. John.

**{¶ 4}** Dr. Sinard, Mid-Ohio, Dr. Salon, Columbus Pulmonary, Columbus Inpatient, and Dr. Brady filed motions for summary judgment, which the trial court granted October 26, 2012. The court did not include the "no just reason for delay" language referred to in Civ.R. 54(B). The claims against Dr. Mallik and Mt. Carmel remained pending.

**{¶ 5}** On February 26, 2013, appellant voluntarily dismissed, pursuant to Civ.R. 41(A)(1)(a), the action "in its entirety" and reserved the right to refile the action "against defendants."

**{¶ 6}** On August 9, 2013, appellant refiled the medical negligence action against Dr. Mallik, Dr. Sinard, Mid-Ohio, Dr. Brady, Columbus Inpatient, Dr. Salon, Columbus Pulmonary, and Mt. Carmel. Dr. Salon, Columbus Pulmonary, Dr. Brady, Dr. Sinard, Columbus Inpatient, and Mid-Ohio, defendants-appellees, filed motions to dismiss, pursuant to Civ.R. 12(B), asserting that summary judgment had already been rendered in their favor and that determination was never appealed.

**{¶ 7}** On November 25, 2013, the trial court granted the motions to dismiss filed by appellees. The trial court found that, although appellant was not permitted to appeal the October 26, 2012 decision, that decision was still final and became final and appealable when appellant voluntarily dismissed the remainder of his claims on February 26, 2013. Appellant then filed a motion for reconsideration seeking to add the Civ.R. 54(B) "no just

reason for delay" language to the November 25, 2013 decision, which the trial court granted. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> THE TRIAL JUDGE ERRED, AS A MATTER OF LAW, BY DISMISSING PLAINTIFF-APPELLANT'S CLAIMS UNDER AUTHORITY OF CIV.R. 12(B).

**{¶ 8}** Appellant argues in his assignment of error that the trial court erred when it dismissed his action pursuant to Civ.R. 12(B). Appellees relied on both Civ.R. 12(B)(1) and (6) in their motions to dismiss. In ruling on a Civ.R. 12(B)(1) motion to dismiss for lack of subject-matter jurisdiction, the trial court determines whether the claim raises any action cognizable in that court. *Brown v. Ohio Tax Commr.*, 10th Dist. No. 11AP-349, 2012-Ohio-5768; *Robinson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-550, 2011-Ohio-713, ¶ 5. Subject-matter jurisdiction involves " 'a court's power to hear and decide a case on the merits and does not relate to the rights of the parties.' " *Id.*, quoting *Vedder v. Warrensville Hts.*, 8th Dist. No. 81005, 2002-Ohio-5567, ¶ 14. We apply a de novo standard when we review a trial court's ruling on a Civ.R. 12(B)(1) motion to dismiss. *Robinson* at ¶ 5, citing *Hudson v. Petrosurance, Inc.*, 10th Dist. No. 08AP-1030, 2009-Ohio-4307, ¶ 12.

**{¶ 9}** A motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim is procedural and tests the sufficiency of the complaint. *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 11, citing *Assn. for Defense of Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117 (1989). Dismissal for failure to state a claim is proper if, after all factual allegations are presumed to be true and all reasonable inferences are made in favor of the non-moving party, it appears beyond doubt from the complaint that the plaintiff could prove no set of facts warranting the requested relief. *State ex rel. Turner v. Houk*, 112 Ohio St.3d 561, 2007-Ohio-814, ¶ 5; *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. In considering a motion to dismiss under Civ.R. 12(B)(6), the court looks only to the complaint to determine whether the allegations are legally sufficient to state a claim. *Springfield Fireworks, Inc. v. Ohio Dept. of Commerce*, 10th Dist. No. 03AP-330, 2003-Ohio-6940, ¶ 12. We review the dismissal of a complaint pursuant to Civ.R. 12(B)(6) under a de novo

standard. *Woods v. Riverside Methodist Hosp.*, 10th Dist. No. 11AP-689, 2012-Ohio-3139, ¶ 9.

**{¶ 10}** In the present case, the trial court found that appellant misunderstood the court's October 26, 2012 ruling. The court found that the October 26, 2012 ruling was not interlocutory but, instead, was a final order that became final and appealable when appellant voluntarily dismissed "the remainder" of his claims on February 26, 2013. In support, the trial court pointed to the language in its October 26, 2012 decision and entry that appellees were dismissed with prejudice from the action as of the date of the filing of the decision. The court found that its decision acted as an entry granting affirmative relief to appellees and affirmatively disposed of appellant's claims against appellees.

**{¶ 11}** Here, appellant argues that the court's October 26, 2012 decision granting summary judgment to Dr. Sinard, Mid-Ohio, Dr. Salon, Columbus Pulmonary, Columbus Inpatient, and Dr. Brady was interlocutory in nature and was rendered null when he subsequently voluntarily dismissed the action "in its entirety" "against defendants." Appellant claims that his voluntary dismissal related to all defendants originally named in the complaint and not just the claims and defendants remaining after summary judgment had been granted to Dr. Sinard, Mid-Ohio, Dr. Salon, Columbus Pulmonary, Columbus Inpatient, and Dr. Brady.

**{¶ 12}** In reply, appellees rely largely upon the Supreme Court of Ohio's decision in *Denham v. New Carlisle*, 86 Ohio St.3d 594 (1999). In *Denham*, Denham filed an action against several defendants, including New Carlisle. The trial court granted New Carlisle summary judgment, but stated that the order was not a final appealable order as the case would proceed on the claims against the remaining defendants. Denham then voluntarily dismissed her claims against the remaining defendants in the case pursuant to Civ.R. 41(A)(1) and appealed the court's order. On appeal, Denham argued that the trial court's decision granting summary judgment to New Carlisle was a final appealable order, as she dismissed all the remaining parties and the summary judgment order for New Carlisle affected a substantial right and determined the outcome of the case. New Carlisle argued that Denham's decision to dismiss the remaining parties to the action did not make the summary judgment decision a final appealable order. Instead, New Carlisle contended that Denham's decision to dismiss the remaining defendants dissolved the summary judgment

decision, rendering the entire case as if it never existed. The court of appeals held that the summary judgment order was an interlocutory non-final order and dismissed the appeal.

**{¶ 13}** After certifying a conflict, the Supreme Court found that the court's decision granting summary judgment for New Carlisle met the requirements of R.C. 2505.02, as it affected a substantial right and determined the outcome of Denham's case against New Carlisle. The Supreme Court interpreted Civ.R. 41 to mean a dismissal dismisses all claims against the defendants designated in the dismissal notice and does not apply to defendants named in the complaint who are not designated in the notice of dismissal. Thus, Denham's voluntary dismissal of the remaining parties to the suit left the parties as if no action had been brought, but only with regard to the parties who were voluntarily dismissed from the action. Therefore, the Supreme Court found, the trial court's summary judgment decision for New Carlisle was no longer an interlocutory order but became a final appealable order when Denham voluntarily dismissed the remaining defendants.

**{¶ 14}** Although appellees contend that *Denham* is directly on point and answers the question before this court, we believe *Denham* does not fully address the issues before us. Not addressed in *Denham* is appellant's argument that he not only dismissed the remaining defendants who had not been granted summary judgment, but he dismissed the entire action and all defendants, including the ones who had been granted summary judgment. Therefore, appellant's argument raises the two following issues: (1) did appellant's voluntary dismissal actually seek to dismiss all of the parties to the original action, including those for whom the trial court had already granted summary judgment, and, if so, (2) may a plaintiff, in a multi-defendant case, voluntarily dismiss defendants for whom the trial court has already granted summary judgment.

**{¶ 15}** With regard to the first issue above, the Supreme Court in *Denham* found by implication that a plaintiff may voluntarily dismiss, pursuant to Civ.R. 41(A)(1), only some defendants and claims in a multi-defendant action. *Id.* at syllabus. Thus, we must determine whether appellant, in the present case, sought to dismiss all of the defendants, including the defendants for which the trial court had already granted summary judgment, or only the remaining defendants. If appellant voluntarily dismissed only the remaining defendants, *Denham* would be directly on point with the present case, and our analysis would be at an end. If appellant sought to voluntarily dismiss all of the original defendants,

then our analysis would turn to the second issue above: whether a plaintiff, in a multi-defendant case, is permitted to voluntarily dismiss defendants for whom the trial court has already granted summary judgment.

**{¶ 16}** The trial court apparently believed appellant's February 26, 2013 dismissal related only to the remaining defendants, as the court stated several times in its decision that appellant dismissed only "the remainder" of the claims in the original case. Appellant's voluntary dismissal provided:

> Now come the Plaintiffs, by and through their attorney, and hereby voluntarily dismisses *this action in its entirety*, pursuant to Rule 41(A) of the Ohio Rules of Civil Procedure. Said dismissal is **without prejudice**, and Plaintiffs reserve the right to reinitiate an action *against Defendants*, as provided by the laws of the State of Ohio.

(Italics emphases added; bold emphasis sic.)

**{¶ 17}** After reviewing appellant's voluntary dismissal, it appears to this court that appellant was attempting to voluntarily dismiss all claims and parties, including those to whom summary judgment was granted. The trial court did not explain why it believed the language of appellant's voluntary dismissal suggested it was meant to dismiss only the remaining defendants and claims, but we disagree. The voluntary dismissal indicated appellant was dismissing "this action in its entirety" and appellant reserved the right to "reinitiate an action against Defendants." Both of these statements are inclusive and provide no suggestion that appellant meant for the dismissal to exclude those defendants for whom the trial court had granted summary judgment. *See Fairchilds v. Miami Valley Hosp., Inc.*, 160 Ohio App.3d 363, 2005-Ohio-1712, ¶ 38 (2d Dist.) (notice of voluntary dismissal informing the trial court that they were voluntarily dismissing the case without prejudice subject to refiling pursuant to Civ.R. 41(A) against "all party Defendants," clearly included the voluntary dismissal of all defendants); *Fox v. Kraws*, 11th Dist. No. 2009-L-157, 2009-Ohio-6860, ¶ 16 (where appellant indicated that she voluntarily dismissed the action without prejudice, without specifying any particular claim or party, the appellant dismissed the entire case pursuant to Civ.R. 41(A)(1)(a)). Therefore, we find the trial court erred when it found appellant's voluntary dismissal related only to the remaining defendants for whom summary judgment was not granted.

**{¶ 18}** Having found appellant intended to voluntarily dismiss all the original defendants and claims, the second issue is whether a plaintiff, in a multi-defendant case, is permitted to voluntarily dismiss defendants for whom the trial court has already granted summary judgment. This court has before held that a voluntary dismissal without prejudice under Civ.R. 41(A) as to all defendants renders a prior interlocutory summary judgment ruling a nullity. *See Klosterman v. Turnkey-Ohio, L.L.C.*, 10th Dist. No. 10AP-162, 2010-Ohio-3620, ¶ 12, citing *Fox* (where voluntary dismissal applies to all defendants, it renders a prior interlocutory summary judgment ruling a nullity). Several other appellate districts are in accord. *See, e.g., Fairchilds* at ¶ 44 (under the rationale of *Denham*, a voluntary dismissal of all defendants renders a prior interlocutory summary judgment ruling a nullity); *Bradley v. Dollar Gen.*, 5th Dist. No. 11-CA-45, 2012-Ohio-3700, ¶ 42 (a voluntary dismissal of all defendants and all claims prevents an interlocutory summary judgment decision from becoming a final adjudication of the claims with which it was concerned); *Fox* at ¶ 14; *Hutchinson v. Beazer East, Inc.*, 8th Dist. No. 86635, 2006-Ohio-6761, ¶ 32 (we have consistently followed the view that a voluntary dismissal of the entire case, pursuant to Civ.R. 41(A), dissolves all prior interlocutory orders made by the trial court in that action, including orders of summary judgment); *Toledo Heart Surgeons v. The Toledo Hosp.*, 6th Dist. No. L-02-1059, 2002-Ohio-3577, ¶ 35 (pursuant to *Denham*, an order that grants a motion for summary judgment to a party while claims against other parties are still pending, and that does not contain Civ.R. 54(B) language that there is no just reason for delay, is not appealable when the entire action is later dismissed without prejudice pursuant to Civ.R. 41(A), but, rather, is dissolved and a nullity). Based on our own precedent, and the above decisions from other appellate districts, we find that appellant's voluntary dismissal without prejudice under Civ.R. 41(A) as to all of the defendants rendered the prior interlocutory summary judgment rulings in favor of appellees a nullity.

**{¶ 19}** In its decision and entry granting appellees' motions to dismiss, the trial court distinguished the present case from *Hutchinson* by finding that its October 26, 2012 decision was not interlocutory, because the decision was an entry granting affirmative relief to appellees, and the decision affirmatively dismissed appellees with prejudice. The court in *Bradley* discussed this same reasoning in reviewing one of its prior decisions that

conflicted with its present holding. The court in *Bradley* noted that the prior conflicting decision relied on the fact that the summary judgment entry specifically ordered the claim against one defendant be dismissed. However, upon further analysis of *Denham*, the court in *Bradley* found its focus on the language of the summary judgment entry to determine whether the entry was a final appealable order was misplaced because *Denham* holds that in order to make a determination of whether a summary judgment decision is a final appealable order, a court must look beyond the summary judgment entry and examine the language of the plaintiff's Civ.R. 41(A) notice of dismissal. *Bradley* at ¶ 40. The court in *Bradley* concluded that it is the notice of voluntary dismissal, not the entry granting summary judgment that controls whether a final appealable order is created as to one or more defendants or whether the entire case against all defendants is dismissed without prejudice. *Id*. at ¶ 41. Therefore, based upon the same reasoning as *Bradley*, we find the trial court's attempt to distinguish the present case from *Hutchinson* by focusing on the language of its entry was improper.

**{¶ 20}** We note that, while we find the general holding in *Bradley*—that a court should look to the language of the voluntary dismissal under these circumstances—to be sound, it is the language of the entry granting summary judgment that would control when the entry contains Civ.R. 54(B) language. Civ.R. 54(B) provides:

> **Judgment upon multiple claims or involving multiple parties**
>
> When more than one claim for relief is presented in an action * * * or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(Emphasis sic.)

The entries in *Denham* and *Bradley* did not contain Civ.R. 54(B) language. In such a case in which the entry contains specific Civ.R. 54(B) language, *Denham* would be inapplicable, and a final appealable order would be created as to any parties included in the summary judgment order, with the language in a subsequent Civ.R. 41(A) notice of voluntary dismissal having no bearing on those parties. In the instant matter, because the trial court failed to include Civ.R. 54(B) language to render it a final appealable order, we must follow the dictates in *Denham*. Therefore, for the foregoing reasons, we find the trial court erred when it granted appellees' motions to dismiss, and we sustain appellant's assignment of error.

**{¶ 21}** Accordingly, appellant's assignment of error is sustained, and the judgment of the Franklin County Court of Common Pleas is reversed.

*Judgment reversed.*

KLATT, J., concurs.
DORRIAN, J., dissents.

DORRIAN, J., dissenting.

**{¶ 22}** I respectfully dissent. I agree with the trial judge that the summary judgment in favor of appellees became final and appealable on February 26, 2013 when appellant filed his voluntary dismissal pursuant to Civ.R. 41(A)(1)(a).

**{¶ 23}** I share the reasoning of the dissent in *Fairchilds v. Miami Valley Hosp., Inc.*, 160 Ohio App.3d 363, 376-77, 2005-Ohio-1712 (2d Dist.) ("*Fairchilds I*"), as well as the dissent in *Fairchilds v. Miami Valley Hosp. Inc.*, 109 Ohio St.3d 1229, 2006-Ohio-3055 ("*Fairchilds II*") (dismissing the appeal as having been improvidently accepted). The facts of that case were summarized by Justice Lundberg Stratton in *Fairchilds II*:

> [In *Fairchilds I*] [t]he plaintiffs filed a complaint * * * against defendants Angela Landis and MVH [Miami Valley Hospital]. On December 1, 2003, the trial court granted summary judgment (after converting a motion to dismiss into a motion for summary judgment at the request of plaintiffs' counsel) in favor of MVH and against plaintiffs on all claims. Because claims remained pending against defendant Landis, the trial court did not include Civ.R. 54(B) language signifying that there was no just reason for delay. The trial court's entry,

> however, did state that "MVH is hereby dismissed from the case *sub judice*."[1]
>
> On January 26, 2004, the day that trial was scheduled to begin on the remaining claims against defendant Landis, the plaintiffs filed a motion asking the court to reconsider or set aside its decision granting summary judgment in favor of MVH. Simultaneously, the plaintiffs filed a notice of voluntary dismissal of the case without prejudice and subject to refiling pursuant to Civ.R. 41(A) against all party defendants—Angela Landis and MVH. MVH responded with a request for a final judgment entry, seeking an order that the court's decision granting the motion for summary judgment constituted a final, appealable order.
>
> * * * [T]he trial court granted MVH's motion, concluding that the summary judgment decision became a final, appealable judgment when the plaintiffs filed the dismissal entry. The trial court concluded that despite the dismissal entry's language to the contrary, the plaintiffs' voluntary dismissal applied only to the remaining defendant, Landis. The lack of Civ.R. 54(B) language did not leave the otherwise final judgment subject to a Civ.R. 41(A) voluntary dismissal without prejudice.
>
> * * *
>
> In the refiled case, the plaintiffs settled with defendant Landis, and she was voluntarily dismissed. MVH again filed a motion to dismiss that was converted into a motion for summary judgment. The trial court granted the motion, concluding that the plaintiffs' claims were barred by res judicata.
>
> The plaintiffs appealed, arguing that there was no final judgment in the first case that could constitute res judicata in the second case. The court of appeals agreed, concluding that plaintiffs had properly dismissed both defendants in the original litigation, and that action prevented the interlocutory summary judgment from becoming a final decision in favor of MVH. The appellate court acknowledged that that result might violate a sense of fair play. Nevertheless, the court noted, the broad stroke of Civ.R. 41(A) authorizes a plaintiff to dismiss an action without prejudice at any point in the litigation prior to the commencement of trial.

[1] In the case before us, the trial court's October 26, 2012 entry dismissed appellees "WITH PREJUDICE."

*Id.* at ¶ 3-8. In *Fairchilds I*, Judge Donovan dissented from the Second District majority:

> I conclude that the trial court's dismissal of MVH as a party defendant prevented appellants from filing a Civ.R. 41(A) voluntary notice of dismissal encompassing MVH. By simply naming MVH in their notice of dismissal and using the phrase "the case," appellants do not make it so. * * * Nor may appellants seek to voluntarily dismiss MVH, a party previously dismissed by court order. Appellants were relegated to an involuntary dismissal of MVH, subject to revision only by court order at any time before the entry of judgment.
>
> Therefore, the grant of summary judgment to MVH and its dismissal as a party defendant by the trial court became a final, appealable order when the appellants dismissed the remaining portion of "the case," to wit, Landis. Appellants having dismissed the sole remaining party defendant, Landis, this matter falls squarely within the Ohio Supreme Court holding in *Denham*. This conclusion not only comports with public policy but is consistent with Civ.R. 1(B), which requires that the Civil Rules "shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Appellants' side step is indeed a misstep that does violate a sense of fair play. It is the trial judge controlling the adjudicatory process, not the appellants. MVH should not be required to defend the same claims a second time once they are dismissed by court order. Since the summary judgment decision became a final adjudication of the claims against MVH, the trial court properly concluded that appellants' voluntary dismissal of Landis converted the interlocutory summary judgment into a final, appealable order and therefore properly sustained MVH's request for a final judgment entry.

*Id.* at ¶ 61-62. Justice Lundberg Stratton agreed in her dissent in *Fairchilds II*:

> In *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, 716 N.E.2d 184, we sanctioned a Civ.R. 41(A) voluntary dismissal of fewer than all of the defendants in a case, and we held that that dismissal caused an interlocutory summary judgment order in favor of the remaining defendant to become final and appealable. I would hold that the plaintiffs' voluntary dismissal applied to Landis only and extend the reasoning of *Denham* to finalize the summary judgment in favor of MVH. Therefore, I respectfully dissent.

*Id.* at ¶ 10. While I find the majority decision to be well-reasoned, I would dissent for the reasons outlined by Judge Donovan and Justice Lundberg Stratton above. I would affirm the decision of the trial court.

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