Ohio Supreme Court Rules Dismissal Of Medical Malpractice Suit For Failure To Attach Affidavit Of Merit Is “Without Prejudice” By Operation Of Law

In Troyer v. Janis, the Supreme Court of Ohio ruled that when a plaintiff’s medical malpractice suit is dismissed for failure to attach a physician’s affidavit of merit as required by Ohio Civil Rule 10(D)(2), the dismissal is “without prejudice” and can likely be refiled.

By way of background, Civ.R.10(D)(2) requires that in every medical malpractice lawsuit, the plaintiff must submit to the court along with his or her complaint an “affidavit of merit” signed by a qualified physician. This affidavit must attest that the reviewing doctor has examined the medical evidence, is familiar with the standard of care and believes that the standard of care was not met in the plaintiff’s case.

In Troyer, the Plaintiffs filed a medical malpractice lawsuit without attaching an affidavit of merit to their complaint. The defendant physician moved for dismissal based upon the fact that the complaint was not supported by the required affidavit of merit. The trial court dismissed the case, but did not indicate in its journal entry that the complaint had been dismissed “without prejudice.”

The Plaintiffs later refiled their complaint, this time with an affidavit of merit attached. In response, the physician filed a motion for summary judgment, arguing that because the trial court’s first journal entry dismissing the original complaint had not indicated the dismissal was without prejudice, under Civ.R.41(B)(3) it was a dismissal with prejudice which therefore barred any further litigation.

Relying on a previous decision from the Tenth District Court of Appeals, the trial court found that the dismissal of the original complaint was with prejudice and granted summary judgment in favor of the physician. On review, the appellate court affirmed the trial court’s ruling. The Supreme Court reviewed the lower courts’ decisions.

In its decision, the Supreme Court unanimously held in favor of the Plaintiffs. The Court began by noting that Civ.R. 10(D)(2) requires an affidavit of merit, and explicitly provides that any dismissal for failure to comply shall be a dismissal “otherwise than on the merits.” As such, the trial court should have dismissed the first complaint without prejudice. The fact that the trial court did not identify the basis of the original dismissal should not be used to prevent the Plaintiffs from re-filing their complaint. Based upon this rationale, the Supreme Court held that the dismissal of a complaint for failure to attach the affidavit of merit required by Civ.R. 10(D)(2) is an adjudication otherwise than on the merits and is a dismissal without prejudice by operation of law.

The decision is important for two reasons. First, it affords predictability for both practitioners and courts when considering the affidavit of merit requirement. Second, it signifies that Ohio Courts, while enforcing a litigant’s obligation to provide an affidavit of merit in medical malpractice suits, will likely provide plaintiffs with every opportunity to litigate their claims.

For a copy of this opinion or more information concerning its application, or any other question with respect to medical liability, please do not hesitate to contact a member of our Medical Malpractice / Healthcare Practice Groups.