

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.)	CASE NO. 2013-0866
CITY OF CLEVELAND, et al.,)	
)	ON APPEAL FROM THE CUYAHOGA
Relators/Appellants)	COUNTY COURT OF APPEALS,
)	EIGHTH APPELLATE DISTRICT
v.)	
)	COURT OF APPEALS CASE
THE HONORABLE JUDGE MICHAEL)	CASE NO. 12-AP-098608
ASTRAB)	
)	
Respondent/Appellee.)	

AMICUS BRIEF OF UNDERLYING PLAINTIFFS IN SUPPORT OF
RESPONDENT/APPELLEE, THE HONORABLE JUDGE MICHAEL ASTRAB

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I. INTRODUCTION

In the underlying action, the Eighth District reversed and remanded the *DiGiorgio* trial court's denial of the Relator's Motion to Dismiss. It did not find immunity for Relators on any issue. Instead, the Eighth District found, pursuant to Rule 12, that the Underlying Plaintiffs' Complaint failed to state a claim for which relief could be granted. The Eighth District went further—in dicta—to note that, as to some of the Underlying Plaintiffs' claims, amendment would be futile. The Respondent entered a dismissal all of the claims, without prejudice. None of the Underlying Plaintiff's claims were adjudicated on the merits. (The Underlying Plaintiffs subsequently re-filed a new Complaint that omitted the claims the Eighth District noted were not cognizable.)

With respect to the remainder of Plaintiffs' underlying claims, the Eighth District did not hold that there are “no set of facts” under which the claim could be recognized. Rather, the Eighth District held that the Plaintiffs' underlying Complaint was insufficiently pled, which made denial of the Relators' Motion to Dismiss improper.

This is not a “determination of immunity,” as Relators claim. Indeed, when presented with technical deficiencies, Ohio courts have uniformly held that such dismissals are “otherwise than upon the merits.” Even when litigants have failed to plead a claim upon which relief can be granted, Ohio jurisprudence requires that any dismissal be “otherwise than upon the merits” unless there are no “set of facts” which could present a cognizable claim. Recognizing this preference, the trial court in interpreting the Eighth District's mandate dismissed the Plaintiffs' underlying claim without prejudice. (Indeed, under the liberal Rule 15 standard, the respondent trial court should have permitted the Underlying Plaintiffs leave to amend, but that issue is not before this Court.)

Knowing that a dismissal with prejudice would be contrary to its mandate and Ohio law, the Eighth District properly denied the Relators' request to issue a writ of mandamus requiring the trial court to dismiss the Plaintiffs' claims with prejudice. Because the Respondent Trial Court, did not patently and unambiguously disregard the Eighth District's mandate, the Relators' appeal must be denied and the Eighth District's decision denying the writ affirmed. Moreover, because the claims have never been adjudicated on their merits, dismissal with prejudice would run counter to Ohio's preference for deciding claims on their merits, rather than on technical pleading requirements.

II. STATEMENT OF PROCEDURAL HISTORY

The case arises from the untimely death of Plaintiffs' decedent, Virginia DiGiorgio, who was hit and killed by a vehicle being pursued by Relators' police officers. Plaintiffs filed the underlying Complaint alleging several different claims against the Relators. These claims, in order, were based upon the following alleged "operative facts":

- 1) The officers' reckless initiation, continuation and manner in which they conducted their high-speed pursuit of the stolen vehicle;
- 2) The supervisors' reckless failure to train and/or have policies and procedures regarding police chases;
- 3) The police chief's reckless failure to train and/or have policies and procedures regarding police chases;
- 4) The police chief and city's reckless failure to adequately supervise the specific high-speed pursuit and/or provide appropriate communication equipment that led to Mrs. DiGiorgio's death; and

- 5) The police chief and supervisor's reckless failure to adequately supervise and/or participate in the specific high-speed pursuit that led to Mrs. DiGiorgio's death.¹

The Relators filed a Motion to Dismiss alleging that the Complaint failed to plead sufficient facts to support an exception to immunity under R.C. 2744, Ohio's political subdivision immunity laws. The trial court denied this Motion without opinion and the Relators appealed.

On appeal, Relators raised two arguments. First, Relators argued that the trial court erred in denying their Motion for Judgment on the Pleadings regarding Appellees' second, third, fourth, and fifth causes of action against the City, Chief McGrath and Sergeant Gibian, in their official capacities, because they are immune from liability under R.C. 2744. In analyzing whether there was "any set of facts" that would support these claims, the Eighth Appellate District in *DiGiorgio II*² held that there were no exceptions to immunity that would impose liability for the training of a police force (second and third causes of action), the supervision of a police force or the operation of its communication system (fourth cause of action), or the discipline of police officers (the fifth cause of action). Hence, *DiGiorgio II* held that Relators' chief and supervisor were immune, in their official capacities, from liability regarding **these causes of action**. This finding of immunity, however, **did not** address Plaintiffs' first cause of action against the officers who actually chased the juveniles during the pursuit itself.

Regarding the first cause of action against the officers for their reckless conduct in initiating/pursuing the juveniles, the Relators argued that the Plaintiffs' Complaint

¹ The remaining five causes of action were either against the juveniles who were being pursued by the police officers and/or were derivative claims.

² November 10, 2011.

should have been dismissed for procedural reasons only – failure to plead sufficient facts. Finding that the allegations were “conclusory” and lacked sufficient facts to support “willful and/or wanton” conduct, *DiGiorgio II* held that the “first cause of action should have been dismissed.” A special mandate was issued to the trial court. Importantly, *DiGiorgio II* was silent on whether any “dismissal” should be with, or without, prejudice.

Upon remand, the Respondent denied Plaintiffs’ efforts to file an Amended Complaint and, instead, dismissed Plaintiffs’ Complaint against the Relators **without prejudice**. The Relators appealed the trial court’s dismissal **without prejudice** to the superior court, the Eighth District Appellate Court. The Relators complained that the Respondent’s dismissal without prejudice failed to comply with *DiGiorgio II*. Specifically, Relators argued that *DiGiorgio II* required a dismissal with prejudice.

Sua sponte, the Eighth District Court dismissed the appeal and cross-appeal per R.C. 2505.02 and Civ.R. 54(B). Specifically, the Eighth District advised that “if there were an issue with a lower court followed the mandate of the Court of Appeals, this challenge can be addressed through filing an extraordinary writ.” The Relator then filed a writ of mandamus action with the Eighth District Court of Appeals – the same court who issued *DiGiorgio II*. The Relator sought an order compelling Respondent, the trial court, to dismiss Plaintiffs’ Complaint **with prejudice**. Interpreting its own decision at length, the Eighth District **denied** Relators’ writ of mandamus. The Relators have now appealed this denial, to this Court. In claiming that the Eighth District’s refusal to issue the writ was error, the Relator necessarily argues that the Eighth District failed to understand the import of its own decision, *DiGiorgio II*. Since this argument fails legally

and factually, the underlying Plaintiffs urge the Court to affirm the Eighth District's decision.

III. LEGAL STANDARD

The “extraordinary relief in the form of writs of mandamus . . . is appropriate to require a lower court to comply with and not proceed contrary to the mandate of a superior court.” *State ex rel. Jelinek v. Schneider*, 2010-Ohio-5986, 127 Ohio St. 3d 332, 939 N.E.2d 847 (2010). In order to compel the issuance of a writ, the relators must establish that: (1) the relators possess a clear legal right to the relief requested; (2) the respondent holds a clear legal duty to perform the relief requested; and (3) there exists no other adequate remedy in the ordinary course of the law. *State ex rel. Nicols v. Cuyahoga Cty. Bd. Of Mental Retardation & Dev. Disabilities*, 72 Ohio St.3d 205, 1995-Ohio-215; *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432. Due to this strict standard, writs will not be issued in cases where the right to mandamus is unclear or doubtful. *State ex rel. Papadopoulos v. Industrial Commission of Ohio (1935)*, 130 Ohio St. 77, 196 N.E. 780; *State ex rel. Connole v. Cleveland Board of Education (1993)*, 87 Ohio App.3d 43, 621 N.E.2d 850.

IV. LAW AND ANALYSIS

In the present case, Relators argue the Eighth District committed error in interpreting its own mandate. Inaccurately, the Relators interpret the opinion rendered in *DiGiorgio II* as mandating the Respondent to dismiss the underlying case with prejudice. The Relators advance three theories: (1) mandamus is justified to compel the respondent to adhere to the Eighth District's incorrect interpretation of its own mandate; (2) Relators have a clear legal right to an entry of dismissal with prejudice as mandated by the law of the case; and (3) pursuant to Civ.R. 41, Respondent is obligated to

dismiss the underlying action with prejudice because the appellate court's mandate did not specify otherwise.

Ohio law requires that dismissals for "procedural deficiencies" be "without prejudice." The trial court did not patently and unambiguously disregard the Eighth District's mandate by dismissing Plaintiffs' complaint without prejudice. The Eighth District's decision is silent on whether such dismissal should be with or without prejudice, and the basis of the reversal was an insufficiently pled complaint. Because the Eighth District correctly interpreted their own mandate, Relators' multiple theories encumber the resolution of this straightforward issue.

A. THE EIGHTH DISTRICT IS IN THE BEST POSITION TO INTERPRET ITS OWN MANDATE.

The Eighth District's denial of the Writ of Mandamus should be affirmed because the Eighth District was interpreting its own mandate. "[T]he court that issued the order sought to be enforced is in the best position to determine if that order has been disobeyed." *State ex rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249, 252, 648 N.E.2d 1355.

In *State ex rel. Pyle v. Bessey*, 112 Ohio St.3d 119, 121 (2006), this Court held a court of appeals to be in the best position to determine whether their prior mandate had been followed. Because the court of appeals did not "patently and unambiguously disregard its mandate" when they affirmed their prior mandate, this Court affirmed denial of the writ. *Id.* Likewise, in *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 387 (2006), this Court again affirmed that "the court of appeals was in the best position to determine whether Judge Celebrezze had disregarded its mandate." *Id.* The trial judge did not patently and unambiguously disregard the mandate of the appellate court, which

was evidenced by their writ denial. *Id.* Moreover, because of the availability of other means of enforcement – appeal and motion for contempt – the Court refused to use the extraordinary relief of issuing a writ. *Id.* at 388. See also, *State ex rel. Willacy v. Smith* (1997), 78 Ohio St.3d 47, 50–51, 676 N.E.2d 109 (affirming the appellate court’s refusal to issue a mandate when the appellate court had simply dismissed the appeal and remanded the case); *State ex rel. Borden v. Hendon*, 96 Ohio St.3d 64 (2002) (Juvenile’s writ to terminate court’s reinstatement of suspended sentence was properly denied when the juvenile had adequate remedies of law); *State ex rel. Sizemore v. Ohio Veterinary Med. Licensing Bd.*, 132 Ohio St.3d 296 (2012).

This is a universal rule. “The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, **it is for this court to construe its own mandate, and to act accordingly.**” *In re Sanford Fork & Tool Co.*, 160 U.S. at 255-256, 16 S.Ct. at 293, 40 L.Ed. at 416 (cited in *State ex rel. Heck v. Kessler*, 72 Ohio St.3d 98 (1995)) (emphasis added). Because the Eighth District is in the best position to interpret its mandates, the Eighth District’s refusal to issue a writ should be affirmed.

B. THE DISMISSAL WAS BASED ON A LACK OF SUFFICIENT PLEADING IS NOT THE EQUIVALENT OF “FINDING IMMUNITY.”

Contrary to the Relators’ argument, the Complaint at issue here from *DiGiorgio II* was not dismissed on immunity grounds; rather, it was remanded for dismissal based on a finding of insufficiently pled Complaint. As such, the Respondent had the discretion to dismiss the action without prejudice and did not modify the law of the case.

The law-of-the-case doctrine is necessary “to ensure consistency of results in case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts.” *Hopkins v. Dyer*, 104 Ohio St.3d 461 (2004). While that structure is pertinent to a consistent judicial process, “neither mandamus, nor procedendo, no prohibition will issue if the party seeking extraordinary relief has an adequate remedy in the ordinary course of the law.” *State ex rel. Jelinek v. Schneider*, 2010-Ohio-5986, 127 Ohio St. 3d 332, 939 N.E.2d 847 (2010). Lastly, “The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results.” *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 11 OBR 1, 462 N.E.2d 410. Thus, mandamus, although used sparingly, is an available remedy to enforce the law of the case. *Potain v. Mathews*, 59 Ohio St.2d 29; *State ex rel. Heck v. Kessler* (1995), 72 Ohio St.3d 98, 100, 647 N.E.2d 792, 795

Likewise, Relators conveniently mention *State ex rel. Sharif v. McDonnell*, 91 Ohio St.3d 46 (2001) as support for issuing the writ, as it is necessary for consistency of result. Here, when compelling the trial court judge to follow their previous mandate, the appellate court noted that “the same appellate panel issued the order on the petition for postconviction relief and the decision on this writ of mandamus...this panel is in the best position to state the import of its order on the appeal of the dismissal of the petition for postconviction relief.” *Id* at 47. The law of the case was determined by that appellate court – no different than the Eighth District determining its own law-of-the-case mandate in the case *sub judice*. The Eighth District recognized their own law of the case. The two panels even shared one judge in common: the judge who issued *DiGiorgio II* participated on the panel that denied the writ.

The Relators' reliance on *Potain v. Mathews*, 59 Ohio St.2d 29 (1979), is misplaced. Although this Court upheld the granting of a writ of mandamus, it did so under entirely different factual circumstances presented herein. In *Potain*, some of the plaintiffs' claims were subject to a clear order dismissing them "with prejudice." There was no dispute that the claims had been dismissed with prejudice by court order. Rather than appealing this order, however, the plaintiff merely filed an amended complaint reasserting both the same and new claims. As it relates to claims previously "dismissed with prejudice," there was no ambiguity in the law: they were barred. Accordingly, the trial court's refusal to strike those claims in the Amended Complaint was clear error. The defendant's motion for a writ of mandamus in that limited circumstance was well-taken. Importantly, however, the *Potain* court noted that the other "new claims" were not to be stricken.

Potain is inapplicable to the facts presented in this case. First, the *Potain* trial court refused to acknowledge a basic tenant of Ohio law – a claim once dismissed with prejudice is final and can no longer be pursued. In contrast, the *DiGiorgio* trial court was tasked with interpreting a lengthy opinion. Although the nature of the "dismissal" was not specifically stated, the context of the "dismissal" – insufficiently pled complaint – certainly supported a dismissal without prejudice. Second, permitting the *Potain* trial court's decision to stand would flout a basic principle of Ohio law. In contrast, permitting *DiGiorgio* trial court's decision to stand promotes Ohio jurisprudence's long-standing principle of deciding cases on their merits and not procedural deficiencies.

Relators' argument ignores this Court's precedent in *Jelinek v. Schneider*, 127 Ohio St. 3d 332 (2010). As in this case, *Jelinek* involved a complex procedural history.

The underlying action was an employment case alleging both age discrimination and constructive discharge claims. At trial, the employee was awarded a verdict on the age discrimination claim; but not on the constructive discharge claim. The trial court granted a motion notwithstanding verdict on the age discrimination claim. Both sides appealed. On appeal, the appellate court overruled the employee's appeal regarding the denied constructive discharge claim and granted a new trial on the age discrimination only. Subsequently, a new trial court judge attempted to limit a new trial to the age discrimination claim. The employee sought a writ of mandamus requiring the trial court to include the constructive discharge claim. The writ was denied – as it was in this case – because the trial court did not “patently and unambiguously disregard the court of appeals’ mandate” and since the employee had “adequate remedies in the ordinary course of law.” Likewise, in this case, the Respondent did not patently and unambiguously disregard the appellate court’s mandate and the Relators have adequate remedies in the ordinary course of law.

Finally, the Respondent’s interpretation of the Eighth District’s mandate as requiring a dismissal **without prejudice** is both reasonable and most consistent with this Honorable Court’s position in analogous settings. Specifically, this Court’s recent decisions within the medical malpractice setting is instructive to this case. Pursuant to Civ.R. 10, an affidavit of merit must be attached to each complaint alleging medical malpractice. Unless excused, failure to attach an affidavit of merit can be grounds for Civ.R.12(B)(6) Motion to Dismiss. This Court has determined that failure to attach an affidavit of merit is an adjudication “otherwise than upon the merits.” *Fletcher v. Univ. Hosps. Of Cleve.*, 120 Ohio St. 3d 167, 2008-Ohio-5379. More recently, this Court has

held that a court's dismissal of a complaint for failure to file an affidavit of merit is otherwise that upon the merits – **by operation of law**. *Troyer v. Janis*, 132 Ohio St.3d 229, 2012-Ohio-2406. Similarly, in this case, a dismissal of an insufficiently pled complaint, by operation of law, is an adjudication otherwise than upon the merits.

C. THE MANDATE IN *DIGIORGIO II* DID NOT ORDER A DISMISSAL WITH PREJUDICE PURSUANT TO CIVIL RULE 41(B)(3) AND WAS NOT AN ADJUDICATION ON THE MERITS.

Contrary to Relators' assertion, the Eighth District's remand for dismissal was not based on the merits, but rather was based on an insufficiently pled complaint. Under Civil Rule 41(B)(3):

A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits, **unless the court, in its order for dismissal, otherwise specifies.**

The context of Civ.R. 41(B)(3) is not applicable to the facts herein. As an initial matter, the appellate court never issued an involuntary order dismissing Plaintiffs' Complaint. Rather, the appellate court issued a remand – not a dismissal order. Indeed, the trial court's order made clear it was a dismissal without prejudice. This order is consistent with Ohio jurisdiction.

The Eighth District, interpreting its own mandate, stated “the judgment of this court did not mandate a dismissal of the relators with prejudice, but simply found that it was error to deny the relators' motions to dismiss for judgment on the pleading and *remanded the matter.*” *State ex rel. City of Cleveland v. Honorable Judge Michael Astrab*, 8th District Cuyahoga, No. 98608 (April 19, 2013). The Relators confuse the situation by interpreting this as an actual adjudication.

While failure to state a claim upon which relief can be granted can constitute adjudication on the merits, it only does so when it appears beyond doubt from the complaint that the Plaintiff can prove no set of facts entitling him to recovery.” *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St. 2d 242, following *Conley v. Gibson*, 355 U.S. 41. As such, “a dismissal for failure to state a claim is **without prejudice** except in those cases where the claim cannot be pleaded in any other way.” *Morris v. Morris*, 189 Ohio App.3d 608, 621 (10th Dist. 2010) (emphasis added).

In this case, however, the Eighth District’s opinion fails to state a claim upon which relief can be granted.³ Rather, the Court remanded for dismissal due to insufficient facts in alleging willful and wanton misconduct.

V. CONCLUSION

The Eighth District’s refusal to issue an extraordinary writ should be upheld since the trial court did not patently and unambiguously disregard the Eighth District’s mandate; the Eighth District has held that the trial court’s actions did not violate its mandate and the trial court’s interpretation of the Eighth District’s mandate was imminently reasonable given Ohio’s preference to decide cases on their merit – not technicalities – and this Court’s parallel decisions in *Fletcher v. Univ. Hosps. of Cleve.*, 120 Ohio St. 3d 167, 2008-Ohio-5379; *Troyer v. Janis*, 132 Ohio St.3d 229, 2012-Ohio-2406.

³ While Relators correctly interpret the Eighth District’s opinion concerning the first assignment of error, they patently misinterpret the second assignment of error and confuse it as adjudication upon the merits. In reality, the Eighth District unambiguously told underlying plaintiffs how to amend their complaint to satisfy the pleading requirements.

The Eighth District's denial of an extraordinary writ of mandamus should be
AFFIRMED.

Respectfully submitted,



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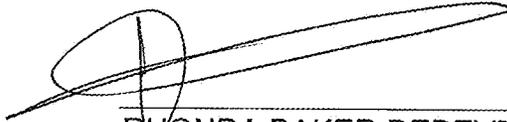
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