

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

ARTHUR HOPSON,

Plaintiff-Appellant,

v.

JASON R. DELATORE, M.D.,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY **Case No. 18 MA 0053**

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2018 CV 401

BEFORE:

Gene Donofrio, Carol Ann Robb, Kathleen Bartlett, Judges.

JUDGMENT:

Affirmed

Atty. Michael Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, Ohio 44482, for Plaintiff-Appellant, and

Atty. Thomas Prislipsky, Reminger Co., LPA, 11 Federal Plaza Central, Suite 1200, Youngstown, Ohio 44503, for Defendant-Appellee.

Dated:
December 27, 2018

Donofrio, J.

{¶1} Plaintiff-appellant, Arthur Hopson, appeals the Mahoning County Common Pleas Court’s judgment granting defendant-appellee’s, Jason Delatore, M.D.’s, motion for judgment on the pleadings.

{¶2} On February 9, 2018, appellant filed a complaint against appellee. The complaint alleged appellee failed to disclose the risks associated with a medical procedure resulting in a lack of informed consent for the procedure. Specifically, the complaint alleged that appellant “elected to undergo the [appellee’s] surgical insertion of an arteriovenous graft, with ligation of fistula and insertion of tunneled catheter.” The complaint further alleged that appellee did not disclose the potential risks associated with the procedure and that the undisclosed risk and danger was the proximate cause of injuries appellant sustained.

{¶3} Appellee filed a motion for judgment on the pleadings. The basis of this motion was that appellant’s complaint set forth a medical claim pursuant to R.C. 2305.113, which requires complaints setting forth medical claims to be accompanied by an affidavit of merit. Because appellant’s complaint was not accompanied by an affidavit of merit, appellee argued that he was entitled to judgment on the pleadings pursuant to Civ.R. 10(D).

{¶4} Appellant argued Civ.R. 10(D) only mandates an affidavit of merit to address issues regarding the standard of care. Appellant argued that the standard of care applied to negligence cases and his claims were based on the lack of informed consent rather than the medical treatment. Because his claim was based on the lack of informed consent, appellant argued his complaint raised a battery claim rather than a medical claim.

{¶5} In a judgment entry dated April 20, 2018, the trial court granted appellee’s motion for judgment on the pleadings. Appellant timely filed this appeal on May 15, 2018. Appellant now raises one assignment of error.

{¶6} Appellant’s sole assignment of error states:

THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON THE
PLEADINGS IN DEFENDANT-APPELLEE'S FAVOR.

{¶7} Appellant argues that his complaint set forth a cause of action for battery, not negligence, and does not require an affidavit of merit.

{¶8} The standard of review for the granting of a motion for judgment on the pleadings is the same standard used to review Civ.R. 12(B)(6) rulings. *Doolittle v. Shook*, 7th Dist. No. 06 MA 65, 2007-Ohio-1412, ¶ 9. The standard of review for a Civ.R. 12(B)(6) motion to dismiss requires the appellate court to independently review the complaint to determine if the dismissal was appropriate. *Ferreri v. Plain Dealer Publishing Co.* 142 Ohio App.3d 629, 639, 756 N.E.2d 712 (8th Dist. 2001). A motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion that tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992).

{¶9} Appellant's complaint, in its entirety, sets forth the following allegations:

1. At all times relevant, the [appellee] was [appellant's] physician-surgeon.
2. At all times relevant, [appellant] elected to undergo the [appellee's] surgical insertion of an arteriovenous graft, with ligation of fistula and insertion of tunneled catheter.
3. At all times relevant, ulnar nerve entrapment, with ensuing and permanent nerve damage was a material risk and potential danger of such surgical insertion, with ligation and insertion of tunneled catheter.
4. The [appellee] never disclosed to [appellant] such risk and danger at any time relevant.
5. In fact, that undisclosed risk and danger materialized as the proximate cause of [appellant's] ensuing injuries, insult, loss and harm.
6. Had the risk and danger been disclosed in advance of the surgical procedure, a reasonable patient in [appellant's] position would have declined to undergo the procedure.

(Complaint).

{¶10} Appellant argues that his complaint set forth a cause of action for battery. But appellant's complaint set forth a medical claim. Under Ohio law, a "medical claim" is defined as:

(3) * * * any claim that is asserted in any civil action against a physician, *
* * that arises out of the medical diagnosis, care, or treatment of any
person. "Medical claim" includes the following:

* * *

(b) Claims that arise out of the plan of care, medical diagnosis, or
treatment of any person and to which either of the following applies:

(i) The claim results from acts or omissions in providing medical care.

R.C. 2305.113(E)(3)(b)(i).

{¶11} Appellant's complaint falls under the definition of medical claim. Appellant's complaint at paragraph one alleges that, at all times relevant, appellee was appellant's physician-surgeon. Appellant's claim also arises out of the plan of care, medical diagnosis, or treatment, specifically appellee's failure to inform appellant of certain risks associated with the procedure appellant received.

{¶12} Moreover, appellant's claim is not one for battery but rather for lack of informed consent. Appellee cites *Nickell v. Gonzalez*, 17 Ohio St.3d 136, 477 N.E.2d 1145 (1985), where the Ohio Supreme Court defined the tort of lack of informed consent as:

- (a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;
- (b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and
- (c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and

incidental to treatment been disclosed to him or her prior to the therapy.

Id. at 139.

{¶13} The elements of lack of informed consent are the same elements that are pled in paragraphs three, four, and five of appellant's complaint.

{¶14} The tort of lack of informed consent is a medical claim. *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, 959 N.E.2d 1033, ¶ 2. The Supreme Court reasoned that lack of informed consent is a medical claim because:

[P]atient bears the burden to present expert medical testimony identifying the material risks and dangers of the medical procedure and showing that one or more of those undisclosed risks and dangers materialized and proximately caused injury. Expert testimony is necessary because these elements of the tort require the knowledge, training, and experience of a medical expert to assist the jury in rendering its verdict.

Id.

{¶15} Pursuant to Civ.R. 10(D)(2)(a), medical claims shall be accompanied by an affidavit of merit provided by an expert witness that contains: a statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning allegations in the complaint, the affiant is familiar with the applicable standard of care, and an opinion by the affiant that the standard of care was breached and said breach caused injury to the plaintiff. Since appellant's complaint sets forth a medical claim, it was required to have an affidavit of merit. Because appellant's complaint was not accompanied with an affidavit of merit, the trial court's judgment granting appellee's motion for judgment on the pleadings was proper.

{¶16} Accordingly, appellant's sole assignment of error lacks merit and is overruled.

{¶17} For the reasons stated above, the trial court's judgment is hereby affirmed.

Robb, P.J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.