[Cite as *Miller v. MetroHealth Med. Ctr.*, 2018-Ohio-1202.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106104

HANSFORD MILLER

PLAINTIFF-APPELLANT

vs.

METROHEALTH MEDICAL CENTER A.K.A. METROHEALTH HOSPITAL, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-848117

BEFORE: E.A. Gallagher, A.J., McCormack, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 29, 2018

ATTORNEY FOR APPELLANT

George K. Simakis
George K. Simakis Attorney at Law L.L.C.
4186 Pearl Road
Cleveland, Ohio 44109

ATTORNEYS FOR APPELLEES

Kris H. Treu
Timothy Y. Chai
Moscarino & Treu, L.L.P.
The Hanna Building
1422 Euclid Avenue, Suite 630
Cleveland, Ohio 44115

EILEEN A. GALLAGHER, A.J.:

{¶1} Plaintiff-appellant Hansford Miller appeals from the trial court's decision granting partial summary judgment in favor of defendants-appellees, MetroHealth Medical Center ("MetroHealth") and Paul Priebe, M.D. (collectively, "appellees") on Miller's medical battery claim. For the reasons that follow, we affirm the trial court's judgment.

Factual and Procedural Background

{¶2} In 2012, Miller sought treatment for abdominal pain with Dr. Priebe at MetroHealth. Dr. Priebe diagnosed Miller with a bilateral inguinal and umbilical hernia and recommended surgery to repair the hernia. Miller executed a written consent form, consenting to the surgery (the "June 11, 2012 consent form"). On June 11, 2012, Dr. Priebe performed the surgery, using a mesh implant to repair the hernia. Nathaniel_Liu, M.D., assisted Dr. Priebe with the surgery (the "June 11, 2012 surgery" or the "first surgery").

{¶3} Miller was discharged on June 12, 2012. After Miller returned home, he began experiencing complications from the surgery. On June 16, 2012, he returned to MetroHealth complaining of severe abdominal pain. He underwent a second surgery on June 17, 2017 (the "June 17, 2012 surgery" or the "second surgery"). Dr. Priebe performed the second surgery. The second surgery was successful and Miller experienced no additional postoperative complications._

{¶4} Miller contends that, prior to the second surgery, he told several MetroHealth employees that he did not want Dr. Priebe to perform the second surgery. Nevertheless, he executed a written consent form, indicating his consent to "[e]xploration and ventral hernia repair with mesh" to be performed by Dr. Priebe.

{¶5} Miller filed suit against MetroHealth and Dr. Priebe in May 2013. In July 2014, he voluntarily dismissed his complaint. A year later, Miller re-filed his action against Dr. Priebe and MetroHealth asserting claims of "negligence— medical malpractice" related to the June 11, 2012 surgery and a battery claim based on lack of consent to the June 17, 2012 surgery. Miller alleged that Miller had breached the "acceptable standard of medical care" by failing to properly implant the mesh in the first surgery and claimed that he had specifically instructed MetroHealth staff, prior to his second surgery, that he did not want Dr. Priebe performing that surgery. Appellees filed answers denying liability and asserting various affirmative defenses.

{¶6} In June 2017, appellees filed a motion for partial summary judgment on the battery claim, arguing that it "has no basis under Ohio law" because Miller gave written consent for the surgery. In support of their motion, appellees submitted excerpts from Miller's deposition and a copy of the June 16, 2012 consent form signed by Miller. Miller opposed the motion, asserting that although he had executed the consent form, he did not, in fact, consent to Dr. Priebe performing the second surgery. He contended that in his testimony that he verbally informed MetroHealth that he did not want Dr. Priebe to perform the second surgery and that he was unaware that what he signed was a consent form for the second surgery. That, along with the testimony of his expert, Michael

Wingate, M.D., that Miller did not consent to the second surgery created genuine issues of material fact for trial on the battery claim according to Miller. In support of his opposition, Miller attached excerpts from his deposition, a copy of the consent form for the second surgery and affidavits executed by himself and his expert.

{¶7} On July 18, 2017, the trial court granted defendant's motion for partial summary judgment on the battery claim, entered judgment on that claim and certified the matter for immediate appeal under Civ.R. 54(B), indicating that there was "no just cause for delay."[1] Miller appealed, raising the following sole assignment of error for review:

> The Trial Court erred when in granted Appellees' Motion for Partial Summary Judgment (battery claim) because Appellant did not consent to receiving medical care and treatment from Appellee Paul Priebe, M.D. on or about June 16, 2012 as evidenced by Appellant's Affidavit, Appellant's deposition testimony and expert Affidavit.

Law and Analysis

Standard of Review

---

[1]On September 13, 2017, appellees filed a motion to dismiss this appeal for lack of a final, appealable order. Appellees argued that Miller's medical battery claim was "so interrelated" to his remaining negligence claims that the trial court's order granting partial summary judgment was not a final, appealable order, notwithstanding the trial court's inclusion of Civ.R. 54(B) language in its judgment entry.

Upon initial review, this court denied appellees' motion but referred the issue to this panel to decide "whether [the battery] claim is so intertwined with appellant's medical malpractice claim that the claims cannot be decided separately." Upon further review, we agree with the denial of appellees' motion to dismiss. We find that the battery and negligence/medical malpractice claims, which involve different conduct, different surgeries and different issues — i.e., whether Dr. Priebe breached a standard of care in performing the first surgery and whether Miller consented to the second surgery — are not so intertwined that they could not be decided separately. Accordingly, the trial court did not abuse its discretion in certifying that there was no just reason to delay the appeal of its summary judgment ruling on the medical battery claim pursuant to Civ.R. 54(B).

{¶8} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We accord no deference to the trial court's decision and conduct an independent review of the record to determine whether summary judgment is appropriate.

{¶9} Under Civ.R. 56, summary judgment is appropriate when no genuine issue as to any material fact exists and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party, entitling the moving party to judgment as a matter of law.

{¶10} On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

{¶11} "Although courts are cautioned to construe the evidence in favor of the nonmoving party, summary judgment is not to be discouraged where a non-movant fails to respond with evidence supporting the essentials of his claim." *Mayhew v. Massey*, 2017-Ohio-1016, 86 N.E.3d 758, ¶ 11 (7th Dist.), citing *Leibreich v. A.J. Refrig., Inc.*, 67 Ohio St.3d 266, 269, 617 N.E.2d 1068 (1993). Civ.R. 56 must be applied in a manner that balances the right of the nonmoving party to have a jury try claims that are adequately

based in fact with the right of the moving party to demonstrate, prior to trial, that the claims have no factual basis. *See, e.g., Mayhew* at ¶ 11, citing *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 11.

Medical Battery

{¶12} In his sole assignment of error, Miller contends that the trial court erred in granting partial summary judgment in favor of appellees on his battery claim.

{¶13} To recover on a claim for battery, a plaintiff must prove an "intentional, unconsented-to touching." *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St.3d 82, 84, 671 N.E.2d 225 (1996); *Schwaller v. Maguire*, 1st Dist. Hamilton No. C-020555, 2003-Ohio-6917, ¶ 14; *Lipp v. Kwyer*, 6th Dist. Lucas No. L-02-1150, 2003-Ohio-3988, ¶ 25. _Every competent adult has a right to decide what is done to his or her body. *Lipp* at ¶ 24, citing *Siegel v. Mt. Sinai Hosp.*, 62 Ohio App.2d 12, 21, 403 N.E.2d 202 (8th Dist.1978). In a medical setting, if a physician treats a patient without authorization or consent, the physician has committed a technical battery — even if the procedure is beneficial or harmless. *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956), paragraph one of the syllabus; *Maglosky v. Kest*, 8th Dist. Cuyahoga No. 85382, 2005-Ohio-5133, ¶ 24; *Estate of Leach v. Shapiro*, 13 Ohio App.3d 393, 395, 469 N.E.2d 1047 (9th Dist.1984)*; see also Dean v. Akron Gen. Med. Ctr.*, 9th Dist. Summit No. 18636, 1999 Ohio App. LEXIS 6169, *13 (Dec. 22, 1999) ("Surgery performed without the proper consent constitutes technical battery.").

{¶14} Unconsented touching can arise either because no consent was given or because the consent that was given was limited and the procedure(s) performed went

beyond the consent given. *See, e.g.*, *Dean* at *13; *see also Leach* at 395 ("Not only must a patient consent to treatment, but the patient's consent must be informed consent. There is no legal defense to battery based_on consent if a patient's consent to touching is given without sufficient knowledge and understanding of the nature of the touching.").

{¶15} Where, however, a patient gives express, informed consent prior to medical treatment, there is no battery. If a defendant offers proof that a plaintiff has consented to a medical procedure and the plaintiff fails to present evidence that the procedure was performed without informed consent or that the procedure performed exceeded his or her informed consent, "there is a failure of proof on an essential element of battery." *Marcum v. Holzer Clinic, Inc.*, 4th Dist. Gallia No. 03CA25, 2004-Ohio-4124, ¶ 37; citing *Lipp*, 2003-Ohio-3988. Whether consent has been given is generally an issue of fact. *Leach* at 395, citing *Wells v. Van Nort*, 100 Ohio St. 101, 125 N.E. 910 (1919).

{¶16} Miller contends he did not consent to the second surgery and that, therefore, the second surgery constituted an intentional, nonconsensual touching. Miller does not dispute that he signed the consent form on June 16, 2012. However, he claims that he also told certain MetroHealth staff he did not want Dr. Priebe performing the second surgery. He argues his deposition and affidavit testimony and the affidavit from his expert Dr. Wingate were sufficient to create a jury question as to whether he consented to the second surgery and that summary judgment on his battery claim was, therefore, improper. We disagree.

{¶17} At his deposition, Miller testified:

A. I thought [Dr. Priebe] wasn't going to do the second operation[.]

Q. Why did you think that?

A. Because I requested I didn't want him working on me.

Q. Who did you tell that to?

A. I told the doctors that I didn't want him working on me no more. So apparently when they put me under he redid the operation then.

Q. Well, you signed a consent form that has his name on it, didn't you?

A. Yeah. But I didn't want — I didn't want him to do the second operation.

Q. Okay. So why did you sign the form giving him permission to do it?

A. I wasn't aware that that was the form.

Q. Okay. Did you read this form?

A. No, I did not.

Q. Are you claiming that the information on there wasn't there when you signed it?

A. No. I'm sure the information was there, but I wasn't — I didn't read it. * * * I mean, I was in a lot of pain. I just wanted to get this done and over. You know what I mean?

* * *

Q. Is it your testimony that you did not see Dr. Priebe before the operation?

A. I'm not sure of that. I mean, I'm pretty sure I seen these two other — the other two doctors, and I remember Dr. Priebe being in the operating room when they did the second operation, but, you know, I requested that I did not want him, you know, redoing the surgery.

{¶18} In his affidavit, Miller states:

> 3. While I was experiencing the severe pain from the said prior surgery conducted by Dr. Priebe, I was informed by members of the MetroHealth Hospital that were in attendance, that a second surgical procedure would be immediately necessary, at which time I emphatically stated to them when they informed me of my such diagnoses and the necessity of a second surgical procedure, that I did not want such surgery to be performed by the same said Dr. Priebe.
>
> * * *
>
> 5. At no time did I give informed consent to Dr. Priebe nor to MetroHealth Hospital to allow Dr. Priebe to perform the second surgery upon me[.]
>
> * * *
>
> 7. Although my signature appears on the [June 16, 2012] consent form, I did not date the form, did not initial the form, did not fill out the form, did not make any notations on the form, or ascribe any further writing whatsoever on the form beyond my signature.
>
> 8. When I signed the aforementioned consent form, I was not aware that that was the consent form.
>
> 9. At that time, I trusted and expected that my instructions that Dr. Priebe not be the surgeon to perform the surgery would be honored and properly reflected in any forms presented to me immediately prior to the second surgical procedure.

{¶19} The June 16, 2012 consent form explicitly authorized Dr. Priebe to perform "[e]xploration and ventral hernia repair with mesh" on Miller — the procedure that was, in fact, performed during the second surgery. The consent form also contained Miller's acknowledgment that the "operation(s)/procedure(s)" and "[d]iscomfort and risks" had been explained to him, that he understood the "reason for the procedure" and the "likelihood of success," that he had "been given a chance to ask questions" and that "[a]ll my questions have been answered to my liking." Miller does not dispute that he was

completely and accurately advised regarding the nature of the second surgery and the risks associated with it.

{¶20} According to Miller's affidavit, he told unidentified MetroHealth staff members that he did not want Dr. Priebe performing the second surgery *before* he signed the written consent form. Miller does not dispute that, despite his prior statements that he did not want to have Dr. Priebe perform the second surgery, he nevertheless, thereafter, voluntarily signed the written consent form, authorizing Dr. Priebe to perform the second surgery. Thus, for a jury to find for Miller on his battery claim, it would have to conclude that the written consent he subsequently gave was of no effect. Based on the record before us, we find reasonable minds could not reach such a conclusion.

{¶21} Although Miller claimed that he was "not aware" that the consent form he signed on June 16, 2012 was, in fact, a consent form, with the exception of the date and the description of the operation(s)/procedure(s) to be performed, the consent form Miller signed on June 16, 2012 was identical to the consent form he signed on June 11, 2012. Each consent form Miller signed stated at the top of the document "INFORMED CONSENT FOR PROCEDURE(S)" in large, capital letters. The words "INFORMED CONSENT" also appeared in bold, capital letters on the bottom and right side of the document. In each consent form, Miller acknowledged and "confirm[ed]" that he had "read and fully understand[s] the above" and that "[a]ll blank spaces have been completed prior to signing." Although Miller claimed at his deposition that he did not read the June 16, 2012 or June 11, 2012 consent forms prior to signing them, Miller's failure to read what he signed does not create a genuine issue of material fact as to his informed consent.

"'A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed. * * * If a person can read and is not prevented from reading what he signs, he alone_is responsible for his omission to read what he signs.'" *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990), quoting *Dice v. Akron, Canton & Youngstown Rd. Co.*, 155 Ohio St. 185, 191, 98 N.E.2d 301 (1951), *rev'd on other grounds*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952); *see also Altercare of Mayfield Village, Inc. v. Berner*, 2017-Ohio-958, 86 N.E.3d 649, ¶ 32 (8th Dist.); *Abm Farms v. Woods*, 81 Ohio St.3d 498, 503, 692 N.E.2d 574 (1998) ("The legal and common-sensical axiom that one must read what one signs survives * * *.").

{¶22} Miller has not offered any evidence that he ever told Dr. Priebe that he did not want him performing the second surgery or that he revoked his written consent to having Dr. Priebe perform the second surgery after signing it. Indeed, although he testified that he saw Dr. Priebe in the operating room prior to his second surgery, he did not offer any evidence that he questioned Dr. Priebe's presence in the operating room or communicated to anyone, after signing the June 16, 2012 consent form, that he did not want Dr. Priebe performing the second surgery.[2]

---

[2] It is unclear from the record how much time elapsed from when Miller told MetroHealth staff that he did not want Dr. Priebe performing the second surgery to his execution of the June 16, 2012 consent form to the performance of the second surgery on June 17, 2012. The June 16, 2012 consent form lists a time of 23:20 next to the "[s]ignature of person who explained procedure/witnessed consent." Miller testified at his deposition that he returned to the hospital during the afternoon of June 16, 2012 and that the second surgery was performed during the early morning hours of June 17, 2012. Other than the consent forms, Miller's medical records relating to the second surgery are not in the record.

{¶23} Dr. Wingate's affidavit likewise does not create a genuine issue of material fact as to whether Miller consented to the second surgery. In his affidavit, Dr. Wingate opines that MetroHealth's medical records "do not show [Miller's] informed consent" for Dr. Priebe to perform the second surgery. He states that the June 16, 2012 consent form "was not part of the medical records," is "inconsistent with similar forms" contained in Miller's medical records and "appears on its face to have been altered" and "to partake the nature of fraud." However, as indicated above, Miller does not dispute that he signed the June 16, 2012 consent form or that "the information on there [was] there when [he] signed it." Under the particular facts and circumstances here, whether or not Miller consented to the second surgery is not an issue as to which Dr. Wingate's expertise is probative.

{¶24} Following a thorough, independent review of the record, we find no genuine issue of material fact regarding whether Miller consented to having Dr. Priebe perform the second surgery. Although appellees met their initial burden under Civ.R. 56, coming forward with evidence establishing the absence of any genuine issues of material fact as to their liability on Miller's battery claim, Miller did not meet his reciprocal burden of pointing to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. As such, the trial court properly granted partial summary judgment in favor of appellees on Miller's battery claim. Miller's assignment of error is overruled.

{¶25} Judgment affirmed.

It is ordered that appellees recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

EILEEN A. GALLAGHER, ADMINISTRATIVE JUDGE

TIM McCORMACK, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR