[Cite as *Theobald v. Univ. of Cincinnati*, 2009-Ohio-5204.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Keith Theobald et al.,	:	
Plaintiffs-Appellants,	:	
		No. 09AP-269
v.	:	(C.C. No. 2001-06461)
University of Cincinnati,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 30, 2009

Douglas C. Holland; *Sullivan & Sullivan*, and *James P. Sullivan*, for appellants.

Richard Cordray, Attorney General, *Karl W. Schedler*, and *Brian M. Kneafsey*, *Jr.*, for appellee.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶1} Plaintiffs-appellants, Keith Theobald, Jacqueline Theobald, Keshia Theobald, and Jacqueline Theobald in her capacity as guardian for Jacob Theobald (collectively "appellants"), filed this appeal seeking reversal of a judgment by the Court of

Claims of Ohio granting summary judgment in favor of defendant-appellee, the University of Cincinnati ("UC"). For the reasons that follow, we affirm.

{¶2} On October 23, 1998, Keith Theobald was seriously injured in a motor vehicle accident, and was taken to University Hospital in Cincinnati. The next day, Theobald underwent extensive surgery performed by Dr. Frederick Luchette and Dr. Jamal Taha. Anesthesia was provided by Dr. Harsha Sharma and nurse anesthetist Maureen Parrott. During the surgery, Theobald suffered a tension pneumothorax. Afterward, Theobald could not see, had lost the use of his right arm, and had limited mobility in his left arm.

{¶3} Appellants filed a medical malpractice action in the Hamilton County Court of Common Pleas against Drs. Luchette, Taha, and Sharma, and Nurse Parrott. The four defendants asserted that they were immune from suit as state employees pursuant to R.C. 9.86. The malpractice action was stayed in Hamilton County while appellants filed an action in the Court of Claims to have the issue of immunity determined. The Court of Claims action was filed on June 15, 2001. The Court of Claims concluded that Dr. Luchette and Dr. Sharma were state employees, but were acting outside the scope of their employment, and that Dr. Taha and Nurse Parrott were not state employees. We concluded that all four were state employees, and ordered the Court of Claims to conduct further proceedings to determine whether the defendants were acting outside the scope of their state employment. *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510. On appeal, the Supreme Court of Ohio affirmed our decision. *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 543, 2006-Ohio-6208.

{¶4} On remand, the Court of Claims conducted an evidentiary hearing on the issue of whether Drs. Luchette, Taha, and Sharma, and Nurse Parrott, were acting outside the scope of their employment. The court determined that all four were acting within the scope of their employment, and thus were entitled to personal immunity under R.C. 9.86. No appeal was filed from that decision.

{¶5} UC then filed a motion for summary judgment, arguing that the statute of limitations had expired prior to the date appellants filed their medical malpractice action. The Court of Claims granted UC's motion, and this appeal followed.

{¶6} Appellants assert seven assignments of error:

> **ASSIGNMENT OF ERROR NO. 1**
>
> THE TRIAL COURT MADE NO FINDING ON THE THEOBALDS' CLAIM THAT THEIR CAUSE OF ACTION AGAINST UNIVERSITY OF CINCINNATI DID NOT ACCRUE UNTIL DECEMBER 18, 2007.
>
> **ASSIGNMENT OF ERROR NO. 2**
>
> THE FINDING THAT THE STATUTE OF LIMITATIONS BARS THIS CASE IS IN ERROR.
>
> **ASSIGNMENT OF ERROR NO. 3**
>
> THE FINDING THAT KEITH THEOBALD'S PATIENT/MEDICAL INSTITUTION RELATIONSHIP WITH THE UNIVERSITY OF CINCINNATI HAS TERMINATED IS IN ERROR.
>
> **ASSIGNMENT OF ERROR NO. 4**
>
> THE FINDING THAT THE UNIVERSITY OF CINCINNATI'S MEDICAL PERSONNEL/EMPLOYEES ARE NO LONGER TREATING KEITH THEOBALD FOR THE MEDICAL CONDITION HE ORIGINALLY SOUGHT MEDICAL CARE IS IN ERROR.

ASSIGNMENT OF ERROR NO. 5

THE FINDING THAT THE UNIVERSITY OF CINCINNATI'S MEDICAL PERSONNEL/EMPLOYEES ARE NO LONGER TREATING KEITH THEOBALD FOR THE INJURIES THEY CAUSED HIM IS IN ERROR.

ASSIGNMENT OF ERROR NO. 6

THE TRIAL COURT ERRED IN SEPARATING OUT INDIVIDUAL PHYSICIANS WHEN THIS SUIT IS BASED ON THE LIABILITY OF THE CORPORATE MEDICAL PROVIDER IS IN ERROR [sic].

ASSIGNMENT OF ERROR NO. 7

THE TRIAL COURT ERRED BY FINDING THAT THE MEDICAL MALPRACTICE SUIT FILED ON OCTOBER 25, 1999, AGAINST THE INDIVIDUAL MEDICAL PROVIDER/EMPLOYER EMPLOYEES DID NOT MEET THE STATUTE OF LIMITATIONS REQUIREMENT TO MAINTAIN THIS CASE IS IN ERROR [sic].

{¶7} Appellants' assignments of error are interrelated, and will therefore be addressed together. Essentially, appellants argue that the trial court erred in granting summary judgment in favor of UC on statute of limitations grounds.

{¶8} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221. We construe the

facts in the record in a light most favorable to appellant, as is appropriate on review of a summary judgment. We review questions of law de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147.

{¶9} Pursuant to R.C. 2305.113, medical claims such as those put forth by appellants must be brought within one year of the date the causes of action accrued. A claim accrues and the statute of limitations begins to run: (1) when the patient discovers or, with the exercise of reasonable care should have discovered, the resulting injury; or (2) when the physician-patient relationship for the condition for which care was sought terminates, whichever occurs later. *Frysinger v. Leech* (1987), 32 Ohio St.3d 38.

{¶10} The trial court concluded that appellants' medical claims accrued on the date Theobald was discharged from University Hospital and transferred to Drake Hospital for specialized rehabilitation, which occurred on November 30, 1998. Appellants set forth a number of arguments to support their claim that the accrual date for their medical claims occurred later than that date.

{¶11} First, appellants argue that their cause of action against UC could only have accrued on December 18, 2007, which was the date upon which the Court of Claims made its final determination that the four original defendants were state employees acting within the scope of their employment. Appellants argue that, prior to that final determination, they could not have known they had medical claims against UC. Appellants further argue that UC affirmatively withheld from them the fact that UC's medical personnel would claim immunity as state employees should act to toll the statute of limitations.

{¶12} Appellants cite to no authority for their claim that the lack of a final determination regarding the claims of immunity by the original four defendants prevented them from knowing they had a cause of action against UC. Appellants were placed on notice that the four medical personnel were claiming immunity as state employees when those claims were asserted in the action originally filed in Hamilton County. Regardless of the lack of a final determination on the issue of immunity, and regardless of whether UC failed to disclose the employment status of their medical personnel at the time of Theobald's surgery, appellants were aware that the status was being claimed more than one year before filing their action in the Court of Claims.

{¶13} Much of the remainder of appellants' argument centers on application of the "termination rule" governing accrual of medical claims, which provides that the date a cause of action accrues may be the date on which the doctor-patient relationship for the condition for which care was sought terminates. The purpose for the termination rule is that it "strengthens the physician-patient relationship. The patient may rely upon the doctor's ability until the relationship is terminated and the physician has the opportunity to give full treatment, including the immediate correction of any errors in judgment on his part. * * * Thus, the termination rule encourages the parties to resolve their dispute without litigation, and stimulates the physician to mitigate the patient's damages." *Frysinger* at 41 (citation omitted).

{¶14} Appellants argue that Theobald's relationship with UC has never terminated, because he has continued to receive rehabilitation treatment from Drake Hospital, another UC affiliated hospital, even up to the current date. The issue is how the termination rule applies when Theobald ceased treating with the medical personnel

involved in his initial medical treatment arising from the motor vehicle accident, and was transferred to a different medical facility affiliated with UC for the purpose of receiving rehabilitation treatment for his injuries.

{¶15} Appellants argue that this case is similar to *Ram v. Cleveland Clinic Found.,* 8th Dist. No. 80447, 2002-Ohio-3644. That case involved a patient who sued the Cleveland Clinic for alleged negligent treatment of her breast cancer. The evidence showed that the physicians who had initially treated her had left the clinic, but that the patient had continued to return to the clinic periodically to continue her breast cancer treatment. The court found that the trial court erred when it concluded that the doctor-patient relationship had terminated when the original treating physicians left, finding that the patient's claim was against the hospital itself, and that she had continued to treat with the clinic for the same condition for which she had originally sought treatment. Id. at ¶24.

{¶16} Here, as in *Ram*, appellants claim is against the hospital itself. However, *Ram* is distinguishable from this case because in *Ram*, the patient was continuing to treat for the exact condition for which she had initially sought treatment, and upon which her medical claims were based. In this case, the evidence shows that Theobald's transfer to Drake was for the purpose of receiving rehabilitation services, and not for the purpose for which care had been sought from University Hospital. Moreover, in *Ram*, the patient continued to treat at the same location. In this case, Theobald was transferred to a completely different hospital that apparently was only coincidentally affiliated with UC.

{¶17} Most importantly, we do not believe the purpose behind the termination rule would be served by a finding that the fact that Drake Hospital and University Hospital are both affiliated with UC compels the conclusion that the doctor-patient relationship has not

been terminated. There is no evidence in the record that Theobald's rehabilitation at Drake was for the purpose of resolving appellants' claims without litigation, or of mitigating appellants' damages.

{¶18} Furthermore, if we were to accept appellants' argument that the doctor-patient relationship has not terminated under these circumstances, appellants' claims would not have accrued even as of this date, and we would be required to consider whether appellants' claims are ripe for adjudication. Requiring patients of entities that own or are affiliated with multiple medical facilities to terminate their relationships with all medical facilities owned by the same entity in order to allow them to have their medical claims against the greater entity adjudicated would actually have the effect of limiting the sources of medical care available to patients in Theobald's position, an effect that seemingly contradicts the purpose behind the termination rule.

{¶19} Appellants also argue that UC has had full knowledge that appellants had medical claims against it since the time appellants filed their action against the individual medical personnel, and therefore could not have been prejudiced by the factors behind the existence of a statute of limitations, such as the ability to collect relevant evidence in order to defend the claims. While correct that the purpose for statutes of limitations is to ensure that defendants have the ability to defend themselves against stale claims, appellants offer no legal support for their argument that plaintiffs may avoid the effect of a statute of limitations by showing that a defendant in a particular case is not affected by that purpose, nor do we find any merit to that argument.

{¶20} Finally, appellants argue that their action was timely filed due to the operation of the savings statute set forth in R.C. 2305.19(A), which provides that:

> In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

{¶21} Appellants argue that the savings statute applies because appellants attempted to commence an action in the Hamilton County Court of Common Pleas, that action failed otherwise than upon the merits, and because the Court of Claims reversed its initial determination that the medical personnel were not state employees after remand from the Supreme Court. We find no merit to these arguments. The action in Hamilton County did not fail otherwise than upon the merits, but instead resulted in the filing of this action in the Court of Claims for a determination on immunity. Furthermore, the change in the decision regarding the employment status by the Court of Claims after remand was not a "reversal" as contemplated by the savings statute.

{¶22} Appellants' seven assignments of error are overruled. Having overruled those assignments of error, we affirm the judgment by the Court of Claims of Ohio.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.

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