

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Raymond L. Eichenberger,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
v.	:	No. 12AP-987
Woodlands Assisted Living Residence, LLC et al.,	:	(C.P.C. No. 10CVC-06-8551)
Defendants-Appellees/ Cross-Appellants.	:	(REGULAR CALENDAR)
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D E C I S I O N

Rendered on September 19, 2013

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*Raymond L. Eichenberger, pro se.*

*Dworken & Bernstein Co., L.P.A., and Richard N. Selby, II,  
for appellees/cross-appellants.*

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiff-appellant/cross-appellee, Raymond L. Eichenberger, personal representative of Jane E. Eichenberger, deceased, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss filed by defendants-appellees/cross-appellants, Woodlands Assisted Living Residence, LLC ("Woodlands"), 7123 Industrial Park Blvd., Inc., Carol Ruff, and Laura Baugus (collectively "appellees"). For the following reasons, we reverse that judgment and remand the matter for further proceedings.

## **I. BACKGROUND**

{¶ 2} On June 8, 2010, appellant filed a complaint alleging he had been "duly appointed by the Franklin County Probate Court as the Executor of the Estate of the late Jane E. Eichenberger" ("decedent"). (June 8, 2010 Complaint, 2.) According to the complaint, decedent was a resident of Woodlands, and on June 12, 2008, appellees "negligently failed to exercise control over" and "negligently failed to provide for" the decedent based upon her falling from a wheelchair being operated and controlled by appellees. (June 8, 2010 Complaint, 2-3.) The complaint also asserted that during 2009, appellees negligently lost or misplaced two sets of decedent's prescription eyeglasses and decedent's wheelchair.

{¶ 3} In addition to an answer, appellees filed a motion to dismiss the first claim of the complaint pursuant to Civ.R. 12(B)(6). Appellees argued appellant's first claim constituted a medical claim that was being asserted beyond the applicable one-year statute of limitations and without the requisite affidavit of merit. Appellant filed a memorandum contra. Attached to the memorandum contra was appellant's affidavit attesting to the circumstances surrounding decedent's fall from the wheelchair. Several procedural motions followed, and on April 7, 2011, appellant sought leave to amend the complaint in order to substitute appellee Baugus for defendant Jane Doe 1. Appellees filed a memorandum contra to appellant's motion, and appellant filed a reply brief in support of the motion to amend.

{¶ 4} Prior to receiving a ruling on either the motion to amend or the motion to dismiss, appellees filed a second motion to dismiss on May 16, 2011. The second motion to dismiss was filed, pursuant to Civ.R. 12(B)(1), and sought dismissal of the entire complaint for lack of standing. Specifically, appellees argued that, because appellant had not been appointed executor of the estate at the time he filed the complaint, he lacked standing to commence litigation, and the complaint had to be dismissed. In support, appellees submitted a copy of a docket sheet from the Franklin County Probate Court purporting to show appellant did not open the estate and become the appointed executor thereof until May 9, 2011.

{¶ 5} In response to the second motion to dismiss, appellant filed on June 1, 2011, a second motion to amend the complaint to reflect that he had now become the appointed

executor of the estate. On the same date, appellant filed a memorandum contra to the dismissal motion wherein appellant admitted he was not appointed executor until May 9, 2011. Appellant also submitted an affidavit attesting to the reasons surrounding the same. In his memorandum contra, appellant argued that, if granted leave to file the second amended complaint, said complaint would relate back to the original filing to cure any quagmires caused by his delayed appointment.

{¶ 6} By entry dated June 15, 2011, the trial court granted appellant's April 7, 2011 motion to amend the complaint, and the amended complaint filed on April 7 was deemed filed instant.<sup>1</sup> Subsequently, on June 24, 2011, appellant, apparently without leave of court, filed an amended complaint that appears to be identical to those amended complaints previously filed.

{¶ 7} On June 29, 2011, appellees filed a third motion to dismiss the complaint pursuant to Civ.R. 12(B)(1) and (6). Appellees argued (1) dismissal of the first claim was proper because it was a medical claim required to be filed within one year and with an affidavit of merit, (2) the entire complaint was required to be dismissed for lack of standing, and (3) Baugus was entitled to dismissal because appellant did not perfect service on her within one year. Appellees again submitted a copy of a docket sheet from the Franklin County Probate Court purporting to show appellant did not open the estate and become the appointed executor thereof until May 9, 2011.

{¶ 8} On October 21, 2011, appellees moved for summary judgment and asserted the same arguments that they asserted in their June 29 motion to dismiss. In support, appellees submitted appellant's deposition and the docket sheets from the Franklin County Probate Court.

{¶ 9} On June 11, 2012, after considering evidence beyond the allegations of the complaint, the trial court granted appellees' June 29, 2011 motion to dismiss the complaint. In that same decision, the trial court held moot all other pending motions. The trial court concluded the first claim asserted in the complaint was not a medical claim subject to a one-year statute of limitations, but, rather, was a negligence claim subject to a

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<sup>1</sup> The April 7, 2011 amended complaint is virtually identical to the original complaint with the exception that Baugus is a named defendant.

two-year statute of limitations and thus denied appellees' motion to dismiss the first claim of the complaint. The trial court next considered the issue of standing. Although the exact basis of its decision is somewhat unclear, the trial court appears to have granted the motion to dismiss, pursuant to Civ.R. 12(B)(1), after having determined that appellant lacked standing at the time he commenced this litigation and that the filing of a complaint after he became executor did not relate back to the original complaint.<sup>2</sup>

## **II. ASSIGNMENTS OF ERROR**

{¶ 10} This appeal followed, and appellant brings the two following assignments of error for our review:

[I.] The trial court erred as a matter of law and abused his discretion in ruling that the plaintiff was not the real party in interest in the litigation, that plaintiff had no standing to file the litigation, and that the amended complaint of the plaintiff did not relate back to the filing of the original complaint for the purposes of the applicable statute of limitations.

[II.] The trial court erred as a matter of law and abused its discretion in ruling that the plaintiff was not the real party in interest to bring the litigation in that the plaintiff had been the trustee of the decedent's trust since 2002. The trust was the sole beneficiary of the last will and testament of the decedent later admitted to probate in Franklin County.

## **III. CROSS-ASSIGNMENTS OF ERROR**

{¶ 11} Appellees have filed a conditional cross-appeal requesting that the following assignments of error be reviewed if this court does not uphold the trial court's dismissal of the complaint:

I. The trial court erred in determining that plaintiff/appellant's claim was not a medical claim governed by Ohio Revised Code Section 2305.113 subject to a one (1) year statute of limitations.

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<sup>2</sup> We note that it is also unclear which complaint the trial court was reviewing, i.e., the April 7 or the June 24 complaint. We presume it was reviewing the April 7 complaint since that was the only complaint for which appellant had leave to file; however, the trial court also references the complaint filed after appellant became executor, which would be referring to the complaint filed seemingly without leave on June 24. However, it is not essential to our analysis in this appeal to determine which complaint the trial court utilized.

II. The trial court erred in not dismissing defendant/cross-appellant Laura Baugus on the grounds that plaintiff/appellant did not obtain service against her within one (1) year of the filing of the complaint.

#### IV. DISCUSSION

##### A. Appellant's Assignments of Error

{¶ 12} Both of appellant's assigned errors challenge the trial court's dismissal of the complaint. In his first assignment of error, appellant challenges the trial court's dismissal of his complaint for lack of standing. We first address the propriety of that dismissal pursuant to Civ.R. 12(B)(1). This rule permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal, pursuant to Civ.R. 12(B)(1), is whether any cause of action cognizable by the forum has been raised in the complaint. *Milhoan v. E. Loc. School Dist. Bd. of Edn.*, 157 Ohio App.3d 716, 2004-Ohio-3243, ¶ 10 (4th Dist.); *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80 (1989). A trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material without converting the motion into one for summary judgment. *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.*, 48 Ohio St.2d 211 (1976), paragraph one of the syllabus. We review an appeal of a dismissal for lack of subject-matter jurisdiction under Civ.R. 12(B)(1) de novo. *Moore v. Franklin Cty. Children Servs.*, 10th Dist. No. 06AP-951, 2007-Ohio-4128, ¶ 15; *Newell v. TRW, Inc.*, 145 Ohio App.3d 198, 200 (6th Dist.2001).

{¶ 13} The action herein involves survival claims that, in accordance with R.C. 2305.21, pass to the decedent's estate. *Williams v. Barrick*, 10th Dist. No. 08AP-133, 2008-Ohio-4592, ¶ 10, citing *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, ¶ 10-11. Thus, in a survival action, a personal representative of the decedent's estate pursues the decedent's claims for the benefit of her estate. *Id.*; *Perry v. Eagle-Picher Industries, Inc.*, 52 Ohio St.3d 168, 169-70 (1990). "In other words, 'a personal representative of a decedent's estate stands in the shoes of the decedent to assert claims on behalf of the estate.' " *Id.*, quoting *Hosfelt v. Miller*, 7th Dist. No. 97-JE-50 (Nov. 22, 2000).

{¶ 14} The trial court's dismissal, pursuant to Civ.R. 12(B)(1), appears to be based on appellant's alleged lack of standing. It is required that to commence a lawsuit, a party must have both standing and capacity to sue. *Mousa v. Mt. Carmel Health Sys.*, 10th Dist. No. 12AP-737, 2013-Ohio-2661, ¶ 12. A person lacks standing unless he has a real interest in the subject matter of the action. *Id.* A person has such an interest if he has suffered an injury of the defendant. *Id.* The complaint alleges it is being brought by decedent's personal representative for the benefit of decedent's children and other next of kin of the decedent pursuant to the relevant Ohio statutes. As such, appellant is a real party in interest and, thus, has standing to bring this litigation. *Id.* (though not yet appointed administratrix of her daughter's estate when the complaint was filed, the parents of the deceased lacked capacity to sue but possessed standing).

{¶ 15} In contrast, capacity concerns a determination as to whether an individual may properly sue, either as an entity or on behalf of another. *Id.* at ¶ 13. Hence, the issue here is whether the action was brought by a properly appointed administrator of the estate and pertains to capacity to sue. As this court has recently explained, while standing is a jurisdictional requirement, capacity to sue is not. *Id.* at ¶ 12-13; *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 24; *Country Club Townhouses-N. Condominium Unit Owners Assn. v. Slates*, 9th Dist. No. 17299 (Jan. 24, 1996) ("Capacity to sue or be sued does not equate with the jurisdiction of a court to adjudicate a matter; it is concerned merely with a party's right to appear in a court in the first instance."); *see also Benefit Mgt. Consultants, Inc. v. Gencorp, Inc.*, 9th Dist. No. 17488 (May 22, 1996) ("Capacity to sue is not jurisdictional."). These issues are properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *See Kiraly v. Francis A. Bonanno, Inc.*, 9th Dist. No. 18250 (Oct. 29, 1997) (affirming Civ.R. 12(B)(6) dismissal of complaint for plaintiff's lack of capacity to sue).

{¶ 16} Because capacity to sue does not challenge the subject-matter jurisdiction of a court, the trial court erred when it dismissed appellant's complaint on these grounds pursuant to Civ.R. 12(B)(1). *Washington Mut. Bank. v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679, ¶ 11; *Vedder v. Warrensville Hts.*, 8th Dist. No. 81005, 2002-Ohio-5567, ¶ 15 (subject-matter jurisdiction involves a court's power to hear and decide a

case on the merits and does not relate to the rights of the parties). Our review of the record reveals no support for the proposition that the trial court lacked subject-matter jurisdiction over this action.

{¶ 17} To the extent the trial court's decision can be construed as dismissing appellant's complaint, pursuant to Civ.R. 12(B)(6), for lack of capacity to sue, "[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Id.*; *O'Brien v. Univ. Community Tenants Union*, 42 Ohio St.2d 242 (1975), syllabus. This court reviews a trial court's disposition of a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6) de novo. *Stewart v. Fifth Third Bank of Columbus*, 10th Dist. No. 00AP-258 (Jan. 25, 2001).

{¶ 18} In contrast to the resolution of a Civ.R. 12(B)(1) motion, a trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint when resolving a Civ.R. 12(B)(6) motion to dismiss. *Estate of Sherman v. Millhon*, 104 Ohio App.3d 614, 617 (10th Dist.1995); *New 52 Project, Inc. v. Proctor*, 10th Dist. No. 07AP-487, 2008-Ohio-465, ¶ 3 (court must limit its consideration to the four corners of the complaint when deciding a Civ.R. 12(B)(6) motion to dismiss). In this case, the trial court relied on matters outside appellant's complaint to resolve appellees' motion to dismiss. Specifically, the court relied on a purported docket sheet from the Franklin County Probate Court filed in support of appellees' motion to dismiss as well as the parties' arguments contained therein.

{¶ 19} When a Civ.R. 12(B)(6) motion to dismiss presents matters outside the pleadings, the trial court may either exclude the extraneous matter from its consideration or treat the motion as one for summary judgment and dispose of it pursuant to Civ.R. 56. *Powell v. Vorys, Sater, Seymour & Pease*, 131 Ohio App.3d 681, 684 (10th Dist.1998). A trial court may not, however, sua sponte convert a Civ.R. 12(B)(6) motion to dismiss into a motion for summary judgment and dispose of it without giving notice to the parties of its intent to do so. *Id.*; *State ex rel. Baran v. Fuerst*, 55 Ohio St.3d 94, 97 (1990). Failure

to notify the parties that the court is converting a Civ.R. 12(B)(6) motion to dismiss into one for summary judgment is, itself, reversible error. *Charles v. Conrad*, 10th Dist. No. 05AP-410, 2005-Ohio-6106, ¶ 30.

{¶ 20} The trial court effectively converted appellees' Civ.R. 12(B)(6) motion to dismiss into a motion for summary judgment by considering the documents appellees submitted with its motion. However, the court did not notify the parties of its intent to convert the motion to dismiss into a summary judgment motion. This failure is reversible error. *Id.*; *Chahda v. Youseff*, 8th Dist. No. 82505, 2004-Ohio-635, ¶ 12; *Wickliffe Country Place v. Kovacs*, 146 Ohio App.3d 293, 297-98 (11th Dist.2001); *Stewart*.

{¶ 21} Though having motions for summary judgment pending, the trial court expressly chose to review and grant appellees' motion to dismiss filed June 29, 2011 and hold as moot all remaining motions. (June 11, 2012 Decision.) Because the trial court erred in dismissing this matter, pursuant to Civ.R. 12(B)(1), and/or erred in reviewing evidence beyond the complaint in dismissing this matter, pursuant to Civ.R. 12(B)(6), we sustain appellant's first and second assignments of error to the extent indicated in this decision.

### **B. First Conditional Cross-Assignment of Error**

{¶ 22} In their first conditional cross-assignment of error, appellees assert the trial court erred in determining that appellant's first claim was not a medical claim governed by R.C. 2305.113 with an applicable one-year statute of limitations.

{¶ 23} As defined by R.C. 2305.113(E)(3), a "medical claim" is one "asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, \* \* \* and that arises out of the medical diagnosis, care, or treatment of any person." R.C. 2305.113(A) states that "an action upon a medical \* \* \* claim shall be commenced within one year after the cause of action accrued."

{¶ 24} "A complaint may be dismissed under Civ.R. 12(B)(6) for failing to comply with the applicable statute of limitations when the complaint on its face *conclusively* indicates that the action is time-barred." (Emphasis added.) *Ohio Bur. of Workers'*

*Comp. v. McKinley*, 103 Ohio St.3d 156, 2011-Ohio-4432, ¶ 13, citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 11. "For there to be a conclusive showing in that regard, the complaint must show both: (1) the relevant statute of limitations; and (2) the absence of factors which would toll the statute or make it inapplicable." *Jude v. Franklin Cty.*, 10th Dist. No. 03AP-1053, 2004-Ohio-2528, ¶ 11.

{¶ 25} The complaint alleges appellees "negligently failed to exercise control over" and "negligently failed to provide for" the decedent's safety and health "when she was ejected face first from a wheel chair being operated and controlled by the Defendants." (Apr. 7, 2011 Amended Complaint, 3.) The complaint further alleges that, as a result of appellees' negligence, the decedent "fell out of her wheel chair onto a carpeted ramp" and sustained injuries. (Apr. 7, 2011 Amended Complaint, 3.)

{¶ 26} In concluding the first claim of appellant's complaint did not constitute a "medical claim," the trial court stated the decedent fell out of her wheelchair on her way to lunch and that "[t]ransportation to lunch is not ancillary to, or 'an inherently necessary party of' [decedent's] treatment or care as required for the one year statute of limitations to apply." (June 11, 2012 Decision 3.) To come to this conclusion, the trial court explicitly relied upon appellant's affidavit that was attached to his memorandum contra to appellees' motion to dismiss.

{¶ 27} Given the procedural posture of this case as discussed above, we must conclude the trial court erred by considering evidence beyond the complaint to determine the applicable statute of limitations. The complaint, on its face, does not conclusively establish whether or not the claim asserted is a medical claim and whether a one-year or two-year statute of limitations is applicable in this case. *Miller v. Village of Lincoln Hts.*, 197 Ohio App.3d 285, 2011-Ohio-6722 (1st Dist.) (unauthorized documents attached to memorandum in response to motion to dismiss cannot be considered when ruling on a Civ.R. 12(B)(6) motion to dismiss). *Brisk v. Draf Industries, Inc.*, 10th Dist. No. 11AP-233, 2012-Ohio-1311, ¶ 10 (recognizing that the trial court specifically noted it may not consider plaintiff's affidavit when deciding a pending motion to dismiss).

{¶ 28} Accordingly, we sustain appellees' first conditional cross-assignment of error to the extent that the court erred by considering evidence beyond the complaint to

determine the applicable statute of limitations for purposes of a Civ.R. 12(B)(6) motion to dismiss.

### **C. Second Conditional Cross-Assignment of Error**

{¶ 29} In their second conditional cross-assignment of error, appellees assert the trial court erred in not dismissing Baugus on the grounds that appellant did not obtain service upon her within one year of filing the complaint. Appellees' second cross-assignment of error is the subject of appellant's motion to dismiss filed in this court on February 8, 2013.

{¶ 30} Because the trial court dismissed the entire complaint on an alternative basis, the trial court did not discuss whether or not service was timely perfected. This court has stated previously that it is well-established that a reviewing court will not ordinarily address issues that were not tried by the trial court. *State ex rel. Pitz v. Columbus*, 56 Ohio App.3d 37, 45 (10th Dist.1988). In such a situation, the appellate court should reserve judgment until such time as the undecided issues are considered by the trial court and that decision is appealed. *Crestmont Cleveland Partnership v. Ohio Dept. of Health*, 139 Ohio App.3d 928, 935 (10th Dist.2000), citing *Warner v. Uptown-Downtown Bar*, 6th Dist. No. WD-96-024 (Dec. 20, 1996).

{¶ 31} As a result, we conclude appellees' second cross-assignment of error is not yet ripe and remand the matter for consideration of this and other issues. *Mehta v. Ohio Univ.*, 194 Ohio App.3d 844, 2011-Ohio-3484 (10th Dist.) (issues not addressed by trial court deemed not yet ripe for appellate review and remanded to trial court for consideration). Our resolution of appellees' second conditional cross-assignment of error renders moot appellant's motion to dismiss.

### **IV. CONCLUSION**

{¶ 32} Based upon the foregoing, we sustain both of appellant's assignments of error. Additionally, appellees' first conditional cross-assignment of error is sustained to the extent indicated in this decision. We decline to address for the first time issues not previously addressed by the trial court and, accordingly, conclude appellees' second conditional cross-assignment of error is not yet ripe, which renders moot appellant's motion to dismiss. We, therefore, reverse the judgment of the Franklin County Court of

Common Pleas and remand this matter for further proceedings in accordance with law and consistent with this decision.

*Motion to dismiss rendered moot;  
judgment reversed and cause remanded.*

**BROWN and DORRIAN, JJ., concur.**

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