[Cite as *Gabriel v. Ohio State Univ. Med. Ctr.*, 2015-Ohio-2661.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Rosa Gabriel, Individually and as Co-Executor of the Estate of Doris A. Thompson, Deceased,	:	
Plaintiff-Appellant,	:	
John Steven Floyd, Individually and as Co-Executor of the Estate of Doris A. Thompson, Deceased,	:	No. 14AP-870 (Ct. of Cl. No. 2013-00552)
Plaintiff-Appellee,	:	(REGULAR CALENDAR)
v.	:	
The Ohio State University Medical Center,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 30, 2015

Butler, Cincione & DiCuccio, N. Gerald DiCuccio, and *William A. Davis*, for appellant.

Michael DeWine, Attorney General, and *Jeffrey L. Maloon*, for appellee The Ohio State University Medical Center.

APPEAL from the Court of Claims of Ohio

SADLER, J.

{¶ 1} This matter is before the court on the appeal of plaintiff-appellant, Rosa Gabriel, co-executor of the Estate of Doris A. Thompson, Deceased, from a judgment of the Court of Claims of Ohio in favor of defendant-appellee, The Ohio State University Medical Center. For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} The facts pertinent to this appeal are as follows. In April 2009, decedent's cardiologist, Stephen Schaal, M.D., diagnosed decedent with atrial fibrillation. Decedent also consulted a cardiologist by the name of Bruce Auerbach, M.D., who referred her to a third cardiologist, F. Kevin Hackett, M.D., for another medical opinion. After seeing Dr. Hackett, decedent continued to treat her condition with a prescribed anti-arrhythmia medication and an anti-coagulant medication to prevent blood clots from forming in her heart.

{¶ 3} Decedent subsequently consulted John Sirak, M.D., a cardiothoracic surgeon who is employed by appellee as an assistant professor of clinical surgery. Dr. Sirak recommended that decedent undergo a MAZE procedure to treat her chronic atrial fibrillation and heart arrhythmia.[1] According to appellant, decedent learned of Dr. Sirak and the MAZE procedure by researching her condition on the internet.[2] On June 5, 2009, Dr. Sirak performed the MAZE procedure on decedent at appellee's medical center. On June 24, 2009, appellee readmitted decedent because she was suffering from complications of the surgery. According to Dr. Sirak's affidavit, decedent developed a fistula between her left atrium and esophagus. Decedent died on June 28, 2009.

{¶ 4} On July 29, 2010, appellant commenced an action against appellee in the Franklin County Court of Common Pleas alleging wrongful death and survivorship claims. On that same date, appellant also filed her complaint against appellee in the Court of Claims of Ohio. The court of common pleas determined that, pursuant to R.C. Chapter 2743, appellant's claims against appellee were within the exclusive jurisdiction of the Court of Claims. Accordingly, the court of common pleas dismissed the action due to a lack of subject-matter jurisdiction. The case then proceeded in the Court of Claims.

{¶ 5} According to appellant, when she conducted a discovery deposition of Dr. Sirak, he changed his opinion regarding the cause of decedent's death. Following an unsuccessful attempt to compel further discovery, appellant dismissed her action against

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[1] The briefs refer to the procedure as a "Total Five-Box Thorascopic MAZE" procedure.
[2] Appellant's July 24, 2014 memorandum in opposition to appellee's motion for summary judgment.

appellee, without prejudice, by filing a notice of voluntary dismissal pursuant to Civ.R. 41(A)(1)(a).

{¶ 6} On September 20, 2013, appellant refiled her action in the Court of Claims pursuant to the savings statute. Along with the complaint, appellant filed the affidavit of merit of Donald E. Hura, M.D. *See* Civ.R. 10(D). Therein, Dr. Hura avers he has reviewed all medical records reasonably available to appellant concerning the allegations contained in the complaint, he is familiar with the applicable standard of care, decedent's surgeon failed to meet the standard of care, and the violation of the standard of care caused decedent's injury and subsequent death.[3]

{¶ 7} On November 13, 2013, a magistrate of the Court of Claims issued an order, pursuant to L.C.C.R. 7(E), requiring appellant to provide appellee with the identities of her expert witnesses and a copy of expert reports on or before July 16, 2014. On July 16, 2014, appellant filed her identification of expert witnesses wherein appellant listed each of decedent's treating cardiologists and the attending pathologist as expert witnesses. Appellant also listed Dr. Sirak. Appellant did not identify any other medical experts nor did appellant provide separate expert reports for the listed physicians.

{¶ 8} On July 17, 2014, appellee filed a motion for summary judgment supported by the affidavit of Dr. Sirak. Appellant filed a memorandum in opposition on July 24, 2014. On September 26, 2014, the Court of Claims issued a decision granting appellee's motion for summary judgment. On October 1, 2014, the Court of Claims entered judgment in favor of appellee.

{¶ 9} Appellant filed a timely notice of appeal to this court on October 23, 2014. On December 8, 2014, appellant moved this court, pursuant to App.R. 9(E), to supplement the record on appeal with copies of a medical record and two deposition transcripts that the clerk of the Court of Claims allegedly refused to accept for filing. In an entry dated December 8, 2014, we granted the motion as follows:

> Appellant's November 24, 2014 motion for leave to supplement the record with exhibits 1, 2, and 3 attached to

[3] "An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment." Civ.R. 10(D)(2)(d). *See also Foster v. Sullivan*, 10th Dist. No. 13AP-876, 2014-Ohio-2909, fn. 1 ("affidavit of merit attached to the complaint was of no consequence in the face of [a] motion for summary judgment").

> appellant's motion is granted for the limited purpose of determining the propriety of the trial court clerk's refusal to allow appellant to file said documents.

II. ASSIGNMENT OF ERROR

{¶ 10} Appellant assigns the following as error:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING THIS CASE WITH PREJUDICE, BY RULING THAT PLAINTIFF HAD FAILED TO COMPLY WITH COURT OF CLAIMS LOCAL RULE 7(E) UNDER THE CIRCUMSTANCES OF THIS CASE.

III. STANDARD OF REVIEW

{¶ 11} Pursuant to Civ.R. 56(C), summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Once the moving party meets its initial burden, the nonmovant must set forth specific facts demonstrating a genuine issue for trial. *Id.* at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992).

{¶ 12} Appellate review of summary judgments is de novo. *Byrd v. Arbors E. Subacute & Rehab. Ctr.*, 10th Dist. No. 14AP-232, 2014-Ohio-3935. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Id., citing Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103, 107 (10th Dist.1992). We must affirm the trial court's judgment if any of the

grounds raised by the movant in the trial court are found to support it, even if the trial court failed to consider those grounds. *Helfrich v. Allstate Ins. Co.*, 10th Dist. No. 12AP-559, 2013-Ohio-4335, ¶ 7, citing *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

IV. LEGAL ANALYSIS

{¶ 13} Appellant's wrongful death and survivorship claims sound in medical malpractice. "In order to establish medical malpractice, a plaintiff must show: (1) the standard of care recognized by the medical community, (2) the failure of the defendant to meet the requisite standard of care, and (3) a direct causal connection between the medically negligent act and the injury sustained. *Stanley v. The Ohio State Univ. Med. Ctr.*, 10th Dist. No. 12AP-999, 2013-Ohio-5140, ¶ 19, citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130 (1976). Ordinarily, the appropriate standard of care must be demonstrated by expert testimony. *Id.* That expert testimony must explain what a physician of ordinary skill, care, and diligence in the same medical specialty would do in similar circumstances. *Id.*

{¶ 14} Dr. Sirak's affidavit provides, in relevant part, as follows:

> 3. I am a cardiothoracic surgeon and Assistant Professor of Clinical Surgery at The Ohio State University Wexner Medical Center;
>
> 4. I provided medical care to Doris A. Thompson during 2009 and was the attending cardiothoracic surgeon during her hospitalizations at The Ohio State University Medical Center in June 2009;
>
> 5. Ms. Thompson initially presented with a chronic atrial fibrillation, a serious heart arrhythmia. After an evaluation, I recommended that Ms. Thompson undergo a MAZE procedure and, after being advised of the risks associated with the procedure, Ms. Thompson agreed to go forward.
>
> 6. I am familiar with the standard of care applicable to cardiothoracic surgeons in the evaluation and treatment of patients suffering from cardiac arrhythmias including chronic atrial fibrillation, the particular arrhythmia Doris A. Thompson presented with in 2009;

> 7. I complied with the accepted standard of care for cardiothoracic surgeons in the pre-operative evaluation, the surgical care, and the post-operative evaluation and treatment of Doris A. Thompson in 2009;
>
> 8. Doris A. Thompson died as a result of complications associated with a fistula between her left atrium and esophagus which is a recognized complication of the MAZE procedure that was performed on June 5, 2009.

{¶ 15} Dr. Sirak's affidavit satisfies appellee's initial burden of demonstrating the absence of a genuine issue of fact on a material element of appellant's medical negligence claim. The affidavit constitutes competent expert testimony that Dr. Sirak met the standard of care applicable to cardiothoracic surgeons in the pre-operative evaluation, the surgical care, and the post-operative evaluation and treatment of a patient with chronic atrial fibrillation and a serious heart arrhythmia. Although Dr. Sirak acknowledges in his affidavit that decedent's death was the result of a fistula between her left atrium and esophagus that developed as a result of the surgical procedure he performed on decedent, he avers that such a complication is a recognized risk associated with the MAZE procedure and that he met the standard of care in performing the MAZE procedure.

{¶ 16} As stated above, once the moving party meets its initial burden to demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim, the nonmovant must set forth specific facts demonstrating a genuine issue for trial. *Dresher* at 293. Civ.R. 56(C) provides, in relevant part, as follows:

> The adverse party, prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the *pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact,* if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *No evidence or stipulation may be considered except as stated in this rule.* A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party

> being entitled to have the evidence or stipulation construed most strongly in the party's favor.

(Emphasis added.)

{¶ 17} Appellant did not present any evidence in opposition to appellee's motion for summary judgment that would qualify under Civ.R. 56(C). Appellant submitted a written memorandum contra and a copy of her July 16, 2014 identification of expert witnesses. Appellant did not submit depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, or written stipulations of fact.

{¶ 18} Civ.R. 56(E) provides as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.*

(Emphasis added.)

{¶ 19} Appellant argues that the clerk of the Court of Claims unfairly prevented her from presenting evidence in opposition to the motion for summary judgment by refusing to accept the medical records from decedent's treating physicians when appellant proffered those records for filing with her July 16, 2014 identification of expert witnesses. Appellant's July 16, 2014 identification of expert witnesses indicates that relevant office records from each of decedent's treating physicians were attached thereto, but those records were not part of the record of the Court of Claims. The Court of Claims' decision on the motion for summary judgment states that "[p]laintiff['s] response only includes a

copy of [her] identification of expert witnesses, and does not include the records of the proposed experts." (Sept. 26, 2014 Entry, 3.)

{¶ 20} Appellant's supplemental record filed with this court contains three exhibits. Exhibit 1 is a two-page medical record dated June 1, 2009, wherein Dr. Auerbach states: "I told [Thompson] there was no way that I would take a surgical procedure to correct atrial fibrillation in the absence of a failed percutaneous approach. I also told her I doubted that there was data that suggested a 95% success rate with this surgeon's approach." Exhibit 2 is a transcript of Dr. Sirak's deposition testimony taken on November 24, 2011 in case No. 2010-09523. Exhibit 3 is a transcript of Dr. Sirak's deposition testimony taken on February 28, 2012, also in case No. 2010-09523.

{¶ 21} Appellant argues that the medical records attached as exhibits to the July 16, 2014 disclosure of expert witnesses should have been accepted for filing by the Court of Claims, pursuant to L.C.C.R. 7(E), because they were being offered by appellant in lieu of expert reports. L.C.C.R. 7(E) is a local rule of the Court of Claims applicable whenever a party intends to use the testimony of an expert witness at trial. *Stanley* at ¶ 68. The rule provides, in relevant part, as follows:

> All experts must submit reports. If a party is unable to obtain a written report from an expert, counsel for the party must demonstrate that a good faith effort was made to obtain the report and must advise the court and opposing counsel of the name and address of the expert, the subject of the expert's expertise together with his qualifications and a detailed summary of his testimony. *In the event the expert witness is a treating physician, the court shall have the discretion to determine whether the hospital and/or office records of that physician's treatment which have been produced satisfy the requirements of a written report.* The court may exclude testimony of the expert if good cause is not demonstrated.

(Emphasis added.)

{¶ 22} Appellant did not separately move the Court of Claims, pursuant to L.C.C.R. 7(E), for a determination that the medical records of decedent's treating physicians satisfied the requirements of a written report. Appellant's July 16, 2014 identification of expert witnesses does state: "The medical/office records of these treating/attending physicians include the reports of the above physicians pursuant to Local Rule 7(E) and are

already in the possession of defense counsel. Plaintiff[ ] and [her] counsel have no additional reports authored by these physicians."

{¶ 23} Even if the clerk of the Court of Claims had permitted appellant to file the medical records of decedent's treating physicians, and even if the Court of Claims had ruled that the medical records satisfied the requirements of a written report, such a ruling would not have prevented summary judgment in favor of appellee. Pursuant to Civ.R. 56(C), " 'documents submitted in opposition to a motion for summary judgment must be sworn, certified or authenticated by affidavit to be considered by the trial court in determining whether a genuine issue of material fact exists for trial.' " *Rilley v. Brimfield*, 11th Dist. No. 2009-P-0036, 2010-Ohio-5181, ¶ 66, quoting *Sintic v. Cvelbar*, 11th Dist. No. 95-L-133 (July 5, 1996). The proper procedure for introducing evidentiary matter of a type not listed in Civ.R. 56(C) is to incorporate the material by reference into a properly framed affidavit. *Martin v. Cent. Ohio Transit Auth.*, 70 Ohio App.3d 83, 89 (10th Dist.1990), citing *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220 (8th Dist.1986). The rule of law applies with equal weight to expert medical reports. *See, e.g., Smith v. Gold-Kaplan*, 8th Dist. No. 100015, 2014-Ohio-1424, ¶ 23 (because nonmoving party failed to incorporate a letter from her medical expert through a properly framed affidavit, the trial court properly disregarded the purported expert report in ruling on a motion for summary judgment); *Toth v. United States Steel Corp.*, 9th Dist. No. 10CA009895, 2012-Ohio-1390, ¶ 11 (in ruling on a motion for summary judgment, trial court could not consider expert report under Civ.R. 56(C) because it is not incorporated into an affidavit); *Wallner v. Thorne*, 189 Ohio App.3d 161, 2010-Ohio-2146, ¶ 18 (9th Dist.) (an unsigned expert's report, which was not incorporated into an affidavit or other sworn document, did not constitute proper Civ.R. 56(C) evidence); *Garland v. Simon-Seymour*, 11th Dist. No. 2009-G-2897, 2009-Ohio-5762, ¶ 51 (an unsworn expert report is irrelevant for purposes of summary judgment); *Cunningham v. Children's Hosp.*, 10th Dist. No. 05AP-69, 2005-Ohio-4284, ¶ 15 (medical expert's letter that is not incorporated into a properly framed affidavit does not fall within the types of evidence listed in Civ.R. 56(C) and lacks any evidentiary value for purposes of a motion for summary judgment).

{¶ 24} For the same reason, medical records that are not sworn, certified, or put into evidence by way of affidavit do not qualify as allowable evidence under Civ.R. 56(C)

and should not be considered by the trial court. *Ogolo v. Greater Cleveland Regional Transit Auth.*, 8th Dist. No. 99675, 2013-Ohio-4921, ¶ 19, citing *Citizens Ins. Co. v. Burkes*, 56 Ohio App.2d 88, 95-96 (8th Dist.1978), citing *Olverson v. Butler*, 45 Ohio App.2d 9 (10th Dist.1975). A trial court errs when it considers such records in ruling on a motion for summary judgment. *Id.*, citing *Widdig v. Watkins*, 4th Dist. No. 13-CA-3531, 2013-Ohio-3858.

{¶ 25} Because the office records of decedent's treating physicians are not incorporated into a properly framed affidavit, such records do not fall within the types of evidence listed in Civ.R. 56(C), whether they are treated as expert reports or not. The records have no evidentiary value for purposes of a motion for summary judgment. For this reason, any error with regard to the filing of the medical records on the part of the clerk was harmless error.

{¶ 26} As to the deposition testimony of Dr. Sirak, appellant acknowledges that the Court of Claims' record does not contain either of the two deposition transcripts. Although appellant alleges in her November 24, 2014 motion to supplement the record that the Court of Claims refused to accept the depositions for filing, there is nothing in the record to support that claim. In appellant's motion to supplement the record on appeal, appellant states that "pursuant to Court of Claims Local Rule 4.2(A) discovery materials such as depositions are not permitted to be filed in the Court of Claims, so they could not be included in the record in the Court below." (Motion to supplement the record, 3.) L.C.C.R. 4.2(A) entitled "Filing of Discovery Materials," provides as follows:

> Depositions, interrogatories, requests for production or inspection, requests for admissions, and any answers or responses thereto, shall not be filed by the clerk *unless they meet the requirements of Civil Rule 5(D).* Parties may file with the court a one-page notice of service or notice of deposition.

(Emphasis added.)

{¶ 27} Civ.R. 5(D) provides as follows:

> All documents, after the original complaint, required to be served upon a party shall be filed with the court within three days after service, but depositions upon oral examination, interrogatories, requests for documents, requests for

> admission, and answers and responses thereto shall not be filed *unless on order of the court or for use as* evidence *or for consideration of a motion in the proceeding*.

(Emphasis added.)

{¶ 28} Contrary to appellant's assertion, L.C.C.R. 4.2(A) does not prohibit the filing of deposition transcripts when offered for consideration of a motion for summary judgment. Consequently, there is no legal or factual basis for this court to conclude that an error on the part of the clerk resulted in the absence of Dr. Sirak's deposition transcripts from the record in this case. Moreover, because the deposition transcripts were not properly before the Court of Claims when it ruled on appellee's motion for summary judgment, the Court of Claims could not have erred in failing to consider them in granting summary judgment in favor of appellee.[4] Furthermore, "[i]t is a fundamental tenet of appellate procedure that a reviewing court may not add matter to the record on appeal and then decide the appeal on the basis of new matter." *Roberts v. Bank of Am. NT & SA*, 107 Ohio App.3d 301 (10th Dist.1995), citing *State v. Ishmail*, 54 Ohio St.2d 402, 406 (1978). Accordingly, we will not consider the deposition transcripts in reviewing the merit of the Court of Claims' judgment.

{¶ 29} Courts are cautioned to construe the evidence in favor of the nonmoving party, but summary judgment is appropriate where the nonmovant fails to respond with proper evidence supporting the essential elements of the claim. *See Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 269 (1993). The Court of Claims determined that appellant failed to oppose appellee's properly supported motion for summary judgment

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[4] Though it appears that the Court of Claims considered statements of fact in appellant's memorandum in opposition to the motion for summary judgment, statements contained in a memorandum of law are not to be considered by the court in ruling on a motion for summary judgment. *See, e.g., Ramos v. Khawli*, 181 Ohio App.3d 176, 2009-Ohio-798, ¶ 82 (7th Dist.) (in ruling on a summary judgment context, "statements of counsel in a motion are arguments but are not evidence that a court can rely upon to find a genuine issue of material fact"); *Pickerel v. Huntington Natl. Bank*, 10th Dist. No. 01AP-911 (Mar. 19, 2002) (in ruling on a motion for summary judgment, trial court may not consider a memorandum outlining appellant's theory of damages which was never submitted to the trial court in the form of an affidavit as required by Civ.R. 56(E)); *Corriveau-Clark v. Daimler Group, Inc.*, 10th Dist. No. 98AP-345 (Dec. 24, 1998) ("the statements by appellee's counsel are not evidence of the type permitted in Civ.R. 56(C) for consideration in a motion for summary judgment"); *Swiger v. Terminix Internatl. Co., L.P.*, 2d Dist. No. 14523 (June 28, 1995) (statements of counsel in memoranda supporting or opposing a motion for summary judgment are not "written admissions" and may not be considered by the court in ruling on the motion).

with evidentiary materials to "show an issue of material fact regarding a breach of the standard of care by Dr. Sirak." (Sept. 26, 2014 Entry, 4.) The Court of Claims did not err when it determined that there were no genuine issues of material fact and that appellee was entitled to judgment as a matter of law. Accordingly, appellant's sole assignment of error is overruled.

V. CONCLUSION

{¶ 30} Having overruled appellant's sole assignment of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

TYACK and LUPER SCHUSTER, JJ., concur.
