

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Daniel Boyd,	:	
	:	
Plaintiff-Appellant,	:	No. 15AP-533
	:	(Ct. of Cl. No. 2014-00186)
v.	:	
	:	(REGULAR CALENDAR)
Haitham Elsamaloty, M.D., and	:	
University of Toledo Medical Center,	:	
	:	
Defendants-Appellees.	:	
	:	

D E C I S I O N

Rendered on December 24, 2015

Blaske & Blaske, P.L.C., and Thomas H. Blaske, for appellant.

Michael DeWine, Attorney General, and Anne Berry Strait, for appellees.

APPEAL from the Court of Claims of Ohio.

BROWN, P.J.

{¶1} Daniel Boyd, plaintiff-appellant, appeals from the judgment of the Court of Claims of Ohio, in which the court denied his motion for relief from judgment pursuant to Civ.R. 60(B).

{¶2} According to appellant's complaint, at or shortly after his birth in 1979, he suffered a cerebral bleed which required that he have a shunt catheter inserted in his brain that resulted in mental and physical handicaps. The shunt catheter malfunctioned several times as he matured, causing further mental and physical impairments. In June 2012, appellant began having headaches. On June 16, 2012, after complaining of a headache, appellant was taken to the emergency department at the University of Toledo

Medical Center, defendant-appellee ("UT"). Appellant had a computerized tomography ("CT") scan and was later discharged.

{¶3} Appellant returned to the UT emergency room on July 17, 2012, and was admitted. UT performed a CT scan on that day, which was read by Haitham Elsamaloty, M.D., defendant-appellee. Dr. Elsamaloty found there was no increase in ventricular size from the June 16, 2012 scan. Appellant was discharged on July 20, 2012.

{¶4} On August 24, 2012, appellant suffered cardiac and respiratory arrest, resulting in a brain hemorrhage and other physical impairments. Appellant alleged that it was later determined there had, in fact, been an increase in ventricular size from the June 16, 2012 scan, and that Dr. Elsamaloty had been wrong in his reading of the July 17, 2012 scan. Appellant claims that if Dr. Elsamaloty had read the CT scan correctly, it would have lead doctors to diagnose a malfunctioning shunt which was the cause of the August 24, 2012 cardiac and respiratory arrest.

{¶5} On June 19, 2013, appellant served UT a "180-day letter," pursuant to R.C. 2305.113, which extends the deadline for the filing of a medical negligence action and allows the person to further investigate the claim. In this case, the 180-day letter extended the deadline to file an action to December 16, 2013.

{¶6} On December 12, 2013, appellant filed a medical negligence action against UT in the Lucas County Court of Common Pleas. UT and Dr. Elsamaloty filed a motion to dismiss, arguing that only the Court of Claims had jurisdiction over a claim against a state university and its employee.

{¶7} On February 27, 2014, appellant filed a medical negligence action against UT and Dr. Elsamaloty in the Court of Claims.

{¶8} On April 22, 2104, at appellant's request, the Lucas County Court of Common Pleas entered a stay until the Court of Claims could determine whether Dr. Elsamaloty was entitled to personal immunity.

{¶9} On July 1, 2014, UT filed a Civ.R. 12(B)(6) motion to dismiss/motion for summary judgment, on the ground that appellant's medical negligence action was barred by the one-year statute of limitations set forth in R.C. 2743.16 and 2305.113(A).

{¶10} On February 12, 2015, the Court of Claims granted UT's motion for summary judgment. The Court of Claims found that appellant filed his action beyond the one-year statute of limitations plus 180 days. The Court of Claims also found that the

statute of limitations was not extended by R.C. 2305.19(A), the savings statute, because the common pleas action did not fail otherwise than upon the merits but was merely stayed pending an immunity determination by the Court of Claims, which neither party had ever requested of the Court of Claims. The Court of Claims further declined to toll the statute of limitations based upon appellant's legal incompetence during the period of time that the statute of limitations was running pursuant to R.C. 2305.16. The Court of Claims found that appellant had not been adjudicated incompetent, and appellant failed to present proper Civ.R. 56 evidence to demonstrate that he had been confined in a hospital under a diagnosed condition rendering him of unsound mind. The Court of Claims also acknowledged that there may be other grounds that support dismissal, insofar as appellant filed the action in his own name, yet he was arguing that he had been incompetent since 2012 and had never sought to have himself represented by a duly appointed guardian. Appellant did not appeal this judgment.

{¶11} On March 30, 2015, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B)(1) and (5). Appellant's counsel claimed that he mistakenly believed that appellant's mother already had guardianship over appellant, and counsel had helped appellant's mother obtain guardianship over appellant in the Allen County Probate Court on March 16, 2015, which was as quickly as he could accomplish such. Also, with regard to the Court of Claims' finding upon summary judgment that the documents appellant submitted were not properly authenticated, appellant submitted an affidavit claiming to cure such defect.

{¶12} On April 24, 2015, the Court of Claims issued a judgment entry denying appellant's motion for relief from judgment. The Court of Claims found there was no admissible evidence to demonstrate that appellant obtained a court adjudication showing that he was incompetent during the period of time between accrual of the action and expiration of the statute of limitations or that he was confined in a hospital under a diagnosed condition or disease that rendered him of unsound mind. The Court of Claims explained that the affidavit provided by appellant's counsel was insufficient to authenticate the medical records as required by Evid.R. 901(A), and the statement of expert evaluation that appellant submitted does not indicate whether appellant was competent at any time prior to December 2013. The Court of Claims also found that relief from judgment was inappropriate under Civ.R. 60(B)(1), as counsel's mistaken belief that

appellant's mother was already appointed his guardian was an insufficient ground, and Civ.R. 60(B)(5), as the grounds offered by appellant were not substantial. Appellant appeals that judgment, asserting the following assignments of error:

[I.] The Court of Claims erred in its decision to grant summary judgment to Defendant on statute of limitations grounds.

[II.] The Court of Claims erred in its decision to deny Plaintiff-Appellant's Motion for Relief From Judgment or Order, filed pursuant to Civ.R. [60](B)(1) and (5).

{¶13} Appellant argues in his first assignment of error that the Court of Claims erred when it granted summary judgment to UT on statute of limitations grounds. Appellant asserts that UT failed to make an initial demonstration with regard to the effect of appellant's mental condition on the timeliness of bringing the action; thus, UT did not discharge its initial burden of demonstrating that the action was not filed in a timely fashion. However, at the outset, we must overrule appellant's first assignment of error. Appellant failed to file a direct appeal of the Court of Claims' February 12, 2015 judgment granting summary judgment to UT. There is no dispute that the Court of Claims' decision to grant summary judgment to UT based on appellant's failure to file the action within the statute of limitations was a final appealable judgment. Pursuant to App.R. 4(A)(1), appellant had 30 days from the date of the Court of Claims' final appealable judgment to file a notice of appeal. He did not do so. *Res judicata* prevents the litigation of issues that could have been raised on appeal but were not. *In re K.B.*, 10th Dist. No. 05AP-783, 2006-Ohio-3104, ¶ 8. Thus, because appellant failed to file a timely notice of appeal of the Court of Claims' judgment granting summary judgment, he is precluded from challenging the Court of Claims' decision to grant summary judgment to UT. Therefore, appellant's first assignment of error is overruled.

{¶14} Appellant argues in his second assignment of error that the Court of Claims erred when it denied his motion for relief from judgment filed pursuant to Civ.R. 60(B)(1) and (5). Civ.R. 60(B) provides that a trial court may relieve a party from a final judgment, order or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under

Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

The rule requires the motion to be made "within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken." Civ.R. 60(B). "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), citing *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). When applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990).

{¶15} To prevail under Civ.R. 60(B), the movant must show that: (1) the movant has a meritorious defense or claim to present if relief is granted, (2) the movant is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5), and (3) the motion is made within a reasonable time. *GTE Automatic Elec. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The movant must satisfy all three of these requirements to obtain relief. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996).

{¶16} In the present case, although the Court of Claims found appellant failed to satisfy both the first and second requirements of Civ.R. 60(B), we will address only the first requirement for purposes of this assignment of error, as appellant's failure to show that he had a meritorious defense or claim to present if relief were granted is fatal to his motion and dispositive of his assignment of error. In its decision, the Court of Claims found that appellant failed to demonstrate a meritorious claim because he failed to present any admissible evidence from which the Court of Claims could infer that the statute of limitations should have been tolled.

{¶17} R.C. 2305.16, the "tolling" statute, provides:

Unless otherwise provided in sections 1302.98, 1304.35, and 2305.04 to 2305.14 of the Revised Code, if a person entitled to bring any action mentioned in those sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed. When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all.

After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease which renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought.

(Emphasis added.) Upon summary judgment by the defendant, the plaintiff bears the burden of presenting evidence substantiating a claim that R.C. 2305.16 tolls the time in which the plaintiff was required to bring her claims against a defendant. *Nadra v. Mbah*, 10th Dist. No. 06AP-829, 2007-Ohio-501, ¶ 36, *rev'd on other grounds*, 119 Ohio St.3d 305, 2008-Ohio-3918.

{¶18} Accordingly, as applied to the present circumstances, in order for the statute of limitations to have been tolled, appellant must have been able to show that, after the cause of action accrued, he either: (1) became of unsound mind and was adjudicated as such by a court, or (2) was confined in an institution or hospital under a diagnosed condition or disease that rendered him of unsound mind. However, it is clear that any evidence of these two circumstances must relate to the period before the statute of limitations expired. This is where appellant's Civ.R. 60(B) motion is fatally flawed.

{¶19} With regard to an incompetency adjudication by a court, the Allen County Probate Court did not adjudicate appellant incompetent until March 16, 2015, which was 15 months after the statute of limitations would have already expired, assuming competency. *See Adams v. Dean Witter Reynolds, Inc.*, 8th Dist. No. 74379 (June 17, 1999) (the appellant could not avail herself of R.C. 2305.16 when the determination by the probate court that the appellant's mother was of unsound mind did not come until more

than ten months after the statute of limitations had already expired). The evidence submitted to the probate court does not indicate that the incompetency finding related to any period prior to the probate court's order and is only prospective in nature. The Statement of Expert Evaluation by Dr. Kemi L. Azeel does not indicate when appellant became incompetent and only indicates that Dr. Azeel believed appellant to be incompetent as of the date of evaluation, November 19, 2014. Therefore, because appellant failed to show that he obtained a court adjudication showing that he was incompetent during the period of time between accrual of the action and expiration of the statute of limitations, appellant cannot avail himself of this provision.

{¶20} With regard to whether appellant was confined in an institution or hospital under a diagnosed condition or disease that rendered him of unsound mind, appellant also failed to present any evidence that such was the case after accrual of the cause of action but before the expiration of the statute of limitations. In granting UT's motion for summary judgment, the Court of Claims rejected appellant's submission of unsworn, unauthenticated, and uncertified medical records, including a discharge summary, nurses' notes, and physician progress notes, all of which were from various times between November 16, 2012 and September 5, 2013. In his Civ.R. 60(B) motion, appellant attempted to cure this defect by attaching an affidavit certifying that the medical records previously submitted to the Court of Claims were accurate copies. However, the affidavit was executed by appellant's counsel.

{¶21} It is well-established that where such material submitted is not sworn, certified, or put in evidence by way of affidavit, it does not qualify as documentary evidence under Civ.R. 56(C) and should not be considered by the trial court. *See Citizens Ins. Co. of New Jersey v. Burkes*, 56 Ohio App.2d 88, 95-96 (8th Dist.1978), citing *Olverson v. Butler*, 45 Ohio App.2d 9 (10th Dist.1975). Specifically, medical records not properly authenticated may not be considered. *Pope v. Univ. Settlement, Inc.*, 8th Dist. No. 73946 (Mar. 25, 1999). Under Evid.R. 901(B)(10), medical records may be authenticated by "[a]ny method of authentication or identification provided by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio or by other rules prescribed by the Supreme Court." R.C. 2317.422 provides that medical records may be qualified as authentic evidence if endorsed by a certification of the custodian of the records that identifies the records, gives the mode and time of their

preparation, and states that they were prepared in the usual course of the business of the institution. In the present case, appellant failed to authenticate any of the medical records with a certification by the custodian of records from the medical providers or facilities; thus, they lacked proper authentication.

{¶22} Appellant's attempt to authenticate the medical records by way of his attorney's affidavit was insufficient to render them admissible for purposes of Civ.R. 56. A proper affidavit under Civ.R. 56(E) must, among other things, be based on personal knowledge. "Personal knowledge" has been defined as "knowledge of factual truth which does not depend on outside information or hearsay." *Wall v. Firelands Radiology, Inc.*, 106 Ohio App.3d 313, 335 (6th Dist.1995). A party's attempt to certify the genuineness of medical records by submitting his attorney's affidavit stating that the documents are accurate copies of the originals is insufficient. *Modon v. Cleveland*, 9th Dist. No. 2945-M (Dec. 22, 1999). Although the attorney may have personal knowledge that the documents have been photocopied, an attorney has no personal knowledge of whether the documents are truthful and genuine. *Id.*, citing *Johnston v. Great Lakes Constr. Co.*, 9th Dist. No. 95CA006111 (Feb. 28, 1996). Thus, the affidavit of appellant's attorney in the present case was ineffectual to authenticate the medical records he submitted in response to UT's summary judgment motion. For the foregoing reasons, the Court of Claims did not err when it found appellant failed to present any admissible evidence from which the Court of Claims could infer that the statute of limitations should have been tolled. Therefore, the Court of Claims did not err when it denied appellant's motion for relief from judgment on the basis that appellant failed to satisfy the first requirement of Civ.R. 60(B), and we overrule appellant's second assignment of error.

{¶23} Accordingly, appellant's two assignments of error are overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.
