[Cite as *Schulte v. Wilkey*, 2010-Ohio-5668.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

RICHARD F. SCHULTE,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-02-035
	:	O P I N I O N
- vs -		11/22/2010
	:	
KEITH WILKEY, M.D.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. 2009-02-0508

David T. Davidson, 127 North Second Street, Hamilton, Ohio 45011, for plaintiff-appellant

Jack C. McGowan, 246 High Street, Hamilton, Ohio 45011, for defendant-appellee, Keith Wilkey, M.D.

POWELL, P.J.

{¶1} Plaintiff-appellant, Richard F. Schulte, appeals from a decision of the Butler County Common Pleas Court dismissing his medical malpractice complaint against defendant-appellee, Dr. Keith Wilkey, M.D. and defendant, Midwest Orthopedics Sports Medicine, Inc., because of Schulte's failure to include in his complaint an affidavit of merit as required by Civ.R. 10(D)(2)(a). We affirm.

{¶2} In December 2003, Schulte fell, injuring his left leg. An x-ray taken at the emergency room revealed that Schulte's leg had been fractured. Schulte went to Dr. Wilkey who placed a hard cast on Schulte's fractured leg. When Schulte complained that the top of the cast was rubbing across his toes, Dr. Wilkey's nurse trimmed part of the cast. Schulte subsequently developed gangrene of his toes and had to have them amputated. When the infection spread, Schulte had to have his left leg amputated just below the knee.[1]

{¶3} In December 2004, Schulte filed a medical malpractice complaint in the Butler County Common Pleas Court against Dr. Wilkey and Dr. Wilkey's employer, Midwest, alleging that his leg had to be amputated as a result of Dr. Wilkey's negligence in treating him. While the lawsuit was pending, Dr. Wilkey filed for bankruptcy protection and Schulte's action was stayed for a period of time. In February 2008, Schulte voluntarily dismissed his action against Dr. Wilkey and Midwest.

{¶4} In February 2009, Schulte refiled his medical malpractice complaint against Dr. Wilkey and Midwest. Schulte was eventually able to obtain service on Dr. Wilkey in September 2009; however, as was the case in the 2004 action, Schulte was never able to obtain service on Midwest. In October 2009, Dr. Wilkey filed a Civ.R. 12(B)(6) motion to dismiss Schulte's complaint on the ground that Schulte failed to include in his medical malpractice complaint an affidavit of merit as required under Civ.R. 10(D)(2)(a). In response, Schulte filed a motion under Civ.R. 10(D)(2)(b) for an extension of time to file the requisite affidavit.

1. In his brief, Schulte's counsel represented that Schulte's leg was amputated "just below the knee," but during oral arguments, counsel represented that Schulte's leg was amputated "above the knee." The difference is immaterial to our decision.

{¶5} In January 2010, the trial court denied Schulte's motion for an extension of time to file an affidavit of merit and granted Dr. Wilkey's motion to dismiss Schulte's medical malpractice complaint because of his failure to include an affidavit of merit in his complaint. Acting sua sponte, the trial court also dismissed Schulte's claim against Midwest for the same reason, even though Midwest had never been served or otherwise appeared in the action.

{¶6} Schulte now appeals, assigning the following as error:

{¶7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS BY GRANTING DEFENDANTS-APPELLEES' MOTION TO DISMISS."

{¶8} Schulte argues the trial court erred in granting Dr. Wilkey's motion to dismiss Schulte's medical malpractice complaint due to his failure to include in his complaint an affidavit of merit as required by Civ.R. 10(D)(2)(a), and in denying his request under Civ.R. 10(D)(2)(b) for an extension of time to file such an affidavit. We disagree.

{¶9} Civ.R. 10(D) states in pertinent part:

{¶10} "(2) *Affidavit of merit; medical liability claim*.

{¶11} "(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. Affidavits of merit shall include all of the following:

{¶12} "(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

{¶13} "(ii) A statement that the affiant is familiar with the applicable standard of care;

{¶14} "(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

{¶15} "(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. *The motion shall be filed by the plaintiff with the complaint.* For good cause shown and in accordance with division (c) of this rule, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit, not to exceed ninety days, except the time may be extended beyond ninety days if the court determines that a defendant or non-party has failed to cooperate with discovery or that other circumstances warrant extension.

{¶16} "(c) In determining whether good cause exists to extend the period of time to file an affidavit of merit, the court shall consider the following:

{¶17} "(i) A description of any information necessary in order to obtain an affidavit of merit;

{¶18} "(ii) Whether the information is in the possession or control of a defendant or third party;

{¶19} "(iii) The scope and type of discovery necessary to obtain the information;

{¶20} "(iv) What efforts, if any, were taken to obtain the information;

{¶21} "(v) Any other facts or circumstances relevant to the ability of the plaintiff to obtain an affidavit of merit.

{¶22} "(d) 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. *Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits*." (Emphasis added.)

{¶23} In *Fletcher v. Univ. Hosp. of Cleveland,* 120 Ohio St.3d 167, 2008-Ohio-5379, ¶10, the court stated:

{¶24} "[T]he purpose behind [Civ.R. 10(D)(2)(a)] is to deter the filing of frivolous medical-malpractice claims. The rule is designed to ease the burden on the dockets of Ohio's courts and to ensure that only those plaintiffs truly aggrieved at the hands of the medical profession have their day in court. To further this end, Civ.R. 10(D)(2)(c) [now Civ.R. 10(D)(2)(d); footnote omitted] expressly ma[kes] it clear that the affidavit is necessary in order to 'establish the adequacy of the complaint.'"

{¶25} The *Fletcher* court held that "[b]ecause the heightened standard imposed by the explicit text of Civ.R. 10(D)(2)(c), now (d), goes directly to the sufficiency of the complaint, a motion to dismiss for failure to state a claim upon which relief can be granted is the proper remedy when the plaintiff fails to include an affidavit of merit." Id. at ¶13.

{¶26} It is undisputed that Schulte failed to include in his medical malpractice complaint an affidavit of merit, as expressly mandated by Civ.R. 10(D)(2)(a). Moreover, while Civ.R. 10(D)(2)(b) allows a plaintiff to file a motion to extend the period of time to file an affidavit of merit for "good cause," this provision explicitly requires a plaintiff to file the motion for an extension of time with his or her complaint.

Id.

{¶27} Here, Schulte failed to include in his medical malpractice complaint either an affidavit of merit or a motion to extend the time to file such an affidavit. As a result, it was appropriate for Dr. Wilkey to move for dismissal of Schulte's complaint under Civ.R. 12(B)(6), see *Fletcher* at paragraph one of the syllabus, and appropriate for the trial court to grant the motion and dismiss Schulte's complaint. See *Hall v. Northside Med. Ctr. & Internal Medicine-Surgical Ctr.,* 178 Ohio App.3d 279, 284, 2008-Ohio-4725, ¶35 (plain language of Civ.R. 10(D)(2) required the trial court to dismiss plaintiff's motion for extension of time to file affidavit of merit where plaintiff failed to file the affidavit with his complaint).

{¶28} Schulte argues Civ.R. 10(D)(2) should not be strictly interpreted as the trial court did in this case, but instead, should be interpreted to allow a plaintiff with a medical liability claim, like himself, to file an affidavit of merit or a motion to extend the time for filing such an affidavit even *after* the plaintiff has already filed his or her complaint. In support, Schulte cites several cases from other districts including *Jackson v. Northeast Pre-Release Ctr.,* Franklin App. No. 09AP-457, 2010-Ohio-1022; *Oglesby v. Consol. Rail Corp.,* Erie App. No. E-08-055, 2009-Ohio-1744; and *Whipple v. Warren Correctional Inst.,* Franklin App. No. 09AP-253, 2009-Ohio-4841. In those cases, the trial court granted the plaintiff an opportunity to file an affidavit of merit even though the plaintiff had already filed his or her medical liability complaint, but then later dismissed the complaint when the plaintiff failed to file the requisite affidavit; the trial courts' decisions were affirmed by the courts of appeals, which found that the trial courts did not err or abuse their discretion in dismissing the plaintiffs' complaints. See *Jackson,* 2010-Ohio-1022 at ¶10-17; *Oglesby,* 2009-Ohio-

1744, ¶4-6, 20-28; and *Whipple,* 2009-Ohio-4841, ¶4-9.

{¶29} Apparently, with these cases in mind, the trial court found, in the alternative, that even if Schulte's motion for an extension of time to file an affidavit of merit is considered despite his failure to include the motion in his complaint, Schulte had, nevertheless, failed to demonstrate good cause for granting him such an extension, "especially taking into consideration that this is the second filing of the case." In support of its decision, the trial court noted that Schulte "has had nearly one and [a] half years from the time [Dr. Wilkey] first raised this issue, and just over five years from the filing of the original [complaint] * * * to obtain the opinion of an expert upon which to base his claim."

{¶30} The trial court's finding that Schulte had nearly one and a half years from the time Dr. Wilkey first raised the affidavit-of-merit issue to obtain an expert opinion to support his claim suggests that Dr. Wilkey had raised this issue even earlier than his October 8, 2009 motion to dismiss Schulte's complaint. However, the record before us only begins with Schulte's February 2009 complaint; therefore, the record does not support this particular finding.

{¶31} Nevertheless, the trial court was correct in finding that this was the second filing of the case, which has been effectively pending since 2004 when it was originally filed. Moreover, the provisions of Civ.R. 10(D)(2) at issue in this case have been in effect since July 1, 2007, and Schulte therefore had ample time to comply with the rule when he re-filed his medical malpractice complaint in February 2009. Consequently, even if we assume that a trial court has discretion to permit a plaintiff with a medical liability claim to file an affidavit of merit or a motion to extend the time for filing such an affidavit *after* the plaintiff has already filed his or her complaint, the

trial court did not abuse its discretion or otherwise err in denying Schulte's request for such an extension of time under the facts and circumstances in this case. See, generally, *Jackson* at ¶10-17; *Oglesby* at ¶4-6, 12-28; and *Whipple* at ¶4-9.

{¶32} Schulte also argues "the newly amended and heightened requirements" of Civ.R. 10(D)(2) are unconstitutional "as applied" to this case, because application of the rule in this situation does not involve merely a procedural matter, but instead, affects a substantive right. Presumably relying on the saving-statute in R.C. 2305.19, Schulte asserts that since he has already voluntarily dismissed his first complaint, the dismissal of his second complaint has resulted in a dismissal on the merits.[2] Therefore, he requests that we apply the version of Civ.R. 10 that was in effect at the time he filed his original complaint in 2004. Schulte acknowledges that he failed to raise this issue in the trial court, but argues that he "never had a reasonable chance" to do so. However, despite his assertion to the contrary, Schulte *did* have a reasonable opportunity to raise this argument in response to Dr. Wilkey's motion to dismiss; see, e.g., *Oglesby* at ¶4-6, 12-28, and since he failed to do so, this court need not address Schulte's constitutional argument. See *Troutman v. Jonathan Alder Local School Dist. Bd. of Edn.,* Madison App. No. CA2009-08-016, ¶12, citing *Brooks v. Miami Valley Hosp.,* Montgomery App. No. 23361, 2009-Ohio-6813, ¶23.

{¶33} Lastly, while the Ohio Supreme Court in *Fletcher* agreed with the trial court's decision to dismiss Fletcher's wrongful death and medical malpractice complaint under Civ.R. 12(B)(6) due to her failure to include an affidavit of merit in

2. See *Hall,* 2008-Ohio-4725, ¶36, citing *Thomas v. Freeman*, 79 Ohio St.3d 221, 227, 1997-Ohio-395 (savings statute in R.C. 2305.19(A) allows plaintiff whose claim fails otherwise than upon the merits to commence a new action within one year of such failure of the claim, but statute can be used only once to re-file a case).

her complaint, the Ohio Supreme Court disagreed with the trial court's decision to dismiss Fletcher's complaint *with prejudice*. The *Fletcher* court held that "[a] dismissal of a complaint for failure to file the affidavit required by Civ.R. 10(D)(2) is an adjudication otherwise than on the merits[,] and therefore, "[t]he dismissal **** is *without prejudice*." (Emphasis added.) Id. at paragraph two of the syllabus. The *Fletcher* court further stated in a footnote:

{¶34} "Presumably, the trial court ordered the dismissal with prejudice as a result of the case's having already been refiled once under R.C. 2305.19, the saving statute. *In the event that Fletcher chooses to file the action a third time, then at that point, the parties may raise the saving-statute issue along with any other applicable Civil Rules or statutes, as they see fit.*" (Emphasis added.) *Fletcher* at ¶19, fn. 4.

{¶35} In this case, the trial court did not specify whether it was dismissing Schulte's claims against Dr. Wilkey and Midwest with or without prejudice; however, under *Fletcher*, a dismissal of a complaint for failure to file an affidavit of merit as required by Civ.R. 10(D)(2)(a) is "an adjudication otherwise than on the merits," and therefore the dismissal of Schulte's complaint was "without prejudice." Id. at paragraph two of the syllabus. As stated in *Fletcher*, in the event Schulte chooses to file his action against Dr. Wilkey and Midwest a third time, "then at that point, the parties may raise the saving-statute issue along with any other applicable Civil Rules or statutes, as they see fit." Id. at ¶19, fn. 4.

{¶36} Accordingly, Schulte's sole assignment of error is overruled.

{¶37} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.