[Cite as *Marchetti v. Blankenburg*, 2011-Ohio-2212.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

GARY "PAT" MARCHETTI,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-09-232
	:	O P I N I O N
- vs -		5/9/2011
	:	
MARK E. BLANKENBURG, M.D.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-11-5018

Kircher Arnold & Dame, LLC, Konrad Kircher, 4824 Socialville-Foster Road, Mason, Ohio 45040, for plaintiff-appellant

Jack C. McGowan, 246 High Street, Hamilton, Ohio 45011 and Reminger Co., LPA, Rick L. Weil, 525 Vine Street, Suite 1700, Cincinnati, Ohio 45202, for defendant-appellee

BRESSLER, J.

{¶1} Plaintiff-Appellant, Gary "Pat" Marchetti, appeals from a decision of the Butler County Court of Common Pleas dismissing his complaint against defendant-appellee, Mark E. Blankenburg, M.D.

{¶2} On November 13, 2009, appellant filed his complaint against appellee, in which he asserted claims of childhood sexual abuse and assault, breach of contract, promissory estoppel, medical negligence, breach of fiduciary duty, and intentional

infliction of emotional distress. In his complaint, appellant alleges that when he was a 14-year-old patient of appellee, appellee molested him during a medical office visit. Appellant alleges that immediately after doing so, appellee gave appellant $100 in cash and ordered appellant not to tell anyone about the incident. Appellant further alleges that throughout his childhood and into his adulthood, appellee continued to sexually molest him and continued to provide appellant financial support. Appellant claims that appellee repeatedly represented that, "[i]f you don't turn me in, I will take care of you." Appellant maintains that on other occasions, appellee threatened to harm appellant's girlfriend and children if he reported appellee to the authorities.

{¶3} On January 7, 2010, appellee moved to dismiss the complaint against him and on August 25, 2010, the trial court dismissed the complaint. Appellant appeals the trial court's decision and raises three assignments of error. We will address appellant's first and second assignments of error together.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE BREACH OF CONTRACT CLAIM."

{¶6} Assignment of Error No. 2:

{¶7} "THE TRIAL COURT ERRED IN FAILING TO ADDRESS THE PROMISSORY ESTOPPEL CLAIM AND DISMISSING IT."

{¶8} In his first assignment of error, appellant argues that the trial court erred in dismissing his breach of contract claim. Appellant maintains the trial court incorrectly found that the agreement between the parties is founded on consideration that is illegal, immoral, and against public policy. In his second assignment of error, appellant argues the trial court erred in dismissing his promissory estoppel claim without considering it.

{¶9} Civ.R. 12(B)(6) authorizes the dismissal of a complaint if it "fails to state a

claim upon which relief can be granted." *Smith v. Village of Waynesville*, Warren App. No. CA2007-03-039, 2008-Ohio-522, ¶6. In order to prevail on a Civ.R. 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling relief." *DeMell v. The Cleveland Clinic Found.*, Cuyahoga App. No. 88505, 2007-Ohio-2924, ¶7. In turn, "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145. A trial court's order granting a motion to dismiss pursuant to Civ.R. 12(B)(6) is subject to de novo review. *Sparks v. Bowling*, Butler App. No. CA2009-02-065, 2009-Ohio-5071, ¶10; *Knoop v. Orthopaedic Consultants of Cincinnati, Inc.*, Clermont App. No. CA2007-10-101, 2008-Ohio-3892, ¶8.

{¶10} The existence of an enforceable contract is a prerequisite to a claim for breach of contract. *Ireton v. JTD Realty Invests., L.L.C.*, Clermont App. No. CA2010-04-023, 2011-Ohio-670, ¶38, citing *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 108. Essential elements of a contract include "an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Artisan Mechanical, Inc. v. Beiser*, Butler App. No. CA2010-02-039, 2010-Ohio-5427, ¶26, quoting *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16.

{¶11} After reviewing the record, we disagree with appellant's argument that the parties reached an enforceable agreement. The parties could not enter into an enforceable contract that was in direct violation of state statutes. See *Dunn v. Bruzzese*, 172 Ohio App.3d 320, 2007-Ohio-3500, ¶81. A contract containing such promises as consideration are either stricken from the contract, if possible, or the promises render the entire contract void. Id., citing *Extine v. Williamson Midwest, Inc.*

(1964), 176 Ohio St. 403, 405. Moreover, "[c]ourts of law and courts of equity will decline to enforce obligations created by contract if the contract is illegal or the consideration given for it is illegal, immoral, or against public policy. *Langer v. Langer* (1997), 123 Ohio App. 3d 348, 354, citing 41 Ohio Jurisprudence 3d (1983), Equity, Section 49.

{¶12} Appellant claims the terms of the alleged contract required appellee to provide money to appellant in exchange for appellant's promise to tell no one about the incidents of sexual abuse. Appellant maintains this requirement included both forgoing assertion of civil remedies and refraining from reporting the abuse to law enforcement authorities. Specifically, appellant states in his complaint, "[appellee] repeatedly represented to [appellant] words to the effect of, 'If you don't turn me in, I will take care of you.' On other occasions, [appellee] threatened to harm [appellant's] girlfriend and [appellant's] children if [appellant] turned [appellee] in to authorities."

{¶13} Appellant is misguided in his argument that the trial court erred in interpreting the term "authorities" in the alleged contract to mean only law enforcement authorities when the trial court concluded that this contract or the consideration for it is illegal, immoral, or against public policy. Appellant's admission that the alleged contract included a requirement to refrain from reporting the sexual abuse to law enforcement authorities alone renders this alleged contract illegal and unenforceable, because knowingly failing to report to law enforcement authorities that a felony crime has been or is being committed is a violation of R.C. 2921.22(A). Moreover, we find such an agreement to be contrary to public policy.

{¶14} Appellant maintains that even if the agreement between the parties is unenforceable, he is entitled to equitable relief under the doctrine of promissory estoppel.

{¶15} An action for damages under promissory estoppel provides an adequate remedy for an unfulfilled or fraudulent promise. "The doctrine of promissory estoppel comes into play where the requisites of contract are not met, yet the promise should be enforced to avoid injustice." *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St. 3d 89, 2009-Ohio-2057, ¶39. Ohio has adopted the view of promissory estoppel expressed in Restatement of the Law 2d, Contracts (1973), Section 90. Id. That section states: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Id at 56.

{¶16} "To be successful on a claim of promissory estoppel, '[t]he party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading.'" *Shampton v. Springboro*, 98 Ohio St.3d 457, 2003-Ohio-1913, ¶34, quoting *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145, citing *Heckler v. Community Health Serv.* (1984), 467 U.S. 51, 59, 104 S.Ct. 2218.

{¶17} However, just as this court will not enforce a contractual obligation based on an illegal agreement or illegal consideration, we will not enforce an equitable obligation based on the same agreement. See *Langer*, 123 Ohio App. 3d at 354. Therefore, even if the trial court erred in dismissing appellant's promissory estoppel claim, we find that error to be harmless as the alleged agreement in this case cannot be enforced.

{¶18} Appellant's first and second assignments of error are overruled.

{¶19} Assignment of Error No. 3:

{¶20} "THE TRIAL COURT ERRED IN DISMISSING THE MEDICAL MALPRACTICE CLAIM DUE TO LACK OF AN AFFIDAVIT OF MERIT."

{¶21} In his third assignment of error, appellant argues the trial court erred in dismissing his medical malpractice claim for failing to attach an affidavit of merit to his complaint in compliance with Civ.R. 10(D)(2).

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

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

{¶24} "(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:

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

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

{¶27} "(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.

{¶28} "(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.

{¶29} "(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:

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

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

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

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

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

{¶35} "(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."

{¶36} Recently, in *Schulte v. Wilkey*, Butler App. No. CA2010-02-035, 2010-Ohio-5668, we analyzed the Ohio Supreme Court's decision in *Fletcher v. Univ. Hosp. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶10, in which the supreme court stated:

{¶37} "[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.'"

{¶38} "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.'" *Schulte* ¶25, citing *Fletcher* at ¶13.

{¶39} Just as in *Schulte*, it is undisputed that appellant failed to include in his medical malpractice complaint an affidavit of merit, as expressly mandated by Civ.R. 10(D)(2)(a). 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 complaint and appellant failed to file such a motion. See *Schulte* at ¶26. Accordingly, it was appropriate for appellee to move for dismissal of appellant's complaint under Civ.R. 12(B)(6). Id. at ¶26. We decline appellant's request to find that the allegations in his complaint and witness testimony at trial are an adequate substitute for the mandates of Civ.R. 10(D)(2), and we find that the trial court properly dismissed appellant's complaint for medical malpractice.

{¶40} Appellant's third assignment of error is overruled.

{¶41} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.