[Cite as *Kenney v. Univ. of Toledo Med. Ctr.*, 2015-Ohio-5652.]

BRIAN KENNEY Plaintiff v. UNIVERSITY OF TOLEDO MEDICAL CENTER Defendant	Case No. 2013-00575 Judge Patrick M. McGrath Magistrate Anderson M. Renick ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On September 4, 2015, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiff has not filed a response. The case is now before the court for a non-oral hearing on defendant's motion. Civ.R. 56(C) and L.C.C.R. 4.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "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." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} Plaintiff alleges medical malpractice arising out of treatment he received at defendant the University of Toledo Medical Center (UTMC) by two faculty members,

Amish Patel, D.O., and Steven Farrell, M.D. Plaintiff alleges that, beginning in October 2008, Drs. Patel and Farrell treated him for chronic back pain, which they allegedly diagnosed as being caused by a herniated disc. Defendant argues that plaintiff failed to timely file his complaint for medical malpractice.

{¶5} An action upon a medical claim shall be commenced within one year after the cause of action accrued. R.C. 2305.113. A "medical claim" is defined in R.C. 2305.113(E)(3) as follows:

{¶6} "(3) 'Medical claim' means any claim that is 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, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person * * *."

{¶7} R.C. 2305.113(B)(1) allows a party to extend the limitations period in a medical malpractice action by serving notice on the medical provider that the party is bringing a claim: "If prior to the expiration of the one-year period specified in division (A) of this section, a claimant who allegedly possesses a medical, dental, optometric, or chiropractic claim gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given."

{¶8} The Supreme Court of Ohio has established a three-part test to determine the accrual of a medical claim. *Hershberger v. Akron City Hospital*, 34 Ohio St.3d 1 (1987). Under the *Hershberger* test, a medical claim accrues: "(1) when the injured party became aware, or should have become aware, of the extent and seriousness of

his condition, (2) whether the injured party was aware, or should have been aware, that such condition was related to a specific professional medical service previously rendered him; and (3) whether such condition would put a reasonable person on notice of need for further inquiry as to the cause of such condition." *Id*.; *Frysinger v. Leech*, 32 Ohio St.3d 38, (1987), syllabus; *Oliver v. Kaiser Community Health Found.*, 5 Ohio St.3d 111, 117 (1983).

{¶9} In support of its motion, defendant submitted the affidavit Susan Mikkonen, R.N, who avers as follows:

{¶10} "1. I am the Legal Nurse Specialist in the Office of Legal Affairs, Health Science Campus, University of Toledo. I make this affidavit based upon my personal knowledge and my review of the records of the University of Toledo Medical Center kept in the ordinary course of business.

{¶11} "2. I have reviewed the complete medical records of all treatment rendered to Brian Kenney by physicians at the University of Toledo Medical Center, including but not limited to the records of Mr. Kenney's treatment by Amish Patel, D.O., and Steven Farrell, M.D.

{¶12} "3. Based upon that review, the last time Mr. Kenney was seen by any physician at the University of Toledo Medical Center was a clinic visit with Dr. Farrell on December 20, 2011. According to the record, at that visit Mr. Kenney told Dr. Farrell that he disagreed with Dr. Farrell's treatment recommendations and that he intended to seek medical treatment elsewhere.

{¶13} "4. Mr. Kenney has not been seen or treated by any physician at the University of Toledo Medical Center since December 20, 2011.

{¶14} "5. The law firm of Barkan & Robon served letters on the University of Toledo Medical Center purporting to extend the statute of limitations for a period of 180 days pursuant to R.C. 2305.113(B)(1). These letters were received by the Office of

Legal Affairs of the University of Toledo on April 2, 2013. A copy of these letters is attached hereto as Exhibit A."

{¶15} Based upon the undisputed evidence, plaintiff served 180-day letters on defendant more than one year after his claim accrued. Applying the one-year limitations period of R.C. 2305.11, plaintiff had until December 20, 2012, to file his complaint against defendant. Plaintiff's complaint in this case was not filed until September 27, 2013, more than nine months after his cause of action accrued. Therefore, plaintiff's complaint was untimely filed.

{¶16} For the foregoing reasons, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

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