[Cite as *George v. Univ. of Toledo Med. Ctr.*, 2017-Ohio-7508.]

FREDERICK GEORGE Plaintiff v. UNIVERSITY OF TOLEDO MEDICAL CENTER Defendant	Case No. 2016-00116 Judge Patrick M. McGrath Magistrate Anderson M. Renick ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On May 11, 2017 and May 25, 2017, defendant, the University of Toledo Medical Center (UTMC), filed motions for summary judgment pursuant to Civ.R. 56(B). On June 1, 2017 and June 9, 2017, plaintiff filed responses to defendant's motions. The motions for summary judgment are now before the court for a non-oral hearing.

{¶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's claims arise from orthopedic surgery that was performed to repair an injury to his left shoulder. Plaintiff alleges that defendant's employee David Sohn,

M.D., performed the surgical procedure improperly. In its May 11, 2017 motion for summary judgment, defendant argues that plaintiff failed to commence this action within one year of the date when the cause of action accrued, as required by R.C. 2743.16 and 2305.113(A). In its May 25, 2017 motion, defendant contends that plaintiff cannot sustain his burden of proof because he does not have a qualified medical expert who is competent to testify in support of his claims.

Plaintiff's expert

{¶5} Defendant contends that plaintiff's medical expert, Casey Darrah, M.D., is not an orthopedic surgeon and, therefore, is neither competent nor qualified to opine regarding plaintiff's shoulder surgery because he admitted that he has not performed the surgery and that he has observed only one such procedure as the "second assist" during the first year of his residency.

{¶6} The Tenth District Court of Appeals has observed that "[u]nder Ohio law, any doctor licensed to practice medicine is competent to testify on medical issues * * *." *Rouse v. Riverside Methodist Hosp.*, 9 Ohio App.3d 206, 212 (10th Dist.1983). The fact that a medical expert has a specialty that is different from the specialty of the doctor at issue "bears only upon the weight to be given the evidence, not its admissibility." *Id.*

{¶7} The court finds that, although Dr. Darrah is not an orthopedic surgeon, construing the evidence most strongly in plaintiff's favor, the court is not convinced that he is not qualified to render an opinion as to the allegations of medical malpractice concerning the surgical procedure that Dr. Sohn performed. Accordingly, defendant's May 25, 2017 motion for summary judgment shall be denied.

Statute of limitations

{¶8} Pursuant to R.C. 2305.113, the applicable statute of limitations for medical claims is one year after the cause of action accrues. *Theobald v. Univ. of Cincinnati*, 10th Dist. No. 09AP-269, 2009-Ohio-5204, ¶ 9. A cause of action accrues and the

statute of limitations begins to run when: 1) "the patient discovers or, with the exercise of reasonable care should have discovered, the resulting injury"; or 2) "the physician-patient relationship for the condition for which care was sought terminates, whichever occurs later." *Id*., citing *Frysinger v. Leech*, 32 Ohio St.3d 38 (1987).

{¶9} Plaintiff testified that he was working as a truck driver when he injured his shoulder while loading a trailer. Plaintiff was initially treated at a local hospital and he subsequently had two shoulder surgeries that were performed by Dr. Olexa. After plaintiff continued to experience pain, he was referred by Dr. Olexa for an examination by Dr. Sohn, a shoulder specialist and chief of the sports medicine division at UTMC. According to plaintiff, Dr. Sohn reviewed his MRI and informed him that his shoulder was "really bad" and that he would attempt a surgical repair, but advised plaintiff that "it may not hold." (Plaintiff's deposition, p. 28.) Another MRI confirmed that the repair had failed and a reverse total shoulder replacement surgery was performed in December 2013; however, plaintiff continued to experience pain even after the replacement.

{¶10} On September 16, 2014, plaintiff was examined by Reuben Gobezie, M.D., at the Cleveland Shoulder Institute. (Affidavit of the records custodian for Dr. Gobezie, Exhibit A.) Dr. Gobezie recommended additional surgery and, according to plaintiff, informed him that "they [Dr. Sohn] put the wrong stuff in your shoulder." (Plaintiff's deposition, p. 46.) Plaintiff explained that the replacement medical devices used by Dr. Sohn were "either too big or too small." (*Id*., p. 47.)

Discovery rule

{¶11} Plaintiff admits that Dr. Gobezie examined him on September 16, 2014 and that he was informed during the examination that his shoulder was "butchered" when Dr. Sohn used "the wrong stuff" for the replacement procedure. However, plaintiff contends that he was not aware that Dr. Sohn had committed the alleged medical malpractice until approximately two months after Dr. Gobezie's examination. According to plaintiff, the discovery rule should apply to his claim for medical malpractice.

Specifically, plaintiff contends that he was not aware that medical malpractice had been committed until November 21, 2014 when a revision surgery was performed. Running the statute of limitations from that date of accrual would make his original complaint, filed November 19, 2015, timely.

{¶12} The Supreme Court of Ohio has "set forth and clarified an analysis to determine the accrual date for a medical malpractice claim, wherein the occurrence of a 'cognizable event' will trigger the running of the statute of limitations." *Patterson v. Janis*, 10th Dist. Franklin No. 07AP-347, 2007-Ohio-6860, ¶ 11, quoting *Akers v. Alonzo*, 65 Ohio St.3d 422, 425. A "cognizable event" has been defined as "some noteworthy event * * * which does or should alert a reasonable person-patient that an improper medical procedure, treatment or diagnosis has taken place." *Id*. ¶ 12, quoting *Allenius v. Thomas*, 42 Ohio St.3d 131, 134 (1989). "Thus, if a patient believes, because of harm she has suffered, that her treating medical professional has done something wrong, such a fact is sufficient to alert a plaintiff to the necessity for investigation and pursuit of her remedies." *Id*. Moreover, it is unnecessary for a patient to be "aware of the full extent of the injury before there is a cognizable event." *Id*. Furthermore, "constructive knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule." *Id*. at ¶ 13, quoting *Flowers v. Walker*, 63 Ohio St.3d 546, 549 (1992). "Accordingly, once the cognizable event occurs, a plaintiff must (1) determine whether the injury suffered is the proximate result of malpractice, and (2) ascertain the identity of the tortfeasor or tortfeasors." *Id.*

{¶13} Based upon the medical records submitted as evidence and accepting plaintiff's testimony regarding his medical history as true, the court finds that the only reasonable conclusion is that the cognizable event triggering the statute of limitations occurred on September 16, 2014 when Dr. Gobezie informed plaintiff that Dr. Sohn had allegedly placed the wrong medical devices in his shoulder and that he needed

additional surgery to repair the prior procedure. The court finds that, at that time, plaintiff was sufficiently alerted that improper medical care allegedly had been rendered by Dr. Sohn, the statute of limitations began to run and, for purposes of R.C. 2305.113(A), plaintiff's cause of action began to accrue no later than September 16, 2014.

180-day letter

{¶14} Furthermore, "[a] plaintiff may extend the statute of limitations '[i]f prior to the expiration of the one-year period * * * a claimant * * * gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim.' R.C. 2305.113(B)(1). Delivery of the so-called 180-day letter then allows commencement of that action 'against the person notified at any time within one hundred eighty days after the notice is so given.'" *Adams v. Kurz*, 10th Dist. Franklin No. 09AP-1081, 2010-Ohio-2776, ¶ 14.

{¶15} Defendant asserts that plaintiff did not give written notice of his intent to sue and did not avail himself of the 180 day extension pursuant to R.C. 2305.113(B)(1). In support of this assertion, counsel for defendant filed an affidavit stating that plaintiff's amended response to defendant's second request for admissions, interrogatories and document requests was received on May 5, 2017, wherein plaintiff admitted that he "did not serve a notice pursuant to R.C. 2305.113(B)(1) upon the University of Toledo, the University of Toledo Medical Center, or Dr. David H. Sohn." (Request for Admission No. 1.)

Savings statute

{¶16} Plaintiff also contends that his medical claims are timely filed pursuant to R.C. 2305.19(A), the savings statute, because he voluntarily dismissed the common pleas action on February 9, 2016 and filed this action on February 17, 2016. (Complaint, ¶ 11.)

{¶17} The savings statute provides that, "[i]n any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant." R.C. 2305.19(A). However, the savings statute will not apply to save a claim where plaintiff's first cause of action was not timely commenced pursuant to R.C. 2743.16(A). *Cristino v. Administrator*, 2012-Ohio-4420, ¶ 37 (10th Dist.).

{¶18} Plaintiff did not file his original complaint against UTMC in the Erie County Court of Common Pleas until November 19, 2015, well past the one-year statute of limitations. (Complaint, ¶ 10.) Because plaintiff waited over one year after the accrual of his claim to file his original complaint, he cannot take advantage of the saving statute. *Id.* For the foregoing reasons, the court finds that plaintiff's medical claims are untimely.

{¶19} Based upon the foregoing, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's May 11, 2017 motion for summary judgment is GRANTED and defendant's May 25, 2017 motion for summary judgment is DENIED. 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

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Filed July 19, 2017
Sent to S.C. Reporter 9/8/17