[Cite as *Young v. Spangler*, 2006-Ohio-401.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD YOUNG

Plaintiff-Appellant

-vs-

ROBERT T. SPANGLER, M.D.

Defendant-Appellee

JUDGES:
Hon. John W. Wise, P. J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 2005 CA 00153

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2005 CV 00417
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	January 30, 2006

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
HARRY J.C. WITTBROD PAUL A. WEICK 1630 Schiller Avenue Suite 1 Cuyahoga Falls, Ohio 44223	THOMAS A. TREADON MICHAEL J. FUCHS ROETZEL & ANDRESS, LPA 222 South Main Street Akron, Ohio 44308

Wise, J.

{¶1} Appellant Richard Young ("appellant") appeals the decision of the Stark County Court of Common Pleas that granted Appellee Dr. Robert Spangler's ("appellee") motion for summary judgment on the basis that appellant failed to identify an expert witness that was able to offer standard of care opinions with regard to a general surgeon.

{¶2} Appellant filed this medical malpractice action, against appellee, on February 7, 2005. Paragraphs 4, 5 and 7 of the complaint essentially set forth appellant's allegations. These paragraphs provide as follows:

{¶3} "4.0 Defendant failed to locate the section & covered up his mistake by failing to notify plaintiff that he could not locate the identified section.

{¶4} "5.0 * * * The polypops (sic) which should have been removed by defendant have turned cancerous and appear to have spread.

"* * *

{¶5} "7.0 As a result of the failure of defendant to notify plaintiff of his inability to remove the section of his colon corrective measures were not employed by plaintiff which would have minimized his damages." Complaint, Feb. 7, 2005, at 1-2.

{¶6} Soon after filing his complaint, appellant provided appellee with a report from his expert witness, Dr. Roy Bugay. Appellee investigated Dr. Bugay's background and discovered that he is an ophthalmologist and has never practiced general surgery. On March 17, 2005, the trial court conducted a pretrial conference. At the pretrial, appellee allegedly informed the trial court that Dr. Bugay is an ophthalmologist and therefore, is not qualified to testify, as an expert witness, about general surgery.

{¶7} On March 30, 2005, the trial court issued a pretrial order that compelled appellant to identify his expert and lay witnesses no later than April 29, 2005. Appellant did not identify a new expert witness by this date. Thereafter, on May 10, 2005, appellee filed a motion for summary judgment on the basis that appellant did not identify a qualified expert witness pursuant to the trial court's scheduling order. The trial court granted appellee's motion on June 7, 2005, finding Dr. Bugay is not qualified, as a matter of law, to offer standard of care opinions with regard to a general surgeon.

{¶8} Appellant timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

{¶9} "I. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO DEFENDANT WHEN DEFENDANT FAILED TO PRESENT ANY EVIDENTIARY MATERIAL TO SUPPORT SUMMARY JUDGMENT.

{¶10} "II. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO DEFENDANT ON THE BASIS THAT PLAINTIFF'S EXPERT WAS UNQUALIFIED."

I

{¶11} In his First Assignment of Error, appellant contends the trial court erred when it granted summary judgment to appellee because appellee did not present any evidentiary material to support his motion for summary judgment. We agree.

{¶12} Prior to addressing the merits of appellant's assignments of error, we will set forth the applicable standard of review for summary judgment motions. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding*

Party, Inc. (1987), 30 Ohio St.3d 35, 36. As such, we must refer to Civ.R. 56 which provides, in pertinent part:

{¶13} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case 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. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * *"

{¶14} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, (1996), 75 Ohio St.3d 280.

{¶15} It is based upon this standard that we review appellant's assignments of error. In his First Assignment of Error, appellant argues appellee failed to identify any portion of the record, in his motion for summary judgment, that demonstrates the absence of a genuine issue of material fact. Specifically, appellant maintains appellee submitted no affidavits nor identified any portion of the record that supports his legal conclusions. Appellant claims that in support of the motion for summary judgment, appellee solely relies upon the trial court's pretrial order that ordered him to identify lay and expert witnesses by April 29, 2005.

{¶16} Further, appellant points out that the pretrial order does not state that he must identify a different medical expert. It merely provides that appellant's witnesses must be identified by April 29, 2005. See Pre-Trial Order/Judgment Entry/Magistrate's Order, Mar. 30, 2005, at 1. Thus, appellant concludes appellee cannot rely upon the pretrial order, in support of his motion for summary judgment, since it does not specifically require him to identify a new expert witness due to the lack of qualifications of Dr. Bugay. Appellant also argues appellee submitted no affidavits to support his motion for summary judgment.

{¶17} In its judgment entry granting appellee's motion for summary judgment, the trial court concluded that appellant's identified expert, Dr. Bugay, who is the same expert appellant identified prior to the pretrial conference on March 17, 2005, was not qualified to offer standard of care opinions. The trial court based its conclusion on the fact that Dr. Bugay is an ophthalmologist and appellee is a general surgeon. Judgment Entry, June 7, 2005, at 3. Further, Dr. Bugay does not state, in his affidavit, that he is

familiar with the standard of care of a general surgeon or that he devotes fifty percent of his professional time to the active clinical practice of medicine. Id.

{¶18} The record is devoid concerning what may have been discussed, at the pretrial conference, in March 2005, regarding appellant's identified expert witness. However, it is known that appellant identified Dr. Bugay, as his expert, prior to the pretrial conference, and that the trial court gave him until April 29, 2005, to identify all witnesses. Appellant maintains, on appeal, that Dr. Bugay is more than qualified to testify about the facts supporting his claim.

{¶19} In response, appellee contends that because appellant sets forth a claim for medical malpractice, he was required to present testimony, from a qualified medical expert, that appellee deviated from the standard of care and proximately caused harm to him. Appellee further maintains that appellant's failure to establish the competency of Dr. Bugay is proper grounds for summary judgment.

{¶20} We agree with appellee's general statement of the law that a plaintiff's failure to establish the competency of its medical experts is proper grounds for summary judgment. See *Marcum v. Holzer Clinic, Inc.*, Gallia App. No. 03CA25, 2004-Ohio-4124, at ¶ 21. However, the issue we first find necessary to address concerns appellee's failure to attach any evidentiary material of the type listed in Civ.R. 56(C) in support of his motion for summary judgment. The evidentiary material set forth in Civ.R. 56(C) is as follows: "* * * pleadings[1], depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact * * *."

[1] "Pleadings" consist of a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party complaint, and a third party answer. Black's Law Dictionary (6 Ed. 1990) 1152.

{¶21} Further, Civ.R. 56(E) provides, in pertinent part, as follows:

{¶22} "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶23} In the case sub judice, the only evidence attached to his motion for summary judgment is the trial court's pretrial order that indicates appellant had until April 29, 2005, to identify his lay and expert witnesses. Appellee argues that appellant failed to identify a qualified expert witness who is critical of appellee and therefore, the trial court properly granted his motion for summary judgment. However, as noted above, the judgment entry does not indicate that the trial court gave appellant until April 29, 2005, to identify a new expert witness because it found, at the pretrial, that Dr. Bugay was not competent to testify. Rather, the document merely establishes that appellant had until that date to name all of his lay and expert witnesses. Further, the pretrial order is not the type of evidentiary material referred to Civ.R. 56(C).

{¶24} In *Hoffman v. Davidson* (1987), 31 Ohio St.3d 60, 62, the Ohio Supreme Court held that in the absence of an opposing affidavit of a qualified expert witness for the plaintiff, the affidavit of a defendant-treating physician attesting to his compliance

with the applicable standard of care presents a legally sufficient basis upon which a trial court may grant a summary judgment motion in a medical malpractice action.

{¶25} Thus, according to the *Hoffman* decision, appellee, in order to meet his burden, under Civ.R. 56(C), that appellant did not have a qualified expert witness, should have attached an affidavit or some other evidentiary quality material setting forth the facts in support of his claim that appellant was not a qualified witness. In fact, the only mention, in the record, that Dr. Bugay is an ophthalmologist and therefore, may not be qualified to testify about general surgery, is contained in the introduction section of appellee's motion for summary judgment.

{¶26} If appellee had attached an affidavit or other evidentiary material in which he indicated Dr. Bugay did not meet the necessary qualifications to be an expert in this case, the burden would have shifted to appellant to set forth specific facts establishing Dr. Bugay's qualifications as an expert witness. At that time, had appellant attached the affidavit of Dr. Bugay, as his medical expert, it would have been appropriate for the trial court to determine whether Dr. Bugay qualified as an expert witness. However, because appellee did not support his motion for summary judgment with evidentiary material as specified in Civ.R. 56(C), we conclude the trial court erred when it granted appellee's motion for summary judgment.

{¶27} Appellant's First Assignment of Error is sustained. We will not address appellant's Second Assignment of Error as it is moot based upon our disposition of appellant's First Assignment of Error.

{¶28} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby reversed and remanded for further proceedings consistent with this opinion.

By: Wise, P. J.

Hoffman, J., concurs separately.

Gwin, J., dissents.

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JUDGES

JWW/d 110

Hoffman, J. concurring

{¶29} I concur in the result reached by Judge Wise. Although captioned as a motion for summary judgment, the thrust of appellee's motion appears to be more akin to a motion in limine to prohibit Dr. Bugay from testifying as an expert. I concede hindsight is "usually" perfect, and a motion to strike his affidavit or motion in limine would have been the appropriate procedural mechanism to bring the issue to the court. If Dr. Bugay was determined not to be qualified to offer expert testimony[2], appellee could then have filed an additional motion to prohibit evidence from any other witnesses not identified pursuant to the June 7, 2005 Judgment Entry. At that time a motion to dismiss or a motion for summary judgment supported by proper evidence could have been filed on behalf of appellee. But as presented here, I concur with Judge Wise the trial court's granting of appellee's motion for summary judgment was improper.

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JUDGE WILLIAM B. HOFFMAN

[2] Although I agree Dr. Bugay is not qualified to offer an opinion as to the standard of care regarding general surgery, a legitimate argument can be made Dr. Bugay is qualified to testify as an expert regarding a doctor's ethical duty to inform a patient of the success or failure of surgery; more specifically, whether the surgery achieved its intended result.

Gwin, J., dissenting

{¶30} The majority finds appellee attached no evidence in support of his motion for summary judgment. Civ. R. 56 (B) provides: "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sougt may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action…"

{¶31} The moving party must point to some evidence in the record which demonstrates the non-moving party cannot support its claim, *Vahilla,* supra. The moving party need not submit its own evidence but may rely on anything in the record, including the opposing party's evidence.

{¶32} The trial court had before it appellee's motion for summary judgment and a copy of the court's pretrial order. The order required appellant to identify all witnesses by April 29. The order stated if a witness is not identified, he or she will not testify.

{¶33} In response, appellant filed his affidavit and medical records, verified by his attorney's affidavit stating the records are accurate copies of ones received from the hospital, and Dr. Bugay's report.

{¶34} Civ. R. 56 (E) requires opposing affidavits to be made on personal knowledge and shall affirmatively show the affiant is competent to testify as to the matters stated in the affidavit.

{¶35} In order to be admissible evidence as the affidavit of an expert witness, Dr. Bugay's affidavit must comply with R.C. 2743.43:

{¶36} "No personal shall be deemed competent to give expert testimony on the Liability issues in a medical claim, … unless:

{¶37} (B)(1) Such person is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state;

{¶38} (2) Such person devotes three-fourths of the person's professional time to the active clinical practice of medicine or surgery, osteopathic medicine and surgery, or podiatric medicine and surgery, or to its instruction in an accredited university;

{¶39} (3) The person practices in the same or a substantially similar specialty as the defendant. The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties.

{¶40} (4) If the person is certified in a specialty, the person must be certified by a board recognized by the American board of medical specialties or the American board of osteopathic specialties in a specialty having acknowledged expertise and training directly related to the particular health care matter at issue."

{¶41} In order to be admissible the affidavit must comply with the Rules of Evidece. Evid. R. 601 (D) provides a person is qualified to testify except:

{¶42} ((D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and

surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.))

{¶43} Evid. R. 702 provides:

{¶44} "A witness may testify as an expert if all of the following apply:

{¶45} The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶46} The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶47} The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

{¶48} The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

{¶49} The design of the procedure, test, or experiment reliably implements the theory;

{¶50} The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

{¶51} The appellant argues as a licensed physician Dr. Bugay is competent to testify about the appellee's ethical duties to his patient. This is probably true.

{¶52} Dr. Bugay's affidavit goes far beyond outlining the ethical duty of a doctor to his or her patient. The affidavit gives an extensive recital of the surgery and its aftermath. It asserts appellee's failure to inform appellant his pre-cancerous area was not removed and caused a delay resulting in the area becoming cancerous. It concludes: "That in my opinion, the malpractice committed by Dr. Spangler in his treatment of Richard Young is as follows: 1. Failure to remove the identified pre-cancerous area to be removed…"

{¶53} Dr. Bugay's testimony is the only evidence of malpractice appellant filed. The attached medical records depend upon the doctor's interpretation.

{¶54} In order to establish appellee had a duty to inform appellant of the failure of the surgery, appellant must establish several things: 1. appellee did not removed the correct portion of the colon; 2. the portion of the colon he should have removed is the same portion that turned cancerous; and 3. appellee's conduct fell below the appropriate standard of care. Without these, there is nothing appellee failed to tell appellant.

{¶55} Appellant alleges if appellee had informed him of the failure of the surgery, he would have sought further medical treatment. I would find appellant must demonstrate another physician could have located and removed the portion of colon appellee allegedly missed.

{¶56} I would conclude Dr. Bugay's affidavit was insufficient as a matter of law, and I would affirm the trial court's decision.

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JUDGE W. SCOTT GWIN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD YOUNG	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ROBERT T. SPANGLER, M.D.	:	
Defendant-Appellee	:	Case No. 2005 CA 00153

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is reversed and remanded for further proceedings consistent with this opinion.

Costs assessed to Appellee.

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JUDGES