[Cite as *Wilson v. Mercy Med. Ctr.*, 2015-Ohio-3928.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ISAAC AND SHAWN WILSON Plaintiffs-Appellants -vs- MERCY MEDICAL CENTER Defendant-Appellee	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 2015CA00010 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2014CV00444
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 21, 2015

APPEARANCES:

For Defendant-Appellee	For Plaintiffs-Appellants
STEPHEN E. MATASICH Day Ketterer, Ltd. Millennium Centre - Suite 300 200 Market Avenue, North P.O. Box 24213 Canton, Ohio 44701-4213	STACIE L. ROTH Allen Schulman & Associates 236 Third Street, SW Canton, Ohio 44702

Hoffman, J.

{¶1} Plaintiffs-appellants Isaac Wilson, et al. appeals the December 19, 2014 Judgment Entry entered by the Stark County Court of Common Pleas, which granted summary judgment in favor of defendant-appellee Mercy Medical Center ("Mercy").

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Isaac Wilson ("Mr. Wilson") was admitted as a patient into Mercy in February, 2011, for medical care following a fall at his home. One week after his admission, Mr. Wilson was transferred to Mercy's rehabilitation unit. Mercy determined Mr. Wilson to be a fall risk which, pursuant to internal policy and records, required he be checked on an hourly basis. Mr. Wilson was advised not to attempt to get out of bed without calling for assistance. At 9:30 p.m. on February 24, 2011, Mr. Wilson was found on the floor of his room with a severe laceration to his head. The last notation documented on Mr. Wilson's medical chart indicated staff administered medication to him at 7:15 that evening.

{¶3} Appellants filed suit on August 20, 2012, alleging medical negligence, premises liability, and loss of consortium. Mercy filed a motion for summary judgment on April 5, 2013. Appellants dismissed the case without prejudice approximately two weeks later.

{¶4} On February 18, 2014, Appellants refiled the complaint, asserting two causes of action. The second cause of action, which is not at issue in the instant appeal, set forth a premises liability claim. The first cause of action alleges medical malpractice/negligence, and reads:

9. Plaintiffs hereby incorporate paragraphs one (1) through eight (8), inclusive, of this Complaint as though fully rewritten herein.

10. Plaintiffs state that said Defendant, as described hereinabove, were engaged to attend and treat Plaintiff Isaac Wilson in a properly skillful manner by the exercise of the degree of care and skill ordinarily employed by members of their profession in the same line of medical practice in this or similar communities.

11. Plaintiffs further state that said Defendant was negligent in their care and treatment of Plaintiff by, among other things, failing to properly monitor and care for Plaintiff Isaac Wilson notwithstanding his known risk for falls, and said failure resulted in his fall and severe and permanent physical injury.

12. Plaintiffs further state that said Defendant was negligent in their care and treatment of Plaintiff Isaac Wilson in that they failed to exercise or possess the degree of care, skill and learning ordinarily exercised by other medical personnel having regard to the existing state of knowledge and medicine.

{¶5} Upon conclusion of discovery, Mercy filed a motion for summary judgment on September 23, 2014. Therein, Mercy argued Appellants' medical malpractice claim should be dismissed as such did not constitute a medical claim. Mercy further asserted the premises liability claim should be dismissed because Appellants failed to establish a duty of care was owed or breached. Mercy also maintained there was no evidence to

prove any alleged failure to monitor Mr. Wilson was the proximate cause of his fall and resulting injuries.

{¶6} Appellants filed their response on October 10, 2014. Appellants agreed the first cause of action was not a claim of medical malpractice, but rather a claim for ordinary negligence. In the alternative, Appellants stated "if this Complaint could possibly be construed to be solely a medical malpractice claim", they "would respectfully request that this Honorable Court grant a motion to allow the evidence to conform to the pleadings" pursuant to Civ. R. 15(B). Plaintiffs' Memorandum Contra to Defendant's Motion for Summary Judgment at 5.

{¶7} Via Judgment Entry filed December 19, 2014, the trial court granted Mercy's motion for summary judgment and dismissed Appellants' complaint. The trial court found, even construing Appellants' first cause of action as a claim of ordinary negligence, or permitting Appellants to amend their complaint to assert a claim for ordinary negligence, Appellants failed to demonstrate Mercy owed Mr. Wilson a duty of care based upon Mercy's internal policy which required hospital staff to conduct hourly rounds to check on patients; or that Mercy breached such a duty. The trial court further found the deposition testimony of Michael Shaffer, a Patient Service Aide, sufficient to rebut Appellants' allegation Mr. Wilson had not been seen between 7:15 p.m. and 9:30 p.m. on February 24, 2011. Additionally, the trial court found Appellants did not present evidence to establish Mercy's alleged failure to check on Mr. Wilson was the proximate cause of his fall.

{¶8} It is from this judgment entry Appellants appeal, assigning as error:

{¶9} "I. THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' FIRST CAUSE OF ACTION RATHER THAN GRANTING LEAVE TO AMEND THEIR COMPLAINT PURSUANT TO OHIO CIVIL RULE 15(B).

{¶10} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN ISSUES REMAINED AS TO WHETHER APPELLEE OWED A DUTY OF ORDINARY CARE TO MONITOR ITS PATIENTS.

{¶11} "III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN ISSUES OF FACT REMAINED AS TO WHETHER APPELLEE'S FAILURE TO MONITOR APPELLANT WAS A DIRECT AND PROXIMATE RESULT OF HIS INJURIES."

I

{¶12} In their first assignment of error, Appellants maintain the trial court erred in dismissing their first cause of action rather than granting leave to amend the complaint pursuant to Civ. R. 15(B).

{¶13} Civ.R.15(B) provides: “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” The rule provides further that an amendment can be made at any time, even after judgment, and is to be liberally construed in an effort to decide cases on their merits. *Id. See, also, Monroe v. Youssef,* 11th Dist. Trumbull No.2009–T–0012, 2012–Ohio–6122, citing *Hall v. Bunn,* 11 Ohio St.3d 118, 121, 464 N.E.2d 516 (1984).

{¶14} Whether to grant or deny a Civ.R. 15(B) motion to amend pleadings is within the discretion of the trial court. *Everhart v. Everhart (In re Estate of Everhart),*

12th Dist. Fayette Nos. CA2013–07–019, CA2013–09–026, 2014–Ohio–2476. In order to find an abuse of that discretion, an appellate court must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Grimes v. Grimes,* 4th Dist. Washington No. 10CA23, 2012–Ohio–3562.

{¶15} We find the trial court did not abuse its discretion in failing to grant Appellants leave to amend their complaint. First, Appellants never filed a motion to amend pursuant to Civ. R. 15(B) or otherwise. Appellants' statement in their memorandum contra Mercy's motion for summary judgment indicating they "would respectfully request that this Honorable Court grant a motion to allow the evidence to conform to the pleadings" pursuant to Civ. R. 15(B) does not constitute a proper motion for leave to amend the pleadings. As such, there was no motion for the trial court to grant or deny. *See, Miller-Wagenknecht v. Midland Mut. Life Ins. Co.* (May 4, 1994), 9th Dist. Summit No. 16457.

{¶16} Additionally, Civ. R. 15(B) is inapplicable to the instant action as the matter never proceeded to trial. In cases where there has been no trial, reviewing courts have found the use of Civ. R. 15(B) inappropriate. *See Merrill Lynch Mtge. Lending, Inc. v. 1867 W. Market, L.L.C.,* 9th Dist. Summit No. 23443, 2007–Ohio–2198,—11; *Suriano v. NAACP,* 7th Dist. Jefferson No. 05 JE 30, 2006–Ohio–6131. Civ. R. 15(B) "is applicable only in cases that have gone to trial, not those determined on summary judgment." *Siegel v. LifeCenter Organ Donor Network,* First Dist. No. C–100777, 2011 - Ohio- 6031.

{¶17} We next consider whether Civ.R. 15(A) would have supported an amendment to Appellants' complaint.

{¶18} Civ. R.15(A) provides: “A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires.”

{¶19} An appellate court reviews a trial court's decision on a motion for leave to file an amended pleading under an abuse of discretion standard. *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.,* 60 Ohio St.3d 120, 573 N.E.2d 622 (1991).

{¶20} “An attempt to amend a complaint following the filing of a motion for summary judgment raises the spectre of prejudice.” *Brown v. FirstEnergy Corp.,* 9th Dist. No. 22123, 2005–Ohio–712, at ¶ 6, 159 Ohio App.3d 696 . “A plaintiff must move to amend under Civ.R. 15(A) in a timely manner.” *Cunningham v. Cunningham,* 9th Dist. No. 01CA007938, 2002–Ohio–2647, at ¶ 16. Appellants’ request was untimely as such was not made until after Mercy filed its motion for summary judgment. *See, Robinson v. Omega Labs., Inc.*, 5th Dist. Stark No. 2006-CA-00178, 2007-Ohio-2482.

{¶21} Based upon the foregoing, we overrule Appellants’ first assignment of error.

{¶22} Despite the foregoing analysis of Civ.R. 15, we find paragraph No. 11 of Appellant's complaint sufficient to raise a common law negligence claim and, accordingly, will proceed with our analysis of their second and third assignments of error.

II, III

{¶23} Because Appellants' second and third assignments of error challenge the propriety of the trial court's granting summary judgment in favor of Mercy, we elect to address said assignments of error together. In their second assignment of error, Appellants contend the trial court erred in granting summary judgment when issues remained as to whether Mercy owed a duty to monitor its patients. In their third assignment of error, Appellants submit the trial court erred in granting summary judgment when issues of fact remained as to whether Mercy's failure to monitor Mr. Wilson was a direct and proximate result of his injuries.

{¶24} 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.,* 30 Ohio St.3d 35, 36, 506 N.E.2d 212 (1987). As such, this Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶25} Civ.R. 56 provides summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

{¶26} It is well established the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v.*

Catrett, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265(1986). The standard for granting summary judgment is delineated in *Dresher v. Burt,* 75 Ohio St.3d 280 at 293, 662 N.E.2d 264 (1996): " * * * a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ,* 37 Ohio St.2d 150, 309 N.E.2d 924 (1974).

{¶27} Appellants assert Mercy's internal policies and procedures established a duty of care owed to Mr. Wilson and the trial court erred in finding to the contrary. We disagree.

{¶28} We find, while hospital rules and regulations are, at the discretion of the trial court, admissible to provide evidence of the standard of care in a medical

negligence action, such internal policies and procedures do not create an independent common law duty. *See, e.g., Luettke v. St. Vincent Mercy Med. Ctr.*, 6th Dist. No. L-05-1190, 2006-Ohio-3872.[1,2] Furthermore, assuming, arguendo, Mercy's internal policies and procedures create a common law duty of care, Appellants' have failed to show Mercy's breach of that duty was the proximate cause of Mr. Wilson's injuries.[3]

{¶29} Appellants' second and third assignments of error are overruled.

{¶30} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

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HON. WILLIAM B. HOFFMAN

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W. SCOTT GWIN

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HON. PATRICIA A. DELANEY

[1] Appellants did not establish Mercy had an independent common law duty to set an internal "check" policy, let alone how often such "check" must occur.

[2] Although we believe the absence of notation of Shaffer's check on Mr. Wilson's medical chart may be sufficient to create a genuine dispute of fact as to possible breach of duty, because we find no duty exists, such dispute become immaterial.

[3] Unless Appellants can prove Mr. Wilson's fall happened at the exact time a check would have been occurring, rather than between the hourly checks, they cannot establish the failure to do so was the proximate cause of the fall. When asked at oral argument if there was any evidence of aggravation of injuries due to delay of discovery, Appellants' counsel candidly conceded none existed.