[Cite as *Dickenson v. Hartwig*, 2004-Ohio-1330.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Samir Dickenson

Appellant

v.

Dr. Robert H. Hartwig, et al.

Appellees

Court of Appeals No. L-03-1085
L-03-1148

Trial Court No. CI-01-5084

DECISION AND JUDGMENT ENTRY

Decided: March 19, 2004

* * * * *

Alex C. Perris and Walter J. Vogel, for appellant.

Nancy D. Moody and Kristen A. Connelly, for appellee, Robert H. Hartwig, M.D.

Susan M. Reinker and Patrick J. Quallich, for appellee, Martin C. Skie, M.D.

* * * * *

PIETRYKOWSKI, J.

{¶1} This medical malpractice case is before the court on appeal from the Lucas County Court of Common Pleas, which granted summary judgment to appellees Dr. Robert Hartwig and Dr. Martin Skie and denied appellant Samir Dickenson's motion for relief from judgment. Because we find that the trial court ruled properly on the summary judgment motion, and because appellant provided no argument on the Civ.R. 60(B) issue, we affirm the judgments of the trial court.

{¶2} In 2001, appellant sued Drs. Hartwig and Skie, both physicians specializing in orthopedic surgery, for medical malpractice. Both physicians had treated appellant for injuries to his hand, and appellant contended in his complaint that both had released him to work prematurely, resulting in re-injury. The physicians filed separate motions for summary judgment, both arguing that the claims against them were barred by the statute of limitations and that they did not deviate from the standard of care in treating appellant. Each physician offered his own affidavit in support of his motion.

{¶3} Appellant responded to both motions and attached an affidavit from his own expert, Dr. Dennis A. Glazer. In his November 18, 2002 reply memorandum in support of his motion for summary judgment, Dr. Hartwig pointed out what he believed to be two defects in Dr. Glazer's affidavit: (1) that Dr. Glazer failed to recite that he spent one-half of his professional time in clinical practice; and (2) that Dr. Glazer did not aver in the affidavit that appellees' alleged malpractice proximately caused appellant's injury. On February 26, 2003, some three months after Dr. Hartwig filed his reply memorandum, the trial court granted both motions for summary judgment, finding that appellant had not set forth a prima facie case of medical malpractice. In so ruling, the trial court held that Dr. Glazer's affidavit did not establish him as a competent expert as his affidavit did not recite that he devoted one-half of his professional time to clinical practice. The trial court also held that there was no evidence of proximate cause as Dr. Glazer's affidavit was silent on this point.

{¶4} Appellant subsequently filed a motion for relief from judgment pursuant to Civ.R. 60(B)(1), excusable neglect. He argued in his motion that his attorney delayed in

correcting the deficient affidavit because he expected the trial court to notify him that the case was deemed submitted before ruling on the motion. According to appellant, case law supports such notice, particularly where no local rule exists governing when a case is deemed submitted for decision. Appellant produced an affidavit from his attorney in which the attorney testified as to his belief that he would be given notice before the court ruled upon the motions for summary judgment. The attorney also testified that he had been in poor health and that this also prevented him from correcting the deficient affidavit. The trial court denied the motion for relief from judgment, holding that the neglect was not excusable since a local rule exists governing when a case is deemed submitted. The trial court also noted that, though the attorney testified that he had been in poor health, he never brought this fact to the court's attention or requested an extension to file an amended affidavit from his expert. Finally, the court noted that appellant was represented by two attorneys, and there was no apparent reason that the other attorney could not have filed an amended affidavit or otherwise acted on appellant's behalf during the first attorney's illness.

{¶5} Appellant now appeals, setting forth the following two assignment of error:

{¶6} "The trial court committed error and an abuse of discretion in granting defendants' motions for summary judgment.

{¶7} "The trial court committed error and an abuse of discretion in denying plaintiff's motion for relief under Civil Rule 60(B)."

{¶8} In his first assignment of error, appellant contends that the trial court erred in granting appellees' motions for summary judgment. We review the trial court's ruling

on the summary judgment motion de novo. *Conley-Slowinski v. Superior Spinning* (1998), 128 Ohio App.3d 360, 363, discretionary appeal not allowed (1998), 83 Ohio St.3d 1464. A movant is entitled to summary judgment pursuant to Civ.R. 56(C) when she demonstrates:

{¶9} "*** that there is no issue as to any material fact, that the moving party is entitled to judgment as a matter of law, and that reasonable minds can come to but one conclusion, and that conclusion is adverse to the non-moving party." *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617.

{¶10} The Ohio Supreme Court has held that, to succeed on a medical malpractice claim in Ohio, a claimant must demonstrate, through expert testimony, that the physician's conduct fell below the "prevailing standard of care." *Ramage v. Central Ohio Emergency Servs.* (1992), 64 Ohio St.3d 97, 102. According to the court:

{¶11} "The law imposes on physicians engaged in the practice of medicine a duty to employ that degree of skill, care and diligence that a physician or surgeon of the same medical specialty would employ in like circumstances. A negligent failure to discharge that duty constitutes 'medical malpractice' if it proximately results in an injury to the patient. Whether negligence exists is determined by the relevant standard of conduct for the physician. That standard is proved through expert testimony. Neither the expert nor the standard is limited by geographical considerations." *Berdyck v. Shinde* (1993), 66 Ohio St.3d 573, 579, citing *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 130-135.

{¶12} Regarding the expert testimony needed to prove malpractice, the Ohio Supreme Court has held:

{¶13} "This expert must be qualified to express an opinion concerning the specific standard of care that prevails in the medical community in which the alleged malpractice took place, according to the body of law that has developed in this area of evidence." *Bruni*, 46 Ohio St.2d at 132.

{¶14} Evid.R. 601 sets out the general rules of witness competency. Generally, every person is competent to testify unless an exception in the rule applies. Subsection (D) applies to testimony in medical malpractice claims. That section provides that an expert in a malpractice case is competent to testify only if:

{¶15} "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. ***."

{¶16} In this case, Glazer did not recite in his affidavit that he spent at least one-half of his professional time in clinical practice. Nevertheless, appellant contends that the curriculum vitae attached to Glazer's affidavit establishes that Glazer has visiting privileges at several area hospitals, so, appellant contends, he must devote more than one-half of his professional time to active practice. Requiring a physician to recite that he devotes more than one-half of his time to clinical practice is, according to appellant, "perfunctory."

{¶17} We disagree. The Ohio Supreme Court has explained that the purpose of the active clinical practice rule is to:

{¶18} "preclude testimony by the physician who earns his living or spends much of his time testifying against his fellows as a professional witness, and to prevent those whose lack of experiential background in the very field they seek to judge, the clinical practitioner, makes the validity of their opinions suspect, from expressing those opinions for pay or otherwise." *McCrory v. State* (1981), 67 Ohio St.2d 99, 103.

{¶19} Given this goal, we cannot see how the Evid.R. 601(D) rule is perfunctory or formalistic. Other courts agree. See *Cunningham v. St. Alexis Hosp. Med. Ctr*. (2001), 143 Ohio App.3d 353, 368-369; *Campbell v. Warren General Hosp.* (1994), 105 Ohio App.3d 417, 422. Appellant cites one case holding otherwise. See *Crosswhite v. Desai* (1989), 64 Ohio App.3d 170. In that case, the plaintiff sought to introduce testimony of his second treating physician, who had since retired. The physician recited in his affidavit that, though he was now retired, he had devoted 75 percent of his professional time to clinical practice at all times relevant to the lawsuit. He also averred that he was still licensed to practice medicine in Ohio. The court allowed the testimony, finding that to do otherwise would thwart the purpose of the rule, which is to ensure that the witness had, in the past, acquired the "special experience" or "experiential background" in the field "which he seeks to judge." Id. at 178. We need not decide whether we agree with this reasoning as the case is distinguishable on its facts. In *Crosswhite*, the physician did recite in his affidavit that he spent the majority of his professional time in active clinical practice at all times relevant to the lawsuit, and the only question was whether it mattered that he had since retired. Here, Glazer made no indication in his affidavit about the

amount of time he spent in clinical practice. The issues are different in the two cases, and we find that *Crosswhite* does not support appellant's contention.

{¶20} In addition to failing to establish the competency of the expert witness, appellant failed in his burden to show proximate cause, an essential element of a prima facie case of medical malpractice. See *Bruni*, 46 Ohio St.2d at 127, paragraph one of the syllabus. Glazer did not aver in his affidavit that appellant's injuries were proximately caused by appellees' alleged negligence. Therefore, the trial court properly granted appellees' summary judgment motion. Appellant's first assignment of error is found not well-taken.

{¶21} Appellant assigned as his second assignment of error that the trial court erred in not granting his Civ.R. 60(B) motion on the basis of excusable neglect. However, appellant makes no argument on this issue in his appellate brief. We therefore decline to address this assignment of error. See App.R. 16(A)(7); App.R. 12(A)(2); *Love v. Pope* (July 14, 2000), Lucas App. No. L-99-1349 (court may disregard assignment of error pursuant to App. R. 12 and App.R. 16 when party provides no argument on that assignment of error). We therefore find appellant's second assignment of error not well-taken.

{¶22} On consideration whereof, we find that substantial justice was done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED.

Peter M. Handwork, P.J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Judith Ann Lanzinger, J.
CONCUR.

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JUDGE