

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

Jeanne Malcolm

Court of Appeals No. L-10-1110

Appellant

Trial Court No. CI0200903810

v.

Timothy G. Duckett, M.D., et al.

DECISION AND JUDGMENT

Appellee

Decided: February 25, 2011

* * * * *

Eric Allen Marks, for appellant.

Lisa Babish Forbes and Stephanie S. Angeloni, for appellee
St. Luke's Hospital.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court awarded summary judgment to appellee, St. Luke's Hospital ("St. Luke's"), and dismissed a complaint filed against St. Luke's by appellant, Jeanne

Malcolm, for damages on a claim of negligent credentialing. On appeal, appellant, Jeanne Malcolm, sets forth the following as her sole assignment of error:

{¶ 2} "First Assignment of Error

{¶ 3} "The trial court erred in granting summary judgment to defendant/appellee St. Luke's Hospital."

{¶ 4} On November 16, 2005, appellee, Timothy G. Duckett, M.D., performed a laparoscopic ventral hernia repair on appellant at St. Luke's in Maumee, Ohio, as an outpatient procedure. On November 19, 2005, appellant presented at St. Luke's emergency room complaining of severe pain and abdominal bloating. Upon examination, Duckett determined that appellant was suffering from a post-operative infection caused by an enterotomy, or perforation of her bowel. That same day, Duckett performed emergency surgery on appellant, during which he removed infected tissue from her abdomen, repaired the defect in her bowel, and removed a piece of infected mesh which had been inserted in appellant's abdomen three days earlier as part of the attempted hernia repair.

{¶ 5} After the emergency surgery, appellant suffered from atelectasis, or the inability to take sufficient breaths to inflate her lungs, which caused her to go into respiratory failure. Appellant also suffered from additional surgical complications, including venous embolism and thrombosis in the blood vessels of her legs. On November 30, 2005, appellant was discharged from St. Luke's and transferred to St. Vincent's Hospital in

Toledo, Ohio, where she remained until December 9, 2005. Appellant did not return to St. Luke's or to Duckett for further treatment.

{¶ 6} On February 28, 2006, appellant asked St. Luke's to provide copies of appellant's medical records. On March 2, 2006, appellant's attorney asked St. Luke's for copies of her x-rays and, on March 7, 2006, appellant asked for copies of the hospital's billing records related to appellant's hospitalizations at St. Luke's. St. Luke's responded by giving appellant all of the above-requested records.

{¶ 7} On October 26, 2006, appellant notified Duckett that she was contemplating bringing an action against him for medical malpractice.¹ On April 6, 2007, appellant filed a complaint against Duckett and his employer, Northwest Surgical Specialists ("NSS"), for medical malpractice (case No. CI2007-2925). Appellant also named her own health insurance carrier, Medical Mutual of Ohio, as a defendant. Filed along with the complaint was an affidavit of merit by Leonard F. Milewski, M.D. The complaint in case No. CI2007-2925 was later dismissed pursuant to Civ.R. 41(A).

{¶ 8} On April 22, 2009, appellant refiled her malpractice claim against Duckett and NSS, and included an additional claim against St. Luke's for negligent credentialing (case No. CI2009-3810). Attached to the refiled complaint was an affidavit of merit by Marshall J. Orloff, M.D., who stated that, in his expert opinion, St. Luke's was negligent in credentialing and retaining Duckett and that the hospital's negligence resulted in injury

¹Pursuant to R.C. 2305.113, the sending of such a letter extends the one-year statutory limit for filing a malpractice action by an additional 180 days.

to appellant. Also attached to the refiled complaint, as with the first complaint, was an additional affidavit of merit by Milewski, who stated that, in his opinion, Duckett breached the standard of care and caused injury to appellant.

{¶ 9} Duckett and NSS filed a joint answer on May 29, 2009, and St. Luke's filed its answer on June 19, 2009. Along with the complaint, appellant served Duckett, NSS and St. Luke's with interrogatories and requests for production of documents. Also, on June 19, 2009, Duckett and NSS filed a motion to transfer all discovery proceedings from case No. CI2007-2925 and incorporate them into the record of case No. CI2009-3810, which appellant partially opposed. The trial court granted the motion to transfer on August 19, 2009, and ordered all discovery in case No. CI2007-2925, including "answers to interrogatories, responses to requests for production, depositions, and all other forms of discovery" transferred into case No. CI2009-3810.

{¶ 10} On February 4, 2010, St. Luke's filed a motion for summary judgment and memorandum in support, in which it stated that appellant's claim was barred by R.C. 2305.10, which sets forth a two-year statutory limitation period for non-medical bodily-injury claims. In support of its motion, St. Luke's argued that appellant terminated her care by St. Luke's on November 30, 2005. Therefore, although appellant timely filed her initial malpractice complaint against Duckett and NSS in April 2007, the complaint against St. Luke's was untimely because it was not filed until April 22, 2009. Attached to St. Luke's motion were copies of the following relevant documents: the refiled complaint; portions of depositions given by Duckett and appellant; an affidavit by St.

Luke's risk manager, William Quinlan; a copy of the trial court's journal and the complaint filed in case No. CI2007-2925; and authenticated documentation of St. Luke's accreditation by the Joint Commission on Accreditation of Healthcare Organizations ("JCAH").

{¶ 11} Appellant testified in her deposition that she had not come into possession of any additional information between the time the original complaint was filed against Duckett and April 2009 that would alert her to a claim of negligent credentialing against St. Luke's. Appellant also testified that she became aware of other impending lawsuits against Duckett through an internet search; however, she could not say when or how she became aware of that information.

{¶ 12} Quinlan stated in his affidavit that St. Luke's responded to appellant's 2006 requests for appellant's medical records and x-rays in a timely manner. He also stated that accreditation by JCAH creates a presumption that St. Luke's adequately credentialed its staff physicians.

{¶ 13} In his deposition, Duckett testified that he mainly performs surgeries at St. Luke's hospital. Duckett further testified that St. Luke's "could most likely tell you the number of laparoscopic hernia repairs" he had performed; however, the hospital's ability to generate such a report would depend on the medical terminology used to describe each individual surgery.

{¶ 14} Appellant filed a response in opposition to summary judgment on February 12, 2010. In an attached memorandum, appellant argued that nothing in appellant's medical

record would have alerted her as to the possibility of a negligent credentialing claim against St. Luke's until at least August 11, 2008. Appellant asserts that it was St. Luke's refusal to comply with her attorney's request for hospital records relating to the number of laparoscopic procedures performed by Duckett, and the number of enterotomies and/or deaths resulting from those procedures, dating back to 2001, that constitutes the "alerting event" in this case.

{¶ 15} Attached to appellant's response were copies of letters exchanged between appellant's attorney, Guy Barone, and St. Luke's attorney, Wendy Cedoz; a subpoena for Cedoz to appear for a deposition along with the hospital's records relating to laparoscopic procedures performed by Duckett; correspondence relating to production of the records requested in the subpoena, dated June 24, 2008; a letter from Barone to St. Luke's attorney, James Brazeau, dated August 11, 2008; and the affidavit of Marshall J. Orloff, M.D.

{¶ 16} In one of the letters, dated May 23, 2008, Barone asked Cedoz for production of the following information relating to Duckett's performance of laparoscopic procedures at St. Luke's:

{¶ 17} "1. The number of laparoscopic procedures performed by Dr. Duckett from 1989² to the present.

²Appellant later stipulated that she sought Duckett's records beginning in 2001, not 1989.

{¶ 18} "2. The number of laparoscopic ventral hernia repairs performed by Dr. Duckett from 1989 to the present.

{¶ 19} "3. The number of laparoscopic ventral hernia repairs that resulted in an enterotomy.

{¶ 20} "4. The number of laparoscopic ventral hernia repairs that resulted in enterotomy and death."

{¶ 21} In her response, dated June 12, 2008, attorney Cedoz stated that "St. Luke's Hospital does not maintain the type of information you requested." In the subpoena, issued on June 16, 2008, and a follow-up letter written on June 24, 2008, appellant again sought to compel St. Luke's to produce the information requested in Barone's letter to Cedoz.

{¶ 22} On August 11, 2008, Barone wrote another letter, addressed to St. Luke's attorney James Brazeau, in which Barone stated that, to date, appellant had not received the requested records. In addition, Barone stated:

{¶ 23} "My recollection is that St. Luke's does maintain records on the number of laparoscopic procedures, (specifically ventral hernia repairs) performed by Dr. Duckett, at least back to 2001 or 2002.

{¶ 24} "Also, it is my recollection that St. Luke's Hospital probably has information concerning the number of enterotomies and deaths that resulted from Dr. Duckett's ventral hernia repairs, but that St. Luke's is unwilling to share the information.

{¶ 25} "Jim, if I don't hear from you, I will assume that the above is accurate and act accordingly. * * *"

{¶ 26} In his affidavit, Orloff stated that he reviewed the medical records of three of Duckett's deceased prior patients, Jesse Elliott, Ethel Drouard, and Deborah Scott, along with appellant's medical records. Based upon his review, Orloff stated that, in his professional medical opinion, the three deaths, as well as appellant's injuries in this case, were caused by Duckett's medical negligence.

{¶ 27} On March 1, 2010, St. Luke's filed a reply in support of summary judgment, in which it asserted that: (1) appellant had put forth no evidence to support her claim of negligent credentialing; and (2) her claim against St. Luke's was filed after the two-year statutory limitation for filing such actions had passed.

{¶ 28} As to the first assertion, St. Luke's argued that its inability to comply with a discovery request is not evidence of a negligent credentialing claim, in spite of the fact that appellant's counsel "recollects" or "assumes" that such information exists. The hospital also argued that Orloff's affidavit is not admissible evidence in support of summary judgment because, pursuant to Civ.R. 10(D)(2), "[a]n affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment." In support of its arguments, St. Luke's cited *Ramos v. Khawli*, 181 Ohio App.3d 176, 2009-Ohio-798, ¶ 86. (An affidavit offered pursuant to Civ.R. 10(D)(2) cannot be used in support of summary judgment.) See, also, Civ.R. 56(E). Finally, St. Luke's argued that Orloff's affidavit was partially

based on records relating to the death of Deborah Scott, which occurred after Duckett performed surgery on appellant and is, therefore, irrelevant and inadmissible in this case.

{¶ 29} As to the second assertion, St. Luke's argued that appellant's counsel had knowledge of the Elliott case, which arguably formed the basis for appellant's negligent credentialing claim, 12 years before Duckett performed surgery on appellant, since he was the attorney of record in that case. St. Luke's further argues that, if appellant intends to rely on the outcomes of Duckett's prior cases to establish her claim in this case, she had a duty to begin her investigation of St. Luke's credentialing practices when she initially filed suit against Duckett in 2005. Attached to St. Luke's reply were portions of the above-quoted depositions of appellant and Duckett, along with select portions of depositions by Quinlan and Milewski, and a copy of St. Luke's answers to appellant's interrogatories which it submitted on June 19, 2009.

{¶ 30} In its answers, St. Luke's made the following relevant statements: (1) "[it] does not maintain a count of laparoscopic procedures performed by * * * Dr. Duckett"; (2) while it does not regularly maintain data regarding the number of a particular type of procedures by any physician, "a review of billing records indicates that from November 1, 2001 until November 30, 2005, Dr. Duckett performed at least 34 laparoscopic ventral hernia repairs"; (3) it does not maintain data as to the number of laparoscopic ventral hernia repairs performed by Duckett that resulted in an enterotomy; (4) it is impossible for St. Luke's to reach a "legal conclusion" as to whether any of the

laparoscopic ventral hernia repairs performed by Duckett between 1989 and 2009 resulted in enterotomy and/or death.

{¶ 31} On March 19, 2010, the trial court journalized an opinion and judgment entry in which it found that a negligent credentialing claim against a hospital is subject to a two-year statute of limitations, and that the statute began to run upon the occurrence of an "alerting event" which did, or should have, alerted appellant to the possibility of wrongdoing on the part of St. Luke's. The trial court reasoned that, based on evidence that appellant inquired as to Duckett's pattern of operations back in 2007, and her attorney's involvement in the Elliott case, it was clear that "Malcolm's counsel, at the very least, had knowledge of Duckett's activities at St. Luke's prior to April 6, 2007." Ultimately, the trial court concluded that the "alerting event" in this case occurred no later than April 6, 2007; therefore, appellant's negligent credentialing claim against St. Luke's was filed outside the applicable two-year statute of limitations. Accordingly, the trial court granted summary judgment to St. Luke's and dismissed appellant's negligent credentialing claim against the hospital. Appellant filed a timely notice of appeal on April 16, 2010.

{¶ 32} In her sole assignment of error, appellant asserts that the trial court erred by finding that the "alerting event" in this case occurred on or before April 6, 2007, and dismissing her negligent credentialing claim on that basis. In support, appellant argues that she had no "definitive information" in her possession that would "reasonably warrant" an investigation into St. Luke's credentialing practices until St. Luke's refused to

respond to Barone's August 11, 2008 letter requesting the total number of laparoscopic hernia repairs performed by Duckett at St. Luke's and identifying which of those procedures resulted in enterotomies and/or death. Appellant further argues that St. Luke's statement that such records are not kept by the hospital led appellant to reasonably conclude that St. Luke's was deliberately hiding information regarding its credentialing practices. Appellant acknowledges the trial court's findings that her counsel was aware of at least one prior lawsuit against Duckett involving the death of a patient, Jesse Elliott, and that appellant had asked Duckett for information as to his pattern of operations as early as 2007. However, appellant argues that, pursuant to *Browning v. Burt* (1993), 66 Ohio St.3d 544, knowledge of prior malpractice is not sufficient to establish an "alerting event," absent the opportunity for further investigation into St. Luke's credentialing practices.

{¶ 33} We note at the outset that an appellate court reviews a trial court's granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 34} Initially, the party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and identifying portions of the record

demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The motion may be filed "with or without supporting affidavits[.]" Civ.R. 56(A). Thereafter, the burden shifts to the non-moving party to show why summary judgment is inappropriate. Civ.R. 56(E). "If the non-movant fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 56(C), the court may enter summary judgment in favor of the moving party." *Snyder v. Ford Motor Co.*, 3d Dist. No. 1-05-41, 2005-Ohio-6415, ¶ 11; Civ.R. 56(E).

{¶ 35} In *Browning v. Burt*, supra, the Ohio Supreme Court determined that a claim for injury arising from a hospital's negligent credentialing does not involve medical care or treatment, as would a claim for medical malpractice against a physician. *Id.* at 557. Accordingly, an action for damages due to negligent credentialing is subject to the two-year statute of limitation set forth in R.C. 2305.10, rather than the one-year limitation period for medical malpractice actions prescribed by R.C. 2305.11. *Id.*, at paragraph three of the syllabus.

{¶ 36} The main issue in this case is whether appellant's cause of action against St. Luke's is time-barred by R.C. 2305.10 which states, in relevant part, that:

{¶ 37} "(A) * * * an action * * * for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues."

{¶ 38} As this court stated in *Kubitz v. Kalb*, 6th Dist. No. L-08-1061, 2008-Ohio-4129:

{¶ 39} "The term 'accrued' is not defined by statute. Accordingly, it has been left up to the judiciary to 'determine when a cause of action accrues for purposes of the statute of limitations.'" Id. at ¶ 18, quoting *Patterson v. Janis*, 10th Dist. No. 07AP-347, 2007-Ohio-6860, ¶ 10.

{¶ 40} The *Browning* court stated that a cause of action for negligent credentialing accrues "when the plaintiff knows or should know that he or she was injured as a result of the hospital's negligent credentialing procedures or practices." Id. at 560. As to what the plaintiff knew or should have known, the Ohio Supreme Court noted:

{¶ 41} "It is sufficient if a plaintiff discovers or, through the exercise of reasonable diligence, should have discovered some definitive information that would reasonably warrant investigation of the hospital's credentialing practices. Such an occurrence might be termed an 'alerting event,' * * *. However, discovery of a physician's medical malpractice does not, in itself, constitute an 'alerting event' nor does such discovery implicate the hospital's credentialing practices or require investigation of the hospital in this regard." *Browning*, supra, at 561.

{¶ 42} "Evidence of prior acts of malpractice by the doctor may be relevant to a negligent-credentialing claim * * *." *Schelling v. Humphrey*, 123 Ohio St.3d 387, 2009-Ohio-4175, ¶ 27, citing *Albain v. Flower Hosp.* (1990), 50 Ohio St.3d 251, 258, reversed on other grounds by *Clark v. Southview Hosp. & Family Ctr.* (1994), 68 Ohio St.3d 435.

Accordingly, a claim for negligent credentialing accrues upon discovery of facts necessary to support a medical malpractice claim, coupled with the acquisition of some knowledge "about the defendant above and beyond the injury itself." *Erwin v. Bryant*, 5th Dist. No. 08-CA-28, 2009-Ohio-758, ¶ 33, reversed on other grounds, 125 Ohio St.3d 519, 2010-Ohio-2202, citing *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 2002-Ohio-2007, ¶ 18. Moreover, we see no reason to distinguish a negligent credentialing claim from any other tort claim involving a statute of limitations, where it is well-settled that *constructive* knowledge of the facts necessary to support a claim, and not *actual* knowledge of their legal significance, is necessary to start the running of the statutory period. See *Kubitz v. Kalb*, supra, at ¶ 21, citing *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549.

{¶ 43} A review of the record in this case shows that it contains a "substantially similar" chart that was created by appellant's attorneys to support allegations of a pattern of Duckett's negligence, which includes information concerning Elliott's death in 1994. Since Barone was the attorney representing the estate of Jesse Elliott in a similar medical malpractice action against Duckett in 1996, it can reasonably be assumed that the information about Elliott that is included in the "substantially similar" chart was available to appellant's attorney before 2007.

{¶ 44} In addition to the above, the record shows that Orloff, who provided expert testimony as to whether St. Luke's was negligent in renewing Duckett's hospital credentials in this case, was also an expert witness on behalf of the plaintiffs in the Elliott

case. In his deposition in this case Orloff stated that, although having one incidence of medical malpractice is not enough to justify labeling a physician incompetent, two or more deaths due to negligence is sufficient to establish a "pattern" which should put the credentialing hospital on notice that there may a problem with that physician's performance. The record also contains evidence that Milewski provided an expert opinion in support of appellant's initial malpractice claim against Duckett. In his deposition in this case, Milewski testified that, statistically, the death rate due to laparoscopic hernia repairs should be "zero."

{¶ 45} Finally, it is undisputed that Barone filed the initial complaint against Duckett on appellant's behalf in 2005 in case No. CI2007-2925. A review of the record in that case shows that interrogatories were served on Duckett in an attempt to obtain information that was virtually identical to the information appellant now claims is vital to establishing a negligent credentialing claim against St. Luke's.

{¶ 46} This court has considered the entire record that was before the trial court and, on consideration thereof, finds that appellant may not have had actual facts to prove a claim of negligent credentialing on the part of St. Luke's Hospital before August 11, 2008. However, the record shows that, by at least April 6, 2007, appellant, through her attorneys, had constructive knowledge sufficient to put her on notice of the need to investigate the facts and circumstances relevant to her negligent credentialing claim, and to determine whether Duckett's alleged medical malpractice could have been prevented by St. Luke's. Accordingly, we agree with the trial court's conclusion that the "alerting

event" which started the running of the two-year statute of limitations predated appellant's document request in August 2008, and that "[appellant's] counsel, at the very least, had knowledge of Duckett's activities at St. Luke's prior to April 6, 2007." Since appellant's negligent credentialing claim was not filed until April 22, 2009, more than three years after Duckett performed the laparoscopic hernia repair surgery, her claim against St. Luke's is time-barred, and the trial court did not err by dismissing the negligent credentialing claim against St. Luke's on that basis. Appellant's sole assignment of error is not well-taken.

{¶ 47} On consideration whereof, this court finds further that there remains no other genuine issue of material fact. Accordingly, after considering the evidence presented in a light most favorable to appellant, appellee is entitled to summary judgment as a matter of law.

{¶ 48} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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