[Cite as *Montanez v. MetroHealth Med. Ctr.*, 2009-Ohio-3881.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92567

VICTOR MONTANEZ, ET AL.

PLAINTIFFS-APPELLANTS

vs.

METROHEALTH MEDICAL CENTER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-634043

BEFORE: Cooney, A.J., Rocco, J., and Dyke, J.

RELEASED: August 6, 2009
JOURNALIZED:

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COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Plaintiffs-appellants, Victor and Nelsa Montanez ("Victor" and "Nelsa"), appeal the trial court's grant of summary judgment to defendants-appellees, Cleveland Clinic Foundation ("Cleveland Clinic"), R. Thomas Temes, M.D. ("Temes"), and MetroHealth Medical Center ("MetroHealth"). Finding no merit to the appeal, we affirm.

{¶ 2} This case arose on August 27, 2007, when Victor and Nelsa sued MetroHealth, Cleveland Clinic, and Temes for medical malpractice after Temes allegedly unnecessarily removed part of Victor's lung in December 2005. Cleveland Clinic and Temes moved for summary judgment, claiming that the one-year statute of limitations had expired. The trial court granted summary judgment to both of these defendants. Soon after, the trial court granted summary judgment to MetroHealth.

{¶ 3} Victor and Nelsa now appeal, raising two assignments of error for our review.

{¶ 4} In the first assignment of error, Victor and Nelsa allege that the trial court erred in granting summary judgment to Cleveland Clinic and Temes. They claim that a question of fact exists as to when the statute of limitations began to run, so the court should not have granted summary judgment. Specifically, they claim that they timely commenced this action under the "termination rule."

Facts

{¶ 5} The following facts underlie this case. In September 2005, Victor was struck in the back by a wooden board. He obtained emergency medical treatment at MetroHealth and was diagnosed with pneumothorax (a condition in which gas is trapped in the pleural cavity, often resulting in injury to the lung tissue).

{¶ 6} In the course of his treatment for this injury, several nodules and other features were found, suggesting cancer in Victor's right lung. Victor consulted Temes, a general and thoracic surgeon. Temes was employed by Cleveland Clinic but treated patients, including Victor, at a MetroHealth facility.

{¶ 7} Temes conducted several medical tests and advised Victor that he had cancer, and all or part of his right lung needed to be removed. Victor agreed to have surgery. In December 2005, Temes surgically removed the diseased portion of the right lung. Further tests showed, however, that the lesions in the lung were not cancerous. Victor attended his last follow-up visit with Temes on January 13, 2006. Temes instructed Victor to use an over-the-counter analgesic for his remaining pain and to consult with Temes "as needed." He referred Victor to pulmonary specialists to treat his other lung conditions. No further

follow-up appointments were scheduled, and Victor never consulted with another thoracic surgeon.

Standard of Review

{¶ 8} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

> "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."

{¶ 9} Once the moving party satisfies its burden, the nonmoving 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." Civ.R. 56(E); *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. Doubts

must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

{¶ 10} In the instant case, Victor and Nelsa claim that they timely commenced this action based upon the "termination rule." Victor's last medical appointment with Temes took place on January 13, 2006, and Victor claims that he intended to return to see Temes as necessary to treat his lung condition. Accordingly, Victor and Nelsa claim that Victor's relationship with Temes did not end until August 27, 2006, or afterwards. Temes and Cleveland Clinic claim that the relationship ended in January 2006. Victor and Nelsa argue that because the parties dispute the date the statute of limitations commenced, there exists a disputed issue of fact that makes summary judgment inappropriate. We disagree.

{¶ 11} R.C. 2305.113 establishes a one-year statute of limitations for medical malpractice claims. The Ohio Supreme Court has explained that the statute of limitations begins to run "(a) when the patient discovers or, in the exercise of reasonable care and diligence should have discovered, the resulting injury, or (b) when the physician-patient relationship for that condition terminates, whichever occurs later." *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337, at paragraph one of the syllabus, citing *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, 449 N.E.2d 438.

{¶ 12} The termination rule enhances the physician-patient relationship, allowing a physician to correct any medical errors while he or she is still treating the patient. *Frysinger*, citing *Ishler v. Miller* (1978), 56 Ohio St.2d 447, 384 N.E.2d 296, and *Wyler v. Tripi* (1971), 25 Ohio St.2d 164, 267 N.E.2d 419. "To require a patient to file a malpractice action during the course of treatment when the patient believes he or she has a malpractice claim would destroy this mutual confidence." *Ryan v. Katz* (Dec. 18, 1997), Cuyahoga App. No. 71893, citing *Frysinger*.

{¶ 13} In *Wells v. Johenning* (1986), 63 Ohio App.3d 364, 367, 578 N.E.2d 878, this court observed several ways that the physician-patient relationship may terminate. If the patient needs post-operative care and fails to keep an appointment and never sees the physician again, then the relationship ends on or before the date of the missed appointment. Id., citing *Millbaugh v. Gilmore* (1972), 30 Ohio St.2d 319, 285 N.E.2d 19, paragraph one of the syllabus. Thus, the relationship ends when the patient refuses further treatment from the physician or on the date that "either party takes affirmative steps to end the relationship." Id., citing *Buckley v. Jefferies* (Jan. 27, 1983), Cuyahoga App. No. 44724 and *Smales v. Portman* (Nov. 5, 1981), Franklin App. No. 81AP-522.

{¶ 14} On the other hand, if the patient obtains ongoing treatment, the relationship ends on the date of a missed appointment. Id. A court may find a

continuing course of treatment where "the patient is taking prescribed medication with the knowledge of the physician and under his supervision." Id., citing *Ishler* at 303, and *Kraus v. Cleveland Clinic* (N.D.Ohio 1977), 442 F.Supp. 310, 314. The point at which a physician-patient relationship terminates and the statute of limitations begins to run depends on the conduct of the parties and is a question of fact. Id. at 367.

{¶ 15} This case does not fall squarely into any of the categories set forth in *Wells*. Victor never missed a scheduled appointment, nor did he refuse to submit to further treatment. Temes, a surgeon, did not explicitly state that the parties' relationship was over, but he also did not advise that a continuing relationship was necessary.

{¶ 16} Still, Victor has not borne his burden to defeat summary judgment. Aside from a self-serving affidavit, Victor does not show why he believed the relationship terminated on or after August 26, 2006, exactly one year before he filed suit. On the other hand, Temes has provided evidence that the relationship ended in January 2006. Medical records from the January 13, 2006 appointment show that Temes told Victor to return "as needed" and referred him to pulmonary specialists for further treatment. Victor's medical chart indicates that Temes did not prescribe ongoing medication nor additional treatment.

{¶ 17} In the instant case, construing the evidence most strongly in favor of Victor and Nelsa as required by Civ.R. 56(C), we find that reasonable minds could not conclude that the physician-patient relationship continued beyond January 2006. Accordingly, we overrule the first assignment of error.

{¶ 18} In the second assignment of error, Victor and Nelsa claim that the trial court erred in granting summary judgment to MetroHealth. Their claim against MetroHealth relied on an agency-by-estoppel theory. In granting MetroHealth's motion, the trial court reasoned that under the doctrine of *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, MetroHealth was not liable under an agency-by-estoppel theory because the statute of limitations had expired on Victor's claim against Temes.

{¶ 19} In *Comer*, the Ohio Supreme Court held:

> "[A]gency by estoppel is a derivative claim of vicarious liability whereby the liability of the hospital must flow through the independent contractor physician. Consequently, there can be no viable claim for agency by estoppel if the statute of limitations against the independent-contractor physician has expired." Id. at ¶2.

{¶ 20} Because the statute of limitations against Temes has expired, MetroHealth cannot be held liable for his alleged negligence under an agency-by-estoppel theory.

{¶ 21} Accordingly, the second assignment of error is overruled.

{¶ 22} Judgment is affirmed.

It is ordered that appellees recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
ANN DYKE, J., CONCUR