[Cite as *Schura v. Marymount Hosp.*, 2010-Ohio-5246.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94359

ELIZABETH SCHURA, ETC.

PLAINTIFFS-APPELLANTS

vs.

MARYMOUNT HOSPITAL, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-674625

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 28, 2010

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MELODY J. STEWART, P.J.:

{¶ 1} Plaintiff-appellant, Elizabeth Schura, administrator of the estate of Mary Pocisk, appeals the order of the Cuyahoga County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Marymount Hospital, Physician Staffing, Inc., and Christine Marsick, M.D., on appellant's medical negligence claims. For the reasons stated below, we affirm.

{¶ 2} Decedent, Mary Pocisk, fell in her home on April 8, 2004. She was discovered the following day and rushed by ambulance to Marymount Hospital. A CT scan of Pocisk's chest showed multiple rib fractures and other injuries, resulting in Pocisk being admitted to the Intensive Care Unit ("ICU"). Hospital records show that shortly after Pocisk arrived in the ICU, Dr. Marsick inserted a chest tube. On May 5, 2004, Pocisk died. An autopsy listed the cause of death as hypertensive congestive cardiovascular disease.

{¶ 3} On October 14, 2005, appellant filed a medical malpractice action alleging that negligence in the diagnosis and treatment of Pocisk's heart condition and in the improper insertion of a chest tube caused Pocisk's death. Appellant's complaint raised survivorship and wrongful death claims against Marymount Hospital, William O'Brien, M.D., Edward S. Rosenthal, M.D.,

David M. Weiner, M.D., Donna J. Waite, M.D., "James Doe, M.D., John Doe, M.D., James Doe, Corp., and John Doe, Corp." Appellant filed a first amended complaint as a matter of course on October 19, 2005, pursuant to Civ.R. 15(A). All claims against O'Brien, Rosenthal, Weiner, and Waite were dismissed in January 2006.

{¶ 4} Marymount Hospital filed a motion for summary judgment. Four days later, on October 6, 2006, appellant sought leave to file her second amended complaint naming Dr. Marsick and Physician Staffing, Inc. for the first time. Appellant claimed she did not know the name of the doctor who inserted the chest tube or the relationship between Physician Staffing, the doctors, and the hospital until that information was disclosed in the hospital's motion for summary judgment filed on October 2, 2006. She served the summons and complaint on Dr. Marsick on October 10, 2006 and Physician Staffing on October 11, 2006. The trial court granted appellant leave to file the second amended complaint on October 19, 2006. On November 2, 2007, appellant voluntarily dismissed all claims pursuant to Civ.R. 41(A)(1).

{¶ 5} Appellant refiled her claims against Marymount Hospital, Dr. Marsick, and Physician Staffing on October 28, 2008. Dr. Marsick and Physician Staffing moved for partial judgment on the pleadings and for summary judgment on the basis that appellant's causes of actions were barred by the one-year statute of limitations for the survivorship claim and

two-year statute of limitations for the wrongful death claim. They argued that because appellant failed to comply with the requirements of Civ.R. 15(D), the claims in the second amended complaint did not relate back to the original filing date of October 14, 2005. The trial court granted the motions. Marymount Hospital subsequently moved for summary judgment that was granted. Appellant timely appeals, raising four errors challenging the trial court's grant of appellees' motions. Appellant's first three assignments of error are premised on the same argument and will be addressed together.

{¶ 6} "I. The trial court erred in granting defendant Christine N. Marsick's motion for summary judgment."

{¶ 7} "II. The trial court erred in granting Physician Staffing, Inc.'s motion for summary judgment."

{¶ 8} "III. The trial court erred in granting defendant Christine N. Marsick's and defendant Physician Staffing, Inc.'s motion for partial judgment on the pleadings."

{¶ 9} Appellant asserts that the trial court erred in finding that her claims against Dr. Marsick and Physician Staffing were time-barred. She argues that her use of the words "unknown physician" in her complaint sufficiently complies with the requirements of Civ.R. 15(D) and, therefore, her second amended complaint relates back to the original pleading date for statute of limitations purposes. Appellant contends that the civil rules and

the statute of limitations should be given a liberal construction so that cases are decided on the merits and not on pleading deficiencies.

{¶ 10} It is undisputed that absent the relation-back provision of Civ.R. 15(D), appellant's claims against Dr. Marsick and Physician Staffing are barred by the applicable statutes of limitations. Civ.R. 15(D) provides:

{¶ 11} "When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant."

{¶ 12} Shortly after appellant filed her brief, the Supreme Court of Ohio issued a decision addressing the proper construction and application of Civ.R. 15(D). In *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019, the plaintiff filed a medical malpractice claim against both a named physician and his professional corporation, and "John Doe, M.D. No. 1 through 5 (whose real names and addresses are unknown at the time of filing this Complaint despite Plaintiffs' Best and Reasonable Efforts to Ascertain Same)," and the professional corporations of each John Doe, M.D. Id. at ¶11. The complaint was filed a few days before the expiration of the statute of

limitations. Seven months later, plaintiff sought and was granted leave to amend the complaint to add a second doctor's name and the name of that doctor's professional corporation. Plaintiff claimed that although she knew the second doctor's name, she had only recently learned of that doctor's role in caring for her husband. The trial court granted summary judgment in favor of the newly named defendants finding that the claims were time-barred and that Civ.R. 15(D) did not apply. The appellate court reversed.

{¶ 13} The supreme court reinstated the trial court's judgment, holding:

{¶ 14} "[A] plaintiff may use Civ.R. 15(D) to file a complaint designating a defendant by any name and designation when the plaintiff does not know the name of that defendant, provided that the plaintiff avers in the complaint that the name could not be discovered, the summons contains the words 'name unknown,' and that summons is personally served on the defendant. Although the plaintiff may designate a defendant whose name is unknown by 'any name and description,' the complaint must nonetheless sufficiently identify that party to facilitate obtaining personal service on that defendant upon the filing of the complaint." Id. at ¶31.

{¶ 15} The court found that plaintiff's use of a "generic description" to describe the John Doe defendants, that of a doctor licensed in Ohio whose actions caused her husband's death and that doctor's professional corporation, did not provide sufficient identification to permit a copy of the summons

containing the words “name unknown” to be personally served upon them. Id. at ¶2. The court also found that no summons containing those words was ever issued or personally served. Id.

{¶ 16} In the instant case, appellant also failed to sufficiently identify Dr. Marsick and Physician Staffing in her original complaint. She employed only a generic description, identifying the appellees as an “unknown physician” whose actions caused Pocisk’s death, and the unknown “Ohio corporation” that employed her. Additionally, appellant did not aver in the complaint the fact that she could not discover Dr. Marsick’s and Physician Staffing’s names, and no summons with the words “name unknown” was ever issued or served. Thus, we find appellant failed to comply with the requirements of Civ.R. 15(D).

{¶ 17} In *Erwin* the court also rejected the argument that Civ.R. 15(D) should be liberally construed to allow claims to proceed notwithstanding the running of the statutory limitations periods. “The existence and duration of a statute of limitations for a cause of action constitutes an issue of public policy for resolution by the legislative branch of government as a matter of substantive law.” Id. at ¶29 (internal citations omitted). “We cannot, through a court rule, alter the General Assembly’s policy preferences on matters of substantive law, and Civ.R. 15(D) therefore may not be construed to extend the statute of limitations beyond the time period established by the

General Assembly. Instead, Civ.R. 15(D) is designed with the limited purpose of accommodating a plaintiff who has identified an allegedly culpable party but does not know the name of that party at the time of filing a complaint." Id. at ¶30.

{¶ 18} We find no merit to appellant's argument that she was unable to discover Dr. Marsick's identity prior to filing the complaint. Appellee presented copies of documents from the medical records that identify Dr. Marsick as the "surgical house officer" who saw Mary Pocisk in the ICU on April 9, 2004 and who inserted the chest tube. Appellant does not dispute that this information was in the hospital records that were in her possession prior to filing the action, she only complains that she was unable to ascertain the information because the medical records contain more than 800 pages. "'The identity of the practitioner who committed the alleged malpractice is one of the facts that the plaintiff must investigate, and discover, once she has reason to believe that she is the victim of medical malpractice.' Once the claim has accrued, the failure of the plaintiff to learn the identity of an allegedly negligent party does not delay the running of the statute of limitations." *Erwin* at ¶28, quoting *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 550, 589 N.E.2d 1284.

{¶ 19} "Civ.R. 15(D) does not authorize a claimant to designate defendants using fictitious names as placeholders in a complaint filed within

the statute-of-limitations period and then identify, name, and personally serve those defendants after the limitations period has elapsed." Id. at ¶30.

{¶ 20} Accordingly, because appellant failed to comply with the requirements of Civ.R.15(D), her second amended complaint does not relate back to the original filing date and her claims against Dr. Marsick and Physician Staffing are barred by the lapse of the applicable statutes of limitations. Appellant's first three assignments of error are overruled.

{¶ 21} "IV. The trial court erred in granting defendant Marymount Hospital's motion for summary judgment."

{¶ 22} An appellate court reviews the granting of summary judgment under a de novo standard. No deference is afforded to the trial court's decision, and we independently review the record to determine whether summary judgment is appropriate.

{¶ 23} Summary judgment is appropriate when, looking at the evidence as a whole, (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C). The only evidence to be considered in deciding summary judgment is that found in the "pleadings, depositions, answers to

interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ.R. 56(C).

{¶ 24} The party moving for summary judgment carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party does meet this burden, summary judgment will be appropriate only if the nonmoving party fails to establish the existence of a genuine issue of material fact. Id. at 293.

{¶ 25} Appellant argues that the trial court erred by granting summary judgment to the hospital because the hospital is vicariously liable on her claims. Appellant relies on *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 1994-Ohio-519, 628 N.E.2d 46, syllabus, in which the Supreme Court of Ohio held that "[a] hospital may be held liable under the doctrine of agency by estoppel for the negligence of independent medical practitioners practicing in the hospital when: (1) it holds itself out to the public as a provider of medical services; and (2) in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care."

{¶ 26} However, in *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, the court limited the application of *Clark* by holding that "agency 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." It was established that Dr. Marsick was an independent contractor and not an employee of Marymount Hospital. It has also been determined that the statute of limitations on appellant's claims had expired against Dr. Marsick. Therefore, appellant has no viable claim for agency by estoppel against Marymount Hospital and summary judgment was properly granted.

{¶ 27} Appellant argues alternatively that even if the agency by estoppel claim fails, thereby precluding vicarious liability, Marymount Hospital may still be held directly liable for the negligent acts of its employees and therefore the trial court erred in granting summary judgment. To prevail on a claim of medical malpractice, a plaintiff must establish through expert testimony the acceptable medical standard of care, the defendant's breach of that standard, and that the breach proximately caused the plaintiff's injuries. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 346 N.E.2d 673. Appellant argues that the affidavits of merit and expert reports of Dr. Michael Ault and Dr. Norman Ernst provide sufficient evidence of negligence by hospital

personnel to establish appellee's direct liability so as to defeat appellee's motion for summary judgment.

{¶ 28} Appellant's reliance on the affidavits of merit is unfounded. Civ.R. 10(D)(2)(d) expressly provides that "[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." (Emphasis added.) An affidavit of merit that merely sets forth the bare assertions required by Civ.R. 10(D)(2)(a) does not constitute evidence of the type enunciated in Civ.R. 56(C) to oppose a motion for summary judgment. *White v. Summa Health Sys.*, 9th Dist. No. 24056, 2008-Ohio-4330, at ¶20. An affidavit used for purposes of avoiding summary judgment is required to list the facts and not merely state final conclusory opinions on liability. *Ramos v. Khawli*, 181 Ohio App.3d 176, 2009-Ohio-798, 908 N.E.2d 495, at ¶87. The affidavits of merit in this case contain only the bare assertions required by Civ.R. 10(D)(2). As such, they are insufficient to oppose summary judgment.

{¶ 29} Appellant did not refile Dr. Ernst's report from the first action and failed to incorporate it by reference through a supporting affidavit as required by Civ.R. 56(C). Documents not properly incorporated in this manner are not to be considered by the trial court in deciding a motion for summary judgment. *Blanton v. Cuyahoga Cty. Bd. of Elections* (2002), 150 Ohio App.3d 61, 65, 779 N.E.2d 788. Therefore, any evidence of negligence

allegedly contained in Dr. Ernst's report was not before the trial court for consideration. Dr. Ault's is the only expert report properly submitted for consideration in opposition to the hospital's motion for summary judgment. To support her claim that the hospital was directly liable, appellant had to point to evidence in Dr. Ault's report to show that the negligent acts of hospital employees proximately caused Mrs. Pocisk's injury.

{¶ 30} The only instances of medical negligence identified in Dr. Ault's report are Dr. Marsick's improper placement of the chest tube and her failure to order immediate follow-up studies. Dr. Ault's report concludes that, "[t]he improper and negligent placement of the thoracostomy tube resulting in the perforations of the diaphragm and liver was the direct cause of Mrs. Pocisk's prolonged hospitalization and death." The only "substandard medical care" identified in the report is that provided by Dr. Marsick. Dr. Ault makes no mention of any other medical personnel in his report. Neither does he allege any acts of negligence by hospital employees. Therefore, appellant has failed to meet her reciprocal burden of showing that genuine triable issues exist in regard to her claim of medical malpractice against the hospital premised on direct liability. Accordingly, the trial court properly granted summary judgment in favor of Marymount Hospital. Appellant's fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellant their 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR