

[Cite as *Kubicek v. Univ. Hosps.*, 2015-Ohio-3886.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102590

KAREN KUBICEK, ET AL.

PLAINTIFFS-APPELLANTS

vs.

UNIVERSITY HOSPITALS, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-829143

BEFORE: E.T. Gallagher, J., Kilbane, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: September 24, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Plaintiffs-appellants, Karen Kubicek (“Kubicek”) and Daniel Kubicek (collectively “appellants”), appeal from the judgment of the common pleas court granting defendants-appellees, University Hospitals Health Systems (“University Hospitals”) and Cliff Andrew Megerian’s, M.D. (“Dr. Megerian”) (collectively “appellees”), motion to dismiss. Appellants raise the following assignment of error for review:

1. The granting of defendants’ motion to dismiss for failure to comply with Civil Rule 10(D)(2) was reversible error.

{¶2} After careful review of the record and relevant case law, we reverse and remand for further proceedings consistent with this opinion.

I. Factual and Procedural History

{¶3} In April 2011, Kubicek was referred to Dr. Megerian,¹ a medical physician at University Hospitals, for the purpose of evaluating Kubicek’s ongoing episodes of vertigo. Following medical evaluations, Dr. Megerian concluded that Kubicek was suffering from Meniere’s disease.² In June 2011,

¹ Dr. Megerian serves as Chairman of the Department of Otolaryngology-Head & Neck Surgery at University Hospitals Case Medical Center and is the Chair of the Department of Otolaryngology at Case Western Reserve University School of Medicine.

² Meniere’s disease is a disorder of the inner ear that causes spontaneous episodes of vertigo

Dr. Megerian performed an inner ear surgery on Kubicek’s right ear, known as an endolymphatic sac shunt procedure, in order to relieve pressure caused by the buildup of fluid in her ear. Following the surgery, Kubicek began to experience worsening symptoms of vertigo and was suffering from a constant feeling of blockage in her ear, ringing in her ear, and the inability to lie on her right side.

{¶4} In March 2013, appellants filed a complaint against appellees, alleging negligence and loss of consortium arising from the medical treatment Kubicek received at University Hospitals. Specifically, the complaint alleges that Kubicek sustained “severe and permanent injuries” as a result of appellees’ “failure to provide [her] with safe and acceptable medical, hospital and surgical care and treatment.” Based on their failure to timely file an affidavit of merit, appellants voluntarily dismissed their original complaint in July 2013.

{¶5} In June 2014, appellants refiled their complaint against appellees, asserting the same causes of action. The refiled complaint was accompanied by an affidavit of merit signed by Mohamed Hamid, M.D., an internal medicine physician. Believing the affidavit of merit was insufficient, appellees filed a

— a sensation of a spinning motion — along with fluctuating hearing loss, ringing in the ear, and sometimes a feeling of fullness or pressure in your ear.

motion to strike Dr. Hamid's affidavit of merit pursuant to Civ.R. 10(D)(2). The trial court granted appellees' motion to strike and provided appellants an additional 30 days to file a complying affidavit of merit. Thereafter, appellants filed an affidavit of merit signed by Richard R. Gacek, M.D., a board-certified otolaryngologist.

{16} In December 2014, appellees filed a motion to strike the affidavit of Dr. Gacek and a motion to dismiss the case, arguing that Dr. Gacek was not a qualified medical expert. In support of their motions, appellees attached relevant discovery materials and the affidavit of Dr. Megerian, who attested that Dr. Gacek was not familiar with the standard of care and that his unorthodox treatment approach to Meniere's disease was not the standard of care for an otolaryngologist.

{17} In January 2015, the trial court granted appellees' motions and dismissed the case "for failure to comply with Civil Rule 10(D)(2)." Appellants now appeal from the trial court's judgment.

II. Law and Analysis

{18} In their sole assignment of error, appellants argue the trial court erred by granting appellees' motion to dismiss for failure to comply with Civ.R. 10(D)(2).

{19} Civ.R. 10(D)(2) provides, in pertinent part:

[A] complaint that contains a medical claim* * * shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be

provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. Affidavits of merit shall include all of the following:

- (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
- (ii) A statement that the affiant is familiar with the applicable standard of care;
- (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

{ ¶ 10} This heightened pleading requirement is designed to “deter the filing of frivolous medical-malpractice claims” and “ease the burden on the dockets of Ohio’s courts and to ensure that only those plaintiffs truly aggrieved at the hands of the medical profession have their day in court.” *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 10.

{¶11} Because an affidavit of merit is necessary to establish the sufficiency of a complaint, a motion to dismiss for failure to state a claim is the proper method to challenge adequacy of the affidavit. *Id.* at ¶ 13. “In order for the court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. This court reviews the trial court’s decision de novo. *Hendrickson v. Haven Place, Inc.*, 8th Dist. Cuyahoga No. 100816, 2014-Ohio-3726, ¶ 12.

{¶12} In the present case, appellants submitted the affidavit of merit of Dr. Gacek, which stated as follows:

Affiant, Richard R. Gacek, M.D., being of lawful age and first duly sworn upon oath, deposes and says:

1. Affiant is qualified and competent to give expert testimony pursuant to Rules 601(D) and 702 of the Ohio Rules of [Evidence].

2. Affiant has reviewed all of the medical records available up to the present time concerning the allegations set forth in plaintiff's complaint for medical negligence against Defendants.

3. Affiant is familiar with the applicable standard of care for dentists³ practicing medicine in the State of Ohio because the standard of care for such physicians with medical education, training and experience is the same throughout the United States.

4. It is the opinion of this Affiant, to a degree of medical certainty, that the standard of care was breached by Defendant, in this action and that said breaches caused injury to the Plaintiff, Karen T. Kubicek.

{¶13} In this case, appellees do not dispute the fact that Dr. Gacek's affidavit of merit contains a recitation of the statements required under Civ.R. 10(D)(2)(a)(i)-(iii). However, appellees contend that Dr. Gacek's affidavit does not satisfy Civ.R. 10(D)(2) because he is not qualified to testify as an expert witness under Evid.R. 702.

{¶14} As stated, Civ.R. 10(D)(2)(a) provides that a complaint that contains a medical claim must include an affidavit of merit from an affiant who meets the qualifications of an expert witness pursuant to Evid.R. 601(D) and 702.

{¶15} Evid.R. 702 states, in relevant part:

A witness may testify as an expert if all of the following apply:

³ Appellants state that the use of the term "dentist" was a clerical error. They submit the statement should have read "physicians."

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *

{¶16} In the context of a medical malpractice action, the witness must demonstrate that he is familiar with the standard of care applicable to the defendant-physician's school or specialty, "sufficient to enable him to give an expert opinion as to the conformity of the defendant's conduct to those particular standards and not to the standards of the witness' school and, or, specialty if it differs from that of the defendant." *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 160, 383 N.E.2d 564 (1978).

{¶17} In challenging Dr. Gacek's qualifications, appellees rely on this court's decision in *Metro v. Diplomat Healthcare*, 8th Dist. Cuyahoga No. 100799, 2014-Ohio-3146, where we held that dismissal was appropriate when the plaintiff failed to support her medical malpractice claims with an affidavit from a person familiar with the applicable standard of care. *Id.* at ¶ 4. In *Metro*, the plaintiff submitted an affidavit of merit authored by a nurse practitioner, whom the trial court determined was not qualified to serve as an expert in a lawsuit against a psychiatrist. This court upheld the dismissal,

reasoning that although the plaintiff attached an affidavit of merit to her complaint, the witness was not qualified to serve as an expert:

A nurse practitioner is unqualified to give an opinion that a psychiatrist violated the relevant standard of care. * * * Being qualified to provide an opinion on whether a person has a mental disability is not the same as being qualified to render an opinion on whether a psychiatrist breached the standard of care applicable to that profession or whether a psychiatric hospital breached its standard of care. With the nurse practitioner unqualified to render an opinion regarding either standard of care, the court did not err by granting judgment on the pleadings for Counts 1, 2 (subpart 4), and 3 of the complaint. *Id.*

{¶18} Appellees argue *Metro* is analogous to the facts of this case because, like the nurse practitioner, Dr. Gacek is unqualified to serve as an expert because he is unfamiliar with the standard of care applicable to Kubicek's medical treatment. In support of their position, appellees rely extensively on the self-serving affidavit of Dr. Megerian and the following answers to appellees' first request for admissions:

5. Admit that Richard R. Gacek, M.D.'s approach to Meniere's disease is not the generally accepted approach recognized by the American Academy of Otolaryngology.

RESPONSE:

Do not know; cannot admit or deny.

6. Admit that Richard R. Gacek, M.D.'s approach to Meniere's disease is not the generally accepted approach recognized by the American Otological Society.

RESPONSE:

Do not know; cannot admit or deny.

* * *

9. Admit that Richard R. Gacek, M.D.’s approach to Meniere’s disease is not generally accepted in the otolaryngology literature.

RESPONSE:

Cannot admit or deny.

{¶19} Taken together, appellees argue these discovery responses “unequivocally establish that Dr. Gacek is not qualified as a medical expert” because he (1) admitted his unfamiliarity with the standard of care applicable to the treatment of Meniere’s disease, and (2) confirmed that he advocates a “non-surgical approach to treating Meniere’s disease” that is not generally accepted in his field.

{¶20} Initially, we find *Metro*, 2014-Ohio-3146, to be distinguishable from the facts of this case. As stated, this court held in *Metro* that a nurse practitioner is unqualified to render an opinion on whether a psychiatrist breached the standard of care applicable to that profession. In reaching this conclusion, *Metro* focused on the distinguishing professional expertise of a nurse practitioner and an individual practicing in the field of psychiatry. However, contrary to the circumstances of *Metro*, Dr. Gacek and Dr. Megerian practice in the same, or similar, field of medicine and each specialize in the treatment of Meniere’s disease. Accordingly, the concerns in *Metro* relating to the proposed expert’s scope of knowledge are inapplicable to this case.

{¶21} Moreover, we do not agree with appellees’ position that the discovery admissions submitted by appellants demonstrate Dr. Gacek’s unfamiliarity with the standard of care relevant to treating Meniere’s disease. Within the same supplemental material relied on by the appellees to dispute his qualifications, we learn that Dr. Gacek (1) is a medical doctor, licensed to practice

medicine in the United States, (2) is board certified by the American Board of Otolaryngology, (3) is a member of the American Otological Society, (4) is a member of the American Academy of Otolaryngology, (5) has routinely treated Meniere's disease during the course of his medical practice, and (6) has performed the same endolymphatic sac procedure performed by Dr. Megerian in this case. In our view, Dr. Gacek's medical experience and standing in the field of otolaryngology take precedence over appellants' vague discovery admissions and support Dr. Gacek's averments that he is familiar with the applicable standard of care. Thus, we are unable to agree with the trial court's determination that Dr. Gacek is unqualified to testify about the applicable standard of care, regardless of his conservative approach to treating Meniere's disease.

{¶122} As correctly stated by appellants, "the fact that Dr. Megerian and Dr. Gacek disagree professionally is not relevant to the validity of Dr. Gacek's affidavit of merit." Collectively, appellees' challenges go to the weight of Dr. Gacek's opinion rather than the threshold question regarding the sufficiency of his qualifications. Issues concerning the substance of Dr. Gacek's expert opinion may be properly addressed at later stages of this action. Thus, appellees' reliance on Evid.R. 702 is misplaced.

{¶123} Based on the foregoing, we find that the affidavit of merit submitted by Dr. Gacek satisfied the heightened pleading requirements of Civ.R. 10(D)(2). Accordingly, the trial court

committed reversible error by dismissing appellants' complaint for failure to state a claim pursuant to Civ.R. 12(B)(6).

{124} Appellants sole assignment of error is sustained.

{125} Judgment reversed and remanded.

It is ordered that appellant recover from appellee 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.

EILEEN T. GALLAGHER, JUDGE

**MARY EILEEN KILBANE, P.J., and
TIM McCORMACK, J., CONCUR**