[Cite as *Vucsko v. Cleveland Urology Assocs., Inc.*, 2019-Ohio-1992.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

FERENC VUCSKO, ET AL.	:	
Plaintiffs-Appellants,	:	No. 107498
v.	:	
CLEVELAND UROLOGY ASSOCIATES, INC., ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: May 23, 2019

Civil Appeal from the Cuyahoga County Common Pleas Court
Case No. CV-16-871517

Appearances:

Eric W. Henry, *for appellants*.

Bonezzi, Switzer, Polito & Hupp Co., Ronald A. Margolis, Brian F. Lange, and Bret C. Perry, *for appellees*.

SEAN C. GALLAGHER, P.J.:

{¶ 1} Plaintiffs-appellants Ferenc Vucsko ("Vucsko") and Elizabeth Vucsko appeal the decision of the trial court that granted summary judgment in favor of defendants-appellees Cleveland Urology Associates, Inc., and Kalish R. Kedia, M.D.

("Dr. Kedia").[1] Upon review, we reverse the decision of the trial court and remand the case for further proceedings.

Background

{¶ 2} On November 7, 2016, plaintiffs filed a complaint against the defendants raising claims arising from a hernia surgery Vucsko underwent on March 30, 2010, and subsequent events. Kalish R. Kedia, M.D. ("Dr. Kedia"), performed the surgery. Plaintiffs alleged that Vucsko developed an abscess in 2014; that Vucsko complained to Dr. Kedia of pain, irritation, and bleeding from the abscess; and that Dr. Kedia advised Vucsko that no additional treatment was required. Plaintiffs further alleged that on November 13, 2015, the abscess ruptured and a gauze-like material could be seen protruding from the abscess. Plaintiffs maintained that Dr. Kedia pulled a gauze-like material from Vucsko's abscess, wrapped it in a surgical glove, and discarded it in the trash, where it was retrieved by Vucsko's wife. Plaintiffs alleged that Vucsko was then taken into surgery and that Dr. Kedia falsified Vucsko's medical record. Plaintiffs asserted the following causes of action against the defendants: medical negligence, negligent misrepresentation, breach of duty of loyalty, fraudulent misrepresentation and nondisclosure, a *Moskowitz* claim,[2] and loss of consortium.

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[1] The other defendants named in the complaint included Cleveland Clinic Health System–East Region, Cleveland Clinic Foundation, and South Pointe Hospital. These defendants were voluntarily dismissed from the case. Plaintiffs' claims proceeded against defendants Cleveland Urology Associates, Inc., and Dr. Kedia, who are the defendants-appellants herein.

[2] In *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331, the Ohio Supreme Court stated that "[a]n intentional alteration, falsification

{¶ 3} During the course of the proceedings, the trial court granted defendants leave to file a motion for summary judgment, instanter. In their motion, filed March 28, 2018, defendants argued that plaintiffs' negligence claims were barred by the statute of repose set forth in R.C. 2305.113(C) and that the remainder of the claims should be barred because they stemmed from the medical care rendered in March 2010. Defendants also argued that the claim for breach of loyalty could not be raised as a separate claim and that the punitive damages claims for misrepresentation and falsification of medical records were not recoverable since the compensatory claims were time-barred.

{¶ 4} In opposing defendants' motion, plaintiffs asserted that there were genuine issues of material fact concerning the identification of the object removed from Vucsko and whether the object is a hernia mesh and could be a "foreign object." Plaintiffs also argued there was a dispute as to whether Dr. Kedia was independently negligent in violating the standard of care in 2014 and 2015 and whether that independent negligence proximately caused Vucsko's injuries. Plaintiffs referenced testimony from their medical expert in support of their claims.

{¶ 5} On July 6, 2018, the trial court granted the motion for summary judgment. The trial court found "plaintiffs' claims are time-barred under R.C. 2305.113(C)" and that "all of plaintiffs' claims stem from the injury allegedly

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or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded whether or not the act of altering, falsifying or destroying records directly causes compensable harm." *Id.* at paragraph one of the syllabus.

resulting from the March 2010 procedure, and as such, * * * are time-barred." The court further found that two exceptions set forth under R.C. 2305.113(D) did not apply, and specifically found "no evidence that a 'foreign object' was negligently left in the patient's body that should have been removed from the body." The court concluded there were no genuine issues of material fact in dispute and found defendants were entitled to judgment as a matter of law on all of plaintiffs' claims. Plaintiffs timely filed this appeal.

Law and Analysis

{¶ 6} Plaintiffs raise one assignment of error challenging the trial court's decision to grant summary judgment in favor of defendants. Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, 75 N.E.3d 161, ¶ 14. Summary judgment is appropriate only when "[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] viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach a conclusion only in favor of the moving party." *Id.*, citing *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12. "[R]esolution of a controversy by summary judgment is disfavored whenever there is a realistic possibility that genuine issues of material fact will require jury consideration." *Whiteleather v. Yosowitz*, 10 Ohio App.3d 272, 276, 461 N.E.2d 1331 (8th Dist.1983).

{¶ 7} In moving for summary judgment, defendants argued that plaintiffs' claims are barred by R.C. 2305.113(C), which is a statute of repose that, with limited exception, bars an action four years after the occurrence giving rise to a medical claim. R.C. 2305.113(C) provides:

> Except as to persons within the age of minority or of unsound mind as provided by section 2305.16 of the Revised Code, and except as provided in division (D) of this section, both of the following apply:
>
> (1) No action upon a medical, dental, optometric, or chiropractic claim shall be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.
>
> (2) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, any action upon that claim is barred.

{¶ 8} The Supreme Court has held that "Ohio's medical-malpractice statute of repose, R.C. 2305.113(C), is constitutional even to the extent that it prohibits bringing suit on a cause of action that has vested." *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 34. "R.C. 2305.113(C) is a statute of repose because the time for bringing a suit under the section begins running from the occurrence of the act or omission constituting the alleged basis of the claim." *Id.* at ¶ 23. "[T]he plain language of the statute is clear * * *. If a lawsuit bringing a medical * * * claim is not commenced within four years after the occurrence of the act or omission constituting the basis for the claim, then any action on that claim is barred." *Id.* Consequently, "[t]he statute establishes a period beyond which medical claims may not be brought even if the injury giving

rise to the claim does not accrue because it is undiscovered until after the period has ended." *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, 983 N.E.2d 291, ¶ 21.

{¶ 9} However, there are certain limited exceptions provided under R.C. 2305.113(D) for malpractice discovered during the fourth year after treatment and for malpractice in which a foreign object is left in a patient's body. Relevant hereto is the foreign-object exception set forth under R.C. 2305.113(D)(2), which provides as follows:

> If the alleged basis of a medical claim, dental claim, optometric claim, or chiropractic claim is the occurrence of an act or omission that involves a foreign object that is left in the body of the person making the claim, the person may commence an action upon the claim not later than one year after the person discovered the foreign object or not later than one year after the person, with reasonable care and diligence, should have discovered the foreign object.

{¶ 10} Pursuant to R.C. 2305.113(D)(3), the person commencing the action under the foreign-object exception has "the affirmative burden of proving by clear and convincing evidence, that the person, with reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim * * * within the one-year period described in [R.C. 2305.113(D)(2)]." Here, the record reflects that plaintiffs filed suit on November 7, 2016, which was less than one year after the November 15, 2015 date on which Vucsko discovered the alleged "foreign object" in his abdomen.

{¶ 11} The term "foreign object" is not defined under the statute. Prior to the enactment of R.C. 2305.113, a discovery rule was applied to toll the statute of

limitations in medical malpractice actions involving a foreign object. Pursuant thereto, in cases where a foreign object was negligently left in a patient's body during surgery, "the running of the statute of limitation governing a claim therefor is tolled until the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act." *Melnyk v. Cleveland Clinic*, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972), syllabus. In *Melnyk*, the Supreme Court of Ohio stated that "[t]he relationship between the utterly helpless surgical patient and his surgeon, during surgery, is such that the latter must be held to have assumed the responsibility for the removal of such articles, excepting only those which are intentionally left there for sound medical reasons." *Id.* at ¶ 200 (finding the negligent leaving of a metallic forceps and a nonabsorbent sponge inside a patient's body during surgery will toll the running of the statute of limitation).

{¶ 12} Although foreign-object cases have generally involved objects such as surgical instruments, needles, and sponges that were left in a patient after the completion of a surgical procedure, other items may constitute foreign objects depending on the circumstances involved. In *Emery v. Dettling*, 9th Dist. Summit No. C.A. No. 8117, 1976 Ohio App. LEXIS 6327 (Aug. 4, 1976), the court found that an IUD that was inserted into the plaintiff's body at her own request, but had subsequently migrated and become imbedded in the uterine wall, could not be considered a foreign object because it was "intentionally put into the patient's body for sound medical reasons." However, in *Beatman v. Gates*, 36 Ohio App.3d 114, 521 N.E.2d 521 (11th Dist.1987), the court found that several factual issues remained

in dispute over whether an IUD, which had migrated into the plaintiff's abdominal area and was not performing any birth-control chemistry, was a foreign object under the circumstances presented, which included allegations that the plaintiff had returned for a follow-up visit during which the doctor could not locate the IUD, the doctor failed to locate the IUD or conduct follow-up examinations to locate the IUD, and the doctor did not notify the plaintiff of a possible malpositioning.

{¶ 13} In *Favor v. W.L. Gore Assocs.*, S.D.Ohio No. 2:13-cv-655, 2013 U.S. Dist. LEXIS 129766 (Sept. 11, 2013), the court considered whether the statute of repose under R.C. 2305.113(C) barred the plaintiff's claims arising from a hernia surgery in which surgical mesh allegedly had been implanted into his body to repair the hernia. The plaintiff argued that the surgical mesh constituted a foreign object under R.C. 2305.113(D)(2) and, as the court indicated, "the gravamen of Plaintiff's complaint is that the Gore Surgical Mesh was somehow defective and that [the doctors] should have known of the defects." *Id.* at 9. However, the court recognized that "Ohio cases indicate that the exception carved out for a 'foreign object' left in a patient's body is intended to cover objects that should have been removed from the body, not the objects which are intentionally placed there as part of the medical procedure to which the patient consented." *Id.* at 8. Thus, the court found that the foreign-object exception did not apply because the case was "not about the surgeons having failed to remove an object from Plaintiff's body that was not intended to be placed there." *Id.* at 9.

{¶ 14} The circumstances of this case are not akin to those presented in *Favor*. Plaintiffs are not asserting any product defect but, rather, assert that the hernia mesh constitutes a foreign object that should have been removed from Vucsko's body. It cannot be said as a matter of law that surgical mesh can never constitute a foreign object.

{¶ 15} The foreign-object exception set forth under R.C. 2905.113(D)(2) applies "[i]f the alleged basis of a medical claim * * * is the occurrence of an act or omission that involves a foreign object that is left in the body of the person making the claim." Although the legislature has not defined the term "foreign object," case law suggests it is an object that is not intentionally left in a patient for sound medical reasons. *See Melnyk*, 32 Ohio St.2d at 200, 290 N.E.2d 916. Under the circumstances of this case, there are a number of genuine issues of material fact in dispute, including whether there was hernia mesh removed from Vucsko and, if so, whether the hernia mesh was left in Vucsko's body for sound medical reasons.

{¶ 16} Plaintiffs presented evidence to support their claim that hernia mesh from the 2010 surgery was removed from Vucsko by Dr. Kedia in the hospital room in 2015. Vucsko testified in his deposition that a gauze-like material was protruding from the area of the abscess and that Dr. Kedia removed the material. Vucsko's wife testified that she had observed the gauze-like material protruding from Vucsko and that she retrieved a pair of gloves with the gauze-like material from the garbage can in the hospital room. Plaintiffs' medical expert, Stuart Diamond, M.D., identified the object as a "foul-smelling foreign body" that he believed to be hernia mesh that

had been used in Vucsko's 2010 hernia repair. He also testified that there appeared to be silk stitches around the middle and that "this looks like the mesh may have been tied together like a plug." As he further stated, "it looks like this was rolled up and then the stitches were placed to keep it in a cigar fashion[.]"

{¶ 17} Defendants dispute plaintiffs' contention that hernia mesh was removed from Vucsko. Dr. Kedia testified that he removed a whitish purulent material from Vucsko and threw it in the garbage. Dr. Kedia maintained that there was no fabric in the material he removed, and that he had never seen the object being presented by plaintiffs. Dr. Roger Classen, who assisted Dr. Kedia with Vucsko's 2010 surgery, testified that the object presented by plaintiffs looked like fabric and that he believed there were sutures wrapped around it. Dr. Classen stated that the material could be mesh that migrated from the surgery, but he had no way of telling with certainty.

{¶ 18} Although defendants dispute plaintiffs' claim, this does not present a factual dispute as to whether some other "foreign object" was removed as suggested by plaintiffs. Nevertheless, there is a genuine issue of material fact as to whether hernia mesh was removed from Vucsko by Dr. Kedia as claimed by plaintiffs.

{¶ 19} Plaintiffs' medical expert offered his opinion that the hernia mesh was improperly used as a "plug" during the 2010 surgery. He referenced Dr. Kedia's operative notes, which indicate the hernia mesh was not sutured into position. Yet, there was testimony that the procedure in which hernia mesh is left in place involves a flat overlay that is sutured along the facia edges. Dr. Kedia maintained that he

followed this procedure. Although there was evidence to suggest a patient could suffer a reherniation if the mesh were not properly sutured into place, according to Dr. Classen, the mesh that was placed in Vucsko's abdomen back in 2010 was a flat overlay that was sutured in place behind the abdominal wall. He did not recall if multiple meshes were used during the surgery, but he testified that the object being presented with what appeared to be sutures wrapped around the middle was "not as big" as the mesh that had been sutured into place. Plaintiffs' expert opined that Dr. Kedia breached the standard of care, and this breach was a direct and proximate cause of the erosion of the mesh and its migration to the skin level, which caused Vucsko pain, discomfort, and further surgery. Our review reflects that there is a genuine issue of material fact in dispute on whether, if in fact hernia mesh was removed from Vucsko, the hernia mesh was left in his body for sound medical reasons.

{¶ 20} Viewing the evidence in a light most favorable to plaintiffs, reasonable minds could reach differing conclusions on whether plaintiffs' claims involve a foreign object.

{¶ 21} Plaintiffs also challenge the trial court's determination that "all of plaintiffs' claims stem from the injury allegedly resulting from the March 2010 procedure, and as such, * * * are time-barred." Plaintiffs assert that their other claims of negligence are not limited to the 2010 hernia surgery. They claim that Dr. Kedia's failure to timely diagnose and treat Vucsko's worsening problems in 2014 and 2015 caused harm independent from the surgery. They presented evidence that

Vucsko sought treatment from Dr. Kedia in 2014 and 2015 for the worsening sore near his stoma and hernia surgery, and that Dr. Kedia dismissed Vucsko's concerns. Plaintiffs' expert, Dr. Diamond, opined that Dr. Kedia breached the standard of care by failing to take action, order appropriate imaging, and timely work up Vucsko's continued complaints. Dr. Diamond also opined that this violation was a direct and proximate cause of harm to Vucsko. In addition, there was testimony relating to the allegations involving Dr. Kedia creating an inaccurate medical record, and his alleged misrepresentations and nondisclosures to Vucsko.

{¶ 22} Plaintiffs' additional claims are no different from any other medical malpractice action in which it is claimed that a physician was negligent in providing follow-up care and treatment. *See Osborne v. Song*, 4th Dist. Scioto No. 2068, 1993 Ohio App. LEXIS 3248, 2 (June 18, 1993). Pursuant to R.C. 2305.113(C), the statute of limitations on a medical claim pertains to "the occurrence of the act or omission constituting the alleged basis of the medical * * * claim." Plaintiffs' additional claims involve separate alleged acts of negligence occurring entirely after Vucsko's 2010 surgery and relate to his follow-up care and treatment. Defendants cite to no authority, and this court has not found any, to support the argument that these claims relate back to the original claimed negligence for purposes of the statute of limitation.

{¶ 23} We recognize that the trial judge was very conscientious and took considerable time evaluating the claims. Nevertheless, upon our review, we find that summary judgment was not warranted in this case.[3]

{¶ 24} Accordingly plaintiffs' sole assignment of error is sustained.

{¶ 25} Judgment reversed; case remanded.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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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SEAN C. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR

[3] On appeal, defendants only argue that the remaining claims are barred as derivative claims as was concluded by the trial court. Because the trial court did not address defendants' argument concerning the separate claim for breach of duty of loyalty, which was raised in the motion for summary judgment, we will not address the issue herein.