

[Cite as *Nicely v. Ohio Dept. of Rehab. & Corr.*, 2009-Ohio-4386.]
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Daniel Nicely,	:	
	:	
Plaintiff-Appellant,	:	No. 09AP-187
v.	:	(C.C. No. 2008-07781)
Ohio Department of Rehabilitation	:	(REGULAR CALENDAR)
and Correction et al.,	:	
	:	
Defendants-Appellees.	:	
	:	

D E C I S I O N

Rendered on August 27, 2009

Daniel Nicely, pro se.

Richard Cordray, Attorney General, and Anne Berry Strait,
for appellees.

APPEAL from the Court of Claims of Ohio.

FRENCH, P.J.

{¶1} Plaintiff-appellant, Daniel Nicely ("appellant"), an inmate, appeals the Court of Claims of Ohio's judgment that dismissed his medical malpractice complaint pertaining to care he has received during incarceration. For the following reasons, we affirm in part, reverse in part, and remand this cause to the Court of Claims.

{¶2} Initially, we determine the identity of the defendants-appellees in this appeal. Appellant originally filed the complaint against (1) the Department of Rehabilitation and Correction, (2) North Central Correctional Institution, and (3) the Ohio State University Medical Center. Appellant listed only the Department of Rehabilitation and Correction and North Central Correctional Institution as defendants in an amended complaint and noted his intent to no longer include the Ohio State University Medical Center in the suit. Under Civ.R. 15(A), a plaintiff may add or remove a defendant from a lawsuit without leave of court through an amended complaint filed before a responsive pleading is served. See *Watts v. Brown* (Aug. 4, 1983), 8th Dist. No. 45638. As the defendants had not yet filed a responsive pleading, we conclude that appellant successfully removed the medical center as a party through the amended complaint. Therefore, the only appellees in this matter are the Department of Rehabilitation and Correction and North Central Correctional Institution. We now turn to the facts of this appeal.

{¶3} The Court of Claims ordered appellant to file an affidavit of merit after he filed his original complaint. Appellant filed an amended complaint with a document from a prison nurse. The document pertained to a prison grievance that appellant filed to complain about his medical care. The nurse concluded that prison staff "responded appropriately to [appellant's] medical concerns." Additionally, the nurse informed appellant, "[y]our request for monetary compensation is a matter that you will need to attempt to pursue through the courts as it is outside the scope of the Inmate Grievance Procedure." Appellant asked the Court of Claims to consider the prison nurse's report

as an affidavit of merit. Appellees filed a motion to dismiss appellant's complaint for lack of an affidavit of merit. In response, appellant filed a motion for appointment of counsel to assist him in his case. The court denied appellant's motion for appointment of counsel. In addition, the court concluded that appellant failed to file a proper affidavit of merit, and the court granted appellees' motion to dismiss. The court did not specify whether the dismissal was with or without prejudice.

{¶4} Appellant appeals, raising the following assignments of error:

Assignment of Error Number 1

The Court of Claims erred in expecting the Appellant to comply with a one-year statute of [limitations] AND must file an affidavit of merit by an expert witness. When an expert CANNOT be obtained while incarcerated by ODRC's own policy of NO SECOND OPINION.

Assignment of Error Number 2

The Court of Claims erred in dismissing case without the notation or determination of dismissing without prejudice as in Fletcher v Univ. Hosps. of Cleveland, 120 Ohio St.3d 167.

Assignment of Error Number 3

The Court of Claims erred by not allowing Appellant comply with Rule 10(D)(2) and be able to obtain medical records from the Appellee(s).

{¶5} In his first assignment of error, appellant argues that the Court of Claims erred by dismissing his complaint for lack of an affidavit of merit. We disagree.

{¶6} It is undisputed that appellant filed a medical claim in his complaint. See R.C. 2305.113(E)(3). Civ.R. 10(D)(2) requires a plaintiff in a medical claim to file an affidavit of merit from an expert witness that includes 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.

A court correctly dismisses a medical claim that lacks the affidavit of merit. *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶15. This dismissal falls under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *Fletcher* at ¶14, 21. We review de novo a dismissal under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5.

{¶7} Appellant asked the Court of Claims to consider the prison nurse's report as an affidavit of merit. On appeal, appellant argues that the document is sufficient because a nurse is a medical professional. We cannot consider the nurse's report as a proper affidavit of merit, however. The report is not an affidavit, which, pursuant to R.C. 2319.02, "is a written declaration under oath." Likewise, the report does not contain the information required in Civ.R. 10(D)(2). In fact, the report does not evaluate appellant's lawsuit at all; the report pertains to appellant's prison grievance and notes that appellant's claim for damages is a matter for the courts and is outside the scope of the grievance procedure. Moreover, the report does not provide support for appellant's

medical claim as required in Civ.R. 10(D)(2). Instead, the nurse concluded that prison staff "responded appropriately to [appellant's] medical concerns."

{¶8} Alternatively, appellant argues that inmates should not have to comply with Civ.R. 10(D)(2) because they cannot obtain experts for the affidavit due to the one-year statute of limitations, pursuant to R.C. 2305.113(A), and prison policy prohibiting second medical opinions. Appellant provides no citation to this policy on medical opinions, and appellees contend that appellant is referring to an inapplicable policy on medical treatment. In any event, we recognize that R.C. 5120.21(C)(2) places limitations on an inmate's access to medical records and states "[u]pon the signed written request of the inmate to whom the record pertains together with the written request of either a licensed attorney at law or a licensed physician designated by the inmate, the department shall make the inmate's medical record available to the designated attorney or physician." The medical record "shall be made available to a physician or to an attorney * * * not more than once every twelve months." *Id.*

{¶9} In *Goings v. Dept. of Rehab. & Corr.* (May 28, 1991), 10th Dist. No. 90AP-1041, an inmate argued that R.C. 5120.21(C)(2) prevented his compliance with law in effect at the time that, like Civ.R. 10(D)(2), required an affidavit of merit in a medical claim. This court rejected the inmate's argument and said that R.C. 5120.21(C)(2)'s "limitation of a prisoner's right of access to his own medical records is a restriction on his liberty imposed incident to his incarceration." This court also noted that, if an inmate cannot obtain a physician to request release of the medical records, the inmate "will be unable to find a physician who can express an opinion on the reasonableness of his

claim." This court concluded that "[t]his is, of course, the very same standard which is applied to any malpractice claimant who must likewise obtain a physician to review the record and express an opinion there is reasonable grounds for the claim." Recognizing the analysis in *Goings*, this court has stated that an inmate is under no different burden than any other plaintiff in a medical malpractice claim. *Farmer v. Marion Corr. Inst.* (Nov. 21, 1991), 10th Dist. No. 91AP-266 (on reconsideration).

{¶10} *Goings* and *Farmer* did not address the impact of the statute of limitations on an inmate's ability to file an affidavit of merit while being subjected to R.C. 5120.21(C)(2)'s limitations on access to medical records. At one time, incarceration tolled the statute of limitations for plaintiffs in civil cases, but the General Assembly has removed incarceration as a tolling event for plaintiffs. See S.B. No. 125, 143 Ohio Laws, Part I, 581, 583-84 and Sub.S.B. No. 108, 149 Ohio Laws Part I, 382, 416. Presently, appellant's incarceration does not toll the statute of limitations. See R.C. 2305.16. In any event, under the analysis in *Goings* and *Farmer*, we reject appellant's argument that Civ.R. 10(D)(2) hinders an inmate's ability to file medical claims, given prison regulations, which we have recognized exist through R.C. 5120.21(C)(2), and the statute of limitations. Specifically, if an inmate cannot obtain a physician to request review of the inmate's medical record, pursuant to R.C. 5120.21(C)(2), the inmate will be unable to find a physician who can express an opinion on the reasonableness of his claim regardless of the statute of limitations. This burden is no different than other medical malpractice claimants in general who must comply with the statute of limitations and find an expert for a Civ.R. 10(D)(2) affidavit.

{¶11} Accordingly, we conclude that the Court of Claims did not err by dismissing appellant's complaint for lack of a Civ.R. 10(D)(2) affidavit of merit. We overrule appellant's first assignment of error.

{¶12} In his second assignment of error, appellant argues that the Court of Claims improperly dismissed his complaint with prejudice. We agree.

{¶13} A dismissal with prejudice operates as an adjudication on the merits; a dismissal otherwise than on the merits is without prejudice. *Fletcher* at ¶16. The Court of Claims dismissed appellant's complaint for lack of a Civ.R. 10(D)(2) affidavit of merit, and the dismissal was pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. See *Fletcher* at ¶14, 21. Generally, pursuant to Civ.R. 41(B)(3), a dismissal is with prejudice unless the court specifies otherwise. Thus, a dismissal under Civ.R. 12(B)(6) is with prejudice if the court fails to specify that the dismissal is without prejudice. *Reasoner v. Columbus*, 10th Dist. No. 04AP-800, 2005-Ohio-468, ¶7-8. Consequently, the Court of Claims' dismissal of appellant's complaint was with prejudice because the court did not specify otherwise.

{¶14} As appellant argues, however, a court must dismiss without prejudice a complaint for lack of a Civ.R. 10(D)(2) affidavit of merit. *Fletcher* at ¶20. See also Civ.R. 10(D)(2)(d) (stating that a dismissal for failure to file a Civ.R. 10(D)(2) affidavit "shall operate as a failure otherwise than on the merits"). Therefore, the Court of Claims erred by dismissing appellant's complaint with prejudice. We sustain appellant's second assignment of error.

{¶15} In his third assignment of error, appellant argues that the Court of Claims needed to appoint counsel for him to enable him to file a proper affidavit of merit. We disagree. Litigants do not have a right to counsel in civil cases, like here, that do not involve the state seeking to take an individual's life, liberty or property. *Scott v. Scott*, 10th Dist. No. 03AP-411, 2004-Ohio-1405, ¶31. Thus, the court did not err by denying appellant's motion for appointment of counsel, and we overrule appellant's third assignment of error.

{¶16} In summary, we overrule appellant's first and third assignments of error, but we sustain appellant's second assignment of error. Therefore, we affirm in part and reverse in part the judgment of the Court of Claims of Ohio, and we remand this cause to that court for further proceedings consistent with this decision.

*Judgment affirmed in part, reversed
in part, and cause remanded.*

BROWN and KLATT, JJ., concur.
