[Cite as *Rose v. State Med. Bd. of Ohio*, 2022-Ohio-3952.]

IN THE COURT OF CLAIMS OF OHIO

BERNARD ROSE Plaintiff v. STATE MEDICAL BOARD OF OHIO Defendant	Case No. 2022-00373JD Judge Patrick E. Sheeran Magistrate Holly True Shaver DECISION

{¶1} On June 14, 2022, the court converted defendant's May 27, 2022 motion to dismiss plaintiff's complaint into a motion for summary judgment pursuant to Civ.R. 56, based upon the additional materials that were submitted in support of and in opposition to the motion. On June 17 and July 19, 2022, plaintiff submitted additional materials in opposition to the motion. Pursuant to L.C.C.R. 4(D), the motion is now before the court for a non-oral hearing. For the reasons stated below, defendant's motion is GRANTED.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is

> made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id.* at 292-293.

{¶3} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which states, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse 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. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Facts

{¶4} The following facts are taken from plaintiff's complaint and the attachments thereto. On April 22, 2013, under a contract with defendant, State Medical Board of Ohio, Dr. Richard Whitney evaluated plaintiff for personality changes and possible substance abuse at Shepherd Hill Rehab Facility in Columbus, Ohio. Plaintiff is critical of the evaluation performed by Dr. Whitney and alleges claims of "fraudulent fulfillment of contract" with defendant, fraudulent concealment, constructive fraud, negligence, defamation, personal injury, and severe emotional distress. Plaintiff asserts that Dr. Whitney failed to review an MRI of plaintiff's brain, which had been taken prior to Dr. Whitney's evaluation. Plaintiff asserts that if Dr. Whitney had reviewed the MRI, he would have realized that the MRI showed signs that plaintiff had been exposed to carbon monoxide. Plaintiff also asserts that defendant committed constructive fraud and failed to warn him of possible exposure to a toxic and potentially lethal gas/chemical. Plaintiff submitted with his complaint an inspection report, dated July 13, 2016, from Leshner &

Associates, Inc., of a 1992 Cadillac Allante (presumably plaintiff's vehicle) which states that the vehicle emitted high levels of carbon monoxide. Plaintiff asserts that Dr. Whitney's failure to warn him that the brain changes noted on the MRI could have been caused by exposure to carbon monoxide resulted in plaintiff continuing to drive his vehicle, exposing himself and his family to carbon monoxide for a period of years. Plaintiff asserts that he discovered his brain injury was caused by carbon monoxide exposure on May 5, 2020, when he read an affidavit of merit by Kenneth DiNella, M.D., a board-certified psychiatrist from Americus, Georgia. (Plaintiff's Ex. E).

{¶5} In its motion, defendant asserts that any claims that plaintiff may have are barred by the applicable statute of limitations, and that the savings statute does not operate to save plaintiff's claims. Specifically, defendant argues that the conduct that gave rise to plaintiff's complaint occurred in 2013, nine years before plaintiff filed his complaint in this court. In addition, defendant states that even though plaintiff argues that he did not discover the alleged medical negligence until 2020, the complaints that plaintiff filed in another court show that plaintiff has been aware of the alleged negligence since 2017. Defendant further argues that the savings statute does not operate to save plaintiff's claims because he has already availed himself of the savings statute in another court. Lastly, defendant argues that plaintiff's complaint should be dismissed for his failure to comply with the requirement in R.C. 2743.16(B) to first attempt to compromise his claim with the Office of Risk Management (ORM) prior to filing his complaint here.

Statute of Limitations

{¶6} R.C. 2743.16(A) states, in relevant part: "civil actions against the state * * * shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." As a general rule, "a '[s]tatute of limitations commences to run so soon as the injurious act complained of is perpetrated * * *.'" *LGR Realty, Inc. v. Frank & London Ins. Agency*, 152 Ohio St.3d 517, 2018-Ohio-334, 98 N.E.3d 241, ¶ 14, quoting *Kerns v. Schoonmaker*, 4 Ohio 331 (1831), syllabus.

{¶7} Generally, claims for medical malpractice "shall be commenced within one year after the cause of action accrued." R.C. 2305.113(A). The one-year statute of

limitations on a medical malpractice claim begins to run "when the patient discovers or, in the exercise of reasonable care and diligence should have discovered, the resulting injury." *Siegel v. State*, 10th Dist. Franklin No. 19AP-355, 2020-Ohio-4708, ¶ 31, quoting *Frysinger v. Leech*, 32 Ohio St.3d 38, 512 N.E.2d 337 (1987), paragraph one of the syllabus.

{¶8} Although plaintiff states in his complaint that he discovered that he was injured by Dr. Whitney in 2020, the previous complaints that plaintiff filed in Montgomery County show that plaintiff knew of the alleged harm caused by Dr. Whitney more than two years prior to filing his complaint in this court. On April 19, 2018, plaintiff filed a complaint in the Montgomery County Court of Common Pleas against Richard Whitney, M.D., wherein plaintiff sought: "compensation for damages due to Dr. Whitney's failure to correctly diagnose my medical problems." (Defendant's Ex. A, p. 1.) Therein, plaintiff states that on April 22, 2013, Dr. Richard Whitney evaluated him for changes in personality and possible substance abuse at the Shepherd Hill rehab facility in Newark, Ohio. (*Id*., p. 2.) Plaintiff states, "This is when I finally realized my case has legitimate merit. Dr. Whitney failed to mention the MRI report of 8/1/11 in 'Lindner center of hope medical records.'" (*Id*., p. 13.) The date that plaintiff references is April 19, 2017, when John P. German, M.D. stated his impressions on a medical imaging report from Kettering Health Network. (*Id*.) Construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that plaintiff discovered that Dr. Whitney had injured him on April 19, 2017. Plaintiff filed his complaint in this court on May 2, 2022. Therefore, the court finds that plaintiff failed to file his claim for medical negligence in this court within one year after the cause of action accrued. Furthermore, any remaining claims plaintiff had against defendant regarding Dr. Whitney's conduct should have been filed, at the latest, on April 19, 2019. The court therefore finds that plaintiff's remaining claims are barred by the applicable two-year statute of limitations found in R.C. 2743.16.

Savings Statute

{¶9} Defendant further asserts that plaintiff's claims are not rendered timely by operation of the Ohio savings statute, R.C. 2305.19(A), which states in part:

> In any action that is commenced or attempted to be commenced, if in due time * * * the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

{¶10} As noted above, plaintiff filed two previous claims in the Montgomery County Court of Common Pleas. Plaintiff filed his first complaint on April 19, 2018, Case No. 2018 CV 01739, which was dismissed for lack of subject matter jurisdiction on July 3, 2018. (Defendant's Ex. A.) On July 2, 2019, plaintiff filed his second action, Case No. 2019 CV 03056, wherein plaintiff states that he filed a malpractice claim against Dr. Whitney in 2018, but the case was "rejected" by the "Montgomery County Civil Court" because of "lack of jurisdiction," and plaintiff specifically mentions that the Attorney General argued in the first action that it should have been filed in the Court of Claims. (Defendant's Ex. B., p. 1.) Thereafter, the Second District Court of Appeals discussed both cases and affirmed the trial court's dismissal of the second case pursuant to Civ.R. 12(B)(1) for lack of subject matter jurisdiction. *Rose v. Whitney*, 2nd Dist. Montgomery No. 28792, 2020-Ohio-5358.

{¶11} Plaintiff's first cause of action was filed on April 19, 2018, exactly one year after he discovered his injury. Plaintiff's first cause of action was dismissed on July 3, 2018 for lack of subject matter jurisdiction. Plaintiff's second cause of action was filed on July 2, 2019, within one year of the dismissal of his first action. The only reasonable conclusion is that plaintiff availed himself of the savings statute in R.C. 2305.19(A) when he filed his second action in the Montgomery County Court of Common Pleas within one year after the date of the failure otherwise than upon the merits of his first complaint in Montgomery County. The Tenth District Court of Appeals has stated that a plaintiff may only use the savings statute once to refile an action. *Brubaker v. Ross*, 10th Dist. Franklin No. 01AP-1431, 2002-Ohio-4396, ¶ 12. Therefore, the court finds that there is no genuine issue as to any material fact that plaintiff's complaint in this court is barred by the applicable statute of limitations and that plaintiff's prior use of the savings statute bars him from filing a third cause of action in this court. Accordingly, defendant is entitled to summary judgment as a matter of law. Based upon the foregoing, defendant's argument

that plaintiff's complaint should be dismissed for his failure to comply with the requirement in R.C. 2743.16(B) to first attempt to compromise his claim with ORM prior to filing his complaint in this court shall not be addressed.

PATRICK E. SHEERAN
Judge

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{¶12} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK E. SHEERAN
Judge

Filed October 5, 2022
Sent to S.C. Reporter 11/4/22