[Cite as *Wade v. Lima Mem. Hosp.*, 2015-Ohio-929.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

PAULA WADE, ET AL.,

PLAINTIFFS-APPELLANTS, **CASE NO. 1-14-36**

v.

LIMA MEMORIAL HOSPITAL, ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Allen County Common Pleas Court
Trial Court No. CV 20140059

Judgment Affirmed

Date of Decision: March 16, 2015

APPEARANCES:

Douglas J. Blue **for Appellant**

Beth A. Wittman **for Appellees**

PRESTON, J.

{¶1} Although originally placed on our accelerated calendar, we have elected pursuant to Loc.R. 12(5) to issue a full opinion in lieu of a summary journal entry. Plaintiffs-appellants, Paula Wade ("Paula") and Dub Wade ("Dub") (collectively "plaintiffs"), appeal the judgment of the Allen County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Lima Memorial Hospital ("Lima Memorial"), Shabbir N. Sabir, M.D. ("Dr. Sabir"), and various John Doe corporations, physicians, and nurses (collectively "defendants"). For the reasons that follow, we affirm.

{¶2} This case stems from a medical-malpractice complaint filed on December 19, 2012 for injuries Paula suffered after seeking treatment at Lima Memorial on June 20, 2011. (Doc. Nos. 1, 13). She was treated at Lima Memorial by Dr. Sabir. (*Id.*). Less than two days later, Paula developed compartment syndrome and pastuerellosis, which required surgical intervention and the eventual amputation of her lower left leg. (Doc. No. 1).

{¶3} On June 12, 2012, Paula sent a letter to Lima Memorial regarding her injuries and "a possible medical mal practice [sic] claim." (*Id.*); (Doc. No. 15, Ex. 1).

{¶4} Paula filed a complaint against defendants alleging medical negligence on December 19, 2012. (Doc. No. 13, Ex. B).[1] The trial court dismissed Paula's complaint without prejudice on January 30, 2013 because Paula failed to file an affidavit of merit. (*Id.*).

{¶5} Plaintiffs filed a second complaint on January 30, 2014, in which Paula alleged medical negligence against defendants, and Dub alleged loss of consortium against defendants. (Doc. No. 1). That same day, plaintiffs filed a motion to extend the period of time to file an affidavit of merit. (Doc. No. 2). The trial court granted plaintiffs motion on February 3, 2014 and ordered them to file their affidavit of merit by May 2, 2014. (Doc. No. 4).

{¶6} On February 24, 2014, defendants filed a motion for relief from judgment, a memorandum in opposition to plaintiffs' motion for an extension of the period of time to file an affidavit of merit, and a motion for summary judgment. (Doc. No. 13).

{¶7} On March 7, 2014, plaintiffs filed a memorandum in opposition to defendants' motion for relief from judgment and a reply to defendants' memorandum in opposition to plaintiffs' motion for an extension of time to file an affidavit of merit. (Doc. No. 14). Plaintiffs also filed a memorandum in

[1] The record does not contain documents related to Paula's December 19, 2012 complaint.

opposition to defendants' motion for summary judgment that same day. (Doc. No. 15).

{¶8} On March 19, 2014, defendants filed a reply to plaintiffs' memorandum in opposition to defendants' motion for summary judgment. (Doc. No. 17).

{¶9} On March 25, 2014, the trial court granted plaintiffs' motion for summary judgment and dismissed the case as to Lima Memorial. (Mar. 25, 2014 JE, Doc. No. 18).

{¶10} Paula filed her affidavit of merit on May 1, 2014. (Doc. No. 22).

{¶11} On June 9, 2012, Dr. Sabir filed a motion for summary judgment, a motion for relief from judgment, and a memorandum in opposition to plaintiffs' motion for an extension of time to file an affidavit of merit. (Doc. No. 28). On June 23, 2014, plaintiffs filed a memorandum in opposition to Dr. Sabir's motion for summary judgment. (Doc. No. 29). Also on June 23, 2014, plaintiffs filed a memorandum in opposition to Dr. Sabir's motion for relief from judgment and a reply to Dr. Sabir's memorandum in opposition to their motion for an extension of time to file an affidavit. (Doc. No. 30).

{¶12} On July 1, 2014, Dr. Sabir filed a reply to plaintiffs' memorandum in opposition to his motion for relief from judgment. (Doc. No. 31). That same day,

Dr. Sabir filed a reply to plaintiffs' memorandum in opposition to his motion for summary judgment. (Doc. No. 32).

{¶13} On July 23, 2014, the trial court granted Dr. Sabir's motion for summary judgment and dismissed plaintiffs' case against him. (July 23, 2014 JE, Doc. No. 33). The trial court incorporated its March 25, 2014 decision into its July 23, 2014 judgment entry. (*Id.*).

{¶14} Plaintiffs filed their notice of appeal on August 20, 2014. (Doc. No. 36). They raise five assignments of error for our review. For ease of our discussion, we will discuss plaintiffs' fourth assignment of error first, followed by their first assignment of error and then their second, third, and fifth assignments of error together.

Assignment of Error No. IV

> **The trial court erred when it held that attorney Burt's letter to Defendant/Appellee Lima Memorial Hospital was not a one-hundred-eighty day letter because the letter gave notice that Plaintiff/Appellant was considering bringing a medical claim against Defendant/Appellee Lima Memorial Hospital.**

{¶15} In their fourth assignment of error, plaintiffs argue that the trial court erred in concluding that a letter sent on Paula's behalf to Lima Memorial ("Paula's letter") did not comport with R.C. 2305.113(B)(1) to extend the statute of limitations. Specifically, plaintiffs argue that the trial court erred in granting

summary judgment in favor of defendants after concluding that Paula's complaint was not timely because, in part, her letter was not a proper 180-day letter.

{¶16} We review a decision to grant summary judgment de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390 (2000). Summary judgment is proper where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. Civ.R. 56(C); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219 (1994).

{¶17} Under R.C. 2305.113(A), "an action upon a medical * * * claim shall be commenced within one year after the cause of action accrued." A "medical claim" is:

> any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis,

> care, or treatment of any person. "Medical claim" includes the following:
>
> (a) Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person * * *.

R.C. 2305.113(E)(3)(a).

> "Derivative claims for relief" include, but are not limited to, claims of a * * * spouse of an individual who was the subject of any medical diagnosis, care, or treatment, * * * that arise from that diagnosis, care, treatment, or operation, and that seek the recovery of damages for any of the following:
>
> (a) Loss of society, *consortium*, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, or any other intangible loss that was sustained by the * * * spouse * * *.

(Emphasis added.) R.C. 2305.113(E)(7)(a).

{¶18} "A cause of action for medical malpractice accrues, and the one-year statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury or when the physician-patient relationship for that condition terminates, whichever occurs later." *Josolowitz v. Grant/Riverside Methodist Hosp. Corp.*,

10th Dist. Franklin No. 99AP-1462, 2000 WL 861836, *2 (June 29, 2000), citing *Frysinger v. Leech*, 32 Ohio St.3d 38 (1987), paragraph one of the syllabus. Here, the parties do not dispute that plaintiffs asserted a medical claim or that the cause of action accrued on June 20, 2011, the last time Paula saw Dr. Sabir for the condition about which she now complains. (*See* Mar. 25, 2014 JE, Doc. No. 18). (*See also* Appellant's Brief); (Appellee's Brief at 4). Accordingly, the one-year statute of limitations would have expired on June 20, 2012. Because Paula filed her first complaint on December 19, 2012, we must determine if the statute of limitations was extended.

{¶19} "R.C. 2305.113(B) (formerly R.C. 2305.11(B)) 'provides an exception to [R.C. 2305.113(A)] by affording litigants the opportunity to extend the one-year statute of limitations for an additional one hundred eighty days from the time proper notice is given to potential defendants.'"[2] *Szwarga v. Riverside Methodist Hosp.*, 10th Dist. Franklin No. 13AP-648, 2014-Ohio-4943, ¶ 8, quoting *Marshall v. Ortega*, 87 Ohio St.3d 522, 523 (2000). R.C. 2305.113(B)(1) provides:

[2] The Ohio Supreme Court noted that former R.C. 2305.11(B)(1) "was enacted in order 'to decrease the likelihood of frivolous medical malpractice claims by allowing parties and their attorneys additional time to investigate a potential claim which is brought to their attention shortly before the one-year statute of limitations expires.'" *Marshall v. Ortega*, 87 Ohio St.3d 522, 524-525 (2000), quoting *Edens v. Barberton Area Family Practice Ctr.*, 43 Ohio St.3d 176, 177-178 (1989). "We note that 2001 Am.Sub.S.B. No. 281, which amended or enacted several statutes relating to medical malpractice actions in Ohio, including R.C. 2305.11, 2305.113, and 2323.43, contains uncodified language stating that part of the General Assembly's 'intent' in the enactment was to 'preserve the right of patients to seek legal recourse for medical malpractice.'" *Szwarga v. Riverside Methodist Hosp.*, 10th Dist. Franklin No. 13-AP-648, 2014-Ohio-4943, ¶ 16, fn. 3.

> If prior to the expiration of the one-year period specified in division (A) of this section, a claimant who allegedly possesses a medical * * * claim gives to the person who is the subject of that claim written notice that the claimant *is considering bringing an action upon that claim*, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given.

(Emphasis added.)

{¶20} To extend the one-year statute of limitations, the 180-day letter must comport with the requirements of R.C. 2305.113(B)(1)—that is, the letter must be received[3] within the one-year period described in R.C. 2305.113(A) and must state that the claimant is considering bringing a malpractice action against the recipient. *Szwarga* at ¶ 10, citing *Marshall* at 525-526. "[W]hen considering the sufficiency of a purported one-hundred-eighty-day notice, the emphasis in the inquiry should be placed on a determination of whether the defendant received adequate notice of the possibility of a malpractice suit." *Id.* at ¶ 18, quoting *DeTray v. Mt. Carmel Health*, 10th Dist. Franklin No. 96APE08-1010, 1997 WL 189333, *4 (Apr. 17, 1997), citing *Mendenhall v. Spyridon*, 2d Dist. Montgomery No. 13972, 1994 WL 107321, *9 (Mar. 30, 1994). Likewise, R.C. 2305.113(B)(1) does not require that

[3] The statute does not designate any specific manner of service; rather it requires only that notice is *received* prior to the end of the one-year statute of limitations. *Marshall*, 87 Ohio St.3d at 526 ("Although the statute does not designate the manner of service, clearly the preferable methods are those in which there is verification of receipt, such as registered or certified mail, so that a medical malpractice claimant can know and prove that the letters have been received by the potential defendants within the one-year statute of limitations.").

a proper 180-day letter reference the statute to sufficiently impart notice that a claimant is considering bringing action on a claim. *Kline v. Felix*, 81 Ohio App.3d 36, 41 (9th Dist.1991).

{¶21} To determine if Paula extended the statute of limitations, we must decide whether her letter was a proper 180-day letter. Although this court has not addressed this issue, other Courts of Appeals have addressed the requirements of a proper 180-day letter. *See, e.g.*, *Rowe v. Bliss*, 68 Ohio App.2d 247, 250-251 (1st Dist.1980) (strictly interpreting the statute to conclude that a 180-day letter must inform its recipient that the claimant is considering bringing an *action* on a claim); *Mendenhall* at *8 (declining to follow the strict interpretation of the statute embraced by *Rowe*, but concluding that a 180-day letter must impart "adequate notice of the possibility of a malpractice lawsuit"); *Gutierrez v. Smith*, 8th Dist. Cuyahoga No. 72408, 1999 WL 43307, *3 (Jan. 28, 1999) (concluding that the statute requires that the letter "specifically state that an action is presently being considered"); *Kline*, 81 Ohio App.3d at 41 (applying *Rowe* to conclude that the letter was a 180-day letter because it sufficiently notified Dr. Felix that the plaintiffs were considering bringing an action on a claim); *Szwarga* at ¶ 18-19 (concluding that the letter was a 180-day letter because it informed "Riverside that appellants retained counsel to represent them, that [plaintiff] sustained an injury during the [procedure] performed at Riverside (i.e., that a potential claim existed),

and that appellants would 'have to file litigation' within 180 days if the claim was not resolved"); *Kulow v. Crago*, 103 Ohio App.3d 138, 141 (11th Dist.1995) (concluding that the claimant's first letter was not a 180-day letter because it "was meant only to invite offers of settlement"); *Cooke v. Sisters of Mercy*, 12th Dist. Butler No. CA97-09-181, 1998 WL 221320, *6 (May 4, 1998) (concluding that the letter was not a 180-day letter because it failed to specifically state that a claim was "presently being considered").

{¶22} We agree that a proper 180-day letter must adequately impart notice that a claimant is considering bringing an action on a malpractice claim and conclude that Paula's letter did not adequately notify Lima Memorial that she was considering bringing an action on a malpractice claim. Paula's letter provided:

> Please be advised our office represents Paula Wade relative to personal injuries sustained from dog bites, which occurred on June 20, 2011. Our office spoke with Cheryl (last name unknown) on April 10, 2012 regarding a possible medical mal practice [sic] claim against Lima Memorial Hospital. Cheryl advised our office that she would contact the insurance company and have the director and manager of the Emergency Room Department review the claim and report back to us.

> Approximately two weeks later Cheryl advised our office that the director of the Emergency Room Department did not agree with Ms. Wade's care being delayed due to the fact that she was brought in by squad meaning the patient is assessed right away.
>
> Cheryl also advised that Jennifer Goldsmith, the claims manager would be contacting our office to speak with us regarding Ms. Wade's circumstances, however, our office has not heard anything back from Cheryl or Jennifer.
>
> We are requesting an appointment with Cheryl and Jennifer to discuss this matter in detail. Please contact my office upon receipt of this letter to schedule an appointment. Your cooperation will be greatly appreciated.

(Doc. No. 15, Ex. 1).

{¶23} The letter conveys to Lima Memorial that she retained counsel. However, Paula's letter does not convey that she sustained injuries from treatment she received at Lima Memorial; rather, the letter states that it is "relative to personal injuries sustained from dog bites, which occurred on June 20, 2011." *Compare Szwarga* at ¶ 19. Most importantly, Paula's letter does not notify Lima Memorial that she is considering bringing action on a malpractice claim. *Compare Rowe* at 250-251; *Mendenhall* at *8; *Gutierrez* at *3; *Kline* at 41;

Szwarga at ¶ 19; *Kulow* at 141; *Cooke* at *6. Instead, the purpose of Paula's letter was to schedule an appointment, not put Lima Memorial on notice of any claim. *Compare Kulow* at 141. Likewise, Paula's letter indicates that she wants to discuss only a *possible* malpractice claim. Paula's request for an appointment "to discuss this matter in detail" without more is insufficient to provide Lima Memorial notice that Paula was considering bringing an action on a malpractice claim.

{¶24} Therefore, the letter was not a 180-day letter that extended the statute of limitations beyond June 20, 2012. Because we determined that Paula's letter did not extend the statute of limitations, Paula's complaint filed on December 19, 2012 was untimely.

{¶25} Paula did not provide *any* written notice to Dr. Sabir. As a result, the one-year statute of limitations also expired on June 20, 2012 as to Dr. Sabir. *See Ryan v. Randolph*, 5th Dist. Tuscarawas No. 2003AP110085, 2004-Ohio-442, ¶ 13-14 (concluding that the 180-day letter did not extend the one-year statute of limitations as to Dr. Randolph because it identified only Union Hospital, and not Dr. Randolph, as a potential defendant); *Josolowitz*, 2000 WL 861836 at *4 ("Nowhere in such complaint or any accompanying documents does it state, in any form, that appellant was considering bringing a malpractice action against appellee.").

{¶26} Therefore, because plaintiffs failed to timely file their suit against defendants, summary judgment in favor of defendants was appropriate.

{¶27} Plaintiffs' fourth assignment of error is overruled.

Assignment of Error No. I

The trial court erred in holding that Defendant/Appellee Lima Memorial Hospital did not waive the statute of limitations defense when it failed to assert the statute of limitations defense in its Motion to Dismiss.

{¶28} In their first assignment of error, plaintiffs argue that the trial court erred in concluding that Lima Memorial did not waive its statute-of-limitations defense when it failed to assert that defense in its motion to dismiss.

{¶29} "The proper response to the failure to file the affidavit required by Civ.R. 10(D)(2) is a motion to dismiss pursuant to Civ.R. 12(B)(6)." *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, paragraph one of the syllabus. "A dismissal of a complaint for failure to file the affidavit required by Civ.R. 10(D)(2) is an adjudication otherwise than on the merits. The dismissal, therefore, is without prejudice." *Id.* at paragraph two of the syllabus. "A dismissal without prejudice relieves the court of all jurisdiction over the matter and leaves the parties in the same position as if the plaintiff had never commenced the action." *Haynes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-78, 2005-Ohio-5099, ¶ 13, citing *Stafford v. Hetman*, 8th Dist. Cuyahoga No. 72825, 1998 WL 289383, *1 (June 4, 1998) and *Butler v. Harper*, 9th Dist.

Summit No. 21051, 2002-Ohio-5029, ¶ 17, citing *Cent. Mut. Ins. Co. v. Bradford-White Co.*, 35 Ohio App.3d 26, 28 (6th Dist.1987). *See also Davis v. Paige*, 5th Dist. Stark No. 2007 CA 00248, 2008-Ohio-6415, ¶ 31, 34.

{¶30} Here, the trial court dismissed Paula's December 19, 2012 complaint without prejudice for failing to file the affidavit required by Civ.R. 10(D)(2). Because Paula's December 19, 2012 complaint was dismissed without prejudice, it is a nullity and we cannot consider it. *See Haynes* at ¶ 13. As such, plaintiffs' argument is without merit.

{¶31} Therefore, plaintiffs' first assignment of error is overruled.

Assignment of Error No. II

The trial court abused its discretion in not giving Plaintiffs/Appellants the opportunity to conduct discovery in order to justify their response to Defendants/Appellants' [sic] Motion for Summary Judgment.

Assignment of Error No. III

The trial court erred when it granted Defendants/Appellants' [sic] Motion for Summary Judgment because a genuine issue of fact existed as to whether Defendants/Appellants [sic] received the one-hundred-eighty day letter sent via the United States Postal Service.

Assignment of Error No. V

The trial court erred in granting Defendant/Appellants' [sic] Motion for Summary Judgment against Plaintiff/Appellant Dub Wade because a genuine issue of fact existed as to when Plaintiff/Appellant Dub Wade lost the consortium of his wife, Plaintiff/Appellant Paula Wade.

{¶32} Because we determined under Paula and Dub's fourth assignment of error that Paula's letter was not a proper 180-day letter and that the trial court properly granted summary judgment in favor of defendants since plaintiffs' complaint was not timely filed, plaintiffs' second, third, and fifth assignments of error are rendered moot, and we decline to address them. App.R. 12(A)(1)(c); *Hubbard v. Defiance*, 3d Dist. Defiance Nos. 4-12-22 and 4-12-23, 2013-Ohio-2144, ¶ 87.

{¶33} Having found no error prejudicial to the appellants herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

WILLAMOWSKI, J., concurs.

SHAW, J., Concurs in Part and Dissents in Part.

{¶34} I concur with the majority opinion and judgment as to Dr. Sabir to whom no notice was provided at all.

{¶35} I respectfully disagree with the majority as to Lima Memorial. I believe the letter adequately apprises the hospital of the possibility of a malpractice claim against Lima Memorial Hospital based upon the phrase "possible med mal practice claim against Lima Memorial Hospital" as stated in the letter, in accordance with the case authority cited by the majority in *Swarga*,

Marshall, DeTray, Mendenhall and Kline, supra, and also based upon the additional notation in the letter that the attorney had received some indication, albeit via hearsay, that the director of the Emergency Room Department had been contacted and may have acknowledged or suggested that Ms. Wade's care at the Emergency Room was improperly delayed.

{¶36} Accordingly, I respectfully dissent as to the judgment of the majority regarding the hospital.