**[Cite as *Kelly v. Aultman Physician Ctr.*, 2015-Ohio-628.]**

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| JAQUAYLA KELLY | : | JUDGES: |
| | : | |
| | : | Hon. Sheila G. Farmer, P.J. |
| Plaintiff-Appellant | : | Hon. Patricia A. Delaney, J. |
| | : | Hon. Craig R. Baldwin, J. |
| -vs- | : | |
| | : | Case No. 2014CA00104 |
| | : | |
| AULTMAN PHYSICIAN CENTER -- OB/GYN, ET AL. | : | |
| | : | |
| | : | |
| Defendants-Appellees | : | O P I N I O N |

| | |
|---|---|
| CHARACTER OF PROCEEDING: | Appeal from the Stark County Court of Common Pleas, Case No. 2013CV00763 |
| JUDGMENT: | AFFIRMED |
| DATE OF JUDGMENT ENTRY: | February 17, 2015 |

APPEARANCES:

For Plaintiff-Appellant:

DAVID M. CUPPAGE
MARGARET M. METZINGER
Climaco, Wilcox, Peca, Taratino & Garofoli, L.P.A.
55 Public Square, Suite 1950
Cleveland, OH 44113

For Defendants-Appellees:

RICHARD S. MILLIGAN
PAUL J. PUSATERI
THOMAS R. HIMMELSPACH
AMANDA L. WALLS
Milligan Pusateri Co., LPA
4684 Douglas Circle NW
P.O. Box 35459
Canton, OH 44735

*Delaney, J.*

{¶1} Plaintiff-Appellant Jaquayla Kelly appeals the September 5, 2013 and May 23, 2014 judgment entries of the Stark County Court of Common Pleas.

**FACTS AND PROCEDURAL HISTORY**

{¶2} Plaintiff-Appellant Jaquayla Kelly was a patient at Defendant-Appellee Aultman Physician Center OB/GYN. On June 18, 2008, Kelly presented to Aultman Physician Center OB/GYN to have a Mirena intrauterine device ("IUD") placed for contraceptive purposes. The Mirena IUD is a T-shaped polyethylene frame with a steroid reservoir that releases a hormone to prevent pregnancy. The healthcare provider inserts the IUD into the uterus. A plastic string tied to the end of the IUD hangs down through the cervix into the vagina.

{¶3} Kelly returned to Aultman Physician Center OB/GYN for her yearly exams. She was seen by Defendant-Appellee Dr. Jennifer L. Rogers Grabenstetter. On February 3, 2009, Kelly presented for her yearly exam. She complained of spotting for three weeks. Upon examination by Dr. Grabenstetter, the strings of the IUD were not visible. Dr. Grabenstetter ordered an ultrasound to check for the IUD placement. Kelly had an ultrasound on February 10, 2009 at Defendant-Appellee Aultman Hospital. The ultrasound determined the IUD was in the uterus but in a lower position than expected.

{¶4} Dr. Grabenstetter recommended the IUD be repositioned. On February 27, 2009, Kelly underwent a colposcopy where the IUD was repositioned.

{¶5} On June 12, 2009, Kelly presented to Aultman Physician Center OB/GYN stating that she could not feel the IUD string. She also stated that she had intermittent, sharp, and achy pain in her left lower abdominal quadrant. Kelly disliked the IUD and

had more cramping since it was placed. Dr. Grabenstetter and Kelly discussed the IUD and determined to continue with the IUD.

{¶6} On June 23, 2009, Kelly underwent an ultrasound at Aultman Hospital to check the IUD placement due to pelvic pain. The ultrasound determined the IUD was malpositioned in that it appeared to extend into the myometrium of Kelly's uterus. Kelly was never informed of the results of the June 23, 2009 ultrasound.

{¶7} Kelly returned to Aultman Physician Center OB/GYN on October 1, 2009. She complained of abdominal pain and requested that her IUD be removed. Dr. Grabenstetter could not observe the IUD string. Dr. Grabenstetter recommended that Kelly return the first week of November 2009 for removal of the IUD if her pain did not improve.

{¶8} On November 5, 2009, Kelly contacted Aultman Physician Center OB/GYN to state that she opted to continue with the IUD because her pain had improved.

{¶9} Kelly visited the Emergency Department at Aultman Hospital on December 14, 2009 and December 21, 2009 complaining of abdominal pain. She was diagnosed with a urinary tract infection.

{¶10} On April 13, 2010, Kelly visited the Emergency Department at Aultman Hospital complaining of abdominal pain. The emergency room physician ordered a CT scan of Kelly’s abdomen and pelvis. The CT scan showed Kelly’s IUD was partially outside the uterine cavity. The CT scan also showed an 8 centimeter round multiloculated fluid density most consistent with a pelvic abscess due to a ruptured uterus, pelvic inflammatory disease, or the IUD. The CT scan report stated that a

malpositioned IUD device was mentioned in the prior ultrasound of June 23, 2009. Kelly was admitted to Aultman Hospital.

{¶11} Kelly had surgery on April 15, 2010. An exploratory laparotomy was performed, which demonstrated near complete extravasation of the IUD through the myometrium and serosa of Kelly's uterus. Multiple abscesses were noted, with pus throughout her abdominal cavity and pelvis. Kelly underwent a total abdominal hysterectomy, removal of both ovaries and fallopian tubes, bilateral gutter abscess removal, appendectomy, and removal of multiple pelvic abscesses.

{¶12} Post-operatively, Kelly developed septic shock, multi-organ system failures, and sepsis induced coagulopathy. Kelly was admitted to the surgical intensive care unit. The physicians placed a central venous catheter and an arterial line. Kelly was on a ventilator for four days. On the fifth day, Kelly was transferred to a step down unit. Kelly was in the hospital for two weeks and discharged on April 26, 2010. She was referred to an infectious disease specialist and received intravenous antibiotics through May 11, 2010 and oral antibiotics through May 26, 2010.

{¶13} After her surgery, Kelly was treated by Aultman Physician Center OB/GYN for symptoms related to menopause.

{¶14} In September 2012, Kelly saw a legal advertisement on television advising viewers of complications related to the use of the Mirena IUD device. Kelly sought legal advice based on the commercial.

{¶15} Kelly's counsel ordered Kelly's medical records from Aultman Physician Center OB/GYN and Aultman Hospital in October 2012. The records were received on

January 28, 2013. Kelly states that January 28, 2013 was the first time she learned the June 23, 2009 ultrasound showed the IUD was malpositioned.

{¶16} Kelly filed her original Complaint for medical malpractice on March 13, 2013. On March 29, 2013, Kelly filed an Amended Complaint that brought additional claims against new party defendant Bayer Healthcare Pharmaceuticals, Inc. Kelly brought seven causes of action. As to Defendants-Appellees Aultman Physician Center OB/GYN, Aultman Hospital, Aultman Health Foundation, and Dr. Grabenstetter (hereinafter "Aultman"), Kelly alleged claims of medical malpractice, respondeat superior, and fraudulent concealment. As to Defendant Bayer Healthcare Pharmaceuticals, Inc., Kelly alleged claims of product defect in design or formulation, product defect due to inadequate warning and/or instruction, product defect in failure to conform to representations, and punitive damages. The claims against Bayer Healthcare Pharmaceuticals, Inc. were removed to federal court.

{¶17} Aultman filed a motion to dismiss Kelly's Amended Complaint. Aultman argued Kelly's claims were barred by the statute of limitations. Kelly filed a response to the motion to dismiss and a motion for leave to file a Second Amended Complaint. On May 5, 2013, the trial court granted the motion for leave to file a Second Amended Complaint.

{¶18} On September 5, 2013, the trial court granted Aultman's motion to dismiss as to Kelly's medical malpractice and respondeat superior claims. The trial court determined Kelly filed her medical malpractice claim beyond the one-year statute of limitations period pursuant to R.C. 2305.113. The trial court held, however, that Kelly did

not file her fraudulent concealment claim outside of the four-year statute of limitations and Kelly could proceed with the claim.

{¶19} Aultman filed a motion for summary judgment on Kelly's claim for fraudulent concealment. The fraudulent concealment claim argued Aultman did not disclose the results of the June 23, 2009 ultrasound to Kelly. Kelly responded to the motion for summary judgment and Aultman replied. On May 23, 2014, the trial court granted Aultman's motion for summary judgment as to Kelly's remaining claim of fraudulent concealment.

{¶20} It is from these judgment entries Kelly now appeals.

**ASSIGNMENTS OF ERROR**

{¶21} Kelly raises two Assignments of Error:

{¶22} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEES' MOTION TO DISMISS APPELLANT'S MEDICAL MALPRACTICE CLAIM.

{¶23} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S CLAIM FOR FRAUDULENT CONCEALMENT."

## ANALYSIS

### I.

{¶24} Kelly argues in her first Assignment of Error that the trial court erred when it dismissed Kelly's medical malpractice claim as barred by the statute of limitations. We disagree.

#### *Civ.R. 12(B)(6) – Motion to Dismiss*

{¶25} The trial court dismissed Kelly's medical malpractice and related respondeat superior claims pursuant to Civ.R. 12(B)(6). Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Autumn Care Ctr., Inc. v. Todd*, 5th Dist. Licking No. 14-CA-41, 2014-Ohio-5235, -- N.E.3d --, ¶ 7 citing *Greeley v. Miami Valley Maintenance Contractors, Inc.,* 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey County Board of Commissioners,* 65 Ohio St.3d 545, 1992-Ohio-73, 605 N.E.2d 378. "In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Walker v. Toledo*, -- Ohio St.3d --, 2014-Ohio-5461, -- N.E.3d --, ¶ 4 citing *Mitchell v. Lawson Milk Co*., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). We therefore accept as true the facts asserted in Kelly's complaint. *Id*.

#### *Statute of Limitations in a Medical Malpractice Action*

{¶26} In accordance with R.C. 2305.113(A), "an action upon a medical * * * claim shall be commenced within one year after the cause of action accrued." The Ohio Supreme Court has stated:"[A] cause of action for medical malpractice accrues and the

one year statute of limitation commences to run (a) when the patient discovers or, in the exercise of reasonable care and diligence should have discovered, the resulting injury, or (b) when the physician-patient relationship for that condition terminates, whichever occurs later." *Frysinger v. Leech*, 32 Ohio St.3d 38, 41-42, 512 N.E.2d 337 (1987).

{¶27} In *Allenius v. Thomas*, 42 Ohio St.3d 131, 134, 538 N.E.2d 93 (1989), the Ohio Supreme Court held that under the discovery rule, a "cognizable event" triggers the running of the statutory time for bringing suit. A "cognizable event" is "some noteworthy event * * * which does or should alert a reasonable person-patient that an improper medical procedure, treatment or diagnosis has taken place." *Id*. Hence, if a patient believes that her physician has done something that has caused her harm, such a fact is enough to alert her to the necessity for investigation for purposes of pursuing redress. *Id.*

{¶28} In *Flowers v. Walker*, 63 Ohio St.3d 546, 589 N.E.2d 1284 (1992), the Ohio Supreme Court elaborated on the manner in which a cognizable event manifests. The court observed, "*constructive* knowledge of facts, rather than the *actual* knowledge of their significance, is enough to start the statute of limitations running under the discovery rule." *Id*. at 549. Consequently, the statute of limitations in a medical malpractice case will be triggered even if a potential plaintiff has not uncovered all relevant facts to constitute her cause of action to trigger the running of the statute of limitations. *Id.* Thus, "[t]he occurrence of a cognizable event makes it incumbent upon that individual to investigate his or her case completely." *Waikem v. Cleveland Clinic Found*., 5th Dist. Stark No. 2011CA00234, 2012-Ohio-5620, ¶ 29 quoting *Hans v. The*

*Ohio State Univ. Med. Ctr*., 10th Dist. Franklin No. 07AP-10, 2007-Ohio-3294, ¶ 11 citing *Simonds v. Kearney*, 9th Dist. Wayne No. 01 CA0035, 2002-Ohio-761.

***The Cognizable Event***

{¶29} Aultman argues the April 2010 surgery was the cognizable event that triggered the running of the statutory time for Kelly to bring her medical malpractice suit. It was the April 2010 event, Aultman contends, that made Kelly aware or should have made Kelly aware that her condition was related to a medical service, treatment, or diagnosis previously provided to her by Aultman. Because Kelly filed her complaint in March 2013, Kelly's claim for medical malpractice was three years outside the one year statute of limitations.

{¶30} Kelly asserts the cognizable event did not occur until she received her medical records on January 28, 2013. In her Second Amended Complaint, Kelly states the breach giving rise to her medical malpractice claim arose as follows:

> 59. Defendants Grabenstetter and Doe breached that duty in June of 2009 when Defendants failed to remove Plaintiff's IUD, despite Plaintiff complaining during multiple office visits of experiencing bleeding, abdominal pain and cramping, and despite the fact that an ultrasound on June 23, 2009 demonstrated that Plaintiff's IUD was malpositioned and perforating into Plaintiff's myometrium.

{¶31} Kelly claims the first time she became aware of the breach was on January 28, 2013 when Kelly's attorneys received her medical records from Aultman. It was at that point Kelly became aware of the June 23, 2009 ultrasound:

> 56. January 28, 2013 is the first time Plaintiff discovered or could have discovered the malpractice of Defendants Grabenstetter and Doe, thereby tolling the statute of limitations for medical malpractice from June 2009 until this point.

Kelly contends because Aultman never informed Kelly of the results of the June 23, 2009 ultrasound demonstrating the IUD was malpositioned, the April 2010 surgery could not constitute a cognizable event that would have made Kelly aware that a medical malpractice could have occurred and she should investigate her case.

{¶32} Kelly stated in her Second Amended Complaint that on June 12, 2009, she complained to Aultman Physician Center OB/GYN that she had intermittent, sharp, and achy pain in her left lower abdominal quadrant. She could not feel the IUD string. On October 1, 2009, she reported to Aultman Physician Center OB/GYN with complaints of abdominal pain. On December 14 and 21, 2009, Kelly reported to the Emergency Department at Aultman complaining of abdominal pain. On April 13, 2010, Kelly presented to Aultman with a serious pelvic and abdominal infection. She had major surgery on April 15, 2010 and was in the hospital for two weeks. In her Second Amended Complaint she states:

> 55. Plaintiff was never made aware that her condition in April of 2010, including the need for a total abdominal hysterectomy, bilateral salpingo-oophorectomy, bilateral gutter abscess removal, appendectomy and the removal of multiple pelvic abscesses, was related to the specific medical services provided to her by Defendants Grabenstetter and Doe,

particularly, their failure to address the uterine perforation in June, 2009, of which she just recently became aware.

In her response to Aultman's motion to dismiss, Kelly acknowledged she was informed after the April 2010 surgery that the migration of the IUD through the uterine wall caused internal injuries requiring a hysterectomy.

{¶33} Kelly argues that without the knowledge of the June 23, 2009 ultrasound, she had no way of knowing her reoccurring abdominal pain and resulting surgery were related to the IUD being malpositioned. Therefore, the cognizable event occurred in January 28, 2013 when she received her medical records. A “cognizable event” is the occurrence of facts and circumstances which lead, or should lead, the patient to believe that the physical condition or injury of which she complains is related to a medical diagnosis, treatment, or procedure that the patient previously received. *Allenius v. Thomas*, 42 Ohio St.3d 131, 538 N.E.2d 93 (1989), syllabus. It is the *constructive* knowledge of facts, not the *actual* knowledge of their legal significance, which is enough to start the statute of limitations running under the discovery rule. *Flowers v. Walker*, 63 Ohio St.2d 546, 549, 589 N.E.2d 1284 (1992). The “cognizable event” itself puts the plaintiff on notice to investigate the facts and circumstances relevant to her claim in order to pursue her remedies. *Id.* Accepting as true the facts alleged in Kelly's complaint and making all reasonable inferences therefrom in favor of Kelly, we agree with the trial court's conclusion the cognizable event in this case occurred in April 2010. The Second Amended Complaint states that since 2009, Kelly experienced repeated discomfort and pain with her IUD. In April 2010, she required major surgery to repair the damage from the malpositioned IUD. The April 2010 events should have given Kelly reason to believe

or at least to investigate her claim that malpractice may have been committed in the placement of the IUD or during her treatment of her complaints with the IUD. The one-year statute of limitation on a medical malpractice action begins to run when the patient discovers or, in the exercise of reasonable care and diligence should have discovered, the resulting injury. *Frysinger v. Leech*, 32 Ohio St.3d 38, 41-42, 512 N.E.2d 337 (1987).

{¶34} We note that reading the facts of the complaint in a light most favorable to Kelly, Kelly could have a viable claim for medical negligence as to the Aultman's actions, or lack of actions, as to the June 23, 2009 ultrasound; however, Kelly's claims are barred by the statute of limitations. Kelly's complaint for medical malpractice was filed on March 13, 2013, three years after the cognizable event. Accordingly, Kelly's complaint for medical malpractice against Aultman is barred by the one-year statute of limitations pursuant to R.C. 2305.113.

{¶35} Kelly's first Assignment of Error is overruled.

**II.**

{¶36} Kelly argues in her second Assignment of Error the trial court erred when it granted Aultman's motion for summary judgment on Kelly's claim for fraudulent concealment.

***Summary Judgment Standard of Review***

{¶37} Kelly's Assignment of Error regards the trial court's grant of summary judgment in favor of Aultman. We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case 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 judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such 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, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶38} The 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 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). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶39} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt,* 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

***Fraudulent Concealment***

{¶40} In Kelly's third cause of action, she alleged on or about April and May 2010, Aultman failed to disclose and knowingly concealed that Kelly's IUD was perforating her uterine wall in June 2009. She contends that Dr. Grabenstetter and the doctors treating Kelly in April and May 2010 had a duty to reveal that the June 23, 2009 ultrasound showed the IUD was perforating her uterine wall. Kelly asserts there is a genuine issue of material fact whether Aultman deliberately concealed the June 23, 2009 ultrasound in order to protect against a claim of medical malpractice.

{¶41} In *Gaines v. Preterm–Cleveland, Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987), the Ohio Supreme Court set forth the elements for a cause of action of fraud in a medical malpractice action as follows:

> The elements of an action in actual fraud are: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it was true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

{¶42} Thus, "[a] physician's knowing misrepresentation of a material fact concerning a patient's condition, on which the patient justifiably relies to his detriment, may give rise to a cause of action in fraud independent from an action in medical malpractice." *Wargo v. Susan White Anesthesia, Inc.*, 8th Dist. Cuyahoga No. 96410,

2011-Ohio-6271, ¶ 12-13 quoting *Gaines v. Preterm–Cleveland, Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).

{¶43} In this case, Kelly does not allege that Aultman made a false representation to Kelly in regards to the placement of the IUD. Instead, Kelly argues Aultman engaged in a concealment of fact as to the placement of the IUD. A physician has a duty to disclose to a patient known material facts about the patient's medical condition. *Gaines v. Preterm-Cleveland, Inc.* 33 Ohio St.3d 54, 56. Kelly also refers to Aultman's Policies and Procedures to establish Aultman's duty to disclose known facts to the patient. Aultman's Policies and Procedures contain guidelines for "Informing Patients and Families About Unanticipated Outcomes." Kelly asserts these guidelines create a duty to inform patients if there is an unanticipated outcome that differs significantly from the anticipated results of a treatment or procedure discussed with the patient during the informed consent process or when there is a medical error that results in actual patient harm and it is of clinical significance. Kelly states the April 2010 surgery was an unanticipated outcome of the placement of the IUD and therefore Aultman had a duty to follow its policies and procedures to inform Kelly of the medical error.

***Dr. Grabenstetter***

{¶44} Kelly argues Dr. Grabenstetter ordered the June 23, 2009 ultrasound and had a duty to disclose the results of the ultrasound to Kelly. In support of its motion for summary judgment on the claim for fraudulent concealment, Aultman submitted the February 27, 2014 affidavit of Dr. Grabenstetter to demonstrate there was no genuine issue of material fact that Dr. Grabenstetter did not purposefully conceal the results of

the June 23, 2009 ultrasound from Kelly. Dr. Grabenstetter stated in her affidavit: "I never concealed any medical information from Jaquayla Kelly."

{¶45} Pursuant to the standards of summary judgment, the nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. In this case, Kelly argued in her response to the motion for summary judgment that Dr. Grabenstetter had access to the results of the June 23, 2009 ultrasound and she had a duty to disclose those results to Kelly. A review of the record shows that Kelly presents no Civ.R. 56 evidence to set forth genuine issues of material fact that Dr. Grabenstetter fraudulently concealed the June 23, 2009 ultrasound from Kelly. Kelly's argument that Dr. Grabenstetter failed to review the June 23, 2009 ultrasound and share those results with Kelly sounds in negligence, which we have determined is a claim barred by the statute of limitations.

***Aultman Hospital and Aultman Health Foundation*[1]**

{¶46} Kelly next argues the Aultman physicians treating Kelly in April 2010 fraudulently concealed information from her regarding the IUD. She states that Aultman's failure to inform Kelly in April and May 2010 that the June 23, 2009 ultrasound showed that the IUD had extended into Kelly's uterine wall was not motivated by medical consideration. She contends there is a genuine issue of material fact that Aultman's failure in April and May 2010 can only be characterized as motivation to conceal the medical malpractice that occurred in June 2009.

[1] The trial court held the Aultman Physician Center OB/GYN is not a legal entity and not capable of being sued. Kelly has not disputed this finding in her appeal.

{¶47} Pursuant to Kelly's answers to Aultman's interrogatories, Kelly stated that ten doctors concealed relevant, pertinent, and material information from Kelly, including the results of the June 23, 2009 ultrasound and the cause of her massive, debilitating, and life-threatening injuries documents in her medical records. Three of the ten doctors were employees of Aultman Hospital or Aultman Health Foundation in 2009 and 2010. The three doctors were Dr. Joanna Quinn, Dr. Anoush Montaser, and Dr. William Schnettler. Dr. Quinn was an OB/GYN resident and provided care to Kelly during her hospital admission on April 15, 2010 and as a patient at the Aultman Physician Center OB/GYN during 2010. Dr. Montaser was a radiology resident with Aultman in 2009 and 2010. In 2010, Dr. Schnettler was employed as the chief resident and was the primary resident involved in the care and treatment of Kelly during her hospitalization. In her response to the motion for summary judgment, Kelly did not dispute Aultman's identification of the three doctors involved in Kelly's care.

{¶48} Kelly points to the following information to demonstrate evidence of concealment. When Kelly presented to the Emergency Department on April 13, 2010, she had a CT scan of her abdomen and pelvis. The preliminary report was authored by Dr. Anoush Montaser, a radiology resident. It stated:

> An IUD device seen. This is partially outside the uterine cavity as best seen on axial and sagittal images. There is a round multiloculated fluid density with enhancing septa within the pelvis within the uterus, rectum. This is about 8 cm in the maximum diameter. This is most consistent with a multiloculated abscess. * * * IMPRESSION 1. There is an 8 centimeter round multiloculated fluid collection with enhancing walls and septa in the

pelvic cavity. The IUD device appears to be partially outside the uterus. These findings are most consistent with a pelvic abscess due to ruptured uterus. Malpositioned IUD device was mentioned on the prior ultrasound of 6/23/2009.

{¶49} On April 13, 2010, Dr. Karl F. Wodrich issued an emergency room admit note. Kelly points the court to following statement in the admit note:

It looks like when I initially had a reading from radiology it said something about a potential perforated uterus. Within a few minutes, the reading was changed over to what appeared to be just septated abscess at 8 cm in diameter, with no further mention of perforation.

{¶50} A second radiology report was issued on April 21, 2010. It was authored by Dr. Matthew Karlen. It stated:

COMPARISON: Ultrasound pelvis 6/23/2009

* * *

FINDINGS:

* * *

An IUD device seen. This is partially outside the uterine cavity as best seen on axial and sagittal images. There is a round multiloculated fluid density with enhancing septa within the pelvis within the uterus, rectum. This is about 8 cm in the maximum diameter. This is most consistent with a multiloculated abscess. * * * 1. There is an 8 centimeter round multiloculated fluid collection with enhancing walls and septa in the pelvic cavity. This is concerning for abscess and may be related to pelvic

inflammatory disease. There is redemonstration of malpositioning of the IUD which is another potential source of infection.

{¶51} Kelly argues the differences between the two radiology reports and the emergency room admit note present direct or circumstantial evidence of fraudulent concealment by Aultman. We disagree with Kelly's conclusion based on our de novo review of these records. Both radiology reports compared the June 23, 2009 ultrasound and refer to the malposition of the IUD as shown in the June 23, 2009 ultrasound. Both radiology reports identify the IUD device and describe the IUD as partially outside the uterine cavity. Both radiology reports refer to an abscess in the pelvic cavity.

{¶52} In support of their motion for summary judgment on the claim of fraudulent concealment, Aultman submitted the affidavits of Dr. Quinn, Dr. Montaser, and Dr. Schnettler. Dr. Quinn, Dr. Montaser, and Dr. Schnettler stated in their affidavits that they did not conceal any medical information from Kelly. Kelly has not provided any Civ.R. 56 evidence to refute the claims of the doctors or to create a genuine issue of material fact as to their knowledge of the June 23, 2009 ultrasound or that they concealed from Kelly their knowledge of the June 23, 2009 ultrasound.

{¶53} Kelly further argues that Aultman, pursuant the "Unanticipated Outcomes" policy, should have told her in April 2010 that the June 23, 2009 ultrasound showed that the IUD was malpositioned. Based on the Aultman policy, Kelly argues Aultman's failure to disclose the results of the June 23, 2009 ultrasound demonstrates fraudulent concealment. As stated above, a physician has a duty to disclose to a patient known material facts about a patient's condition. Kelly is correct that a reading of Aultman's "Unanticipated Outcomes" policy requires Aultman to inform its patients of their health

status. This policy encompasses the physician's duty to disclose to his or her patient known material facts about the patient's condition. In April 2010, the radiology reports stated that the IUD device was partially outside the uterine cavity. The reports stated Kelly had a pelvic abscess. The April 2010 radiology reports both refer to the June 23, 2009 ultrasound. The reports stated the source of the infection could be the IUD device, pelvic inflammatory disease, or ruptured uterus. In April 2010, these were the known facts as to Kelly's condition.

{¶54} Black's Law Dictionary (9th Ed.2009) defines "concealment" as, "the act of refraining from disclosure, especially, an act by which one prevents or hinders the discovery of something; a cover-up." The Aultman doctors named by Kelly as engaging in fraudulent concealment averred that they did not conceal any medical information from Kelly. Kelly did not rebut this evidence in her responses to the motion for summary judgment so as to create a genuine issue of material fact pursuant to Civ.R. 56. Kelly's claim that the Aultman doctors failed to inform her of the June 23, 2009 ultrasound sounds in medical negligence, as opposed to fraudulent concealment. Any claim that Kelly may have as to medical negligence is barred by the statute of limitations.

{¶55} Kelly also argues Aultman's failure to timely provide her medical records is another example of fraudulent concealment. Kelly does not point this court to the record where she claimed discovery violations by Aultman. In oral argument, Kelly referred this court to our decision in *Griffith v. Aultman Hosp*., 5th Dist. Stark No. 2013CA00142, 2014-Ohio-1218, as to Aultman's failure to provide complete medical records. Kelly's complaint, however, does not allege any violations of R.C. 3701.74.

{¶56} We find no genuine issue of material fact of fraudulent concealment as to Aultman.

{¶57} Kelly's second Assignment of Error is overruled.

**CONCLUSION**

{¶58} The two Assignments of Error of Plaintiff-Appellant Jaquayla Kelly are overruled.

{¶59} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.,

Farmer, P.J. and.

Baldwin, J., concur.