[Cite as *Sowders v. Summa Health Sys.*, 2026-Ohio-4702.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JUSTIN SOWDERS, et al. Appellants v. SUMMA HEALTH SYSTEM, et al. Appellees	C.A. No. 31793 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2025-06-2826

DECISION AND JOURNAL ENTRY

Dated: November 25, 2026

SUTTON, Judge.

{¶1} Plaintiffs-Appellants Justin Sowders, as administrator and personal representative of the estate of W.S., deceased, and Justin and Sarrah Sowders, individually and as parents of W.S. (collectively "the Sowders") appeal the judgment of the Summit County Court of Common Pleas. For the reasons that follow, this Court affirms.

I.

Relevant Background Information

{¶2} This case arises from the 2024 death of W.S., the infant daughter of Justin and Sarrah Sowders.

{¶3} In June 2025, the Sowders filed a complaint against Summa Health System ("Summa") and others, alleging the following: In June 2024, Mrs. Sowders presented to Summa in labor with her first child. Mrs. Sowders specifically instructed her healthcare providers that she was refusing the administration of Vitamin K, erythromycin eye ointment, and the Hepatitis B

vaccine to her baby, and this refusal was noted in her record as "requested no baby medications." W.S. was born by emergency cesarian section on June 20, 2024, and she was administered erythromycin ointment and the Hepatitis B vaccine. W.S. was transferred to Akron Children's Hospital. Later that same day, W.S. began experiencing seizures and developed severe hypoxic ischemic encephalopathy and required mechanical ventilation. W.S. died on June 28, 2024.

{¶4} The Sowders' complaint set forth two counts, captioned "medical battery" and "wrongful death." The Sowders alleged that "[d]espite the parents' explicit refusal of consent," the Hepatitis B vaccine and erythromycin eye ointment were administered to W.S., "the administration of medications to [W.S.] without parental consent was an unlawful touching and medical battery[,] and "as a direct and proximate result of [Summa's] battery, [W.S.] suffered injury and death[.]" The Sowders further alleged, "[Summa's] wrongful acts and omissions directly and proximately caused the death of [W.S.]"

{¶5} Summa moved to dismiss the Sowders' complaint pursuant to Civ.R. 12(B)(1) and (6) arguing that the trial court lacked subject matter jurisdiction over the Sowders' claims and that the complaint failed to state a claim upon which relief could be granted. Specifically, Summa argued federal law mandates that *before* a person can file a civil action for a vaccine-related injury or death, they must first comply with the mandates of the Vaccine Injury Compensation Program ("VICP") by filing a petition for compensation in the United States Court of Federal Claims, and there was no indication in the complaint that the Sowders filed such petition

{¶6} The trial court granted Summa's motion to dismiss, stating, "in the absence of any evidence from [the Sowders] that this matter has been brought before the United States Court of Federal Claims, this [c]ourt has no choice but to follow the explicit instructions contained in 42 U.S.C. 300aa-11(a)(2)(B) which require that this [c]ourt dismiss this action."

{¶7} The Sowders have appealed, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN GRANTING [SUMMA'S] MOTION TO DISMISS [THE SOWDERS'] MEDICAL BATTERY CLAIM ON THE GROUNDS THAT THE VACCINE INJURY COMPENSATION PROGRAM, 42 U.S.C. § 300aa-11(a)(2)(A), BARS ALL CIVIL ACTIONS INVOLVING THE ADMINISTRATION OF A VACCINE, REGARDLESS OF WHETHER THE CLAIM ARISES FROM VACCINE-RELATED INJURY OR FROM THE LACK OF CONSENT TO THE MEDICAL PROCEDURE ITSELF.

{¶8} The National Childhood Vaccine Injury Act of 1986 ("the Act") created a no-fault compensation program to stabilize a vaccine market adversely affected by an increase in vaccine-related tort litigation and to facilitate compensation to claimants. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 228 (2011). The VICP "establishes a scheme of recovery designed to work faster and with greater ease than the civil tort system." *Shalala v. Whitecotton*, 514 U.S. 268, 269 (1995). The United States Supreme Court has stated that a claimant alleging more than $1,000 in damages resulting from a vaccination must exhaust the procedures set forth in 42 U.S.C. 300aa-11 before filing any civil action in state or federal court. *Id.* at 270, citing 42 U.S.C. § 300aa-11(a).

{¶9} 42 U.S.C. 300aa-11(a)(1) and (2)(A) provide that no person may bring a civil action for damages greater than $1,000 against a vaccine administrator in state or federal court for damages arising from a vaccine-related injury or death "associated with the administration of a vaccine" unless a petition is filed for compensation for a vaccine-related injury or death for compensation under the VICP. 42 U.S.C. 300aa-11(a)(2)(B) further provides if a civil action is barred under this section, the court shall dismiss the action. The Hepatitis B vaccine is one of the vaccines listed in the Vaccine Injury Table and is covered under the VICP in accordance with the Act. 42 C.F.R. § 100.3(a).

{¶10} In their first assignment of error, the Sowders argue the trial court erred in dismissing their complaint because their claim for medical battery falls outside of the scope of claims required to be first submitted to the United States Court of Federal Claims under the VICP. Summa argues dismissal of the complaint was appropriate pursuant to Civ.R. 12(B)(1) and (6) because the trial court lacked subject matter jurisdiction over the Sowders' claims and relatedly, the complaint failed to set forth a claim upon which relief could be granted.

{¶11} "The standard to apply for a dismissal pursuant to Civ.R. 12(B)(1), lack of jurisdiction over the subject matter, is whether the plaintiff has alleged any cause of action cognizable by the forum." *State ex rel. Bush v. Spurlock*, 42 Ohio St. 3d 77, 80 (1989), citing *Avco Financial Services Loan, Inc. v. Hale*, 36 Ohio App.3d 65, 67 (10th Dist. 1987).

{¶12} A Civ.R. 12(B)(6) motion tests the sufficiency of the complaint, and dismissal is appropriate where the complaint "fail[s] to state a claim upon which relief can be granted." Civ.R. 12(B)(6). In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 192 (1988). Before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. This Court reviews de novo a trial court's decision granting a motion pursuant to Civ.R. 12(B)(6). *Perrysburg Twp. v. City of Rossford,* 2004-Ohio-4362, ¶ 5.

{¶13} Here, we must presume the allegations in the complaint are true, i.e. that Summa administered erythromycin eye ointment and a Hepatitis B vaccine to W.S., that "[t]he administration of medications to [W.S.] . . . without parental consent was an unlawful touching and medical battery[,]" and "as a direct and proximate result of [Summa's] battery, [W.S.] . . .

suffered injury and death." The Sowders' complaint alleges that the administration of the Hepatitis B vaccine to W.S. caused her injury and death. Thus, the Sowders' complaint is a "civil action . . . associated with the administration of a vaccine" that was required to be first submitted to the United States Court of Federal Claims under the under the plain language of the Act.

{¶14} The Sowders nevertheless argue that their complaint alleges W.S.'s injury and death were caused by the *medical battery*, not by the properties of the vaccine. To recover on a claim for medical battery, a plaintiff must prove an "intentional, unconsented-to touching." *Anderson v. St. Francis–St. George Hosp., Inc.*, 77 Ohio St.3d 82, 84 (1996); *Schwaller v. Maguire*, 2003-Ohio-6917, ¶ 14 (1st Dist.). While the Sowders captioned one of the counts in the complaint "Medical Battery," this alone is not dispositive because when this Court "constru[es] a complaint, we look to the substance of the complaint, not the caption, to determine the nature of the cause being pleaded." *Hartung v. Agarwal-Antal*, 2020-Ohio-1016, ¶ 26 (9th Dist.), quoting *Byers DiPaula Castle, L.L.C. v. Portage Cty. Commrs.*, 2015-Ohio-3089, ¶ 24 (11th Dist.), citing *Funk v. Rent-All Mart, Inc*., 91 Ohio St.3d 78, 80 (2001). Here, the Sowders' complaint specifically alleged that W.S.'s injury and death were caused by the administration of the Hepatitis B vaccine, a claim clearly included in 42 U.S.C. 300aa-11 and required to be first submitted to the United States Court of Federal Claims.

{¶15} Therefore, as to the Sowders' claims that the administration of the Hepatitis B vaccine caused W.S.'s injury and death, the trial court was correct that the claims must first be submitted to the United States Court of Federal Claims. Because they were not, the trial court properly dismissed the Sowders' claims concerning the Hepatitis B vaccine.

{¶16} The Sowders' complaint also included allegations concerning the unauthorized administration of erythromycin eye ointment. Erythromycin is not a vaccine set forth in the

Vaccine Injury Table. The Sowders argue that because erythromycin is not listed in the Vaccine Injury Table, they were not required to first submit their claims concerning erythromycin to the United States Court of Federal Claims. However, the Sowders failed to raise this specific argument in the trial court but raised it for the first time in their reply brief on appeal. "When reviewing arguments on appeal, this Court cannot consider issues that are raised for the first time on appeal." *Harris v. Akron*, 2009-Ohio-3865, ¶ 18 (9th Dist.).

{¶17} Accordingly, the Sowders' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY RELYING ON THE ASSERTION THAT [THE SOWDERS] FAILED TO EXHAUST VICP ADMINISTRATIVE REMEDIES - A FACT NOT ALLEGED IN THE COMPLAINT - WITHOUT HOLDING A FURTHER HEARING ON THOSE UNPLED FACTS.

{¶18} The Sowders' second assignment of error concerns subject matter jurisdiction. Summa argues the trial court lacked subject matter jurisdiction over the Sowders' claims because the Sowders failed to first file a petition in the United States Court of Federal Claims as required by 42 U.S.C. 300aa-11(a). While the Sowders did not state in their complaint whether or not they filed a petition for compensation under the VICP, they state in their appellate brief that they have not filed such a petition.

{¶19} Summa argued in their motion to dismiss that the Sowders' complaint should be dismissed pursuant to Civ.R. 12(B)(1), which provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> Lack of jurisdiction over the subject matter[.]

{¶20} The issue is whether the trial court erred in looking outside the four corners of the complaint to determine whether it had jurisdiction over the Sowders' claims.

{¶21} In determining whether a plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, a court is not confined to the allegations of the complaint and may consider material pertinent to such inquiry without converting it into a motion for summary judgment. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211 (1976), paragraph one of the syllabus.

{¶22} Akron Children's Hospital ("Children's") was also a defendant named in the Sowders' complaint. In response to Children's motion to dismiss, which raised the same grounds as Summa's motion to dismiss, that the Sowders failed to file a petition for compensation pursuant to the VICP, the Sowders argued that Children's "administered a vaccine which resulted in the death of newborn [W.S.]." The Sowders further argued, "the VICP does not preempt claims for state law claims for medical battery in Ohio[,]" and "the VICP does not impose an administrative exhaustion requirement." In response to Children's motion to dismiss, the Sowders did not argue that they complied with the requirements of the VICP. Rather, they argued that their claims fell outside the mandates of the VICP.

{¶23} The filing of a petition in the United States Court of Federal Claims is a condition precedent to filing a state law civil lawsuit for a vaccine-related injury or death. 42 U.S.C. 300aa-11(a)(1)(2)(a). Civ.R. 9(C) provides in relevant part: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." While the Sowders' complaint alleged the trial court had subject matter jurisdiction it did not state whether required conditions precedent had been met.

{¶24} Here, the trial court used the absence of an affirmative showing by the Sowders as material "pertinent" to subject matter jurisdiction that they did not first file a petition for compensation in the United States Court of Federal Claims. After Children's and Summa filed their motions to dismiss, the Sowders did not seek to amend their complaint to include that the condition precedent to their claims had been met. Given that the Sowders had an opportunity to show they satisfied the condition precedent for their claims, together with their admission in this appeal that they did not satisfy the condition precedent, we cannot say the trial court erred in looking outside the four corners of the complaint to determine whether it had subject matter jurisdiction over the Sowders' claims.

{¶25} Accordingly, the Sowders' second assignment of error is overruled.

III.

{¶26} For the forgoing reasons, this Court must overrule the Sowders' assignments of error. The judgment of the Summit County Court of Common pleas is affirmed

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to

mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETTY SUTTON
FOR THE COURT

HENSAL, P. J.
MANNING, J.
CONCUR.

APPEARANCES:

BRIAN UNGER, Attorney at Law, for Appellants.

EMILY K. ANGLEWICZ and MEGAN M. MILLICH, Attorneys at Law, for Appellees.

ROCCO D. POTENZA, CAROL N. TRAN, and HANNAH O. YAEGER, Attorneys at Law, for Appellee.