[Cite as *Smith v. Gill*, 2010-Ohio-4012.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93985

GLEN A. SMITH

PLAINTIFF-APPELLANT

vs.

DARRELL GILL, D.O., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-646283

BEFORE: Celebrezze, J., Boyle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: August 26, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiff-appellant, Glen Smith, appeals the trial court's decision granting summary judgment in favor of defendant-appellee, Darrell Gill, D.O. Based on our review of the record and pertinent case law, we affirm.

{¶ 2} On July 17, 2006, appellant was transported to Doctors Hospital of Nelsonville ("Doctors") complaining of chest pains he believed to be a heart attack. He requested and was eventually transferred to Riverside Methodist Hospital ("Riverside") in Columbus, Ohio, on July 18, 2006.

{¶ 3} On July 6, 2007, appellant sent letters to Dr. Gill, Doctors, and National Emergency Services ("NES") via certified mail notifying them that he intended to pursue a medical malpractice claim as a result of the treatment he received at Doctors. These letters, sent pursuant to R.C. 2305.113, were intended to extend the statute of limitations for filing his claim by 180 days ("180-day letter"). The letter sent to Doctors specifically named Dr. Gill and was signed for by J. Blair on July 9, 2007. The letter sent to NES, which is a medical staffing company with which Dr. Gill is an independent contractor, was signed for by M. A. Mitchell on July 9, 2007, but did not name Dr. Gill in any manner. The letter sent to Dr. Gill's personal address was not signed for until July 21, 2007.

{¶ 4} On January 4, 2008, appellant filed a complaint in the common pleas court for medical malpractice and named as defendants Dr. Gill,

Doctors, and Riverside. Dr. Gill filed his answer on March 10, 2008 asserting as a defense that appellant failed to file his claim within the one-year statute of limitations for medical malpractice claims. On June 25, 2008, appellant voluntarily dismissed Riverside from the suit, leaving Dr. Gill and Doctors as the only remaining defendants.

{¶ 5} On September 10, 2008, Dr. Gill filed a motion for summary judgment claiming that he never received the 180-day letter that was sent to his home, and therefore the statute of limitations was not extended. Dr. Gill relied on this to argue that appellant failed to file his complaint within the one-year statute of limitations, and thus the suit should be dismissed as it pertained to Dr. Gill. This motion was accompanied by Dr. Gill's affidavit, which merely reiterated that he never received a 180-day letter at his home and that the only 180-day letter he saw was the one sent to NES that was shown to him by his attorney.

{¶ 6} Appellant filed a brief in opposition to Dr. Gill's motion for summary judgment, wherein he provided proof that Dr. Gill had signed for the 180-day letter on July 21, 2007. Appellant relied on this evidence, the 180-day letters sent to NES and Doctors, and a letter from the vice president of Western Litigation, Inc. to argue that Dr. Gill had notice of the lawsuit and that the statute of limitations had been extended. The letter from Western Litigation was dated July 17, 2007 and informed appellant's counsel that

NES had received the 180-day letter addressed to it and that Western Litigation had "been retained to investigate [appellant]'s claim by the professional liability insurer for Darrell Gill, D.O."

{¶ 7} Dr. Gill responded to appellant's brief in opposition by redacting the two paragraphs in his affidavit that indicated that he never received a 180-day letter. Dr. Gill's reply brief then argued that the fact that he signed for a 180-day letter on July 21, 2007 is irrelevant because the statute of limitations had already expired. The trial court denied Dr. Gill's motion for summary judgment stating that it had no evidence of when the statute of limitations began to run on appellant's claim and thus the cause of action could not be disposed of by a summary judgment motion.

{¶ 8} Appellant was deposed on March 25, 2009. During his deposition, appellant admitted that he threatened to sue Dr. Gill before being transferred to Riverside. He specifically stated, "when I left I told Dr. Gill that I was going to pursue a claim of medical negligence against him, yes." Based on this testimony, Dr. Gill filed a motion for reconsideration of the trial court's ruling on his previous summary judgment motion. In his motion, Dr. Gill argued that because of appellant's admission, the statute of limitations began to run on July 18, 2006, and thus the statute of limitations had already expired when Dr. Gill received the 180-day letter on July 21, 2007.

{¶ 9} The trial court entered summary judgment in Dr. Gill's favor, finding: 1) the statute of limitations began to run on July 17, 2006; 2) Dr. Gill did not receive the 180-day letter until July 21, 2007; and 3) the 180-day letters received by Doctors and NES were insufficient to impart notice upon Dr. Gill, and thus the statute of limitations had not been extended. After this ruling, appellant voluntarily dismissed Doctors. This appeal followed wherein appellant argues that the trial court improperly granted summary judgment in favor of Dr. Gill.

Law and Analysis

{¶ 10} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. A de novo standard of review affords no deference to the trial court's decision, and we independently review the record. *Gilchrist v. Gonsor*, Cuyahoga App. No. 88609, 2007-Ohio-3903. Before summary judgment may be granted, the court must determine that there is no genuine issue of material fact, that the moving party is entitled to judgment as a matter of law, and that viewing the evidence in a light most favorable to the nonmoving party, reasonable minds can reach one conclusion in favor of the moving party. Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 11} There are no material facts at issue in this case. All parties agree that the statute of limitations began to run on July 18, 2006 when appellant told Dr. Gill that he intended to file a medical malpractice suit against him.[1] We must now determine whether Dr. Gill is entitled to judgment as a matter of law.

{¶ 12} Medical malpractice claims are subject to a one-year statute of limitations. R.C. 2305.113(A). If, however, before the one-year period has expired, the plaintiff "gives to the person who is the subject of that claim written notice that the [plaintiff] 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." R.C. 2305.113(B). Because Dr. Gill did not receive his 180-day letter until three days after the statute of limitations had expired, we must determine whether Doctors's and NES's receipt of the 180-day letters was sufficient to extend the statute of limitations for appellant's medical malpractice claim.

{¶ 13} Our research indicates a lack of case law analyzing R.C. 2305.113 and its application in the context of 180-day letters. This concept was previously set forth in former R.C. 2305.11(B), and thus we will utilize case

[1] The trial court used July 17, 2006 as the date when the statute of limitations began to run. Appellant was admitted to Doctors in the late hours of July 17 but was not transferred to Riverside until the early morning hours of July 18, 2006. As such, we will give appellant the benefit of having the statute of limitations begin on July 18, 2006. Whichever date is applied, our analysis is the same.

law that analyzed that statute in our analysis. Former R.C. 2305.11(B) did not espouse a particular method by which a potential defendant must receive a 180-day letter. *Fulton v. Firelands Community Hosp.*, Erie App. No. E-05-031, 2006-Ohio-1119, ¶11. In *Edens v. Barberton Area Family Practice Ctr.* (1989), 43 Ohio St.3d 176, 539 N.E.2d 1124, the Ohio Supreme Court applied the rules of statutory construction to analyze the language of former R.C. 2305.11(B). Since former R.C. 2305.11(B) and current R.C. 2305.113(B)(1) contain the same language, we find the analysis in *Edens* to be persuasive in this case.

{¶ 14} R.C. 2305.113(B)(1) states: "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 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." In *Edens*, the Court held, "[f]rom the use of the words 'notify' and 'give,' it appears that the General Assembly intended that the one-hundred-eighty day letter would be effective when actually received and not when merely mailed. Thus, we hold that where a statute such as R.C. 2305.11(B) is silent as to how notice is to be effectuated, written notice will be deemed to have been given when received. Therefore, under R.C. 2305.11(B), the

one-hundred-eighty day period commences to run from the date the notice is received and not the date it is mailed." *Edens* at 179.

{¶ 15} There is no dispute that Dr. Gill did not receive the 180-day letter that was sent to his personal address until after the statute of limitations had already expired. Thus, in order for the statute of limitations to be extended, the 180-day letters sent to Doctors or NES must have been sufficient to impart notice upon Dr. Gill that appellant was considering filing a medical malpractice action against him. Appellant argues that Dr. Gill was an agent of Doctors and NES, and the 180-day letters received by them were, in fact, sufficient to extend the statute of limitations.

{¶ 16} The letter sent to Doctors was addressed to Dr. Gill, in care of the Department of Emergency Medicine, Doctors Hospital of Nelsonville; however, the letter was signed for by J. Blair. This is similar to *Fulton*, supra, in which numerous 180-day letters were mailed to the potential defendant, but were signed for by a third party named Evelyn Bilger. *Fulton* at ¶13. The court stated, "This certainly raises the issue of who is Bilger and what is her relationship to appellees and Fisher-Titus. Neither party submitted any evidence on this issue. Nevertheless, it is not a genuine issue of material fact. This court and others have held that where actual receipt of a notice is required, receipt by the intended recipient's agent will not suffice. * * * Appellants have not asserted why *Edens* and its progeny do not apply

to this case. They simply argue that they complied with the statute by mailing the notice within the statutory time period to appellees' place of employment. Assuming arguendo that Fisher-Titus was appellees' place of employment, former R.C. 2305.11(B), as interpreted by the Supreme Court of Ohio, demands that the intended recipient actually received the 180-day notice prior to the expiration of the one-year statute of limitations[.]" Id.

{¶ 17} There is no evidence in this case that Dr. Gill was an employee of Doctors. In fact, Dr. Gill testified in his deposition that he is an independent contractor and that he does not maintain an office at Doctors. Nevertheless, *Fulton* involved a situation where a 180-day letter was sent to the defendant's employer and was signed for by a third party. The court in *Fulton* unequivocally held that the potential defendant must receive actual notice of the possible lawsuit. In this case, Dr. Gill presented evidence, by way of the return receipt signed by J. Blair, that he did not receive the 180-day letter that was sent to Doctors. As such, the burden then shifted to appellant to demonstrate that Dr. Gill did, in fact, receive this letter. Appellant did not meet this burden, and thus we must agree with the trial court that the letter sent to Doctors did not extend the statute of limitations in this case.

{¶ 18} The letter sent to NES was addressed to NES Healthcare Group, care of Administrator. The letter mentioned appellant's name and stated that appellant was considering filing a medical claim against NES based on

care provided by one of its employees. The letter did not indicate which employee it was speaking of, and Dr. Gill's name was not included in the letter in any manner. In *Ryan v. Randolph*, Tuscarawas App. No. 2003AP110085, 2004-Ohio-442, a letter was received by the physician, but identified the hospital as the possible defendant and simply said the patient was considering bringing an action arising out of treatment. Id. at ¶13. The court in *Ryan* acknowledged the requirement that the 180-day letter contain the name of the potential defendant and held that "[b]ecause the letter in the case sub judice did not advise [the doctor] the claimant was considering bringing a malpractice action against him, we conclude it failed to comply with R.C. 2305.11(B)(1)." Id. at ¶14. Based on the holding in *Ryan*, the letter sent to NES did not comply with the mandates of R.C. 2305.113(B)(1), and the statute of limitations was not extended in the case at bar.

{¶ 19} Appellant relies on the letter sent to his counsel by Western Litigation, Inc., which acknowledged NES's receipt of the 180-day letter and stated that it had "been retained to investigate [appellant]'s claim by the professional liability insurer for Dr. Darrell Gill, D.O." This letter is evidence that NES and Dr. Gill's malpractice carrier had actual notice of the suit, but it is not evidence that Dr. Gill had actual notice. Dr. Gill testified in his deposition that NES maintained his malpractice insurance; therefore, it

is plausible that NES and the malpractice carrier had notice of the suit without actually informing Dr. Gill.[2] Nevertheless, the 180-day letter sent to NES did not comply with the mandates of R.C. 2305.113(B)(1) in that it failed to name Dr. Gill as the potential defendant; therefore, it did not extend the statute of limitations. Appellant's sole assignment of error is overruled.

Conclusion

{¶ 20} The material facts show that Dr. Gill did not receive the 180-day letter sent to his personal address until after the statute of limitations had already expired. The letter sent to Doctors was insufficient to extend the statute of limitations because the letter was signed for by a third party and there is no evidence that Dr. Gill actually received it. The letter sent to NES was insufficient to extend the statute of limitations because it did not name Dr. Gill as a potential defendant, and thus it did not comply with R.C. 2305.113(B)(1). As such, no genuine issue of material fact existed, appellant did not file his medical malpractice action within the statute of limitations, and the trial court properly granted summary judgment in favor of Dr. Gill.

Judgment affirmed.

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[2] Appellant also relies on Dr. Gill's deposition, wherein he testified that NES had received service on his behalf, to argue that Dr. Gill had notice once NES received the letter. The fact that NES received service on Dr. Gill's behalf in the past is not evidence that Dr. Gill had actual notice of the possibility of a medical claim being filed by appellant. Also, such a fact is irrelevant in light of appellant's failure to comply with R.C. 2305.113(B)(1) when sending the letter to NES.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR