[Cite as *Boggia v. Wood Cty. Hosp.*, 2010-Ohio-4932.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Mary Boggia, et al.

Appellants

v.

Wood County Hospital, et al.

Appellee

Court of Appeals No. WD-09-091

Trial Court No. 2007-CV-0422

DECISION AND JUDGMENT

Decided: October 8, 2010

* * * * *

Chad M. Tuschman and Peter O. DeClark, for appellants.

Donald J. Moracz, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} On May 30, 2007, appellants Mary and Raymond Boggia commenced a medical malpractice action against Frances E. Webb-Smith, M.D. and her medical group, All About Women, Inc. Appellants alleged that Dr. Webb-Smith was negligent and departed from accepted standards of medical care in failing to: (1) "properly work up" Mary Boggia for a TVT-O procedure (a treatment for urinary stress incontinence); (2) properly conduct appropriate preoperative tests and studies; (3) obtain informed consent from Mary; and (4) properly perform the procedure. Appellants also set forth a claim against appellee, the Wood County Hospital, for negligently credentialing Dr.

Webb-Smith and allowing her to perform the TVT-O procedure at a hospital where she no longer had privileges.

{¶ 2} After they filed their answers, Dr. Webb-Smith and All About Women, Inc., filed separate motions to bifurcate and stay the negligent-credentialing claim. Appellants filed a memorandum in opposition to these motions. On November 30, 2008, the common pleas court granted the defendants' motions. On December 22, 2008, Dr. Webb-Smith and All About Women, Inc., notified the court of the fact that appellants had settled their claims against them. Therefore, on January 8, 2009, the trial court dismissed, with prejudice, the claims against these parties.

{¶ 3} Subsequently, appellee filed a Civ.R. 12(B)(6) motion to dismiss the negligent-credentialing cause of action. The hospital argued that because there was no admission of negligence or finding of negligence against Dr. Webb-Smith, the negligent-credentialing claim "cannot be established and must be dismissed as a matter of law." Appellants filed a memorandum in opposition, relying on this court's decision in *Schelling v. Humphrey*, 6th Dist. No. WM-07-001, 2007-Ohio-5469 ("*Schelling I*"). Upon applying the law set forth in *Schelling I*, the trial court denied appellee's motion.

{¶ 4} Thereafter, our decision in *Schelling I* was affirmed by the Supreme Court of Ohio. See *Schelling v. Humphrey*, 123 Ohio St.3d 387, 2009-Ohio-4175 ("*Schelling II*"). Citing the Ohio Supreme Court's decision in *Schelling II*, appellee filed a second Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Appellants filed a memorandum in opposition. The trial court, in applying

Schelling II to the case before us, found that, due to the fact that the parties entered into a settlement agreement, Dr. Webb-Smith could not be found negligent in her treatment of Mary Boggia. Thus, the court concluded that appellants' claim for negligent-credentialing could not be maintained against the Wood County Hospital and granted appellee's Civ.R. 12(B)(6) motion.

{¶ 5} Appellants appeal this judgment and assert the following assignment of error:

{¶ 6} "I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY GRANTING APPELLEE'S MOTION TO DISMISS AS IT FAILED TO RECOGNIZE THAT THE RELEASE LANGUAGE ITSELF ESTABLISHED THAT DR. WEBB-SMITH ACTING BY AND THROUGH HER GROUP, ACTED TORTIOUSLY AND THEREBY CAUSED DAMAGES."

{¶ 7} Rulings on motions to dismiss filed pursuant to Civ.R. 12(B)(6) are reviewed under a de novo standard of review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. When ruling on a motion to dismiss for a failure to state a claim upon which relief can be granted, an appellate court must presume the truth of the factual allegations in the complaint and must make all reasonable inferences in favor of the non-moving parties. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Finally, it must appear beyond doubt from the complaint that the plaintiffs can prove no set of facts entitling them to recover. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus.

{¶ 8} In applying that standard to appellants' complaint, we find that, based upon *Schelling II*, the trial court did not err in granting appellee's Civ.R. 12(B)(6) motion. In *Schelling II*, Loretta and Brent Schelling sued Dr. Stephen Humphrey for medical malpractice for two surgeries he performed on Loretta at the Community Hospital of Williams County. Id. at ¶ 2. They also sued the hospital for negligently granting staff privileges to Dr. Humphrey. Id. Subsequently, the physician filed a petition in bankruptcy; therefore, the Schellings dismissed, without prejudice, their medical malpractice claim against him. Id. at ¶ 3. The hospital then filed a motion to dismiss the negligent-credentialing claim, contending that the Schellings were required to prove negligence on the part of Dr. Humphrey before it could prevail on the negligent-credentialing cause of action. Id. The trial court granted that motion, but on appeal, this court reversed. Id.; *Schelling I* at ¶ 19.

{¶ 9} The sole issue in the Schellings' appeal to the Ohio Supreme Court was "whether a plaintiff can proceed on a negligent-credentialing claim against a hospital without a prior finding, either by adjudication or stipulation, that the plaintiff's injury was caused by the physician's malpractice." *Schelling II* at ¶ 11. A plurality of the Ohio Supreme Court Justices first noted that in the normal negligent-credentialing case where a doctor is or has been amenable to suit, he or she would ordinarily have been found liable for medical malpractice prior to a determination of the injured party's negligent-credentialing claim against the hospital. Id. at ¶ 26. However, the plurality then concluded that, due to the "unusual" circumstances in *Schelling II* case, i.e., the doctor

was no longer amenable to suit, "*and the plaintiffs, through no fault of their own*," could not maintain their malpractice suit against that doctor, those plaintiffs could proceed on their negligent-credentialing claim. Id. at ¶ 32. That is, the plaintiffs could prove Dr. Humphrey's malpractice "and that the alleged malpractice caused the Schellings injury, as an element of their negligent-credentialing claim against the hospital." Id. at ¶ 30.

{¶ 10} As applied to the present case, appellants settled their malpractice claim against Dr. Webb-Smith and All About Women, Inc. without obtaining any concession from the doctor as to her alleged negligence/liability. To the contrary, in the release of all claims signed by the parties to this cause, Dr. Webb-Smith "denies any liability of any sort." The release/settlement agreement goes on to state that it "is executed to extinguish any and all liabilities and/or responsibilities in tort, as well as any other past, present or future legal claims against [Dr. Webb-Smith and All about Women, Inc.] by or on behalf of [Mary and Raymond Boggia]." Thus, while it may seem a harsh result, it was appellants who agreed to enter into the settlement agreement thereby precluding any opportunity to prove malpractice on the part of Dr. Webb-Smith.

{¶ 11} Accordingly, appellants' sole assignment of error is found not well-taken. The judgment of the Wood County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.
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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE