

[Cite as *Stephenson v. Grant Hosp.*, 2011-Ohio-5622.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

William E. Stephenson, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 11AP-253
 : (C.P.C. No. 10CVA 03 3629)
 Grant Hospital et al., : (ACCELERATED CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on November 1, 2011

William E. Stephenson, pro se.

Baker & Hostetler LLP, John H. Burtch, and Gregory R. Flax,
for appellee Grant Hospital.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} William E. Stephenson, plaintiff-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court granted the motion to dismiss filed by Grant Hospital ("Grant"), defendant-appellee; denied appellant's motion for temporary restraining order and preliminary injunction; and denied appellant's motion to compel discovery.

{¶2} On February 20, 2009, appellant filed a complaint against Grant alleging medical malpractice occurring in April 2008. The trial court dismissed the complaint on

September 22, 2009, for failure to comply with the requirement in Civ.R. 10(D)(2) that appellant file an affidavit of merit. Appellant refiled his medical malpractice complaint on March 16, 2010, again failing to submit an affidavit of merit pursuant to Civ.R. 10(D)(2). Appellant then filed a motion for extension of time and an affidavit of merit signed by Samantha Martin. On April 13, 2010, Grant filed a motion to strike appellant's motion for extension of time and affidavit of merit. On December 10, 2010, the trial court granted Grant's motion to strike with regard to Martin's affidavit of merit, but the court granted appellant an extension of time to file another affidavit of merit.

{¶3} On January 21, 2011, appellant filed an affidavit signed by Stacy Bush. On February 10, 2011, appellant filed a motion for temporary restraining order and preliminary injunction. On February 22, 2011, appellant filed a motion to compel discovery.

{¶4} On March 9, 2011, the trial court issued a decision and entry, in which it struck the Bush affidavit, denied appellant's motion for injunctive relief and motion to compel discovery, and dismissed appellant's case due to his failure to comply with Civ.R. 10(D)(2). Appellant appeals the judgment of the trial court. Although appellant sets forth no clear assignments of error, he sets forth the following issue in his table of contents, which we will construe as his assignment of error:

The trial court erred in granting Defendants [sic] motion for summary judgment for Plaintiffs [sic] failure to comply with Civil. R 10(D) [sic], Affidavit of merit.

{¶5} Although appellant argues in his assignment of error that the trial court erred when it granted summary judgment to Grant, the trial court did not grant summary judgment. Instead, the trial court granted Grant's motion to dismiss based upon

appellant's failure to comply with Civ.R. 10(D)(2). Civ.R. 10(D)(2) provides, in pertinent part:

Affidavit of merit; medical liability claim.

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence.

{¶6} The failure to file a Civ.R. 10(D)(2) affidavit is contested by way of a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Fletcher v. Univ. Hosp. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶13. In deciding whether to dismiss a complaint, pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Before the court may dismiss the complaint, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. We review de novo the dismissal of a complaint pursuant to Civ.R. 12(B)(6). *Shockey v. Wilkinson* (1994), 96 Ohio App.3d 91, 94.

{¶7} As indicated above, any affidavit of merit pursuant to Civ.R. 10(D)(2) must comply with Evid.R. 601(D), which provides:

A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

{¶8} In the present case, appellant submitted a purported affidavit of merit from Stacy Bush. In the purported affidavit, Bush indicates that she is "either a licensed physician, or medical student, or person practice/study at a credited school of health care." This statement is insufficient to comply with the requirements of Evid.R. 601(D). To comply with Evid.R. 601(D), the affiant must be licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state. Bush does not affirmatively state she is licensed, as she indicates she *either* is a licensed physician, medical student, or person practice/study at a credited school of health care. Therefore, the Bush statement was insufficient in this regard.

{¶9} In addition, Bush's signature is not notarized. The only notary stamp appearing on the document specifically indicates that it applies to "Plaintiff only." A paper purporting to be an affidavit, but that has not been sworn to before an officer, is not an affidavit. *Benedict v. Peters* (1898), 58 Ohio St. 527, 536-37. Thus, because Bush's

signature was not notarized, it was not an affidavit for purposes of Civ.R. 10(D)(2). For these reasons, the trial court did not err when it found appellant did not comply with Civ.R. 10(D)(2) and granted Grant's motion to dismiss.

{¶10} We also note that, although appellant does not argue any error in the trial court's denial of his motion for temporary restraining order and preliminary injunction and motion to compel discovery, we find the trial court did not err in denying these motions on the bases cited in the trial court's decision. With regard to the motion for temporary restraining order and preliminary injunction, appellant's motion was not accompanied by an affidavit or verified complaint, as required by Civ.R. 65(A). With regard to the motion to compel discovery, appellant did not attach to his motion a statement reciting the efforts made to resolve the matter through discussion with attorneys for Grant, as required by Civ.R. 37(E). Therefore, the trial court did not err when it denied these motions. For the foregoing reasons, appellant's assignment of error is overruled.

{¶11} Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
