[Cite as *Baker v. Scheetz*, 2019-Ohio-685.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Vanessa Baker,	:	
Plaintiff-Appellant,	:	No. 18AP-655 (C.P.C. No. 18CV-2537)
v.	:	(ACCELERATED CALENDAR)
Richard E. Scheetz, D.D.S.,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on February 26, 2019

On brief: *Butler, Cincione & DiCuccio, N. Gerald DiCuccio,* and *William A. Davis*, for appellant. **Argued:** *William A. Davis.*

On brief: *Reminger Co., L.P.A., David H. Krause, Melvin J. Davis,* and *Steven A. Chang*, for appellee. **Argued:** *Steven A. Chang.*

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Plaintiff-appellant, Vanessa Baker, appeals from a judgment of the Franklin County Court of Common Pleas sua sponte dismissing her complaint against defendant-appellee, Richard E. Scheetz, D.D.S. For the following reasons, we reverse and remand.

I. Facts and Procedural History

{¶ 2} On March 23, 2018, Baker filed a complaint against Dr. Scheetz, a dentist with a specialty of oral and maxillofacial surgery, alleging malpractice in connection with Dr. Scheetz's performance of cosmetic surgery on Baker's upper and lower jaws, chin and lips on August 2, 2016. Baker alleged Dr. Scheetz was negligent in the surgical care he provided to her, and his negligence caused her to sustain severe and permanent injuries and disability, including requiring additional surgery. Pursuant to Civ.R. 10(D)(2)(c),

Baker filed with her complaint a motion to extend the period of time to file an affidavit of merit. In April 2018, Dr. Scheetz filed an answer to Baker's complaint and a motion for judgment on the pleadings pursuant to Civ.R. 12(C), arguing Baker failed to provide the required affidavit of merit and her motion for extension of time to file that affidavit was deficient. On June 18, 2018, Baker filed an affidavit of merit. Nine days later, Dr. Scheetz filed a second motion for judgment on the pleadings pursuant to Civ.R. 12(C), arguing Baker failed to provide an affidavit of merit from a competent medical expert as required under Civ.R. 10(D)(2). In neither of Dr. Scheetz's motions for judgment on the pleadings did he move for dismissal based on the applicable statute of limitations. On July 9, 2018, Baker filed a memorandum in opposition to Dr. Scheetz's request for judgment on the pleadings. Two days later, Dr. Scheetz filed a reply memorandum in support. On August 2, 2018, the trial court sua sponte dismissed the case based on its finding that Baker's complaint was not filed in compliance with the applicable statute of limitations. On August 7, 2018, Baker filed a motion for reconsideration, or, in the alternative, a motion for relief from judgment pursuant to Civ.R. 60(B). The trial court has not ruled on Baker's request for relief from judgment.[1]

{¶ 3} On August 28, 2018, Baker filed a notice of appeal.

II. Assignment of Error

{¶ 4} Baker assigns the following error for our review:

> The trial court erred to the prejudice of plaintiff in ordering *sua sponte* the dismissal of this case on its own conclusion that the statute of limitations for medical claims set forth in R.C. §2305.113 had expired, without any motion to that effect filed by the defense, because of the fact that a notice of claim letter had been delivered to defendant.

III. Discussion

{¶ 5} In her sole assignment of error, Baker argues the trial court erred in sua sponte dismissing her complaint based on its conclusion that she had not complied with the applicable statute of limitations. We agree.

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[1] While a party may move for relief from final judgment pursuant to Civ.R. 60(B), the Ohio Rules of Civil Procedure do not permit motions for reconsideration after a final judgment in the trial court. *See Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 380 (1981).

{¶ 6} "The Rules of Civil Procedure neither expressly permit nor forbid courts to sua sponte dismiss complaints." *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 108 (1995). However, sua sponte dismissal without notice may be appropriate where the complaint is frivolous or the claimant obviously cannot possibly prevail on the facts alleged in the complaint. *Id.* When a defendant moves for judgment on the pleadings based on the applicable statute of limitations, a court should dismiss a complaint on that basis only if the complaint "conclusively show[s] on its face the action is barred by the statute of limitations." *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376 (1982), paragraph three of the syllabus; *Schisler v. Columbus Med. Equip.*, 10th Dist. No. 15AP-551, 2016-Ohio-3302, ¶ 16. Further, courts must remain mindful that a plaintiff does not have the burden of affirmatively pleading compliance with the applicable statute of limitations. *Mills v. Whitehouse Trucking Co.*, 40 Ohio St.2d 55, 60 (1974) ("To hold otherwise would effectively place the burden of affirmatively pleading compliance with the statute of limitations upon the plaintiff, contrary to the express mandate of Civ.R. 8(C)."); *see* Civ.R. 8(C) (identifying statute of limitations as an affirmative defense).

{¶ 7} R.C. 2305.113(A) generally provides that "an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the cause of action accrued." However, if prior to the expiration of this one-year period, a claimant gives the defendant "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." R.C. 2305.113(B)(1). Thus, R.C. 2305.113(B)(1) provides a 180-day extension to the one-year limitations period in R.C. 2305.113(A) if the prospective medical negligence claimant provides the defendant with written notice of the forthcoming action. A cause of action for a medical malpractice claim accrues "(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 (1987), paragraph one of the syllabus.

{¶ 8} Applying these principles, we find the trial court erred in sua sponte dismissing Baker's complaint. The complaint does not conclusively show on its face that Baker's claim is barred by the applicable statute of limitations. In its decision dismissing

the case, the trial court stated that Baker did not provide the court with notice of her compliance with R.C. 2305.113(B), which would have shown her entitlement to a 180-day extension to file the complaint. Thus, the trial court erroneously assumed Baker had the burden of alleging in her complaint that she had delivered the 180-day notice to Dr. Scheetz. Regardless, the trial court reasoned that, even if Baker had provided written notice to Dr. Scheetz of her intent to file suit, and there was a 180-day extension, the complaint was still filed outside the statute of limitations. But this reasoning does not address the possibility that Baker's cause of action accrued later than the date of the surgery itself. The complaint, which was filed on March 23, 2018, indicates Dr. Scheetz performed surgery on Baker in August 2016 but does not affirmatively state when the physician-patient relationship between the parties terminated. Dr. Scheetz contends in appellate briefing that the physician-patient relationship for the condition at issue terminated, at the latest, in October 2016, when he refused to provide further treatment to Baker and referred her to counseling. Applying this time of accrual illustrates the flaw in the trial court's reasoning. If Baker's claim against Dr. Scheetz accrued in October 2016, and she availed herself of the 180-day extension, then it was possible for her to have timely filed her action in March 2018. Therefore, in this case, the complaint does not conclusively demonstrate the action was filed beyond the applicable statute of limitations. Consequently, we find the trial court erred in sua sponte dismissing the action on statute of limitations grounds.

{¶ 9} Accordingly, we sustain Baker's sole assignment of error.

{¶ 10} Dr. Scheetz argues that, even if the trial court erred in finding the complaint was untimely based solely on the facts alleged in the complaint, we should affirm the trial court's dismissal of the action because Baker did not file an affidavit of merit in compliance with Civ.R. 10(D)(2). Pursuant to Civ.R. 10(D)(2), an affidavit of merit must accompany every complaint that contains a medical claim. "The proper response to the failure to file the affidavit required by Civ.R. 10(D)(2) is a motion to dismiss pursuant to Civ.R. 12(B)(6)." *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, paragraph one of the syllabus. "The purpose behind the requirement in Civ.R. 10(D)(2) is to deter individuals from filing frivolous medical malpractice claims and to 'establish the adequacy of the complaint.' " *Jackson v. Northeast Pre-Release Ctr.*, 10th Dist. No. 09AP-457, 2010-Ohio-1022, ¶ 15, quoting *Fletcher* at ¶ 10, citing current Civ.R. 10(D)(2)(d). A plaintiff may

file with the complaint a motion to extend the period of time to file an affidavit of merit. Civ.R. 10(D)(2)(b). Upon the showing of good cause, a trial court must grant such a motion and provide the plaintiff with a reasonable period of time to file the affidavit, generally not to exceed 90 days. *Id*.

{¶ 11} Here, Baker filed with her complaint a motion for extension of time to file an affidavit of merit. Within 90 days of filing her complaint, Baker filed an affidavit of merit. Dr. Scheetz responded to Baker's filing of an affidavit of merit with a motion for judgment on the pleadings, alleging Baker's complaint fails to state a claim on which relief can be granted because she failed to provide an affidavit of merit from a competent medical expert. Without ruling on either Baker's motion for extension of time to file an affidavit of merit or Dr. Scheetz's motion for judgment on the pleadings, the trial court sua sponte dismissed the complaint on statute of limitations grounds solely based on the facts alleged in the complaint. Our determination that dismissal on this basis was erroneous requires analysis of the previously mooted issues raised by the parties' respective motions. We decline to address and resolve these issues in the first instance on appeal. *See State v. Peagler*, 76 Ohio St.3d 496, 501 (1996) ("A court of appeals cannot consider the issue for the first time without the trial court having had an opportunity to address the issue."). Therefore, we reject Scheetz's contention that we should affirm the trial court's judgment on alternate grounds.

IV. Disposition

{¶ 12} Having sustained Baker's sole assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for further proceedings consistent with law and this decision.

Judgment reversed;
cause remanded.

BROWN and DORRIAN, JJ., concur.