[Cite as *Henry v. Mandell-Brown*, 2010-Ohio-3832.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LAVAR HENRY,	:	APPEAL NO. C-090752 TRIAL NO. A-0900612
Plaintiff-Appellant,	:	*D E C I S I O N.*
vs.	:	
MARK MANDELL-BROWN, M.D.,	:	
and	:	
THE PLASTIC SURGERY EXPERTS,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 18, 2010

Michele Young, for Plaintiff-Appellant,

Calderhead, Lockemeyer & Peschke Law Office, Stephanie P. Franckewitz, and *David S. Lockemeyer*, for Defendants-Appellees.

Please note: This case has been removed from the accelerated calendar.

SUNDERMANN, Judge.

{¶1} Lavar Henry appeals the trial court's entry of summary judgment in favor of Mark Mandell-Brown, M.D., and The Plastic Surgery Experts. Because Henry did not commence or attempt to commence an action against Mandell-Brown before the expiration of the statute of limitations, the savings statute did not apply. The trial court properly granted summary judgment to the defendants.

{¶2} Mandell-Brown performed surgery on Henry on January 10, 2007, and provided treatment for Henry until March 1, 2007. On November 27, 2007, Henry filed a pro se complaint against The Mandell-Brown Plastic Surgery Center ("the surgery center"). The complaint alleged medical malpractice and fraud related to the surgery. On January 30, 2008, the trial court dismissed the complaint without prejudice because Henry had not filed an affidavit of merit as required by Civ.R. 10(D).

{¶3} On January 21, 2009, Henry, who was now represented by counsel, filed a complaint against Mandell-Brown and The Plastic Surgery Experts, which was the corporate name for the surgery center. The complaint alleged medical malpractice and gross negligence and also sought to recover from The Plastic Surgery Experts under the doctrine of respondeat superior. Mandell-Brown and The Plastic Surgery Experts filed a motion for summary judgment, arguing that the claims against them had not been filed within the applicable limitations period. The trial court granted the motion for summary judgment.

{¶4} We consider Henry's first four assignments of error together. In the first, he asserts that the trial court erred when it stated that service of process must actually occur before the savings statute may be applied. In the second, he asserts that the court erred when it failed to consider the complaint as a whole to determine who was

an actual party to the lawsuit. In the third, he asserts that the court erred when it considered the motion for summary judgment before discovery was complete. And in the fourth, he asserts that the court erred when it dismissed the gross-negligence cause of action with no discussion. The gist of these four assignments of error is that the trial court erred when it granted summary judgment to Mandell-Brown.

{¶5} Summary judgment is proper when (1) there remains no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and with the evidence construed in favor of the party against whom the motion is made, that conclusion is adverse to that party.[1] We review the trial court's decision to grant summary judgment de novo.[2]

{¶6} Henry argues that, under R.C. 2305.19 ("the savings statute"), he had one year from the January 30, 2008, dismissal of his first lawsuit to file a complaint against Mandell-Brown and The Plastic Surgery Experts. The savings statute provides that "[i]n any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later." At issue in this case is whether Henry had "commenced or attempted to [] commence" an action against Mandell-Brown when he filed the first lawsuit in November 2007.

[1] Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.
[2] *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243.

{¶7} The 2007 lawsuit named as the sole defendant The Mandell-Brown Plastic Surgery Center. Henry now argues that because Mandell-Brown was contractually connected to the surgery center as its chief executive officer and statutory agent, Henry's attempt to sue the surgery center was also an attempt to sue Mandell-Brown. He argues that the defendant in the first action cannot be determined by simply looking at the caption of the 2007 complaint. But within the body of the complaint, the defendant—the surgery center—was referred to separately from Dr. Mark Brown. From a review of the entire complaint, while Mandell-Brown was mentioned in the complaint, it is clear that the Mandell-Brown Surgery Center was the defendant.

{¶8} Henry contends that this case is similar to the one decided by the Tenth Appellate District in *Cox v. Ohio Parole Commission*.[3] In that case, the plaintiff filed a lawsuit in the Court of Claims, naming individual members of the parole commission as defendants.[4] The court dismissed the complaint because only state agencies and instrumentalities of the state can be defendants in original actions filed in the Court of Claims.[5] The plaintiff filed a second suit in the Court of Claims, naming the Ohio Parole Commission as the defendant.[6] The case was dismissed by the Court of Claims for not having been filed within the applicable statute of limitations.[7] The Tenth Appellate District reversed the judgment of the Court of Claims, holding that the savings statute applied to the second lawsuit, despite the fact that the parties in the second lawsuit were different from those in the first.[8] The court reasoned that the plaintiff had attempted to

[3] (1986), 31 Ohio App.3d 216, 509 N.E.2d 1276.
[4] Id. at 217.
[5] Id.
[6] Id.
[7] Id.
[8] Id. at 217-218.

commence a suit against the parole commission when he had named the individual members in the initial suit.[9]

{¶9} We conclude that *Cox* is distinguishable from this case. There, it was not possible for the individual defendants to be sued in the Court of Claims. Clearly, the plaintiff was attempting to commence an action against the parole commission. Here, a corporation can be sued in common pleas court. And there is no indication that Henry had attempted to commence an action against Mandell-Brown individually. While Henry is correct that courts have concluded that actual service is not necessary to show an attempt to commence an action, some effort to serve the party is necessary. In *Pridemore v. Dula*, which Henry contends is similar to this case, the Twelfth Appellate District held that the savings statute applied where the plaintiff had attempted to serve the defendant but had not been successful.[10] Here, Henry made no attempt to obtain service of the 2007 complaint on Mandell-Brown.

{¶10} Although Henry was not represented by counsel when he filed the 2007 complaint, he was bound by the same civil rules that apply to litigants who are represented by counsel. While we recognize that the savings statute is a remedial statute, it cannot be construed so liberally that it applies to save an action as to a defendant against whom the plaintiff never attempted to commence suit. And Henry's argument that the trial court improperly decided the motion for summary judgment before discovery was completed is unavailing. Further evidence of the relationship between Mandell-Brown and the surgery center would not have changed the fact that Henry had never attempted to commence an action against Mandell-Brown individually.

[9] Id.
[10] (Apr. 10, 1995), 12th Dist. Nos. CA94-02-043 and CA94-06-139.

{¶11} Because Henry never attempted to commence an action against Mandell-Brown individually, we conclude that the savings statute did not apply. The trial court properly granted summary judgment with respect to all the claims against Mandell-Brown. The first four assignments of error are not well taken.

{¶12} In his final assignment of error, Henry asserts that the trial court erred when it held that the malpractice claim could not go forward without Mandell-Brown as a defendant. We disagree.

{¶13} It is clear that only individuals can be held directly liable for medical malpractice.[11] At issue is whether the respondeat superior claim against the surgery center could survive after the dismissal of the claims against Mandell-Brown. In *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, the Ohio Supreme Court held that "[a] law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice."[12] In that case, the malpractice claim against the individual defendant was dismissed because it had not been filed within the one-year statute of limitations.[13] The court stated that "[a]lthough a party injured by an agent may sue the principal, the agent, or both, a principal is vicariously liable only when an agent could be held directly liable."[14]

{¶14} As acknowledged by the Ohio Supreme Court, legal-malpractice issues are analogous to medical-malpractice issues.[15] As in *Wuerth*, Mandell-Brown cannot be held directly liable for the alleged malpractice because the claims against him were not filed within the limitations period. And the respondeat-superior claim against the

[11] See *Browning v. Burt*, 66 Ohio St.3d 544, 1993-Ohio-178, 613 N.E.2d 993; *Propst v. Health Maintenance Plan* (1990), 64 Ohio App.3d 812, 582 N.E.2d 1142.
[12] 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.3.2d 939, paragraph two of the syllabus.
[13] Id. at ¶8.
[14] Id. at ¶22.
[15] Id. at ¶13.

surgery center could not survive the dismissal of the claims against Mandell-Brown. The fifth assignment of error is overruled.

{¶15} We therefore affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., and **DINKELACKER, J.,** concur.

Please Note:

The court has recorded its own entry this date.