[Cite as *Leckrone v. Kimes Convalescent Ctr.*, 2021-Ohio-556.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

JOSEPH LECKRONE,EXECUTOR,	:	
Plaintiff-Appellant,	:	Case No. 20CA02
vs.	:	
KIMES CONVALESCENT CENTER, ET. AL,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendants-Appellees.		

APPEARANCES:

R. Craig McLaughlin, Mayfield Heights, Ohio, for Appellant.

Brant E. Poling and Sabrina S. Sellers, Columbus, Ohio, for Appellees.

CIVIL CASE FROM COMMON PLEAS COURT, GENERAL DIVISION
DATE JOURNALIZED: 2-22-21
ABELE, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court judgment that granted a Civ.R. 12(C) motion for judgment on the pleadings filed by Marietta Memorial Hospital, defendant below and appellee herein. Plaintiff below and appellant herein, Joseph Leckrone, Executor of the Estate of Jonas L. Leckrone, Deceased, assigns the following error for review:

> "THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR JUDGMENT ON THE PLEADINGS FILED BY APPELLEE MARIETTA MEMORIAL HOSPITAL."

{¶ 2} On April 15, 2019, appellant filed a complaint against Kimes Convalescent Center, Ltd., Jay R. McDougal, D.O., Marietta Memorial Hospital, David P. Hill, M.D., and Scott G.

Wine, M.D. Contemporaneous with the complaint, appellant filed a motion for extension of time to file Civ.R. 10(D)(2) affidavits of merit. The trial court granted the request.

{¶ 3} The appellant's complaint alleged that the decedent: (1) suffered a hip fracture, (2) after surgery, resided at Kimes Convalescent Center from December 9, 2016 to January 15, 2017, with Jay R. McDougal, D.O. as his attending physician, (3) was a patient at Marietta Memorial Hospital in Marietta, Ohio from January 15, 2017 to January 31, 2017, with David P. Hill, M.D. as his attending physician and Scott G. Wine, M.D. also providing care and treatment, (4) resided again at Kimes from January 31, 2017 to February 16, 2017, with Dr. McDougal as his attending physician, (5) was transferred to O'Bleness Hospital in Athens, Ohio, on February 16, 2017 and hospitalized for several days, and (6) was transferred to another nursing home. The decedent passed away on April 16, 2017.

{¶ 4} Appellant averred that between December 9, 2016 and February 16, 2017, the decedent's medical condition rapidly declined due to negligent medical care, and that on April 16, 2017 the negligent care proximately caused his death. Appellees denied liability[1].

{¶ 5} On July 15, 2019, appellant filed affidavits of merit from David W. Seignious, M.D. and Marlene S. Blackford, MSN, RN. Appellee, however, filed a Civ.R. 12(C) motion for judgment on the pleadings and asserted that appellant's affidavits of merit are insufficient as a matter of law, and that the time for filing the affidavits had expired. On November 26, 2019, the trial court granted appellee's motion and dismissed the action. The court also observed that appellant had sought leave to file a corrective affidavit, but because appellant filed his affidavit

[1] Appellant voluntarily dismissed Jay R. McDougal, M.D., David P. Hill, M.D., and Scott G. Wine, M.D. pursuant to Rule 41(A)(1)(a).

after he obtained an initial ninety-day extension and not with its complaint, appellant exhausted any additional time to file a corrected affidavit. The trial court denied appellant's motion to file a corrected affidavit. This appeal followed.[2]

{¶ 6} In his sole assignment of error, appellant asserts that the trial court erred by granting appellee's Civ.R. 12(C) motion for judgment on the pleadings. In particular, appellant contends that a plaintiff who pursues a wrongful death claim for medical negligence can satisfy the affidavit of merit requirement with a nurse's affidavit to address the standard of care element and a doctor's affidavit to address the issues of causation and damages.

STANDARD OF REVIEW

{¶ 7} Appellate courts conduct a de novo review of trial court decisions concerning Civ.R. 12(C) motions for judgment on the pleadings. *Harris Farms, LLC v. Madison Twp. Trustees,* 4th Dist. Scioto No. 17CA3817, 2018-Ohio-4123, ¶ 12; *see also, State ex rel. Mancino v. Tuscarawas Cty. Court of Common Pleas*, 151 Ohio St.3d 35, 2017-Ohio-7528, 85 N.E.3d 713, ¶ 8. Therefore, appellate courts independently review trial court decisions regarding a Civ.R. 12(C) motion for judgment on the pleadings. *Harris Farms, supra,* citing *Rayess v. Educational Comm. for Foreign Med. Graduates*, 134 Ohio St.3d 509, 2012-Ohio-5676, 983 N.E.2d 1267, ¶18 ("Because the review of a decision to dismiss a complaint pursuant to Civ.R. 12(C) presents only questions of law, * * * our review is de novo.").

[2] On December 30, 2019, appellant filed a motion for reconsideration, or, in the alternative, to amend the court's November 26, 2019 entry to include language to make it a final appealable order. On January 28, 2020, the trial court filed an amended entry. However, the only substantive change from the November 26, 2019 entry related to the language that directed entry of a final judgment as to the hospital because the court expressly determined pursuant to Civ.R. 54(B) that no just reason for delay exists.

{¶ 8} Civ.R. 12(C) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A court that considers a Civ.R. 12(C) motion for judgment on the pleadings "must construe the material allegations in the complaint, along with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true." *Ohio Manufacturers' Assn. v. Ohioans for Drug Price Relief Act*, 147 Ohio St.3d 42, 2016-Ohio-3038, 59 N.E.3d 1274, ¶ 10 (citation omitted); *accord State ex rel. Leneghan v. Husted*, 154 Ohio St.3d 60, 2018-Ohio-3361, 110 N.E.3d 1275, ¶ 13, *State ex rel. Midwest Pride IV., Inc. v. Pontious,* 75 Ohio St.3d 565, 580, 664 N.E.2d 931 (1996). A court may enter judgment on the pleadings "only if it appears beyond doubt that the nonmoving party can prove no set of facts entitling it to relief." *Ohio Manufacturers' Assn.* at ¶ 10; *accord Harris Farms, supra,* at ¶ 13, *Maynard v. Norfolk S. Ry.,* 4th Dist. Scioto No. 08CA3267, 2009-Ohio-3143, ¶ 12; *Dolan v. Glouster*, 173 Ohio App.3d 617, 2007-Ohio-6275, 879 N.E.2d 838, ¶ 7 (4th Dist.). " 'Thus, Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law.' " *Rayess* at ¶ 18, quoting *Midwest Pride IV, supra,* at 570. "Consequently,'as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion * * * [for judgment on the pleadings].'" *Kerr v. Logan Elm School Dist.,* 4th Dist. Pickaway No. 14CA6, 2014-Ohio-5838, ¶ 12, quoting *York v. Ohio State Hwy. Patrol,* 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

{¶ 9} Civ.R. 10 (D)(2) provides the framework for pleadings in a negligent medical care/wrongful death claim and states in pertinent part:

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains

a medical claim * * * as defined in R.C. 2305.113, shall be accompanied by 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 meeting the requirements of Evid.R. 702, and if applicable, also meeting the requirements of Evid.R. 601(D). Affidavits of merit shall include all of the following:

> (I) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
>
> (ii) A statement that the affiant is familiar with the applicable standard of care;
>
> (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown and in accordance with division (c) of this rule, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit, not to exceed ninety days, except the time may be extended beyond ninety days if the court determines that a defendant or non-party has failed to cooperate with discovery or that other circumstances warrant extension.

(c) In determining whether good cause exists to extend the period of time to file an affidavit of merit, the court shall consider the following:

> (I) A description of any information necessary in order to obtain an affidavit of merit;
>
> (ii) Whether the information is in the possession or control of a defendant or third party;
>
> (iii) The scope and type of discovery necessary to obtain the information;
>
> (iv) What efforts, if any, were taken to obtain the information;
>
> (v) Any other facts or circumstances relevant to the ability of the plaintiff to obtain an affidavit of merit.

> (d) An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment. Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.
>
> (e) If an affidavit of merit as required by this rule has been filed as to any defendant along with the complaint or amended complaint in which claims are first asserted against that defendant, and the affidavit of merit is determined by the court to be defective pursuant to the provisions of division (D)(2)(a) of this rule, the court shall grant the plaintiff a reasonable time, not to exceed sixty days, to file an affidavit of merit intended to cure the defect.

{¶ 10} The Supreme Court of Ohio has explained that the purpose behind the affidavit of merit requirement "is to deter the filing of frivolous medical-malpractice claims. The rule is designed to ease the burden on the dockets of Ohio's courts and to ensure that only those plaintiffs truly aggrieved at the hands of the medical profession have their day in court. To further this end, Civ.R. 10(D)(2)(c) expressly made it clear that the affidavit is necessary to 'establish the adequacy of the complaint.'" *Fletcher v. University Hospitals of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 10 (noting that the rule has since been amended, and the cited language is now contained in Civ.R. 10(D)(2)(d)), *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, 929 N.E.2d 1019, ¶ 19 (The affidavit of merit requirement prevents the filing of medical claims that are not supported by an expert's opinion, and deters filing actions against all medical providers who cared for a patient).

{¶ 11} The Supreme Court of Ohio set the standard for expert witness opinions in *Zelenka v. Industrial Comm. of Ohio*, 165 Ohio St. 587, 138 N.E.2d 667 (1956), when it held that "[a]n expert witness may not express his opinion based upon evidence which he has heard or read on the assumption that the facts supported thereby are true, where such evidence is voluminous, complicated or conflicting or consists of the opinions, inferences and conclusions of

other witnesses." *Zelenka*, syllabus. Moreover, Evid.R. 703 prescribes that the "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

{¶ 12} Expert witnesses who provide affidavits of merit must meet the requirements of Evid.R. 702 and, if applicable, Evid.R. 601(D). Evid.R. 702 provides:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
>> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>>
>> (2) The design of the procedure, test, or experiment reliably implements the theory;
>>
>> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Evid.R. 601(D) provides:

> **{¶ 13}** Every person is competent to be a witness except:
>
> (D) A person giving expert testimony on the issue of liability in any medical claim, as defined in R.C. 2305.113, 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:

(1) 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;

(2) 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 and

(3) The person practices in the same or a substantially similar specialty as the defendant. The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties.

* * *.

{¶ 14} In the case sub judice, Nurse Blackford's affidavit of merit states in its entirety:

1. I, Marlene Blackford, am a Registered Nurse, am familiar with the applicable standard of care for nurses and nursing home employees, and am competent and qualified to render opinions with respect to the nursing care and treatment provided to Jonas Leckrone while he was a resident at Kimes Convalescent Center, Ltd. (aka Kimes Nursing & Rehabilitation Center) and while he was a patient at Marietta Memorial Hospital.

2. I devote at least 75% or more of my professional time to the active clinical practice of nursing.

3. I have reviewed the available medical records and other documents concerning the nursing care provided to Jonas Leckrone while he was a resident at Kimes Convalescent Center, Ltd. and a patient at Marietta Memorial Hospital, including the medical records from the following places: Kimes Nursing & Rehabilitation Center; Marietta Memorial Hospital; Genesis HealthCare- New Lexington Center, Fairfield Medical Center; Fair Hope Hospice & Palliative Care; O'Bleness Hospital; Dr. Sergio Ulloa- Heritage College Orthopedics and Sports Medicine; Portsmouth Emergency Ambulance Service, and the Certificate of Death.

4. In my professional opinion, to a reasonable degree of nursing certainty, the nurses and/or aides and/or employees/agents of Kimes Convalescent Center, Ltd. and Marietta Memorial Hospital deviated from the standard of care and were

> negligent in their care and treatment of Jonas Leckrone while he was a resident and/or patient at these two facilities.
>
> 5. These deviations from the standard of care led to Jonas Leckrone suffering new injuries; aggravated pre-existing conditions he had; and ultimately caused and contributed to his death on April 16, 2017."

{¶ 15} The trial court concluded that Nurse Blackford's affidavit does not set forth sufficient grounds to establish her competence to testify on the causation of the decedent's death as it relates to the appellee hospital. The court noted the Evid.R. 601(D) requirement for an expert to testify regarding medical liability that "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." Thus, the court concluded that Nurse Blackford's affidavit "does not properly establish that she may render a medical diagnosis and causality that a defect in care contributed or caused decedent's death as it applies to Defendant Marietta Memorial Hospital." The court noted that Nurse Blackford could opine on the issue of the breach of the duty of care regarding other nurses, but it is improper for her to offer an opinion as to causation and harm because she is not a licensed medical practitioner. Thus, the court concluded that her affidavit of merit is defective.

{¶ 16} R.C. 4723.151(A) states that nurses are prohibited from providing a medical diagnosis or practicing medicine or surgery or any of its branches. *See Robertson v. Mt. Carmel E. Hosp.*, 10th Dist. Franklin No. 09AP-931, 2011-Ohio-2043, ¶ 30. Ohio appellate courts have also determined that expert nurse testimony on the issue of proximate cause is inadmissible. *Id.,* citing, Hager *v. Fairview Gen. Hosp.*, 8th Dist. No. 83266, 2004-Ohio-3959, ¶ 10 (trial court did not err in prohibiting nurse from testifying as to the cause of injuries); *Keck v. Metrohealth Med.*

Ctr., 8th Dist. No. 89526, 2008-Ohio-801, ¶ 5 (a certified nurse practitioner is not qualified to testify regarding proximate cause of a patient's bedsores). *See also Marr v. Mercy Hosp.*, 6th Dist. Lucas No. L-97-1160, 1998 WL 336923, *3 (expert nurse competent to give expert testimony as to whether the treating nurse met accepted nursing standards, but not competent to render medical opinion as to whether a breach of that standard caused the decedent's death).

{¶ 17} Similarly, in *McKay v. Ohio State Univ. Med. Ctr.*, Ct. of Cl. No. 2013–00120, 2013 WL 10734517 (Apr. 22, 2013), the Court of Claims examined a nurse's affidavit of merit that contained her opinion that "the standard of care was breached by the Defendant to the action and * * * said breach proximately caused the injury to the Plaintiff." *Id.* at *2. The court held that the affidavit did not support the plaintiff's wrongful death action under Civ.R. 10(D)(2) because the nurse was not competent to opine regarding the cause of death. *Id.* at *3. Therefore, we agree with the trial court's conclusion that Ohio law does not permit Nurse Blackford to give an opinion on causation in this matter.

{¶ 18} Turning to the other affidavit of merit in question, Dr. David Seignious attests the following:

> 1. I am board certified in Internal Medicine, have additional training and experience in the field of Geriatrics, and am licensed to practice medicine in the state of South Carolina.
>
> 2. I devote at least 75% or more of my professional time to the active clinical practice of medicine or to the instruction and/or teaching of the same at an accredited institution.
>
> 3. I am familiar with the applicable standards of care for health care providers who are responsible for caring for patients and/or residents in nursing homes and other long-term health care facilities.
>
> 4. Based upon my review of the medical records for Jonas Leckrone that were

> reasonably available at this time (Kimes Nursing & Rehabilitation Center; Marietta Memorial Hospital; Genesis HealthCare- New Lexington Center; Fairfield Medical Center; Fair Hope Hospice & Palliative Care; O'Bleness Hospital; Dr. Sergio Ulloa - Heritage College Orthopedics and Sports Medicine; Portsmouth Emergency Ambulance Service, and the Certificate of Death), it is my professional opinion, with reasonable medical certainty, that the standard of care for a nursing home was breached by employees and/or agents of Kimes Convalescent Center, Ltd. (aka Kimes Nursing & Rehabilitation Center) during their management, care, and treatment of Jonas Leckrone while he was a resident at that facility on two different occasions between December 9, 2016 and February 16, 2017.
>
> 5. It is my further professional opinion, with reasonable medical certainty, that these deviations from the standards of care resulted in new injuries and damages to Jonas Leckrone; substantially aggravated pre-existing conditions he had; and ultimately caused and contributed to his premature death on April 16, 2017.
>
> 6. I have been asked to assume that another medical expert will testify that the standard of care was breached by employees and/or agents of Marietta Memorial Hospital while Jonas Leckrone was a patient at that facility, which occurred in between Mr. Leckrone's two stays at Kimes Convalescent Center, Ltd., based on that assumption, it is my further professional opinion, with reasonable medical certainty, that the deviations from the standard of care at Marietta Memorial Hospital also resulted in new injuries and damages to Jonas Leckrone; substantially aggravated pre-existing conditions he had; and ultimately caused and contributed to his premature death on April 16, 2017.

{¶ 19} The trial court spoke to the issue of whether Dr. Seignious's opinion "appears to be based upon the expert medical opinion of another." The court pointed out that within the doctor's affidavit, he states, "I have been asked to assume that another medical expert will testify that the standard of care was breached by employees and/or agents of Marietta Memorial Hospital * * * based on that assumption, it is further my professional opinion * * * ultimately caused and contributed to his premature death on April 16, 2017." The trial court concluded that because an expert's opinion cannot be predicated upon the opinions, inferences and conclusions of others, this affidavit could not properly support the plaintiff's complaint. Thus,

the court found the affidavit to be defective. The court further concluded that appellant failed to file its affidavit of merit within the original complaint (as the plaintiff filed a motion for extension of time, which was granted). Consequently, the court also determined that appellant exhausted any additional time to file a corrected affidavit.

{¶ 20} It is well-established that an expert may not base his or her opinion on other's opinions. Each element of fact upon which an expert opinion is based must either be based on personal perception or upon facts in the record. *State v. Jones*, 9 Ohio St.3d 123, 459 N.E.2d 526 (1984); *State v. Chapin*, 67 Ohio St.2d 437, 424 N.E.2d 317 (1981). *See also Leichtamer v. American Motors Corp.*, 67 Ohio St.2d 456, 424 N.E.2d 568 (admission of expert testimony based upon previous expert testimony was error); *Kraner v. Coastal Tank Lines, Inc.*, 26 Ohio St.2d 59, 60, 269 N.E.2d 43 (1971) (physician cannot testify about hypothetical questions in which another doctor's report is read and interpreted.)*; Price v. Daugherty*, 5 Ohio App.3d 157, 450 N.E.2d 296 (2d Dist.1982), syllabus (an expert witness may not base his opinion upon assumed facts which he has heard or read.); *Fennell v. Forest Hills Nursing Home,* 8th Dist. Cuyahoga No. 52851, 1987 WL 19253 (an expert may not consider a diagnosis made at a hospital as it required the expert to base his opinion on the opinion of whoever made the previous diagnosis); *Williams v. Lake Cty. Pediatrics, Inc.*, 11th Dist. Lake No. 90-L-15-089, 1991 WL 260169, *3-4 (admission of physician's testimony reciting factual details of four other cases and then later drawing a comparison was inadmissible evidence based on hearsay and was improperly admitted.); *Woodlock v. Elliott*, 5th Dist. Stark No. 7376, 1988 WL 59521 (error when expert witness physician prepared for his testimony by reviewing chiropractor's report and testified as to the findings and diagnoses made by chiropractor); *Pack v. Findlay Indus., Inc.,* 3d Dist. Auglaize

No. 2-84-38, 1986 WL 3486, * 5 (expert not permitted to offer opinion based in part on review of medical records that included a treating psychiatrist's opinion). Appellant argues that he complied with Civ.R. 10(D)(2) and Ohio law with affidavits from two experts to support his wrongful death claim. Appellant contends that Dr. Seignious referred to his assumption that another medical expert would testify about the breach of the standard of care because Nurse Blackford had not yet filed her affidavit. While appellant concedes that this "could have been worded better," he claims that he did not attempt to bootstrap causation. However, after our review, we agree with the trial court's conclusions that (1) Nurse Blackford's affidavit of merit is insufficient concerning causation, and (2) Dr. Seignious's affidavit is defective as to causation because it is based upon the expert medical opinion of another.

{¶ 21} Accordingly, based upon the foregoing reasons, we overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry these judgments into execution.

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY:______________________
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.