[Cite as *Woods v. Riverside Methodist Hosp.*, 2012-Ohio-3139.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph Woods et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-689
v.	:	(C.P.C. No. 10CVA-06-8441)
Riverside Methodist Hospital et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on July 10, 2012

Anthony A. Moraleja, for appellants.

Bricker & Eckler LLP, *Anne Marie Sferra*, and *Bobbie S. Sprader*, for appellees Riverside Methodist Hospital, Geoffrey Eubank, M.D., Ken Mankowski, D.O., T. Alexander, C.S.T., Jennifer Christman, M.D., and Megan Durbin, M.D.; *Reminger Co., LPA*, *G. Michael Romanello*, and *Lisa R. House*, for appellee Ken Mankowski, D.O.

Lane, Alton & Horst, LLC, *Gregory D. Rankin*, and *Ray S. Pantle*, for appellee Stephen R. Vijan, M.D.

Arnold Todaro & Welch Co., LPA, *Maryellen C. Spirito*, and *Karen L. Clouse*, for appellee Philip H. Taylor, Jr., M.D.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Joseph Woods (individually "Woods") and Tina Woods, plaintiffs-appellants, appeal from a judgment of the Franklin County Court of Common Pleas, in which the trial court dismissed appellants' complaint for medical malpractice.

{¶ 2} On June 5, 2008, Woods underwent a sigmoidectomy at Riverside Methodist Hospital. Woods claims that, post-surgery, starting at approximately 10:30 a.m., he began to exhibit signs of a stroke. Woods alleges that, although he continued to show signs of a stroke and was eventually referred for a neurology consult, he was not taken to Riverside's stroke unit until approximately 7:00 p.m. Due to the delay in treatment, Woods claims, he suffered permanent injuries. Tina Woods is appellant's wife.

{¶ 3} On June 5, 2009, appellants filed a medical malpractice and loss of consortium action against Riverside Methodist Hospital ("Riverside"); Geoffrey Eubank, M.D.; Kenneth Mankowski, M.D.; T. Alexander, C.S.T.; Jennifer Christman, M.D.; Megan Durbin, M.D.; K. Jenkins, M.D.; Stephen R. Vijan, M.D.; and Philip Taylor, Jr., M.D., defendants-appellees. Appellants failed to attach an affidavit of merit to the complaint. Appellants requested a 90-day extension to file the affidavit but never filed one. After several appellees filed motions to dismiss, pursuant to Civ.R. 12(B)(6), appellants voluntarily dismissed their complaint on September 30, 2009.

{¶ 4} On June 4, 2010, appellants refiled their complaint, which included an attached affidavit of merit from Michael E. Jones, D.O., a neurologist. Thereafter, several appellees filed motions to dismiss the refiled complaint based upon appellants' failure to file an affidavit that complied with Civ.R. 10(D)(2). On November 24, 2010, Dr. Vijan filed a motion for judgment on the pleadings, arguing that the affidavit of merit did not comply with Civ.R. 10(D)(2). Appellants did not respond to any of the motions.

{¶ 5} On December 20, 2010, the trial court issued an entry conditionally granting appellees' motions and gave appellants until March 1, 2011 to serve and file supplemental interrogatory answers, specifically identifying which doctors they claim were negligent and how they were negligent or, in the alternative, to file a new affidavit of merit identifying the same. Several appellees filed motions for reconsideration of the trial court's December 20, 2010 entry seeking an immediate dismissal, and appellants did not respond to any of them.

{¶ 6} On February 25, 2011, appellants filed a "Notice of Compliance," which included Woods' medical records, Woods' interpretation of the medical records, and various medical publications. Appellants also included amended responses to interrogatories, which were signed by Woods.

{¶ 7} Appellees subsequently filed renewed motions to dismiss, arguing that appellants had failed to comply with the trial court's December 20, 2010 entry, and several appellees also filed motions for summary judgment on the same basis. On July 19, 2011, the trial court dismissed the action. Appellants have appealed the judgment of the trial court. In their statement of amended assignments of error, appellants assert:

> [I.] THE TRIAL COURT ERRED BY GRANTING DEFENDANTS-APPELLEES' MOTIONS TO DISMISS FOR FAILURE TO COMPLY WITH CIV.R. 10(D)(2), WHEN PLAINTIFFS-APPELLANTS HAD FILED AN AFFIDAVIT OF MERIT WITH THEIR MEDICAL CLAIM.
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> [II.] THE TRIAL COURT ERRED BY DISMISSING PLAINTIFFS-APPELLANTS' COMPLAINT BASED ON SUFFICIENCY OF THE PLEADINGS WHEN AN AFFIDAVIT OF MERIT ALONG WITH SUPPLEMENTAL INFORMATION WAS FILED BY PLAINTIFFS-APPELLANTS.
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> [III.] THE TRIAL COURT ERRED BY REQUIRING PLAINTIFFS-APPELLANTS TO FILE SUPPLEMENTS, INCLUDING EXPERT TESTIMONY, TO THE AFFIDAVIT OF MERIT IN ORDER TO AVOID DISMISSAL WHEN SUCH SUPPLEMENTS ARE BEYOND WHAT IS REQUIRED BY CIV.R. 10(D)(2)(a).
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> [IV.] THE TRIAL COURT ERRED BY DISMISSING PLAINTIFFS-APPELLANTS' COMPLAINT WITHOUT A HEARING IN VIOLATION OF THEIR RIGHTS TO DUE PROCESS.

{¶ 8} Appellants argue in their first assignment of error that the trial court erred when it dismissed their medical claim for failing to comply with Civ.R. 10(D), which provides, in pertinent part:

> (2) *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. 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.

{¶ 9} The failure to file a Civ.R. 10(D)(2) affidavit is properly 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 because a complaint on a medical claim is not sufficient without a proper Civ.R. 10(D)(2) affidavit. *Fletcher v. Univ. Hosps. 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 a light most favorable to the plaintiff, drawing all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). 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.*, 42 Ohio St.2d 242 (1975), syllabus. We review de novo the dismissal of a complaint pursuant to Civ.R. 12(B)(6). *Shockey v. Wilkinson*, 96 Ohio App.3d 91, 94 (4th Dist.1994).

{¶ 10} In the present case, it is undisputed that appellants' claim was a medical claim, and they filed an affidavit of merit from Dr. Jones, a neurologist. In the affidavit, Dr. Jones averred, in full:

> 1. I am a physician licensed to practice medicine in the State of Ohio.
>
> 2. As a medical doctor, I am currently engaged in the practice of medicine, and based on my education and experience in the medical field, I am familiar with the applicable standard of care.

> 3. I have reviewed all of the medical records of the Plaintiff, Joseph Allen Woods, reasonably available to the Plaintiff concerning the allegations contained in the complaint.
>
> 4. It is my opinion, to a reasonable degree of medical certainty, 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.

{¶ 11} Appellants argue that Dr. Jones' affidavit includes exactly what is required by Civ.R. 10(D)(2). Appellants assert that the only requirement of Civ.R. 10(D)(2) is that the affidavit must state the standard of care was breached by one or more of the defendants. Appellants maintain that nowhere in the rule does it require that facts be presented or include any mandate to name each defendant and state specifically what each defendant did that would amount to medical negligence. Appellants also contend that the mere fact that Dr. Jones may not practice in the same specialties as the defendants does not disqualify him from completing the affidavit of merit, as long as he is at least familiar with the applicable standard of care, and he had an opinion that at least one of the named defendants breached that standard.

{¶ 12} Civ.R. 10(D)(2) requires: (1) one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability; (2) the expert witness must comply with Evid.R. 601(D) and 702; (3) the affidavit must include a statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint; (4) the affidavit must include a statement that the affiant is familiar with the applicable standard of care; and (5) the affidavit must include 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.

{¶ 13} In the present case, Dr. Jones' affidavit does not satisfy all of the requirements of Civ.R. 10(D)(2). We first note that, although Civ.R. 10(D)(2) provides that affidavits of merit must be provided by an expert witness who complies with Evid.R. 601(D) and 702, the rule does not indicate that the expert must state so or paraphrase the language of these rules in the affidavit.

{¶ 14} However, Civ.R. 10(D)(2) does provide that the plaintiff must submit "one or more affidavits of merit relative to each defendant named in the complaint." Civ.R. 10(D)(2)(a). Here, Dr. Jones averred that "the standard of care was breached by one or more of the Defendants to the action." This statement does not satisfy Civ.R. 10(D)(2). According to the language employed by Dr. Jones, he may be of the opinion that only one of the numerous appellees was negligent. At the very least, Dr. Jones could have indicated that the standard of care was breached by every defendant named in the complaint. An affidavit that vaguely avers that the standard of care was breached by one or more defendants is insufficient.

{¶ 15} In support of their respective arguments on this issue, both appellants and appellees rely upon *Bonkowski v. Fairfield Med. Ctr.*, 163 Ohio Misc.2d 21, 2011-Ohio-2777. In *Bonkowski*, a trial court decision from the Franklin County Court of Common Pleas, the defendant doctors moved to dismiss a medical negligence action based upon Civ.R. 10(D)(2), arguing the complaint was not supported by an affidavit of merit as to the claims against each defendant, pointing to the "relative to each defendant" language in the rule. The trial court denied the defendants' motion for judgment on the pleadings. In doing so, the court found the following:

> Defendants' argument is that Civ.R. 10(D)(2) requires an affidavit of merit as to each named defendant. That argument is based on the "relative to each defendant" language in the rule. To the extent that the defendant argues that the rule requires a separate affidavit of merit for each defendant, that interpretation is clearly incorrect. It fails to account for Civ.R. 10(D)(2)(a)(iii), which requires that an affidavit of merit contain an opinion that "the standard of care was breached by *one or more of the defendants*." (Emphasis added.)
>
> The phrase "relative to each defendant," read in light of the rest of the rule, means that a medical claim is not properly made against any defendant concerning whom there is not an affidavit of merit. That requirement can be met a number of ways. In a claim alleging negligence during a complex surgery, for example, it may be that a single expert is not qualified to address both the standard of care applicable to the defendant surgeon and the standard of care applicable to the defendant anesthesiologist. In that event, the plaintiff would be required to obtain a separate affidavit as to each. In another case, it may be that a single expert is qualified to address the standard

> of care applicable to multiple defendants. In that event, only a single affidavit is needed, which will be "relative to" "one or more of the defendants." Just as "more than one affidavit may be required as to a particular defendant," one affidavit may suffice as to several defendants. See Civ.R. 10, Staff Note (July 1, 2007 Amendments). From the materials presently before the court, this action appears to be in the latter category. As stated above, defendants have raised no question as to Dr. Keder's qualifications.

Id. at ¶ 7-8.

{¶ 16} Initially, we agree that Civ.R. 10(D)(2) does not necessarily require a separate affidavit of merit for each defendant in every case. As the court in *Bonkowski* explains, the phrase "relative to each defendant" would require multiple affidavits of merit from multiple experts when a single expert is not qualified to address the standard of care applicable to medical providers in different specialties, while a single affidavit may be acceptable when one expert is qualified to address the standard of care applicable to multiple medical providers. In the present case, Dr. Jones failed to identify in his affidavit which defendant or defendants to the action breached the standard of care pursuant to Civ.R. 10(D)(2)(a)(iii). Therefore, we agree with the trial court that appellants did not provide one or more affidavits of merit relative to each defendant named in the complaint, as required by Civ.R. 10(D)(2)(a). For all the foregoing reasons, we find appellants' affidavit of merit did not meet the requirements of Civ.R. 10(D), and the trial court did not err when it found so. Appellants' first assignment of error is overruled.

{¶ 17} Appellants argue in their second assignment of error that the trial court erred when it dismissed their complaint based upon the sufficiency of the pleadings when they filed an affidavit of merit, along with the supplemental information. The only argument appellants address in any depth is that the trial court erred when it concluded that the supplemental information they submitted was merely generic material. Appellants maintain that the trial court failed to understand that these publications were "learned treatises," which are admissible to impeach an expert, and they provided the applicable standard of care by way of experts in the field of strokes.

{¶ 18} We disagree with appellants. None of the supplemental material, and specifically the publications from the American Health Association and National Institute

of Neurological Disorders and Stroke, cured the defects in the affidavit of merit. The publications do not indicate the standard of care in the present case and do not contain averments provided by experts that comply with Civ.R. 10(D)(2). Furthermore, learned treatises under Evid.R. 803(18) are permissible as an exception to the hearsay rule only "[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination" and only if they are "established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." There is no mention in the rule of using a learned treatise in lieu of an affidavit of merit or to establish the standard of care, and, regardless, the publications submitted by Woods were not established to be reliable authority in any of the ways described by the rule. For these reasons, appellants' second assignment of error is overruled.

{¶ 19} Appellants argue in their third assignment of error that the trial court erred when it required appellants to file supplements, including expert testimony, to the affidavit of merit in order to avoid dismissal when such supplements were beyond what was required by Civ.R. 10(D)(2). More specifically, appellants contend that it was error to dismiss the complaint on the basis that the answers to the interrogatories submitted in their supplemental material were not provided by an expert witness. Appellants point out that Civ.R. 33(A) provides that interrogatories are "to be answered by the party served." Appellees counter that any supplemental answers to the interrogatories could not have cured the deficient affidavit of merit. Appellees contend that an affidavit of merit must itself comply with the requirements of Civ.R. 10(D)(2), and there is nothing in the rule that permits an affidavit of merit to be cured or supplemented via discovery.

{¶ 20} We find the trial court did not err. The supplemental answers here did not cure the defect in the initial affidavit of merit because neither appellants nor their counsel were qualified as an expert witness, and the answers to the interrogatories did not refer to any opinion by any doctor as to the negligence of each medical provider. Although appellants complain that Civ.R. 33 permits interrogatories to be answered only by a "party," appellants cannot escape the fact that their amended responses to the interrogatories did not satisfy the requirements of Civ.R. 10(D)(2). For these reasons, appellants' third assignment of error is overruled.

{¶ 21} Appellants argue in their fourth assignment of error that the trial court erred when it dismissed their complaint without hearings on the motions to dismiss, in violation of their due process rights. Appellants cite no authority for their proposition, and we find none. To the contrary, several courts have held that a trial court is not required to hold an evidentiary hearing on a motion to dismiss. *See, e.g., Copeland v. Myer*, 5th Dist. No. 2009CA00047, 2009-Ohio-3132, ¶ 22; *Cummings v. Ohio Dept. of Rehab. & Corr.*, 5th Dist. No. 2002CA0065, 2003-Ohio-1250, ¶ 18 (court need not conduct an evidentiary hearing prior to granting a motion to dismiss), citing *Savage v. Godfrey*, 10th Dist. No. 01AP-388 (Sept. 28, 2001); *McKinley Machinery, Inc. v. Acme Corrugated Box Co., Inc.*, 9th Dist. No. 98CA007160 (July 12, 2000). Furthermore, Franklin County Loc.R. 21.01 specifically provides that motions are deemed submitted to the trial judge on the 28th day after being filed, and oral hearings are not permitted except by leave of court upon written request. In the present case, appellants did not request an oral hearing on the motions to dismiss and did not even file responses to the motions to dismiss. For these reasons, we find the trial court did not err when it did not hold any evidentiary hearings on appellees' motions to dismiss. Therefore, appellants' fourth assignment of error is overruled.

{¶ 22} Accordingly, appellants' four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
