[Cite as *Nye v. Univ. of Toledo*, 2013-Ohio-2311.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dea Nye et al.,	:	
Plaintiffs-Appellants,	:	
		No. 12AP-670
v.	:	(Ct. of Cl. No. 2011-06757)
The University of Toledo,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 4, 2013

Miller, Stillman & Bartel, and *Willard E. Bartel*, for appellants.

Michael DeWine, Attorney General, and *Anne Berry Strait*, for appellee.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶ 1} Plaintiffs-appellants, Dea and Cory Nye, appeal from a judgment of the Court of Claims of Ohio granting summary judgment in favor of defendant-appellee, The University of Toledo. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On December 15, 2005, Dea Nye sustained serious injuries in a motor vehicle accident. Nye was flown by helicopter to St. Vincent Mercy Medical Center in Toledo, Ohio, where she underwent trauma surgery. The surgery was performed by

Gregory Georgiadis, M.D. According to appellants' complaint, Nye remained under the care of Dr. Georgiadis until August 2006. At all times relevant to this action, Dr. Georgiadis was an employee of appellee, Medical College of Ohio, now known as The University of Toledo.

{¶ 3} Alleging that Dr. Georgiadis was negligent in the medical care rendered to Nye, appellants served appellee on March 1, 2007, pursuant to R.C. 2305.113, with a 180-day notice of their intent to sue. Appellants filed a complaint on November 5, 2007 in the Court of Claims of Ohio, and on May 20, 2010, appellants filed a notice of voluntary dismissal pursuant to Civ.R. 41(A). Appellants re-filed the instant complaint in the Court of Claims on May 2, 2011 asserting claims for medical negligence, loss of consortium, and fraud. All of the asserted claims relate to the medical care rendered by Dr. Georgiadis.

{¶ 4} Appellee sought summary judgment arguing the matter was barred by the applicable statute of limitations. Particularly, appellee asserted appellants' notice of claim was served on appellee on March 1, 2007; therefore, appellants had 180 days from that date in which to bring their claims against appellee. However, because appellants failed to file a complaint against appellee until November 5, 2007, appellee argued it was entitled to judgment as a matter of law on the claims asserted by appellants. The trial court agreed and granted summary judgment in favor of appellee.

II. ASSIGNMENT OF ERROR

{¶ 5} This appeal followed, and appellants bring the following assignment of error for our review:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE THE UNIVERSITY OF TOLEDO AND FINDING THAT APPELLANTS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

III. DISCUSSION

{¶ 6} We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination.

Maust v. Bank One Columbus, N.A., 83 Ohio App.3d 103, 107 (10th Dist.1992); *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 7} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

{¶ 8} Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978).

{¶ 9} As previously indicated, the trial court concluded appellants' claims were barred by the applicable statute of limitations. R.C. 2743.16(A) provides that civil actions against the state "shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." The applicable statute of limitations for appellants' medical negligence claim and any derivative claims arising therefrom is found in R.C. 2305.113(A), which provides that such claims must be brought within one year of the date that the causes of action accrued. A claim accrues and the statute of limitations begins to run: (1) when the patient discovers or, with the exercise of reasonable care, should have discovered the resulting injury; or (2) when the physician-patient relationship for the condition for which care was sought terminates, whichever occurs later. *Theobald v. Univ. of Cincinnati*, 10th Dist. No. 09AP-269, 2009-Ohio-5204, ¶ 9, citing *Frysinger v. Leech*, 32 Ohio St.3d 38 (1987).

{¶ 10} To extend the statute of limitations for medical negligence claims, R.C. 2305.113(B)(1) provides, in relevant part:

> If prior to the expiration of the one-year period specified in division (A) of this section, a claimant who allegedly possesses

> a medical, dental, optometric, or chiropractic claim gives to the person who is the subject of that claim 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.

{¶ 11} It is undisputed that appellee was served with appellants' notice of intent to sue on March 1, 2007. Thus, in accordance with R.C. 2305.113, appellants' complaint against appellee was required to be filed by August 28, 2007. However, appellants did not file their complaint against appellee in the Court of Claims until November 5, 2007. For this reason, the trial court granted appellee's motion for summary judgment on the basis that appellants' claims were barred by the statute of limitations.[1]

{¶ 12} Appellants challenge the trial court's finding and contend their claims are timely. Appellants assert the malpractice in this case occurred at a privately run hospital where Dr. Georgiadis was a "privately employed trauma surgeon," therefore, a complaint was filed against Dr. Georgiadis individually in the Lucas County Court of Common Pleas on August 14, 2007. (Brief, 8.) Appellants also assert they were unaware of Dr. Georgiadis's employment relationship with the state via appellee until Dr. Georgiadis claimed immunity in a motion to dismiss. The Lucas County Court of Common Pleas dismissed the case against Dr. Georgiadis for lack of subject-matter jurisdiction on December 26, 2007. Because they filed suit against appellee in the Court of Claims within one year of their notice of employment relationship between Dr. Georgiadis and appellee, appellants argue their claims were timely asserted and the trial court's decision to the contrary must be reversed. In support, appellants rely on this court's decision in *Theobald*.

{¶ 13} Initially, we note the curious nature of appellants' argument that it had no knowledge of Dr. Georgiadis's involvement with the state via appellee given that they actually sent appellee a notice of intent to file suit on March 1, 2007. Regardless, we

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[1] In addition to the medical negligence and loss of consortium claims, summary judgment was also granted on the asserted claim for fraud. As this court has stated, "the statute's definition of 'medical claim' does not permit us to split a fraud theory involving medical treatment off from a professional negligence claim involving medical treatment." *Harris v. Ohio State Univ. Hosp. Med. Ctr.*, 10th Dist. No. 06AP-1092, 2007-Ohio-1812, ¶ 10, appeal not allowed, 115 Ohio St.3d 1412, 2007-Ohio-4884. *See also Brittingham v. GMC*, 2d Dist. No. 24517, 2011-Ohio-6488, ¶ 19, citing *Harris*.

conclude reliance on *Theobald* is misplaced as *Theobald* and several cases decided thereafter stand for a proposition contrary to that set forth by appellants.

{¶ 14} In *Theobald*, a plaintiff was seriously injured in a car accident and treated at University Hospital in Cincinnati where he underwent extensive surgery. Arising out of the care received at that hospital, the *Theobald* plaintiffs filed a medical malpractice action against three doctors and one nurse in the Hamilton County Court of Common Pleas. The defendants asserted immunity, pursuant to R.C. 9.86, and the Hamilton County case was stayed pending the plaintiffs filing in the Court of Claims for an immunity determination. The Court of Claims concluded the four defendants were not state employees, but this court reversed and ordered the Court of Claims to conduct an analysis regarding whether the four defendants were acting outside the scope of their state employment. The Supreme Court of Ohio affirmed this court's decision.

{¶ 15} On remand, the Court of Claims determined the four defendants were acting within the scope of their employment and were, therefore, entitled to personal immunity under R.C. 9.86. Thereafter, the University of Cincinnati ("UC") sought summary judgment arguing the statute of limitations expired before the plaintiffs filed their medical malpractice action. The Court of Claims agreed.

{¶ 16} On appeal to this court, the plaintiffs argued the cause of action accrued on December 18, 2007, the date the court determined the four defendants were state employees acting within the scope of their employment. According to the plaintiffs, they could not have known they had medical claims against UC prior to that time. This court rejected said position noting the lack of authority supporting the plaintiffs' assertion. This court stated, "[r]egardless of the lack of a final determination on the issue of immunity, and regardless of whether UC failed to disclose the employment status of their medical personnel at the time of Theobald's surgery, appellants were aware that the status was being claimed more than one year before filing their action in the Court of Claims." *Id.* at ¶ 12.

{¶ 17} Appellants interpret this statement as meaning they had one year from the time Dr. Georgiadis asserted immunity in which to file their claim against appellee in the Court of Claims. Though disagreeing with appellants' characterization of *Theobald*, we find that more recent decisions from this court dispose of appellants' argument.

{¶ 18} In *Schultz v. Univ. of Cincinnati College of Medicine*, 10th Dist. No. 09AP-900, 2010-Ohio-2071, Dr. Dunskar was a member of the UC faculty and was responsible for the supervision and instruction of neurosurgery residents who rotated through both UC Hospital and The Christ Hospital, a private facility. Dr. Dunskar performed a surgery on plaintiff Schultz at The Christ Hospital on January 13, 1997. On July 7, 1998, the *Schultz* plaintiffs filed a medical malpractice action against Dr. Dunskar and his private practice group in the Hamilton County Court of Common Pleas. The case was dismissed and re-filed twice, the last re-filing occurring on December 20, 2005. In May 2007, one month prior to trial, Dr. Dunskar filed a motion asserting personal immunity. Therefore, the common pleas court stayed proceedings pending an immunity determination in the Court of Claims.

{¶ 19} On May 22, 2008, the *Schultz* plaintiffs filed a medical malpractice action in the Court of Claims against Dr. Dunskar, his private practice group, and UC. The Court of Claims concluded the action against UC was time-barred by the statute of limitations applicable to medical malpractice claims. Because the alleged medical malpractice occurred during surgery performed by a resident being supervised by Dr. Dunskar on January 13, 1997, but the complaint against UC was not filed until May 22, 2008, this court affirmed the trial court's determination that the claims were time-barred.

{¶ 20} This court rejected the *Schultz* plaintiffs' argument that their claims were timely since they filed them within one year from May 23, 2007, the date the doctor asserted personal immunity and the plaintiffs discovered, and had reason to believe, the Court of Claims was the appropriate forum. In rejecting such argument, this court noted the plaintiffs' medical chart indicated a neurosurgery resident was present during the surgery, and that "[m]edical malpractice appellants have a duty to examine medical records to ascertain the identity of medical personnel who may have rendered negligent care." *Id.* at ¶ 40, citing *Hans v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 07AP-10, 2007-Ohio-3294.

{¶ 21} Additionally, we cited this court's rejection of a similar argument presented in *Clevenger v. Univ. of Cincinnati College of Medicine*, 10th Dist. No. 09AP-585, 2010-Ohio-88, wherein the plaintiff failed to initiate litigation in the Court of Claims within one year of the alleged medical malpractice. The plaintiff in *Clevenger* argued that a new

theory of discovery regarding a tort claim should be developed and applied to her case, specifically that a claim for medical malpractice does not accrue until the patient or her counsel are certain which court is the appropriate court in which to pursue the claim. This court declined to adopt this proposition of law, stating " '[w]e find no case law to support this theory and will defer to the Supreme Court of Ohio to add or not to add this theory to the law of Ohio.' " *Schultz* at ¶ 41, quoting *Clevenger* at ¶ 16.

{¶ 22} Appellants argue that affirming the trial court in this case imposes an unreasonable and impractical burden on medical malpractice plaintiffs because it requires them to discover "hidden" and unrelated employment relationships prior to filing suit. (Brief, 13.) As stated in *Clevenger* and reiterated in *Schultz*, because the plaintiff was on notice that issues regarding immunity might well have been present in the case, " '[t]he prudent course of action would have been to file suit in both the Ohio Court of Claims and the Court of Common Pleas for Hamilton County, Ohio and then submit the immunity issue to the Court of Claims in order to determine which court was the appropriate forum.' " *Schultz* at ¶ 42, quoting *Clevenger* at ¶ 17.

{¶ 23} Appellants also assert the Ohio savings statute, R.C. 2305.19, applies to the claims asserted herein, and, thus, the Court of Claims erred in concluding said claims were barred by the statute of limitations. R.C. 2305.19 affords a plaintiff a limited period of time to re-file a dismissed claim that would otherwise be time-barred. The statute provides, "In any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later." R.C. 2305.19(A). Thus, even after the applicable statute of limitations has expired, the savings statute permits a plaintiff to re-file within one year after the action has failed "otherwise than upon the merits."

{¶ 24} This court has consistently held that "the savings statute does not apply where a plaintiff files a second complaint before failing otherwise than upon the merits in a previous complaint." *Windsor House, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 09AP-584, 2010-Ohio-257, ¶ 19, citing *Boozer v. Univ. of Cincinnati School of Law*, 10th Dist. No. 05AP-1099, 2006-Ohio-2610; *see also Partin v. Ohio Dept. of*

Transp., 158 Ohio App.3d 200, 2004-Ohio-4038 (10th Dist.). In *Windsor House*, the plaintiff filed an action in the Court of Claims while its original action remained pending in the Franklin County Court of Common Pleas. We stated that, because the plaintiff's earlier complaint remained pending at the time the plaintiff filed its complaint in the Court of Claims, the plaintiff did not file the Court of Claims complaint within one year after a "failure otherwise than upon the merits," as required for application of R.C. 2305.19. *Id*. at ¶ 19; *see also Partin* (holding that there was no failure otherwise than upon the merits, as required by R.C. 2305.19, where the plaintiffs did not dismiss their common pleas complaint before filing in the Court of Claims).

{¶ 25} We reach the same conclusion here. Appellants' November 5, 2007 filing in the Court of Claims occurred prior to the Lucas County case failing otherwise than on the merits on December 26, 2007. "Although courts liberally construe the savings statute, a plaintiff must satisfy the criteria of the statute in order to prevent circumvention of the statute of limitations and unfairness to defendants." *Boozer* at ¶ 32, citing *Motorists Mut. Ins. Co. v. Huron Rd. Hosp*., 73 Ohio St.3d 391, 397 (1995).

{¶ 26} Lastly, appellants argue that, pursuant to *Boehmke v. N. Ohio Traction Co.*, 88 Ohio St. 156 (1913), the statute of limitations is not applicable because the state of Ohio has at all times participated, appeared, and answered on behalf of Dr. Georgiadis such that no prejudice has been suffered. *Boehmke* concerned the amendment of a complaint to replace the defendant's former corporate name with the defendant's newly formed corporate name. As incorporated into Civ.R. 15, *Boehmke* held if the wrong defendant is made a party by mistake or misnomer, and the correct defendant is aware of the action and aware that the action should have been brought against him, then the plaintiff may amend the complaint to include the correct defendant, even if the statute of limitations has run as to that defendant. *Gomersall & Assocs. v. Amari*, 8th Dist. No. 71142 (June 5, 1997).

{¶ 27} We conclude *Boehmke* has no application to the matter presented before us. Initially, we note that, unlike *Boehmke*, this case involves two completely different parties being named as defendants, specifically Dr. Georgiadis and appellee. Secondly, this case does not concern an amendment to a complaint, but involves the filing of complaints in courts of different jurisdictions, specifically the Lucas County Court of Common Pleas and

the Court of Claims of Ohio. Accordingly, we conclude any reliance on *Boehmke* is misplaced and that *Boehmke* does not apply to render appellants' claims timely in this case.

{¶ 28} For the foregoing reasons, appellants' assignment of error is overruled.

IV. CONCLUSION

{¶ 29} Having overruled appellants' single assignment of error, the judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

KLATT, P.J., and BROWN, J., concur.
