[Cite as *Adams v. Kurz*, 2010-Ohio-2776.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alene Adams,	:	
Plaintiff-Appellant,	:	
		No. 09AP-1081
v.	:	(C.P.C. No. 09CVA-06-8523)
Daryl E. Kurz, M.D. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 17, 2010

Isabella Dixon Thomas, for appellant.

Richard Cordray, Attorney General, *Karl W. Schedler,* and *Daniel R. Forsythe,* for appellee Thomas F. Mauger, M.D.

Karen L. Clouse, for appellees Jack Dingle, M.D. and Central Ohio Eye Physicians and Surgeons, Inc.

Reminger Co., L.P.A., and *Chad E. Dworkin,* for appellee Eye Center of Columbus, LLC.

Porter Wright Morris & Arthur LLP, James Oliphant, and Sheena Little, for appellee Ohio State University Eye Physicians & Surgeons, LLC.

Reminger Co., L.P.A., and *Warren M. Enders,* for appellees Ophthalmic Surgeons and Consultants of Ohio, Inc. and N. Douglas Baker, M.D.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, Alene Adams, appeals from a judgment of the Franklin County Court of Common Pleas (1) granting the motions for summary judgment of defendants-appellees, Jack Dingle, M.D., Central Ohio Eye Physicians and Surgeons, Inc. ("Central Ohio Eye"), Eye Center of Columbus, LLC ("Eye Center"), N. Douglas Baker, M.D., and Ophthalmic Surgeons and Consultants of Ohio, Inc. ("Ophthalmic Surgeons") and (2) denying plaintiff's motion for an extension of time to file an affidavit of merit which, in turn, resulted in the trial court's granting the motions to dismiss of defendants-appellees, Thomas Mauger, M.D. and Ohio State University Eye Physicians and Surgeons ("OSU Eye"). Because the trial court did not err in (1) granting defendants' motions for summary judgment and (2) denying plaintiff's motion for extension of time to file an affidavit of merit, we affirm.

I. Facts and Procedural History

{¶2} Plaintiff originally filed a complaint for medical malpractice against these same defendants on November 28, 2007 in case No. 07-16224 in the Franklin Country Court of Common Pleas. The complaint alleged medical negligence in the surgery and treatment provided to plaintiff in early 2006 for cataracts and glaucoma. Plaintiff did not include an affidavit of merit with her complaint, as Civ.R. 10(D)(2) requires; all defendants filed motions to dismiss. Although plaintiff requested and received extensions of time to file an affidavit of merit, plaintiff voluntarily dismissed case No. 07-16224 on June 9, 2008 without ever having filed an affidavit of merit under Civ.R. 10(D)(2).

{¶3} On June 5, 2009, plaintiff again filed a medical malpractice complaint in the Franklin Country Court of Common Pleas against the same defendants. While plaintiff's

re-filed complaint added Daryl E. Kurz, M.D. and the Retina Group as defendants, the trial court granted their motion to dismiss because not only did the statute of limitations bar plaintiff's claims against them but plaintiff failed to plead her fraud claim against them with particularity. As to the remaining defendants, plaintiff once again failed to include with her complaint an affidavit of merit under Civ.R. 10(D)(2). Pursuant to plaintiff's motion, the trial court granted plaintiff until August 13, 2009 to file an affidavit of merit.

{¶4} Beginning July 7, 2009, defendants filed various dispositive motions:

- OSU Eye filed a motion to dismiss based on plaintiff's failure to file an affidavit of merit with her medical claim.
- Dr. Mauger filed a motion to dismiss based both on plaintiff's failure to file an affidavit of merit and his immunity as a state employee.
- Dr. Dingle and Central Ohio Eye filed a motion for summary judgment based on the statute of limitations.
- Dr. Baker and Ophthalmic Surgeons, as well as the Eye Center, each sought summary judgment based on the lack of evidence that they caused plaintiff's injuries.

{¶5} Plaintiff responded to the various motions and on September 11, 2009 moved for another extension of time to file an affidavit of merit. Beginning October 20, 2009, the trial court issued a series of decisions granting defendants' motions.

{¶6} On October 20, 2009, the trial court granted Dr. Mauger's motion to dismiss and the summary judgment motion of Dr. Baker and Ophthalmic Surgeons. On the same day, the trial court denied plaintiff's motion seeking another extension of time to file an affidavit of merit. On October 23, 2009, the trial court granted OSU Eye's motion to

dismiss; on November 4, 2009, it granted the summary judgment motion of Dr. Dingle and Central Ohio Eye; and on November 12, 2009, it granted the Eye Center's summary judgment motion. All decisions were journalized, rendering the trial court's judgment final.

II. Assignments of Error

{¶7} Plaintiff timely appeals, assigning as error:

> I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S [SIC] MOTIONS FOR SUMMARY JUDGMENT.
>
> II. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR EXTENSION OF TIME TO FILE AFFIDAVIT OF MERIT.

III. First Assignment of Error – Summary Judgment

{¶8} In her first assignment of error, plaintiff asserts the trial court erred in granting the summary judgment motions of the various defendants. Plaintiff contends none of the defendants to whom the trial court granted summary judgment met their initial burden of demonstrating no genuine issues of material fact exist for trial.

{¶9} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc*. (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶10} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once the moving party discharges its initial burden, summary judgment is appropriate only if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. Civ.R. 56(E); *Dresher* at 293; *Vahila v. Hall*, 77 Ohio St.3d 421, 430, 1997-Ohio-259. See also *Castrataro v. Urban* (Mar. 7, 2000), 10th Dist. No. 99AP-219.

{¶11} To prevail on a medical malpractice claim, a plaintiff must demonstrate (1) the existence of a standard of care within the medical community, (2) the defendant's breach of that standard, and (3) proximate cause between the medical negligence and the injury. *Williams v. Lo*, 10th Dist. No. 07AP-949, 2008-Ohio-2804, ¶11, citing *Campbell v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 04AP-96, 2004-Ohio-6072, ¶10; *Jones v. Schirmer* (July 17, 2001), 10th Dist. No. 00AP-1330, citing *Taylor v. McCullough-Hyde Mem. Hosp*. (1996), 116 Ohio App.3d 595, 599. Expert testimony is necessary to prove the elements of medical malpractice "whenever those elements are beyond the common knowledge and understanding of the jury." Id., citing *Campbell* at ¶10, citing *Clark v. Doe* (1997), 119 Ohio App.3d 296, 307. Once the moving party produces expert testimony in support of a motion for summary judgment, "the non-moving party must submit contrary expert testimony to withstand summary judgment, unless the standard of care is so obvious that non-experts can reasonably evaluate the defendant's conduct." Id., citing *Campbell* at ¶10, citing *Jones*.

{¶12} Of the named defendants, Dr. Dingle, Central Ohio Eye, Eye Center, Dr. Baker, and Ophthalmic Surgeons all filed summary judgment motions. We address separately the issues unique to each defendant's motion.

A. Statute of Limitations

{¶13} In their joint motion for summary judgment, Dr. Dingle and Central Ohio Eye asserted they were entitled to summary judgment because plaintiff did not commence her medical negligence action against them within the applicable statute of limitations.

{¶14} For medical claims, the applicable statute of limitations, set out in R.C. 2305.113, is one year after the cause of action accrues. See *Theobald v. Univ. of Cincinnati*, 10th Dist. No. 09AP-269, 2009-Ohio-5204, ¶9. A cause of action accrues and the statute of limitations begins to run when: (1) "the patient discovers or, with the exercise of reasonable care should have discovered, the resulting injury"; or (2) "the physician-patient relationship for the condition for which care was sought terminates, whichever occurs later." Id., citing *Frysinger v. Leech* (1987), 32 Ohio St.3d 38. A plaintiff may extend the statute of limitations "[i]f prior to the expiration of the one-year period * * * a claimant * * * gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim." R.C. 2305.113(B)(1). Delivery of the so-called 180-day letter then allows commencement of that action "against the person notified at any time within one hundred eighty days after the notice is so given." Id.

{¶15} In their motion for summary judgment, Dr. Dingle and Central Ohio Eye attached Dr. Dingle's affidavit stating the physician-patient relationship with plaintiff terminated with her final office visit on May 3, 2006. According to the affidavit, Dr. Dingle and Central Ohio Eye received 180-day letters from plaintiff on March 13, 2007. Plaintiff

did not file her original complaint until November 28, 2007, which is more than one year from the date of the termination of the physician-patient relationship and more than 180 days after the statutory notice letters. Dr. Dingle and Central Ohio Eye having presented evidence under Civ.R. 56(C) supporting their contentions that the statute of limitations bars plaintiff's action against them, plaintiff was required to respond with Civ.R. 56(C) material demonstrating a genuine issue of material fact for trial.

{¶16} Plaintiff responded with a memorandum that argued her cause of action against Dr. Dingle and Central Ohio Eye did not accrue until December 2, 2006, the day she actually discovered the injury to her eye allegedly resulting from their negligence. Plaintiff thus asserts she had until December 2, 2007 to file her complaint for medical malpractice against them. Although plaintiff concedes Dr. Dingle and Central Ohio Eye received 180-day letters on March 13, 2007, she contends those letters cannot shorten the statute of limitations otherwise applicable as a result of the date she discovered her injury. Plaintiff's contentions suffer at least two deficiencies.

{¶17} Initially, plaintiff's argument in effect acknowledges the two events under *Frysinger* that trigger the statute of limitations but asserts she did not discover, and should not have discovered, the injury until December 2006. A patient discovers or should have discovered an injury when a cognizable event occurs, an event that "led or should have led plaintiff to believe that the condition of which [s]he complains is related to a previously rendered medical procedure, treatment or diagnosis." *Salyer v. Riverside United Methodist Hosp.*, 10th Dist. No. 01AP-1196, 2002-Ohio-3068, ¶17, citing *Allenius v. Thomas* (1989), 42 Ohio St.3d 131. To the extent plaintiff argues the cognizable event did not occur until December 2, 2006, the date her memorandum states she actually

discovered the injury to her eye, plaintiff supplied no evidence under Civ.R. 56(C) to support her contentions. Indeed, the allegations of her complaint undermine her argument. Plaintiff's complaint alleges she experienced pain and vision loss shortly after her surgical procedure with Dr. Dingle on March 8, 2006. In the absence of Civ.R. 56(C) evidence from plaintiff, the trial court properly could grant summary judgment to Dr. Dingle and Central Ohio Eye because the evidence attached to their motions supports the conclusion they posit: plaintiff's claims against them are time-barred.

{¶18} Secondly, plaintiff asserts the 180-day letters cannot shorten the statute of limitations. Plaintiff thus contends the one-year statute of limitations under R.C. 2305.113 expired in December 2007, one year after she discovered her injury, not 180 days after the March 13, 2007 letters sent under R.C. 2305.113(B)(1). Because plaintiff supplied no evidence supporting her contention that she did not discover the injury until December 2006, we need not address her argument that the 180-day letters cannot shorten the statute of limitations to 180 days from March 13, 2007. Cf. *Freeland v. Harrison Community Hosp., Inc.*, 7th Dist. No. 04 HA 568, 2004-Ohio-6815 (rejecting appellant's argument that her cause of action accrued when she discovered her injury and after she sent the 180-day letter out of "an abundance of caution," not with the intention to extend the statute of limitations 180 days from that point).

{¶19} In the end, not only did plaintiff fail to present evidence of the date she discovered her injury, but her complaint alleges she experienced pain and vision loss shortly after her surgical procedure with Dr. Dingle on March 8, 2006, a date preceding termination of her physician-patient relationship with Dr. Dingle and Central Ohio Eye on May 3, 2006. Because plaintiff's cause of action accrued on the latest of the two triggering

factors set forth in *Frysinger*, plaintiff had one year from the termination of her physician-patient relationship to file her complaint. Plaintiff's statutory notice letters on March 17, 2007 extended the statute of limitations by 180 days. Since plaintiff did not file her original complaint in this matter until November 28, 2007, the complaint missed the statutory deadline by more than two months.

{¶20} Nor does the saving statute rescue plaintiff's complaint. Plaintiff voluntarily dismissed her original complaint only to re-file it on June 5, 2009. Pursuant to Civ.R. 41(A), she may utilize the savings statute contained in R.C. 2305.19 only if she timely filed the original action. See *Rosendale v. Ohio Dept. of Transp*., 10th Dist. No. 08AP-378, 2008-Ohio-4899, ¶11 (holding the savings statute does not apply when the first action was not timely). Since plaintiff filed her original complaint outside the statute of limitations, the savings statute does not apply here to allow plaintiff to re-file an otherwise untimely lawsuit.

{¶21} Dr. Dingle and Central Ohio Eye, as the parties moving for summary judgment, satisfied their initial burden of informing the trial court of the basis for their motion and identifying the portions of the record demonstrating the absence of a genuine issue of material fact. Plaintiff provided no evidence to refute the evidence provided in Dr. Dingle's affidavit or to demonstrate a genuine issue of material fact with regard to the application of the statute of limitations. Accordingly, the trial court properly granted Dr. Dingle's and Central Ohio Eye's motion for summary judgment.

B. No Negligence Demonstrated

{¶22} The remaining defendants moving for summary judgment, Dr. Baker, Ophthalmic Surgeons, and the Eye Center, all maintain the trial court properly granted

their respective motions supported with Civ.R. 56(C) evidence. The three defendants assert plaintiff failed to respond with any evidence that they caused any of plaintiff's injuries.

{¶23} In their joint motion for summary judgment, Dr. Baker and Ophthalmic Surgeons submitted the affidavit of Dr. Baker describing his involvement in plaintiff's care. As a board certified ophthalmologist trained in treating glaucoma, Dr. Baker was qualified to render an expert opinion in this matter. See Evid.R. 702(B). In his affidavit, Dr. Baker averred that, to a reasonable degree of medical probability, he at all times complied with the standard of care for an ophthalmologist during his treatment and care of plaintiff. (Baker Affidavit, ¶8.) Based on Dr. Baker's affidavit, neither Dr. Baker nor his professional corporation, Ophthalmic Surgeons, was liable in negligence. Plaintiff did not present any expert testimony to contest the expert opinion of Dr. Baker or any other evidence of the type Civ.R. 56 contemplates. Thus, the trial court did not err in granting summary judgment to Dr. Baker and Ophthalmic Surgeons.

{¶24} Similarly, the Eye Center contends its motion for summary judgment met its burden to establish the absence of a genuine issue of material fact for trial. The Eye Center points out that plaintiff's complaint did not criticize the care the nurses or staff of the Eye Center provided, and its affidavit states the physicians who treated plaintiff at the Eye Center are independent medical practitioners, not employees of the Eye Center.

{¶25} Hospitals do not practice medicine and are incapable of committing malpractice. *Browning v. Burt* (1993), 66 Ohio St.3d 544, 556, citing *Lombard v. Good Samaritan Med. Ctr.* (1982), 69 Ohio St.2d 471, and *Richardson v. Doe* (1964), 176 Ohio St. 370 (only physicians can commit "medical malpractice"). Rather, hospitals can be

vicariously liable for the alleged medical negligence of their employees through theories of either agency or agency by estoppel. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶12-13. A hospital may be held liable under the doctrine of agency by estoppel if the hospital " 'holds itself out to the public as a provider of medical services' and that the patient looks to the hospital, not a particular doctor, for medical care." Id. at ¶16, quoting *Clark v. Southview* (1994), 68 Ohio St.3d 435, 444-45. Plaintiff thus may maintain her medical malpractice action against the Eye Center only if plaintiff can prove either (1) the Eye Center's employees fell below the appropriate standard of care, or (2) plaintiff looked to the Eye Center to provide medical care, rather than to Drs. Baker, Dingle, Mauger or Kurz.

{¶26} The Eye Center supported its motion for summary judgment with the affidavits of two of its staff nurses, Shawn Herman and Pam Canfield. Herman's affidavit included the medical opinion "that all of the treatment and care rendered to Plaintiff by the staff and/or nurses of the Eye Center, met or exceeded the standard of care of the staff and/or nurses of a surgery center." (Herman Affidavit, ¶4.) Canfield's affidavit averred the Eye Center neither held itself out to the public as a provider of medical services nor did it employ any of the physicians named in the lawsuit. (Canfield Affidavit, ¶3-4.) Instead, Drs. Baker, Dingle, Mauger, and Kurz were all independent medical providers. (Canfield Affidavit, ¶4.) Based on these affidavits, the Eye Center met its initial burden to demonstrate no genuine issue of material fact for trial. Civ.R. 56(C).

{¶27} In response, plaintiff did not submit any evidence to demonstrate either that the care the nurses and staff of the Eye Center provided fell below the applicable standard of care or that plaintiff looked to the Eye Center, rather than her individual

physicians, to provide her medical care. Since plaintiff has failed to adequately respond to the moving party's evidence demonstrating no genuine issue of material fact, the trial court did not err in granting the Eye Center's motion for summary judgment. See *Dresher* at 293; Civ.R. 56(E).

{¶28} Accordingly, we overrule plaintiff's first assignment of error.

IV. Second Assignment of Error – Motion for Extension of Time

{¶29} In her second assignment of error, plaintiff argues the trial court erred in denying her motion to extend the time to file an affidavit of merit. The assignment of error indirectly challenges the trial court's decision to grant the motions to dismiss of Dr. Mauger and OSU Eye based on plaintiff's failure to file the affidavit of merit required under Civ.R. 10(D)(2).

{¶30} Plaintiff's complaint undisputedly is a medical claim. See R.C. 2305.113(E)(3). "Civ.R. 10(D)(2) requires a plaintiff in a medical claim to file an affidavit of merit from an expert witness." *Nicely v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-187, 2009-Ohio-4386, ¶6. The affidavit of merit must include (1) "[a] statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint," (2) "[a] statement that the affiant is familiar with the applicable standard of care," and (3) "[t]he 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." Id., quoting Civ.R. 10(D)(2).

{¶31} Civ.R. 10(D)(2)(b) allows a plaintiff to file a motion to extend the period of time in which to file an affidavit of merit. A trial court shall grant a plaintiff a reasonable period of time to file an affidavit of merit "[f]or good cause shown and in accordance with

division (c) of this rule." Civ.R. 10(D)(2)(b). To determine whether "good cause" exists to grant an extension, the court is to consider (1) "[a] description of any information necessary in order to obtain an affidavit of merit," (2) "[w]hether the information is in the possession or control of a defendant or third party," (3) "[t]he scope and type of discovery necessary to obtain the information," (4) "[w]hat efforts, if any, were taken to obtain the information," and (5) "[a]ny other facts or circumstances relevant to the ability of the plaintiff to obtain an affidavit of merit." Civ.R. 10(D)(2)(c).

{¶32} Plaintiff did not comply with Civ.R. 10(D)(2) when she initially filed her complaint on November 28, 2007, but the trial court granted her extensions of time to file an affidavit of merit. Plaintiff did not file the affidavit but instead voluntarily dismissed her case. When plaintiff re-filed her complaint, she again did not comply with Civ.R. 10(D)(2). The trial court again granted plaintiff an extension to file an affidavit of merit. Plaintiff again did not file the affidavit but sought yet another extension of time. The trial court denied any further extension.

{¶33} The decision whether to grant or deny a motion for extension of time lies within the sound discretion of the trial court, and we will not reverse the decision on appeal absent an abuse of that discretion. *Whipple v. Warren Corr. Inst*., 10th Dist. No. 09AP-253, 2009-Ohio-4841, ¶6, citing *Johnson v. Univ. Hosp. Case Med. Ctr*., 8th Dist. No. 90960, 2009-Ohio-2119, ¶5. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (noting an "abuse of discretion is more than an error of law or judgment; it suggests an attitude that is unreasonable, arbitrary or unconscionable").

{¶34} In her September 11, 2009 motion for an additional extension of time, plaintiff contended she was unable to timely comply with the previous extension of time

for two reasons. She initially cited ongoing health issues. She further asserted she was hampered in her efforts to comply due to what she characterized as the defendants' failure "to provide plaintiff with complete and accurate copies of her medical records thereby precluding an independent medical professional from accurately assessing the quality of care given to Plaintiff by the Defendants." (Sept. 11, 2009 motion.) Plaintiff thus contends "health issues and what appears to be discovery issues" prevented her from timely filing an affidavit of merit. (Plaintiff's brief, 8.)

{¶35} Dr. Mauger and OSU Eye respond that plaintiff did not demonstrate good cause for an extension as she did not explain how her medical issues or her ability to review her own medical records differentiate her from other medical malpractice plaintiffs who comply with Civ.R. 10(D)(2). Defendants further assert plaintiff received her medical records and summarized some of them to support her request for an extension of time.

{¶36} The trial court concluded plaintiff did not demonstrate good cause for another extension of time, and the record does not indicate the trial court abused its discretion in so concluding. Plaintiff did not describe for the court what efforts she had undertaken to obtain the information but instead revealed a repeated inability to comply with the affidavit of merit requirement from the time she first filed her complaint in November 2007. Absent plaintiff's presenting evidence describing the efforts she undertook and the cause for her inability to procure the necessary affidavit, the trial court did not err in refusing to grant plaintiff further extensions, especially when plaintiff began the process with her initial complaint as early as November 2007.

{¶37} Plaintiff nonetheless asserts the trial court abused its discretion in denying her motion for an extension of time to file an affidavit of merit because, even though she

was unrepresented at trial, nothing in the record indicates the trial court advised plaintiff she faced having her complaint dismissed if she did not meet the latest deadline for her affidavit of merit. "Ohio courts generally hold pro se litigants to the same rules and procedures as those litigants who retain counsel." *Williams v. Griffith*, 10th Dist. No. 09AP-28, 2009-Ohio-4045, ¶21. Pro se litigants thus "must accept the results of their own mistakes." Id., citing *Whitehall v. Ruckman*, 10th Dist. No. 07AP-445, 2007-Ohio-6780, ¶21.

{¶38} Because plaintiff did not file an affidavit of merit, the trial court did not err in granting the motions to dismiss of OSU Eye and Dr. Mauger. "A court correctly dismisses a medical claim that lacks the affidavit of merit." *Whipple* at ¶8, citing *Nicely* at ¶6, citing *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶15. Plaintiff did not address, in either her assignment of error or the body of her argument, Dr. Mauger's contention that the trial court properly granted his motion to dismiss on the basis of his potential immunity as a state employee, so we do not address it here. *Cohen v. House-Cohen,* 10th Dist. No. 08AP-344, 2009-Ohio-6564, ¶10, n.1, citing *Martin v. CSX Transp., Inc.,* 10th Dist. No. 08AP-846, 2009-Ohio-6054, ¶10; App.R. 12(A)(2).

{¶39} Plaintiff's second assignment of error is overruled.

V. Disposition

{¶40} Having overruled plaintiff's two assignments of error, we affirm the trial court's judgment.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

_____