

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

JAMES DAVIS, et al.	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 05-CA-39
vs.	:	T.C. CASE NO. 04-820
	:	(Civil Appeal from
UPPER VALLEY MEDICAL	:	Common Pleas Court)
CENTER, et al.	:	
Defendants-Appellees	:	

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O P I N I O N

Rendered on the 23rd day of March, 2007.

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GRADY, J.

{¶ 1} Plaintiff, James Davis, appeals from an order denying his Civ. R. 60(B) motion for relief from summary judgment in favor of Defendant Upper Valley Medical Center ("Upper Valley").

{¶ 2} On December 20, 2004, Davis filed an action against

Upper Valley and "Jane Doe", alleging that Davis suffered severe burns to his lower back on December 18, 2002, which proximately resulted from the negligent act or omission of Jane Doe, a.k.a. "Nicole", who was then an employee in Upper Valley's physical therapy department. In its Answer, Upper Valley asserted one-year statute of limitations for medical and hospital malpractice claims as an affirmative defense.

{¶ 3} On July 7, 2005, the trial court issued a scheduling order (Dkt. 7) that, inter alia, established a trial date and set February 14, 2006 as the deadline for filing motions for summary judgment. The scheduling order also cited Miami County Local Rule 3.04 for the deadline for responding to any motions for summary judgment.

{¶ 4} Upper Valley moved for summary judgment on September 20, 2005. (Dkt. 13). As grounds, the motion argued that Davis failed to file his medical claim within the one-year statute of limitations in R.C. 2305.113(A). Davis did not respond to the motion. On October 19, 2005, the trial court granted Upper Valley's motion for summary judgment.

{¶ 5} On November 16, 2005, Davis filed a motion for relief from judgment pursuant to Civ. R. 60(B), which the trial court overruled. Davis filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶ 6} "THE TRIAL COURT ERRED BY GRANTING DEFENDANT UPPER VALLEY MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT, CIVIL RULE 56 AND SUBSEQUENTLY OVERRULING PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT, CIVIL RULE 60(B)."

{¶ 7} The standard of review of a trial court's decision on a Civ. R. 60(B) motion is an abuse of discretion standard. *Tidwell v. Quaglieri*, Greene App. No. 06-CA-0036, 2007-Ohio-569, _21. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citations omitted).

{¶ 8} Civ. R. 60(B) provides that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . or (5) any other reason justifying relief from the judgment. . . ."

{¶ 9} To prevail on a Civ. R. 60(B) motion, the movant must demonstrate that: "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made

within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-51, 351 N.E.2d 113 (citations omitted).

{¶ 10} The trial court held that Davis could not demonstrate that he had a meritorious claim if relief was granted, because the statute of limitations had run on his claim against Upper Valley. We agree.

{¶ 11} At the time Davis was injured, R.C. 2305.11(B)(1) provided that "an action upon a medical . . . claim shall be commenced within one year after the cause of action accrued, except that, if prior to the expiration of that one-year period, a claimant who allegedly possesses a medical . . . 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 given."

{¶ 12} R.C. 2305.11 was revised on April 11, 2003. At the time Davis filed his complaint, R.C. 2305.113(A) provided that "an action upon a medical . . . claim shall be commenced within one year after the cause of action accrued." R.C.

2305.113(B) (1) provided for a 180-day notice provision similar to what was contained in former R.C. 2305.11(B) (1).

{¶ 13} "'Medical claim' means any claim that is asserted in any civil action against a physician, podiatrist, or hospital, against any employee or agent of a physician, podiatrist, or hospital . . . and that arises out of the medical diagnosis, care, or treatment of any person. 'Medical claim' includes derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person." R.C. 2305.11(D) (3) (2002); see also R.C. 2305.11(E) (3) (2003).

{¶ 14} Davis alleged in his complaint that he was injured when an employee of Upper Valley "performed and/or administered therapy/therapeutic devices upon [him]." (Dkt. 1, _6). "The term 'medical claim' as defined in R.C. 2305.11 includes a claim for a hospital employee's negligent use of hospital equipment while caring for a patient which allegedly results in an injury to the patient." *Rome v. Flower Memorial Hosp.*, 70 Ohio St.3d 14, 1994-Ohio-574, at paragraph one of the syllabus.

{¶ 15} Davis argues that his claim should be subject to a two-year statute of limitations rather than a one-year statute of limitations. Davis fails to cite any authority for his position. See: *Hill v. Primed Pediatrics*, Montgomery App.

No. 20947, 2006-Ohio-2405, ¶19, applying the one-year statute of limitations contained in former R.C. 2305.11(B)(1). Further, Davis states that "Plaintiff does not believe that the statute in effect on the date of filing was the applicable statute in effect on the date of injury." Davis cites no support for his belief. The relevant statutes in effect at the time of injury and at the time of filing of the complaint both provided for a one-year statute of limitations on medical claims.

{¶ 16} A party seeking to vacate a summary judgment pursuant to Civ.R. 60(B) must at least proffer evidence that could have rebutted the grounds offered in support of a summary judgment, had the evidence been offered in opposition to the motion for summary judgment. *Dysert v. State Auto Mutual Insurance Co.* (April 23, 1999), Miami App. No. 98CA46.

Davis did not present any evidence in support of his Rule 60(B) motion demonstrating that there was a genuine issue of material fact as to when the statute of limitations began to run. On this record, we cannot find that the trial court erred in finding that the one-year statute of limitations had expired before Davis commenced his action against Upper Valley.

{¶ 17} Davis also argues that there is a conflict between

Civ. R. 56(C) and Miami County Local Rule 3.04 that denied Davis procedural and substantive due process. Civ. R. 56(C) provides, in relevant part: "The [summary judgment] motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. . . ." Local Rule 3.04 provides "Unless otherwise ordered by court, motions for summary judgment shall be heard on briefs and other materials authorized by Civil Rule 56(C) without oral arguments twenty days after filing of the motion with the Clerk. . . ."

{¶ 18} There is no conflict between these two rules. A trial court is not required to schedule an oral hearing on every motion for summary judgment. *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, _14. Therefore, trial courts routinely schedule non-oral hearings in order to establish deadlines for filing oppositions to summary judgment motions. "[A] trial court need not notify the parties of the date of consideration of a motion for summary judgment or the deadlines for submitting briefs and Civ. R. 56 materials if a local rule of court provides sufficient notice of the hearing date or submission deadlines." *Id.* at _33.

{¶ 19} Miami County Local Rule 3.04 sets the date for hearing on a motion for summary judgment as twenty days after

filing of the motion with the clerk. This local rule gave Davis "notice of the date after which a summary judgment motion will be decided, as well as the deadline for a response to such motion." *Slack v. Burton* (June 9, 2000), Miami App. No. 99CA42. That is consistent with Civ. R. 56(C), which provides that the summary judgment motion must be served at least fourteen days before the hearing and that Davis had until the date of hearing to oppose the motion for summary judgment. Davis failed to oppose the motion for summary judgment prior to the hearing date set in Miami County Local Rule 3.04, and the trial court properly granted summary judgment after the twenty days expired.

{¶ 20} Finally, Davis argues that the last paragraph of Local Rule 3.04 precludes the trial court from granting a motion for summary judgment once a case has been set for pretrial. The last paragraph of Local Rule 3.04 provides: "*In the absence of a pretrial order setting deadlines for the filing of motions for summary judgment, no motion for summary judgment shall be filed in any case after it has been set for pretrial or trial without leave of the Trial Judge first obtained, who may establish the times for filing of briefs and submissions of the motion.*" (Emphasis supplied.)

{¶ 21} By its own terms, the last paragraph of Local Rule

3.04 applies only where there is no pretrial order setting deadlines for the filing of motions for summary judgment. But the trial court did issue a scheduling order that set a deadline for the filing of a motion for summary judgment. Consequently, the fact that the case had been set for trial or pretrial does not preclude the filing of a motion for summary judgment within the deadline provided for in the July 7, 2005 scheduling order, without leave of court.

{¶ 22} The assignment of error is overruled. The judgment of the trial court will be affirmed.

WOLFF, J. and DONOVAN, J., concur.

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Hon. Jeffrey M. Welbaum