

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BROWN COUNTY

JESSIE MARDIS, Individually and as :
Administrator for the Estate of Arthur L. :
Mardis, : CASE NO. CA2010-04-007
 :
Plaintiff-Appellant, : OPINION
 : 10/4/2010
 :
- vs - :
 :
MEADOW WOOD NURSING HOME, :
et al., :
 :
Defendants-Appellees. :
 :

CIVIL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CVH2008-0687

Elk & Elk Co., L.P.A., Phillip A. Kuri, Peter D. Traska, Landerhaven Corporate Center,
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HENDRICKSON, J.

{¶1} Plaintiff-appellant, Jessie Mardis, bringing suit individually and as administrator for the estate of Arthur L. Mardis, appeals a decision of the Brown County Court of Common Pleas dismissing defendant-appellee, Janice Mofford, from a medical negligence action. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} Arthur Mardis ("the decedent") was a resident at Meadow Wood Nursing Home at the time of the events described herein. In January 2007, the decedent fell from his bed at the facility and hit his head, causing a subdural hematoma. The decedent passed away on the day following the fall.

{¶3} On June 24, 2008, appellant filed a complaint against the nursing home and other defendants alleging claims of medical negligence and wrongful death. In addition to the named defendants, the complaint designated "John Does 1 through 10" as defendants pursuant to Civ.R. 15(D). The "John Doe" defendants were described as "persons and/or entities whose names the Plaintiff does not know and has been unable to presently ascertain, but are people and/or entities who provided medical treatment and/or were responsible for supervising the medical treatment of Plaintiff Arthur L. Mardis."

{¶4} On December 21, 2009, appellant filed an amended complaint purporting to add two new defendants. One of these defendants was appellee, a nurse who participated in the decedent's care at the nursing home. Appellee moved for dismissal on the basis that appellant was attempting to substitute her for one of the John Doe defendants past the deadline outlined in the Ohio Rules of Civil Procedure. The trial

court agreed, dismissing the claims against appellee in a decision rendered on March 3, 2010. Appellant timely appeals, raising three assignments of error.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT THE STATUTE OF LIMITATIONS FOR PLAINTIFF-APPELLANT'S CLAIMS AGAINST DEFENDANT MOFFORD DID NOT BEGIN TO RUN UNTIL HER NEGLIGENT ACT WAS DISCOVERED BY PLAINTIFF-APPELLANT."

{¶17} In his first assignment of error, appellant insists that the statutes of limitation on his claims against appellee were tolled until he learned that the harm suffered by the decedent was related to appellee's failure to properly monitor the decedent's Coumadin levels. Despite his multiple requests for discovery prior to filing the original complaint, appellant maintains that he did not and could not have discovered appellee's identity until Meadow Wood provided him with a document entitled "Outpatient Anticoagulation Flow sheet" on July 1, 2009.

{¶18} Although appellant's first cause of action was framed in terms of "medical negligence," the nature of the claim actually implicates medical malpractice. *Prysock v. Ohio State Univ. Med. Ctr.*, Franklin App. No. 01AP-1131, 2002-Ohio-2811, ¶10. It is well-accepted that misconduct perpetrated by medical professionals constitutes malpractice, irrespective of the label affixed by the complaining party. *Id.* Indeed, appellant's complaint asserted that the defendants (medical professionals and institutions) failed to properly examine, diagnose, and care for the decedent. The complaint further alleged that the defendants' conduct fell below acceptable standards of medical care, ultimately causing the decedent's death. It is thus through the lens of medical malpractice that we analyze appellant's statute of limitations argument.

{¶19} R.C. 2305.113(A) provides that an action upon a claim for medical

malpractice must be commenced within one year after the cause of action accrued. It is undisputed that the original complaint was filed within this period of limitation. At issue is whether the discovery rule operated to extend the limitations period for asserting this claim against appellee in the amended complaint.

{¶10} In *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, the Supreme Court of Ohio adopted the discovery rule for medical malpractice cases. The court held that "a cause of action for medical malpractice accrues and the statute of limitations commences to run when a patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury." *Id.* at syllabus.

{¶11} The *Oliver* holding was further expounded upon by the high court in *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St.3d 1. The *Hershberger* court established the following three-part test for determining the accrual date for medical malpractice claims:

{¶12} "[T]he trial court must look to the facts of the particular case and make the following determinations: [1] when the injured party became aware, or should have become aware, of the extent and seriousness of his condition; [2] whether the injured party was aware, or should have been aware, that such condition was related to a specific professional medical service previously rendered him; and [3] whether such condition would put a reasonable person on notice of need for further inquiry as to the cause of such condition." *Id.* at syllabus.

{¶13} Appellant concedes that he was aware the decedent's Coumadin levels had not been properly monitored when he filed the original complaint. Nonetheless, appellant argues that the statute of limitations was tolled until he acquired information revealing appellee's role in perpetrating the negligent conduct. Appellant claims that the information was withheld from him until July 1, 2009, when defense counsel received

the anticoagulation flow sheet. The document identified "J.M." (determined to be appellee) as one of the nurses responsible for monitoring the decedent's Coumadin levels. According to appellant, the document intimated that appellee was responsible for the failure to obtain follow up tests in order to monitor the effects of alterations in the decedent's Coumadin dosage.

{¶14} Of note, the allegations in the original complaint referenced negligent care perpetrated against the decedent by the defendants *and their employees*. See *Doe v. Catholic Diocese of Cleveland*, 158 Ohio App.3d 49, 2004-Ohio-3470, ¶33. Therefore, despite the fact that appellant did not possess the anticoagulation flow sheet when he filed the original complaint, he was already aware that employees working for the defendants may have been at fault. *Id.* Appellee was one such employee.

{¶15} Once appellant discovered the injury, he had a duty to identify the negligent party or parties. *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, ¶26. The burden lies with the plaintiff to investigate and ascertain the identity of the tortfeasors once the plaintiff has reason to believe that he or she has a claim for medical malpractice. See *id.* Failure to timely uncover the identity of the alleged tortfeasors does not toll the statute of limitations. *Id.*

{¶16} It appears that appellant requested discovery from Meadow Wood on three separate occasions prior to filing the original complaint, and that the nursing home sent the decedent's records in response. We are not prepared to conclude that Meadow Wood purposefully withheld the anticoagulation flow sheet from appellant. Even if we were to assume that this document was withheld, this did not excuse appellant's duty to pursue the identity of the parties responsible for monitoring the decedent's Coumadin levels when they were put on notice of the potential malpractice. *Id.* at ¶26. Once appellant knew of the negligent act upon which his complaint was

premised, he was tasked with diligently identifying the person or persons responsible if he wished to sue them individually. Id.

{¶17} The record discloses that appellant did not file a single discovery motion, conduct a single deposition on the record, or submit a single set of interrogatories to seek the identity of the individuals who provided care for the decedent. Appellant makes no attempt to explain why no further attempt was made after the complaint was filed to obtain records which could reveal the individual tortfeasors. The fact that Meadow Wood did not convey the anticoagulation flow sheet earlier does not excuse appellant's duty to act with due diligence in pursuing his claims against all pertinent parties.

{¶18} Moreover, the April 21, 2009 report submitted by appellant's own expert should have directed appellant to take action by way of discovery tools to ascertain the identities of the negligent parties. Notably, this report was issued by nurse Betty Pederson over two months prior to appellant's receipt of the anticoagulation flow sheet. In her report, Pederson stated that she reviewed records provided by Meadow Wood, local hospitals, and the department of health. Pederson then described the various dates, doses, and follow up tests pertaining to the decedent's Coumadin treatment.

{¶19} The information detailed in Pederson's report precisely reflects the information contained in the anticoagulation flow sheet. The sole items missing from the report that were present in the anticoagulation flow sheet were the initials of the nurses responsible for each dose of Coumadin. However, this omission did not render it impossible to discern the identity of the persons who administered and monitored the decedent's Coumadin levels. It simply forced appellant to dig deeper to discern the identities of those responsible. Rather than taking action, appellant sat idly by and allowed the limitations period to expire before finally amending the complaint to assert

claims against appellee.

{¶20} Finally, we note that the arguments proffered by appellant under this assignment of error focus entirely upon his medical negligence claim. Appellant tenders no specific arguments to support why the statute of limitations for his wrongful death claim against appellee should have been extended beyond the two-year period enunciated in R.C. 2125.02(D)(1).

{¶21} Appellant's wrongful death claim against appellee was not brought within two years of the decedent's death. In his appellate brief, appellant does not attempt to explain why the discovery rule should apply to toll the statute of limitations on this claim. Where an appellate brief fails to argue the assignment, we may disregard the argument. See App.R. 12(A)(2), 16(A). See, also, *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 159.

{¶22} Even if appellant had explained why he believed the statute of limitations was tolled on his wrongful death claim against appellee, we would find such an argument to be without merit. The reasoning employed above applies with equal force to appellant's wrongful death claim. Appellant believed there was a link between the decedent's death and the administration of Coumadin when he filed the original complaint. Consequently, appellant had duty to timely identify the parties responsible for the decedent's wrongful death if he wished to sue them individually. *Erwin*, 2010-Ohio-2202 at ¶26.

{¶23} We decline to find that appellant's carelessness in failing to fulfill his discovery duty tolled the applicable statutes of limitation. Appellant's first assignment of error is overruled.

{¶24} Assignment of Error No. 2:

{¶25} "THE TRIAL COURT ERRED BY APPLYING CIV. R. 15(D) WHERE THE

ADDITION OF JANICE MOFFORD AS A DEFENDANT WAS NOT MADE UNDER CIV. R. 15(D)."

{¶26} In his second assignment of error, appellant contends that the amendment of the complaint to add appellee as a defendant was a timely action against a newly identified defendant, rather than a substitution of a previously known but unnamed defendant under Civ.R. 15(D). Appellant alleges that it was not possible for him to identify appellee by name or description at the time the original complaint was filed because he had no knowledge of the role she played in the decedent's care prior to receiving the anticoagulation flow sheet on July 1, 2009.

{¶27} Civ.R. 15(A) permits a party to amend its pleading by leave of court and specifies that such leave "shall be freely given when justice so requires." This liberal rule places the decision on whether to allow a party to amend its pleading squarely within the discretion of the trial court. *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99, 1999-Ohio-207. Such a practice, however, is distinct from substituting the proper name of a fictitious party in an original complaint under Civ.R. 15(D).

{¶28} When Civ.R. 15(D) is invoked, a plaintiff is acquainted with the description of a defendant but is unaware of the defendant's name at the time the complaint is filed. *Erwin*, 2010-Ohio-2202 at ¶23. The complaint is later amended when the name is discovered. Civ.R. 15(D) must be read in pari materia with Civ.R. 3(A). See *Amerine v. Haughton Elevator Co., Div. of Reliance Elec. Co.* (1989), 42 Ohio St.3d 57, 59. In accordance with Civ.R. 3(A), where a plaintiff names a fictitious defendant and later corrects the complaint to insert the defendant's proper name, the amendment relates back to the filing of the original complaint and the defendant must be served with process within one year of the date the original complaint was filed. *Amerine* at 59.

{¶29} Appellant insists that appellee was added as a new defendant rather than

substituted for one of the "John Does 1 through 10" named in the original complaint. However, even a cursory review of the complaints contradicts appellant's argument.

{¶30} As stated, the original complaint described the John Doe defendants as "people and/or entities who provided medical treatment and/or were responsible for supervising the medical treatment of Plaintiff Arthur L. Mardis." Appellee, a nurse at Meadow Wood who participated in the decedent's treatment and care, undeniably fit this description. This conclusion is corroborated by the wording of the amended complaint, which described appellee as "one of the nurses, attendants, employees, assistants and consultants of Defendant Meadow Wood Nursing Home."

{¶31} In addition, the amended complaint collectively referred to appellee and the other defendants in alleging its claims. For example, the amended complaint averred that "Defendants took on the responsibility of caring and treating for [sic] Arthur L. Mardis[.]" The amended complaint further averred that "Arthur L. Mardis[] came under the care and treatment of said Defendants and their agents and/or employees. While under their care and treatment, Defendants were negligent by * * * failing to properly examine, diagnose and care for Arthur L. Mardis * * *." The amended complaint thus did not differentiate appellee's status as a person who provided medical treatment for the decedent, a status that coincided with the description of the John Doe defendants in the original complaint.

{¶32} Appellant availed himself of the benefits of Civ.R. 15(D) in his original complaint by identifying "John Does 1 through 10." Although appellant's motion for leave to amend the complaint indicated that the naming of appellee was an "addition" and not a "substitution" of a defendant, this wording does not permit appellant to escape the confines of the Ohio Rules of Civil Procedure. Civ.R. 15(D) cannot operate as a ceaseless "placeholder" that permits a plaintiff to escape the statutory time limitations

set by the General Assembly for bringing claims against defendants. *Erwin*, 2010-Ohio-2202 at ¶¶29-30. Nor does the rule relieve a plaintiff of his duty to learn the identity of culpable parties should he wish to file suit against them. *Id.* at ¶27.

{¶33} We conclude that appellee fit the description of a John Doe defendant who failed to properly participate in the decedent's medical treatment and care as described in the original complaint. Accordingly, appellee was substituted as a party in the amended complaint and not added as a new party. Because this substitution occurred six months after the expiration of the period allowed by Civ.R. 3(A), appellant failed to timely commence his action against appellee.

{¶34} Appellant's second assignment of error is overruled.

{¶35} Assignment of Error No. 3:

{¶36} "THE TRIAL COURT ERRED BY MAKING A FINDING OF FACT CONTRARY TO DIRECT AND UNCHALLENGED EVIDENCE."

{¶37} Finally, appellant challenges a finding made by the trial court in rendering its decision in favor of appellee's motion to dismiss. In granting the motion, the court noted that it had reviewed the April 21, 2009 report issued by appellant's expert, nurse Betty Pederson. The court noted that Pederson's report was based on documents which were provided to her by counsel for appellant, including Meadow Wood nurses notes. The court concluded that Pederson, in preparing her report, relied upon the very information that appellant emphasized he did not receive until July 1, 2009 regarding the decedent's Coumadin levels.

{¶38} Appellant finds no support in the record for the trial court's finding. To the contrary, appellant argues that the finding was directly opposed to the only evidence submitted on the subject, the affidavit of attorney Phillip Kuri. In the affidavit, Kuri averred that the anticoagulation flow sheet was not conveyed by Meadow Wood until

July 1, 2009. Appellant maintains that there is no evidence Pederson was in possession of this document, which was pivotal in discerning the identity of appellee. Thus, appellant concludes, the trial court erred in assuming that appellant had access to information revealing appellee's identity prior to July 1, 2009.

{¶39} Appellant places far too much emphasis on the anticoagulation flow sheet. We find it incredible that this document was the one and only means to uncover appellee's identity. As discussed above, appellant was in a position to name appellee as a party prior to the expiration of the one-year period following the original complaint. Appellant could have employed one or more discovery tools in order to garner this information from one of the named defendants. Appellant offers no explanation for his inaction. Kuri's affidavit cannot excuse appellee's failure to conduct discovery.

{¶40} Appellant's third assignment of error is overruled.

{¶41} Judgment affirmed.

YOUNG, P.J., and BRESSLER, J., concur.