

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Sue Ann Rose et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 10AP-910
 : (C.P.C. No. 09CVA-08-13153)
 Dr. Kelly Zyniewicz et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on July 28, 2011

Leigh-Ann M. Sims, for appellants.

Freund, Freeze & Arnold, W. Frederick Fifner, and Jennifer L. Hill, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Plaintiffs-appellants, Sue Ann Rose and her husband James Richardson, appeal from a judgment of the Franklin County Court of Common Pleas denying their "Motion to Vacate and Motion to Stay." Because the trial court properly denied plaintiffs' motion, we affirm.

I. Facts and Procedural History

{¶2} On August 31, 2009, plaintiff filed a medical malpractice action against defendants-appellees, Dr. Kelly Zyniewicz and Central Ohio Skin and Cancer, Inc., as well as several unnamed corporations, physicians, and nurses. According to the complaint, in September 2006 defendants negligently cared for and treated plaintiff in failing to diagnose a mole on plaintiff's lower right leg, a mole Dr. Zyniewicz excised in plaintiff's August 2007 visit and diagnosed as Stage III melanoma. Defendants responded with an answer on September 14, 2009, denying the substantive allegations of plaintiffs' complaint and asserting affirmative defenses, including plaintiffs' failure to file their complaint within the applicable statute of limitations.

{¶3} After taking Rose's deposition, defendants filed a motion for summary judgment based on plaintiffs' failure to file their complaint within the one-year statute of limitations set forth in R.C. 2305.113. Defendants asserted plaintiffs knew in August 2007 the dark spot Dr. Zyniewicz called a mole in 2006 actually was a malignant melanoma. Defendants argued plaintiffs should have filed their action by August 2008. Because plaintiffs did not, defendants contended their action was time-barred under R.C. 2305.113.

{¶4} In responding to defendants' motion, plaintiffs noted the dual premises for determining when a medical malpractice action accrues. Acknowledging the discovery rule and its negative implications for the timeliness of their complaint, plaintiffs also noted the alternative basis for accrual of a medical malpractice case that hinges on the date the physician-patient relationship terminated. To support their claim that the termination rule

rendered their complaint timely, plaintiffs attached to their response Rose's affidavit indicating she still considered Dr. Zyniewicz to be her dermatologist. Claiming her physician-patient relationship had not yet terminated, plaintiffs argued the one-year statute of limitations had not expired when they filed their complaint.

{¶5} Defendants' reply memorandum pointed to some of Rose's deposition responses, including her testimony that, following the August 2007 appointment where the mole was excised for biopsy, she never returned to see Dr. Zyniewicz and did not intend to see her again. Defendants further argued Rose's affidavit was ineffective, as it contradicted her earlier deposition testimony and thus could not be properly considered in determining when Rose's physician-patient relationship with Dr. Zyniewicz ended.

{¶6} On June 14, 2010, the trial court issued its decision and entry resolving defendants' summary judgment motion ("original judgment"). The court concluded plaintiffs' complaint was untimely under the discovery rule, since plaintiffs discovered the alleged malpractice in August 2007 but did not file their complaint until August 2009. The court, however, determined issues of fact remained concerning the date Rose's physician-patient relationship with Dr. Zyniewicz terminated. Despite the substance of its decision, the trial court determined "plaintiffs have failed to timely file their action within the applicable statute of limitations in this case. * * * Accordingly, this Court finds the defendants' motion for summary judgment well-taken, and it is hereby GRANTED." (June 14, 2010 Decision and Entry, 6.)

{¶7} In response, plaintiffs filed a "Motion to Vacate and Motion to Stay" on July 12, 2010. In their motion, plaintiffs pointed to the discrepancy in the trial court's

original judgment: although the court found issues of fact concerning the date Rose's physician-patient relationship with Dr. Zyniewicz terminated, the court granted summary judgment to defendants. After defendants responded to plaintiffs' motion, the court on August 26, 2010 issued a "Decision and Entry Denying Plaintiffs' Motion for Reconsideration" as well as a "Decision and Entry Modifying this Court's Decision and Entry" ("motion judgment").

{¶8} Treating plaintiffs' motion as a motion for reconsideration, the court reconsidered its ruling under the termination rule and noted Rose's affidavit contradicted her earlier deposition testimony. The court ultimately concluded Rose's deposition testimony was "the only proper evidence before this Court as to the 'termination rule' issue and, therefore, the plaintiffs failed to file their claim within the one-year statute of limitations set forth in R.C. 2305.113."

{¶9} The court also rejected plaintiffs' contention that the four-year statute of limitations governed Richardson's claim for loss of consortium. The court determined R.C. 2305.113 "specifically incorporates derivative claims of a spouse." Observing Richardson's claim "is clearly derivative to" Rose's medical claim, the court concluded the one-year statute of limitations set forth in R.C. 2305.113 applied to Richardson's loss of consortium claim.

{¶10} On that basis, the court denied plaintiffs' motion for reconsideration, modified its original judgment to reflect not only that no genuine issues of material fact remained regarding the termination rule but that the one-year statute of limitations applied

to Richardson's loss of consortium claim. Not modifying its original judgment regarding the discovery rule, the court determined the case "remains DISMISSED." (Final Order, 6.)

II. Assignments of Error

{¶11} Plaintiffs appeal, assigning two errors:

Assignment of Error #1

The trial court commits reversible error when it fails to conform its earlier decision to conform to a specific pronouncement of law by the Supreme Court of Ohio, when afforded an opportunity to do so by a motion to vacate, therefore the judgment of the lower court must be reversed.
[sic]

Assignment of Error #2

The trial court commits reversible error when it grants summary judgment under the termination rule when the Plaintiffs' [sic] present genuine issues of material facts as to the termination of the physician-patient relationship, therefore the judgment of the lower court must be reversed.
[sic]

Plaintiffs' assignments of error raise both a procedural issue and a substantive issue.

III. Applicable Law—Summary Judgment

{¶12} An appellate court's review of summary judgment is conducted 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 proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are 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; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

IV. First Assignment of Error – Procedural Issues

{¶13} The facts and procedural history of this case present a procedural quagmire. Plaintiffs' first assignment of error addresses their complexities and essentially asserts the trial court, when presented with plaintiffs' motion to vacate, was required to amend its original decision to make it internally consistent and, as a result, deny defendants' summary judgment motion.

{¶14} The trial court's original judgment granted defendants' summary judgment motion and concluded plaintiffs' claims were untimely. In concluding plaintiffs could not proceed because they did not comply with R.C. 2305.113, the applicable statute of limitations, the court determined the action prevented plaintiffs from recovering, and rendered a final judgment. See R.C. 2505.02. Plaintiffs had 30 days to appeal from the original judgment pursuant to App.R. 4(A), but they did not. Because they did not, they no longer have the opportunity to appeal from that judgment, even though the rationale of the original judgment unquestionably is inconsistent with its result in granting defendants' summary judgment motion and dismissing plaintiffs' claims as untimely.

{¶15} Moreover, because the trial court's original judgment was a final judgment, it was not subject to reconsideration. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378. As a final judgment, it properly was subject to a Civ.R. 60(B) motion requesting that the judgment be vacated for one of the reasons set forth in Civ.R. 60(B). See Civ.R. 60(B) (providing that "[o]n 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"); *Coleman v. Coleman*, 2d Dist. No. 2003-CA-39, 2004-Ohio-1018, ¶12-14.

{¶16} As a result, the trial court should have addressed plaintiffs' motion as it was filed; by converting it to a motion for reconsideration, the court violated *Pitts*, which declared a motion for reconsideration to be a nullity following final judgment. *Id.* at 380. We ordinarily would remand the matter to the trial court to consider plaintiffs' motion as a Civ.R. 60(B) motion. Indeed, if the issues presented in plaintiffs' Civ.R. 60(B) motion required the trial court to exercise its discretion, a remand arguably would be necessary. Here, the issues are strictly matters of law over which we have de novo review. Accordingly, we can address the merits of the trial court's decision denying plaintiffs' motion, even though the court never addressed it as a motion to vacate.

{¶17} Civ.R. 60(A) permits a court to correct clerical errors on its own initiative or on motion of a party. Civ.R. 60(B) is invoked on motion. To prevail on a motion for relief from judgment under Civ.R. 60(B), plaintiffs were required to demonstrate (1) they have a meritorious defense or claim to present if release is granted; (2) they are entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) – (5); and (3) the motion is made within a reasonable time. *Perry v. Gen. Motors Corp.* (1996), 113 Ohio App.3d 318, 320, citing *GTE Automatic Elec. v. ARC Indus., Inc.* (1976), 47 Ohio St.2d 146. We need not determine whether Civ.R. 60(A) applies, as neither the court nor plaintiffs invoked it.

{¶18} Plaintiffs' Civ.R. 60(B) motion does not reference any of the grounds for relief set forth in Civ.R. 60(B)(1) – (5). Instead, plaintiffs' motion argued the merits of the trial court's original judgment that granted defendants' summary judgment motion,

contending the trial court erred in concluding the statute of limitations barred plaintiffs' claims. Even if we were to select one of the provisions of Civ.R. 60(B) to apply here, only Civ.R. 60(B)(1) or (5) plausibly could apply. Plaintiffs' contentions do not fail under either provision, as plaintiffs assert the court committed a mistake of law, which is not a basis for relief from judgment under Civ.R. 60(B)(1) or (5). *Smith v. Bd. of Health*, (June 29, 1993), 4th Dist. No. 92CA-2095.

{¶19} Moreover, whether or not plaintiffs' contentions may have had merit on appeal, plaintiffs may not use their Civ.R. 60(B) motion, under the circumstances here, to argue issues they could have raised in an appeal from the trial court's original judgment. *Daroczy v. Lantz*, 10th Dist. No. 02AP-31, 2002-Ohio-5417, ¶34, discretionary appeal not allowed, 98 Ohio St.3d 1461, quoting *Kelm v. Kelm* (1992), 73 Ohio App.3d 395, 399, affirmed, 68 Ohio St.3d 39 (stating that "[i]n support of a Civ.R. 60(B) motion, a party may not raise issues that could have been raised on appeal, and 'errors which could have been corrected by a timely appeal cannot be a predicate for a Civ.R. 60(B) motion for relief from judgment' "); cf. *Brunner Firm Co., L.P.A. v. Bussard*, 10th Dist. No. 07AP-867, 2008-Ohio-4684.

{¶20} In the end, plaintiffs' Civ.R. 60(B) motion fails as a matter of law. Because plaintiffs not only may not use a Civ.R. 60(B) motion as a substitute for appeal, but also failed to present grounds for relief under Civ.R. 60(B)(1) – (5), the motion properly was denied. Although the issues raised in their motion properly are addressed on appeal, plaintiffs failed to timely appeal the trial court's original judgment finding their claims barred under the applicable statute of limitations.

{¶21} Even though the trial court denied plaintiffs' motion, the trial court modified its original judgment. Had its original judgment not been a final judgment, a motion for reconsideration would have provided the trial court a means to modify the not yet final decision. Because the original judgment was a final judgment, the trial court needed a procedural avenue to modify it. Although plaintiffs' Civ.R. 60(B) motion may have allowed the trial court to modify or vacate its original judgment, the trial court denied plaintiffs' motion. The issue that surfaces is whether the trial court erred in modifying its original judgment while at the same time denying plaintiffs' motion. We need not resolve that issue under plaintiffs' first assignment of error: even if the trial court erred in modifying its judgment, plaintiffs suffered no prejudice.

{¶22} Had the trial court not modified its original judgment, plaintiffs would be required to address that judgment and its alleged errors. To the extent plaintiffs attempted in the current appeal to address the trial court's original judgment, we would lack jurisdiction to correct the error since plaintiffs did not timely appeal from the original judgment. Rather, the only judgment plaintiffs timely appealed was the motion judgment. Plaintiffs, however, cannot demonstrate error in the court's decision refusing to vacate its original judgment: because plaintiffs used their Civ.R. 60(B) motion, in effect, to appeal the trial court's error in the original judgment, the motion properly was denied.

{¶23} Accordingly, plaintiffs' first assignment of error is overruled.

V. Second Assignment of Error – Substantive Issue

{¶24} If, however, the trial court's decision to modify its original judgment is allowed to stand, even though the court denied plaintiffs' Civ.R. 60(B) motion, then

plaintiffs on appeal may challenge whether the trial court's modification is substantively correct.

{¶25} 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 *Fry singer 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).

{¶26} Little dispute surrounds the trial court's determination that plaintiffs discovered Dr. Zyniewicz's allegedly negligent care and treatment when, in August 2007, the changed mole was excised, biopsied, and determined to be a malignant melanoma. Accordingly, under the discovery rule, plaintiffs had one year from August 2007 to file their complaint. Because plaintiffs failed to do so, the complaint is untimely under the discovery rule as it relates to R.C. 2305.113.

{¶27} Plaintiffs' motion addressed whether the complaint was timely under the termination rule. Although Rose's affidavit, submitted in connection with plaintiffs' response to defendants' summary judgment motion, asserted she continued to consider

Dr. Zyniewicz her dermatologist, Rose's deposition testimony stated she never returned to Dr. Zyniewicz for further treatment after August 2007 and did not intend to do so.

{¶28} "[A]n affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, paragraph three of the syllabus. Rose's affidavit directly contradicts her earlier deposition testimony, and Rose posits no explanation for the discrepancy. The trial court properly concluded the affidavit could not undermine her deposition testimony that demonstrated the physician-patient relationship terminated in August 2007. As a result, the complaint is untimely under the discovery rule. Even if the trial court could modify its original judgment by means of a denied Civ.R. 60(B) motion, the trial court's modification substantively was correct. Plaintiffs' second assignment of error is overruled.

VI. Disposition

{¶29} In the final analysis, the trial court's original judgment was final and was not appealed. Although the trial court erred in treating plaintiffs' motion to vacate as a motion for reconsideration, plaintiffs suffered no prejudice, as their motion to vacate lacked merit both procedurally and substantively. Having overruled plaintiffs' two assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
