

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Richard Carter, Individually	:	
and as Administrator of the	:	
Estate of Lisa Carter,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-1037
	:	(C.P.C. No. 09CV-11775)
Thomas F. Vivyan, Esq. et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on August 14, 2012

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*Law Offices of Daniel R. Mordarski LLC, Daniel R. Mordarski and Paige C. Buffington, for appellant.*

*Thomas F. Vivyan, Esq., pro se.*

*Lane, Alton & Horst, LLC, Rick E. Marsh and Edward G. Hubbard, for appellee Scott Schiff & Associates Co. LPA.*

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APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶1} Plaintiff-appellant, Richard Carter, individually and as the administrator of the estate of Lisa Carter, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment to defendants-appellees, Scott W. Schiff & Associates ("Schiff") and Thomas F. Vivyan ("Vivyan"). Plaintiff assigns a single error:

THE TRIAL COURT ERRED BY DETERMINING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND THAT DEFENDANTS

WERE ENTITLED TO JUDGMENT AS A  
MATTER OF LAW

Because plaintiff submitted sufficient evidence in response to defendants' summary judgment motions to demonstrate a genuine issue of material fact regarding the proximate cause of Lisa Carter's injury, we reverse.

**I. Facts and Procedural History**

{¶2} Plaintiff filed a complaint against defendants on August 6, 2009 seeking damages as a result of defendants' alleged legal malpractice. Plaintiff's complaint explained that plaintiff hired defendants in April 2006 to represent him in a lawsuit regarding injuries his wife, Lisa Carter, sustained while under the care of home healthcare nurses. Approximately two years after taking the case, defendants filed a complaint against the nurses and their employer CareStar, Inc. ("CareStar"), alleging negligence and loss of consortium against the nurses, and respondeat superior against CareStar. The trial court granted summary judgment to the nurses and CareStar, concluding the case involved a medical malpractice claim filed outside the applicable statute of limitations.

{¶3} In the legal malpractice action, plaintiff alleged defendants breached the applicable standard of care for a legal professional by failing to plead and prosecute plaintiff's claims within the applicable statute of limitations. Following defendants' answers to the complaint, Schiff filed a Civ.R. 56(C) motion for summary judgment on April 14, 2011. Schiff alleged it was entitled to summary judgment in the legal malpractice action because plaintiff could not establish the proximate cause of Lisa's injuries and thus would not have prevailed in the underlying medical malpractice action. Schiff supported its summary judgment motion with citations to plaintiff's deposition testimony and an affidavit from Schiff's attorney that incorporated by reference a CareStar/Ohio Department of Job and Family Services ("ODJFS") Referral Summary Sheet plaintiff produced during discovery.

{¶4} According to that evidence, Lisa suffered from end-stage multiple sclerosis in March 2006. As a result of her condition, Lisa was immobile and non-verbal, needing both a feeding tube and a tracheotomy. Lisa required total care, provided through CareStar pursuant to CareStar's contract with ODJFS. Lisa received the necessary aid

from two CareStar licensed practical nurses: Nurse Littlejohn cared for Lisa from 7 a.m. until 4 p.m. and Nurse Alagbe cared for her from 4 p.m. until 11 p.m. Plaintiff filled in the remaining hours by caring for his wife from 11 p.m. until 7 a.m. The nurses' duties included giving Lisa her medications, feeding her through her tube, and physically turning her over in order to change the dressings on her ulcers.

{¶5} On March 22, 2006, plaintiff received a call from Nurse Alagbe as she began her shift, informing plaintiff that something was wrong with Lisa's arm. Plaintiff called an ambulance to have Lisa transported to the hospital, where doctors determined she had fractured the bone in her arm. A doctor at the hospital informed plaintiff that although the contractures, or tensed muscles, in Lisa's arm "may have caused some of the resistance," the break required a "significant force swinging that arm away." (Vivyan's Motion for leave to file Motion for Summary Judgment, exhibit B, Carter Deposition, at 41.)

{¶6} Both nurses denied engaging in any activity that could have caused Lisa's arm to break, and plaintiff did not know who of the two broke his wife's arm. Lisa's orthopedic physician indicated in the CareStar Referral Summary Sheet that he could not identify whether the fracture occurred as the result of negligence. The report concluded that, although the cause of the fracture was unknown, it likely "occurred during routine repositioning." (Vivyan's Motion for leave to file Motion for Summary Judgment, exhibit No. 1, CareStar Report.) On such facts, Schiff alleged plaintiff could not "establish a genuine issue of material fact as to the proximate cause of Lisa's injury" and, accordingly, could not "prevail on the causation element of his legal malpractice claim." (Schiff's Motion for Summary Judgment.)

{¶7} Plaintiff filed a memorandum opposing Schiff's summary judgment motion, asserting he could prove that one of the nurses proximately and negligently caused Lisa's injury. Plaintiff supported the memorandum with plaintiff's affidavit and the affidavit of Keith A. Hollingsworth, M.D., a licensed physician practicing as an orthopedic surgeon. Dr. Hollingsworth explained that he reviewed the emergency room records concerning Lisa's March 22, 2006 injury and determined the fracture was "consistent with a twisting type injury to the right upper extremity with a concurrent axial loading." (Carter Memorandum in Opposition, exhibit B, Hollingsworth affidavit.)

Dr. Hollingsworth opined that, since Lisa was non-ambulatory and the fracture required a significant load placed on her arm, the injury would have resulted from Lisa's falling or being dropped onto her arm. Dr. Hollingsworth explained that a caregiver would have known when the fracture occurred, as "this type of fracture typically involves significant auditory clues, i.e. a loud snap," and "the right upper extremity would have been in a significantly externally rotated position after the injury." (Hollingsworth affidavit.)

{¶8} Schiff filed a reply to plaintiff's memorandum, noting plaintiff failed to submit evidence of negligence, as neither Carter nor Dr. Hollingsworth were qualified to offer expert testimony regarding the prevailing standard of care for nurses. Schiff asserted that, in the absence of any evidence of negligence, plaintiff could not prevail on his legal malpractice claim.

{¶9} The trial court filed a decision and entry granting Schiff's motion for summary judgment on June 15, 2011. The court noted that, in order to succeed in his legal malpractice action, plaintiff was "required to prove, by a preponderance of the evidence, that, but for the defendant's alleged negligence, the plaintiff would have prevailed in the previous claim." (Decision and Entry.) The court addressed the parties' evidence, observing that while Schiff's evidence demonstrated the cause of the fracture was unknown, and plaintiff's evidence indicated the fracture was the result of a fall, no one submitted "evidence that the injury was caused by negligence." (Decision and Entry.) The court concluded that because "plaintiff [could not] prevail on the causation element of its medical malpractice claim, it [could not] prevail on its legal malpractice claim." (Decision and Entry.)

{¶10} Defendant Vivyan filed a motion for summary judgment on October 24, 2011 alleging that, since Vivyan was in the same position as Schiff, Schiff's summary judgment motion should pertain to Vivyan as well. The trial court issued a judgment entry granting Vivyan's summary judgment motion, incorporating the findings of fact and conclusions of law from its June 15, 2011 decision, and certifying the entry as a final appealable order.

{¶11} Plaintiff appeals, contending the trial court erred in concluding no genuine issue of material fact exists for trial regarding the proximate cause of Lisa's injury.

## II. Standard of Review and Applicable Law

{¶12} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). 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).

{¶13} 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 identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421 (1997). Once the moving party discharges its initial burden, summary judgment is appropriate 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. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E). *See also Castrataro v. Urban*, 10th Dist. No. 99AP-219, (Mar. 7, 2000).

{¶14} To prevail on a claim for legal malpractice based upon negligent representation, a plaintiff must establish that: (1) the attorney owed a duty or obligation to the plaintiff; (2) the attorney breached the obligation and failed to conform to the requisite standard; and (3) the conduct complained of is causally connected to the resulting damage or loss. *Vahila* at syllabus. The failure of a party asserting a legal malpractice claim to establish any one of the three elements entitles the opposing party to summary judgment. *Katz v. Fusco*, 10th Dist. No. 97APE06-846 (Dec. 9, 1997).

{¶15} Where a plaintiff files a legal malpractice action premised on an attorney's failure to file an action within the applicable statute of limitations period, the plaintiff must establish that, but for the attorney's negligence, the plaintiff would have succeeded on the "case within a case." See *Young-Hatten v. Taylor*, 10th Dist. No. 08AP-511, 2009-Ohio-1185, ¶ 27 (interpreting the Supreme Court's summary reversal of *Neighbors v. Ellis*, 12th Dist. No. CA2007-05-125, 2008-Ohio-2110 in *Neighbors v. Ellis*, 120 Ohio St.3d 276, 2008-Ohio-6105, ¶ 2, on the authority of *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, to mean the court "would not accept appellants' proposition that a 'lost opportunity' case should be subject to a different standard of proof of causation and damages than a 'better result' case"). *Young-Hatten* at ¶ 26. Thus, to succeed on his legal malpractice action, plaintiff was required to establish that he would have prevailed on the underlying medical malpractice action.

{¶16} To succeed on a medical malpractice claim, a plaintiff must establish the following: (1) the standard of care within the medical community; (2) the defendant's breach of that standard of care; and (3) proximate cause between the breach and the plaintiff's injuries. *Korrekt v. Ohio Health*, 10th Dist. No. 10AP-819, 2011-Ohio-3082, ¶ 11, citing *Adams v. Kurz*, 10th Dist. No. 09AP-1081, 2010-Ohio-2776, ¶ 11; *Williams v. Lo*, 10th Dist. No. 07AP-949, 2008-Ohio-2804, ¶ 11. Because nurses are persons of superior knowledge and skill, nurses must employ that degree of care and skill that a nurse of ordinary care, skill and diligence would employ in the same or similar circumstances. *Berdyck v. Shinde*, 66 Ohio St.3d 573 (1993), paragraph three of the syllabus. "In a negligence action involving the professional skill and judgment of a nurse, expert testimony must be presented to establish the prevailing standard of care, a breach of that standard, and that the nurse's negligence, if any, was the proximate cause of the patient's injury." *Ramage v. Cent. Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97 (1992), paragraph one of the syllabus. See also *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131-32 (1976).

### **III. Evidentiary Issues**

{¶17} Plaintiff's assigned error initially contends the trial court erred in relying on the CareStar report defendants submitted with their motions, as the report is not a

document listed in Civ.R. 56(C), was unauthenticated, constituted inadmissible hearsay, and amounted to non-expert medical opinion testimony. Plaintiff, however, raises his concerns regarding the CareStar report for the first time on appeal. Where "a party does not object in the trial court to the introduction of evidence submitted in support of, or in opposition to, a motion for summary judgment, that party waives any error and, thus, cannot raise such error on appeal." *Timberlake v. Jennings*, 10th Dist. No. 04AP-462, 2005-Ohio-2634, ¶ 14-15, citing *Dick v. Columbus Athenaeum, Ltd.*, 10th Dist. No. 00AP-121 (Dec. 5, 2000); *Churchwell v. Red Roof Inns, Inc.*, 10th Dist. No. 97APE08-1125 (Mar. 24, 1998) (refusing to consider plaintiff's objections to an unauthenticated police accident report attached to defendant's summary judgment motion where plaintiff raised her objections for the first time on appeal).

{¶18} Plaintiff's failure to object to the CareStar report in the trial court waived, or forfeited, any objection plaintiff may have had regarding the document. The trial court did not err in considering the document.

#### **IV. Summary Judgment – Issues of Fact and Proximate Cause**

{¶19} Plaintiff next contends the trial court erred in granting defendants' summary judgment motion, because the evidence attached to plaintiff's memorandum opposing those motions demonstrated a genuine issue of material fact regarding the proximate cause of Lisa's injury. According to plaintiff, the trial court incorrectly weighed the evidence instead of viewing the evidence in a light most favorable to plaintiff. See *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 121 (1980), quoting *Nader v. de Toledano*, 408 A.2d 31, 50 (D.C.App.1979) (noting that when a trial court rules on a motion for summary judgment, the court "may not weigh the proof or choose among reasonable inferences" but is limited "to examining the evidence 'taking all permissible inferences and resolving questions of credibility in plaintiff's favor' ").

{¶20} The evidence before the trial court, viewed in a light most favorable to plaintiff, demonstrates Lisa was a quadriplegic and completely dependant on the assistance of others. Plaintiff, Nurse Littlejohn, and Nurse Alagbe provided for all of Lisa's needs, which included rolling Lisa on her side to clean her dressings and prevent bed sores. Dr. Hollingsworth explained that because Lisa was non-ambulatory, she could not possibly have caused the injury herself. Rather, Dr. Hollingsworth stated,

Lisa's fracture "had both a rotational and a loading type component to it," meaning there must have been a "significant load placed on the arm to cause this type of fracture." (Hollingsworth affidavit.) Dr. Hollingsworth thus opined that the injury was consistent with Lisa's falling or being dropped onto her arm. Plaintiff averred that at no time on March 22, 2006 or any time prior did he "ever do anything to Lisa that could have twisted her arm or caused injury to her arm." (Carter Memorandum in Opposition, exhibit A, Carter Affidavit.)

{¶21} Based on these facts, a reasonable juror could conclude that either Nurse Littlejohn or Nurse Alagbe proximately caused Lisa's injury. When a dispute concerns who "is the correct party responsible for the negligence," the record demonstrates an "issue of credibility that must be decided by the jury." *Eannottie v. Carriage Inn of Steubenville*, 155 Ohio App.3d 57, 2003-Ohio-5310, ¶ 17, 40 (7th Dist.) (determining that "reasonable minds could find that the Trinity nurses were responsible for placing and leaving the sponge inside Eannottie" during their care of Eannottie even though Eannottie could not establish which of the nurses left the sponge in her wound).

{¶22} Although defendants admit Dr. Hollingsworth's affidavit constitutes "some evidence that one of the two nurses was interacting with Ms. Carter when the injury occurred," defendants contend that evidence of such interaction does not amount to evidence of negligence, or a breach of the standard of care. (Appellee's brief, at 10.) Defendants assert they specifically argued in their reply to plaintiff's memorandum opposing their summary judgment motions that plaintiff failed to submit either expert testimony regarding the prevailing standard of care for nurses or evidence a breach of the standard resulted in Lisa's injury. Neither Dr. Hollingsworth's nor Carter's affidavits contain expert testimony regarding the applicable standard of care or breach.

{¶23} Not until their reply memoranda supporting their summary judgment motions did defendants raise plaintiff's failure to submit evidence regarding the standard of care and breach of that standard; they moved for summary judgment solely on the issue of causation. A party seeking summary judgment "must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (1988), syllabus.

{¶24} A court commits reversible error in awarding " 'summary judgment on grounds not specified in the motion for summary judgment.' " *State ex rel. Sawicki v. Ct. of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, ¶ 27, quoting *Patterson v. Ahmed*, 176 Ohio App.3d 596, 2008-Ohio-362, ¶ 14 (6th Dist.) (concluding an appellate court that relies on an unargued summary-judgment ground "denie[s] the judicial appellants a meaningful opportunity to respond"). *See also Butler v. Harper*, 9th Dist. No. 21051, 2002-Ohio-5029, ¶ 28 (deciding that where the defendant moved for summary judgment alleging the plaintiffs could not establish the causation element of their medical malpractice claim, the trial court erred in granting summary judgment in favor of defendant on the basis that plaintiffs failed to establish the requisite standard of care, as plaintiffs were not put on notice that they needed to present evidence regarding the standard of care); *Functional Furnishings, Inc. v. White*, 10th Dist. No. 06AP-614, 2007-Ohio-3284, ¶ 13 (concluding that because "the issue of reformation on the basis of a mutual or unilateral mistake was never raised in the motion for summary judgment, nor addressed by the parties in their supporting briefs and materials," the plaintiff was never put on notice of the "need to address theories of mutual or unilateral mistake, nor afforded the opportunity to present evidence on those issues").

{¶25} Because defendants' motions for summary judgment raised only the issue of proximate cause, plaintiff understandably responded to the motion with evidence demonstrating that one of the two nurses proximately caused Lisa's injury. Similarly, because defendants did not argue the standard of care or breach of it in their motion for summary judgment, plaintiff did not incur a reciprocal burden to submit evidence establishing the standard of care or its breach in responding to defendants' motions. By raising for the first time in their reply memorandum the argument about expert testimony to establish the standard of care, defendants did not afford plaintiff a meaningful opportunity to respond to their standard of care argument. *See Ware v. King*, 187 Ohio App.3d 291, 2010-Ohio-1637, ¶ 18 (3rd Dist.) (concluding that "[b]ecause appellees asserted the argument regarding lack of evidence of recklessness for the first time in their reply to appellants' memorandum contra, appellants were not afforded a 'meaningful opportunity to respond' to that specific argument"); *Buren v. Karrington Health, Inc.*, 10th Dist. No. 00AP-1414 (Jan. 17, 2002) (determining that

"defendants' failure to address plaintiff's retaliation claim until they filed their reply memoranda in support of their motions for summary judgment plainly left plaintiff without the ability to respond to defendants' new argument").

{¶26} Moreover, even if defendants had raised the standard of care issue in their motions for summary judgment, they failed to support it with affidavits of experts who opined about the standard of care and the nurses' compliance with it. Rather, defendants commented, without supporting evidence, that even if the court were to assume, for summary judgment purposes only, one of the nurses caused the injury, "there is still no evidence that the injury was caused by negligence." (Schiff's Motion for Summary Judgment.) Relying on the CareStar report, defendants stated it was "plausible that the injury occurred in the normal course of following the proper protocol for the patient." (Schiff's Motion for Summary Judgment.)

{¶27} Such bare assertions do not specifically delineate an argument regarding the applicable standard of care or its breach; nor are they supported with the opinion of one qualified to render an opinion on the matter. Instead, they amount to a comment that plaintiff cannot carry his burden of proof, an assertion that does not meet defendants' burden in summary judgment and therefore does not pass onto plaintiff the reciprocal burden to meet defendants' evidence with his own expert evidence. *See Patterson* at ¶ 16 (noting "[a] passing allusion to a contested element is not sufficient to delineate it with specificity as the basis for a motion for summary judgment"); *Castrataro*, *supra*.

{¶28} In the final analysis, defendants premised their motion for summary judgment on plaintiff's inability to establish who proximately caused Lisa's injury. Plaintiff responded to the motion with evidence establishing that one of the two nurses caused the injury. The trial court accordingly erred in granting defendants' motion for summary judgment. Although at trial plaintiff will bear the burden of demonstrating that he would have been successful on each element of the underlying medical malpractice action, plaintiff, in responding to defendants' motion for summary judgment, needed only to present evidence demonstrating a genuine issue of material fact regarding the proximate cause of Lisa's injury. Because he did, the trial court erred in granting summary judgment.

{¶29} For the reasons stated, we sustain plaintiff's single assignment of error.

**V. Disposition**

{¶30} Having sustained plaintiff's assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand this case for further proceedings consistent with this decision.

*Judgment reversed, and case remanded.*

KLATT and TYACK, JJ., concur

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