In the Court of Common Pleas
Cuyahoga County, Ohio

KAREN DOBY-ROBINSON, Plaintiff, v. KAISER PERMANENTE FOUNDATION HEALTH PLAN OF OHIO, et al. Defendants	)	CASE NO. CV 10 741493 JUDGE PAMELA A. BARKER **Journal Entry**: Decision and Order on Motion for Summary Judgment

Defendants Kaiser Foundation Health Plan of Ohio, Ohio Permanent Medical Group ("OPMG"), Delilah Armstrong, M.D., Alexander Jakubowycz, M.D., and James Tagliabue, M.D., ask this Court to grant summary judgment in their favor on Plaintiffs Karen Doby-Robinson's and Samuel Robinson's medical claims. Mrs. Robinson claims that the physicians failed to timely diagnose and treat a fractured heel, and Mr. Robinson seeks damages for the loss of consortium.

Defendants collectively argue that, because the one-year limitations period in R.C. 2305.113(A) lapsed, Defendants cannot be held vicariously or directly liable for Plaintiffs alleged medical claims. This Court agrees. For the reasons that follow, this Court grants summary judgment in Defendants' favor.

Facts

Mrs. Robinson sustained an injury to her heel on May 9, 2007. (Compl., ¶10; see MSJ, Exs. C (responses to Dr. Armstrong's combined discovery requests), D (responses to Dr. Jakubowycz's combined discovery requests), and E (responses to Dr. Tagliabue's combined discovery requests)). She sought treatment from Dr. Tagliabue, who purportedly misread Mrs. Robinson's x-rays on May 10, 2007. (Ex. E, pp. 2-3.) She admits that May 10, 2007 was last time Dr. Tagliabue provided medical treatment for her heel injury. (Ex. E, pp. 2-3.) Mrs. Robinson also received treatment from Dr. Jakubowycz who, like Dr. Tagliabue, allegedly failed to diagnose a fractured heel. (Ex. D., p. 3.) She identifies May 17, 2007 as the last day she received treatment from Dr. Jakubowycz. (Ex. D., p. 3.)

When the pain in her heel did not subside, Mrs. Robinson sought treatment from a Kaiser podiatrist named "Dr. Hardy" who, in August, September, or October 2007, "finally . . . diagnosed [her] fractured foot." (Ex. C., p. 3; Ex. F (responses to Kaiser and OPMG's combined discovery requests), p. 5.) Seven to nine months after receiving the diagnosis from Dr. Hardy, she started treating with Dr. Armstrong on May 10, 2008, treating intermittently until November 10, 2008, when the patient-physician relationship ended. (Ex. C, p. 2.)

On May 17, 2010, Plaintiffs filed suit against Kaiser and OPMG only. The clerk assigned the matter to this Court's predecessor's docket as Case No. 726860. See *Industrial Risk Insurers v. Lorenz Equipment Co.,* 69 Ohio St.3d 576, 580, 1994-Ohio-442, 635 N.E.2d 14 ("[A] trial court may take judicial notice of its own docket."). The corporate defendants filed a motion to dismiss, which the judge granted on June 24, 2010. The docket does not identify the reason for the dismissal, nor does it indicate whether the dismissal was with or without prejudice.[1]

A few months after the dismissal, Plaintiffs filed the present action on November 16, 2010. The face of the Plaintiffs' complaint and the designation form contained in the file state that this present action is the "re-filed" Case No. 726860. This time, however, the Plaintiffs added Drs. Armstrong, Jakubowycz, and Tagliabue as defendants and alleged that these physicians were OPMG agents or employees.[2] (Compl., ¶¶ 4-9.)

Arguments

Defendants argue that the one-year limitations period for medical-malpractice claims against Drs. Armstrong, Jakubowycz, and Tagliabue expired long before November 16, 2010, so the medical claims against them are barred. Kaiser and OPMG further argue they cannot be held vicariously liable for medical malpractice unless the doctors are liable.

Plaintiffs contend, however, that the physician-patient relationship did not terminate until January 16, 2009, when Mrs. Robinson was scheduled for an appointment with Dr. Hardy, or possibly March 25, 2010, when Dr. Hardy apparently

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[1] See *Cairns v. Ohio Sav. Bank* (1996), 109 Ohio App.3d 644, 650-651, 672 N.E. 2d 1058.

[2] See Children's Hosp. v. Ohio Dept. of Public Welfare (1982), 69 Ohio St.2d 523, 433 N.E.2d 187, paragraph one of the syllabus (holding that savings statute applies only where actions are substantially the same); id. at 525 ("[A]ctions are not substantially the same, however, when the parties in the original action and those in the new action are different.").

closed Mrs. Robinson's file. Plaintiffs also argue that, because they served Kaiser and OPMG with a 180-day letter on January 5, 2010, the limitations period against the defendants did not lapse. (See Ex. F, p. 4 & attached correspondence.) Plaintiffs also apparently argue that Kaiser and OPMG can be held independently liable for medical malpractice of one employee or associate where continuing care is rendered by other employees of the same entity, even if the limitations period runs as to the negligent employee.

Law and Opinion

A medical claim must "be commenced within one year after the cause of action accrued." R.C. 2305.113(A); see R.C. 2305.113(E)(3)(a) (describing a "medical claim" to include derivative claims arising from medical diagnosis, care, or treatment). The one-year limitations period begins to run "(a) when the patient discovers or, in the exercise of reasonable care and diligence should have discovered, the resulting injury, or (b) when the physician-patient relationship for that condition terminates, whichever occurs later." *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 512 N.E.2d 337, paragraph one of the syllabus.

Construing the Plaintiffs' discovery responses in their favor, no genuine issue of material fact exists as to when the one-year period began to run as to Drs. Jakubowycz and Tagliabue: October 2007, at the latest, when Dr. Hardy diagnosed Mrs. Robinson with a fractured heel. Dr. Hardy's diagnosis was the "cognizable event" that alerted her to (what she claims is) the dispositive fact of medical negligence (i.e., Drs. Jakubowycz and Tagliabue may have failed to render a correct diagnosis in May 2007). *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 538 N.E.2d 93, syllabus. Thus, Plaintiffs' medical claims against these two doctors, filed more than two years after the limitations period expired, are barred as a matter of law. R.C. 2305.03(A).

With regard to Dr. Armstrong, Plaintiffs contend that "[t]he failure to diagnose caused delay in treatment causing further significant and more extensive treatment." (Ex. C, p. 6.) Dr. Hardy, however, already had diagnosed Mrs. Robinson with a fractured heel about seven to nine months before she sought "intermittent treatment" from Dr. Armstrong. If, indeed, Dr. Armstrong could be held liable for either Dr. Tagliabue's or Dr. Jakubowycz's purported failure to diagnose Mrs. Robinson's fractured heel, Plaintiffs had one year from the last date of treatment – November 10, 2008 – within which to file a medical claim. (Ex. C, p. 6.) See *Frysinger*, supra. Because Plaintiffs did not file their medical claims against Dr. Armstrong until November 2010, one year after the limitations period expired, the medical claims against Dr. Armstrong are barred as a matter of law. R.C. 2305.03(A).

Because the medical claims against Drs. Armstrong, Jakubowycz, and Tagliabue are barred, Kaiser and OPMG cannot be held vicariously liable for Plaintiffs' medical claims. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 720, ¶20; accord *Hignite v. Glick, Layman & Assoc., Inc.*, 8th Dist. No. 95782, 2011-Ohio-1698, ¶10-13, discussing *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio- 3601, 913 N.E.2d 939. Thus, Kaiser and OPMG are entitled to judgment in their favor as a matter of law.

Finally, this Court cannot agree with Plaintiffs' position that Mrs. Robinson's treatment with Dr. Hardy, whose diagnosis apprised her of Drs. Jakubowski and Tagliabue's purported misdiagnosis, extends the accrual date of Plaintiffs' medical claims. If a patient, who has actual knowledge that her present malady is related to an improper diagnosis, can extend R.C. 2305.113(A)'s limitation period simply by engaging ongoing treatment for that malady with a non-negligent physician employed by the same medical provider, then this Court would be rendering null longstanding decisions that specifically identify the accrual date of a medical claim. This Court will not depart from those cases, nor will it formulate an exception for those situations where all of the patient's physicians who treated the particular malady are employed by or agents of the same medical provider. See, e.g., *Allenus*, supra; *Frysinger*, supra; *Wuerth*, supra.

Order

Defendants Kaiser Foundation Health Plan of Ohio, Ohio Permanent Medical Group ("OPMG"), Delilah Armstrong, M.D., Alexander Jakubowycz, M.D., and James Tagliabue, M.D.'s motion for summary judgment is granted.

FINAL.

Costs to Plaintiffs.

Pamela A. Barker

Judge Pamela A. Barker

Date: 10-5-11

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GERALD E. FUERST, CLERK

BY _____ DEP.