

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

<p>KELLY POLASKO, Administratrix of the Estate of JOHN EDWARD LEEDS</p> <p style="text-align: center;">Plaintiff</p> <p>v.</p> <p>PARMA COMMUNITY GENERAL HOSPITAL, et al.</p> <p style="text-align: center;">Defendants</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>CASE NO. CV 12 795207</p> <p>JUDGE PAMELA A. BARKER</p> <p><u>OPINION AND JOURNAL ENTRY</u></p>
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This matter is before the Court on the Motions For Judgment On The Pleadings filed on March 27, 2013, March 28, 2013, March 29, 2013 and April 3, 2013, respectively, by Defendants Mirela Rossi, M.D. and Mirela Rossi, MD. L.L.C. (hereinafter "Rossi defendants") , Defendants Ronald P. Flauto, D.O. and Comprehensive Kidney Care, Inc., Defendant LLC, DBA Regency Hospital Of Cleveland West, and Defendants Belai Damtew, M.D., Vincent J. Bertin, M.D., Vincent J. Bertin, M.D., Inc. and Julie A. Davian, P.A.; the Motions To Dismiss filed on March 27, 2013, March 28, 2013, March 29, 2013 and April 1, 2013, respectively, by Defendants' Salvatore Sidoti, D.P.M., Inc. and Salvatore Sidoti, D.P.M., Defendant Habib Khoury, M.D., Defendants Northeast Surgical Wound Care, Inc., Mary Elchlinger, R.N., M.S.N., C.N.P., C.W.S., and Tina McNall, R.N., M.S.N., C.N.P., Defendant Geriatric Nurse Practitioners, Inc., Defendant Medina Operations, LLC d/b/a Life Care Center Of Medina, and Defendant Parma Community General Hospital;¹ and Plaintiffs' Briefs In Opposition thereto filed on April 15, 2013.

¹ The court acknowledges that in *Fletcher v. Univ. Hosps. Of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, at ¶11 of the Syllabus, the Ohio Supreme Court held: "The proper response to the failure to file the affidavit

In their Motions these Defendants argue that the single Affidavit of Merit authored by Leonard S. Williams, M.C., P.A.² is insufficient under Civ. R. 10(D)(2)³ because: 1.) in it Dr. Williams failed to specifically state who or which of the defendants breached the applicable standard of care, and in all but two of the Motions *Woods v. Riverside Methodist Hosp.*, 10th Dist. No. 11AP-689, 2012 Ohio 3139 is cited and relied upon to support this argument; and 2.) because the Affidavit does not establish that Dr. Williams is competent and qualified pursuant to Evidence Rules 601(D) and 702 to render opinions against these Defendants.⁴

required by Civ.R. 10(D)(2) is a motion to dismiss pursuant to Civ.R. 12(B)(6). However, Plaintiffs did not fail to file an Affidavit of Merit. Indeed, in their Motions to Dismiss under Civ.R. 12(B)(6), these defendants seek dismissal based upon what they argue is an insufficient or inadequate Affidavit of Merit. The court notes that these defendants filed Answers in this action, thereby closing the pleadings. "A motion to dismiss filed after the pleadings have closed *** is appropriately considered a motion for judgment on the pleadings pursuant to Civ.R. 12(C)." *State ex rel. Midwest Pride IV v. Pontious* (1996), 75 Ohio St.3d 565, 569, 1996 Ohio 459, 664 N.E.2d 931, quoting *Lin v. Gatehouse Constr. Co.* (1992), 84 Ohio App.3d 96, 99, 616 N.E.2d 519. As the court did in *Bonkowski v. Fairfield Medical Center*, 163 Ohio Misc.2d 21, ¶2, FN 1, 2011 Ohio 2777, 949 N.E.2d 606, this court, "[i]n the interests of justice," will so construe these defendants' Civ.R. 12(B)(6) motions.

² In his Affidavit, Dr. Williams avers that: he has "knowledge of the facts contained herein"; he is "a physician licensed to practice medicine in the state of Florida and devote[s] at least 50% of [his] professional time to the active clinical practice of medicine"; he "[has] reviewed all medical records of John Edward Leeds reasonably available to the Plaintiffs concerning the allegations contained in the complaint" he is "familiar with the applicable standard of care in treating patients like John Edward Leeds"; and "[b]ased on [his] review of the records, it is [his] opinion, that the standard of care was breached by the Defendants to this action, and that breach caused injury to John Edward Leeds". (Emphasis added.)

³ Civ.R. 10(D)(2)(a) requires "one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability"; and that the affidavit be provided by an expert witness and include "(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint; (ii) A statement that the affiant is familiar with the applicable standard of care; [and] (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff."

⁴ The Rossi defendants and defendant Geriatric Nurse Practitioners, Inc. ("GNP") also argue in support of their motions that the complaint does not allege that these defendants treated or rendered any care to Plaintiffs' decedent, Mr. Leeds, during his stay or hospitalization at Parma Community General Hospital ("PCGH"); and defendant GNP makes an additional argument that the complaint does not describe the care rendered by it. In Plaintiffs' Briefs in Opposition to these defendants' motions (and in their Briefs in Opposition to other defendants' motions although the other defendants had not made any such argument), Plaintiffs attached uncertified copies of medical records to attempt to demonstrate that they treated Mr. Leeds subsequent to his hospitalization at PCGH in May of 2011. In response, Plaintiffs also directed this Court to ¶¶ 10-12 of their complaint, where they allege that "[a]s a result of the pressure ulcers [developed prior to his discharge from PCGH on May 27, 2011 [sic]] Plaintiff's decedent became severely debilitated, requiring extensive medical treatment with all of the Defendants, which continued from May 2011 through March 2012"; and "[a]ll of the Defendants jointly and severally were negligent in their care and treatment of Plaintiff's decedent."

In Plaintiffs' Briefs in Opposition, Plaintiffs distinguish Dr. Williams' Affidavit of Merit from the Affidavit of Merit at issue in *Woods*⁵ and cite and rely upon *Bonkowski v. Fairfield Medical Center* (2011), 163 Ohio Misc. 2d 21, 24-26⁶ to support their argument that the single Affidavit of Merit of Dr. Williams is sufficient under Civ. R. 10(D)(2); and argue that Dr. Williams' averment that he is familiar with the requisite standard of care applicable to the Defendants, is sufficient at this stage of the litigation, especially since Defendants did not produce any evidence rebutting this averment.⁷

When considering a defendant's Civ.R. 12(C) motion for judgment on the pleadings, the trial court is required to construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party. *Whaley v. Franklin County Bd. Of Comm'rs*, (2001) 92 Ohio St.3d 574, 581, citing *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 165-166, 63 Ohio Op. 2d 262, 264, 297 N.E.2d 113, 117. In order to be entitled to a dismissal under Civ.R. 12(C), it must appear beyond doubt that plaintiffs can prove no set of facts warranting the requested relief, after construing all material factual allegations in the complaint and all reasonable inferences therefrom in the plaintiffs' favor. *State ex rel. Brantley v. Ghee* (1998), 83 Ohio St.3d 521, 522-523. *See, also*,

(Emphasis added.) Thus, the Complaint alleges negligent care and treatment by all defendants and resulting injury to Mr. Leeds.

⁵ In *Woods*, the Affidavit of the expert neurologist included the averment or statement that "the standard of care was breached by one or more of the Defendants to the action...." *Woods, supra*, at ¶10.

⁶ In *Bonkowski*, the Affidavit of expert obstetrician/gynecologist included the averment or statement that "the physicians and staff treating Tiffany Bonkowski at Fairfield Medical Center from November 26, 2009 through November 29, 2009, breached the standard of care and that breach caused injury to plaintiff." *Bonkowski, supra*, at ¶6.

⁷ Plaintiffs are correct in stating that none of the defendants submitted any evidence to support any argument that since Dr. Williams is purportedly board certified or an expert in geriatric medicine and internal medicine (and the court notes that Plaintiffs have not submitted any competent evidence to demonstrate Dr. Williams' area(s) of expertise), and the defendants' respective fields of expertise include internal medicine, nephrology, podiatry, plastic surgery, and nursing, Dr. Williams is not competent or qualified to render opinions regarding the standard(s) of care and any breach thereof.

State ex rel. Midwest Pride IV v. Pontious (1996), 75 Ohio St.3d 565, 570, 1996 Ohio 459, 664 N.E.2d 931.

Accordingly, this Court must construe as true all of the allegations in Plaintiffs' Complaint to include the allegations that: Mr. Leeds required extensive medical treatment with all of the Defendants, which continued from May 2011 through March 2012; that all of the Defendants jointly and severally were negligent in their care and treatment of Plaintiffs' decedent; and that as a direct and proximate result of the negligence of *all* Defendants, Plaintiffs sustained damages. This Court cannot and will not consider any assertions – whether or not supported by any documentation (as distinguished from evidence) presented – for purposes of ruling on Defendants' Motions.

The language in Dr. Williams' Affidavit opining "that the standard of care was breached by the Defendants to this action", and that "that breach caused injury to John Edward Leeds" is more akin to the language in the Affidavit at issue in *Bonkowski* in that it applies to all of the named defendants; and is distinguishable from the language in the Affidavit at issue in *Woods* which applied to one or more of the named defendants. Therefore, this Court finds *Bonkowski* to be persuasive authority for Plaintiffs' position that the Affidavit is sufficient under Civ.R. 10(D)(2).

The Court acknowledges that in *Bonkowski* the court noted that the defendants had not questioned the qualifications of the plaintiffs' expert that had authored the Affidavit. In their Motions, Defendants do argue that Dr. Williams is not competent and qualified to render opinions against them, and in support thereof, cite several Ohio cases. However, none of the cases cited by Defendants involve a court's determination of the competency or

qualifications of a medical expert in a malpractice case for purposes of determining the sufficiency of the Affidavit of Merit.

Defendants are seeking dismissal on the bare sufficiency of the pleadings. Looking only to the Complaint and Affidavit of Merit, this court cannot find that there is no set of facts upon which plaintiffs could prove they are entitled to relief against these Defendants.

Therefore, Defendants' Motions for Judgment on the Pleadings are **DENIED**.

IT IS SO ORDERED.

Pamela A. Barker 4-30-13
JUDGE PAMELA A. BARKER DATED

RECEIVED FOR FILING

APR 30 2013

CUYAHOGGA COUNTY
CLERK OF COURTS
By Ward Deputy