

87-LW-3252 (10th)

Andrew C. ROGERS, Jr., Plaintiff-Appellant,

v.

D.B. COLLINS, D.D.S., Defendant-Appellee.

No. 87 AP-386.

10th District Court of Appeals of Ohio, Franklin County.

Decided on September 24, 1987.

Appeal from the Franklin County Common Pleas Court.

Robert C. Paxton, II & Associates, Robert C. Paxton, II, and Walter W. Grelle, Jr., for appellant.

Porter, Wright, Morris & Arthur, Craig D. Barclay, and Kenneth S. Blumenthal, for appellee.

OPINION

BRYANT, Judge.

Plaintiff-appellant, Andrew C. Rogers, Jr., appeals from an order of the trial court granting summary judgment for the defendant-appellee, D.B. Collins, D.D.S. Plaintiff's sole assignment of error is that the trial court improperly granted summary judgment because this matter presents genuine issues of material fact.

Plaintiff was a patient of Dr. Collins from approximately February 1983 through February 1984. On December 27, 1983, he saw Dr. Collins for a routine visit, during which Dr. Collins ground plaintiff's bridge. Later that evening, plaintiff's jaw locked. He contacted Dr. Collins, who at a subsequent visit, attempted to rebuild plaintiff's bridge with enamel.

On February 7, 1984, plaintiff again saw Dr. Collins, who asked his partner, Dr. Mathias, to examine plaintiff. Dr. Mathias indicated that plaintiff's problem could have been caused by Dr. Collins' grinding plaintiff's bridge. Again, on February 13, 1984, plaintiff saw Dr. Mathias, who removed the enamel Dr. Collins had applied. Later that day, the problems and the pain worsened. Finally, on February 21, 1984, plaintiff phoned Dr. Collins who saw him later that day. Following treatment, plaintiff advised Dr. Collins:

"* * * I have no intention of paying you. You ground my bridge down and caused me all this grief and misery. * * *" (Plaintiff's affidavit, paragraph 13.)

Plaintiff never returned to Dr. Collins after that date, and felt his relationship with Dr. Collins had ended as of that time.

On March 14, 1985, plaintiff's counsel sent to defendant a "one hundred-eighty day letter," purportedly pursuant to R.C. 2305.11(A).¹ Plaintiff filed suit against Dr. Collins on July 17, 1985 alleging that he had sustained injury due to Dr. Collins' improper procedures, and further that the procedures were performed without plaintiff's informed consent.

Plaintiff then filed a motion for summary judgment against defendant. In support of his motion, plaintiff attached an affidavit, portions of which stated that during his office visit with Dr. Collins on February 21, 1984, plaintiff told Dr. Collins: "You ground my bridge down and caused me all this grief and misery." (Par. 13.) In response, defendant filed a motion for summary judgment, contending that the statute of limitations set forth in R.C. 2305.11(A) barred plaintiff's claims. In response to that motion, plaintiff filed another affidavit, stating that:

"2. [H]e did not know that Defendant's dental work could have caused his severe and excruciating pain, which he suffered for approximately one year after his last appointment with the defendant;

"4. That Affiant believed the cause for the pain and suffering was from arthritis, not from the dental problem created by Dr. Collins;

"5. That Affiant first learned of the causal connection between the pain he was suffering when, upon referral to Dr. Shankland, the connection was specifically identified.' (Paragraphs 2, 4, and 5.)

The trial court sustained defendant's motion for summary judgment, and determined that as a result, plaintiff's motion for summary judgment was moot. Plaintiff appeals from the trial court's granting defendant's motion for summary judgment.

Summary judgment should be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Moreover, construing the facts most strongly in favor of the nonmoving party, a summary judgment must not be rendered unless it appears from the evidence that reasonable minds could come to but one conclusion and that that conclusion is adverse to the nonmoving party. Civ. R. 56; Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317.

As to plaintiff's claim for medical malpractice, R.C. 2305.11(A) sets forth the statute of limitations applicable herein:

"An action for * * * malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, * * *."

Inasmuch as Ohio has adopted the discovery rule with respect to medical malpractice claims, Oliver v. Kaiser Community Health Found. (1983), 5 Ohio St. 3d 111, a cause of action is deemed to accrue when:

"* * * [T]he patient discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury.' Id. at 117-118.

See, also, Richards v. St. Thomas Hospital (1986), 24 Ohio St. 3d 27. Citing McKee v. Williams (1985), 23 Ohio App. 3d 187, plaintiff further contends that discovery includes not only the mere manifestation of a physical injury, but that plaintiff discovered the cause of the physical injury and the person responsible for it.

Applying plaintiff's contentions under McKee to the facts before us, we are confronted by conflicting affidavits. In his original affidavit, plaintiff clearly stated that as of February 21, 1984, he understood that he had sustained an injury, and that Dr. Collins' prior dental procedures had caused his "grief and misery." Apparently recognizing the impact of that statement in the context of defendant's motion for summary judgment, plaintiff filed a second affidavit claiming that he did not know of the causal connection between the pain he was suffering and Dr. Collins' dental procedures; and at no point in the second affidavit does plaintiff explain the obvious inconsistency between the statements contained in the two affidavits. Moreover, no ambiguity exists in either of the statements to permit the trial court to construe in plaintiff's favor any reasonable inferences which might be drawn to reconcile the inconsistency between the two affidavits. See McKee, supra, at 189.

In the final analysis, construing all of the evidence in favor of plaintiff, as we must for purposes of Civ. R. 56, we must conclude that plaintiff's conflicting affidavits are not sufficient to create a genuine issue of material fact. Moreover, given the obvious inconsistencies in the affidavits, with no attempts to reconcile the differing statements, reasonable minds can come to but one conclusion, and that is adverse to plaintiff: plaintiff is bound by the statements of his first affidavit and the unexplained inconsistencies between his affidavits.

By February 21, 1984, plaintiff was fully aware of his injury, the cause of the injury and the person responsible therefor: plaintiff's cause of action accrued on that date. Since plaintiff failed to properly initiate an action within the time limits set forth by R.C. 2305.11(A), his claim is barred by the statute of limitations set forth therein. Accordingly, we overrule plaintiff's assignment of error as to his cause of action for dental malpractice.

Plaintiff raises no assignment or error as to the lack of informed consent claim, and therefore we address none.

Plaintiff's assignment of error is overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

WHITESIDE and BOWMAN, JJ., concur.

Footnote 1 Given the facts herein, the parties have not addressed the effect, if any, of plaintiff's letter, and we do not decide that issue herein.