

86-LW-1200 (5th)

Christopher BRANT, a minor, et al., Plaintiffs-Appellants,

v.

ASHLAND SAMARITAN HOSPITAL, et al., Defendants-Appellees.

No. CA-855.
5th District Court of Appeals of Ohio, Ashland County.
Decided on April 18, 1986.

Civil Appeal from the Court of Common Pleas

Case No. 33027

Martin W. Williams, Toledo, Ohio, for plaintiffs-appellants.

David L. Herbert, Canton, Ohio, Philip Shafer, Ashland, Ohio, Craig D. Barclay, Columbus, Ohio, for defendants-appellees.

OPINION

PUTMAN, Presiding Judge.

There are two assigned errors in this summary judgment entered for all defendants, a hospital and several doctors, against a minor plaintiff and his parents for their consequential expense resulting from alleged malpractice damage to the minor plaintiff at birth. The assignments of error read:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS-APPELLANTS A CONTINUANCE OF TIME TO CONCLUDE THEIR DISCOVERY BEFORE RULING ON DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN SUSTAINING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT IN LIGHT OF THE EVIDENCE PRESENTED BY PLAINTIFFS-APPELLANTS ESTABLISHING GENUINE ISSUES OF MATERIAL FACT.

We overrule both assignments of error and affirm the judgment of the Court of Common Pleas. Our reasons follow.

I

The plaintiff was born April 18, 1983, and his action was filed January 28, 1985. The action was one in malpractice alleging damages for injuries to the plaintiff arising out of his birth and delivery on April 18, 1983. Plaintiffs filed requests for production of documents together with their complaint and these were promptly complied with. No further effort to conduct any discovery was filed by the plaintiffs. In February, 1985, defendant Ashland Samaritan Hospital, defendant Dr. Schafer, defendant Dr. Rigo, and defendant Dr. Irvine served interrogatories upon plaintiffs. Dr. Lee also served a set of interrogatories on plaintiffs on April 4, 1985. Plaintiffs failed to respond to any of the defendants' interrogatories within twenty-eight days of the service as required. On May 2, 1984, Drs. Schafer, Irvine, and Rigo filed motions asking the trial court to compel plaintiffs to answer their interrogatories. This was ordered on May 6, 1985. Also on May 21, 1985, the hospital moved for an order compelling plaintiffs to answer its interrogatories. The trial court scheduled an oral hearing on these motions to compel discovery on June 17, 1985. Plaintiffs failed to respond to interrogatories. Consequently, on June 12, 1985, Drs. Schafer, Irvine, and Rigo filed motions to dismiss the action pursuant to Civ.R. 37 based upon the

plaintiffs' failure to comply with the May 6, order directing plaintiffs to answer the interrogatories. A similar motion was filed by Dr. Lee on June 13. Plaintiffs responded to the defendants' interrogatories on Friday, June 14, one work day prior to the scheduled hearing date. The answers were unresponsive.

The trial court denied the defendants' motion to dismiss the action by entry July 3, 1985, and scheduled a September 23, 1985, pre-trial.

Drs. Schafer, Irvine, and Rigo moved for leave to file motions for summary judgment which were granted by the trial court on September 6, and these three defendants filed their respective motions for summary judgment September 13, 1985, supporting them with hospital records and the affidavits of each defendant. The trial court then continued the pre-trial conference and scheduled an oral hearing on these motions for October 18, 1985.

With leave of court, Dr. Lee filed a motion for summary judgment on October 9, 1985, supported by his affidavit and certain hospital records. On October 24, 1985, plaintiffs served their memorandum in opposition to the various motions for summary judgments and attached a memorandum and a copy of an unexecuted affidavit of a Dr. Giles. This affidavit was completed on October 28, 1985, the day of the oral hearing on the motion for summary judgment.

The essence of Dr. Giles' affidavit was that he needed more information before he could render an expert medical opinion. Upon that basis, the plaintiffs asked the trial court to grant a continuance so that the plaintiffs might pursue further discovery.

The trial court refused to grant the continuance and entered summary judgment for all defendants.

Considering that no attempt was made to initiate any discovery and that nine months had elapsed before the motion was filed for summary judgment, we find the trial court acted within its sound discretion in refusing to allow plaintiffs additional time. Accordingly, the first assignment of error is overruled.

II

The second assignment of error complains that the affidavits filed by the defendants are insufficient in fact to "support" their summary judgment motion within the meaning of Civ.R. 56.

We disagree.

The several affidavits recite the facts of the birth and conclude with the statement that the care afforded the patient was in accordance with the standard in the medical community. This was sufficient to place upon plaintiffs the duty to refute these factual assertions. It is not contended that the plaintiffs filed sufficient counter-affidavits. The sole point of the second assignment of error is that the defendants' evidentiary materials are claimed to be insufficient to trigger plaintiffs' duty to respond. We find them to be sufficient.

For the foregoing reasons, the second assignment of error is overruled. We have examined the cases and the briefs of the parties and find no support therein for the position of the appellants. The plaintiffs-appellants concede that they could not be sure that they had a case when they filed their complaint, but we consider their delay in initiating any further discovery for a period of nearly ten months until the summary judgment motion was filed, to be a sufficient basis to afford the trial court grounds in the exercise of its sound discretion for denying the continuance.

For the foregoing reasons, both assigned errors are overruled and the judgment of the Court of Common Pleas of Ashland County is affirmed.

MILLIGAN and TURPIN, JJ., concur.

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Ashland County, Ohio, is affirmed.

NORMAN J. PUTMAN, P.J.

JOHN R. MILLIGAN, J.

IRA G. TURPIN, J.