

87-LW-4471 (10th)

Marjorie ZORGER and Eugene Zorger, Plaintiffs-Appellants,

v.

OHIO STATE UNIVERSITY HOSPITAL et al., Defendants-Appellees.

No. 87AP-339.
10th District Court of Appeals of Ohio, Franklin County.
Decided on December 23, 1987.

Appeal from the Franklin County Common Pleas Court.

Christoff & Christoff, and William Z. Christoff, for appellants.

Anthony J. Celebrezze, Jr., Attorney General, Emens, Hurd, Kegler & Ritter, William J. Brown and Steven B. Ayers, special counsel to Attorney General for appellees State of Ohio and Ohio State University Hospital.

Lane, Alton & Horst, Theodore M. Munsell and John M. Alton, for appellees Cataland and Cerilli.

OPINION

BOWMAN, Judge.

On February 1, 1982 appellant, Marjorie Zorger, was admitted to Ohio State University Hospital for a parathyroidectomy. The surgery was performed on February 2, 1982 by Dr. Cerilli who removed three and one-half of appellant's four parathyroid glands. A clip was left at the end of the remaining one-half of the parathyroid gland so that the gland could be located in the event a future procedure was needed.

In March or April 1984, appellant discovered the clip when her chiropractor took x-rays of her neck. On March 26 or 27, 1985, appellant served appellees with notice of an action for medical malpractice. Appellant filed her complaint against appellees on September 11, 1985 alleging that appellees were negligent in leaving a clip in appellant's body following the surgery.

Appellees filed a motion for summary judgment on March 20, 1986. Appellant filed a memorandum in opposition to the motion wherein she alleged that her case turned on one issue, to wit: lack of informed consent. The court granted appellees' motion for summary judgment on the basis that appellant's memorandum contra did not contain any sworn, expert testimony to rebut appellees' experts' affidavits that no malpractice had occurred. In addition, the court found that appellant's reliance on lack of informed consent as her sole remaining contention was misplaced because the issue was not raised in the complaint or in any amended complaint of record.

Appellant now brings this appeal and asserts the following assignments of error:

"1. There is a genuine issue of fact as to whether plaintiff-appellant was informed of the risk of hypoparathyroidism and there is a genuine issue of fact as to whether if she had been informed of the risk of hypoparathyroidism whether she would have proceeded with the operation on February 2, 1982.

"2. The Statute of Limitations does not bar this action because the plaintiff-appellants did not discover that the risk of hypoparathyroidism was a complication to the operation performed February 2, 1982, until the later part of March or the early part of April 1984.

"3. The plaintiff-appellants' amended complaint contained an issue of lack of informed consent and the issue of lack of informed consent was never raised by defendant-appellees in their brief."

This court will address appellant's third assignment of error first as it is dispositive of the appeal. In the third assignment of error, appellant contends that the issue of lack of informed consent was properly before the court.

In her complaint, appellant alleged that appellees were negligent in leaving a clip in her body after surgery was performed. Appellant first referred to lack of informed consent as a possible issue in a memorandum filed April 4, 1986 entitled "MEMORANDUM IN OPPOSITION TO DEFENDANTS DR. CATALAND'S AND DR. CERILLI'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR CONTINUANCE PURSUANT TO OHIO CIVIL RULE 56(F)." In this memorandum, appellant alleges that she could not respond to appellees' motion for summary judgment until she took appellees' depositions. After the depositions were completed, and depending on appellees' testimony, appellant contended that she might have to amend her complaint pursuant to Civ.R. 15(A).

Civ.R. 15(A) states:

" * * * Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. * * * "

In Peterson v. Teodosio (1973), 34 Ohio St.2d 161, the court held that it was an abuse of discretion for a court to deny a timely filed motion seeking to amend a complaint. The court also stated that a liberal amendment policy is within the spirit of the civil rules which prefers a resolution of cases on their merits, and not on pleading deficiencies. See, also, Hambleton v. R.G. Barry Corp. (1984), 12 Ohio St.3d 179.

In the case at bar, appellant never amended her complaint to include the issue of lack of informed consent. Appellant did attempt to amend her complaint by filing the required motion to amend; however, the motion was not timely made since it was filed after the judgment entry was journalized.

In addition, after the judgment entry was filed, appellant could have requested relief pursuant to Civ.R. 60(B) as a means of bringing the issue of lack of informed consent before the trial court. However, appellant did not file a motion to this effect.

Because appellant never properly amended her complaint, nor asked for relief from judgment, the issue of lack of informed consent was never before the trial court. Accordingly, said issue is not before this court. Therefore, appellants' third assignment of error is overruled.

Appellant's first assignment of error alleges that a genuine issue of material fact exists as to whether appellant was informed of the risk of hypoparathyroidism and if she had been so informed, would she have elected to proceed with the surgery. Since the issue of lack of informed consent was not properly raised, as discussed in this court's disposition of the third assignment of error, there is no genuine issue of material fact for the court to address. Accordingly, the trial court's granting appellees' motion for summary judgment was proper, and appellant's first assignment of error is overruled.

In her second assignment of error, appellant alleges that the statute of limitations does not bar her cause of action. This court disagrees. In her affidavit, appellant stated she knew she had a calcium problem the day after surgery and that she had never been informed hypoparathyroidism was a risk of the surgery. Accordingly, the statute of limitations began to run at that time. See R.C. 2305.11(A) and Richards v. St. Thomas Hospital (1986), 24 Ohio St.3d 27. Therefore, appellant's second assignment of error is overruled.

Appellant's first, second and third assignments of error are hereby overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

WHITESIDE and BRYANT, JJ., concur.