

MAY 27 2011



COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

PATRICIA L. LUTZ,  
PLAINTIFF

CASE NO. A1100575

-vs-

JUDGE JEROME METZ, JR.

DR. MICHAEL J. COLUMBUS, ET AL.,  
DEFENDANTS.

ENTRY GRANTING DEFENDANTS'  
MOTION TO DISMISS AND MOTION TO  
DECLARE PLAINTIFF TO BE A  
VEXATIOUS LITIGATOR PURSUANT TO  
R.C. 2323.52

This matter came before the Court on Defendants Dr. Michael J. Columbus and the Plastic Surgery Group, Inc.'s Motion to Dismiss pursuant to Civ. R. 12(B)(6) and Motion to Declare Plaintiff to be a vexatious litigator pursuant to R.C. 2323.52. The Court has considered the briefs and the arguments from both sides, and for the reasons that follow, the Court hereby grants both Motions.

I. MOTION TO DISMISS STANDARD

A motion to dismiss is a procedural mechanism that tests the sufficiency of a complaint.<sup>1</sup> When deciding a motion to dismiss under Civ. R. 12(B)(6), the Court is confined to the allegations in the complaint and cannot consider outside materials.<sup>2</sup> In order for the Court "to grant a motion to dismiss for failure to state a claim, it must appear 'beyond doubt that the plaintiff can prove no set of facts in support of his claim

<sup>1</sup> *State ex rel. Hanson v. Guernsey Cty Bd. of Comm'rs* (1992), 65 Ohio St. 3d 545, 547.

<sup>2</sup> *Id.*

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which would entitle him to relief.”<sup>3</sup> When a motion to dismiss is filed, “all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.”<sup>4</sup>

## II. PLAINTIFF’S CLAIMS ARE MEDICAL CLAIMS UNDER O.R.C. § 2305.113

Plaintiff alleges numerous injuries and other problems to her body and mind as a result of a plastic surgery performed by Defendant Dr. Columbus of the Plastic Surgery Group.<sup>5</sup>

Under § 2305.113(E) of the Ohio Revised Code, this claim constitutes a medical claim. A medical claim is defined as:

...Any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility...and that arises out of the medical diagnosis, care, or treatment of any person. “Medical claim” includes the following:

- (a) Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person;
- (b) Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies:
  - (i) The claim results from acts or omissions in providing medical care.
  - (ii) The claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.<sup>6</sup>

In this case, Plaintiff alleges injuries resulting from a surgery performed by Defendant Dr. Columbus, a member of The Plastic Surgery Group, Inc. Plaintiff’s claims

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<sup>3</sup> *Byrd v. Faber* (1991), 57 Ohio St. 3d 56, 60, 565 N.E.2d 584, 589 (quoting *O’Brien v. Univ. Community Tenants Union* (1975, 42 Ohio St. 2d 242, 245, 71 O.O.2d 223, 224, 327 N.E.2d 753, 755).

<sup>4</sup> *Id.* at 60.

<sup>5</sup> See Plaintiff’s Complaint.

<sup>6</sup> R.C. 2305.113(E)(3).

fall squarely under section (b)(i), which allows recovery for acts or omissions of medical professionals in carrying out their duties. As such, they are medical claims and are subject to further procedural requirements.

**III. PLAINTIFF HAS FAILED TO FILE AN AFFIDAVIT OF MERIT PURSUANT TO CIV. R. 10(D)(2)**

Any complaint alleging a medical claim must be supported by an expert or experts to assure its merit before the case may proceed. Civil Rule 10 (D)(2) specifies that:

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. Affidavits of merit shall include all of the following:

- (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;
- (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.<sup>7</sup>

Evid. R. 601(D) allows medical professionals who are competent to testify under the Evidence Rules to "give expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person."<sup>8</sup>

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<sup>7</sup> Oh. Civ. R. 10(D)(2).

<sup>8</sup> Evid. R. 601(D).

In the present case, Plaintiff Lutz has failed to file an affidavit of merit for her claims against defendant. Thus, the purpose of an affidavit of merit, to establish the validity of the complaint and to “winnow out utterly frivolous claims...not to test the sufficiency of the plaintiff’s evidence on the ultimate issue of defendant’s liability,”<sup>9</sup> is not served, and there is nothing to establish the merit of Plaintiff’s claims. In fact, Ms. Lutz’s claims have been dismissed twice before for the same failure to file an affidavit of merit as required by Civ. R. 10(D)(2).<sup>10</sup>

**IV. PLAINTIFF DOES NOT HAVE A GOOD FAITH BASIS ON WHICH TO MAKE HER MEDICAL CLAIM**

Upon motion by a defendant, the Ohio Revised Code requires that the court conduct a hearing to determine whether plaintiff has a good faith basis for her claim against the moving defendant.<sup>11</sup> At this oral hearing, evidence and arguments are presented by the parties for the court’s consideration.<sup>12</sup> In examining this evidence, the court is to consider whether the plaintiff:

- (1) Obtained a reasonably timely review of the merits of the particular claim by a qualified medical, dental, optometric, or chiropractic expert, as appropriate;
- (2) Reasonably relied upon the results of that review in supporting the assertion of the particular claim;
- (3) Had an opportunity to conduct a pre-suit investigation or was afforded by the defendant full and timely discovery during litigation;

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<sup>9</sup> *Tranter v. Mercy Franciscan Hosp. Western Hills* (Ohio App. 1<sup>st</sup> Dist.), 2007-Ohio-5132, ¶12.

<sup>10</sup> See Judgment Entries in Case A1005958 and A1009899.

<sup>11</sup> R.C. § 2323.42(A).

<sup>12</sup> *Id.* at (B).

- (4) Reasonably relied upon evidence discovered during the course of litigation in support of the assertion of the claim in question;
- (5) Took appropriate and reasonable steps to timely dismiss any defendant on behalf of whom it was alleged or determined that no reasonable good faith basis existed for continued assertion of the claim in question.<sup>13</sup>

In the present case, the lack of an affidavit of merit is fatal to Plaintiff's claim. Without it, there is no evidence that Plaintiff obtained any review of her medical claims by an appropriate expert, and thus she could not have relied upon that review to support her claims. Without this support, and without any other evidence to support her claims, Plaintiff's claims lack the requisite good faith to proceed.

Further, Plaintiff's claims have been dismissed twice before, as indicated by the Certified Copies of the final judgment entries in Cases A1005958 and A1009899, both captioned Patricia Lutz v. Dr. Michael Columbus and the Plastic Surgery Group. Indeed Ms. Lutz says in her complaint that she "do[es] not want [her] law suit of January 2011 dismissed like [her] last two law suits."<sup>14</sup> Plaintiff has not established a good faith basis to file yet another law suit alleging the same facts that she alleged in two previous suits that have both been dismissed.

**V. PLAINTIFF IS A VEXATIOUS LITIGATOR UNDER RULE R.C. 2323.52.**

R.C. 2323.52 defines "vexatious litigator" as follows:

Any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions,

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<sup>13</sup> *Id.* at (B)1-5.

<sup>14</sup> Plaintiff's Complaint, 1.

and whether the vexatious conduct was against the same party or against different parties in the civil action or actions.<sup>15</sup>

“Vexatious conduct” is defined as:

Conduct of a party in a civil action that satisfies any of the following:

- (a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action
- (b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.
- (c) The conduct is imposed solely for delay.<sup>16</sup>

In the present case, the record shows that the Plaintiff has engaged in persistent, habitual, unreasonable litigation against Defendants. Similar claims have been dismissed now three times in the Hamilton County Court of Common Pleas; first, in case number A1005958, dismissed without prejudice by Judge Robert Winkler on 7/29/10, then in A1009899, dismissed with prejudice by Judge Pat DeWine on 1/20/11, and pursuant to this decision, is now dismissed in the present case.

Plaintiff did not present any affidavit of merit for her medical claims, and has failed to do so in three separate law suits, which have now all been dismissed. Furthermore, despite the pendency of this action, Plaintiff has filed a nearly identical complaint in the Hamilton County Court of Common Pleas on April 27, 2011, now pending before Judge Ethna Cooper in case number A1103347 alleging the same cause of action. These cases indicate the sort of habitual, persistent conduct described in R.C.

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<sup>15</sup> R.C. § 2323.52(A)(3).

<sup>16</sup> *Id.* at (A)(2).

2323.52, and their dismissals indicate the lack of reasonable grounds for the claims on which they are based.

VI. CONCLUSION

For all of the foregoing reasons, Defendants' Good Faith Motion pursuant to R.C. 2323.42 is granted. Defendants' motion to dismiss pursuant to Civ. R. 12(B)(6) is well taken and is hereby granted.

Given the vexatious conduct of Patricia Lutz, it is the order of this court, pursuant to R.C. 2323.52(D), that Ms. Lutz be considered a vexatious litigator. As a consequence, it is the order of the Court that Ms. Lutz be prohibited from the following: (1) instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court; (2) continuing any legal proceedings that the vexatious litigator had instituted in any of the courts specified above prior to this order; and (3) making any application, other than an application for leave to proceed under R.C. 2323.52(F)(1), in any legal proceedings instituted by the vexatious litigator or another person in any of the courts specified above.<sup>17</sup>

Plaintiff must seek leave from the Presiding Judge of the appropriate Court before instituting new litigation or continuing any existing litigation in any Ohio court.

ENTERED  
SO ORDERED.

MAY 26 2011

*Metz*

JEROME J. METZ, JR. JUDGE

COURT OF COMMON PLEAS  
ENTER  
JEROME J. METZ, JR., JUDGE  
THE OVERSHERIFF SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

<sup>17</sup> As provided in § 2323.52 (D)(1)(a-c).

