ORIGINAL

No. 2010-1638

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 93985

GLENN A. SMITH
Plaintiff-Appellant,

v.

DARRELL GILL, D.O.,
Defendants-Appellees.

APPELLEE DARRELL GILL, D.O.'S MEMORANDUM OPPOSING JURISDICTION

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I. Statement of why this case does not present a substantial constitutional question or an issue of public or great general interest.

No constitutional question, let a substantial one, is at issue here. Appellant Glenn A. Smith claims his right to a remedy has been infringed because the trial court granted summary judgment to Appellee Darrell Gill, D.O. But it is well settled, and has been for some time, that a properly granted motion for summary judgment infringes no constitutional right. *Sartor v. Arkansas Natural Gas Corp.* (1944), 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967 ("where it is quite clear what the truth is, that no genuine issue remains for trial," summary judgment is properly granted and does not "cut litigants off from their right of trial by jury"); see, also, *State Farm Mut. Auto Ins. Co. v. Advanced Impounding & Recovery Serv.*, 165 Ohio App.3d 718, 2006-Ohio-760, at ¶19 (rejecting appellant's argument that trial court's grant of summary denied appellant rights to a jury trial and to a remedy); *Goodin v. Columbia Gas of Ohio*, (2000), 141 Ohio App.3d 207, 230-31 (same); *Capital One Bank v. Branch*, 10th Dist. No. 05AP-442, 2005-Ohio-5994, at ¶7 (same).

Nor is there any public or great general interest in what Smith characterizes as "an improper application of Civil Rule 56." Mem. in Support of Jurisdiction at 2. An "improper application" says nothing more than the appellate court got it wrong and made a mistake. But this Court's discretionary review is not invoked merely because the appellate court may have made an error; it is not an error-correcting court. Instead, discretionary review is limited to resolving novel or unresolved issues of public or state-wide importance. S.Ct.Pract.R. II(1)(A)(3). There is nothing novel or unresolved about the parties' respective summary-judgment burdens. On the contrary, this Court decided that issue some 14 years ago in *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

Consistent with *Dresher*, the moving party—Dr. Gill here—bore the initial burden of showing the absence of genuine issue of material fact as to the timeliness of Smith's medical

claim, which Dr. Gill satisfied when argued that Smith's medical claim was untimely. Smith, in response, negated some of Dr. Gill's supporting evidence, but did not satisfy his reciprocal burden because the evidence Smith presented in opposition still did not show that Smith's claim was timely filed. Applying *Dresher*, the trial court properly granted summary judgment because Dr. Gill successfully pointed to evidence in the record, whether supplied by him or by Smith in response, showing that Smith's medical claim was untimely. This is *Dresher* applied and applied correctly. There is nothing novel about the *Dresher* analysis as applied here that invokes this Court's discretionary review. Jurisdiction should be declined.

II. Counterstatement of the case and facts

Smith's lengthy recitation of Smith's medical history is unnecessary here to resolve whether Smith's medical malpractice claim was timely brought. Facts necessary to resolve that issue are set forth below.

A. Dr. Gill—an independent contractor physician providing medical services through NES Healthcare Group—treats Glenn Smith on July 17, 2006.

Dr. Gill provides medical services as an independent contractor through NES Healthcare Group, Inc., a national emergency room staffing group. He is not an employee of NES Healthcare nor does he maintain an office at NES Healthcare's office in Toledo, Ohio. As part of his contract with NES Healthcare, Dr. Gill was staffing the emergency room at Doctors Hospital of Nelsonville on the evening of July 17, 2006. Dr. Gill is not an employee of, or otherwise under contract with, Doctors Hospital. See 8/26/10 Judgment, Appx. at 3.

Smith presented to the emergency room at Doctors Hospital in the late evening hours of July 17, 2006 complaining of chest pain. Dr. Gill was one of the physicians who provided medical care to Smith that evening until Smith was transferred to Defendant Riverside Hospital sometime in the early morning hours of July 18, 2006. Id. Dr. Gill never saw Smith again.

B. Smith sends three 180-day letters; only one is sent to his home address, which he acknowledges bears his signature as having been received on July 21, 2007.

Smith retained Columbus attorney Craig Barclay, who prepared three 180-day letters on Smith's behalf. The first was addressed to Dr. Gill in care of Doctors Hospital and sent certified mail to the hospital in Nelsonville, Ohio. It was signed as received on July 9, 2007 by an individual named "J. Blair." The letter stated that Smith was considering bringing a medical claim against Dr. Gill and his corporate employer. Appx. at 3. As noted above, Dr. Gill is not an employee of Doctors Hospital or otherwise under contract with that facility.

The second letter was addressed to Dr. Gill and sent certified mail to his home address in Richmond Heights, Ohio. It was signed as received on July 21, 2007 by Dr. Gill. Like the letter mailed to Doctors Hospital, the letter stated that Smith was considering bringing a medical claim against Dr. Gill and his corporate employer. Id. Although Dr. Gill had no recollection of receiving this letter and did not have it in his records, he acknowledged his signature on the receipt, which indicated he received it but after the one-year limitations period had expired. Id.

The third letter was addressed to NES Healthcare Group in care of its administrator and sent certified mail to its office in Toledo, Ohio. It was not addressed to Dr. Gill. It was signed as received on July 9, 2007 by an individual named "M.A. Mitchell." Unlike the other two letters, this letter stated:

> [Y]ou are hereby notified that Glenn Smith is presently considering bringing a medical negligence action against NES Healthcare Group with regard to treatment of Glenn Smith by your employees. (Emphasis added.)

There is no indication in this letter that Smith was considering suing Dr. Gill. Id. On the contrary, it shows only that Smith was considering a potential lawsuit against NES Healthcare.

Dr. Gill's liability insurer acknowledged receiving the letter sent to NES Healthcare in a July 17, 2007 letter to Barclay. Appx. at 4-5.

C. Smith sues several defendants on January 4, 2008 based on a medical claim that accrued on July 18, 2006—more than one year earlier.

Believing he had effectively extended the one-year statute of limitations, Smith did not file his complaint for medical malpractice until January 4, 2008. Appx. at 3. In addition to naming several John Doe defendants, he named Darrell Gill, D.O., Doctors Hospital of Nelsonville, and Riverside Methodist Hospital. He alleged generally that he received medical care from these medical professionals and entities on July 17, 2006 and that the care rendered was negligent. Without stating who or which entity received 180-day letters, Smith alleged that the complaint was timely filed because he received return receipts showing the letters were received on July 9, 2007.

D. Dr. Gill moves for summary judgment; makes a good faith argument that he never received a 180-day letter extending the limitations period.

Dr. Gill answered Smith's complaint and asserted a statute-of-limitations defense. Appx. at 4. After some discovery, Smith voluntarily dismissed Riverside Hospital in June 2008. The case thereafter proceeded against Dr. Gill and Doctors Hospital. Id.

Dr. Gill eventually moved for summary judgment, arguing that Smith's medical claim was barred by the one-year statute of limitations. Believing in good faith that he had never received any 180-day letter, Dr. Gill supported his motion with an affidavit to that effect. Without receipt of a 180-day letter extending the statute, Dr. Gill argued that Smith's medical claim was untimely when filed in January 2008—more than one year after he received emergency care from Dr. Gill. Id.

E. Smith opposes the motion and argues that Dr. Gill received a 180-day letter; but letter received after the limitations period.

Smith opposed the motion, moved to strike the affidavit, and requested sanctions. Attached to Smith's opposition brief was an affidavit of Smith's former attorney—Barclay—who averred that he had sent three 180-day letters and that one of the letters had a return receipt signed by Dr. Gill as received on July 21, 2007. Appx. at 4. A copy of the receipt was attached to the Barclay affidavit. Also attached were receipts for the 180-day letters mailed to Doctors Hospital and to NES Healthcare Group. Both were signed by unknown and unidentified individuals and both showed receipt on July 9, 2007. Barclay also averred that Dr. Gill's insurer had knowledge of the lawsuit because the insurer, in a July 17, 2007 letter addressed to Barclay, acknowledged receipt of the 180-day letter sent to NES Healthcare Group. Id.

F. Dr. Gill acknowledges his signature on the July 21, 2007 receipt, but argues that Smith's medical claim is still untimely.

In opposing the motion for sanctions, Dr. Gill acknowledged that the July 21, 2007 signed receipt bore his signature, but said that he did not recall receiving the letter nor did he have the letter in his records. He argued that the affidavit was based on a good-faith belief that he had not received a 180-day letter and therefore sanctions were unwarranted. Dr. Gill thereafter withdrew the portions the affidavit averring nonreceipt. Appx. at 5.

Dr. Gill nonetheless argued in reply that Smith's medical claim was still untimely even though Smith produced Dr. Gill's signed receipt. He argued that the receipt showed that he received the 180-day letter on July 21, 2007—three days past the one-year statute of limitations. Id. Dr. Gill also showed that the other two certified mail receipts were signed by individuals other than him and sent to addresses where he neither was an employee nor maintained an office.

G. The trial court denies the motion for summary judgment, but grants motion for reconsideration.

The trial court initially denied the motion, claiming that it could not determine when the claim accrued. Appx. at 5. After additional discovery, Dr. Gill moved for reconsideration, supporting his motion with Smith's deposition testimony showing that the claim accrued no later than the time he left the emergency room in the early morning hours of July 18, 2006. Id.

Smith opposed the motion, but did not dispute the date of accrual. Indeed, Smith stipulated to the July 18, 2006 accrual date. Smith nonetheless argued that Dr. Gill received timely notice of the lawsuit through the 180-day letters received by NES Healthcare, Doctors Hospital, and his insurer.

The court granted the motion for reconsideration. The trial court noted the stipulated accrual date and found Smith's medical claim untimely because Dr. Gill did not receive a 180-day letter until July 21, 2007—more than one year after the accrual date. Finding the claim untimely, it found Dr. Gill's motion for summary judgment well taken on reconsideration and granted the motion. Smith then voluntarily dismissed his claim against Doctors Hospital, the only remaining defendant, and then appealed to the Eighth District Court of Appeals. Appx. at 6.

H. The Eighth Appellate District affirms.

The appellate court, in a unanimous decision, found no "material facts at issues" and affirmed. Appx. at 6, 12; see, also *Smith v. Gill*, 8th Dist. No. 93985, 2010-Ohio-4012. There was no dispute that Smith's claim accrued on July 18, 2006 (Appx. at 6-7) and, relying on *Edens v. Barberton Area Family Practice Ctr.* (1989), 43 Ohio St.3d 176, there was no dispute that Dr. Gill received the 180-day letter addressed to him on July 21, 2006—after the one-year statute of limitations had already expired (id. at 8-9).

The appellate court likewise found that the 180-day letters addressed to Doctors Hospital and NES Healthcare did not create triable issues of fact. The letter addressed to Doctors Hospital and signed for by a "J. Blair" was not receipt by Dr. Gill (Appx. at 9-10), and the letter addressed to NES Healthcare was defective because it failed to name Dr. Gill as a potential defendant (id. at 10-11).

III. Argument

Counterproposition of Law:

> Summary judgment is appropriate under *Dresher v. Burt* (1996), 75 Ohio St.3d 280, when the moving party points to evidence in the record showing the absence of a triable issue of fact.

A. Smith's medical claim is untimely and properly subject to summary judgment.

Smith correctly states that his claim against Dr. Gill is subject to a one-year statute of limitations, that the one-year period began to run on July 18, 2006, and that the limitations period can be extended under R.C. 2305.113(B)(1) if there is any evidence showing that Dr. Gill *received* any of the three 180-day letters sent by his former counsel before July 18, 2007. See Mem. in Support of Jurisdiction at 8; see, also, *Edens*, 43 Ohio St.3d 176, syllabus (physician must actually receive the 180-day letter to extend the one-year statute of limitations; accord *Marshall v. Ortega* (2000), 87 Ohio St.3d 522, 525 (receipt by anyone other than the physician is not sufficient); *Fulton v. Firelands Community Hosp.*, 6th Dist. No. E-05-031, 2006-Ohio-1119, at ¶13 (certified receipts for 180-day letters signed by someone at hospital other than physicians sued were insufficient to extend statute against physicians); *Jones v. St. Anthony Med. Ctr.* (Feb. 20, 1996), 10th Dist. No. 95APE08-1014, 1996 WL 70997 at *8 (absent proof of agency, fact that hospital employee signed certified mail receipt for 180-day letter is not actual notice to the physician).

What Smith misunderstands, however, is the summary judgment standard this Court established in *Dresher v. Burt*. Smith argues that once Dr. Gill withdrew portions of his affidavit averring nonreceipt of a 180-day letter, there was no evidence provided by Dr. Gill to show that he was entitled to summary judgment. He claims that the appellate court, like the trial court before it, "skipped the question of what evidence Dr. Gill submitted" and instead looked to the evidence Smith submitted in response. He claims that this is wrong because evidence submitted by Smith "should never have been reached in the summary judgment analysis, because Dr. Gill did not submit any evidence to shift the burden." Mem. in Support of Jurisdiction at 9-10.

Smith's argument fails. Dr. Gill's satisfied his initial burden under *Dresher* when he provided affidavit evidence showing when Smith's claim accrued, that he did not receive a 180-day letter before the one-year statute of limitations expired, and that he was not an employee of NES Healthcare. The burden then shifted to Smith to present evidence sufficient to create a triable issue of fact. Although Smith presented some evidence that refuted part of Dr. Gill's "no receipt" argument, it was not sufficient to create a *triable* issue because there was no evidence that Dr. Gill received a *timely* 180-day letter. Despite acknowledging his signature on the July 21, 2007 certified mail receipt, Dr. Gill pointed to other parts of the record (the remaining averments in his affidavit, his answers to interrogatories, and the certified mail receipts provided by Smith) that continued to show lack of timeliness.

1. Dr. Gill satisfied his initial burden by demonstrating that he did not receive a 180-day letter, was not an employee of NES Healthcare, and did not maintain an office there.

Under *Dresher*, Dr. Gill bore "the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher*, 75 Ohio St.3d at 293.

Dr. Gill satisfied that initial burden. He argued that Smith's medical claim accrued when he treated Smith in the emergency room at Doctors Hospital on July 17/18, 2006 and, believing in good faith that he did not receive a 180-day letter extending the one-year statute, Dr. Gill also argued that he did not receive a 180-day letter extending the one-year statute of limitations. He supported this argument with an affidavit to that effect. He further averred that the only 180-day letter he saw was the letter addressed to NES Healthcare that was in his counsel's possession. He thereafter averred that he is neither an employee of NES Healthcare and does not maintain an office where NES Healthcare's letter was sent.

2. Smith did not satisfy his reciprocal burden because the certified-mail-receipt evidence shows either untimely receipt or receipt by individuals other than Dr. Gill.

Having satisfied his initial burden under *Dresher*, the burden then shifted to Smith who had "a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial." *Dresher*, 75 Ohio St.3d at 293. Although Smith presented evidence showing that he mailed three 180-day letters—one of which was signed by Dr. Gill—he failed to satisfy his reciprocal burden showing that there was a genuine issue because none of the signed receipts indicate timely receipt by Dr. Gill. The certified mail receipt signed by Dr. Gill indicates that he received the letter *after* the expiration of the one-year statute of limitations, while the other two signed receipts, although received before the statute expired, were signed by individuals other than Dr. Gill. Under *Marshall*, *Fulton*, and *Jones*, the certified receipts signed by others are insufficient to constitute receipt by Dr. Gill. Without any evidence showing an agency relationship between Dr. Gill and the individuals who signed the other two certified receipts—barring any other defects in the 180-day notice—the three certified receipts are insufficient to satisfy Smith's reciprocal burden showing that a genuine issue exists as to timeliness.

Dr. Gill showed how Smith failed to satisfy this reciprocal burden in his reply brief. There, in further support of his burden under *Dresher*, Dr. Gill acknowledged his signature on the signed receipt dated July 21, 2007, but argued that it was received after the statute expired. And although Dr. Gill withdrew two paragraphs of his affidavit—the paragraphs that averred he did not receive a 180-day letter and the only letter he saw was the letter sent to NES Healthcare shown by his counsel—he otherwise identified portions of the record (remaining averments in the affidavit and his answers to interrogatories) showing that he was not an employee at either Doctors Hospital or NES Healthcare and does not maintain an office at either facility. Consequently, Dr. Gill appropriately satisfied his summary judgment burden despite withdrawing part of his affidavit because he identified other parts of the record that showed he did not receive a timely 180-day letter extending the statute of limitations.

B. Neither *Thomas v. Cranley* nor *Amadasu v. O'Neal* support Smith's argument.

Smith relies on two cases to support his "burden" argument—i.e., that Dr. Gill had to show he *did not* receive either of the letters sent to Doctors Hospital or NES Healthcare. The first is *Thomas v. Cranley* (Nov. 2, 2001), 1st Dist. No. C-010096, 2001 WL 1346184. At issue before the First Appellate District in that case was whether a 180-day letter sent to a hospital sufficiently put the parent healthcare corporation on notice of a subsequently filed suit. Although the court acknowledged that the letter "arguably does not extend the statute of limitations," the court looked to the applicable statutory definition of "hospital" to find the "definition contemplates that notice received by a managing health care corporation may serve as notice to the hospital." Id. at *3. In light of that definition, the court found that the defendant hospital did not satisfy its *Dresher* burden by identifying parts of the record that "negated a relationship" between the two entities. Id.

This case does not support Smith's argument for several reasons. First, Dr. Gill's burden was to identify parts of the record showing that he did not receive a timely 180-day letter. He satisfied that burden. He showed that the certified mail receipt that bore his signature was signed after the statute of limitations expired. Second, he showed that the signed receipts for Doctors Hospital and NES Healthcare were not signed by him and that he had no employer/employee relationship with, nor maintained an office at, either Doctors Hospital or NES Healthcare. Id. And lastly, without conceding that the analysis in *Thomas v. Cranley* is correct, there is no statutory definition that arguably links either of these two entities with him as a physician like the definition of "hospital" did in *Thomas*. This case simply does not provide the support that Smith thinks it does.

Nor does his reliance on *Amadasu v. O'Neal*, 176 Ohio App.3d 217, 2008-Ohio-1730 support his cause. Again before the First Appellate District, the court there was faced with resolving the timeliness of a 180-day letter as part of a motion for judgment on the pleadings. With nothing but the pleadings before it, the court had to accept the allegations in plaintiff's complaint as true, as it was required to do under Civ.R. 12(C). Those allegations stated that the 180-day letter was "given" as alleged, which the court had to accept as true. *Amadasu*, 2008-Ohio-1730, at ¶15. It was within constraints of the court's standard of review that it had to accept the plaintiff's allegation as to when the 180-day letter was received. The court did not foreclose the possibility that the defendant could defeat that allegation with a properly supported motion for summary judgment. Id. at ¶17.

This case, like *Thomas*, does not support Smith's argument. Dr. Gill submitted a properly supported motion for summary judgment—not a motion for judgment on the pleadings—and then, when faced with Smith's evidence, further identified portions of the record showing that summary judgment was still appropriate.

IV. Conclusion

Contrary to Smith's assertions, the appellate court did not require him to "disprove an affirmative defense." Mem. in Support of Jurisdiction at 10-11. Instead, the trial court, and the appellate court on de novo review, simply applied the summary-judgment analysis set forth by this Court in *Dresher* to find that evidence provided in support of and against summary judgment left no genuine issue of material fact as to the timeliness of Smith's complaint. There is nothing in this well-settled analysis that warrants this Court's review. Jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 19th day of October, 2010, by U.S. Mail, postage prepaid, upon the following:

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APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93985

GLEN A. SMITH

PLAINTIFF-APPELLANT

vs.

DARRELL GILL, D.O., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-646283

BEFORE: Celebrezze, J., Boyle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: August 26, 2010

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FRANK D. CELEBREZZE, JR., J.:

Plaintiff-appellant, Glen Smith, appeals the trial court's decision granting summary judgment in favor of defendant-appellee, Darrell Gill, D.O. Based on our review of the record and pertinent case law, we affirm.

On July 17, 2006, appellant was transported to Doctors Hospital of Nelsonville ("Doctors") complaining of chest pains he believed to be a heart attack. He requested and was eventually transferred to Riverside Methodist Hospital ("Riverside") in Columbus, Ohio, on July 18, 2006.

On July 6, 2007, appellant sent letters to Dr. Gill, Doctors, and National Emergency Services ("NES") via certified mail notifying them that he intended to pursue a medical malpractice claim as a result of the treatment he received at Doctors. These letters, sent pursuant to R.C. 2305.113, were intended to extend the statute of limitations for filing his claim by 180 days ("180-day letter"). The letter sent to Doctors specifically named Dr. Gill and was signed for by J. Blair on July 9, 2007. The letter sent to NES, which is a medical staffing company with which Dr. Gill is an independent contractor, was signed for by M. A. Mitchell on July 9, 2007, but did not name Dr. Gill in any manner. The letter sent to Dr. Gill's personal address was not signed for until July 21, 2007.

On January 4, 2008, appellant filed a complaint in the common pleas court for medical malpractice and named as defendants Dr. Gill, Doctors, and

Riverside. Dr. Gill filed his answer on March 10, 2008 asserting as a defense that appellant failed to file his claim within the one-year statute of limitations for medical malpractice claims. On June 25, 2008, appellant voluntarily dismissed Riverside from the suit, leaving Dr. Gill and Doctors as the only remaining defendants.

On September 10, 2008, Dr. Gill filed a motion for summary judgment claiming that he never received the 180-day letter that was sent to his home, and therefore the statute of limitations was not extended. Dr. Gill relied on this to argue that appellant failed to file his complaint within the one-year statute of limitations, and thus the suit should be dismissed as it pertained to Dr. Gill. This motion was accompanied by Dr. Gill's affidavit, which merely reiterated that he never received a 180-day letter at his home and that the only 180-day letter he saw was the one sent to NES that was shown to him by his attorney.

Appellant filed a brief in opposition to Dr. Gill's motion for summary judgment, wherein he provided proof that Dr. Gill had signed for the 180-day letter on July 21, 2007. Appellant relied on this evidence, the 180-day letters sent to NES and Doctors, and a letter from the vice president of Western Litigation, Inc. to argue that Dr. Gill had notice of the lawsuit and that the statute of limitations had been extended. The letter from Western Litigation was dated July 17, 2007 and informed appellant's counsel that NES had received

the 180-day letter addressed to it and that Western Litigation had "been retained to investigate [appellant]'s claim by the professional liability insurer for Darrell Gill, D.O."

Dr. Gill responded to appellant's brief in opposition by redacting the two paragraphs in his affidavit that indicated that he never received a 180-day letter. Dr. Gill's reply brief then argued that the fact that he signed for a 180-day letter on July 21, 2007 is irrelevant because the statute of limitations had already expired. The trial court denied Dr. Gill's motion for summary judgment stating that it had no evidence of when the statute of limitations began to run on appellant's claim and thus the cause of action could not be disposed of by a summary judgment motion.

Appellant was deposed on March 25, 2009. During his deposition, appellant admitted that he threatened to sue Dr. Gill before being transferred to Riverside. He specifically stated, "when I left I told Dr. Gill that I was going to pursue a claim of medical negligence against him, yes." Based on this testimony, Dr. Gill filed a motion for reconsideration of the trial court's ruling on his previous summary judgment motion. In his motion, Dr. Gill argued that because of appellant's admission, the statute of limitations began to run on July 18, 2006, and thus the statute of limitations had already expired when Dr. Gill received the 180-day letter on July 21, 2007.

The trial court entered summary judgment in Dr. Gill's favor, finding: 1) the statute of limitations began to run on July 17, 2006; 2) Dr. Gill did not receive the 180-day letter until July 21, 2007; and 3) the 180-day letters received by Doctors and NES were insufficient to impart notice upon Dr. Gill, and thus the statute of limitations had not been extended. After this ruling, appellant voluntarily dismissed Doctors. This appeal followed wherein appellant argues that the trial court improperly granted summary judgment in favor of Dr. Gill.

Law and Analysis

This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. A de novo standard of review affords no deference to the trial court's decision, and we independently review the record. *Gilchrist v. Gonsor*, Cuyahoga App. No. 88609, 2007-Ohio-3903. Before summary judgment may be granted, the court must determine that there is no genuine issue of material fact, that the moving party is entitled to judgment as a matter of law, and that viewing the evidence in a light most favorable to the nonmoving party, reasonable minds can reach one conclusion in favor of the moving party. Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

There are no material facts at issue in this case. All parties agree that the statute of limitations began to run on July 18, 2006 when appellant told Dr. Gill

that he intended to file a medical malpractice suit against him.[1] We must now determine whether Dr. Gill is entitled to judgment as a matter of law.

Medical malpractice claims are subject to a one-year statute of limitations. R.C. 2305.113(A). If, however, before the one-year period has expired, the plaintiff "gives to the person who is the subject of that claim written notice that the [plaintiff] is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given." R.C. 2305.113(B). Because Dr. Gill did not receive his 180-day letter until three days after the statute of limitations had expired, we must determine whether Doctors's and NES's receipt of the 180-day letters was sufficient to extend the statute of limitations for appellant's medical malpractice claim.

Our research indicates a lack of case law analyzing R.C. 2305.113 and its application in the context of 180-day letters. This concept was previously set forth in former R.C. 2305.11(B), and thus we will utilize case law that analyzed that statute in our analysis. Former R.C. 2305.11(B) did not espouse a particular method by which a potential defendant must receive a 180-day letter.

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[1] The trial court used July 17, 2006 as the date when the statute of limitations began to run. Appellant was admitted to Doctors in the late hours of July 17 but was not transferred to Riverside until the early morning hours of July 18, 2006. As such, we will give appellant the benefit of having the statute of limitations begin on July 18, 2006. Whichever date is applied, our analysis is the same.

Fulton v. Firelands Community Hosp., Erie App. No. E-05-031, 2006-Ohio-1119, ¶11. In *Edens v. Barberton Area Family Practice Ctr.* (1989), 43 Ohio St.3d 176, 539 N.E.2d 1124, the Ohio Supreme Court applied the rules of statutory construction to analyze the language of former R.C. 2305.11(B). Since former R.C. 2305.11(B) and current R.C. 2305.113(B)(1) contain the same language, we find the analysis in *Edens* to be persuasive in this case.

R.C. 2305.113(B)(1) states: "If prior to the expiration of the one-year period specified in division (A) of this section, a claimant who allegedly possesses a medical * * * claim gives to the person who is subject of that claim written notice that the claimant is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eighty days after the notice is so given." In *Edens*, the Court held, "[f]rom the use of the words 'notify' and 'give,' it appears that the General Assembly intended that the one-hundred-eighty day letter would be effective when actually received and not when merely mailed. Thus, we hold that where a statute such as R.C. 2305.11(B) is silent as to how notice is to be effectuated, written notice will be deemed to have been given when received. Therefore, under R.C. 2305.11(B), the one-hundred-eighty day period commences to run from the date the notice is received and not the date it is mailed." *Edens* at 179.

There is no dispute that Dr. Gill did not receive the 180-day letter that was sent to his personal address until after the statute of limitations had already expired. Thus, in order for the statute of limitations to be extended, the 180-day letters sent to Doctors or NES must have been sufficient to impart notice upon Dr. Gill that appellant was considering filing a medical malpractice action against him. Appellant argues that Dr. Gill was an agent of Doctors and NES, and the 180-day letters received by them were, in fact, sufficient to extend the statute of limitations.

The letter sent to Doctors was addressed to Dr. Gill, in care of the Department of Emergency Medicine, Doctors Hospital of Nelsonville; however, the letter was signed for by J. Blair. This is similar to *Fulton*, supra, in which numerous 180-day letters were mailed to the potential defendant, but were signed for by a third party named Evelyn Bilger. *Fulton* at ¶13. The court stated, "This certainly raises the issue of who is Bilger and what is her relationship to appellees and Fisher-Titus. Neither party submitted any evidence on this issue. Nevertheless, it is not a genuine issue of material fact. This court and others have held that where actual receipt of a notice is required, receipt by the intended recipient's agent will not suffice. * * * Appellants have not asserted why *Edens* and its progeny do not apply to this case. They simply argue that they complied with the statute by mailing the notice within the

statutory time period to appellees' place of employment. Assuming arguendo that Fisher-Titus was appellees' place of employment, former R.C. 2305.11(B), as interpreted by the Supreme Court of Ohio, demands that the intended recipient actually received the 180-day notice prior to the expiration of the one-year statute of limitations[.]" Id.

There is no evidence in this case that Dr. Gill was an employee of Doctors. In fact, Dr. Gill testified in his deposition that he is an independent contractor and that he does not maintain an office at Doctors. Nevertheless, *Fulton* involved a situation where a 180-day letter was sent to the defendant's employer and was signed for by a third party. The court in *Fulton* unequivocally held that the potential defendant must receive actual notice of the possible lawsuit. In this case, Dr. Gill presented evidence, by way of the return receipt signed by J. Blair, that he did not receive the 180-day letter that was sent to Doctors. As such, the burden then shifted to appellant to demonstrate that Dr. Gill did, in fact, receive this letter. Appellant did not meet this burden, and thus we must agree with the trial court that the letter sent to Doctors did not extend the statute of limitations in this case.

The letter sent to NES was addressed to NES Healthcare Group, care of Administrator. The letter mentioned appellant's name and stated that appellant was considering filing a medical claim against NES based on care provided by

one of its employees. The letter did not indicate which employee it was speaking of, and Dr. Gill's name was not included in the letter in any manner. In *Ryan v. Randolph*, Tuscarawas App. No. 2003AP110085, 2004-Ohio-442, a letter was received by the physician, but identified the hospital as the possible defendant and simply said the patient was considering bringing an action arising out of treatment. Id. at ¶13. The court in *Ryan* acknowledged the requirement that the 180-day letter contain the name of the potential defendant and held that "[b]ecause the letter in the case sub judice did not advise [the doctor] the claimant was considering bringing a malpractice action against him, we conclude it failed to comply with R.C. 2305.11(B)(1)." Id. at ¶14. Based on the holding in *Ryan*, the letter sent to NES did not comply with the mandates of R.C. 2305.113(B)(1), and the statute of limitations was not extended in the case at bar.

Appellant relies on the letter sent to his counsel by Western Litigation, Inc., which acknowledged NES's receipt of the 180-day letter and stated that it had "been retained to investigate [appellant]'s claim by the professional liability insurer for Dr. Darrell Gill, D.O." This letter is evidence that NES and Dr. Gill's malpractice carrier had actual notice of the suit, but it is not evidence that Dr. Gill had actual notice. Dr. Gill testified in his deposition that NES maintained his malpractice insurance; therefore, it is plausible that NES and the

malpractice carrier had notice of the suit without actually informing Dr. Gill.[2] Nevertheless, the 180-day letter sent to NES did not comply with the mandates of R.C. 2305.113(B)(1) in that it failed to name Dr. Gill as the potential defendant; therefore, it did not extend the statute of limitations. Appellant's sole assignment of error is overruled.

Conclusion

The material facts show that Dr. Gill did not receive the 180-day letter sent to his personal address until after the statute of limitations had already expired. The letter sent to Doctors was insufficient to extend the statute of limitations because the letter was signed for by a third party and there is no evidence that Dr. Gill actually received it. The letter sent to NES was insufficient to extend the statute of limitations because it did not name Dr. Gill as a potential defendant, and thus it did not comply with R.C. 2305.113(B)(1). As such, no genuine issue of material fact existed, appellant did not file his medical malpractice action within the statute of limitations, and the trial court properly granted summary judgment in favor of Dr. Gill.

Judgment affirmed.

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[2]Appellant also relies on Dr. Gill's deposition, wherein he testified that NES had received service on his behalf, to argue that Dr. Gill had notice once NES received the letter. The fact that NES received service on Dr. Gill's behalf in the past is not evidence that Dr. Gill had actual notice of the possibility of a medical claim being filed by appellant. Also, such a fact is irrelevant in light of appellant's failure to comply with R.C. 2305.113(B)(1) when sending the letter to NES.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR

ORIGINAL

IN THE OHIO SUPREME COURT

STATE OF OHIO EX REL. BRYANT GOSHAY

CASE NO. 2010-1653

Relator

v.

JUDGE: RICHARD JOHN AMBROSE

JUDGE: PAUL LUCUS

CAPITAL SOURCE BANK

Respondents.

RELATOR'S AFFIDAVIT OF DISQULIFICATION AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR CONTEMPT

The critical questions in relator's *instanter* motion for Alternative Writ judgment are party Judge Ambrose, has violated **(1)** R.C. 2705.02 on 10/13/10 (see attached Judgment Entry) while this action was pending, he and Magistrate Lucus disobedience of, or resistance to, a lawful writ, process, specifically by failure to respond to Subpoena both judges have not answered the Complaint, in furtherance both judges knew or should have known that relator represents the state of Ohio and Cuyahoga County Prosecutor William Mason via Charles Hannan who represents the State of Ohio is prohibited from representing a Judge in one action both cannot be parties too. The pleadings filed by William Mason are unauthorized representation thus void. And; **(2)** Judge Ambrose has violated Canon law Canon 3 (B)(2) by not being faithful to Tax Law (RC 5721. 36 (A)(b)(2)) in case CV-09-709000 by staying relators "motion to dismiss" he is swayed by partisan interests of respondent Capital Source.

And; **(3)** Party respondent Capital Source Bank has failed to defend or otherwise plead. And; **(4)** respondent Capital Source Bank, and Judge Ambrose in collusion have steered relators counter-claim CV-10-724459 in retaliation to relators writ action. And; **(5)**, respondent Ambrose sua sponta mischaracterization of respondent Capital Source Banks Motion to Dismiss as a Motion for Summary judgment is for the purpose to steer a related case to mitigate damages, counter-claim CV-10-724459 for Capital Source who has not timely answered the counter-claim, nor the instant action?

O.R.C. § 2705.01 provides: A court, or judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice. Judge Ambrose willful wonton disobedience of, or resistance to, a lawful writ, process and willful wonton disobedience of, or resistance to Ohio Revised Code 5721. 36 and Ohio Rules of Civil Procedure, conferred on him by relator is misbehavior in the presence of or so near this court, and is malignant (sic) is grounds for alternative writ to preempt his behavior, against realtor. Moreover the state of Ohio's public officials cannot represent judges in writ actions where by virtue of law R.C. 2731.04 such citizens represent the state in writ actions in essence there are two state representations in this action, this practice is prohibited by 2731.04 and cannon law and must end.

The amended Complaint served to Charles Hannan, but however he cannot represent respondents Judge's Ambrose & Lucus, it is uncontroverted both received constructive notice, the action was filed in this Court on September 29th 2010, on September 28th 2010 all respondents were served and per S.Ct. Prac. R. 14.2(B)(1) an answer was due 21 Days after FAX service...i.e. before 5:00PM September 19th 2010; all foregoing named are acting in collusion against relator.

"Where a defendant fails to plead within the time allowed by law such defendant is in default, and may not plead as of right after the rule day *Suki v. Blume* (Cuyahoga County1983) 9 Ohio App.3d 289 459 N.E.2d 1311 9 OBR56 no conflict exist with S. Ct. Prac. R. 15(A) does nor does it conflict with Civ. R. 15(C) [1] relation back to original service 09/27/10 for respondents ambrose, and lucus. The Ohio Rules of Civil Procedure Civ. R. 15(C) supplements S.Ct. Prac. R. 15(A) it is clearly applicable here upon the amendment, the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, Civ. R. 15(C) governs time for responsive pleading after service of the Amended Complaint, which began 09/28/2010 response was due on or before October 19th 2010 respondents received notice of the institution of the action, and knew or should have known that, but for a mistakes concerning the identity of service to the proper party, CAPITAL SOURCE BANK FBO AEON FINANCIAL LCC Statutory Agent: Tax Lien Law Group., LLP a.k.a. Schwartz & Associates, the action would have been brought against them.

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1 Civ. R. 15 **(C) Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.

O.R.C. § 2731.04 abrogates Cuyahoga County Prosecutor William Mason common law powers, which would allow him to answer writ action from Ohio citizens. "The exercise of his authority under the unique, and limited facts of writ actions where Judges are charged with Constitutional violations is not consistent with the common-law powers of prosecutors, when a relator presents a prima facie case showing prior government judgments were unconstitutional or unauthorized, to a reasonable person the State of Ohio's continued allowance of prosecutor representation undermines, and makes R.C. § 2731.04 meaningless, thus preempting lawful pro se litigants claims, the conduct protects Judges from citizens and the prosecutor is placed in multiple relationships; Relator for all intensive purposes' is William D. Masons client by virtue of his public duty O.R.C. §3.23 directly or indirectly, under any allegation of denial (5721.36) of equal protection of law under the Ohio Constitution ART I § XIV (unreasonable seizers) the burden shifts to William D. Mason to prove he does not represent relators interest as a Ohio resident who filed public record of a crime, or constitutional violation S. Ct. Pract. R. 14.1 (B) This court is authorized under R.C. 2731.02 to issue a Alternative writ where no R.C. 2731.05 Adequacy of law remedy bars the writ, and no answer to the Complaint is proffered by a respondent(s) this entire matter proves Cuyahoga County judges bar pro se litigants in foreclosure Civil Actions, IN CONCLUSION resistance or failure to respond to Subpoena is contempt... *unius est exclusio alterius* respondents reliance on William Mason to protect them is misplaced because his legal representation are unauthorized representation Alternative writ should be grated FORTHWITH.

Under 28 U.S.C. § 1746 I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 19th 2010

BRYANT GOSHAY

/s/ Bryant Goshay

CERTIFICATE OF SERVICE

Under the penalty of perjury: I Bryant Goshay swear, that the following averments are true, and that the forgoing RELATOR'S AFFIDAVIT OF DISQULIFICATION AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR CONTEMPT has been filed in THE SUPREME COURT OF OHIO and served by Relater 10/19/2010 to Respondents/representatives by Facsimile:

JUDGE: RICHARD JOHN ABBROSE
JUDGE: PAUL LUCUS

Represented: CUYAHOGA COUNTY PROSECUTOR'S OFFICE
Justice Center Bld. Floor 8th and 9th | 1200 Ontario Street, Cleveland, OH-44113
Phone: 216.443.7800 | Facsimile: 216.698.2270

CAPITAL SOURCE BANK

Representatives:

David T. Brady, Esquire

Kirk W. Liederbach, Esquire

SCHWARTZ & ASSOCIATES, LLP

55 Public Square

Cleveland, OH 44113-1901

(216) 583-0542 Fax

From: BRYANT GOSHAY

/s/ Bryant Goshay

65469439

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

BRYANT GOSHAY
Plaintiff

CAPITAL SOURCE BANK FBO AEON FINANCIAL LLC
Defendant

Case No: CV-10-724459

Judge: DICK AMBROSE

JOURNAL ENTRY

DEFENDANT'S MOTION TO DISMISS IS HEREBY CONVERTED TO A MOTION FOR SUMMARY JUDGMENT IN ACCORDANCE WITH OHIO CIV. R. 12(B). PLAINTIFF IS HEREBY GRANTED LEAVE THROUGH NOVEMBER 3, 2010 TO FILE AN OPPOSITION TO DEFENDANT'S CONVERTED MOTION FOR SUMMARY JUDGMENT.

Judge Signature 10/13/2010

10/13/2010

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10/14/2010 08:48:49
By: CLPAL
GERALD E. FUERST, CLERK