COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

SERINA L. LAVELY	:	
Plaintiff,	:	**CASE NO. 2015 CVA 01689**
vs.	:	**Judge McBride**
BRADLEY C. BRENNECKE DDS, ET AL.	:	**DECISION/ENTRY**
Defendants	:	

McCaslin, Imbus & McCaslin, Stephen M. Bernat and R. Gary Winters, counsel for the plaintiff Serina Lavely, 7969 Cincinnati Dayton Road, Suite A, West Chester, Ohio 45069

Reminger Co., LPA, Michael M. Mahon, counsel for the defendants Bradley C. Brennecke, DDS, and Goshen Family Dentistry, LTD, 525 Vine Street, Suite 1700, Cincinnati, Ohio, 45202

This cause is before the court for consideration of the motion for partial summary judgment as to the plaintiff's claim of lack of informed consent filed by the defendants Bradley C. Brennecke, DDS and Goshen Family Dentistry, LTD on November 30, 2016.

The plaintiff Serina L. Lavely filed a memorandum in opposition to the motion on January 3, 2017, and the defendants filed a reply memorandum on January 31, 2017.

Oral arguments were presented as to the motion on February 3, 2017, and at the close of the oral arguments, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the evidence before the court, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

This case involves claims that arose after a dental surgery performed by the defendant Bradley C. Brennecke, DDS on the plaintiff Serina L. Lavely in July 2014 at the office of the defendant Goshen Family Dentistry, LTD. The plaintiff filed a complaint against the defendants on December 28, 2015, alleging claims of dental malpractice and lack of informed consent.[1]

The thrust of the plaintiff's allegations is that on July 11, 2014, the plaintiff underwent surgery with Dr. Brennecke to remove three molars and to repair multiple decayed teeth, and as a result of this surgery, the "plaintiff incurred significant and continued pain, had difficulty post-operatively with muscle splinting and tightness, suffered continuous infection and developed partial numbness in plaintiff's tongue, said numbness by information and belief has become permanent."[2] After returning to Dr. Brennecke for follow-up care on several occasions, the plaintiff eventually sought the

[1] Compl., ¶ 16.
[2] Compl., ¶¶ 8-9.

care of another dentist, who performed an additional surgery on the plaintiff to fully extract a tooth that Dr. Brennecke had been unsuccessful in extracting.[3]

The present motion is only concerned with the claim of lack of informed consent arising from these events, in which the plaintiff claims that Dr. Brennecke failed "to inform the plaintiff of the risks of surgery and the complications including but not limited to loss of taste and numbness of the tongue of which the plaintiff suffers."[4]

The plaintiff's claim regarding informed consent deals with the validity of the consent form that she may have signed. Whether the plaintiff signed the consent form on the day of surgery is significant because the plaintiff claims that the prescribed sedatives she took before arriving for her surgery on July 11th were so strong that she does not recollect anything from shortly before she left her home until after the surgery was completed.[5] In her complaint, she alleges as follows:

> "Plaintiff further states that she has reviewed the dental records her counsel received from defendant Brennecke's office per his request, including but not limited to the document titled 'Goshen Family Dentistry Oral Surgery Consent.' Although plaintiff states that she does not remember having signed the form, if she did sign the form, states that her signature is not her normal signature as it appears sloppily signed, apparently due to the effects of the sedatives she took that morning. Moreover, plaintiff states that she did not sign the form on the date written after her signature, that is, July 9, 2014, for the reason that July 9, 2014 was a Wednesday and plaintiff was at work all day. Plaintiff states she did not sign any forms on Wednesday July 9, 2014. Furthermore, plaintiff states no one ever spoke to her regarding this form and never discussed the contents, particularly the risks recited therein, either on July 11, 2014 or July 9, 2014 or at any other time."[6]

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[3] Compl., ¶¶ 10-11.
[4] Compl., ¶ 16.
[5] Pls. Compl., ¶ 7.
[6] Pls. Compl., ¶ 7.

The consent form from Goshen Family Dentistry, LTD advised of the following:

> "I understand the purpose of the procedure/surgery is to treat and possibly correct my diseased oral and/or maxillofacial tissues. * * * I have been informed the following complications can occur with oral and maxillofacial surgery: Post-operative infection, swelling, discoloration, bruising, bleeding, delayed and/or poor healing, dry socket (alveotis), injury to adjacent teeth, fillings and dental work, root and bone fragments left in the jaw, bone fracture, sinus complications including and [*sic*] opening between the mouth and sinus, loss of taste, numbness or painful sensation of the lip and/or tongue and/or gums and/or face which could last for days, weeks, or rarely permanently. These complications may require additional surgeries or referral to specialists for additional treatment. * * *."[7]

In her affidavit, Kim Collett, an employee of the defendant Goshen Family Dentistry, LTD, avers that the plaintiff received this consent form for the surgery before the day of surgery, which was July 11, 2014.[8] Moreover, Ms. Collett states that on the day of the surgery the plaintiff submitted a previously executed consent form to her, with an execution date of July 9, 2014.[9]

In contrast, David Constable, the plaintiff's husband, avers in his affidavit that the plaintiff did not have any paperwork with her the morning of her surgery.[10] Rather, he explains that at some point the plaintiff was in the back of the office to sign some papers.[11]

In her deposition, the plaintiff testified as to her recollection regarding the consent form. The plaintiff testified that she could not recall when she first saw the consent

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[7] Defs. Ex. A.
[8] Defs. Ex. C.
[9] Defs. Ex. C.
[10] D. Constable Aff.
[11] D. Constable Aff.

form,[12] and in fact she could not remember having ever seen it.[13] Although she could not recall seeing it, the plaintiff acknowledged that it is possible that she had seen and received it.[14] Although the plaintiff was not sure at what point she first saw the consent form, she was certain that she had not seen it before the day of her surgery, July 11, 2014:

> "Q. But the question is, it's a possibility that you received this "Oral Surgery Consent Form" prior to July 11th, 2014; is that right?
>
> A. No. Because the day that I went to the dentist, the first time I saw Dr. Brennecke, I did not receive this paper, and the next time I went to Dr. Brennecke's office was the day of my surgery. So I could not have received it before, because I know I did not receive this the day that I initially saw Dr. Brennecke, I guess is –
>
> Q. So you specifically – you don't recall ever seeing it, but you specifically recall not receiving it prior to July 11th, 2014?
>
> A. I don't remember seeing this, and I know that I did not receive this, because it does not look familiar to me at all, the initial day that I saw Dr. Brennecke.
>
> Q. What about after the initial day that you saw Dr. Brennecke?
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> A. Then I saw him the day of my – well, I don't recall seeing him, but I know that I saw him on the day of my surgery.
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> Q. Could somebody else have picked this up for you?
>
> A. No. I mean, could have – my husband could have, but he did not.
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> Q. So it's your testimony that you did not receive this "Oral Surgery Consent Form" prior to July 11th, 2014, the date of the extraction?

[12] S. Lavely Dep., 34:23-35:6.
[13] S. Lavely Dep., 35:7-15.
[14] S. Lavely Dep., 35:16-19.

> A. Yes, I did not see this prior to the day, nor do I remember seeing it the day of my extraction. I do not recall this piece of paper."[15]

Although the plaintiff testified she had not received the consent form in advance of her surgery, she did testify that the signature on the form did look like or resembled her signature, although she added that "[i]t does look like I was having issues signing, but that does resemble my signature."[16] However, with respect to the date next to her signature, that of July 9, 2014, the plaintiff testified that she did not know if the date was forged or not, as she could not remember whether she wrote it or not.[17]

On November 16, 2016 the defendants filed a motion for partial summary judgment on the plaintiff's claim of lack of informed consent. The plaintiff filed a response in opposition on January 3, 2017, and the defendants filed a reply in support of their motion on January 31st. On February 3rd this court held oral argument on the motion for partial summary judgment, after which the court took the motion under advisement.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made,

[15] S. Lavely Dep., 36:5-37:11.
[16] S. Lavely Dep., 37:35-38:5.
[17] S. Lavely Dep., 38:21-39:18.

> that conclusion is adverse to the party opposing the motion."[18]

The court must view the evidence in a light most favorable to the nonmoving party.[19] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[20] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[21]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[22] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[23]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[24] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in

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[18] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

[19] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

[20] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

[21] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

[22] Id. at 251-52.

[23] Id. at 250.

[24] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

order to allow the opposing party a meaningful opportunity to respond."[25] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[26]

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in the pleadings, demonstrating that a "triable issue of fact" remains.[27] The duty of the nonmoving party is more than that of resisting the motion's allegations.[28] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[29] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[30] It may not rely on the pleadings or unsupported allegations.[31]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[32] The trial court maintains the sound discretion to admit or exclude relevant evidence.[33] When a document falls outside the enumerated

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[25] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[26] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).
[27] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[28] *Wells Fargo*, 2013-Ohio-855 at ¶ 25.
[29] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[30] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[31] Id.
[32] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[33] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[34]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[35] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[36] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[37] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[38]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[39] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[40]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus,

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[34] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[35] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[36] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[37] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[38] Id.
[39] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[40] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

documents referenced in the affidavit "must be attached to the affidavit."[41] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[42]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[43] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[44]

LEGAL ANALYSIS

Under Ohio common law, the tort of lack of informed consent is established when:

> "(a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any; (b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and (c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy."[45]

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[41] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[42] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[43] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[44] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[45] *Shell v. Durrani*, 12th Dist. Butler No. CA2014-11-232, 2015-Ohio-4140, ¶ 14, citing *Nickell v. Gonzales*, 17 Ohio St.3d 136, 139 (1985). *See Wheeler v. Wise*, 133 Ohio App.3d 564, 572, 729 N.E.2d 413 (3d Dist. 1999), quoting *Nickell*, 17 Ohio St.3d at 139 (holding same).

In the instant case, the defendants argue that the plaintiff cannot prevail on her lack of informed consent claim because Dr. Brennecke informed her of the material risks and dangers involved in the tooth extraction procedure. More specifically, the defendants posit that the plaintiff cannot succeed because she executed a valid consent form that disclosed the same risks and dangers that she now alleges manifested post-surgery.

In support, the defendants cite case law for the following proposition: "[A] signature on a contract is evidence that the parties' minds met on the terms of the contract as executed, but such inference drawn from the fact of execution is rebuttable."[46] The defendants highlight deposition testimony in which the plaintiff testified that (1) she does not claim that her signature on the consent form was forged, and (2) she does not recall if she wrote July 9, 2014 as the signature date.[47] The defendants also point to the affidavit of Kim Collett in which Ms. Collett avers that the plaintiff received a consent form before July 11, 2014, and that the plaintiff provided the executed form to Ms. Collett on that day. The defendants argue that the plaintiff cannot rebut the presumption of validity and that they are entitled to judgment in their favor on the lack of informed consent claim.

The plaintiff does not argue that the consent form was inadequate in terms of its warnings, nor does she argue that the presumption of validity is inapplicable to causes

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[46] *Cardinal Const. Co. v. Americare Corp.*, 3d Dist. Marion No. 9-84-46, 1986 WL 4948, *2 (Apr. 28, 1986), quoting *Parklawn Manor Inc. v. The Jennings-Lawrence Co.*, 119 Ohio App. 151, 197 N.E.2d 390 (10th Dist. 1962). *See R.C. Olmstead, Inc. v. GBS Corp.*, 7th Dist. Mahoning No. 08 MA 83, 2009-Ohio-6808, ¶ 45, citing *Cardinal Const. Co.*, 1986 WL 4948 at *2 ("It has also been stated that a signature on a contract creates a rebuttable presumption that it was validly executed.").

[47] Defs. Mot., pgs. 5-6.

of action for lack of consent. Instead, the plaintiff argues that there exists a genuine issue of material fact as to whether she in fact signed the consent form before the date of her surgery, July 11, 2014. In opposition to the evidence submitted by the defendants, the plaintiff cites to different passages of her testimony, in which she avers that she did not see the consent form before the day of her surgery and that she does not remember seeing it on the day of her extraction.[48] Additionally, the plaintiff submitted the affidavit of her husband, David Constable, who brought her to Goshen Family Dentistry for her surgery. Mr. Constable avers that the plaintiff did not have any paperwork with her to submit to the defendants on the day of her surgery.[49]

Upon reviewing the evidence of both parties, the court finds that there exists a genuine issue of material fact as to when the plaintiff signed the consent form. Although the defendants contend that there exists an unrebutted presumption in their favor that the plaintiff's signature on the consent form evidences that the parties' minds met on the terms of the consent form,[50] the plaintiff has submitted evidence, that when viewed in a light most favorable to her, creates a genuine issue of material fact as to whether she had a meeting of the minds with the defendants on the terms of the consent form. In other words, the plaintiff's evidence, if believed, would rebut the defendants' presumption that the plaintiff's signature on her consent form is valid. The plaintiff has highlighted deposition testimony and submitted an affidavit that calls into question when the plaintiff signed the consent form, and therefore whether the consent form was signed while the plaintiff was under the heavy influence of sedatives.

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[48] Pls. Resp., pg. 2.
[49] Pls. Resp. pg. 3.
[50] *See Cardinal Const. Co.*, 1986 WL 4948 at *2, quoting *Parklawn Manor Inc.*, 119 Ohio App. 151; *R.C. Olmstead, Inc.*, 2009-Ohio-6808 at ¶ 45, citing *Cardinal Const. Co.*, 1986 WL 4948 at *2.

Although the plaintiff did not claim that the signature was forged and acknowledged she may have signed the form at some point, she was resolute that she had not seen the consent form before her surgery on July 11, 2014. If the plaintiff had never seen the consent form before July 11th, the only reasonable inference is that she signed it while at the defendant Goshen Family Dentistry, LTD the day of her surgery, the same day that she was so heavily affected by sedatives that she cannot remember being in the office until after the surgery concluded. Moreover, although Ms. Collett avers that she received the previously signed form from the plaintiff on July 11th, Mr. Constable contends that the plaintiff did not bring any paperwork with her into the office that day.

The plaintiff, as the nonmovant, has satisfied her burden of setting forth specific facts demonstrating that a triable issue of fact remains on her claim of lack of informed consent.[51] The jury will be required to decide when the plaintiff signed the consent form. If the jury finds that the plaintiff signed the consent form the same day as her surgery, then the jury will necessarily be required to decide whether she was capable of giving informed consent while under the influence of heavy sedatives.

CONCLUSION

For the foregoing reasons, the court finds that the motion for partial summary judgment which was filed by the defendants Bradley C. Brennecke, DDS and Goshen Family Dentistry, LTD's motion is not well-taken and is hereby denied.

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[51] *Dresher*, 75 Ohio St.3d at 293.

IT IS SO ORDERED.

DATED: 3-2-17

Judge Jerry R. McBride