

ORIGINAL

COURT OF CLAIMS  
OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

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| MATTHEW RIES, Admr., et al., | : |                          |
|                              | : |                          |
| Plaintiffs                   | : |                          |
| v.                           | : | Case No. 2010-10335      |
| THE OHIO STATE UNIVERSITY    | : | Judge Patrick M. McGrath |
| MEDICAL CENTER,              | : |                          |
| Defendant                    | : |                          |

**DEFENDANTS' MOTION FOR BIFURCATION**

Defendant, The Ohio State University Medical Center ("OSUMC"), moves this Court to bifurcate the liability and damages portions of this case, because the issues to be presented in the damages phase will be unique and distinct from the medical issues presented in the liability phase.

**I. INTRODUCTION & FACTS**

This medical malpractice wrongful death case was filed by the Estate of Michael McNew. On September 14, 2009, Mr. McNew went to see his primary care physician, Dr. Howard Rothbaum, at OSU Internal Medicine due to complaints of rectal pain. See Compl., ¶ 9. Dr. Rothbaum referred Mr. McNew to fellow OSU physician Dr. Syed Husain, a colorectal surgeon, due to Mr. McNew's presenting issue. Compl., ¶ 9. Mr. McNew went to see Dr. Husain the following day, September 15, 2009, during which time Dr. Husain incised Mr. McNew's hemorrhoid and prescribed him pain medication. Compl., ¶10. Over the next couple

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of days, plaintiffs allege that Mr. McNew had some telephone conversation with Dr. Husain. (Compl., ¶¶ 11-14). Then on September 18, 2009, Mr. McNew lost consciousness and was taken via ambulance to Dublin Methodist Hospital and later transferred to Riverside Methodist Hospital. (Compl., ¶¶ 15-16). The Complaint alleges that Mr. McNew died at Riverside Hospital on September 18, 2009 as a result from a “cerebral hemorrhage from thrombocytopenia [low blood platelet count] which went undiagnosed until after his death.” Complaint, ¶¶ 10-17. Thrombocytopenia can affect individuals with leukemia, another diagnosis of Mr. McNew which was not known until his final hospitalization at Riverside. However, neither Dr. Rothbaum nor Dr. Husain ever treated Mr. McNew for thrombocytopenia or any other blood cancer or disorder.

Based on the allegations contained in their Complaint (¶¶ 19, 28), and based on their recent discovery depositions of Doctors Rothbaum and Husain, it appears that plaintiffs will attempt to prove that Doctor Rothbaum (primary care/internal medicine) and Dr. Husain (colorectal surgeon) breached the relevant standards of care during their care and treatment of Mr. McNew. However, in order to prove damages – including the life expectancy of Mr. McNew with a diagnosis of thrombocytopenia, it would appear that plaintiffs will require life expectancy testimony from an oncologist or hematologist.

## **II. LEGAL ARGUMENT**

Pursuant to Civ. R. 42(B), all courts have authority to bifurcate a civil matter for the sake of convenience or to preserve resources. *See* Civ.R. 42(B). A motion is not required by the rule. *See id.* The issue of bifurcation is a matter within the discretion of the trial court. *See, e.g.,*

*Heidbreder v. Trustees*, 64 Ohio App. 2d 95, 411 N.E. 2d 825 (1979). In the instant matter, the Court should bifurcate the liability and damages phases of trial because bifurcation would promote judicial economy, preserve judicial resources, as well as preserving resources and expenses for the State of Ohio and parties involved. In addition, neither party would be prejudiced by such an order.

This Court has previously denied a motion for reconsideration by a plaintiff who opposed a bifurcation order. In *White v. Ohio State University Medical Center*, 2010-03215 (Entry, March 9, 2012), this Court held that in claims of wrongful death or major permanent injury that typically include expert testimony of life expectancy, economic loss of earning and life care plans, these experts are irrelevant to the issue of liability. This Court stated that the “plaintiff failed to demonstrate that bifurcation was reached without thought or has in any way prejudiced plaintiff.” The same should be true for the case at bar.

There is no question that bifurcation acts to preserve the resources of this Court as well as those of the State of Ohio. A vast majority of cases in this Court conclude after the liability phase. Plaintiffs are either unsuccessful in proving liability or, if they are successful, the matter is frequently resolved prior to the damage trial. Thus, it is a waste of the Court’s time and resources to hear each case in its entirety the issue of damages prior to deciding the liability issue. The Court does not abuse its discretion to wait and conduct what amounts to be a damage hearing in only those cases in which the parties are unable to resolve after a plaintiff has proven liability.

This case is a prime example. In order to prove their liability case, besides any necessary factual witnesses, plaintiffs will have to use medical expert witnesses in the areas of internal medicine and colorectal surgeon to prove that Doctors Rothbaum and Husain, respectively, breached their respective standards of care. And to defend the liability issue, OSUMC will need similar experts. However, to prove damages in this case, plaintiffs will need very different medical experts – including an oncologist and/or hematologist – because they will be required to prove the life expectancy of Mr. McNew with a diagnosis thrombocytopenia or leukemia had he received earlier treatment for his blood disorder. OSUMC, likewise, will need these types of experts to present its own life expectancy arguments. In addition, because Mr. McNew left behind a spouse and three minor children, it is expected that plaintiffs – and thus OSUMC as well – will need to present the testimony of an economist to present the issues of lost wages and lost household services.

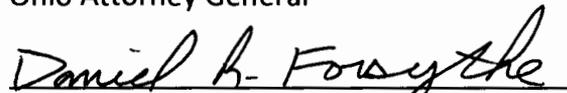
These additional damages experts could easily add one to two days of trial – testimony that is not necessary to make a determination on liability – and extra trial expenses that neither party needs to endure if liability is not determined. In addition, judicial economy is better served by bifurcation in this case as well. Even if liability is determined, no prejudice will accrue to either party in trying the damages separately. Any evidence presented as part of the liability trial that might relate to damages remains part of the record and need not be repeated. The parties would merely need to present the evidence that would have been presented initially had the case not been bifurcated.

**III. CONCLUSION**

In this case, the damages expert witnesses – including medical expert witnesses – will be unique and distinct from the liability expert witnesses, which makes this an appropriate case to bifurcate pursuant to Civ. R. 42(B). Based upon the foregoing, Defendant respectfully requests the Court to issue an order allowing bifurcation.

Respectfully submitted,

MICHAEL DeWINE  
Ohio Attorney General

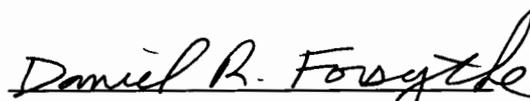


DANIEL R. FORSYTHE (0081391)  
KARL W. SCHEDLER (0024224)  
Assistant Attorneys General  
Court of Claims Defense  
150 East Gay Street, 18<sup>th</sup> Floor  
Columbus, Ohio 43215  
Tel: (614) 466-7447  
Fax: (614) 644-9185  
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was sent by regular U.S. mail, postage prepaid, this 19<sup>th</sup> day of May, 2014, to

David I. Shroyer  
536 South High Street  
Columbus, Ohio 43215  
Attorney for Plaintiff



DANIEL R. FORSYTHE (0081391)  
Assistant Attorney General