COURT OF CLAIMS OF OHIO

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IN THE COURT OF CLAIMS FOR THE STATE OF OHIO

MATTHEW RIES, Admr., et al.,

Plaintiff,

ORIGINAL

Case No. 2010-10335

vs.

Judge Patrick M. McGrath

THE OHIO STATE UNIVERSITY MEDICAL CENTER,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR BIFURCATION

Plaintiff now opposes Defendant's motion to bifurcate the issues of liability and damages in this case on the basis that Defendant has failed to demonstrate how these circumstances require holding two separate trials. For the reasons stated in the attached memorandum opposing bifurcation, Plaintiff respectfully asks the Court to deny the motion and allow this matter to be tried in one proceeding.

Respectfully submitted,

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MEMORANDUM IN OPPOSITION

In this case, the issues of liability and damages are inextricably related, and the damage issue requires only a small amount of additional testimony from the expert witnesses. In fact, the Defendant in wrongful death cases usually does not dispute evidence about earning capacity, and

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here, the damages testimony will be relatively brief and inseparable from testimony about decedent's disease process itself.

Defendant relies on this Court's ruling in *White v. The Ohio State University Medical Center,* Ct. Cl. Case No. 2010-03215 (Entry of March 9, 2012), for the concept that a court acts within its discretion when it bifurcates liability and damages, because the two issues require different witnesses and analyses. However, in that case liability evidence and damages evidence, which was economic in nature, were separable. That is not true in the case at bar.

This case had its genesis when Plaintiff's decedent Michael McNew presented to OSU physician Syed Husain, M.D., who diagnosed and drained Mr. McNew's hemorrhoid, after which Mr. McNew experienced a large amount of bleeding, and began to experience shortness of breath and bruising. Dr. Husain admits receiving a phone call the day after Mr. McNew's procedure from Mr. McNew's wife, Cyrelle, who had originally called Dr. Husain's secretary in the morning hours to report that Mr. McNew was short of breath and that because of this symptom he had stopped taking the pain medication Dr. Husain had prescribed. Dr. Husain called back in the afternoon hours and was informed that Mr. McNew was in extreme pain and had stopped taking the pain medication due to the shortness of breath. Cyrelle also informed Dr. Husain that Mr. McNew was experiencing unusual bruising, and excessive bleeding from the hemorrhoid site. Dr. Husain informed Cyrelle that the pain medication would not cause shortness of breath. Dr. Husain did not consider a bleeding disorder.

The McNew's family doctor, Dr. Rothbaum, was deposed, and testified that if a patient experienced more bleeding than usual, he would "typically order blood work." (Deposition Transcript of Howard R. Rothbaum, M.D., at page 24.) Dr. Husain merely instructed Mr. McNew to take additional pain medicine and gave no consideration to the bleeding symptoms or

a bleeding disorder, nor did he order blood work or refer Mr. McNew to the emergency room for these symptoms. Later that evening, Mr. McNew suffered a brain bleed, lost consciousness, and was transported by ambulance to Dublin Methodist Hospital, then transferred to Riverside Methodist Hospital's emergency room. The diagnosis of leukemia and the related thrombocytopenia was quickly made, but the infusion of platelets to prevent bleeding was too late as the bleeding already had occurred. The administration of platelets prior the bleed would have prevented the hemorrhage and brain injury that resulted in Mr. McNew's death the next day. The standard of care experts will also testify on the proximate cause issue and life expectancy.

Dr. Husain's treatment of Mr. McNew's hemorrhoid did not cause Mr. McNew to suffer thrombocytopenia; in fact, Mr. McNew already had the underlying blood disorder when he presented to Dr. Husain but was unaware of his illness. Instead, this was a case in which a physician treating a patient for a specific symptom ignored or failed to recognize that the patient was suffering from an underlying, life-threatening disease, thus proximately causing the patient's wrongful death from the failure to diagnose. The classic signs of thrombocytopenia are bleeding, bruising, and shortness of breath. The issues of liability and damages are linked, and bifurcation is neither required nor suitable for allowing a just resolution of the case.

Defendant asserts that Plaintiff will need an oncologist and/or hematologist to prove Mr. McNew's life expectancy, and that this question is so separate from the liability phase of the trial that it should be tried separately. Plaintiff intends to use the same expert oncologist on liability issues as well as on proximate cause issues and life expectancy. Testimony regarding Mr. McNew's underlying disease and its effect upon his life expectancy, under these facts, is directly connected to the question of whether Dr. Husain's acts and omissions were the proximate cause

of harm to Mr. McNew. Specifically, at the core of this case is the question of whether or when Mr. McNew would have succumbed to thrombocytopenia had Dr. Husain's treatment not fallen below the standard of care. The testimony of Plaintiff's experts inevitably will overlap, and the same expert who testifies about the breach of the standard of care and/or the proximate cause of Mr. McNew's injury and death will testify about what his life expectancy would have been had he received proper diagnosis and treatment.

If this case is bifurcated, Plaintiff's same experts would have to appear twice in Columbus to present their testimony: once during the liability phase, during which they will discuss standard of care and proximate cause; and once during the damages phase, during which they will again discuss proximate cause in the process of opining about life expectancy. Obviously, it will be expensive and prejudicial to Plaintiff to have to bring the same experts back twice, and doing so will result in much more Court time. In addition to two separate fees that will be charged by both of Plaintiff's experts, who would have to take additional time away from their medical practices to be present in Court, Plaintiff will also have to pay for separate travel and accommodation expenses for one expert, whose practice is located in Atlanta, Georgia, and another expert, who is located in Richmond, Virginia. Defendant claims the only thing to consider is the "waste of the Court's time and resources," yet certainly a part of the bifurcation analysis must be the waste of the Plaintiff's resources and the inconvenience to the witnesses. Further, it is not a waste of the Court's resources briefly to extend the trial with a few extra questions of two witnesses, instead of scheduling a separate trial for that purpose.

Defendant's claim that "a vast majority of cases in this Court conclude after the liability phase," is also unavailing. There is no reason to assume that this case will conclude with a finding of no liability. The administrator represents decedent's wife and two young sons, and

expects to present evidence at trial proving that the acts and omissions of Defendant's employee Dr. Husain proximately caused Mr. McNew's death. There should be no assumption by the State that the Court will decide cases in its favor. As far as judicial economy is concerned, the entire testimony in the first trial would consist of 90 minutes or so of testimony, while a new trial on proximate cause and damages would last several days.

For all of these reasons, Plaintiff respectfully asks the Court to deny Defendant's motion to bifurcate the trial of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following counsel of record by regular U.S. Mail, postage prepaid, this 30th day of May, 2014:

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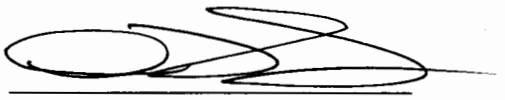

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