

**ORIGINAL**

FILED  
COURT OF CLAIMS  
OF OHIO

IN THE COURT OF CLAIMS FOR THE STATE OF OHIO FEB 27 PM 3:09

MATTHEW RIES, Admr., et al.,

Plaintiff,

vs.

Case No. 2010-10335

Judge Patrick M. McGrath

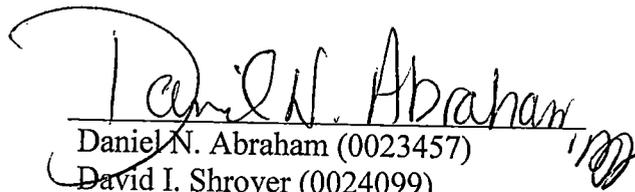
THE OHIO STATE UNIVERSITY  
MEDICAL CENTER,

Defendant.

**PLAINTIFF'S MOTION FOR LEAVE TO FILE MOTION FOR  
PARTIAL SUMMARY JUDGMENT *INSTANTER***

Plaintiff, by and through counsel, hereby moves the Court for an Order granting leave to file a motion for partial summary judgment *instanter*. The reasons for this motion are set forth in the supporting memorandum.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT**

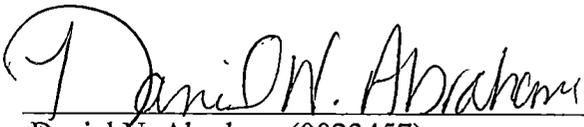
On February 7, 2014, following a case management conference held on January 28, 2014, this Court put on an entry establishing deadlines for certain events to occur in this case. One of those deadlines required that dispositive motions be filed on or before November 17, 2014.

Defendant's experts were not deposed until after the dispositive motion deadline. Olaf B. Johansen, M.D., Defendant's expert in colorectal surgery, was deposed on January 14, 2015. Stephen R. Payne, M.D., Defendant's expert in internal medicine, was deposed on December 17, 2014. It was not apparent that there would be no dispute as to a number of material facts bearing on liability until after these depositions were taken.

Plaintiff is seeking leave to file a motion for partial summary judgment to address several discrete issues in this case. The trial date set by the Court on February 7, 2014 has been continued and trial is now scheduled to begin on May 26, 2015. The purpose of the motion is to limit the issues to be resolved at trial, thereby expediting the trial and conserving judicial resources.

For these reasons, Plaintiff urges the Court to grant leave for him to file a motion for partial summary judgment *instanter*.

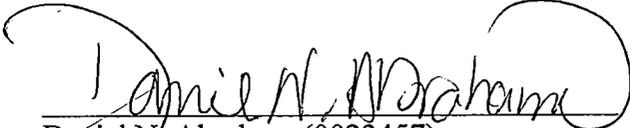
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served upon the following counsel of record via email only, this 27<sup>th</sup> day of February, 2015:

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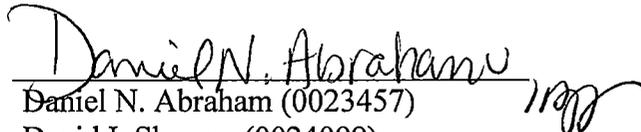
THE OHIO STATE UNIVERSITY  
MEDICAL CENTER,

Defendant.

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff, by and through counsel, hereby moves the Court for an Order, pursuant to Rule 56(A) of the Ohio Rules of Civil Procedure, granting partial summary judgment in favor of Plaintiff on some of the issues bearing on liability. The reasons for this motion are set forth in the supporting memorandum.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT**

**I. Introduction**

This case involves the tragic death of Michael McNew, a 37-year-old father of three young children, from a brain bleed caused by low platelets related to his undiagnosed leukemia. The Administrator of his Estate, Matthew Ries, has filed this wrongful death action against

PLAINTIFF'S  
EXHIBIT

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Defendants The Ohio State University Medical Center (hereinafter "OSU") and the State of Ohio based on the negligence of Howard R. Rothbaum, M.D. and his nursing staff and Syed Husain, M.D. who were acting as agents of OSU in the course of their treatment of Michael McNew.

Plaintiff has filed this motion for partial summary judgment to address three issues:

1. The negligence of Dr. Husain in responding to a phone call from Michael and Cyrelle McNew on September 18, 2009;
2. The negligence of the nursing staff of Dr. Rothbaum in not recording a history or duration of Michael's symptoms on August 27, 2009; and
3. The issue of proximate cause that an earlier evaluation would have prevented the brain bleed that was the cause of Michael McNew's death on September 19, 2009.

There are other issues in this case involving the negligence of nurses, Dr. Rothbaum and Dr. Husain but this motion is intended only to address the above issues. This motion is based upon the deposition testimony of Dr. Husain and Dr. Rothbaum as well as the deposition testimony of the experts retained by OSU, Olaf B. Johansen, M.D., a Board Certified Colorectal Surgeon, and Stephen R. Payne, M.D., who is Board Certified in Internal Medicine.

## **II. Undisputed Facts**

On September 18, 2009, Michael was diagnosed with leukemia which caused a low platelet count of 3,000 (normal is 150,000). The low platelets caused a bleed in his head causing unconsciousness at 8:30 p.m. on September 18. The death certificate states the cause of death was a brain bleed due to low platelets. The cause of death on September 19 is not disputed. The events that led up to the brain bleed are also not disputed.

On August 27, 2009, Michael McNew presented to Dr. Rothbaum's office. (Dr. Rothbaum TR 39) Cyrelle McNew has testified that Michael had felt bad for a month and had developed a sore throat. Mr. McNew only saw a nurse who did a rapid strep test that was reported as negative. Dr. Rothbaum did not see the patient and closed the file after seeing a

history of "sore throat". The only history in the medical records is "sore throat" with no additional information. Dr. Rothbaum has testified he is only aware of what was written in the chart. (Dr. Rothbaum TR 40)

On September 14, 2009, Michael again presented to Dr. Rothbaum's office complaining of hemorrhoid pain. (Dr. Rothbaum TR 44) Dr. Rothbaum referred Michael to a colorectal surgeon and prescribed Tramadol for pain relief. (Dr. Rothbaum TR 51, 53-54) On September 15, Dr. Husain, a colorectal surgeon, saw both Michael and Cyrelle McNew. (McNew TR 23) After an evaluation, Dr. Husain made a small incision in the hemorrhoid to relieve the pressure and instructed Michael and his wife to expect some "spotting of blood". (McNew TR 30)

That evening, Michael looked pale and kind of sick. (McNew TR 43) Cyrelle called Dr. Husain and told him that Michael was bleeding through 5 gauzes quickly and changing it frequently. (McNew TR 39-40) According to OSU expert Dr. Johansen, that represents about one cup of blood each time the gauzes are changed. (Dr. Johansen TR 161) Dr. Husain prescribed Oxycodone for pain relief. (McNew TR 35) Later in the evening of the 16<sup>th</sup>, Michael and Cyrelle noticed unusual darker bruising on Michael's arm. (McNew TR 45) Michael called the doctor the next morning to report his symptoms and was told to just stop taking the Tramadol, which he did. (McNew TR 47) OSU expert Dr. Johansen has testified it would be inappropriate just to tell him to stop taking the Tramadol. (Dr. Johansen TR 124)

On September 17, Michael switched to Oxycodone for pain relief. Later that day Michael developed shortness of breath. Cyrelle has testified that the shortness of breath occurred when he went up the stairs to the second floor. (McNew TR 49) He "seemed particularly winded, heavy breathing." It got a little better when he laid down and rested. (McNew TR 50, 89) Michael was 37 years old and in good shape. (McNew TR 90) He was still bleeding as Cyrelle remembers he was still changing gauze pads. (McNew TR 49)

On September 18<sup>th</sup> at 8:04 a.m., the McNews placed a phone call to Dr. Husain's office and spoke to a staff member. There was no return call. (McNew TR 51) Cyrelle McNew again called Dr. Husain's office at 2:08 p.m. and received a call back at 2:32 p.m. During that call, Cyrelle informed Dr. Husain of the following:

1. Michael was in too much pain and could not speak to him on the phone.
2. Michael had developed bruising so he stopped taking the Tramadol.
3. Michael had developed shortness of breath while on Oxycodone and stopped taking Oxycodone.
4. Michael was still bleeding from the incised hemorrhoid.

(McNew TR 52- 56)

Dr. Husain informed Cyrelle that the pain medications would not be causing the shortness of breath and that Michael should take the Oxycodone. Dr. Husain asked where they lived but did not recommend a visit to the ER or any other physician. Dr. Husain suggested he follow up with a cardiologist the following week for the shortness of breath. (McNew TR 52-54) The phone call lasted 12 minutes. Dr. Husain does not remember what advice he gave on this phone call.

Q. Do you remember what your advice was?

A. No.

(Dr. Husain TR 114) Cyrelle recalls Dr. Husain advising them that everyone heals at a different rate. (McNew TR 53-55)

Approximately five hours later at around 8:30 p.m., Michael collapsed to the floor in front of Cyrelle. (McNew TR 61-66) He was rushed to Dublin Methodist Hospital. He was noted to have a large bruise on his arm. His platelet count was only 3,000 (normal is 150,000). The CT scan showed a brain bleed. He was transferred to Riverside Methodist Hospital. He died on September 19 due to the brain bleed from thrombocytopenia (low platelets).

### **III. Medical Background**

Bleeding is known to cause anemia, a condition that occurs when there is a low hemoglobin count. Hemoglobin carries oxygen to the muscles and if it is low the patient will experience symptoms such as fatigue and shortness of breath. On September 18<sup>th</sup>, Michael's hemoglobin was measured at the hospital at 7.9 which is low with normal in the range of 12. This level of hemoglobin can cause shortness of breath on exertion and a feeling of fatigue. (Dr. Johansen TR 55) OSU expert Dr. Johansen has admitted that the anemia in this case was a contributing factor to the shortness of breath. (Johansen TR 85) He testified that a drop in hemoglobin from 12 to 7.9 is the equivalent of two units of blood loss. (Johansen TR 179-180)

Pulmonary embolism is a condition where a blood clot travels to the heart. A pulmonary embolism is a life threatening condition and is treated as an emergency. It can be caused by immobility and often occurs after surgery.

There is a dispute in this case as to whether Michael suffered from AML or APL which are subtypes of leukemia which effect life expectancy. Life expectancy is a disputed issue and is not an issue for purposes of this motion. The issue on proximate cause, however, relates to the issue of the immediate cause of the brain bleed which caused Michael McNew's death on September 19<sup>th</sup>.

Anemia and low platelets can cause bleeding, shortness of breath and bruising. Unexplained bruising and complaints of bleeding are symptoms of leukemia. (Dr. Rothbaum TR 23) Dr. Rothbaum has testified that with unexplained bruising, leukemia should be on the differential. (Dr. Rothbaum TR 30)

### **II. Law and Argument**

#### **A. Summary Judgment Standard**

Summary judgment is governed by Civil Rule 56 which provides in relevant part that summary judgment shall be granted if the evidence

. . . show[s] that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. . . . A summary judgment shall not be rendered unless it appears from such evidence . . . that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence . . . construed most strongly in the party's favor.

Civ. R. 56(C); *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

**B. No Genuine Issue of Material Fact Exists Concerning Whether Syed Husain, M.D. Failed To Meet The Requisite Standard Of Care.**

“In order to establish medical malpractice, a plaintiff must show: (1) the standard of care recognized by the medical community, (2) the failure of the defendant to meet the requisite standard of care, and (3) a direct causal connection between the medically negligent act and the injury sustained.” *Stanley v. Ohio State Univ. Med. Ctr.*, 10<sup>th</sup> Dist. Franklin No. 12AP-999, 2013-Ohio-5140; ¶ 19, citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130, 346 N.E.2d 673 (1976).

In *Bruni*, the Ohio Supreme Court established the legal standard for medical malpractice.

In evaluating the conduct of a physician and surgeon charged with malpractice, the test is whether the physician, in the performance of his service, either did some particular thing or things that physicians and surgeons, in that medical community, of ordinary skill, care and diligence would not have done under the same or similar circumstances, or failed or omitted to do some particular thing or things which physicians and surgeons of ordinary skill, care and diligence would have done under the same or similar circumstances. He is required to exercise the average degree of skill, care and diligence exercised by members of the same medical specialty community in similar situations.

*Id.* at 20, quoting *Bruni* at 129-30.

This motion centers upon Dr. Husain's failure to refer Michael for urgent medical attention on September 18<sup>th</sup> after being informed by his wife that Michael was unable to speak on the phone due to pain, and had unusual bruising, continued bleeding and new onset of shortness of breath. Although Dr. Husain does not dispute that the phone call on the 18<sup>th</sup>

occurred, he does not recall it. Mrs. McNew testified about the phone call which was documented by phone records and her personal records which included detailed notes of the conversation. Dr. Husain made no notes per his practice concerning phone calls. (Dr. Husain TR 114)

Cyrelle reported four symptoms to Dr. Husain during the phone call made at 2:32 p.m. on September 18<sup>th</sup> which effect whether a referral for immediate care is called for:

1. too much pain to talk (undisputed);
2. shortness of breath due to anemia (undisputed);
3. bruising (disputed as defense experts claim there needs to be more than one bruise although medical records show bruising on both arms); and
4. continued bleeding.

This motion addresses only symptoms 1 and 2 which Defendant and its experts have admitted require immediate attention and cites testimony from the defense experts that establishes that Dr. Husain was negligent in not calling for an immediate evaluation based on these symptoms.

#### **1. Shortness of Breath**

Since it is undisputed that Michael had symptoms of shortness of breath reported to Dr. Husain, the only issue that exists is whether that symptom should result in an immediate evaluation. Dr. Husain did not make an immediate referral on the 18<sup>th</sup> and, instead, suggested a follow up with a cardiologist the following week. There is no dispute that Michael was experiencing shortness of breath. Cyrelle witnessed it and informed Dr. Husain of the symptom on the 18<sup>th</sup>. Lab work done later showed a low hemoglobin of 7.9 which is consistent with shortness of breath with exertion. (Dr. Johansen TR 179) The shortness of breath is also reflected in the medical records as reported by Cyrelle McNew. The defense experts have also conceded that a proper history by Dr. Husain on the 18<sup>th</sup> would have asked about shortness of breath.

Since the undisputed evidence established that Michael had shortness of breath and since both Dr. Husain and the defense experts have testified that an immediate evaluation is necessary if he had shortness of breath, summary judgment on this issue of negligence should be granted since Dr. Husain did not make a referral on the 18<sup>th</sup>.

Dr. Husain admitted that anemia in a post surgical patient that causes symptoms needs to be evaluated "immediately". Dr. Husain testified as follows:

Q. Let's talk, then, in general about signs and symptoms of anemia.

A. **Uh-huh.**

Q. What can they be?

A. **Palpitation, fatigue, shortness of breath.**

Q. Okay. And obviously if they're having –

A. **Lack of energy.**

Q. Those kind of symptoms would indicate a hemoglobin, a dropping hemoglobin?

A. **Correct.**

Q. And that can be dangerous –

A. **Correct.**

Q. -- for any number of reasons. Right?

A. **Correct.**

Q. And that's something you would want to respond to immediately?

A. **Correct.**

Q. And then if you have concerns about a patient that was having bleeding with associated symptoms of anemia, would you send them to the emergency room or would you schedule them in the next day for an appointment?

**A. Well, if they are having significant bleeding, they have to go to the emergency room, especially something to this degree that we discussed. If it is -- if it's producing symptoms, they have to be seen. Either they need to see me immediately if I'm in the office or go to the emergency room.**

...  
**If they are truly having symptoms as a result of blood loss, they need to go to the emergency room.**

(Dr. Husain TR 89-90, 92)

Dr. Husain admitted that if he had known Michael had shortness of breath, he would have sent him to the emergency room. (Dr. Husain TR 141) Michael's shortness of breath is undisputed based upon his wife's deposition, her notes and his blood work showing a low hemoglobin. Dr. Husain cannot and does not dispute that he was told of these symptoms. Dr. Husain admits that he should have sent Michael to the emergency room. (Dr. Husain TR 141)

Q. And this is hypothetical. -- if in the conversation with Mrs. McNew, if she had told you that he had had shortness of breath, would you have recommended that he go the emergency room?

**A. Most likely, yes.**

OSU expert Dr. Johansen agreed with this admission by Dr. Husain and acknowledged that such a patient should go the emergency room. (Dr. Johansen TR 70) Dr. Payne, another OSU expert, has testified that a post operative patient with unexplained shortness of breath needs to go to the emergency room 100% of the time.

**A. . . . But in a scenario of unexplained shortness of breath in a postoperative patient, they're going to go to the emergency room, basically, 100 percent of the time.**

Q. What if you conclude that the shortness of breath is most probably related to anemia, for instance?

**A. That would be really hard to do over the phone. I just wouldn't be able to make that assumption over the phone.**

Q. You would want to get them in and look at them?

**A. Yes.**

(Dr. Payne TR 24-25)

It is undisputed that Michael had shortness of breath going up the stairs and this was reported to Dr. Husain on the 18<sup>th</sup>. Dr. Payne, OSU's expert, admits that this is a concerning symptom, testifying that:

Q. Are symptoms associated with anemia often associated in activity levels?

A. Yes.

Q. And tell me what that means.

A. Well, an activity level--you're more likely to feel the symptom when you exert yourself. So, somebody who feels okay at rest, if they try to walk up the couple flights of stairs, and they're significantly anemic, they may feel short of breath trying to do that when they didn't used to feel short of breath trying to do that, depending on --

Q. Well, I guess one of the things you would want to know is whether that was a change for them or different for them?

A. Right. You know, in an otherwise healthy 37-year-old, a shortness of breath on mild to moderate exertion would be abnormal.

Q. Something you'd want to work up?

A. Yep.

(Dr. Payne TR 31-32) Dr. Johansen admits that the fact that Michael stopped taking pain medications due to shortness of breath raises a red flag to a physician.

A. So the fact -- I think the fact that she stopped -- he stopped taking pain medications because of shortness of breath, to me that might raise a red flag that, Boy, this shortness of breath is -- is somewhat significant.

(Dr. Johansen TR 59) Dr. Johansen also admits that if a patient continues to bleed and is symptomatic that patient needs to come in for an evaluation. Dr. Johansen stated:

A. But if -- if somebody was --was continuing to actively bleed and if they were symptomatic, I would ask them to come in.

(Dr. Johansen TR 73)

On September 18, 2009, there is no dispute that Michael still had bleeding and was symptomatic, yet Dr. Husain did NOT ask him to come in. Dr. Johansen further testified:

Q. All right. And if he told you that the - - the bleeding was continuing; I've got a new onset of bruise on my arm, and I've got shortness of breath when I walk up the steps, would you, to be reasonably careful and prudent, want to have that patient evaluated  
--

**A. Yeah.**

(Dr. Johansen TR 79) Dr. Johansen has agreed with the Plaintiff's experts that a reasonably careful doctor should be able to put together that the anemia from bleeding was causing the shortness of breath. (Dr. Johansen TR 129) This is important since Dr. Husain himself has admitted that if the anemia caused a symptom, an immediate referral was necessary. Dr. Johansen testified as follows:

**A. . . . I think I would likely put together or at least be concerned that he's having enough bleeding that he's become anemic that's leading to some shortness of breath. I think I would put that together.**

(Dr. Johansen TR 129) He also testified:

**A. I - - I think personally, as a reasonably prudent and hopefully somewhat intelligent physician, I would connect the dots, and again, not in retrospect, but at the time, of having significant bleeding and having shortness of breath as maybe relating to anemia.**

\* \* \*

**A. I would - - I would be concerned that they have gotten anemic; that they're actually bleeding more than they've told me, and that they are anemic, and that's why they're short of breath.**

(Dr. Johansen TR 97)

## **2. Pain**

In this case it is undisputed that Michael was in so much pain he could not speak on the phone. This is not disputed by Dr. Husain. The expert for OSU admits that this symptom alone

requires an evaluation. Dr. Husain also does not dispute that such a patient should be evaluated. Thus, Plaintiff should be granted summary judgment on the issue of negligence associated with not evaluating the patient for the severe pain reported to Dr. Husain on September 18<sup>th</sup> at 2:32 p.m. Dr. Husain even admits that such a post operative pain should be evaluated "right away":

Q. . . . If Cyrelle McNew had called and said that her husband was in so much pain he couldn't talk to you, would that cause you to want to have him evaluated right away?

A. Yes.

(Dr. Husain TR 155-156)

Dr. Payne also admits that the level of pain that Michael was experiencing on the 18<sup>th</sup> needs a further evaluation.

Q. . . . Let's suppose you've got a patient -- that Mr. McNew called you. And his wife is on the phone and he is in so much pain he can't even talk to you. And you asked to talk to him, but - - you know, he's on the phone and says, I can't talk to you, I'm in too much pain and gives it back to his wife.

A. Okay.

Q. Would that be some level of concern as a physician, just for pain management purposes?

A. Yes.

Q. What would you do about that?

A. I'd want to do some type of further evaluation.

(Dr. Payne TR 89) Dr. Johansen has testified that "I would refer that patient to a doctor - - to a family physician or an internist." (Dr. Johansen TR 126) In this case, however, it is undisputed that Dr. Husain only suggested that Michael see a cardiologist the following week. Five hours later Michael suffered a brain bleed.

**C. No Genuine Issue of Material Fact Exists Concerning Whether The Nursing Staff At Dr. Rothbaum's Office Failed To Meet The Requisite Standard Of Care.**

Michael presented to Dr. Rothbaum's office on August 27, 2009 after not feeling well for a month. He developed a sore throat and scheduled an appointment. He only saw Nurse Bush and was not given an appointment with the doctor. (Dr. Rothbaum TR 43) Nurse Bush administered a strep test which was read as normal. Nurse Bush only recorded in the history "sore throat". This is not a complete history. Nurse Chris Reid, the only expert to comment on the actions of Nurse Bush, testified that Nurse Bush needed to document a complete history of the present illness. (Reid TR 33) His history contains no information concerning the history of symptoms. OSU expert Dr. Payne has also testified that this documentation is below the standard of care:

Q. It sounds like to me - - I mean, shouldn't there have been some more history obtained in this case, other than just sore throat?

**A. Yeah. I think the documentation - - now, I'm not saying it wasn't obtained. I'm just saying the documentation is below what I would like to see in my chart for a patient who was being treated for a sore throat. I'd want to see a little more documentation.**

Q. So shouldn't Dr. Rothbaum, before closing the file, have called the patient and gotten more history.

**A. Either called the patient or talked to Bush?**

Q. If Bush had it.

**A. If Bush had more history, yes.**

Q. Now, if Bush had more history, they should record that history, right?

**A. Yeah. The standard of documentation, I think, is to have more history here. Okay.**

(Dr. Payne TR 56-57)

The importance of having a complete history is underscored by Dr. Rothbaum who has testified he did not know what occurred during this office visit. (Dr. Rothbaum TR 40) The only complaint that Dr. Rothbaum knew about was what was in the record. (Dr. Rothbaum TR 40) Dr. Rothbaum was asked what he would do when presented with a patient that has a sore throat:

Q. Do you order blood work in patients that have --that complain of a sore throat like this?

**A. Not typically if that's the symptom complaint.**

Q. And when you say "not typically," I take it that sometimes there are. What's the - - what's the reason for ordering it versus not ordering it?

**A. A sore throat is a vague complaint. It depends on the other history that the patient might provide.**

(Dr. Rothbaum TR 42-43) Had Nurse Bush recorded a complete history, including the duration of the sore throat and associated symptoms, blood work would have been done.

A nurse cannot meet the standard of care by just reporting a "sore throat". Here, Michael had a variety of symptoms that had been going on for a month or so which prompted him to go to the doctor. (McNew TR 19-21) During his visit with Dr. Husain on September 15, 2009, Dr. Husain noted other current symptoms. Since it is undisputed that Nurse Bush's failure to record a complete history was negligent, summary judgment should be granted on this narrow issue.<sup>1</sup>

**D. The Failure of Dr. Rothbaum's Nursing Staff To Document Michael McNew's Symptoms Was A Proximate Cause Of Michael McNew's Death.**

Both OSU expert Dr. Payne and Plaintiff's expert Dr. Daniel agree that with a history of feeling bad for several weeks, including a recurring sore throat, that blood work including a CBC should be done. (Dr. Payne TR 51; Dr. Daniel TR 21-22) In this case, the undisputed testimony is that a CBC would have revealed abnormalities and would have resulted in treatment and avoided the low platelet induced brain bleed.

**E. The Failure To Order An Earlier Hospital Admission Or Evaluation Which Would Have Included Platelet Transfusion Was A Proximate Cause Of Michael McNew's Death.**

All experts agree that Michael's immediate cause of death was from a brain bleed due to low platelets. It is undisputed that an earlier hospital admission or evaluation would have

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<sup>1</sup> Nurse Bush refuses to testify due to mental issues of some sort.

resulted in a platelet transfusion. OSU expert Dr. Payne testified that “[y]ou would certainly get some blood counts, including CBC to check him for anemia, check him for white blood count for a sign of infection, things like that.” (Dr. Payne TR 26) A CBC includes a platelet count which would have been low and monitored to not allow it to drop to dangerously low levels. Dr. Bloomfield and Dr. Eisenberger have testified that earlier intervention as late as 8:00 p.m. on the 18<sup>th</sup> would have prevented Michael McNew’s death from a brain bleed.

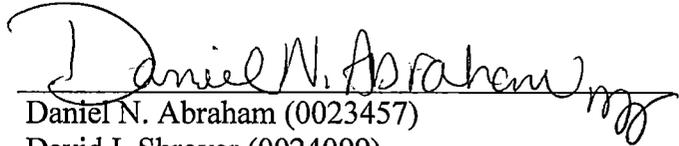
A issue in this case which is disputed is the type of leukemia Michael had and his life expectancy which, based upon the parties’ respective experts, would be years to a normal life expectancy. This motion is not intended to resolve that issue but, rather, to remove from the case the undisputed evidence that if Michael had presented for evaluation earlier, the brain bleed that caused his death would not have occurred.

#### **IV. Conclusion**

In this case, there is no genuine issue of material fact preventing partial summary judgment in favor of Plaintiff with respect to whether Dr. Husain deviated from the standard of care in his treatment of Michael McNew. There is also no genuine issue of material fact preventing partial summary judgment in favor of Plaintiff with respect to whether the nursing staff at Dr. Rothbaum’s office failed to meet the standard of care. The undisputed evidence establishes that these deficiencies were the proximate cause of Michael McNew’s death.

For the foregoing reasons, Plaintiff urges the Court to grant partial summary judgment in their favor and to find that Defendants, through Dr. Husain and Dr. Rothbaum’s nursing staff, engaged in conduct that fell below the standard of care and that their negligence was the proximate cause of Michael McNew’s death.

Respectfully submitted,



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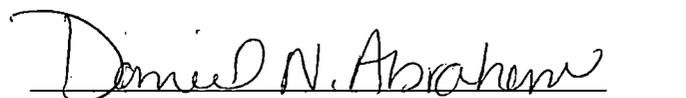
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*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing instrument was served upon the following counsel of record via email only, this 21<sup>st</sup> day of February, 2015:

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