

ORIGINAL

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COURT OF CLAIMS
OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

MATTHEW RIES, Admr., et al., :

Plaintiffs :

v. :

Case No. 2010-10335

THE OHIO STATE UNIVERSITY :
MEDICAL CENTER,

Judge Patrick M. McGrath

Defendant :

**DEFENDANT'S MEMORANDUM CONTRA
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant, The Ohio State University Medical Center ("OSUMC"), respectfully submits that plaintiffs' motion is not well taken, and should be overruled. Plaintiffs' motion seeks partial summary judgment on three issues. However, because material facts are in dispute, plaintiffs do not meet the summary judgment standard, and therefore their motion for partial summary judgment must be overruled.

I. Introduction.

This medical negligence/wrongful death case involves Michael McNew who died from complications associated with a rare form of acute leukemia. Plaintiffs' allegations center on two physicians who were involved in the evaluation and treatment of the decedent who consulted them for the evaluation of a hemorrhoid. Mr. McNew initially consulted his family physician, Dr. Howard Rothbaum, who examined the area and referred the patient to Dr. Syed Husain, a board certified colorectal surgeon. Dr. Husain subsequently removed the hemorrhoid by incision, without complications, and monitored the decedent postoperatively.

At issue in this case are a number of phone calls which took place following the hemorrhoid procedure and between the McNews and the OSU medical providers. Plaintiffs are alleging that OSUMC failed to recognize the seriousness of the following symptoms: continued pain, excessive bleeding, bruising, and shortness of breath. However, the facts of each phone call are not exactly clear. Mrs. McNew testified during her deposition about these phone calls; however, some of the calls she was not present for, and only knows about them based on what her husband told her afterwards. In fact, many of the facts presented in plaintiffs' partial motion for summary judgment are based on the hearsay statements from Mr. McNew to Mrs. McNew. Dr. Husain testified during his depositions that he recalls very little related to these phone calls, and that the only symptom he can truly remember being discussed was pain. (Deposition of Syed Husain, M.D., p. 111-114)¹. Thus as he did during his deposition, Dr. Husain will testify at trial regarding his habit and routine while discussing these symptoms over the telephone. (Deposition of Syed Husain, M.D., p. 141-159). Therefore, it is incorrect for plaintiffs to claim that Mrs. McNew's version of these telephone conversations is undisputed.

On September 18, 2009, Mr. McNew was rushed to Dublin Methodist Hospital after becoming unresponsive, and then was transferred to Riverside Methodist Hospital for a neurosurgery consultation after initial blood labs revealed a critical platelet level of 3,000 – a condition called thrombocytopenia – which had been caused by Mr. McNew's undiagnosed leukemia. Unfortunately, as a result of his leukemia, Mr. McNew suffered a brain hemorrhage and died the following day on September 19, 2009.

¹ The deposition of Dr. Syed Husain was filed with this Court on March 4, 2015.

II. Law and Argument.

Plaintiffs simply cannot prove a prima facie case for the three issues in their partial motion for summary judgment, and therefore are not entitled to summary judgment. When Mr. McNew was treated by OSUMC for his hemorrhoid, neither he nor OSUMC knew of his leukemia diagnosis. Dr. Husain treated Mr. McNew's hemorrhoid and then monitored Mr. McNew postoperatively. Plaintiffs simply cannot show that OSUMC had a duty to diagnose Mr. McNew's leukemia.

A. **Plaintiffs' motion for partial summary judgment should be denied, because plaintiffs cannot prove a prima facie case on these claims.**

Despite plaintiffs' description of "undisputed facts," there are disputed material facts which prevent plaintiffs' recovery on the three issues listed in their motion for partial summary judgment. The standard governing summary judgment is set forth in Civ. R. 56(C). Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Civ. R. 56(C)*. See, also, *Dresher v. Burt*, 75 Ohio St.3d 280 (1996). Despite plaintiffs' arguments to the contrary, there are disputed material facts. Therefore, plaintiffs cannot obtain summary judgment on their medical malpractice claims.

It is well settled in Ohio that in order to prevail in a medical negligence action, a plaintiff must prove four elements by a preponderance of the evidence. The elements are (1) establishing the relevant standard of care (usually via expert testimony), (2) that a health care provider deviated from the standard of care, (3) the deviation was a proximate cause of the patient's injury or death, and (4) the extent of harm and damages that resulted from the substandard care. See,

e.g., *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976); *Ramage v. Central Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97 (1992); *Berdyck v. Shinde*, 66 Ohio St.3d 573 (1993).

Applying the summary judgment standard to the elements of a medical malpractice claim, plaintiffs are not entitled to summary judgment.

1. Plaintiffs have not proven Dr. Husain's negligence in responding to the September 18, 2009 phone call, because it is disputed how the symptoms were reported.

Mrs. McNew is expected to testify about a phone call between Dr. Husain and herself and her husband which took place at approximately 2:30 P.M. on September 18, 2009. Mrs. McNew is expected to testify about discussing a number of symptoms with Dr. Husain: pain, bleeding, bruising, and shortness of breath. However, Dr. Husain cannot recall this specific conversation. Rather, pain is the only symptom Dr. Husain has any clear memory discussing on the telephone. (Deposition of Syed Husain, M.D., p. 111-114). Therefore, the facts as set forth by Mrs. McNew are not undisputed simply because Dr. Husain cannot recall this specific conversation. The area of dispute is *how* these symptoms were discussed. At trial – as he did during his deposition – Dr. Husain will testify regarding his habit and routine in responding to such symptoms over the telephone, in particular attempting to determine the severity of such symptoms. (Deposition of Syed Husain, M.D., p. 141-142 (bleeding); p. 144-145 (bruising); p. 147-159 (shortness of breath)). Comparing Dr. Husain's habit and routine with Mrs. McNew's version of the events will allow the trier of fact to determine exactly how the symptoms were described to Dr. Husain.

The symptom of shortness of breath was not described to Dr. Husain in a manner which required immediate medical examination. According to Mrs. McNew's deposition, Mr. McNew had experienced some shortness of breath the evening prior (September 17, 2009) when climbing

the stairs, which the McNews thought was due to taking Oxycodone. (Deposition of Cyrelle McNew, p. 49-50)². Nowhere in her deposition does she describe Mr. McNew having any shortness of breath any other time besides the evening of September 17, 2009 when climbing the stairs. Interestingly, according to Mrs. McNew, Dr. Husain told her that if the shortness of breath persists, then Mr. McNew should see his cardiologist. (Deposition of Cyrelle McNew, p. 52). Clearly, this admission by Mrs. McNew makes it clear that the shortness of breath that she described during the telephone call with Dr. Husain on September 18, 2009 was not persistent nor progressive. If shortness of breath is neither persistent nor progressive, then there would be no need to refer Mr. McNew to an immediate medical examination. (Deposition of Syed Husain, M.D., p. 147, 149-150).

Medical experts in this case agree that shortness of breath which is neither persistent nor progressive does not require immediate medical examination. (Deposition of Mark Fialk, M.D., p. 92; Deposition of Olaf Johansen, M.D., p. 42-46). Plaintiffs attempt to cherry pick quotes from the depositions of Doctors Payne and Johansen is unpersuasive, because the experts were responding to hypothetical questions not based on the facts presented in this case, namely that there was no evidence that Mr. McNew had persistent or progressive shortness of breath of September 18, 2009. Dr. Payne, an internal medicine expert, testified that there was no evidence of shortness of breath (dyspnea) in the records prior to Mr. McNew suffering the brain hemorrhage. (Deposition of Stephen Payne, M.D., p. 20)³. Dr. Fialk, a hematologist, also testified that the shortness of breath described by Mrs. McNew in her deposition is a single episode and thus neither persistent nor progressive, and was not described as what he would

² The deposition of Cyrelle McNew was filed with this Court on March 4, 2015.

expect to see in someone with leukemia. (Deposition of Mark Fialk, M.D., p. 77-78)⁴. A single occurrence of shortness of breath would not be a significant concern for Dr. Fialk, a hematologist. (Deposition of Mark Fialk, p. 92).

Indeed plaintiffs' own medical experts agree that not every episode of shortness of breath is an emergency. Plaintiff's oncologist expert Andrew Eisenberger, M.D., testified in his deposition that shortness of breath "can be an emergency," but "it depends on the context," and acknowledged that Mr. and Ms. McNew did not treat it like an emergency on the evening of September 17, 2009. (Deposition of Andrew Eisenberger, M.D., p. 41-42)⁵. Plaintiff's second oncologist expert Kenneth Braunstein, M.D., also agreed that shortness of breath is not always an emergency:

"Q. [by Mr. Forsythe] Is having shortness of breath an emergency?"

"A. Sometimes. Sometimes not."

See (Deposition of Kenneth Braunstein, M.D., p. 75)⁶.

According to Dr. Braunstein, it also depends on the how the complaint of shortness of breath is communicated and the time of day whether a colorectal surgeon should tell a patient that he should be examined emergently. (Deposition of Kenneth Braunstein, M.D., p. 104-105).

Dr. Husain reiterated this during his deposition, including the types of questions he would typically ask when presented with the symptom of shortness of breath. (Deposition of Syed Husain, M.D., p. 141-150). Dr. Husain was clear that the key factor would be the severity of the shortness of breath:

³ The deposition of Stephen Payne, M.D. was filed with this Court on March 4, 2015.

⁴ The deposition of Mark Fialk, M.D. was filed with this Court on April 6, 2015.

“Q. [by Mr. Shroyer] [...] If you’re dealing with one of your patients and they call in and they say, You know, I’m having a shortness of breath, would you make an inquiry about their cardiology status and whether they had a cardiologist?”

“A. [...] It depends upon how they’re describing their shortness of breath. If it is a chronic mild problem and they have cardiac history, I would tell them to see a cardiologist. If it is a severe acute-onset shortness of breath, I wouldn’t ask them to go to a cardiologist. I would ask them to go to the emergency room.”

See (Deposition of Syed Husain, M.D., p. 147).

So plaintiffs’ theory of negligence regarding Dr. Husain’s response during the September 18, 2009 phone call hinges upon the description of the shortness of breath. Another way to determine this would be to review what Mrs. McNew was doing on September 18, 2009 to determine whether she herself was treating Mr. McNew’s shortness of breath as an emergency.

Mrs. McNew’s own actions are evidence that her husband was not experiencing persistent nor progressive shortness of breath which would warrant immediate medical examination. First, on the evening of September 17, 2009, even with Mr. McNew’s shortness of breath while climbing stairs, neither he nor his wife sought immediate emergency care. (Deposition of Andrew Eisenberger, M.D., p. 41-42). Then the next morning, September 18, 2009, Ms. McNew left her husband all alone at home for at least six hours, from 8:00 A.M. until 2:00 P.M. (Deposition of Cyrelle McNew, p. 50-57). Then later that evening after dinner, she again left her husband all alone at home for one to two hours while she took her children to a park. (Deposition of Cyrelle McNew, p. 61). Mr. and Ms. McNew were both attorneys and well educated individuals. (Deposition of Cyrelle McNew, p. 4-11). Ms. McNew’s action of leaving

⁵ The deposition of Andrew Eisenberger, M.D. was filed with this Court on April 6, 2015.

⁶ The deposition of Kenneth Braunstein, M.D. was filed with this Court on April 6, 2015.

her husband alone for most of the day on September 18, 2009 simply does not paint a picture of Mr. McNew suffering from persistent nor progressive shortness of breath that day. Plaintiffs' own expert Dr. Eisenberger agreed that there is no evidence that Mr. McNew was experiencing shortness of breath on September 18, 2009. (Deposition of Andrew Eisenberger, M.D., p. 44-48).

Shortness of breath can be an emergency. However, there are many instances where shortness of breath is not an emergency. (Deposition of Syed Husain, M.D., p. 141-150). Plaintiffs have simply failed in showing that the symptom of shortness of breath, as well as any other symptom, as described to Dr. Husain on September 19, 2008 was an emergency. And because the shortness of breath was not described as persistent nor progressive, then Dr. Husain was not required to refer Mr. McNew to an immediate medical examination.

2. Plaintiffs have not proven any negligence on the part of OSUMC during Mr. McNew's nurse visit on August 27, 2009.

Mr. McNew had a nurse visit at the office of his internist, Dr. Rothbaum, on August 27, 2009. According to the medical records, he complained of a sore throat, and the nurse conducted a strep throat swab test. The results of both the rapid strep test and strep culture were negative. (Deposition of Howard Rothbaum, M.D., p. 42).⁷ Mr. McNew was told to call back for an appointment if his symptoms did not improve within five days. There is no evidence in the medical records that he ever called back for an appointment to address a sore throat. (Deposition of Jerome Daniel, M.D., p. 17-18)⁸. Mr. McNew did, however, see Dr. Rothbaum on September

⁷ The deposition of Howard Rothbaum, M.D. was filed with this Court on March 4, 2015.

⁸ The deposition of Jerome Daniel, M.D. was filed with this Court on March 4, 2015.

14, 2009, at which time he presented with complaints of acute rectal pain – and *no other* complaints.

The nurse visit on August 27, 2009 has nothing to do with this lawsuit, because it has nothing to do with Mr. McNew's complaint of acute rectal pain, which was the reason he sought treatment from Doctors Rothbaum and Husain. Despite plaintiffs' attempt to mischaracterize the deposition testimony of defendant's internal medicine expert Stephen Payne, M.D., he never said OSUMC breached the standard of care during this visit, nor any other. All Dr. Payne admitted was that he would like to see more documentation regarding how long the patient had been complaining of a sore throat. Dr. Payne never said that not documenting how long Mr. McNew had a sore throat was a violation of the standard of care. Instead, Dr. Payne clearly stated that just because something is not documented does not mean a nurse did not obtain that information. (Deposition of Stephen Payne, M.D., p. 60).

Plaintiffs argument relies on the fact that it is not documented how long Mr. McNew suffered from a sore throat. It is true that some of the medical professionals testified during their depositions that it is important to know the duration of symptoms. However, the length of this symptom is simply not relevant to this case, because Mr. McNew never returned to Dr. Rothbaum's office to complain of a sore throat. See (Deposition of Stephen Payne, M.D., p. 71-73). In fact, in reviewing the August 27, 2009 records, Dr. Rothbaum testified that there were no signs or symptoms consistent with leukemia noted. (Deposition of Howard Rothbaum, M.D., p. 43).

Because Mr. McNew did not complain of a sore throat at Dr. Rothbaum's office on September 14, 2009 – plaintiffs' theory of negligence arising out of the August 27, 2009 nurse

visit must be cut off. There is simply no evidence that after August 27, 2009 that Mr. McNew ever complained of a sore throat to Dr. Rothbaum or anyone in his office.

3. Plaintiffs have not proven with specificity that an earlier evaluation would have prevented the brain bleed, which was the cause of Mr. McNew's death.

Once again, plaintiffs incorrectly use the term “undisputed” while describing that an earlier hospital admission or evaluation would have prevented the brain bleed. First, such brain bleeds in leukemic patients can happen spontaneously, and in this case it is not clear whether the bleed was a spontaneous bleed or the result of a trauma. (Deposition of Stephen Payne, M.D., p. 14-19). Second, plaintiffs’ own experts disagree or could not provide an opinion as to what time Mr. McNew would have to have been seen on September 18, 2009 to (1) prevent a brain bleed, and/or (2) not affect his long term neurologic function. Finally, this theory is simply too speculative and tenuous as it relies upon several assumptions in order to play out to fruition: an examination would have undoubtedly led to blood work, which would have undoubtedly led to a diagnosis of leukemia and a platelet transfusion, which undoubtedly would have prevented any brain bleed, which undoubtedly would have saved Mr. McNew’s life. Based on disputed evidence – in part coming from the testimony of plaintiffs’ own experts – plaintiffs cannot prove this theory for purposes of summary judgment.

The main fault in plaintiffs’ causation argument is that the type of brain hemorrhage that Mr. McNew suffered can happen spontaneously due to his underlying leukemia, especially until he would have completed his induction chemotherapy. It appears that plaintiffs will attempt to present anecdotal hearsay at trial from Mrs. McNew that Mr. McNew told her that he fell in the bathtub and bumped his head, which will be alleged to be the precipitating factor which led to his

brain bleed. Thus plaintiffs argue that the sooner Mr. McNew would have been sent to the hospital, he would not have been home to have fallen in his bathtub. However, there was no medical evidence that Mr. McNew suffered any trauma to his head. An individual in Mr. McNew's condition suffering from low platelets would be expected to have bruising on the head from a trauma, especially when the patient then suffered a brain hemorrhage. Dr. Payne testified that he would expect to see external evidence in the form of skin bruising, but saw no evidence of that in the records. (Deposition of Stephen Payne, M.D., p. 15).

In fact, no trauma at all is needed for a patient in Mr. McNew's condition to have suffered a spontaneous brain hemorrhage. Plaintiffs' own expert Dr. Eisenberger testified that with acute promyelocytic leukemia (APL), a patient is at risk of suffering a spontaneous bleed, including fatal hemorrhage, before and during initial chemotherapy treatment. (Deposition of Andrew Eisenberger, M.D., p. 68-70). Acute promyelocytic leukemia is the subtype of leukemia that plaintiffs allege Mr. McNew had even though Dr. Eisenberger admitted that the standard for diagnosing APL – using cytogenetic testing – was not done in this case. (Deposition of Andrew Eisenberger, M.D., p. 63-64). Mr. McNew may also have suffered a spontaneous hemorrhage even while he was in the hospital for treatment, and thus plaintiffs' argument also fails because an earlier hospital admission may have made no difference whatsoever on the outcome.

The exact time when an earlier hospital admission would have prevented a brain bleed and not affected Mr. McNew future neurologic assessment is a material fact in this case. Because the experts in this case disagree over the time of an earlier evaluation – including even among plaintiffs' own experts – plaintiffs cannot win summary judgment on this causation issue. In their motion for partial summary judgment, plaintiffs wrote that their experts Dr. Bloomfield

and Dr. Eisenberger testified that an earlier platelet intervention as late as 8:00 PM on September 18, 2009 would have prevented Mr. McNew's death from a brain bleed. However, no citation to any such opinions was noted, and such a specific time frame does not appear in Dr. Eisenberger or Dr. Bloomfield's deposition testimony. However, it should be noted that both Dr. Eisenberger and Dr. Bloomfield's opinions regarding earlier platelet therapy appears to be premised on receiving treatment before the alleged bumping of Mr. McNew's head in the bathtub. (Deposition of Andrew Eisenberger, p. 89-94; Deposition of Stephen Bloomfield, M.D., p. 69-70⁹). However, this alleged fact that Mr. McNew even bumped his head is disputed by the lack of medical evidence showing any bruise on his head. Dr. Eisenberger concedes that if Mr. McNew came to the hospital after the bleed began and began platelet therapy, then Mr. McNew may have survived and "been left with some kind of residual neurological deficit, but it's impossible to tell what it would have been." (Deposition of Andrew Eisenberger, M.D., p. 114-115). Dr. Braunstein, plaintiffs' other hematologist expert, also admitted that he was not sure he was the right person to answer the question whether starting platelet transfusion after the bleed could have prevented the patient's death within a couple of days. (Deposition of Kenneth Braunstein, M.D., p. 111).

Thus, there is disagreement among plaintiffs' own experts as to what earlier time would have prevented Mr. McNew's death or have a significant impact on his future neurologic assessment. Interestingly, in the records from Riverside Methodist Hospital, where Mr. McNew was taken for treatment of his brain bleed, Dr. Janet Bay – a neurosurgeon – noted that it appeared that Mr. McNew had a spontaneous hemorrhage which resulted in a brainstem injury

⁹ The deposition of Stephen Bloomfield, M.D. was filed with this Court on April 6, 2015.

with no evidence of brain function – almost from the minute he hemorrhaged. (Deposition of Stephen Bloomfield, M.D., p. 87-88). Because the experts disagree over what time an earlier hospital presentation would have made any difference, this part of plaintiffs’ motion for summary judgment must be overruled due to the genuine issue of material fact.

Not only are material facts in dispute, but plaintiffs’ theory of this issue is simply too speculative to be granted summary judgment, because it relies upon several assumptions in order to play out to fruition. The speculative and tenuous course includes an physical examination which would have undoubtedly led to blood work, which would have undoubtedly led to a diagnosis of leukemia and a platelet transfusion, which undoubtedly would have prevented any brain bleed, which undoubtedly would have saved Mr. McNew’s life, without any impact on his future neurologic function. Based on disputed evidence – in part coming from the testimony of plaintiffs’ own experts – plaintiffs cannot prove this theory for purposes of summary judgment.

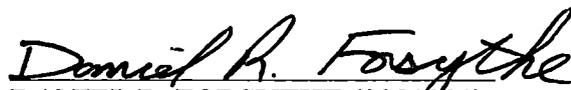
The dearth of evidentiary support in plaintiffs’ motion for this claim shows that this may have just been a “throw-in” argument. Nonetheless, due to material facts in dispute, plaintiffs’ motion for summary judgment on this claim must also be overruled.

III. Conclusion.

Plaintiffs lack the ability to prove their case for partial summary judgment. Therefore, OSUMC respectfully requests that plaintiffs' motion for partial summary judgment be denied. Instead, this Court should grant defendant's motion for partial summary judgment.

Respectfully Submitted,

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Attorney General of Ohio

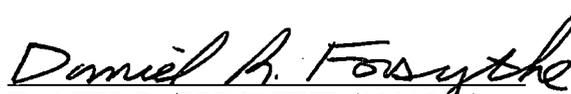


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Defendant's Memorandum Contra* was sent by regular U.S. Mail, postage prepaid, this 23rd day of April, 2015 to:

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