

2015 APR 27 PM 3: 34

**ORIGINAL**

IN THE COURT OF CLAIMS OF OHIO

MATTHEW RIES, Admr., et al., :

Plaintiffs, :

v. :

Case No. 2010-10335

Judge Patrick M. McGrath

THE OHIO STATE UNIVERSITY :

MEDICAL CENTER, :

Defendant. :

**DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO  
DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs' response to defendant's motion for partial summary judgment relies heavily on certain *procedural* admissions provided by The Ohio State University Medical Center ("OSUMC") after this Court granted plaintiffs' motion to have the admissions deemed admitted. However, in doing so and as explained below, plaintiffs severely undercut the credibility of their main witness, Mrs. Cyrelle McNew.

**I. Plaintiffs have no evidence to support their claim that Dr. Husain should have referred Mr. McNew for immediate medical examination on September 15, 2009 following a telephone conversation between Dr. Husain and Mr. McNew.**

Mrs. McNew was not a party to the telephone call. She merely overheard her husband's portion of the conversation. Plaintiffs acknowledge that she cannot speak to the instructions or advice given by Dr. Husain. Plaintiffs argue, however, that Mrs. McNew will be able to testify regarding what she overheard Mr. McNew say during the telephone conversation. But plaintiffs also acknowledge the hearsay in these statements by attempting to use the hearsay *exception* for medical diagnosis or treatment under Evid. R. 803(4).

The problem with plaintiffs' reliance on Evid. R. 803(4) is that whatever Mr. McNew

**ON COMPUTER**

said during this conversation was told to Dr. Husain, who has no recollection of discussing any symptom, other than pain. (Deposition of Syed Husain, M.D., p. 111-114)<sup>1</sup>. Evidence Rule 803(4) permits a health care provider to testify regarding comments made by the declarant. Examples include assault victims' statements made to physicians, nurses, paramedics, and social workers. See, e.g., *State v. Ridley*, 2013Ohio 1268, 2013 Ohio App. LEXIS 1171 (March 29, 2013); *State v. Diggle*, 2012 Ohio 1583, 2012 Ohio App. LEXIS 1396 (April 9, 2012), *State v. Jillson*, 2012 Ohio 1034, 2012 Ohio App. LEXIS 974 (March 16, 2012); *State v. Hazel*, 2012 Ohio 835, 2012 Ohio App. LEXIS 727 (March 2, 2012). In this case, Mrs. McNew was merely overhearing one side of a conversation, and there is no evidence that Dr. Husain heard what Mr. McNew is alleged to have said to him. In the absence of any recollection of the declarant's comments, Dr. Husain cannot offer testimony pursuant to Evid. R. 803(4).

Due to the hearsay involved, evidence of the telephone call on September 15, 2009 is inadmissible, and plaintiffs cannot prove their claim of negligence related to this phone call. However, to the extent that the Court allows this hearsay statement, then the Court must also allow the testimony of Mrs. McNew related to Dr. Husain calling back the next day on September 16, 2009 to check on Mr. McNew's status. (Deposition of Cyrelle McNew, p. 43-44)<sup>2</sup>. According to Mrs. McNew, Mr. McNew had told Dr. Husain that he was still bleeding, but not as much as the previous evening. (Deposition of Cyrelle McNew, p. 49-50). Thus, the symptom of bleeding – which is expected following the type of hemorrhoid procedure that Mr. McNew had – was actually improving. (Deposition of Andrew Eisenberger, M.D., p. 37-38)<sup>3</sup>.

---

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

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

<sup>3</sup> The deposition of Andrew Eisenberger, M.D. was filed with this Court on April 6, 2015.

Without any evidence to prove their claim regarding a breach of the standard of care regarding the telephone call on September 15, 2009, this Court must grant summary judgment to defendant on this issue.

**II. Plaintiffs cannot prove their claim that a staff member of Dr. Husain's office breached the standard of care regarding advice to discontinue Tramadol during a telephone call on the morning of September 16 or 17, 2009.**

Five years into this litigation, plaintiffs acknowledge that they only recently changed the date of this alleged phone call to September 17, 2009 and identified that it went to Dr. Husain's office. Interestingly, while plaintiffs now chalk this up to "confusion" (Plaintiff's Response to Defendant's Motion for Partial Summary Judgment, p. 4), the only confusion expressed during Mrs. McNew's deposition four years ago was not knowing to which medical doctor's office the call went to – the internist Dr. Rothbaum, who prescribed the Tramadol, or the colorectal surgeon Dr. Husain, who incised Mr. McNew's hemorrhoid. (Deposition of Cyrelle McNew, p. 46). But there was *never* any confusion during her deposition about the date of this phone call: September 16, 2009. (Deposition of Cyrelle McNew, p. 45-47).

Despite what Mrs. McNew testified to under oath, plaintiffs now state that they "no longer need to rely upon the testimony of Mrs. McNew to establish" the fact related to the Tramadol phone call, because the Court has ruled that the fact was deemed admitted. See Plaintiff's Response to Defendant's Motion for Partial Summary Judgment, p. 5. However, on cross-examination, Mrs. McNew's testimony will be impeached and will rebut any *procedural* admission from OSUMC.

The *procedural* admission from OSUMC that someone in Dr. Husain's office provided instructions to Mr. McNew to stop taking Tramadol due to the symptom of bruising simply does

not make any sense. Dr. Husain himself testified during deposition that he was not aware of any such side effect from Tramadol. (Deposition of Syed Husain, M.D., p. 152). Julie Barrett, R.N., a nurse in Dr. Husain's office, testified that if a patient called in with possible symptoms from taking a medication, she would page the physician. (Deposition of Julie Barrett, R.N., p. 51-52)<sup>4</sup>. Finally, Sheila Starrett, who answered telephones in Dr. Husain's office, testified that she is not aware of the side effects of Tramadol, but would never have told a patient to stop taking a medication without first consulting with a nurse or Dr. Husain. (Deposition of Sheila Starrett, R.N., p. 12-13, 40-42)<sup>5</sup>. Therefore at trial, there will be no testimony from anyone that such a conversation took place or that such a conversation would ever take place by someone in Dr. Husain's office.

Finally, to the extent that plaintiffs must prove this fact without any shred of evidence, except for a *procedural* admission by OSUMC – then at trial OSUMC will renew its motion to withdraw its admissions based on Civ. R. 36(B). Ohio courts interpreting Civ. R. 36(B) have repeatedly emphasized the importance of having matters resolved on the merits, rather than on procedural technicalities. The Ohio Supreme Court and the Tenth District Court of Appeals have summarized Rule 36(B) this way: “This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.” *Cleveland Trust Co. v. Willis*, 20 Ohio St.3d 66, 68 (1985); *accord, Tucker v. Gilley*, 2002-Ohio-1456, ¶13 (10<sup>th</sup> Dist.). As *Tucker* explained, that interpretation is consistent with “the spirit of the Civil Rules” under which cases are to be resolved “upon the merits” rather than “upon pleading deficiencies.” *Id.*

---

<sup>4</sup> The deposition of Julie Barrett, R.N. was filed with this Court on April 6, 2015.

<sup>5</sup> The deposition of Sheila Starrett was filed with this Court on April 6, 2015.

Some courts and commentators state that Rule 36 “might well require” courts to permit withdrawal “when an admission has been made inadvertently.” *See, e.g., Kutscherousky v. Integrated Communications Solutions, LLC*, 2005-Ohio-4275, ¶19. Rule 36(B)’s reference to prejudice “‘relates to the difficulty a party may face in proving its case’ because of the sudden need to obtain evidence required to prove the matter that had been admitted.” *Kutscherousky*, 2005-Ohio-4275, ¶25.

Plaintiffs obtained these procedural admissions after taking the depositions of OSUMC witnesses whose testimony – except for acknowledging the telephone number of the surgery department – did not support any of the requests for admissions. Therefore permitting OSUMC to withdraw its inadvertent admissions – including somehow being able to authenticate an AT&T phone record – would not prejudice plaintiffs.

**III. Plaintiffs cannot prove their claim that a staff member of Dr. Husain’s office breached the standard of care regarding the symptom of shortness of breath during a telephone call on the morning of September 18, 2009.**

Instead of focusing solely on the alleged telephone call on the morning of September 18, 2009 – which plaintiffs have no evidence concerning what was actually discussed – plaintiffs have failed to respond to defendant’s argument by grouping together all telephone calls from September 18, 2009, and thus defendant must be granted summary judgment that plaintiffs cannot prove the claim regarding a breach of the standard of care during the 8:04 A.M. telephone call on that date.

While the *procedural* admission of OSUMC includes that OSUMC received a phone call from the McNews on September 18, 2009 at 8:04 A.M. (Request for Admission No. 7), there is no admission as to what was discussed during this phone call. Mrs. McNew has testified that she

was not present for this phone call and unlike the phone call on September 15, 2009 regarding the symptom of bleeding, she was not *even* present for this telephone call. (Deposition of Cyrelle McNew, p. 57). Therefore, any attempt to allow Mrs. McNew to testify regarding this conversation would include double hearsay: one-part hearsay for the statements between Mr. McNew and whoever he spoke with, and a second-part hearsay for Mr. McNew repeating those statements to Mrs. McNew. As previously argued in defendant's motion for partial summary judgment, with no other piece of evidence than hearsay statements, plaintiffs cannot prove any negligence during the phone call that took place on September 18, 2009 at 8:04 A.M.

The telephone record indicates that a two-minute telephone call was made to Dr. Husain's office at this time. Whether Mr. McNew spoke to anyone, hung up, or merely left a message remains unknown. What transpired during that conversation, assuming one even took place, also remains unknown. Plaintiffs have been unable to establish if Mr. McNew spoke to a receptionist, nurse, nurse's aide, or a physician. Further, the true nature of any patient complaints voiced during the conversation remains unknown.

#### **IV. Conclusion.**

As a matter of law, The Ohio State University Medical Center is entitled to summary judgment regarding the following theories of recovery presented by plaintiffs, because plaintiffs are unable to provide the necessary elements of a medical malpractice claim for these issues:

1. Based upon the information provided to him by the decedent during a telephone conversation on September 15, 2009, Dr. Husain should have immediately seen the patient or had him evaluated in a local emergency department;
2. Based upon the information provided by the decedent during a telephone conversation on September 16, 2009, a staff member of either Dr. Husain or Dr. Rothbaum should have asked additional

questions of the patient in order to determine whether the patient needed to be evaluated by a physician; and

3. Based upon the information provided by the decedent during a telephone conversation with someone in Dr. Husain's office the morning of September 18, 2009, a staff member should have either consulted Dr. Husain or immediately referred the patient to a local emergency department.

Therefore, OSUMC respectfully requests that its motion for partial summary judgment be granted. In addition, this Court should deny plaintiffs' motion for partial summary judgment.

Respectfully Submitted,

MICHAEL DEWINE  
Attorney General of Ohio

*Daniel R. Forsythe*

DANIEL R. FORSYTHE (0081391)  
JEFFREY L. MALOON (0007003)

Assistant Attorneys General

Court of Claims Defense

150 East Gay St., 18<sup>th</sup> Floor

Columbus, OH 43215-4220

Telephone: (614) 466-7447

Fax: (866) 422-9165

COUNSEL FOR DEFENDANT

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Defendant's Reply* was sent by regular U.S.

Mail, postage prepaid, this 27th day of April, 2015 to:

David I. Shroyer  
Daniel N. Abraham  
536 South High Street  
Columbus, Ohio 43215  
*Counsel for Plaintiffs*

  
DANIEL R. FORSYTHE (0081391)  
Assistant Attorney General