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COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS FOR THE STATE OF OHIO

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MATTHEW RIES, Admr., et al.,

Plaintiff,

Case No. 2010-10335

vs.

Judge Patrick M. McGrath

THE OHIO STATE UNIVERSITY
MEDICAL CENTER,

Defendant.

**PLAINTIFF'S REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

To defeat a motion for summary judgment, the nonmoving party must present some evidence to raise a genuine issue of material fact. *Nice v. Marysville*, 82 Ohio App.3d 109, 116, 611 N.E.2d 468 (3rd Dist. 1992). If the nonmoving party fails to provide the necessary evidence, the motion should be granted. The defense experts have simply failed to rebut certain aspects of this case and do, in fact, agree with the Plaintiff's experts on many points.

Points of Agreement

1. Nurse Bush should have obtained a complete history of the length of Michael's symptoms.
2. Knowledge by a physician of a month of symptoms would result in a CBC.
3. Dr. Husain should have asked detailed questions on Michael's shortness of breath symptoms on September 18th.
4. Shortness of breath from exertion needs immediate evaluation.
5. Michael's shortness of breath was from anemia (low red blood cell count).

Points Not Disputed

1. Treatment between 2:30 p.m. and the evening of September 18th would have prevented the death from a brain bleed.

Defendant's response to Plaintiff's motion for partial summary judgment rests largely on the flawed premise that Dr. Husain can create a material issue of fact through testimony that he

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does not recall the conversations at issue. However, Dr. Husain's testimony that he does not recall or remember the conversations with Mrs. McNew does not raise an issue of fact because Defendant "has not actually controverted" Mrs. McNew's deposition testimony. See, *Brown v. Westfield Nat'l Ins. Co.*, 6th Dist. Lucas No. L-98-1256, 1999 Ohio App. LEXIS 1378, *9; *State ex rel. Mike v. Warden of Trumbull Corr. Inst.*, 11th Dist. Trumbull No. 2002-T-0153, 2003-Ohio-2237, ¶ 11; *Maxwell v. Mark's Supply*, 117 Ohio App.3d 834, 837, 691 N.E.2d 757 (2nd Dist. 1997).

Plaintiff's motion is based on testimony from Defendant's experts as shown in this brief.

A. Nurse Bush Was Negligent In Recording A History During Micheal McNew's Nurse Visit On August 27, 2009 Which Proximately Resulted In A Failure To Obtain Blood Work.

In this case, it is undisputed that if blood work had been done, Michael McNew would have been diagnosed as having leukemia. (Eisenberger TR 98) Michael was prompted by his wife to seek treatment because of virus symptoms including fatigue, headache, nausea, diarrhea, and fever off and on **for a month**. (McNew TR 19) When Michael presented to Dr. Rothbaum's office on August 27, 2009, he was only seen by a nurse. The only history recorded was that Michael had a "sore throat". It is undisputed Nurse Bush was negligent in failing to document the length of the symptoms. Nurse Bush refused to testify due to a mental condition. As a result of not noting the duration of the symptoms, Dr. Rothbaum merely closed the file as he was unaware of the length of the symptoms. The negligence stems from the failure of Nurse Bush to record a complete history to include the length of time Michael had been symptomatic.

OSU's Expert Dr. Payne testified:

- 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.

(Payne TR 56) Dr. Payne never state that Nurse Bush was not negligent. Plaintiff's expert Nurse Reid testified that Nurse Bush should have communicated a complete history to Dr. Rothbaum.

(Reid TR 33) OSU expert Dr. Payne testified that a complete history would include the duration of the symptoms. (Payne TR 47-48)

On the issue of proximate cause, every expert who testified regarding the issue agreed that had they known the duration of Michael's sore throat, they would have ordered a CBC.

OSU expert Dr. Payne testified:

A. If I had a history of . . . actually a month of feeling badly, that wouldn't be typical of the usual respiratory kind of sore throat thing that we see.

Q. And why would you order a CBC in that circumstance?

A. I'd order it as part of the – I'd probably order more than a CBC. . . .

(Payne TR 51)

OSU expert Dr. Johansen testified:

A. -- I am not a family physician; but I think if somebody had persistent, significant malaise and not feeling well, I imagine a typical family physician would take a detailed history and physical and determine what to do from that point; which, if the symptoms were significant and unusual, part of that might be getting blood work.

Q. CBC?

A. Including a CBC.

(Johansen TR 110)

OSU expert Dr. Fialk testified:

Q. -- if he says, I have been feeling bad for a month and running down, and I have had this surgery, and I have –

A. Well, hold on. So it wouldn't be wrong to order the CBC. It wouldn't be right. Some – it's – some might do it. Some may say, Let's keep an eye on it.

Q. Keep an eye on it? Okay. Come back in two weeks, and he comes back in two weeks and says, I feel the same way. Would you order a CBC then?

A. I think more people then might consider doing the CBC.

(Fialk TR 120) This issue was not addressed by Dr. Husain or Dr. Rothbaum.

By Nurse Bush neglecting to obtain and record a complete history, specifically including the duration of Michael's symptoms, he was negligent. Nurse Bush's actions resulted in Dr. Rothbaum not ordering a CBC which was indicated and would have shown blood abnormalities associated with leukemia.

B. It Is Undisputed That Dr. Husain's Failure To Take An Adequate History Related To The Complaint Of Shortness Of Breath On The 18th Resulted In Michael McNew Not Receiving Immediate Timely Medical Treatment That Would Prevent His Death From A Brain Bleed. Dr. Husain Was Negligent When He Failed To Obtain A Complete History And To Urgently Have Michael McNew's Complaints Of Shortness Of Breath Evaluated On The Afternoon Of September 18th.

All Defense experts and Plaintiff's experts agree that the report of shortness of breath by Mrs. McNew required a detailed solicitation of history by Dr. Husain of the shortness of breath symptoms. (Payne TR 23; Johansen TR 99-101; Fialk TR 135) It is undisputed that this did not occur. (McNew TR 51-55) Mrs. McNew told Dr. Husain of the shortness of breath but he did not ask her questions about it. Mrs. McNew testified that she noticed the shortness of breath when he walked up the steps. All experts agree that Michael suffered from anemia (loss of oxygen-carrying red blood cells) from his bleeding which in turn caused shortness of breath on exertion.

All experts agree that a report of persistent shortness of breath when he walked up the steps on September 17th and 18th required evaluation at the emergency room or at the physician's office. This is undisputed as shown below. Defense argues that Dr. Husain should be able to rebut the evidence of shortness of breath by the contention that his custom would have been to make a referral to the ER. Dr. Husain's deposition testimony shows otherwise. Dr. Husain has testified that he does not remember the conversation but that if he had been told that Michael had shortness of breath going up the steps, he states "I don't know what I would have done." (Husain

TR 157) Even Defendant's own experts had to concede that under the circumstances present in this case that an evaluation and CBC was indicated.

OSU's expert Dr. Payne testified:

- A. . . . [T]he most pressing concern is – anemia associated with bleeding is that you're not going to get enough oxygen to tissues.
- 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.

(Payne TR 31-32)

OSU's expert Dr. Fialk testified:

- Q. Now, on the –on the shortness of breath going up the steps, I have just had surgery, I have been confined to bed, I am 37 years old, I am in good shape –
- A. One episode, I wouldn't.
- Q. -- every time I walk up the steps, I have shortness of breath.
- A. If it's every time I walk up the steps - - that was the catch word.
- Q. Okay.
- A. If it's every single time I walk up the steps, if I am walking around the house, and every time, I am – I have shortness of breath, yes.

(Fialk TR 121) Complaints of shortness of breath need to be evaluated initially through obtaining a detailed history.

OSU's expert Dr. Johansen testified:

- Q. . . . If in this particular case, if Dr. Husain had known and asked questions and found out that he had had – he had had shortness of breath upon going up the steps, he would have probably wanted to know more information, such as, Well, does it happen every time you go up the steps. Right?
- A. **I think so, yes.**

(Johansen TR 99)

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

(Johansen TR 59) It is undisputed that any time a condition is “persistent” it needs to be evaluated. Defendant’s own expert Dr. Fialk testified that **“any symptom that is persistent and progressive in a postoperative patient, I would evaluate.”** (Fialk TR 147)

Here, without taking a complete history, Dr. Husain had no way of assessing whether the shortness of breath was persistent. However, as a matter of science, we know that it was due to the anemia measured at the hospital later on September 18th.

OSU's expert Dr. Johansen further testified:

- Q. . . . Why is it that blood loss would cause shortness of breath upon exertion?
- A. **Because you don't have as much oxygen-carrying capacity, so you're not going to be able to – to bring as much oxygen to – to the tissues, including the muscles, to sustain yourself.**
- Q. All right. So actually on your differential would be anemia?
- A. **Yeah.**

(Johansen TR 55)

- Q. . . . Let's say a patient has anemia with - - with symptoms of anemia. That patient needs to be in and be evaluated. Would you agree with that?

* * *

- A. **If – if you know that –that anemia is causing significant symptoms and it a new thing that needs to be evaluated.**

- Q. So in this particular case, we have a history of blood loss; do we not?
- A. **Yeah.**
- Q. And we know that blood loss can result in anemia, right?
- A. **Yeah.**
- Q. And we know a symptom of anemia can be shortness of breath on exertion; --
- A. **Yeah.**
- Q. Right?
- A. **Yeah.**

* * *

- Q. In this particular case, looking back on it, if he was having a mild shortness of breath upon going up the steps, in light of this blood loss, do you believe that it was due to the anemia?

* * *

- A. **I think the anemia certainly could have been a contributing factor.**

(Johansen TR 61- 62)

OSU's expert Dr. Johansen went on to testify that:

- 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.**

(Johansen TR 97)

- Q. The anemia was causing the shortness of breath on exertion. True?
- A. **I think in retrospect, that was certainly a contributing factor.**
- Q. All right. And the anemia was not getting better.
- A. **I think in retrospect, that's absolutely true.**
- Q. And so we know that if he had shortness of breath in walking up the steps with this anemia and the condition that was getting worse, he would have continued shortness of breath every time he walked up the steps.
- A. **Assuming all the other facts remain constant.**

- Q. All right. Well, we know that anemia wasn't getting better. Right?
- A. **Sure, that – that one variable, I presume –**
- Q. All right.
- A. **--wasn't getting better.**

(Johansen TR 85-86)

OSU's expert Dr. Payne testified:

- 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.**

(Payne TR 24-25) Dr. Johansen agreed. (Johansen TR 70)

OSU's expert Dr. Johansen then stated:

- Q. All right. And if he told you that the – the bleeding is 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.**

(Johansen TR 79)

- C. **It Is Undisputed That If Michael Had Been Referred To The Emergency Room By Dr. Husain On The Afternoon Or Early Evening Of September 18th He Probably Would Not Have Suffered A Deadly Brain Bleed As Defendant's Experts Failed To Address This Issue In Their Depositions And Failed To Dispute The Plaintiff's Experts On This Point.**

Plaintiff's experts testified that had Michael McNew gone to the emergency room or received additional evaluation by a physician after the 2:30 telephone call, blood work consisting of a CBC measuring anemia and platelet levels would have revealed that Michael had leukemia.

Platelets would have been administered which would have prevented the brain bleed. (Bloomfield TR 71) The Defendant's experts did not address nor dispute this testimony.

First, it is undisputed that if Michael McNew had gone to the emergency room on September 18th, blood work would have been done. According to Dr. Payne, this is just one of many things that would have been done. He explained 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. All those things would have [been] done in an ER setting for sure." (Payne TR 26) There is no testimony from Dr. Husain, Dr. Rothbaum or Dr. Johansen to the contrary.

The experts in this case agree that the brain bleed occurred because Michael's platelets were low. (Johansen TR 20-21; Bloomfield TR 60) Had Dr. Husain directed Michael to the emergency room when he spoke with Mrs. McNew on the afternoon of September 18th, a CBC would have been done and would have shown the low platelets. The platelets would have been administered and the brain bleed that caused Michael's death would have been avoided.

Defendant's experts have offered no testimony concerning whether Michael would have died of a brain bleed if he had been referred to the emergency room on the afternoon of September 18th. Dr. Payne, Dr. Johansen and Dr. Fialk did not address this issue during their depositions or in their reports. In contrast, Plaintiff's experts Dr. Bloomfield, Dr. Braunstein and Dr. Eisenberg all testified that an emergency room visit on the afternoon of September 18th would have prevented Michael's death from a brain bleed. (Bloomfield TR 70-72; Braunstein TR 98; Eisenberg TR 84-85)

Dr. Bloomberg testified that [i]f he had gone to the emergency room before 5:00 or 5:30, and not had that head bump, he would have survived without any sequelae to his brain. He would have had a high chance of surviving his leukemia." (Bloomberg TR 70) What is also clear from Dr. Braunstein's testimony is that earlier treatment would have altered the course of the bleed

and either prevented it all together or mitigated its consequences. Dr. Braunstein explained that “[i]f platelets had been given before the bleeding started, it would have prevented the bleed.” (Braunstein TR 110) Once the bleeding has begun, the purpose of using platelet transfusion is to “[s]top what you can and mitigate the extent.” (Braunstein TR 110)

The bleeding occurred around 8:00 p.m. (Bloomfield TR 75) The last telephone conversation that Cyrelle McNew had with Dr. Husain occurred at approximately 2:30 p.m. on September 18th, well before the bleed which began at 8:00 p.m.

Defendant has not produced any expert testimony to rebut the testimony of Plaintiff’s experts. Defendant has failed to dispute that intervention on September 18th, after 2:30 p.m. and before 8:00 p.m., would have prevented Michael’s death from a brain bleed. The sole issue at trial will thus be did Michael have a 49% chance, 56% chance or 80% chance of surviving leukemia treatment and living a full life. There is a factual dispute about that issue but not about the avoidance of brain death from bleeding.

For the foregoing reasons, Plaintiff urges the Court to grant partial summary judgment in his favor and to find that Defendant, 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 from a brain bleed.

Respectfully submitted,



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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 27th day of April, 2015:

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