

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS FOR THE STATE OF OHIO 2015 APR 27 PM 4:23

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 IN LIMINE TO EXCLUDE EVIDENCE OF
LIFE INSURANCE AND SOCIAL SECURITY BENEFITS**

Now comes the Plaintiff, by and through counsel, and respectfully moves the Court for an Order *in Limine* excluding any and all references by counsel during opening or closing statements and testimony or evidence related to the life insurance proceeds paid to Cyrelle McNew or the social security benefits to be paid to her minor children in connection with Michael McNew's death. This motion is based upon the grounds set forth with particularity in the accompanying Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. Factual Background

On September 19, 2009, Michael McNew died as a result of a brain bleed caused by low platelets related to his undiagnosed leukemia. The Administrator of his Estate, Matthew Ries, filed this wrongful death action against Defendants The Ohio State University Medical Center (hereinafter "OSU Medical Center") 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 Medical Center in the course of their treatment of Michael McNew.

At the time of his tragic death, Michael was 37 years old and a father of three young children. He had purchased a life insurance policy for the benefit of his wife, Cyrelle McNew, and she has received the \$1 million death benefit payable under the policy. Their children, Jason (DOB 7-31-03), Bradford (DOB 10-20-04) and Mitchell (DOB 6-6-06), have been receiving social security benefits.

Plaintiff anticipates that Defendant will attempt to offer evidence of the payment of life insurance proceeds and social security benefits to argue that these payments should reduce any award made to Plaintiff as damages in this wrongful death action. However, Defendant is not entitled to a setoff of these payments. Therefore, any evidence related to the payments is not relevant or admissible in this case.

II. Law and Argument

The purpose of a motion in limine "is to avoid injection into [the] trial of matters which are irrelevant, inadmissible and prejudicial." *State v. Maurer*, 15 Ohio St.3d 239, 259, 473 N.E.2d 768 (1984). A motion in limine is designed "to avoid the injection into a trial of a potentially prejudicial matter which is not relevant and is inadmissible." *Reinhart v. Toledo Blade Co.*, 21 Ohio App. 3d 274, 278, 487 N.E.2d 920 (3rd Dist. 1985). To be relevant and therefore admissible, evidence must have a tendency "to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R. 401. The decision to admit or exclude evidence lies within the sound discretion of the trial court. *O'Brien v. Angley*, 63 Ohio St.2d 159, 163, 407 N.E.2d 490 (1980).

In determining whether evidence is admissible, it must first be found to be relevant under Evid. R. 401 and Evid. R. 402. Evid. R. 401 provides that evidence is relevant when it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid. R. 402 provides in relevant part that “[e]vidence which is not relevant is not admissible.” The evidence related to the life insurance proceeds paid to Mrs. McNew and the evidence related to the minor children’s receipt of social security benefits is not relevant under Evid. R. 401 and is therefore not admissible under Evid. R. 402

A. Life Insurance Proceeds Are Not “Benefits” To Be Deducted From The Damages Awarded.

Plaintiff anticipates that Defendant will rely on R.C. 3345.40(B)(2) to argue that Defendant is entitled to offset the life insurance and social security payments against any damages awarded to Plaintiff. R.C. 3345.40(B)(2) provides in relevant part that:

If a plaintiff receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against the state university or college recovered by the plaintiff.

The statute does not encompass every payment received by Plaintiff, just those payments considered “benefits” for purposes of R.C. 3345.40(B)(2).

The language in R.C. 3345.40(B)(2) mirrors the language in R.C. 2744.05(B) which provides for the deduction of collateral benefits from awards against political subdivisions. *McMullen v. Ohio State Univ. Hosp.*, 88 Ohio St.3d 332, 343, 725 N.E.2d 1117 (2000). The Ohio

Supreme Court considered what amounts could be set off as “benefits” by political subdivisions in *Vogel v. Wells*, 57 Ohio St.3d 91, 566 N.E.2d 154 (1991). The Court noted that the term “benefits” is not defined in the statute and adopted a definition derived from Black’s Law Dictionary. For purposes of both R.C. 2744.05(B) and R.C. 3345.40(B)(2), “benefits” is now defined as “[f]inancial assistance received in time of sickness, disability, unemployment, etc. either from insurance or public programs such as social security.” See *Aubrey v. Univ. of Toledo Med. Ctr.*, 10th Dist. No. 11AP-509, 2012-Ohio-1313, ¶ 22, quoting *Black’s Law Dictionary* 158 (6th Ed. 1990).

Although this definition specifically mentions insurance, R.C. 3345.40(B)(2) expressly excludes life insurance from the “benefits” that can be set off, stating that “[n]othing in this division affects or shall be construed to limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds.” The plain language of R.C. 3345.40(B)(2) prevents the Court from reducing any amount awarded to Plaintiff by the amount of life insurance proceeds paid to Mrs. McNew. *Rosenshine v. Medical College Hosps.*, Ct. of Cl. No. 1998-04701, 2013-Ohio-3630, ¶ 9.

Since the life insurance proceeds cannot be set off against any judgment awarded, evidence related to the proceeds paid to Mrs. McNew under her husband’s life insurance policy has no tendency “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Therefore, the evidence is not relevant under Evid. R. 401 or admissible under Evid. R. 402.

B. Defendant Is Not Entitled To A Setoff For Social Security Benefits Paid To The Decedent’s Minor Children.

“It is a nearly universal rule that evidence of a survivor’s receipt of social security benefits is not admissible in a wrongful death action to prove mitigation of damages.” *McFarland v. Slattery*, 8th Dist. Cuyahoga No. 44434, 1983 Ohio App. LEXIS 12925, *6 (Jan.

13, 1982) (citations omitted). As the Sixth Circuit explained in *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970), social security and insurance benefits paid to widows and minor children “represent receipt of private or governmental contract rights which became fully executed and payable upon death without regard to the cause of death.” *Id.* at 1273. The Sixth Circuit rejected the argument that “the receipt of the social security and insurance benefits reduces the pecuniary loss to the survivors occasioned by reason of the deaths” and concluded that refusing to permit an offset does not result in the survivors being paid twice for the same loss. *Id.* Neither of these cases involved R.C. 3345.40(B)(2) or addressed a similar statute providing a setoff. Nevertheless, the cases are instructive in that they provide a context for considering whether Defendant should be entitled to a setoff for the social security benefits received by the minor children in this case.

Notwithstanding these decisions, the Ohio Supreme Court has held that social security benefits are the type of collateral source benefits contemplated by R.C. 2744.05(B), and by extension, R.C. 3345.40(B)(2). *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.*, 73 Ohio St.3d 260, 265, 652 N.E.2d 952 (1995). In *Buchman*, the Court held that the social security benefits Donald Buchman’s children received, or were entitled to receive, were not deductible from the jury’s verdict. *Id.* There the Northwest Ohio District Manager for the Social Security Administration testified that these benefits “are for the care and welfare and use of the children.” *Id.* The Court noted that “[n]o part of the \$5,082,482 verdict against which Wayne Trace seeks to offset these benefits was awarded to Donald’s children.” *Id.*

The Ohio Supreme Court “adhere[s] to the proposition that deductions for collateral benefits are constitutionally permitted only to the extent that the loss for which the collateral benefit compensates is actually included in the award.” *McMullen*, 88 Ohio St.3d at 343. In *Buchman*, the Court stated that “there shall be no constitutionality without a requirement that deductible benefits be matched to those losses actually awarded.” *Buchman*, 73 Ohio St.3d at

269. In *McMullen*, the Court went on to explain that “due process requires that the collateral benefits to be deducted belong to the party whose recovery is to be offset. Due process does not allow one party’s recovery to be reduced by another person’s collateral benefits.” *McMullen*, 88 Ohio St.3d at 343. Although *Buchman* addressed this concept based on the language in R.C. 2744.05(B), *McMullen* held that R.C. 3345.40(B)(2) “is susceptible of an interpretation that requires the matching of deductible benefits to losses actually awarded.” *Id.*

The potential for double recovery does not necessarily mandate a setoff. *Adae v. State*, 10th Dist. Franklin No. 12AP-406, 2013-Ohio-23, ¶ 28. In this case, Defendant bears the burden of proving the extent to which it is entitled to a setoff, if at all. *Id.* “The law precludes an off-set without proof of double recovery (i.e. that the [judgment] includes the amounts paid by collateral sources).” *Id.*, quoting *Baker v. Cleveland*, 8th Dist. Cuyahoga No. 93952, 2010-Ohio-5588, ¶ 53.

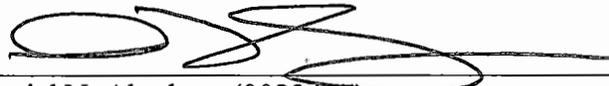
In this case, Defendant cannot prove that any judgment awarded to the Estate encompasses the social security benefits received by the children. To the extent the judgment encompasses an award of lost income, the lost income is an award to Mrs. McNew, not her children. The social security benefits paid to the children can not be offset against Mrs. McNew’s recovery. In the absence of a right to set off the social security benefits against the judgment, the receipt of social security benefits by the children, like the receipt of life insurance proceeds, has no tendency “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Therefore, the evidence is not relevant under Evid. R. 401 or admissible under Evid. R. 402.

III. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that the Court issue an Order *in Limine* excluding any and all references by counsel during opening or closing statements and

testimony or evidence related to the life insurance proceeds paid to Cyrelle McNew or the social security benefits to be paid to her minor children in connection with Michael McNew's death.

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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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