

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

2015 MAY 11 PM 3:40

IN THE COURT OF CLAIMS OF OHIO

MATTHEW RIES, Admr., et al., :

Plaintiffs, :

v. :

THE OHIO STATE UNIVERSITY :
MEDICAL CENTER, :

Defendant. :

Case No. 2010-10335

Judge Patrick M. McGrath

**DEFENDANT'S MEMORANDUM CONTRA
PLAINTIFFS' MOTION IN LIMINE REGARDING
LIFE INSURANCE AND SOCIAL SECURITY BENEFITS**

Defendant, The Ohio State University Medical Center ("OSUMC"), respectfully submits that plaintiffs' motion in limine to exclude evidence of life insurance and social security benefits is not well taken and should be overruled. *First*, evidence of life insurance benefits should be allowed into evidence, because R.C. 3345.40(B)(2) allows such benefits to be set off from judgments against state universities. While this Court has recently concluded otherwise, this narrow issue has not yet been decided by the Ohio Supreme Court, and thus this Court should allow such evidence into the record. *Second*, plaintiffs' own arguments acknowledge that social security benefits can be set off from judgments against the state, and therefore this argument must be overruled. *Finally*, a motion in limine is generally made to prevent prejudicial evidence from reaching the ears of a jury and because this case will be tried before the Court rather than a jury, the Court can determine during the course of trial, whether the evidence is admissible or not. In addition, this Court need not exclude damages evidence before it even decides the issue of liability.

R.C. 3345.40(B)(2) requires that life insurance benefits be set off from judgments against state universities.

Notwithstanding this Court's recent decision to the contrary as discussed below, R.C. 3345.40(B)(2) can be used to set off any benefits that plaintiffs received from life insurance benefits. Revised Code section 3345.40(B)(2) provides:

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....

(Emphasis added). Here, the plain language of the statute requires that life insurance be set off against any possible damages award against the university. In *Rosenshine v. Medical College Hosps.*, Ct. of Cl. No. 1998-04701, 2013-Ohio-3630, this Court found that life insurance proceeds cannot be deducted from plaintiff's award of damages based on the following sentence in R.C. 3345.40(B)(2): "Nothing 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." In essence, this is a statutory interpretation issue, and if the General Assembly wanted to exclude life insurance proceeds, it could have written just that, but it didn't. Instead, the General Assembly wrote that the rights of a beneficiary under a life insurance policy cannot be affected. If a beneficiary, such as Mrs. McNew in this case, has received the full proceeds of the life insurance policies – as she has in this case – it is not clear how her rights are limited by a set off. Mrs. McNew testified in her deposition that she received \$1,000,000 in life insurance from Mr. McNew's personal life insurance policy, as well as approximately \$100,000 from Mr.

McNew's employee benefit life insurance policy. (Deposition of Cyrelle McNew, p. 81).¹ Defendant is not aware of any evidence that Mrs. McNew's proceeds, which she has already received, will be diminished as a result of any judgment she may be able to obtain against OSUMC.

Nonetheless, because this unique statutory interpretation has yet to be addressed by the jurisdictional appellate courts, this Court must admit into evidence any testimony or documents regarding life insurance proceeds.

Social security benefits are set off from judgments against state universities.

In an unusual argument, plaintiffs argue that social security benefits also should not be set off, because OSUMC cannot prove that any possible judgment awarded to the Estate encompasses awards to Mr. McNew's children. By this argument, it is not clear if plaintiffs will make the unusual argument that the children should not receive any distribution from a possible damages award against OSUMC. Under the wrongful death statute, it is "rebuttably presumed" that Mr. McNew's three children suffered damages. See R.C. 2125.02(A)(1). OSUMC cannot reasonably make the argument that Mr. McNew's children did not suffer damages as a result of his death. However, OSUMC is willing to stipulate to such a fact based on plaintiffs' unusual argument in their motion in limine.

The case cited by plaintiffs is clearly distinguishable from this case. In *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.*, 73 Ohio St.3d 260 (1995), the plaintiff was a motorist who was rendered quadriplegic in a collision with a municipal school bus. The Supreme Court ruled that social security benefits paid to his children could not reduce the jury's

¹ The deposition of Cyrelle McNew was filed with this Court on March 4, 2015.

damages verdict, because no part of that verdict was awarded to plaintiff's children, who were not parties. *Id.* Here, as presumed beneficiaries of the Estate, Mr. McNew's children would be expected to be awarded part of the damages award.

Social security benefits are clearly the type of collateral source benefits that are subject to setoff. *Aubry v. Univ. of Toledo Med. Ctr.*, 10th Dist. No. 11AP-509, 2012-Ohio-1313; R.C. 3345.40(B)(2). "Benefit," as used in R.C. 3345.40(B)(2), was defined as "[f]inancial assistance received in time of sickness, disability, unemployment, etc. either from insurance or public programs such as social security." *Aubry, supra*, at ¶ 20, quoting *Vogel v. Wells*, 57 Ohio St.3d 91, 98 (1991), citing *Black's Law Dictionary* 158 (6th Ed. 1990). According to the calculations by defendant's expert economic, Bruce Jaffee, Ph.D., over the course of their lifetime until each reaches age 18, the three McNew children will collect a total of \$632,302.51 in social security benefits.² There is no doubt that this amount must be set off against any award that plaintiffs may be able to obtain against defendant.

In the alternative, based on plaintiffs' reliance on *Buchman, supra*, that the McNew children's social security benefits cannot be offset against any damages awarded to plaintiffs, which therefore appears to be an admission that the McNew children are somehow not entitled to any damages that would be awarded to plaintiffs (including the Estate), then OSUMC will stipulate that any damages awarded to the children will not exceed the amount they have received in social security benefits. Based on statutory and case law, such benefits would offset such damage award, thus setting off any award to the children to zero dollars.

² The expert report of Bruce Jaffee, Ph.D., was filed with this Court on October 15, 2014.

Plaintiffs are essentially seeking a motion in limine and it should be denied.

This Court recently denied a motion in limine to exclude evidence, noting that without a jury at trial, the court itself can make determinations regarding the exclusion of the testimony during the course of trial. (See Exhibit A: *James Tobin, Admr. v. University Hospital East*, Case No. 2012-08494, Entry, dated October 1, 2014). In this case, this Court can do the same thing by denying plaintiffs' motion and then make determinations regarding admissibility of evidence at trial.

A motion *in limine* "is a precautionary request, directed to the inherent discretion of the trial judge, to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court." *State v. Grubb*, 28 Ohio St.3d 199, 201, 503 N.E.2d 142 (1986)(quoting *State v. Spahr*, 47 Ohio App.2d 221, 224, 353 N.E.2d 624 (1976)). "The purpose of a motion *in limine* is to avoid injection into trial matters which are irrelevant, inadmissible, and prejudicial." *State v. Maurer*, 15 Ohio St. 3d 239, 259, 473 N.E.2d 768, 787 (1984).

A motion *in limine* is "a tentative or presumptive evidence ruling which states the court's anticipated treatment of an evidentiary issue... It cannot be a definitive ruling on an evidence question until the full context and foundation for the issue has been developed." *State v. White* (Cuyahoga County, 1982), 6 Ohio App. 3d 1, 4.; *State ex rel. DeWine v. Fred's Party Ctr.*, Seventh App. Dist. No. 13BE-29, 2014-Ohio-699, 13 N.E.3rd 2358, ¶ 44; *Thyssen Krupp Elevator Corp. v. Construction Plus, Inc.*, 10th App. Dist. No. 09AP-788, 2010-Ohio-1649, ¶ 35. A motion *in limine* requires a court to engage in a two-step procedure. "First, a consideration of the motion *in limine* as to whether any reference to the area in question should be precluded until

admissibility can be ascertained during trial. Second, at the time when the party desires to introduce the evidence which is the subject of the motion *in limine*, there must be a second hearing or determination by the trial court as to the admissibility of the evidence which is then determined by the circumstances and evidence adduced in the trial and the issues raised by the evidence.” *Riverside Methodist Hosp. v. Guthrie* (Franklin County 1982), 3 Ohio App. 3d 308, 310; *see also, Krotine v. Neer*, 10th Dist. App. No. 02AP-121, 2002-Ohio-7019, ¶ 10 (“since a motion in limine seeks only a preliminary ruling, the proponent of the evidence must actually move the court at trial to admit the evidence, whereas the party opposing the evidence must present to the court at that time an objection in order to properly preserve the question for appeal”).

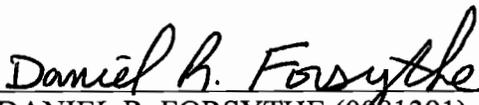
Generally, a motion *in limine* is made to exclude potentially prejudicial evidence before the trial so that irrelevant and prejudicial evidence is not heard by the jury. *Rinehart v. Toledo Blade* (Hancock County 1985), 21 Ohio App. 3d 274, 278. In this case, the Court, rather than a jury, is the finder of fact. Once the Court has heard the testimony of witnesses and has seen documented evidence, it can determine whether or not the evidence is admissible and make a ruling at that time.

Conclusion

Plaintiffs’ motion lacks merit and should be denied. Denying the motion at this time will not prevent plaintiffs from making a motion to exclude the testimony or evidence at time of trial, and at that time the Court can make an informed and final ruling. Plaintiffs will not be prejudiced by a denial of the motion as the same objections can be raised at trial. Therefore, OSUMC respectfully urges this Court to overrule the plaintiffs’ motion to limit expert testimony.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General


DANIEL R. FORSYTHE (0081391)
JEFFREY L. MALOON (0007003)
Assistant Attorneys General
Court of Claims Defense
150 E. Gay Street, 18th Floor
Columbus, Ohio 43215
(614) 466-7447
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail, postage prepaid, this 11th day of May, 2015, to:

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


DANIEL R. FORSYTHE
Assistant Attorney General



Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

JAMES TOBIN, Admr.

Plaintiff

v.

UNIVERSITY HOSPITAL EAST

Defendant

Case No. 2012-08494

Judge John P. Bessey

ENTRY

FILED
COURT OF CLAIMS
OF OHIO
2014 OCT -1 PM 1:12

On September 29, 2014, the court conducted a pretrial conference with the parties. As a result of the conference, the court was informed that settlement negotiations have ended and that the parties are prepared for trial as scheduled for *October 14-17, 2014*. Plaintiff also indicated that it may present witnesses via video conference.

On another matter, plaintiff filed a motion in limine on September 12, 2014, to exclude defendant's duplicative testimony. Pursuant to a stipulation approved by the court on September 16, 2014, defendant filed a response to plaintiff's motion on September 26, 2014.

Plaintiff argues in its motion that defendant's nursing experts Mary Jane Smith (Smith) and Jenny Beerman (Beerman) will present the same testimony and that the presentation of both of them will result in the needless presentation of cumulative evidence under Ohio Evid. R. 403(B). In response, defendant asserts that the combined testimony of Smith and Beerman is needed to show that nurse Wendy Morton (Morton) met the nursing standard of care. Defendant further argues that a motion in limine is generally made to prevent prejudicial evidence from reaching the ears of a jury and because this case will be tried before the court rather than a jury, the court can determine during the



JOURNALIZED

FILED
COURT OF CLAIMS
OF OHIO

2014 OCT -1 PM 1:12

Case No. 2012-08494

- 2 -

ENTRY

course of Smith and Beerman's testimony whether or not it is duplicative. Upon review, plaintiff's motion in limine is hereby DENIED. The court shall make any determinations regarding the exclusion of the testimony of Smith or Beerman during the course of trial.



JOHN P. BESSEY
Judge

cc:

Daniel R. Forsythe
Karl W. Schedler
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

James C. Carpenter
Lindsay M. Bouffard
Huntington Center
41 South High Street, Suite 2200
Columbus, Ohio 43215

Paul K. Reese
707 Virginia Street, East
Chase Tower - Eighth Floor
Charleston, West Virginia 25326

007

JOURNALIZED