



# Court of Claims of Ohio

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MATTHEW RIES, Admr., et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY  
MEDICAL CENTER

Defendant

Case No. 2010-10335

Judge Patrick M. McGrath

ENTRY DENYING MOTIONS FOR  
SUMMARY JUDGMENT

FILED CLAIMS  
COURT OF OHIO  
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On February 27, 2015, plaintiffs filed a motion for leave to file a motion for partial summary judgment pursuant to Civ.R. 56(A). Defendant filed a response and its own motion for leave to file a motion for partial summary judgment on March 11, 2015. On April 1, 2015, the court granted the parties' motions for leave, and on April 13, 2015, the court set a non-oral hearing date for April 24, 2015. The parties filed their memoranda contra on April 23, 2015, and filed responses to the memoranda contra on April 27, 2015. The motions are now before the court for a non-oral hearing pursuant to L.C.C.R 4(D).

Civ.R. 56(C) states in part, as follows:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

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In its motion, plaintiffs seek partial summary judgment on three issues: 1) The negligence of Dr. Syed Husain in responding to a phone call from Michael and Cyrelle McNew (McNews) on September 18, 2009; 2) The negligence of the nursing staff of Dr. Howard Rothbaum in not recording a history or duration of Michael McNew's (Michael) symptoms on August 27, 2009; and 3) The issue of proximate cause that an earlier evaluation would have prevented the brain bleed that caused Michael's death on September 19, 2009. Defendant seeks partial summary judgment on the following theories of recovery presented by plaintiffs: 1) Based upon the information provided to Dr. Husain 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 Michael 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 Michael during a telephone conversation with someone at Dr. Husain's office on September 18, 2009, Dr. Husain should have been consulted or Michael should have been immediately referred to a local emergency department.

This case revolves around the death of Michael on September 19, 2009 from a brain bleed due to low platelets. A few weeks before his death, Michael had several interactions with defendant's medical personnel. On August 27, 2009, Michael visited Dr. Rothbaum for a sore throat. On September 14, 2009, Michael visited Dr. Rothbaum again for hemorrhoid pain and was referred to Dr. Husain, a colorectal surgeon. At his second visit with Dr. Rothbaum, Michael was prescribed Tramadol for pain relief. On September 15, 2009, Michael saw Dr. Husain who performed a minor procedure to relieve the pressure of his hemorrhoid. The parties disagree as to the events which took place after the procedure performed by Dr. Husain. According to plaintiffs and based on defendant's admissions, the McNews made several calls to Dr. Husain's office in the following days. Plaintiffs state that on the evening of September 15, 2009, Cyrelle McNew (Cyrelle) called

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Dr. Husain about excessive bleeding from the site of the procedure. Plaintiffs also state that on September 16, 2009, the McNews noticed unusual bruising on Michael's arm which prompted Michael to call Dr. Husain on September 17, 2009, during which Michael was told to stop taking Tramadol and switched to Oxycodone. On the same day, Michael experienced shortness of breath when he climbed the stairs to the second floor. The next day, the McNews called Dr. Husain at 8:04 a.m. and spoke to a staff member but did not receive a call back from Dr. Husain. Cyrelle called again at 2:08 p.m. and received a call back at 2:32 p.m. Pursuant to Cyrelle's testimony, during the call she told Dr. Husain that 1) Michael was in too much pain and could not speak to him on the phone; 2) Michael had developed bruising so he stopped taking Tramadol; 3) Michael had developed shortness of breath while on Oxycodone so he stopped taking it; and 4) Michael was still bleeding from the incised hemorrhoid. At 8:30 p.m. on the evening of September 18, 2009, Michael collapsed and was rushed to the hospital and died the next day from the brain bleed.

In order to prove negligence, a plaintiff must prove the existence of duty and a breach of such duty, which proximately causes damages. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573. "To maintain a wrongful death action on a theory of negligence, a plaintiff must show (1) the existence of a duty owing to plaintiff's decedent, (2) a breach of that duty, and (3) proximate causation between the breach of duty and the death." *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 92, 529 N.E.2d 449 (1988). Similarly, "[i]n order to establish medical malpractice, it must be shown by a preponderance of the evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct result of such doing or failing to do some one or more of such particular things." *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), paragraph 1 of the syllabus.

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Upon review, plaintiff cannot prevail on its motion, which seeks summary judgment on the issue of breach of the standard of care for both Dr. Husain and the nurse at Dr. Rothbaum's office as well as the issue of proximate cause. The court finds that there are material issues of fact regarding how the symptoms were reported, which determines the applicable standard of care. The court also finds that with regard to the nurse's conduct, there are issues of material fact of whether the sore throat that Michael complained of on August 27, 2009, bears any relationship to the acute rectal pain that brought him to Dr. Rothbaum on September 14-15, 2009, which would have required a different course of action by the nurse. Because the court finds that there are issues regarding the standard of care, plaintiff's arguments with regard to proximate cause also fail.

In its motion, defendant argues that plaintiff's theories for recovery are based upon inadmissible hearsay evidence which do not fall under a hearsay exception. Hearsay is a "statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R. 801(C). Defendant states that any call that took place between Dr. Husain and the McNews was with Michael, and that Cyrelle, although present for some of the calls, cannot testify to the content of the calls hearing only one side of the conversation. Indeed, there are hearsay issues that need to be resolved with regard to the calls that occurred between Dr. Husain and the McNews. However, subsequent to the filing of the defendant's motion, the court granted plaintiff's motion to deem requests for admission admitted. Based upon those admissions, Cyrelle conveyed to Dr. Husain directly that Michael was experiencing shortness of breath and bruising on his arms during a telephone conversation, which she can testify to personally. Although these facts have been admitted and a portion of the hearsay issues argued by defendant have been resolved, there are still issues regarding the weight of the admissions and Cyrelle's testimony in the totality of the evidence to be presented at trial.

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Accordingly, the court finds that there are issues of material fact which preclude summary judgment. Therefore, both plaintiffs' and defendant's motions for summary judgment are DENIED.



PATRICK M. MCGRATH  
Judge

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