

[Cite as *Anderson v. Ohio State Univ. Wexner Med. Ctr.*, 2017-Ohio-7146.]

LEROY ANDERSON, et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY
WEXNER MEDICAL CENTER

Defendant

Case No. 2016-00761

Judge Patrick M. McGrath
Magistrate Holly True Shaver

ENTRY GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

{¶1} On February 16, 2017, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiffs filed no response and, despite previously obtaining an extension to do so, have not filed an affidavit of merit as required by Civ.R. 10(D)(2). Pursuant to L.C.C.R. 4(D), defendant's motion is ripe for the court's review. For the reasons discussed below, the court hereby grants defendant's motion.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "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).

{¶4} The following facts are drawn from defendant's motion and accompanying affidavits. Plaintiff Leroy Anderson (plaintiff) had an extensive medical history including multiple spine surgeries when he initially consulted with Dr. H. Francis Farhadi, a neurosurgeon. However, these previous procedures failed to stabilize plaintiff's spine and plaintiff developed a severe spinal deformity. After evaluating plaintiff, Dr. Farhadi advised plaintiff regarding a complex revision thoracolumbar fusion known as a "540 degree procedure" to re-align plaintiff's spine by removing broken screws and stabilization rods and placing new cages and hardware over the thoracolumbar spine, including at the L2-L3, L3-L4, and L4-L5 levels. Dr. Farhadi recommended a combined posterior and anterior approach to prevent further damage to the spinal nerves. The anterior portion of this procedure is typically performed by two surgeons, a general surgeon who dissects the tissues and blood vessels to expose the spine and a neurosurgeon who places hardware around the spine.

{¶5} Dr. Farhadi sought the assistance of Dr. Andrie V. Manilchuk, a general surgeon, who concurred that plaintiff was an appropriate candidate for the 540 degree procedure. Dr. Farhadi and Dr. Manilchuk held separate informed consent discussions with plaintiff and each obtained plaintiff's consent for the 540 degree procedure. Thereafter, plaintiff was admitted to the Ohio State University Wexner Medical Center on September 12, 2014.

{¶6} When Dr. Manilchuk exposed the L4-L5 portion of plaintiff's spine during the procedure, the surgeons discovered a fragile left common iliac vein with a small hole. Dr. Manilchuk placed a small suture in the area but it would not hold. Dr. Jean Starr, a vascular surgeon, repaired the vein. The surgeons elected to close plaintiff and admit him to the surgical intensive care unit. After recovery, plaintiff returned to surgery on September 20, 2014 and Dr. Farhadi completed the 540 degree procedure without further complications. After discharge, plaintiff followed-up with Dr. Farhadi on several

occasions. Plaintiff's self-reporting to Dr. Farhadi, post-operative radiographic images, and Dr. Farhadi's own evaluation all indicated that the procedure was successful.

{¶7} Dr. Farhadi and Dr. Manilchuk's affidavit testimony establishes that the surgeons informed plaintiff about the risks associated with the procedure before plaintiff elected to proceed. Dr. Farhadi's affidavit indicates that he complied with the accepted standard of care for neurosurgeons including his pre-operative evaluation of plaintiff, his performance of surgical procedures on plaintiff, and his post-operative evaluation of plaintiff. Dr. Manilchuk's affidavit indicates he complied with the standard of care for general surgeons throughout the complex revision thoracolumbar fusion.

{¶8} Finally, defendant also submitted the affidavit Dr. Christopher Shaffrey, Professor of Neurological Surgery and the Director of the Neurosurgery Spine Division at the University of Virginia. Dr. Shaffrey's affidavit testimony establishes his qualifications as a neurosurgery expert including the fact that Dr. Shaffrey served as an editor for the Journal of Neurosurgery and has authored or co-authored over 200 peer reviewed articles. Dr. Shaffrey's affidavit testimony indicates he is familiar with the standard of care applicable to the evaluation and treatment of someone like plaintiff as well as the standard of care for surgeons performing a complex revision thoracolumbar fusion. Finally, Dr. Shaffrey indicates that Dr. Farhadi and Dr. Manilchuk both "complied with the applicable standard of care in all aspects of Mr. Anderson's care."

{¶9} Plaintiffs' complaint asserts a claim for medical malpractice. Plaintiffs assert that the surgeons failed to meet the applicable standard of care and failed to obtain plaintiff's informed consent prior to surgery. Plaintiffs seek recovery against defendant based on the doctrine of *respondeat superior*.¹ Finally, plaintiff Arma Anderson asserts a loss of consortium claim.

¹Though delineated by plaintiff as a separate claim, *respondeat superior* is a common-law doctrine imposing vicarious liability on an employer for the torts of an employee and not an independent basis for recovery.

{¶10} As stated in *Reeves v. Healy*, 192 Ohio App.3d 769, 2011-Ohio-1487, ¶ 38 (10th Dist.):

- a. To establish a cause of action for medical malpractice, the plaintiff “must show the existence of a standard of care within the medical community, breach of that standard of care by the defendant, and proximate cause between the medical negligence and the injury sustained.” *Deer v. River Valley Health Sys.*, 4th Dist. No. 00CA20, 2001 Ohio 2662, quoting *Taylor v. McCullough-Hyde Mem. Hosp.* (1996), 116 Ohio App.3d 595, 599, 688 N.E.2d 1078. Expert testimony is required to establish the standard of care and to demonstrate the defendant’s alleged failure to conform to that standard. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 130-31, 346 N.E.2d 673. Failure to establish the standard of care is fatal to a prima facie case of medical malpractice. *Id.* at 130.

As to Plaintiff’s claim for lack of informed consent, it requires the following 3 elements:

- b. (a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any; (b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and (c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.”

{¶11} *Nickell v. Gonzalez*, 17 Ohio St.3d 136, 139 (1985).

{¶12} Plaintiff failed to file an affidavit of merit and did not respond to defendant’s motion for summary judgment. Expert testimony is an absolute prerequisite to prevail on a medical malpractice claim. Plaintiff has the burden to produce expert testimony on the standard of care, breach of that standard, and proximate cause. The failure to provide expert opinion alone merits summary judgment for defendant. Here, however, defendant also submitted the affidavits of Drs. Farhadi, Manilchuk, and Shaffrey. All three affidavits establish that Drs. Farhadi and Manilchuk acted in accordance with the

standard of care before, during, and after the complex revision thoracolumbar fusion. As for the lack of informed consent claim, defendant's motion and affidavits also establish that Drs. Farhadi and Manilchuk explained the 540 degree procedure to plaintiff and obtained his informed consent.

{¶13} Having failed to respond to defendant's motion for summary judgment and having failed to provide any expert testimony, there is no genuine issue as to any material fact regarding the standard of care, the lack of any breach of the same, and proximate cause. Therefore, defendant is entitled to judgment as a matter of law on plaintiffs' malpractice claim. See *Stuller v. Price*, 10th Dist. Franklin No. 00AP-1355, 2001 Ohio App. LEXIS 4170, at *9 (Sep. 20, 2001) ("Because appellants provided no admissible evidence that appellee did not comply with the standard of care, no genuine issue of material fact existed that precluded summary judgment for appellee."). There is also no genuine issue of material fact regarding the fact that plaintiff was fully informed regarding the risk of the 540 degree procedure and, therefore, defendant is entitled to judgment as a matter of law on this claim as well. Finally, as it is purely derivative in nature, defendant is also entitled to summary judgment on the loss of consortium claim of Arma Anderson. *Bowen v. Kil-Kare*, 63 Ohio St.3d 84, 93 (1992).

{¶14} For the foregoing reasons, defendant is entitled to summary judgment as a matter of law on all claims asserted in plaintiffs' complaint. Defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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