

[Cite as *Siegel v. Univ. of Cincinnati College of Medicine*, 2019-Ohio-2617.]

FRANCES B. SIEGEL, Admr., etc., et al.	Case No. 2009-09531JD
Plaintiffs	Judge Patrick M. McGrath Magistrate Holly True Shaver
v.	<u>DECISION</u>
UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE	
Defendant	

{¶1} On December 16, 2009, plaintiffs, Daniel and Frances Siegel, filed a complaint asserting claims of medical malpractice, wrongful death, and fraud regarding the medical care and treatment that was provided to their daughter, Jessica Siegel, who died at the age of 16 on August 23, 2006. Plaintiffs filed an amended complaint on January 19, 2010, and a second amended complaint on May 28, 2010.

{¶2} On October 6, 2010, the court issued a stay of proceedings in this matter because of the connected action that was pending in the Hamilton County Court of Common Pleas. On May 15, 2013, a magistrate of the court conducted an evidentiary hearing to determine whether Andrew Joel Ringer, M.D., was entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. On November 5, 2013, the magistrate issued a decision finding that Dr. Ringer did not act with malicious purpose, in bad faith, or in a wanton or reckless manner during his treatment and care of Jessica and recommended that Dr. Ringer be entitled to immunity. Objections were filed, and the court overruled them and adopted the magistrate's decision and recommendation as its own. The Tenth District Court of Appeals affirmed the court's decision and denied plaintiffs' application for reconsideration in 2015. The Supreme Court of Ohio declined to accept jurisdiction of the appeal and denied a motion for reconsideration in 2016. Defendant's motion to amend its answer was granted in 2016, and defendant's amended answer

was filed on December 12, 2016. In July 2018, the court vacated the stay of proceedings.

{¶3} On October 4, 2018, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On October 17, 2018, plaintiff filed a response in opposition. With leave of court, on November 30, 2018, defendant filed a reply. The motion for summary judgment is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

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

{¶5} “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, 661, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

FACTS

{¶6} On August 14, 2006, Jessica Siegel was admitted to Good Samaritan Hospital in Cincinnati, Ohio, and came under the care of her attending physician, Andrew Joel Ringer, M.D. (Second Amended Complaint, ¶ 4.) On August 14, 2006, Dr. Ringer performed an embolization procedure upon the vessels in Jessica’s head. (*Id.*, ¶ 16.) After the procedure, Jessica experienced complications which led to her being

hospitalized longer than expected. (*Id.*, ¶ 17.) Jessica then underwent several other operations and procedures involving her brain and breathing ability. (*Id.*, ¶ 18.) On August 23, 2006, Jessica's heart rate suddenly dropped, a "code blue" was called, and she was pronounced dead at 7:09 p.m. (*Id.*, ¶ 19, 20.)

{¶7} On the evening of Jessica's death, plaintiff, Daniel Siegel, signed an Autopsy Consent Form, with no restrictions or limitations upon the autopsy. (*Id.*, ¶ 29.) Plaintiffs then left the hospital. (*Id.*, ¶ 30.)

{¶8} On August 24, 2006, Daniel Beckman, M.D., a pathologist at Good Samaritan Hospital, performed an autopsy on Jessica Siegel. (*Id.*, ¶ 38.) Plaintiffs requested a copy of the autopsy report. The autopsy report was completed on December 8, 2006. (Plaintiffs' Exhibit 16; Exhibit 2 to Beckman's deposition.) Plaintiffs were provided with a copy of the autopsy report approximately three to four months after Jessica's death. (Transcript, p. 115.) Daniel Siegel did not read the autopsy report when he first received it because he was distraught about Jessica's death. (Transcript, p. 137-138.) Eventually, Daniel and Frances Siegel both read the autopsy report by December 2007 or January 2008. (Transcript, p. 155.) Among other findings, the autopsy report states: "Reason for Autopsy: Requested by Physician. Autopsy Restrictions: None. NO HEAD." (Exhibit 2 to Beckman's deposition, p. 1.) In the Clinical Summary, it states: "Autopsy permission was given by parents and a request for muscle tissue for evaluation of malignant hyperthermia was made. There was no permission for removal of the brain." (*Id.*, p. 2.) In the Gross Description portion, it states: "The eyes have been removed for transplantation." (*Id.*)

{¶9} On January 17, 2008, Daniel Siegel met with Dr. Ringer to discuss "the cause of [Jessica's] death." (Second amended complaint, ¶ 41-42.) Mary Gulleman, Daniel's sister-in-law, went with Daniel to talk to Dr. Ringer. (Transcript, p. 161.) During the meeting, Daniel and Mary asked Dr. Ringer why the autopsy did not include Jessica's brain, and why Jessica's eyes had been harvested. (*Id.*, p. 161-162.)

According to Daniel, during the meeting, Dr. Ringer told him that he did not know why the brain was not included in the autopsy and did not know that her eyes had been taken. (Transcript, p. 118.)

{¶10} Plaintiffs filed a lawsuit against the Cincinnati Eye Bank in another court. (Second Amended Complaint, ¶ 52.) On December 17, 2008, plaintiffs took the deposition of Amie Smith, R.N., a nurse who had cared for Jessica during her hospital stay, and who had filled out the autopsy form pursuant to Dr. Ringer's instructions. (Plaintiff's Exhibit 15, deposition of Amie Smith, p. 45.) Plaintiffs allege that on the date of Smith's deposition, they first discovered that Dr. Ringer had instructed Smith to limit the autopsy to exclude Jessica's head and brain. (Second amended complaint ¶ 54, 55, Smith's deposition, pgs. 47-52.)¹ Plaintiffs allege that Dr. Ringer intentionally interfered with obtaining a full autopsy of Jessica in an attempt to frustrate plaintiffs' ability to prove the cause of Jessica's death. (*Id.*, ¶ 55.)

{¶11} In their second amended complaint, plaintiffs allege claims of medical negligence, wrongful death, and fraud. Plaintiffs also allege that Dr. Ringer "interfered with the contract between plaintiffs and Good Samaritan Hospital * * * to have their daughter undergo a complete autopsy." (*Id.*, ¶ 67-68.) Plaintiffs further allege that Dr. Ringer "intentionally altered, falsified and/or destroyed medical records and/or took steps to prevent plaintiffs from obtaining physical evidence and/or information to avoid liability for defendants' medical negligence," and that Dr. Ringer "fraudulently ordered a change in the medical record which he knew was contrary to plaintiffs' specific instructions and wishes." (*Id.*, ¶ 70-71.) Plaintiffs further allege that Dr. Ringer "fraudulently and falsely told Daniel Siegel that he did not know why the complete (including head) autopsy was not done in this case," and that Dr. Ringer "made such false representation in an attempt to avoid his medical negligence liability and to avoid

¹Although paragraphs 52-55 of plaintiffs' second amended complaint assert that the date of Smith's deposition was December 17, 2009, the date of the deposition was December 17, 2008. (Deposition of Smith, cover page.)

the possibility of a legal action against him or Mayfield for a wrongful death claim.” (*Id.*, ¶ 72-73.) Lastly, plaintiffs assert a claim of “intentional alteration, falsification or destruction of medical records to attempt to avoid liability for negligence and where a physician is not truthful with their patient.” (*Id.*, ¶ 83.) Plaintiffs also assert a claim for lack of informed consent regarding the autopsy. (*Id.*, ¶ 85.)

{¶12} In its motion, defendant asserts that it is entitled to summary judgment on plaintiffs’ malpractice and wrongful death claims based upon the applicable statute of limitations. Defendant further argues that any claims of fraud regarding the autopsy have already been adjudicated, or, alternatively, those claims are “medical claims,” and are also time-barred.

LAW AND ANALYSIS

I. Medical Malpractice

{¶13} R.C. 2743.16(A) states: “Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties.” R.C. 2305.113(A) states: “Except as otherwise provided in this section, an action upon a medical * * * claim shall be commenced within one year after the cause of action accrued.” R.C. 2305.113(E)(3) defines a “medical claim” as: “any claim that is asserted in any civil action against a physician * * * and that arises out of the diagnosis, care, or treatment of any person.” Accordingly, plaintiffs’ claim for medical malpractice is subject to the one-year statute of limitations set forth in R.C. 2305.113(A). The first issue to be determined is when did plaintiffs’ claims for medical negligence accrue.

{¶14} Defendant argues that plaintiffs’ claims accrued on August 14, 2006, after Jessica encountered complications from her surgery. Alternatively, defendant argues that plaintiffs’ claims accrued on August 23, 2006, the date of Jessica’s death. In contrast, plaintiffs allege that their claims arose on December 17, 2008, when they

conducted Nurse Smith's deposition and discovered that Dr. Ringer had limited the autopsy to exclude the brain.

{¶15} In determining the accrual date for a claim of medical malpractice, courts examine three factors: 1) the time at which the injured party became aware, or should have become aware, of the extent and seriousness of his or her condition; 2) whether the injured party was aware, or should have been aware, that the condition stemmed from a specific professional medical service previously rendered; and 3) whether the condition would put a reasonable person on notice of the need to inquire about the cause of the condition. *Hershberger v. Akron City Hosp.*, 34 Ohio St.3d 1, paragraph one of the syllabus (1987).

{¶16} "The 'extent and seriousness of his condition' language of the test set forth in *Hershberger* * * * requires that there be an occurrence of a 'cognizable event' which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies." *Allenius v. Thomas*, 42 Ohio St.3d 131, syllabus (1989). "[C]onstructive knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule. * * * Rather, the 'cognizable event' itself puts the plaintiff on notice to investigate the facts and circumstances relevant to her claim in order to pursue her remedies." (Internal citations omitted.) *Flowers v. Walker*, 63 Ohio St.3d 546, 549 (1992). "The occurrence of a 'cognizable event' imposes upon the plaintiff a duty to (1) determine whether the injury suffered is the proximate result of malpractice and (2) ascertain the identity of the tortfeasor or tortfeasors." *Id.*, 549-550.

{¶17} During the evidentiary hearing, both Daniel and Frances Siegel testified. According to Daniel's testimony, on the evening of August 14, 2006, after Jessica's surgical procedure, Jessica experienced complications, including a stroke and paralysis

on her right side. (Transcript, p. 99-100.) According to Daniel's testimony, on August 14, 2006, he "realized something went wrong." (Transcript, p. 100.) Jessica was placed in a medically-induced coma and remained in that state until she died on August 23, 2006. (*Id.*, p. 102.) On the evening of Jessica's death, Daniel Siegel, signed an autopsy consent form because he wanted "to know what happened to her." (Transcript, p. 109.)

{¶18} Plaintiffs assert that the cognizable event occurred on December 17, 2008, the date that they took the deposition of Amie Smith, R.N., and discovered that Dr. Ringer had limited the autopsy to exclude the head and brain. However, the cognizable event occurs "when, based on the factual circumstances, the injured party is put on notice of the need to pursue possible remedies and not when an attorney actually identifies the pertinent legal injury and remedy." *Burden v. Lucchese*, 173 Ohio App.3d 210, 219 (3rd Dist.2007), citing *Hersberger v. Akron City Hosp.*, 34 Ohio St. 3d 1, 5 (1987).

{¶19} Construing the evidence most strongly in plaintiffs' favor, the court finds that the complications that Jessica suffered after the surgical procedure, including a stroke and paralysis, and her sudden and untimely death, imposed upon plaintiffs the duty to investigate the cause of her death and to determine whether it was related to a medical procedure, treatment, or diagnosis. The court finds that the cognizable event that triggered the statute of limitations for medical negligence was Jessica's sudden and untimely death on August 23, 2006. Pursuant to the test in *Hersberger, supra*, the court finds that plaintiffs should have become aware of the extent and seriousness of Jessica's condition at the time of her death; that plaintiffs were aware, or should have been aware, that Jessica's death stemmed from a specific professional medical service rendered to her during her admission at Good Samaritan Hospital from August 14-23, 2006; and that Jessica's untimely death would put a reasonable person on notice of the need to inquire about the cause of her death. In fact, Jessica's death did put plaintiffs

on notice of the need to inquire about the cause of her death. As alleged in plaintiffs' second amended complaint, Daniel Siegel signed a consent form for an autopsy to learn why his daughter died. Daniel Siegel signed the consent form on August 23, 2006. (Deposition of Amie Smith, p. 44-45.) The autopsy report was completed on December 8, 2006, and plaintiffs were provided with a copy of the autopsy report in December 2006. (Transcript, p. 115.) The autopsy report clearly states that the brain was not examined. It is undisputed that plaintiffs did not file their medical malpractice claim until December 16, 2009. Construing the evidence most strongly in favor of plaintiffs, the only reasonable conclusion is that any claim of medical malpractice was not timely filed, and that R.C. 2305.113(A) bars their claim.

II. Wrongful Death

{¶20} Turning to plaintiffs' claim of wrongful death, R.C. 2125.02(D)(1) states that a civil action for wrongful death shall be commenced within two years after the decedent's death. As previously stated, pursuant to R.C. 2743.16(A), civil actions against the state shall be commenced no later than two years after the date of accrual of the cause of action. Plaintiffs' claim for the wrongful death of Jessica Siegel accrued on the date of her death, August 23, 2006. Plaintiffs needed to file their claim for wrongful death in this court by August 23, 2008. Plaintiffs filed their original complaint in this court on December 16, 2009, more than two years after the date of Jessica's death. Construing the evidence most strongly in plaintiffs' favor, the only reasonable conclusion is that their claims for wrongful death are time-barred.

III. Fraud and Any Remaining Claims

{¶21} Plaintiffs allege that Dr. Ringer "fraudulently" excluded Jessica's head and brain from the scope of the autopsy in order to interfere with or conceal evidence of malpractice, causing plaintiffs to sustain "damages, including, but not limited to their inability to bring and fully prosecute a malpractice suit." Plaintiffs further allege that

Dr. Ringer “fraudulently and falsely told Daniel Siegel that he did not know why” the head and brain were excluded when they met on January 17, 2008.

{¶22} Although plaintiffs phrase these allegations in terms of fraud, the second amended complaint states that “[p]laintiffs bring these claims pursuant to the caselaw of Ohio including, but not limited to * * * *Smith v. Howard Johnson Co.*, 67 Ohio St.3d 28 (1993)” and other decisions that concern the spoliation of evidence rather than fraud.

{¶23} In *Smith*, the Supreme Court of Ohio first recognized the tort of spoliation of evidence and set forth the elements as follows: “(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff’s case, (4) disruption of the plaintiff’s case, and (5) damages proximately caused by the defendant’s acts * * * .” *Smith v. Howard Johnson Co.*, 67 Ohio St.3d 28, 29 (1993).

{¶24} In contrast, the elements of fraud are: “(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.” *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 55 (1987). However, “[c]lever pleading cannot transform what are in essence medical claims into claims for fraud.” *Hensley v. Durrani*, First Dist. Hamilton No. C-13005, 2013-Ohio-4711, ¶ 19. As the Tenth District Court of Appeals has stated, the statutory “definition of ‘medical claim’ does not permit us to split a fraud theory involving medical treatment off from a professional negligence claim involving medical treatment.” *Harris v. Ohio State Univ. Hosp. Med. Ctr.*, 10th Dist. Franklin No. 06AP-1092, 2007-Ohio-1812, ¶ 10, appeal not

allowed, 115 Ohio St. 3d 1412, 2007-Ohio-4884. See also *Brittingham v. GMC*, 2d Dist. Montgomery No. 24517, 2011-Ohio-6488, ¶ 19, citing *Harris*.

{¶25} Consistent with a claim of spoliation of evidence, the crux of plaintiffs' allegations is that Dr. Ringer intentionally concealed or destroyed evidence so as to interfere with their potential malpractice claim. Plaintiffs do not allege that they were induced to rely upon a misrepresentation or concealment of fact, as is required for a claim of fraud.

{¶26} Although plaintiffs allege that Dr. Ringer told Daniel Siegel on January 17, 2008, that he did not know why the brain was not included in the autopsy, plaintiffs do not allege what their justifiable reliance upon that statement was or could have been. Plaintiffs seem to argue that Dr. Ringer had a duty to tell them that he intended to perform a limited autopsy, or that he had a duty to tell them that he was going to exclude the head and brain from the autopsy. However, an authorization to perform a complete autopsy did not create an obligation for Dr. Ringer to do so. See *Federman v. Christ Hospital*, 1st Dist. Hamilton No. C-120484, 2013-Ohio-5507, ¶ 14.

{¶27} Even assuming that Dr. Ringer falsely represented that he did not know why the brain was excluded, plaintiffs have not shown that they took any action or failed to take any action in reliance upon that representation. Plaintiffs seem to argue that they could not file a medical negligence or wrongful death claim without an autopsy of Jessica's brain. However, the testimony presented at the evidentiary hearing shows that plaintiffs knew when they met with Dr. Ringer on January 17, 2008, that Jessica's brain had not been included in the autopsy. In fact, plaintiffs knew or should have known that fact in December 2006. Plaintiffs present no argument to support a claim of justifiable reliance upon Dr. Ringer's representation in the January 17, 2008 meeting. Therefore, even construing the evidence most strongly in plaintiffs' favor, their claim of fraud fails as a matter of law.

{¶28} With regard to a claim for spoliation of evidence, plaintiffs allege that their claim was timely filed because they filed it within one year of discovering that Dr. Ringer had ordered a limited autopsy. However, again, it is undisputed that the autopsy report, which was finalized and provided to plaintiffs in December 2006, clearly states that the head was not examined, and that no permission had been granted to remove the brain. Even if the statement about not having permission to remove the brain was false, the language in the autopsy report would have put a reasonable person on notice that a full autopsy had not been conducted. This fact was discoverable in December 2006, when plaintiffs received a copy of the autopsy report. At that time, plaintiffs had a duty to investigate the facts and circumstances relevant to their claims in order to pursue their remedies. Moreover, it is clear that plaintiffs' claims of lack of informed consent, falsification of medical records, intentional alteration of medical records, and "failing to report a death to the coroner," are all "medical claims" as that term is defined in R.C. 2305.113(E)(3), because they are claims in a civil action against a physician that arise out of the diagnosis, care, or treatment of Jessica. Dr. Ringer ordered a limited autopsy on August 23, 2006. The autopsy report was completed, and plaintiffs received a copy of it in December 2006. The language contained in the autopsy report shows that Jessica's brain was not examined. Thus, reasonable minds can only conclude that plaintiffs' claims, filed in 2009, were untimely.

{¶29} Finally, the evidence presented at the immunity hearing fails to support a claim that Dr. Ringer willfully destroyed evidence designed to disrupt plaintiffs' case. The court found that Dr. Ringer did not act with malicious purpose, in bad faith, or in a wanton or reckless manner. (Magistrate's decision, Nov. 5, 2013; Judgment Entry, March 12, 2014.) That finding was affirmed on appeal. (*Siegel v. State*, 10th Dist. Franklin No. 14AP-279, 2015-Ohio-441; discretionary appeal not allowed, 144 Ohio St.3d 1441, 2015-Ohio-5468 (Dec. 30, 2015); reconsideration denied, 145 Ohio St.3d 1411, 2016-Ohio-899 (Mar. 9, 2016).

{¶30} Based on the foregoing, the only reasonable conclusion is that plaintiffs' claims are barred by the applicable one-year or two-year statutes of limitations. Judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

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Plaintiffs

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UNIVERSITY OF CINCINNATI
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Defendant

Case No. 2009-09531JD

Judge Patrick M. McGrath
Magistrate Holly True Shaver

JUDGMENT ENTRY

{¶31} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. 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

Filed May 1, 2019
Sent to S.C. Reporter 6/28/19