[Cite as *Bingman v. Ohio Dept. of Rehab. & Corr.*, 2005-Ohio-6314.]

IN THE COURT OF CLAIMS OF OHIO
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BERNICE BINGMAN	:	
Plaintiff	:	CASE NO. 2004-06828 Judge J. Craig Wright
v.	:	DECISION
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION	:	
Defendant	:	

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{¶ 1} Plaintiff brought this action against defendant alleging claims of medical malpractice and wrongful death. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} At all times relevant to this action, the decedent, Charles Bingman, was an inmate in the custody and control of defendant pursuant to R.C. 5120.16. On October 18, 2001, Bingman arrived at the Corrections Reception Center (CRC) at Orient to begin his term of incarceration. He was 69 years old upon arrival. As part of the intake process at CRC, Bingman received a medical screening and examination that included blood tests, an EKG, and a chest x-ray. There is no dispute that Bingman's intake physical did not reveal any significant health concerns. On December 14, 2001, Bingman was transferred to Hocking Correctional Facility (HCF) after completing an offender program at Madison Correctional Institution.

{¶ 3} On December 17, 2001, Bingman was examined by Herbert Estis, M.D., the medical director at HCF. Dr. Estis testified that it was his practice to examine inmates soon after they had been

transferred to HCF because most of the inmates at that institution were elderly and had chronic health conditions. For several months following his initial examination by Dr. Estis, Bingman occasionally returned to the infirmary with common complaints such as athlete's foot or a sinus infection. In May 2002, Dr. Estis prescribed an anti-inflammatory medication based upon Bingman's history of arthritis and his complaints of pain "off and on" in his left hip. In November 2002, Dr. Estis examined Bingman and determined that his complaints of pain in his back, legs, and hips were caused by back strain. When Bingman complained of pelvic pain later that month, Dr. Estis ordered a prostate-specific antigen (PSA) test to screen for prostate cancer. The test revealed that Bingman's PSA level was 122 nanograms per deciliter (ng/dl), an extremely elevated reading. A subsequent biopsy confirmed that Bingman had a high-grade malignant tumor and a bone scan revealed that the disease was widely metastatic. After he was diagnosed with prostate cancer, Bingman spent the remainder of his incarceration at either the Corrections Medical Center or the Frazier Health Center. Bingman died from complications associated with prostate cancer on February 19, 2004.

{¶ 4} Plaintiff alleges that defendant's negligence in failing to timely diagnose and treat Bingman's prostate cancer proximately caused his death. Specifically, plaintiff alleges that both the applicable standard of care and defendant's policy required that PSA testing be offered to men over the age of 50 and that defendant was negligent in failing to require Bingman to undergo PSA testing during his intake examination.

{¶ 5} In order to prevail on a claim of medical malpractice or professional negligence, plaintiff must establish: 1) the standard of care recognized by the medical or nursing community; 2) the failure of defendant to meet the requisite standard of care; and 3)

a direct causal connection between the negligent act and the injury sustained. *Wheeler v. Wise* (1999), 133 Ohio App.3d 564; *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. The appropriate standard of care must be proven by expert testimony. *Bruni*, at 130. The expert testimony must explain what a medical professional of ordinary skill, care, and diligence in the same medical specialty would do in similar circumstances. Id. Similarly, in order to maintain a wrongful death action on a theory of negligence, plaintiff must establish three elements: 1) a duty owed 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.* (1988), 39 Ohio St.3d 86, 92, citing *Bennison v. Stillpass Transit Co.* (1966), 5 Ohio St.2d 122, paragraph one of the syllabus.

{¶ 6} In support of her claims, plaintiff offered the expert testimony of Robert Bracken, M.D., a urologic oncologist and professor of medicine at the University of Cincinnati Medical Center. Dr. Bracken testified that the key to treating prostate cancer is to diagnose the disease before it progresses to the point where it becomes symptomatic. Dr. Bracken explained that most, but not all, prostate cancer tumors produce PSA and that an elevated PSA reading can be an indication of prostate cancer. However, Dr. Bracken testified that PSA readings can be elevated for reasons other than cancer and that 75 percent of men with "abnormal" PSA readings do not have cancer. Although Dr. Bracken testified that he would recommend a biopsy for patients who had a PSA reading greater than 2.5, he acknowledged that many oncologists believed that a PSA reading below 4 was "normal." Dr. Bracken further testified that oncologists also consider "PSA velocity," the rate of change in a patient's annual PSA measurement, as a significant factor in determining whether to recommend a biopsy.

{¶ 7} Dr. Bracken also explained that the "Gleason" grading system is used by pathologists to assign a score that reflects the abnormality of the cancer cell and corresponds to the growth rate of the tumor. According to Dr. Bracken, a Gleason score of six would indicate a relatively slow-growing tumor and a score of ten, the maximum score on the Gleason scale, would represent a fast-growing malignancy. It is undisputed that Bingman's biopsy showed his prostate cancer was rated a ten on the Gleason scale.

{¶ 8} With regard to the standard of care for PSA testing, Dr. Bracken testified that men between 50 and 70 years of age and African-American men between 40 and 70 years of age "should be offered the opportunity to have" an annual PSA test. According to Dr. Bracken, this standard is advocated by both the American Cancer Society and the American Urological Association. Dr. Bracken testified that he reviewed Bingman's medical records which showed that prior to his incarceration he had been given three annual PSA tests through his private physician, Dr. Nolan Weinberg. According to the medical records, the results of Bingman's PSA tests for 1999 through 2001 were 2.4, 3.0, and 2.88, respectively. Dr. Bracken conceded that there was no significant difference between Bingman's PSA measurements for 2000 and 2001 and that the standard of care did not require Dr. Weinberg to offer another PSA screening until Bingman's next annual physical examination in May 2002. However, Dr. Bracken observed that Bingman's institution medical records do not reflect that defendant was aware of the May 2001 PSA test; he opined that without a written record of the test, the standard of care required defendant to offer Bingman a PSA test during his October 2001 intake physical examination.

{¶ 9} In contrast to Dr. Bracken's opinions, defendant's expert, Robert Bohl, M.D., a board-certified urologist, testified that national organizations have varying opinions on the subject. For

example, Dr. Bohl testified that the American Academy of Family Physicians does not endorse annual PSA screenings; he opined that defendant should not be held to a higher standard than family practice physicians because defendant's physicians provide care that is comparable to that of a family physician. Dr. Bohl further opined that defendant's policy to offer PSA screenings to inmates who are 50 years of age or older was reasonable, within the standard of care, and in compliance with the recommendation of the American Urological Association. According to Dr. Bohl, any PSA reading less than 4ng/dl has been considered "normal" since before the time of Bingman's incarceration.

{¶ 10} Dr. Bohl testified that PSA screening has been controversial because it has not been shown to lead to a decrease in the risk of mortality from prostate cancer. Dr. Bohl explained that while prostate cancer may cause PSA levels to increase, PSA can also rise as a result of benign conditions such as prostate enlargement or infection. Dr. Bohl stated that even when an increase in PSA is caused by cancer, the cancer could be so slow-growing that it never becomes life-threatening. Dr. Bohl testified that the controversy over PSA screening has been fueled by the fact that PSA screening may result in both false/positive and false/negative readings, and because many unnecessary biopsies are performed as a result of the imprecise correlation between PSA and prostate cancer.

{¶ 11} Dr. Bohl testified that his review of Bingman's medical records from both Dr. Weinberg and defendant revealed that Bingman's PSA was "fairly stable" before he was incarcerated and that his PSA readings before November 2002 were "normal." According to Dr. Bohl, it would be speculative to conclude that Bingman's PSA would have been elevated above a normal level in October 2001 based upon an extrapolation between the scores from

the May 2001 and November 2002 screenings. Dr. Bohl opined that Bingman's cancer was very aggressive and that it was likely "doubling" in a matter of weeks. In addition, Dr. Bohl explained that because the poorly differentiated structure of Gleason 10 cells spread to other organs in the body early in the course of the disease, it was unlikely that the prognosis for Bingman's cancer would have been different if it had been diagnosed at an earlier time during his incarceration.

{¶ 12} Based upon the evidence and testimony presented at trial, the court finds that defendant complied with all applicable standards of care concerning PSA screening and that routine yearly screening is not required by the accepted standard of care. Specifically, the court finds that defendant was in compliance with the recommendations of both the American Cancer Society and the American Urological Association. As set forth in defendant's protocol B-5, Health Exam Guidelines for Inmates Age 50 and Older, inmates who have been incarcerated for at least one year were notified of their eligibility for an annual physical exam. (Plaintiff's Exhibit 5.) Defendant's medical policy provides that the annual exam includes both a PSA and a digital rectal exam (DRE). The testimony at trial also established that defendant's doctors were authorized to order any additional laboratory tests, including the PSA screening, at any time such a test was indicated. Indeed, Dr. Estis ordered a PSA screening for Bingman when he first complained of pelvic pain. Even plaintiff's oncological expert agreed that defendant's medical staff responded properly to Bingman's complaints of pain and that defendant provided adequate medical treatment both before and after Bingman's prostate cancer was diagnosed.

{¶ 13} Furthermore, even if plaintiff had proven that defendant breached its duty of care to Bingman, plaintiff also had

the burden to prove that breach was the proximate cause of his death. Plaintiff's expert conceded that if a DRE had been performed during Bingman's intake physical, it most likely would have been normal because his prostate never became enlarged, even after he was diagnosed with prostate cancer. The court is also persuaded by Dr. Bohl's testimony that it would be speculative to conclude that Bingman's PSA would have been elevated in October 2001. As discussed above, Bingman's PSA screening in May 2001, only five months before his incarceration, was normal. Therefore, the court finds that plaintiff failed to prove that even if defendant had offered Bingman either a PSA screening or a DRE in October 2001, the tests would have indicated the need for a biopsy or otherwise have led to a diagnosis of prostate cancer. The court also finds credible Dr. Bohl's testimony that an earlier diagnosis would not have changed the prognosis in Bingman's case due to the aggressive nature of his cancer and its failure to respond to treatment.

{¶ 14} Based upon the totality of the evidence, the court finds that plaintiff has failed to prove her claims of medical negligence and wrongful death by a preponderance of the evidence.

{¶ 15} Plaintiff also asserts a claim for loss of consortium. "[A] claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the [individual] who suffers bodily injury." *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 93. Since plaintiff has failed to prove her claims of medical negligence and wrongful death, her loss of consortium claim must also be denied. Accordingly, judgment shall be rendered in favor of defendant.

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Defendant	:	

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This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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J. CRAIG WRIGHT
Judge

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