[Cite as *Boyer v. Ohio State Univ. Med. Ctr.*, 2007-Ohio-3865.]

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
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LANCE BOYER, Exec.

Plaintiff

v.

OHIO STATE UNIVERSITY MEDICAL CENTER, et al.

Defendants

Case No. 2003-08924

Judge J. Craig Wright

DECISION

{¶1} Plaintiff brought this action alleging claims of wrongful death, medical negligence, lack of informed consent, and loss of consortium. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} In January 2002, plaintiff's decedent, Mary Jane Boyer, sought treatment at defendants' hospital for a sinus condition. Boyer, who was 53 years old, was diagnosed with granulocytic sarcoma (GS), a rare form of cancer of the blood-forming and immune system that presents as a tumor in a location outside of the bone marrow. In February and April 2002, Boyer underwent chemotherapy and radiation therapy to treat the GS which was located in her nasopharyngeal region. After completion of chemotherapy and radiation, Boyer's cancer was in remission.

{¶3} Boyer's treating physicians recommended that she undergo a stem cell transplant (SCT) to further treat her condition. In May 2002, an allogeneic SCT was scheduled for Boyer with her sister as the bone marrow donor. On May 1, 2002, Boyer underwent a pre-transplant examination during which she signed a consent form. (Plaintiff's Exhibit 17.) On May 29, 2002, Boyer began the preparative regimen for her SCT. On June 6, 2002, the SCT was begun. On June 15, 2002, Boyer suffered a respiratory event and was placed on a ventilator. On June 19, 2002, Boyer was taken off of the ventilator and died.

{¶4} Plaintiff, Boyer's husband, asserts that defendants' employees negligently diagnosed Boyer with acute myelogenous leukemia (AML), a cancer of the bone marrow, and that the recommendation to perform an SCT was a deviation from the standard of care. Plaintiff further asserts that defendants' employees were negligent when they proceeded with the preparative regimen for an SCT when Boyer was suffering from an active infection. Plaintiff also asserts a claim of lack of informed consent in that the consent form that Boyer signed was not appropriate for a GS patient.

{¶5} Plaintiff testified that although Boyer's treating physicians told her that she had a "blood tumor" that was confined to a specific area of her body, they never explained that there was a difference between GS and AML. Plaintiff also testified that Boyer's treating physicians diagnosed her with leukemia and told her that an SCT was her "last chance." On cross-examination, however, plaintiff testified that both he and Boyer had read the consent form and that a physician had explained the risks of an SCT, including both infection and death.

{¶6} Carol Osborn, defendants' associate director of medical information management, testified that after a patient is discharged, she and her staff review the medical records to assign diagnosis codes. Osborn stated that she used the "ICD-9-CM" as a reference guide for code numbers. Osborn stated that the May 29, 2002, cytogenetic report of Boyer's bone marrow states that Boyer was being treated for "AML 205.0." (Plaintiff's Exhibit 16.) However, Osborn testified that Boyer's principle diagnosis code on May 29, 2002, was GS. (Joint Exhibit 2, Tab 52.)

{¶7} Plaintiff's expert, Arthur J. Weiss, M.D., testified that he was board-certified in internal medicine and oncology and that he was licensed to practice medicine in the state of Maine. Dr. Weiss stated that he had performed bone marrow transplants since 1960. Dr. Weiss explained that leukemia is a presence of cancer cells in the bone marrow or bloodstream. Dr. Weiss defined GS as a localized collection of cells that resemble

leukemia but which form a solid mass outside of the bone marrow or bloodstream. Dr. Weiss stated that Boyer's medical records show that her disease was diagnosed as GS. Dr. Weiss further stated that Boyer did not suffer from AML; however, Dr. Weiss stated that a substantial percentage of patients with GS would develop AML if left untreated.

{¶8} Dr. Weiss opined that at the time the SCT was performed, Boyer was not suffering from a life-threatening disease of her blood-forming and immune system in that there was no evidence of any cancer cells in her body. Dr. Weiss further opined that Boyer was provided with an inappropriate consent form in that it specified her treatment for AML, not GS; that defendants' employees fell below the standard of care when they recommended an SCT to treat Boyer's condition; that defendants' employees performed the SCT when Boyer was suffering from an active infection; and that Boyer's death was proximately caused by the bone marrow ablation that was done in preparation for an SCT.

{¶9} Dr. Weiss further testified that he could find no articles in medical literature to show that an allogeneic ablative SCT was of any benefit to a patient with isolated GS who had been successfully treated with chemotherapy and radiation.

{¶10} Belinda Avalos, M.D., testified that she was board-certified in internal medicine, hematology, and oncology, and that she was a professor of medicine at defendants' hospital. Dr. Avalos stated that she had performed hundreds to thousands of SCTs since 1989 on patients with life-threatening disorders. Dr. Avalos defined an allogeneic SCT as a transplant from one person to another. Dr. Avalos testified that during an SCT, a cancer patient's bone marrow is completely obliterated and then replaced with a donor's bone marrow.

{¶11} Dr. Avalos described GS as an extremely rare disease, which occurs when a patient has a mass of malignant myeloid cells that presents outside of the bone marrow. Dr. Avalos stated that Boyer's admitting diagnosis was GS. (Joint Exhibit 2, Tab 52.) Dr. Avalos explained that because GS is a precursor to AML, GS patients are treated as if

they have AML. Dr. Avalos also stated that if a patient with GS develops AML, the rate of survival is extremely poor.

{¶12} Dr. Avalos testified that she did not specifically remember Boyer as a patient, but that she was the attending physician when Boyer was treated from May 29 to 31, 2002. Dr. Avalos stated that the medical records reflect that she treated Boyer on May 31, 2002. Dr. Avalos opined that Boyer's medical records from May 29 to 31, 2002, contain no findings to suggest that Boyer was suffering from either an active infection or sepsis.

{¶13} Dr. Avalos opined to a reasonable degree of medical probability that it was within the standard of care to proceed with the preparative regimen for an SCT on May 29, 2002, and that all of the care and treatment she rendered to Boyer met the standard of care.

{¶14} Thomas Lin, M.D., testified that he was board-certified in hematology and oncology, and that he had a faculty appointment at defendants' hospital. Dr. Lin stated that having GS without evidence of AML is extremely rare, and that patients with GS will typically develop AML. Dr. Lin stated that the standard treatment options for patients with GS are essentially the same for patients with AML: chemotherapy and radiation followed by the decision whether to perform an allogeneic SCT.

{¶15} Dr. Lin further stated that the vast majority of GS patients will develop AML within one to two years if an SCT is not performed. Dr. Lin also stated that the odds of survival are better when an SCT is performed on a patient who is in his or her first remission. Dr. Lin stated that Boyer's tumor could not be completely removed because of its location in the nasopharyngeal region.

{¶16} Dr. Lin testified that in 2002, defendants' hospital had weekly committee meetings to discuss the status of all leukemia patients and all bone marrow transplant patients. According to Dr. Lin, the transplant team agreed that Boyer's chance of survival would be low without an SCT.

{¶17} Dr. Lin testified that he specifically remembered Boyer as a patient because her case was so unusual. Dr. Lin stated that he first met Boyer during her chemotherapy and then he saw her again in the clinic for her transplant work-up. Dr. Lin stated that patients are typically given consent forms prior to the transplant work-up so that they can read the form and present any questions to their physician. Dr. Lin stated that he discussed the risks of the SCT procedure with plaintiff on May 1, 2002.

{¶18} Dr. Lin opined to a reasonable degree of medical probability that even though Boyer's cancer was in remission, her condition was life-threatening because of the probability of relapse without further treatment; that it was within the standard of care to recommend an SCT to Boyer; that he acted appropriately in the treatment and care he provided to Boyer; and that the consent form that Boyer signed was appropriate for her treatment.

{¶19} Edward Copelan, M.D., testified that he was board-certified in internal medicine, oncology, and hematology. In 2002, Dr. Copelan was the director of defendants' bone marrow transplant department. Dr. Copelan testified that he had performed hundreds of SCTs and had published approximately 70 articles regarding SCTs. Dr. Copelan stated that GS is a life-threatening disease and that 90 percent of patients with GS will develop AML. Dr. Copelan stated that GS is treated with the same regimen as AML, and that an SCT is appropriate to perform when a GS patient is in remission.

{¶20} Dr. Copelan testified that on April 26, 2002, he spoke to Boyer and her husband for approximately 45 minutes about the risks and benefits of an SCT. (See Plaintiff's Exhibit 19.) Dr. Copelan stated that the two alternatives to an SCT were additional chemotherapy or no further treatment. Dr. Copelan believed that an SCT was appropriate for Boyer in that she had a life-threatening malignancy, which if not eradicated, would have a high probability of recurring, at which point treatment would be less likely to be successful. Dr. Copelan opined that it was appropriate to begin the SCT on May 29,

2002, and that all of the treatment and care that he rendered to Boyer met the standard of care.

{¶21} Defendants' expert, Richard Stone, M.D., testified that he was board-certified in internal medicine, medical oncology, and hematology; that he was employed as an associate professor of medicine at Harvard Medical School; and that he was the clinical director of the adult leukemia program at the Dana-Farber Cancer Institute in Boston, Massachusetts.

{¶22} Dr. Stone described GS as a group of immature, leukemic myeloid cells that are found outside of the bone marrow. Dr. Stone stated that GS cells are the same cells that are found in AML. Dr. Stone opined that it is very likely that GS will develop into AML, and that cancer is more difficult to treat once it has spread to the bone marrow.

{¶23} Dr. Stone opined that following chemotherapy and radiation, Boyer's cancer went into remission, which Dr. Stone defined as showing no evidence of the presence of leukemia. Dr. Stone stated that the treatment options for Boyer once her cancer was in remission were: 1) observation; 2) more chemotherapy; or 3) an SCT. Dr. Stone opined that it was within the standard of care to recommend an SCT for Boyer; that based upon his review of Boyer's medical records, her physicians had at least three discussions with her about the risks involved in the SCT procedure; that Boyer was adequately informed of the risks; and that the consent form was appropriate for Boyer's treatment. Dr. Stone added that a patient's cancer must be in remission before an SCT will be performed. Dr. Stone opined that the medical records did not reflect that Boyer was suffering from an infection during the transplant.

{¶24} "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.* (1988), 39 Ohio St.3d 86, 92, citing *Bennison v. Stillpass Transit Co.* (1966), 5 Ohio St.2d 122, paragraph one of the syllabus.

{¶25} "In order to establish medical malpractice, it must be shown by a preponderance of 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 and proximate result of such doing or failing to do some one or more of such particular things." *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, paragraph 1 of the syllabus.

{¶26} Upon review of the evidence presented at trial, the court finds that plaintiff has failed to prove that defendants' recommendation that Boyer undergo an allogeneic SCT fell below the standard of care. The court finds that Dr. Stone was very persuasive when he testified that an SCT was one of the generally accepted treatment options for Boyer while her cancer was in remission because of the likelihood of GS to progress into AML. The court further finds that the testimony of Drs. Stone and Lin was more persuasive than the testimony of Dr. Weiss regarding the nature of GS and its appropriate treatment options. The court finds that plaintiff has failed to prove that a physician of ordinary skill, care, and diligence would not have recommended an SCT for Boyer given her diagnosis of GS.

{¶27} The court further finds that plaintiff has failed to prove that Boyer was diagnosed with AML. A review of the medical records clearly shows that she was diagnosed with and treated for GS throughout her admission. (Joint Exhibit I, Tabs 2, 6, 7, and 8.) Even plaintiff's expert, Dr. Weiss, admitted that Boyer's medical records show that she was diagnosed with GS. In addition, Osborn testified that the coding of medical records does not occur until after the patient is discharged; thus the court finds that plaintiff's argument regarding "improper coding" is without merit.

{¶28} "The tort of lack of informed consent is established when: (a) [t]he 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." *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, syllabus.

{¶29} The court finds that plaintiff has failed to prove his claim of lack of informed consent by a preponderance of the evidence. Plaintiff's own testimony established that both he and Boyer were aware that an SCT carried a risk of infection and/or death. In response to plaintiff's argument that the consent form was specifically written for an AML patient as opposed to a GS patient, the court notes that neither the term "GS" nor "AML" appears on the consent form. With regard to plaintiff's argument that Boyer did not have a life-threatening disease of the blood-forming or immune system, the court finds that such assertion is without merit in light of the greater weight of the medical evidence. The court further finds that plaintiff's claim of lack of informed consent must fail inasmuch as the medical records show that the risks and benefits of an SCT were discussed with Boyer and plaintiff at least three times before the SCT was performed.

{¶30} In his post-trial brief, plaintiff asserts that the court should apply the evidentiary doctrine of res ipsa loquitur in this case because Boyer was under the exclusive management and control of defendants' employees at the time she was injured. The doctrine of res ipsa loquitur is a rule of evidence that permits plaintiff to prove negligence circumstantially upon showing that: 1) the instrumentality that caused the harm was in the exclusive control of defendants; and 2) the event that caused the harm was not of the type that would normally occur in the absence of negligence. *Wiley v. Gibson* (1990), 70 Ohio App.3d 463.

{¶31} The court finds that the doctrine of res ipsa loquitur does not apply in this case inasmuch as plaintiff has failed to prove that the event that caused the harm to Boyer

was not of the type that would normally occur in the absence of negligence. The greater weight of the evidence shows that recommending and performing an SCT on Boyer was not a deviation from the standard of care, and that the known risks of an SCT include infection and death.

{¶32} In addition, plaintiff asserted that an SCT should not have been performed because Boyer was suffering from an active infection at the time of the SCT. The court finds that plaintiff's allegations in that regard are not supported by the evidence.

{¶33} Lastly, plaintiff 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 spouse who suffers bodily injury." *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 93. Inasmuch as plaintiff has failed to prove his claims of negligence, his loss of consortium claim must also be denied.

{¶34} For the foregoing reasons, the court finds that plaintiff has failed to prove any of his claims by a preponderance of the evidence and, accordingly, judgment shall be rendered in favor of defendants.

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LANCE BOYER, Exec.	Case No. 2003-08924
Plaintiff	Judge J. Craig Wright
v.	JUDGMENT ENTRY
OHIO STATE UNIVERSITY MEDICAL CENTER, et al.	
Defendants	

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 defendants. 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.

_____
J. CRAIG WRIGHT
Judge

cc:

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HTS/cmd
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