

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
www.cco.state.oh.us

TYLER BECK

Plaintiff

v.

MEDICAL UNIVERSITY OF OHIO

Defendant

Case No. 2003-05461

Judge Joseph T. Clark

DECISION

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

{¶ 2} Late in the evening of June 21, 2002, plaintiff was severely injured when he dropped a 145-pound barbell on his abdomen while lifting weights with his friends. After experiencing acute pain, vomiting, and periods of unconsciousness for approximately seven hours, plaintiff went to the emergency room at Lima Memorial Hospital. He was admitted and the severity of his condition was assessed. Plaintiff was then referred to defendant, Medical College of Ohio (MCO).¹ On June 25, 2002, Juan Sanabria, M.D. performed a distal pancreatectomy and splenectomy to repair plaintiff's lacerated pancreas and to remove his spleen. (Joint Exhibit 1.)

¹The Medical College of Ohio is now known as the Medical University of Ohio.

{¶ 3} On October 7, 2002, plaintiff was involved in a one-car accident in which his vehicle swerved off the road and struck a telephone pole. Plaintiff and his passenger were transported to Lima Memorial Hospital where they were treated for minor injuries and released. On October 12, 2002, plaintiff went to the emergency room at St. Rita's Medical Center where he reported abdominal soreness and diarrhea. Abdominal films showed an unusual lucency of the left upper quadrant, along with a ribbon-like "radio density" projecting over the left mid-abdomen. (Joint Exhibit 1.) Plaintiff received palliative care and was discharged. On October 13, 2002, plaintiff returned to St. Rita's complaining of acute abdominal pain and vomiting. A CT scan revealed the presence of a foreign body in plaintiff's abdomen. Dr. Sanabria was then contacted and plaintiff was instructed to follow up with him.

{¶ 4} On October 15, 2002, plaintiff was admitted to MCO and Dr. Sanabria performed an exploratory laparotomy. Dr. Sanabria was unable to locate any foreign object either near the site of the surgery which he had performed in June 2002, or anywhere else in the abdominal cavity. However, after reviewing x-rays and using a method known as "triangulation" Dr. Sanabria ultimately located a surgical laparotomy sponge² rolled up inside the lumen of plaintiff's small bowel. (Joint Exhibit 1.)

{¶ 5} Plaintiff asserts that defendant's medical staff left the sponge in his abdomen during the course of the June 25, 2002 surgery and that their care and treatment fell below the applicable standard of care in doing so. Plaintiff also asserts that the doctrine of *res ipsa loquitur* applies to establish that defendant was negligent because the instrumentality that caused the injury was under defendant's exclusive control and management.

{¶ 6} Defendant argues that this is not an "ordinary" retained-surgical sponge case inasmuch as how the sponge came to be in the location where the sponge was found cannot be explained. According to defendant, it is not possible for the sponge to have traveled from the abdominal area where the June 2002 surgery was performed to

²An example of such a sponge was entered into evidence. It is an approximately 14" x 14" square of thin, gauzy material with an approximately 6" x 1/4" blue fabric "tag" that, according to the testimony, is generally left hanging outside a surgical site for ease of removal of the sponge. (Plaintiff's Exhibit 4.) The actual sponge that was removed from plaintiff's bowel was also admitted as an exhibit.

the area of the small bowel where it was found. Defendant posits that plaintiff may have swallowed the sponge.

{¶ 7} In order to prevail on a claim of medical malpractice, plaintiff must first prove: 1) the standard of care recognized by the medical community; 2) the failure of defendant to meet the requisite standard of care; and 3) a direct causal connection between the medically negligent act and the injury sustained. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. The appropriate standard of care must be proven by expert testimony. *Id.* at 130.

{¶ 8} The doctrine of *res ipsa loquitur* permits the trier of fact to infer negligence if plaintiff demonstrates that: 1) the instrumentality causing injury was, at the time of injury, under the exclusive management and control of defendant; and 2) the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed. *Hake v. Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 66-67.

{¶ 9} In support of his claims, plaintiff presented his own testimony and that of Marc Alpert, M.D., a board-certified general surgeon who practices in the state of Pennsylvania and, among other things, serves as Chief of Surgery at Central Montgomery Medical Center. Dr. Alpert testified that he did not believe that a laparotomy sponge could be swallowed and opined that the sponge that was found in plaintiff's small bowel was left in his abdomen during the June 2002 surgery. He explained that leaving a foreign object in the body falls below the standard of care because of the complications it causes, such as infection, bleeding, damage to the surrounding tissues, intestinal obstruction, adhesions, and pain. According to Dr. Alpert, the sponge could have migrated from the abdominal area where the surgery was performed and eroded through the wall of the bowel and into the bowel itself. Dr. Alpert stated that there would have been leakage of the intestinal contents around the sponge, but not throughout the entire abdomen, and that the area where the sponge passed through the bowel would have sealed itself off via scar tissue.

{¶ 10} Plaintiff testified that he did not swallow or otherwise ingest the laparotomy sponge. He stated that he has never had any mental health issues or counseling. He testified that in June 2002 he had been working out regularly in order to get in physical

condition for boot camp because he had joined the Army Reserves. He was 17 years old at the time. After the June 2002 surgery, plaintiff was informed that his physical condition would prohibit him from pursuing a military career. There was some suggestion at trial that plaintiff may have swallowed the sponge as a tactic to avoid his admittedly hasty decision to join the Army. However, plaintiff insisted that he had no intention of avoiding military service and that he had actively attempted, but without success, to find some other position with the Army in which his medical condition would be acceptable. He has since entered college and is pursuing another career.

{¶ 11} Plaintiff did admit upon cross-examination that he had been untruthful about various matters during his discovery deposition. For example, plaintiff originally insisted that he had injured himself with the barbell while working out at his own home. He explained that he had not been honest about that because someone had told him that his medical expenses would not be covered if the accident had happened, as it did, at someone else's residence. He stated that he persisted with the story because he feared that if he did not his mother would be charged with insurance fraud. When asked why he eventually admitted the truth, he stated that "it weighed on me that I lied. And second of all, I found out that, you know, the insurance wasn't going to cover it, and she wouldn't have gotten in trouble even if I did tell the truth to begin with." (Transcript, Page 59, Lines 2-7.)

{¶ 12} Defendant presented the testimony of Dr. Sanabria, a board-certified surgeon who in June 2002 performed primarily liver and pancreas transplants, and hepatobiliary surgeries at MCO. Sheryl Lusky, R.N., who was present during plaintiff's June 2002 surgery, also testified.

{¶ 13} Lusky worked at MCO as a "circulating nurse," which she defined as a nurse who literally circulates throughout the operating room performing various functions during surgeries. She and a scrub nurse, whom Lusky defined as a nurse that primarily assists the physicians during surgeries, were responsible for the sponge count on the date of plaintiff's surgery. Lusky provided a detailed explanation of how the counts are conducted by the circulating and scrub nurses to ensure that every sponge, needle, and instrument is accounted for at the beginning of, in the course of, and at the end of surgeries. Lusky stated that she remembered plaintiff's surgery "vividly" (for

reasons that are not germane to this decision). Lusky reviewed the medical records and testified that she was confident that the counts that she and the scrub nurse made during plaintiff's surgery were accurate. She stated that, in the event that a count would be off, or if one of the nurses felt uncertain for any reason, an x-ray would be taken to ascertain whether any foreign body had been left in a patient. Lusky testified that she had had no doubts about the sponge count in plaintiff's case and that no x-ray had been requested. On cross-examination, Lusky acknowledged that her shift had ended before plaintiff's surgery concluded and that another nurse, Sarah Sprunger, came on duty. Lusky testified that she conducted a "final" count before her shift ended and that Sprunger performed a second "final" count that was documented in the medical records. Lusky testified that she knew Sprunger "very, very well" and that she was confident that Sprunger would not have simply taken her word on what the count was, but would have re-counted before initialing the record to confirm that the count was accurate.

{¶ 14} Dr. Sanabria testified that the gastrointestinal tract where the sponge was found was an abdominal area that was not entered during the June 2002 surgery. He explained that the June surgery involved the pancreas and the spleen, which are inside the abdominal cavity, but outside the gastrointestinal tract. He further explained that the gastrointestinal system, which begins at the mouth, goes through the esophagus and the stomach, and then through the small and large intestines, is a "closed system" and that there are no entry points into the system except for the mouth and the rectum. Dr. Sanabria photographed the bowel and the removal of the sponge when the October 2002 surgery was performed. (Defendant's Exhibits C-F.) He noted that upon examination at the time of that surgery there were no fistulas (pathways) involving the small bowel, or any other signs of inflammation or injury where the sponge might have moved from the abdominal cavity into the bowel. Dr. Sanabria testified that the bowel looked completely normal and was totally intact.

{¶ 15} Upon review of the evidence, the court finds that plaintiff failed to prove his claim of medical negligence by a preponderance of the evidence. It is also inappropriate to apply the doctrine of *res ipsa loquitur* where the cause of plaintiff's injury is either unknown or could possibly be within plaintiff's knowledge and control.

Fidelity & Guaranty Ins. v. Spires (May 26, 1983), Athens App. No. 1123; *Hansen v. Wal-Mart Stores, Inc.*, Ross App. No. 07CA2990, 2008-Ohio-2477.

{¶ 16} Specifically, the court finds that the testimony of both plaintiff and Dr. Alpert lacked credibility. The court is persuaded that plaintiff swallowed the sponge that was found in his small bowel. The evidence establishes that surgical sponges are not kept under lock and key at hospitals and are, therefore, accessible to persons other than medical staff. Moreover, examination of the sponge admitted into evidence, and defendant's trial demonstration of wetting and rolling such a sponge, persuade the court that a person is capable of swallowing a laparotomy sponge. Further, Dr. Alpert conceded that he had never seen or heard of any actual cases where a laparotomy sponge had migrated from the abdominal cavity through the intestinal wall into the bowel. His opinions and testimony were based in large part upon a book from his personal library entitled "Foreign Bodies in Abdomens" that was published in 1940, and which was never established to be a reliable or authoritative source under Evid.R. 803 (18).³

{¶ 17} Moreover, the court is persuaded by Dr. Sanabria's testimony that, if the sponge had migrated in accordance with Dr. Alpert's theory, there should have been inflammation, scar tissue, or some other visible sign that the large, gauzy sponge had worked its way through the bowel wall. The court is equally persuaded by Dr. Sanabria's testimony that if the sponge did in fact migrate into the bowel there would have been leakage of intestinal contents into the abdominal cavity that would have caused an acute and life-threatening infection. The evidence is clear that plaintiff exhibited no such symptoms in his post-operative visits with Dr. Sanabria in July and September 2002. Finally, there is no evidence that the procedures followed by the

³Evid.R. 803 (18), provides in relevant part that information taken from learned treatises may be admitted as an exception to the hearsay rule:

"[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, *established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.*" (Emphasis added.)

nurses in performing the sponge counts in any way violated the applicable standards of care.

{¶ 18} In short, the court finds the testimony of Dr. Sanabria and nurse Lusky to be more credible than that of plaintiff and his expert. The weight of the evidence establishes that Dr. Sanabria's care and treatment of plaintiff complied with the applicable standards of care. The court further concludes that the doctrine of res ipsa loquitur does not apply because the evidence fails to establish either that the surgical sponge that caused plaintiff's injury was under the exclusive control of defendant or that ordinary care was not observed. Accordingly, judgment shall be entered for defendant.

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JUDGMENT ENTRY

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.

JOSEPH T. CLARK
Judge

cc:

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LH/cmd
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