[Cite as *Fisher v. Univ. of Cincinnati Med. Ctr.*, 2013-Ohio-5960.]

Court of Claims of Ohio
The Ohio Judicial Center
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Columbus, OH 43215
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DEBORAH L. FISHER

Plaintiff

v.

UNIVERSITY OF CINCINNATI MEDICAL CENTER

Defendant

Case No. 2003-07235

Judge Patrick M. McGrath

DECISION

{¶ 1} Plaintiff brought this action against defendant, University of Cincinnati Medical Center, alleging medical malpractice. The lengthy procedural history of this case and of the connected action filed in Hamilton County Court of Common Pleas have resulted in a lengthy delay in reaching the merits of plaintiff's claim against defendant. After a previous voluntary dismissal, this case was refiled on June 26, 2003. Shortly thereafter, the case was stayed until February 2010 pending the final disposition of the connected action in Hamilton County. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability. Following a liability trial, a magistrate recommended judgment for plaintiff and the court subsequently overruled defendant's objections and adopted the magistrate's recommendation.

{¶ 2} According to the magistrate's decision, on December 20, 1990, Harry Van Loveren, M.D., surgically removed plaintiff's craniopharyngioma in a fairly uneventful procedure, which was the second surgery addressing plaintiff's brain tumor. Following the second surgery, plaintiff was noted to have weakness on her left side and to have

suffered a stroke in her right thalamus. In the morning of December 24, 1990, plaintiff's neurological condition began to deteriorate while she was under the care of both Brad Osborne, M.D., and Bradley Mullen, M.D. Such neurological deterioration included pupillary changes, breathing changes, and decorticate and decerebrate posturing. In the evening of December 24, 1990, Dr. Van Loveren was asked to return to the hospital where he subsequently intubated plaintiff and surgically placed a ventricular catheter. Dr. Van Loveren also measured plaintiff's intracranial pressure, and such a reading was well within the normal range. Plaintiff's ventricular catheter was removed on December 26, 1990, and she was discharged from the hospital on February 22, 1991.

{¶ 3} The magistrate determined that "more likely than not, plaintiff suffered from increased intracranial pressure." Specifically, the magistrate found that plaintiff's "normal pressure reading in the medical record is likely attributable to intubation and hyperventilation prior to placement of the ventricular catheter" in the evening of December 24, 1990. The magistrate was convinced that after receiving such treatment, plaintiff's "neurological condition began to improve." Accordingly, the magistrate determined that defendant was liable for plaintiff's neurological damage sustained because of the delay in treatment on December 24, 1990. In overruling defendant's objections, the court stated that "the extent of plaintiff's injuries proximately caused by defendant's breach remains to be tried." The case then proceeded to trial on the issue of damages.[1]

{¶ 4} At the damages trial, plaintiff presented the testimony of her primary care physician, Amy Ruschulte, M.D., a board-certified family medicine physician. Dr. Ruschulte has been treating plaintiff and coordinating her care among various subspecialists since 2008. Dr. Ruschulte testified that plaintiff currently suffers from dysfunction of the pituitary known as panhypopituitarism, hypothyroidism, an inability to

concentrate urine known as diabetes insipidus, and corticoadrenal insufficiency, all of which are treatable to some extent through medications and appropriate adjustments. Dr. Ruschulte classified such issues as endocrine related. Plaintiff, currently weighing 265 pounds, also suffers from morbid obesity, which affects all levels of her life including both osteoarthritis in her knee and her current hormonal issues. Plaintiff has also been diagnosed with depression and demonstrates a lack of executive function as well as cognitive impairments.

{¶ 5} Regarding plaintiff's cognitive impairments, Dr. Ruschulte testified that plaintiff is able to clearly communicate verbally. Plaintiff can also feed herself; however, she does require daily monitoring by family members. Plaintiff is able to walk with the assistance of a cane.

{¶ 6} Plaintiff's sisters, Gloria Wirthwine and Elaine Williams, both testified regarding the care they have provided to plaintiff since the December 1990 surgery. Both Wirthwine and Williams check in on plaintiff five or six times per week. Plaintiff currently lives alone in her own apartment. Plaintiff is able to prepare light meals and take care of her basic grooming needs, but she is incapable of making healthy eating choices or performing tasks that require multiple steps and planning. Plaintiff also attends water aerobics three times per week. Plaintiff is often angry, uncooperative, and irrational and has difficulty understanding reason. Wirthwine and Williams perform plaintiff's household tasks such as cleaning, laundry, and shopping. Wirthwine and Williams both insist that plaintiff's short and long term memory has been affected, contributing to plaintiff's problems. Plaintiff is incapable of turning off household appliances after completing tasks; however, Wirthwine and Williams have purchased appliances that automatically shut off. Plaintiff now walks with a cane, occasionally falling and having difficulty getting back up.

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[1] Plaintiff's September 3, 2013 motion for leave to file post-trial briefs in excess of the page

{¶ 7} Wirthwine and Williams also control plaintiff's finances. Plaintiff receives $17,000 per year in disability pay from her former employer, Proctor and Gamble. Plaintiff also has health insurance, which covers most health expenses; however, plaintiff is required to pay a $500 monthly premium and doctors' office copays. Upon reaching the age of 66, plaintiff will begin receiving $319 per month from Social Security.

{¶ 8} Regarding her neurological condition, plaintiff presented the testimony of Randall Benson, M.D., a board-certified neurologist. Dr. Benson performed a neurological evaluation on plaintiff, which consisted of obtaining a detailed history from Wirthwine and Williams; a cognitive evaluation to determine the extent of plaintiff's deficits; and an MRI. Finally, Dr. Benson integrated the information he obtained with plaintiff's medical records and depositions taken in this case.

{¶ 9} Based upon his evaluation, Dr. Benson concluded that plaintiff has neurological deficits that tend to predominantly involve the right hemisphere of her brain in addition to her frontal lobes. Dr. Benson testified that plaintiff also suffers from some left hemispheric language deficits. Dr. Benson opined that plaintiff suffered a diffuse permanent brain injury, meaning plaintiff's brain is essentially functioning on a lesser level. Dr. Benson explained that as a result of right hemispheric damage, plaintiff lacks the ability to solve problems, has a decreased ability to socialize, lacks an ability to empathetically interact with people and has a self-centered view of reality.

{¶ 10} Additionally, as a result of left hemispheric damage, plaintiff has deficits in her higher language capacity, while the frontal lobe deficits leave plaintiff with a decreased ability to stay on task, filter information and make appropriate decisions. Finally, Dr. Benson concluded that plaintiff's brain injury is diffuse and permanent in nature, likely attributable to increased intracranial pressure rather than the surgery or

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limitation is GRANTED instanter.

the stroke. However, Dr. Benson admitted that plaintiff's left-sided weakness was attributable to a stroke. Dr. Benson also admitted that plaintiff's obesity, hypothalamic damage, pituitary and endocrine problems are not attributable to increased intracranial pressure.

{¶ 11} With respect to plaintiff's neuropsychological state, neuropsychologist, Bradley Sewick, Ph.D., performed a battery of neuropsychological tests, which included tests for sensory and motor functions, and language-related capacities. After performing such tests, Sewick concluded that plaintiff has a diffuse pattern of brain damage and generalized impairment throughout the brain. Sewick explained that plaintiff has deficits to her memory, executive function, and motor functions making it both difficult for plaintiff to respond to her world and susceptible to manipulation and exploitation.

{¶ 12} Regarding proximate cause, plaintiff presented the testimony of Jay Martin Barrash, M.D., a board-certified neurosurgeon. Dr. Barrash testified that plaintiff's most significant challenges stem from the diffuse cognitive damage that includes both hemispheres of the brain. Dr. Barrash asserted that the stroke plaintiff suffered had very little effect in her cognitive processes; however, Dr. Barrash stated that the brain damage plaintiff suffered is permanent. Dr. Barrash attributed plaintiff's cognitive deficits to an episode of increased intracranial pressure on December 24, 1990. However, Dr. Barrash admitted that plaintiff's weight gain, hyperphagia, hypothalamic, pituitary and endocrine problems would have occurred regardless of any episode of increased intracranial pressure.

{¶ 13} Dr. Van Loveren, a board-certified neurosurgeon and chairman of the Department of Neurosurgery at the University of South Florida, explained that he met plaintiff in 1990 and recommended surgically removing a craniopharyngioma that had been causing her hormonal dysfunction, headaches, visual loss and memory dysfunction. Dr. Van Loveren explained the risks of the surgery, which included death,

vascular injury with stroke, hormonal dysfunction, blindness, and deep-brain injury or hypothalamic injury. Dr. Van Loveren testified that plaintiff's current problems include hypothalamic injury, hyperphagia, dramatic changes in personality, hormonal changes, and cognitive impairment resulting in a loss of quality of life. Dr. Van Loveren opined that increased intracranial pressure was not a factor in causing any of plaintiff's current problems and that plaintiff never suffered from increased intracranial pressure. However, Dr. Van Loveren admitted that plaintiff's cognitive brain damage occurred on December 24, 1990, while he was away from the hospital.

{¶ 14} Defendant also presented the testimony of Herbert Bruce Newton, M.D., a board-certified neurologist and professor of neurology, neurosurgery and oncology at The Ohio State University Medical Center. Dr. Newton explained that a craniopharyngioma is a low-grade, benign brain tumor that is sticky and difficult to remove. Dr. Newton opined that removal of the craniopharyngioma, rather than any delay in treatment on December 24, 1990, proximately caused plaintiff's short-term memory loss, hyperphagia, cognitive dysfunction, left-sided hemiparesis, endocrinopathies, and weight gain. Dr. Newton testified that the more the surgeon manipulates the brain in order to reach the craniopharyngioma, the more likely it is that brain damage will occur. However, Dr. Newton admitted that plaintiff's surgery appeared to have gone smoothly.

{¶ 15} Defendant argues that plaintiff did not suffer from increased intracranial pressure on December 24, 1990; however, at the conclusion of the liability trial, the magistrate determined that "more likely than not, plaintiff suffered from increased intracranial pressure." Accordingly, the magistrate concluded that "the unreasonable delay in treatment of intracranial pressure was the proximate cause of plaintiff's permanent neurological damage." Inasmuch as the court has already adopted such a finding, the court is disinclined to revisit such an issue.

{¶ 16} Based upon the foregoing, the court concludes that plaintiff's weight gain, hyperphagia, hypothalamic, pituitary and endocrine problems were not caused by any delay in treatment and are the result of the surgery itself. However, the court is persuaded that plaintiff suffered brain damage resulting in cognitive impairment while Dr. Van Loveren was away from the hospital on December 24, 1990. The court further finds that such cognitive impairment is permanent in nature. Such impairment affects plaintiff's executive and motor functions as well as her language-related capacities.

{¶ 17} Regarding plaintiff's future care needs, plaintiff presented the testimony of registered nurse and certified life care planner, Marianne Boeing. In preparation for developing a life care plan for plaintiff, Boeing reviewed relevant therapy and medical records, interviewed plaintiff and her family, corresponded with plaintiff's treating physicians and performed an assessment of plaintiff's home environment. After completing her evaluation, Boeing formulated a plan to address plaintiff's health care needs, some of which were recommended by both plaintiff's family and her physicians. Regarding an estimated cost, Boeing testified that such a determination is based upon her education, training, and experience in addition to market research of local vendors and various publications listing medical costs, services, and therapies.

{¶ 18} Boeing's life care plan consists of several areas that together address plaintiff's needs. Boeing proposed therapeutic evaluations such as physical and occupational therapies; therapeutic modalities with a specific number of sessions per year of each recommended therapy; health and strength management which includes a membership to a fitness center; therapeutic equipment which includes a stationary bicycle; mobility aids consisting of a walker and scooter; orthotics with the recommendation of orthopedic or diabetic shoes; medications and supplies; adapted transportation with the recommendation of purchasing of a modified minivan capable of transporting a scooter; home furnishings and accessories consisting of a lift and a recliner; facility care with a choice of either a residential facility or an assisted living

facility; routine medical care; and leisure/recreational activities to improve plaintiff's socialization.

{¶ 19} Defendant presented the testimony of Dorene Ann Spak who holds a master's degree in rehabilitation counseling and has been working as a life care planner for 36 years. In preparation for developing a life care plan, Spak reviewed the relevant reports of several physicians in the case, Boeing's life care plan, and the depositions of both Wirthwine and Williams. Spak then performed a needs-driven assessment and contacted several home care providers and medical vendors to discuss their services, rates and products. Spak then compiled a list of recommendations, which include medical follow-up, diagnostic tests, therapeutic intervention, medications, and medical equipment and supplies.

{¶ 20} Spak's life care plan is similar to Boeing's with the most significant disagreement concerning how home care would be provided. Spak prefers a live in option for home care rather than an assisted living facility. Spak contacted two agencies that provide such care, Griswold, option A and Right at Home, option B. Spak testified that the difference between option A and option B is simply the rate which Griswold and Right at Home charge. Spak presented a third option of purchasing eight hours of care per day, which is roughly the same cost as option A.

{¶ 21} Upon review, the court finds Spak's testimony to be more persuasive than that of Boeing. Indeed, Boeing was under the mistaken belief that that all of plaintiff's current brain deficiencies, including any damage related to the surgery or to the stroke plaintiff suffered subsequent to her surgery, are injuries for which plaintiff is entitled to compensation. Boeing in no way attempted to delineate between plaintiff's cognitive deficiencies and any brain damage as a result of plaintiff's surgery. Furthermore, Spak's plan is consistent with the reality of the previous 20 years of care that Wirthwine and Williams have provided to plaintiff. Plaintiff has been living in her own apartment for

a number of years with limited daily supervision. The court believes that with the benefit of some additional assistance, plaintiff can continue to live a relatively independent life.

{¶ 22} Finally, Spak did not convince the court that plaintiff requires aquatic therapy in addition to a membership at a fitness center. Spak referenced plaintiff's "bad left knee" and difficulty walking as reasons for the therapy; however, plaintiff has not persuaded the court that plaintiff's weight and knee problems are related to plaintiff's cognitive deficiencies.

{¶ 23} As stated above, Spak provided the court with three separate life care plan estimates. After revising her report to eliminate compensation for plaintiff's endocrine issues and aquatic therapy, Spak estimated that option A would cost $81,000 per year; option B: $120,000 per year; and option C: $80,000 per year. Inasmuch as the only difference that Spak identified between option A and option B was the rate at which each provider charges, the court finds that $80,000 is a reasonable estimate of the costs of an annual life care plan to address plaintiff's cognitive deficiencies. Accordingly, the court shall award plaintiff $80,000 annually for the remainder of her life.

{¶ 24} Regarding plaintiff's life expectancy, defendant presented the court with the testimony of Steven Day, Ph.D., in applied statistics in epidemiology. Day described applied statistics in epidemiology as the application of statistical methods to the study of issues in health and medicine. Day has been involved in many published studies focused on life expectancy, mortality and survival. Day described life expectancy as the number of years of life remaining for an average individual within a population.

{¶ 25} In formulating his opinion of plaintiff's life expectancy, Day referred to a life table published by the Center for Disease Control for people in the United States broken down by subgrouping. Day also reviewed plaintiff's medical records, relevant medical literature, and the reports of Dr. Barrash, Dr. Sewick, and Dr. Benson. Day also reviewed the depositions of Wirthwine, Williams and Dr. Ruschulte. Day then determined what factors may be relevant to plaintiff's life expectancy. Those factors

included plaintiff's craniopharyngioma, brain injury, obesity, panhypopituitarism, and depression. Day then made adjustments to the life table to correspond to plaintiff's increased mortality risks.

{¶ 26} Day opined that plaintiff's life expectancy is between 14 and 18 years, a reduction of 10 to 14 years for a "normal" life expectancy of a 55-year-old female. Day explained that plaintiff is 55.5 years old and that plaintiff should expect to live to the age of 69.5 to 73.5 years old.

{¶ 27} The court finds that Day testified credibly that as a result of plaintiff's current medical conditions she will have a reduced life expectancy. Despite plaintiff's attempt to discredit Day's testimony, the court is convinced that plaintiff's life expectancy is approximately 14 years given her current medical conditions. Plaintiff argues that Dr. Ruschulte's testimony supports the proposition that plaintiff has a full life expectancy; however, Dr. Ruschulte is not an expert on life expectancy, did not consult any medical literature on the subject, and has never done any research on the subject. Accordingly, the court finds that, given plaintiff's current medical conditions, plaintiff's life expectancy is 14 years. Therefore, the court shall award plaintiff $1,120,000 to fund a life care plan. To the extent plaintiff seeks an adjustment to such an award to represent the alleged increased cost of future medical care, the court finds that plaintiff's evidence on an alleged increased cost of medical care to be highly speculative and not reasonably reliable.

{¶ 28} Plaintiff also seeks damages for loss of earnings and loss of earning capacity. Plaintiff presented the testimony of economist Harvey Rosen, Ph.D. Plaintiff began working for Proctor and Gamble in 1989 and was paid an annual salary of $38,000 in addition to fringe benefits. Plaintiff did not, however, work a full year in 1990 because of the two surgeries addressing plaintiff's brain tumor. Plaintiff did not return to work following the second surgery in December 1990.

{¶ 29} Rosen first determined plaintiff's work life expectancy, meaning how long plaintiff would have remained in the work force. Rosen referred to a life table published by the Department of Labor, which compiles labor force participation rates. Rosen concluded that plaintiff would likely retire at the age of 62. Rosen then estimated the rate at which plaintiff's salary would have grown from 1989 through 2013 by referring to the Employment Cost Index, a measure of the average American worker's wage growth published by the Bureau of Labor Statistics. Rosen determined that the average worker's salary in the private industry grew by 3.39 percent per annum. Rosen then grew plaintiff's wages at a rate of half a percent per annum to represent plaintiff's estimated wage growth from 2013 to retirement at the age of 62. Rosen then performed three calculations assuming plaintiff would have retired at the age of 62 having earned $2.4 million, 65 having earned $2.6 million or 67 having earned $2.8 million.

{¶ 30} The court finds that plaintiff more than likely would have retired at the age of 62, which represents plaintiff's work life expectancy. Rosen, however, assumed plaintiff's wages would grow at an annual rate of 3.39 percent through 2013 and half a percent from 2013 through plaintiff's retirement. Given that plaintiff had only worked at Proctor and Gamble for a little more than a year, the court cannot conclude that plaintiff's salary would have continued to increase at such a rate into the future. Simply put, plaintiff's limited wage history at Proctor and Gamble does not support an assumption of annual wage increases. Furthermore, Rosen did not make any adjustment to his figures representing plaintiff's $17,000 annual disability pay from Proctor and Gamble. Plaintiff's disability pay is a benefit under R.C. 3345.40(B)(2) and must be offset against any award. *See Aubry v. Univ. of Toledo Med. Ctr.*, 10th Dist. No. 11AP-509, 2012-Ohio-1313. Accordingly, the court shall award $1,200,000 representing plaintiff's lost wages and lost earning capacity. Such a figure includes a reduction for plaintiff's $17,000 annual disability payment and an adjustment to Rosen's unrealistic wage growth percentages.

{¶ 31} Plaintiff also seeks compensation for loss of services she can no longer provide to herself. Rosen testified that according to the American Timing Study published by the Bureau of Labor Statistics, the average employed female with no children spends approximately 2.5 hours per day on household services. After retirement, that figure increases to 3.6 hours per day. Wirthwine and Williams have been providing such services to plaintiff for the previous 20 years. Rosen then multiplied the hours per day for performing household services by a $15 hourly rate. Rosen based such a rate on three different sources of material: life care plans; job classification statistics maintained in Ohio by Job and Family Services; and a survey of private companies that provide such services. Rosen then calculated the cost of replacing such services through the end of plaintiff's life, which he assumed was a normal life expectancy.

{¶ 32} On cross-examination, Rosen calculated the cost of replacing such services using the minimum wage plus legally required benefits. Rosen concluded that such a cost would be $540,000, about half of which would represent the cost of household services from 1990 up to the present. However, the court has previously determined that plaintiff's life expectancy is 14 years rather than the "normal" life expectancy that Rosen used. Additionally, if plaintiff enters an assisted living facility, such services will be included in the cost of the facility. Moreover, plaintiff is attempting to recover for services that Wirthwine and Williams have provided to plaintiff since 1990. Accordingly, the court finds that $236,000 is a reasonable award for loss of services.

{¶ 33} Finally, the court shall award plaintiff $250,000 representing plaintiff's non-economic damages for plaintiff's pain and suffering. R.C. 3345.40(B)(3).

{¶ 34} Based upon the foregoing, the court awards plaintiff $1,120,000 to fund a life care plan; $1,200,000 in lost wages; $236,000 for loss of services; and $250,000 in non-economic damages for a total of $2,806,025, which includes the $25 filing fee.

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PATRICK M. MCGRATH
Judge

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JUDGMENT ENTRY

{¶ 35} This case was tried to the court on the issue of plaintiff's damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of $2,806,025, which includes the $25 filing fee paid by plaintiff. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH
Judge

cc:

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