



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

BROOKE FRALEY-ARPAN, etc.

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2012-03140

Judge Dale A. Crawford

DECISION

{¶ 1} This cause comes to be heard on a Complaint brought by Plaintiff, as the administratrix of the estate of Brandon Copas (Copas), alleging (1) medical negligence; (2) negligent hiring, retention, and supervision of Defendant Ohio Department of Rehabilitation and Corrections employees; (3) negligence; and (4) wrongful death. These claims all stem from Defendant's handling of Copas' medical care after an altercation occurring at the Warren Correctional Institution (WCI) on April 5, 2011.

{¶ 2} The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability. Prior to trial, Defendant filed a stipulation stating that it breached the standard of care by "not sending Mr. Copas for transfer to an outside medical facility within two hours of his presentation to the infirmary on April 5, 2011." (Defendant's Stipulation.) Accordingly, the parties acknowledged that the issue of causation was the only contested matter to be determined at this portion of the trial. The following constitutes the Court's Findings of Fact and Conclusions of Law.

Findings of Fact

{¶ 3} Copas was an inmate at WCI on April 5, 2011, when Copas was assaulted by fellow inmate Jeffrey Benner (Benner). Benner struck Copas two times in the head, which caused Copas to lock up and fall to the ground, hitting his head. The punches caused visible lacerations to Copas' face;

{¶ 4} Copas was sent to the WCI infirmary and examined by nurses. Copas was diagnosed as having a possible seizure and head trauma. Copas felt dizzy, vomited twice, and admitted to drinking, although the autopsy did not show evidence of the consumption of alcohol. Copas also experienced confusion and could not identify the proper date;

{¶ 5} Copas' Glasgow Coma Scale (GCS) never fell below a thirteen;

{¶ 6} At 4:09 a.m. on April 6, 2011, Copas was found unresponsive, and was determined to be dead. During his time in the WCI infirmary, Copas was not examined by a doctor; and

{¶ 7} As stipulated, Defendant breached the standard of care by not sending Copas for transfer to an outside medical facility within two hours of his presentation to the infirmary on April 5, 2011.

Conclusions of Law

{¶ 8} In order to prove negligence, Plaintiff must prove the existence of duty and a breach of such duty, which proximately causes damages. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573. "[T]o 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." *Little v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 92 (1988). Similarly, on a claim of medical malpractice or professional negligence, a plaintiff must 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. *Wheeler v. Wise*, 133 Ohio App.3d 564 (1999); *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976). The only issue in this case is the determination of proximate cause. Did Plaintiff prove by a preponderance of the evidence that the stipulated breach proximately caused the death of Copas? The Court finds that the Plaintiff has met its burden. Plaintiff claims that the injuries incurred by Copas were treatable with proper diagnosis and that but for Defendant's breach by not sending Copas to the hospital in a timely manner, Copas would not have died. Defendant argues that the injuries to Copas were already far too severe for recovery, and regardless of whether Copas was sent to a hospital within two hours, he would have died.

{¶ 9} At trial, Plaintiff presented Dr. Russell Uptegrove, the Warren County coroner, who testified to the findings in his report from his autopsy of Copas. Dr. Uptegrove confirmed that the pictures of Copas' brain showed intercranial bleeding, epidural bleeding, and subdural bleeding. (Plaintiff's Exhibit 6.) Based on the autopsy pictures, Dr. Uptegrove also pointed to what he identified as a subdural hematoma, which was "more than just a scattering of subdural blood." He estimated the presence of "at least" 100 mL of liquid blood. Dr. Uptegrove also testified that all of the contusions on Copas' brain were only surface contusions and upon sectioning the brain, he did not find any intercerebral damage or blossoming. He further testified that there was no indication of diffuse cerebral edema. Accordingly, Dr. Uptegrove concluded that it was the bleeding surrounding the brain that caused the herniation and Copas' death. Dr. Uptegrove could not give an opinion on proximate cause.

{¶ 10} Plaintiff then presented the testimony of Dr. Bernhard Zunkeler, a licensed and board certified neurosurgeon in Maryland who specializes in the treatment of the brain and spinal nerves. Dr. Zunkeler testified that upon examination of Copas' autopsy report and pictures, he identified contusions as well as a clot in the middle of the brain,

which he testified was more likely than not a subdural hematoma. (Plaintiff's Exhibits 6-000001-000003.) He also testified that the contusions on Copas' brain were little and would not kill a patient or necessarily require medical attention. Dr. Zunkeler continued by testifying that Copas' symptoms were not consistent with intercerebral hemorrhage. He also testified about the Glasgow Coma Scale (GCS), which is a way to assess neurological status as well as to assess head injury severity. Dr. Zunkeler stated that Copas never had a GCS of less than thirteen, which has a mortality rate of 10-15%. Dr. Zunkeler further testified that had Copas been transferred to a hospital within the required time, there would have been many options to treat his injuries, and he would have more likely than not made a full recovery.

{¶ 11} Defendant presented the testimony of Dr. Patrick McCormick, a board certified neurosurgeon with the Neurosurgical Network, Inc. in Toledo, Ohio. Dr. McCormick testified that there was no life threatening subdural hematoma on Copas' brain and therefore, it could not have been Copas' cause of death.¹ Dr. McCormick submitted that a brain edema, an increase of fluid in the brain, fit better with the evidence of the contusions, herniation, and sudden death. Dr. McCormick agreed with Dr. Zunkeler regarding the purpose and meaning of the GCS on a universal scale, but stated that, on an individual basis, it should be evaluated in conjunction with other factors. Dr. McCormick also agreed with Dr. Zunkeler that Copas' GCS never fell below a thirteen, which he asserted supports his brain edema theory. Dr. McCormick further testified that although there was a course of treatment available for Copas if he had been transferred to a hospital, such as a CT scan, admittance to the intensive care unit, ventilators, etc., the treatments would have been ineffective for Copas' type of injury. Dr. McCormick also refuted Plaintiff's experts' testimony regarding the subdural

¹ Plaintiff objected to a portion of Dr. McCormick's testimony and stated its reason for objection at a side bar outside of the hearing of the court reporter. Plaintiff requested to memorialize the objection on

hematoma by stating that subdural hematomas need to be quite large and clotted to cause herniation, and that the approximately 100 mL of liquid blood that Dr. Uptegrove testified to finding in Copas' skull was not enough to cause a herniation.

{¶ 12} Based on the foregoing, the Court finds that the coroner's testimony, along with Dr. Zunkeler's opinion that Copas' cause of death was a treatable subdural hematoma, is more persuasive than Dr. McCormick's testimony. Plaintiff's Exhibit 6 also supports this testimony. Accordingly, the Court finds that Defendant's breach of the standard of care was the proximate cause of Copas' death.

{¶ 13} On a separate matter, prior to trial, Plaintiff filed a motion in limine to prevent any evidence to be presented regarding Benner's liability in Copas' death. Defendant states in its Answer that "[t]he negligent and/or intentional acts of one or more persons for whom Defendant is no [sic] responsible were the intervening and superseding causes of the injuries and damages as alleged in the complaint[.]" in an attempt to apportion liability to Benner. (Defendant's Answer, at ¶ 36.) The exchange of pleadings on this issue implicates consideration of the "empty chair" doctrine found in R.C. 2703.23,2 which allows apportionment of liability to a nonparty. The Court is not convinced that R.C. 2703.23 is applicable here. If it is determined to be applicable, it has the potential of creating an unwanted trend that would allow defendants to push liability on a nonparty who is at least a degree or more removed from the negligence of

the record, and the Court instructed Plaintiff to file a written supplement with its basis for the objection. Plaintiff filed its supplement on December 16, 2013, and the Court has accepted this supplement.

¹ R.C. 2702.23 states in pertinent part that "[in] determining the percentage of *tortious conduct* attributable to a party in a tort action under [this section], the court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following: (2) The percentage of *tortious conduct* that proximately caused the injury or loss to person or property or the wrongful death that is attributable to each person from whom the plaintiff does not seek recovery in this action * * * For purposes of (A)(2) of this section, it is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the *tortious conduct* that proximately caused the injury or loss to person or property or the wrongful death is attributable to one or more persons from whom the plaintiff does not seek recovery in this action." (Emphasis added.)

the defendant. For example, if an individual was injured in an automobile accident and sent to a hospital wherein malpractice occurred during his treatment, is the court to apportion in the malpractice case the negligence of the other driver? If an individual negligently fell from a tree and went to a hospital wherein malpractice occurred, would a court apportion comparative negligence against the hospital's malpractice? The answer is "no." The "tortious conduct" which brought an individual to the hospital is separate and distinct from the "tortious conduct" of the hospital just as the tortious conduct of Benner is distinct from the tortious conduct of WCI. This Court cannot contemplate that the legislature's intent in enacting this statute was to apportion separate "tortious conduct" in the same action as is sought by Defendant. Further, upon review of numerous cases in the United States addressing the empty chair doctrine, the Court was not able to find any examples in which any court allowed an empty chair argument with this particular set of circumstances.³ Accordingly, the Court will not permit Defendant to apportion any liability to nonparty Benner.

DALE A. CRAWFORD
Judge



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³ Likewise, Defendant has not been able to identify a case applying R.C. 2703.23 to a similar set of circumstances.

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JUDGMENT ENTRY

{¶ 14} 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 Plaintiff. The trial on damages shall commence on *April 7, 2013, at 9:00 a.m.*

DALE A. CRAWFORD
Judge

cc:

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