

Court of Claims of Ohio

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ROSA GABRIEL, Co-Exec., etc., et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY MEDICAL CENTER

Defendant

Case No. 2013-00552

Judge Patrick M. McGrath

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On July 17, 2014, defendant filed a motion for summary judgment of plaintiffs' wrongful death claim. On July 24, 2014, plaintiffs filed a memorandum in opposition to defendant's motion. On August 6, 2014, defendant filed a motion for leave to file a reply memorandum along with its reply. Defendant's motion for leave is hereby GRANTED. The motion for summary judgment is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to

have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} Civ. R. 56(E) states, in part:

{¶5} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶6} In April 2009, plaintiffs' decedent, Doris Thompson (Thompson), was diagnosed by cardiologist Dr. Stephen Schaal with atrial fibrillation. Thompson went to see another cardiologist, Dr. Bruce Auerbach, who arranged for her to receive a second opinion from cardiologist Dr. Kevin Hackett. As a result of seeing Dr. Hackett, Thompson was prescribed anti-arrhythmia and anticoagulation medicine to prevent blood clots from forming in her heart. When Thompson returned to Dr. Auerbach, she conveyed some interest in the MAZE procedure, a procedure developed by Dr. John Sirak, a cardiothoracic surgeon at The Ohio State University Medical Center (OSUMC).

Dr. Auerbach's office records state that he told Thompson that he would not "take a surgical procedure to correct her atrial fibrillation in the absence of a failed percutaneous approach." (Plaintiff's Memorandum in Opposition, at 4.) Thompson went ahead with the MAZE procedure on June 5, 2009, at OSUMC, was readmitted on June 24, 2009, and subsequently died on June 28, 2009. Thompson died as a result of complications associated with a fistula between her left atrium and esophagus. (Affidavit of Dr. Sirak, at ¶ 8.)

{¶7} The basis of defendant's motion is that plaintiffs have failed to timely identify expert witnesses and provide their reports pursuant to the requirements of L.C.C.R. 7. The rule states, in part, that "[i]n the event the expert witness is a treating physician, the court shall have the discretion to determine whether the hospital and/or office records of that physician's treatment which have been produced satisfy the requirements of a written report." Plaintiffs argue that they provided their expert reports on July 16, 2014, and that their disclosure of expert witnesses satisfies the requirements because all of the identified experts were treating physicians and L.C.C.R. 7 allows for patient records to satisfy the requirements of a written report. In their expert witness disclosure, plaintiffs list Dr. Auerbach to testify that he did not recommend a surgical approach; Dr. Hackett to testify that medications would have been appropriate for Thompson's condition; and Dr. Shaal to testify about Thompson's diagnosis of atrial fibrillation. Plaintiffs also identify Dr. Sirak and the pathologist who performed the autopsy on Thompson as expert witnesses.

{¶8} Although L.C.C.R. 7 gives the court discretion to allow patient records to be submitted in lieu of expert reports, the records submitted must at the minimum create an issue of material fact in order to prevail against defendant's motion for summary judgment. Defendant argues that the records are not sufficient to show that Dr. Sirak breached the standard of care. In order to prevail on a medical negligence claim, plaintiffs must prove through expert testimony the existence of a standard of care within the medical community, breach of that standard of care by the physician, and that the breach of the standard of care was a proximate cause of the patient's injury. *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976). Defendant provides an affidavit from Dr. Sirak that states that he recommended the MAZE procedure and advised Thompson of the risks associated with the procedure. The affidavit further states that he complied with the accepted standard of care for cardiothoracic surgeons in his treatment of Thompson.

{¶9} Plaintiffs' response only includes a copy of their identification of expert witnesses, and does not include the records of the proposed experts. Furthermore, plaintiffs do not provide any affidavits to refute Dr. Sirak's testimony that he complied with the standard of care. Even accepting the treatment records as expert reports as plaintiffs would have this court do, none of the testimony from the records establish the applicable standard of care, an issue of material fact that Dr. Sirak failed to meet the applicable standard of care, or that Thompson died as a result of Dr. Sirak's substandard care. Testimony of Thompson's diagnosis, medications that could be appropriate for Thompson's condition, Thompson's autopsy report, and testimony that Dr. Auerbach would not have recommended a surgical treatment is not enough to show an issue of material fact regarding a breach of the standard of care by Dr. Sirak. Accordingly, defendant's motion for summary judgment is GRANTED. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

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