

[Cite as *Fisher v. Univ. of Toledo Med. Ctr.*, 2015-Ohio-5650.]

JOCELYNE CLAIRE FISHER, et al.	Case No. 2011-08679
Plaintiffs	Judge Patrick M. McGrath
v.	<u>ENTRY GRANTING DEFENDANTS'</u>
THE UNIVERSITY OF TOLEDO	<u>MOTION FOR SUMMARY JUDGMENT</u>
MEDICAL CENTER, et al.	
Defendants	

{¶1} On July 1, 2015, defendants filed a motion for summary judgment. On July 28, 2015, plaintiffs filed their response. 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} This matter arises from an operation on plaintiff Jocelyne Fisher (Jocelyne) to place a Broviac catheter for chemotherapy as well as perform a bone marrow biopsy

and lumbar puncture. For the procedures, Jocelyne was placed under general anesthesia based on the plan of the attending anesthesiologist, Dr. Howard Black. A first-year resident, Dr. Christopher Lewis, assisted Dr. Black in the administration of the anesthesia for Jocelyne's procedure, including the first intubation attempt. The plan specifically called for a standard induction procedure which required an intubation for the placement of the breathing tube. After the operation, Jocelyne developed dyspnea, hemoptysis, a pulmonary hemorrhage, and coagulopathy, which resulted in severe acute respiratory distress syndrome with hypoxemia. Jocelyne also suffered a subsequent stroke. Plaintiffs allege that these adverse reactions were caused by an improper anesthesia plan, especially considering Jocelyne's morbid obesity, abdominal pain, nausea and vomiting, and history of gastroesophageal reflux.

{¶5} On December 17, 2012, this court made an immunity decision regarding Dr. Black and found that he was not entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). The Tenth District Court of Appeals affirmed this decision on May 29, 2014. Therefore, the only issue under the court's consideration in this case involves the actions of Dr. Lewis and whether his participation in the treatment of Jocelyne met the applicable standard of care.

{¶6} In order to prove negligence, plaintiffs 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. "In order to establish medical malpractice, it must be shown by a preponderance of the 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 result of such doing or

failing to do some one or more of such particular things.” *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), paragraph 1 of the syllabus.

{¶7} With regard to interns and residents, appellate courts in Ohio have found that the applicable standard of care as an intern or resident is the possession of such skill and use of such care and diligence as interns and residents ordinarily possess under similar circumstances, having regard to the same or similar localities and the opportunities afforded to them. See *Rush v. Akron General Hospital*, 84 Ohio Law Abs. 292, 295, 171 N.E.2d 378 (9th Dist.1957). Furthermore, the Tenth District Court of Appeals has applied the same standard, affirming a trial court’s approach in comparing the ordinary skill, care and diligence required for a resident with that of a resident in a similar circumstance, and also finding that the resident had the right to rely on an attending physician’s instructions. See *Fender v. Univ. of Cincinnati Med. Ctr.*, 10th Dist. Franklin No. 95API02-194, 1994 Ohio App. LEXIS 6219 (Aug. 24, 1994).

{¶8} Defendants move for summary judgment on the basis that Dr. Lewis, who was acting under the supervision of Dr. Black throughout the procedure, adhered to the applicable standard of care for a first-year resident as set forth in *Fender*. In support of their motion, defendants submit the deposition and trial transcripts of Dr. Black, Dr. Lewis, and plaintiffs’ expert, Dr. Aaron Zuckerberg, as well as an affidavit from their expert Dr. Peter Papadakos, a professor of anesthesiology, surgery, and neurosurgery at the University of Rochester School of Medicine and Dentistry.

{¶9} Defendants argue that Dr. Lewis met the standard of care for a first-year resident when he followed the instructions of Dr. Black’s plan, including the laryngoscopy and the subsequent intubation. Dr. Papadakos also testified in his affidavit that the anesthesia care rendered by Dr. Lewis was within the standard of care for a first-year resident and that at that stage of his training, Dr. Black was the one expected to evaluate the patient, create the anesthesia plan, and administer the anesthesia. Dr. Papadakos also supported both Dr. Lewis’ and Dr. Black’s testimony

that there were no intraoperative complications and that Jocelyne did not aspirate during the surgery, and further opined that the cause of Jocelyne's respiratory failure was likely from a pulmonary hemorrhage due to her leukemia rather than from aspiration of her stomach contents.

{¶10} Plaintiffs argue that there are genuine issues of fact regarding whether Dr. Lewis was negligent in implementing the instructions of Dr. Black. Plaintiffs support their argument with the testimony of Dr. Zuckerberg, which criticized Dr. Black's decision not to implement a rapid sequence intubation plan or use a Sellick maneuver. Dr. Zuckerberg also testified that the intubation decision caused Jocelyne to aspirate the contents of her stomach, which eventually led to her pneumonia. However, Dr. Zuckerberg only refers to Dr. Lewis once in his deposition and only in the context of naming the resident who worked alongside Dr. Black during the implementation of Jocelyne's anesthesia plan. Dr. Zuckerberg did not criticize the conduct of Dr. Lewis in any capacity for his participation in the care of Jocelyne. Furthermore, Dr. Zuckerberg stated in his testimony that the only criticism he had was directed at Dr. Black. Deposition of Dr. Zuckerberg, p. 75. Dr. Zuckerberg also did not testify that the intubations themselves were improperly conducted but rather that the "casual laryngoscopies, [were] not consistent with the standard of care that mandates that [Jocelyne] should have had a rapid-sequence induction of anesthesia," which was a treatment plan decision made by Dr. Black. *Id.*, at p. 41.

{¶11} Based on the foregoing and viewing this matter in light most favorable to plaintiffs, the court finds that there is no genuine issue as to any material fact with regard to Dr. Lewis' role in the care of Jocelyne, and that defendant is entitled to judgment as a matter of law. Although Dr. Zuckerberg criticized the anesthesia plan created by Dr. Black, plaintiffs' case only involves the issue of whether Dr. Lewis met the applicable standard of care. As a first-year resident, Dr. Lewis was required to adhere to the standard of care for a first-year resident in a similar circumstance, which

was to follow Dr. Black's treatment plan. Plaintiffs only present evidence from Dr. Zuckerberg that Dr. Black's course of treatment was not proper in Jocelyne's case but present no evidence asserting that Dr. Lewis failed to meet the standard of care applicable to him or performed the first intubation attempt negligently. Thus, because Dr. Lewis met the standard of care for a first-year resident and plaintiffs have not presented any evidence to the contrary, plaintiffs have not created a genuine issue of material fact as to Dr. Lewis' conduct. Accordingly, defendants' motion for summary judgment is GRANTED, and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date upon the journal.

PATRICK M. MCGRATH
Judge

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