

[Cite as *Aguilar v. Univ. of Toledo Med. Ctr.*, 2015-Ohio-5656.]

BERNICE O. AGUILAR, Admr., etc.

Plaintiff

v.

UNIVERSITY OF TOLEDO MEDICAL
CENTER

Defendant

Case No. 2014-00417

Judge Patrick M. McGrath

DECISION

{¶1} This cause came to be heard on a complaint brought by plaintiff, Bernice Aguilar (Bernice), individually and as administrator of the estate, for the wrongful death of her mother, Minerva Aguilar (Mrs. Aguilar). On April 27, 2015, defendant filed a motion for rulings on the objections in the transcript of the video deposition of Dennis C. Tanner, Ph.D.¹ The case proceeded to trial on the issues of liability and damages on May 5-8, 2015, and post-trial briefs were simultaneously filed on May 29, 2015.

{¶2} Mrs. Aguilar was an eighty-two year old woman who, prior to her death, experienced many medical problems. In 2008, she suffered a stroke, and in 2010, she was diagnosed with stage IV ovarian cancer, which had spread to her pelvis and abdomen. After some chemotherapy treatment and a major debulking surgery on July 11, 2011 to remove some of the cancer, Mrs. Aguilar was given a prognosis of one to two years. However, at her autopsy, it was discovered that the metastatic cancer had spread to her gall bladder, which would have reduced her prognosis.

{¶3} Following the surgery, Mrs. Aguilar was placed in defendant's surgical ICU for two days, and was progressing well in her recovery. During her time in the surgical ICU, her oral intake advanced to eating regular food and taking medication by mouth.

¹At the beginning of trial, the court granted defendant's motion and sustained the objections regarding any of Dr. Tanner's testimony on standard of care.

Nurse Joy Kauzlick, the lead nurse in the surgical ICU at the time, testified that while Mrs. Aguilar was in the ICU, she could swallow ice chips and clear liquids and she never noticed signs of dysphagia or identified problems with Mrs. Aguilar's gag reflex or swallowing. Nurse Kauzlick also testified that Mrs. Aguilar took pills without incident, and that the pills were administered either at thirty to forty-five degrees or in a recliner. Mrs. Aguilar's dietician in the surgical ICU, Michelle Lovett, also testified that she did not observe any dysphagia and that her note of "dysphagia, at times" in Mrs. Aguilar's medical records was in response to what Mrs. Aguilar's family relayed to her.

{¶4} On July 13, 2011, Mrs. Aguilar was transferred to a regular medical-surgical floor, where Nurse Mallory Heintschel-Horstman (Nurse Horstman) was assigned to her care. Upon her transfer, Nurse Horstman performed a head to toe assessment, and to relieve some of the pain she was experiencing, Mrs. Aguilar was placed in a quarter-turned position on her right side with the head of her bed at a forty-five degree angle and given Percocet pills. Her vital signs were stable at that time.

{¶5} During the administration of the pills, Mrs. Aguilar began to cough. Her medical records show that the coughing began at 20:50. In response to the coughing, Nurse Horstman raised the head of the bed and began to suction her throat and mouth, suctioning out small amounts of fluid and food particles. Nurse Horstman then summoned Lauralee Kapela (Kapela), the respiratory therapist on duty and a member of defendant's rapid response team, who recommended a breathing treatment and stayed in the room with Mrs. Aguilar and her two adult children, Armando and Bernice, while Nurse Horstman paged the resident doctor. The records show that at 21:10, Dr. Eleonora Cekova was called and orders for a breathing treatment and a continuous pulse oximeter came through. Dr. Cekova was repaged regarding concerns about Mrs. Aguilar's coughing at 21:25. Joint Exhibit A, 734-735. The records show that Mrs. Aguilar's vitals were taken once at 21:01 and a second time at 21:27. By the time the second set of vitals had been taken, Kapela had finished setting up Mrs. Aguilar's

breathing treatment and the treatment had already started, but Mrs. Aguilar became unresponsive and a code blue was called. Joint Exhibit A, 524. Mrs. Aguilar was eventually revived after twenty-seven minutes and returned to the surgical ICU, where she stayed in a coma for seven days. Mrs. Aguilar was taken off of life support on July 20, 2011. A bronchoscopy was performed on Mrs. Aguilar approximately four hours after the arrest and revealed no evidence of aspiration, but her autopsy identified aspirated material in her lungs.

{¶6} Plaintiff alleges that defendant was negligent in the care of Mrs. Aguilar in both the administration of her medicine and the response she received from defendant's medical personnel after she began coughing from the water used to take her pills. Specifically, plaintiff criticizes the position in which Mrs. Aguilar was placed when taking her medicine, the failure to take Mrs. Aguilar's vital signs more frequently, and the failure to call a rapid response team to assist in Mrs. Aguilar's care.

{¶7} In order to prove negligence, a 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. "To 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) breach of that duty, and (3) proximate causation between the breach of duty and the death." *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 92 (1988). Similarly, "[i]n 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 (1976), paragraph

1 of the syllabus. Because nurses are persons of superior knowledge and skill, nurses must employ that degree of care and skill that a nurse practitioner of ordinary care, skill and diligence should employ in like circumstances. *Berdyck v. Shinde*, 66 Ohio St.3d 573 (1993). In a negligence action involving the professional skill and judgment of a nurse, expert testimony must be presented to establish the prevailing standard of care, a breach of that standard, and that the nurses' negligence, if any, was the proximate cause of the patient's injury. *Ramage v. Central Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97 (1992).

{¶8} In support of her claim, plaintiff presented the expert testimony of Nurse Carol Alvin, who was previously a nurse on a rapid response team. However, the last time Nurse Alvin took care of a patient was in 2010 and she testified that she never worked on a medical/surgical floor. Nurse Alvin testified that her opinion was that Mrs. Aguilar should have been administered the medication while sitting at a ninety degree angle and flat on her back, rather than at a quarter-turn on her side, especially considering her age, recent surgery, and the fact that she was intubated and extubated. Although Nurse Alvin insisted that Mrs. Aguilar should not have been given medication in any other position, she was not able to provide or point to any documentation or medical literature stating that it was not proper to administer medication when a patient is on her side or for the proposition that medication needs to be administered only when the patient is sitting upright at ninety degrees. Furthermore, when questioned about the frequency of measuring vital signs, Nurse Alvin testified that if a nurse does not think a patient is deteriorating, vitals do not need to be taken more than every four hours.

{¶9} Plaintiff also presented the testimony of Dr. Bradford Grassmick, the director of critical care and respiratory therapy at St. Mary Mercy Hospital in Livonia, Michigan. Dr. Grassmick testified that a rapid response team should have been called in to provide extra hands to help protect the patient's airway while Mrs. Aguilar was coughing. Dr. Grassmick agreed that Nurse Horstman took the proper steps after

Mrs. Aguilar began coughing by raising the head of the bed, suctioning her, calling in a respiratory therapist, and calling the resident doctor for orders, but criticized the sufficiency of those actions to prevent Mrs. Aguilar's respiratory distress. He stated that if Mrs. Aguilar's respiratory distress was handled more effectively, she would not have suffered her cardiac event which eventually caused her death. Dr. Grassmick based his view on the assumption that the aspirate found in Mrs. Aguilar's lungs in the autopsy was the same water taken with the pills, and concluded that the coughing after taking the pill was a sign of aspiration which caused the respiratory arrest and, in turn, caused the cardiac arrest. With regard to the administration of the pills, Dr. Grassmick testified that the preferred position would have been the patient flat on her back at an angle where her head was above her stomach.

{¶10} Armando and Bernice also testified as to their mother's condition. Armando testified that Mrs. Aguilar was sitting up in the ICU by the second day and was taking oral medication without any problems. He also corroborated Nurse Kauzlick's testimony that Mrs. Aguilar had no history with trouble swallowing. Armando also described the administration of the Percocet as being given through the bed rails with a cup of water through a straw although Nurse Horstman testified that she would not have administered the pills through the bed rails, and that the cup would not have even fit through the bed rails. Bernice testified during the trial that Mrs. Aguilar began to have coughing fits after taking the medicine and could not speak, which contradicted both Nurse Horstman's and Kapela's testimony that Mrs. Aguilar was communicating with them during the coughing. Finally, although Bernice initially testified that her mother did not have any problems with eating or swallowing, she testified on cross-examination that Mrs. Aguilar had difficulty swallowing her whole life. However, after being presented with her deposition testimony, during which she testified that Aguilar had no difficulty swallowing, Bernice changed her testimony at trial and stated that even after her mother's stroke, she could eat and drink normally.

{¶11} In response, defendant presented the expert testimony of Nurse Jenny Beerman, a clinical assistant professor in nursing at the University of Kansas Hospital, who testified that she had never heard of the standard of care for the administration of medicine to be at ninety degrees, which was an opinion also shared by Nurse Kauzlick. She further testified that hospital beds generally only go up to seventy-five degrees and a patient cannot reach ninety degrees without a pillow supporting them. Nurse Beerman also stated that Nurse Horstman acted within the standard of care by identifying the airway issue and using the yankeur device to suction Mrs. Aguilar, that she did not need to call the rapid response team because the respiratory therapist on the team was already in the room and engaging in a treatment for Aguilar, and that at no time did Nurse Horstman abandon Mrs. Aguilar even when she was not present in the room.

{¶12} Nurse Beerman's testimony also supported Nurse Horstman's own testimony that she had no reason to update vitals between 21:01 and 21:27 unless there was a color change, which indicates lack of oxygen or if respirations fell to the low thirties. Nurse Horstman further testified that she did not feel it was necessary to call the rapid response team because a rapid response team should have only been called if she felt like she could not adequately care for a patient, which was not the case with Mrs. Aguilar's situation.

{¶13} Defendant also presented the expert testimony of Dr. Peter Papadakos, who is a board-certified physician in critical care medicine and anesthesiology as well as a professor at the University of Rochester Medical Center. Dr. Papadakos disagreed with Dr. Grassmick's assumption regarding the aspirate found in Mrs. Aguilar's lungs on the autopsy. Dr. Papadakos testified that the aspiration found in the autopsy was aspirate from the time Mrs. Aguilar was comatose after the incident and also that aspiration of the amount of water taken with medication would not have caused the cardiac arrest in Mrs. Aguilar. Dr. Papadakos further testified that there could have

been many possibilities for the cause of Mrs. Aguilar's cardiac arrest, and it could not be identified within a reasonable degree of medical probability which cause it was. Although Dr. Papadakos could not identify the cause, he testified that the aspiration of the water used to swallow a pill would not have caused a cardiac arrest within forty minutes.

{¶14} Based on the foregoing, the court finds that plaintiff did not prove by a preponderance of the evidence that defendant breached the standard of care in the administration of Mrs. Aguilar's medication or during her subsequent medical care. Furthermore, the court finds the testimony of Nurse Beerman and Dr. Papadakos to be more persuasive than Nurse Alvin and Dr. Grassmick. Although Nurse Alvin testified that the standard of care for administering pills was flat on her back and sitting up at a ninety degree angle, none of the other medical testimony corroborated her assertion and she could not provide support in medical literature. Furthermore, Nurse Alvin has not treated a patient since 2010 and has never worked on a medical-surgical floor while Nurse Beerman has vast clinical experience in medical-surgical environments. With regard to Dr. Grassmick's testimony, the court finds that his conclusions were speculative and based on the assumption that the aspirate in Mrs. Aguilar's lungs was the same as found in her autopsy. However, the bronchoscopy taken approximately four hours after Mrs. Aguilar's arrest did not show any aspirate, which undermines Dr. Grassmick's assumption. Therefore, having found no liability on the part of defendant, the court finds it unnecessary to address damages. Accordingly, judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

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Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶15} This case was tried to the court on the issue of liability and 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 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.

PATRICK M. MCGRATH
Judge

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