[Cite as *Estrada v. Univ. of Toledo Med. Ctr.*, 2017-Ohio-5780.]

ROSA ESTRADA, Admx. Plaintiff v. UNIVERSITY OF TOLEDO MEDICAL CENTER Defendant	Case No. 2012-07218 Judge Patrick M. McGrath DECISION

{¶1} On January 26, 2017, the magistrate issued a decision recommending judgment in defendant's favor. On February 9, 2017, plaintiff filed an objection to the magistrate's decision and requested leave to supplement the objections once the trial transcript was available pursuant to Civ.R. 53(D)(3)(b)(iii). On February 17, 2017, defendant filed a memorandum contra to plaintiff's objections. On March 9, 2017, plaintiff filed a motion for extension of time to file the transcript and to supplement the objections. The court granted the motion and ordered plaintiff to file objections by April 14, 2017. On March 13, 2017, plaintiff filed a transcript of the proceedings. On April 14, 2017, plaintiff filed a second motion for an extension of time to supplement objections. The court granted the motion and ordered plaintiff to file objections by April 24, 2017. Plaintiff untimely filed her supplemental objections on April 25, 2017.

{¶2} Civ.R. 53(D)(3)(b)(i) states: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." Civ.R. 53(D)(3)(b)(iii) states: "An objection to a factual finding * * * shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. * * * The objecting party shall file the transcript or affidavit with the court within thirty days

after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections." Pursuant to Civ.R. 53(D)(3)(b)(iii), plaintiff timely filed transcripts, but filed her supplemental objections a day late. Because plaintiff's original and supplemental objections are substantially the same, in the interests of justice, the court has considered this late filing in formulating its decision.

{¶3} According to the record and the magistrate's opinion, this is a wrongful death case brought by Rosa Estrada, the administrator of the estate of Rosemarie Becerra. Mrs. Becerra underwent a total hysterectomy with a bilateral salpingo-oophorectomy on September 20, 2010. Essentially, plaintiff's uterus, cervix, and both ovaries and fallopian tubes were removed. Plaintiff alleged that the post-operative care and treatment rendered by defendant's agents, including Dr. John P. Geisler, fell below the standard of applicable care and resulted in Mrs. Becerra's death on September 27, 2010.

{¶4} The chronological timeline of events leading up to Mrs. Becerra's death is as follows: Dr. Geisler, while performing the surgery on September 20, 2017, observed that Mrs. Becerra's liver was sclerotic and took a biopsy. As a result of this biopsy, Mrs. Becerra was eventually diagnosed with hepatitis. During the procedure, Dr. Geisler also removed a mesh from Mrs. Becerra's abdomen, which had been placed in a prior procedure.

{¶5} Mrs. Becerra's post-operative (post-op) course was relatively normal during the first two days after the surgery, September 21 and 22, 2010. On the third post-op day, September 23, 2010, defendant's agents identified a firm mass in Mrs. Becerra's lower right quadrant of the abdomen. A CT scan and the accompanying radiologist's report indicated that Mrs. Becerra had an ileus and large ventral hernia. However, there was no indication of a bowel obstruction. On post-op day four, September 24, 2010,

Mrs. Becerra still had the mass in her abdomen and an elevated ammonia level. She also developed confusion. During this entire post-op period, Mrs. Becerra had no flatus or bowel movements and was given lactulose to lower her ammonia level.

{¶6} On September 25, 2010, Mrs. Becerra projectile vomited. She was taken for x-rays, where she vomited again. Mrs. Becerra aspirated on the vomit, which led to cardiac arrest lasting around 15 to 20 minutes. Due to the lack of blood flow to various organs, the cardiac arrest caused catastrophic damage, including to the bowel, and multiple organ failure ensued. Dr. Geisler then took Mrs. Becerra to surgery, discovered two separate areas of necrotic bowel and surgically removed them. Life support was ultimately withdrawn on September 27, 2010 and Mrs. Becerra passed away.

{¶7} During trial, plaintiff's expert witness, Dr. Edmund S. Petrilli, opined that Dr. Geisler deviated from the standard of care in failing to immediately recognize and repair a post-op wound dehiscence. Dr. Petrilli opined that the large mass in Mrs. Becerra's right lower quadrant was a post-op wound dehiscence caused by the separation of the abdominal closure that closed the previous hernia, which Dr. Geisler had repaired when he removed the mesh. This failure to diagnose and repair Mrs. Becerra's condition resulted in bowel obstruction, necrosis, and sepsis, which ultimately lead to her premature death. Dr. Petrilli also opined that it was a departure from generally accepted standards of care to fail to place a nasogastric (NG) tube after Mrs. Becerra vomited in her room, and before sending her to radiology for x-rays. According to Dr. Petrilli, an NG tube would have prevented the second incidence of vomiting in the x-ray room, which resulted in Mrs. Becerra's cardiac arrest, multiple organ failure, and brain death.

{¶8} The magistrate found that defendant's expert, Dr. Jeffrey Fowler, generally presented more credible testimony which was well-supported by the available medical evidence. Moreover, according to the record, the decision whether to allow Dr. Petrilli to testify as an expert in this case was a fairly close one. (Magistrate's opinion, p. 32).

Overall the magistrate found Dr. Fowler more persuasive than Dr. Petrilli about the central inquiry in the case: whether the care and treatment rendered by defendant's medical professionals leading up to Mrs. Becerra's cardiac arrest complied with the standard of care.

{¶9} Regarding causation, the magistrate found that the evidence did not substantiate Dr. Petrilli's theory. Specifically, the CT scan taken on the afternoon of September 23, 2010 indicated that Mrs. Becerra had an ileus and large ventral hernia and the radiologist's report specifically confirmed she did not have a definite obstruction. As such, the magistrate found Dr. Petrilli's central opinion, that there was a surgical emergency based on the CT scan, substantially outweighed by Dr. Fowler's explanation why surgical intervention was not indicated. According to the magistrate, Dr. Geisler's decision not to operate at that point complied with the standard of care.

{¶10} Next, the magistrate found that while Dr. Petrilli attributed Mrs. Becerra's post-operative confusion to sepsis resulting from bowel necrosis, he never established that Mrs. Becerra ever had sepsis. While Dr. Petrilli downplayed the significance of her liver disease, emphasizing that her liver enzymes were normal post-op, he admitted that a patient with liver disease can have normal enzymes. Based on the evidence, the magistrate found that Mrs. Becerra's confusion was consistent with hepatic encephalopathy, and it was within the standard of care to suspect that the confusion was caused by poor liver function. Mrs. Becerra's bleeding during the surgery, her albumin and bilirubin levels, her elevated ammonia level, the sclerotic appearance of her liver as observed by Dr. Geisler, and the diagnosis of cirrhosis during the autopsy all supported defendant's expert, Dr. Fowler's opinion that the liver was compromised and, considering the relationship between the liver and the body's other organ systems, that it played a role in the sequence of events leading to her demise.

{¶11} Lastly, about whether the standard of care necessitated the placement of an NG tube, the magistrate found Dr. Fowler's testimony persuasive that it was not

necessary to do so. In sum, the magistrate found that the diagnosis, care and treatment rendered by defendant's medical professionals complied with the standard of care.

{¶12} Plaintiff now presents two objections, each of which are discussed below.

I. Failure to place NG tube

{¶13} In her first objection, plaintiff reiterates that defendant's agents deviated from the standard of care when they failed to place an NG tube upon Mrs. Becerra after her first episode of projectile vomiting in her room on September 25, 2010. Plaintiff states that considering the totality of circumstances, including that Mrs. Becerra was five days post-op without any significant bowel function; she was confused; and that she had one episode of projective vomiting; placing the NG tube was imperative and would have prevented Mrs. Becerra from aspirating on her own vomit. (Transcript 119: 19). Plaintiff also emphasizes that she, Mrs. Becerra's daughter, is a registered nurse and asked nurses to place an NG tube on her mother after the first episode of vomiting.

{¶14} Plaintiff's claim for wrongful death is based upon a theory of medical malpractice. "In order to establish medical malpractice, a plaintiff must show: (1) the standard of care recognized by the medical community, (2) the failure of the defendant to meet the requisite standard of care, and (3) a direct causal connection between the medically negligent act and the injury sustained." *Tobin v. Univ. Hosp. E.*, 10th Dist. Franklin No. 15AP-153, 2015-Ohio-3903, ¶ 14, citing *Stanley v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 12AP-999, 2013-Ohio-5140, ¶ 19. "Expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard." *Reeves v. Healy*, 192 Ohio App.3d 769, 2011-Ohio-1487, ¶ 38 (10th Dist.), citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130-131 (1976).

{¶15} Based on the record, the magistrate agreed with defendant's position that the standard of care did not require the placement of an NG tube. Defendant's expert, Dr. Fowler testified that he might have placed such a tube, but the standard of care did not require it. Notably, Dr. Fowler stated that it was only Mrs. Becerra's first episode of

vomiting and the prudent course of action was to determine the cause of the vomiting via x-ray before placing the NG tube. (Transcript 589: 20-24; 590: 1-4). Moreover, Dr. Fowler indicated that even if the tube was placed, it was possible for Mrs. Becerra to have choked because an NG tube is usually clamped off and not draining contents out of the stomach when a patient's x-rays are taken. (Transcript 590: 4-8). Lastly, with regard to plaintiff's contentions that she is a registered nurse and asked nurses to place a NG tube on her mother after the first episode of vomiting, the record is clear that Ms. Estrada was never established as an expert witness. Moreover, the magistrate noted that even if defendant's employees were slow to place an NG tube, "there was no expert testimony to establish a causal relationship between their acts or omissions and Mrs. Becerra's death." (Magistrate's opinion, p. 30). Upon review, the court agrees with the magistrate's finding that defendant did not deviate from the standard of care when it did not place an NG tube after Mrs. Becerra's first episode of projectile vomiting. Consequently, plaintiff's first objection is OVERRULED.

II. Magistrate's findings concerning Dr. Fowler's testimony is against manifest weight of the evidence.

{¶16} Plaintiff, in her second objection, states Mrs. Becerra's eventual demise was caused by an undiagnosed wound dehiscence, which required immediate surgical intervention. Plaintiff further states liver failure, which is the reason defendant attributes to Mrs. Becerra's eventual demise, "is a red herring utilized by defendant." (Plaintiff's supplemental objections, p. 7). Plaintiff states that liver failure is not supported by medical evidence and offers a multitude of reasons explaining why defendant's reliance on liver failure is misplaced. First, plaintiff states that while Mrs. Becerra had high levels of ammonia levels, which can be indicative of liver failure, it can also be caused by constipation, renal failure, renal insufficiency, and sepsis. Next, Mrs. Becerra's confusion, another indicator of liver failure, can also be caused by sepsis. Additionally, the biopsy taken during Mrs. Becerra's surgery indicated she had mild chronic active

hepatitis, which plaintiff states is "simply inflammation of the liver." Moreover, plaintiff points to the autopsy report, which only states that Mrs. Becerra had "cirrhosis" and does not note the particular stage of cirrhosis. Liver failure is also not mentioned in the discharge summary. Lastly, plaintiff states that in the days after her operation, Mrs. Becerra's liver function was in fact improving and not deteriorating. (Plaintiff's supplemental objections, p. 6).

{¶17} Plaintiff proposes an alternate sequence of events which allegedly establish defendant's deviation from the generally accepted standard of care. According to plaintiff, Dr. Geisler's surgical repair of the previous hernia on September 20, 2010 failed on September 23, 2010. In the days after the operation, the wound repair dehisced leading the bowel to press up against the abdomen, leading to necrosis of the intestine, a bowel obstruction, and septic shock. During this time, Mrs. Becerra had no flatus and bowel movements and was given stimulants. While these high doses of stimulants produced no bowl movement, it exacerbated Mrs. Becerra's already obstructed bowel, which caused the projectile vomiting. Unfortunately, Mrs. Becerra aspirated on her stomach contents and this eventually led to her cardiac arrest. In sum, plaintiff contends that a reasonably prudent medical practitioner should have diagnosed Mrs. Becerra with a bowel obstruction requiring immediate intervention on post-op day three. (Plaintiff's supplemental objections, p. 8-10; Transcript 138: 23-24; 139: 1-8; 140: 1-12).

{¶18} "In a medical malpractice case, a plaintiff bears the burden of presenting sufficient evidence to allow the fact finder to conclude that the defendant breached the standard of care." *Lips v. Univ. of Cincinnati Coll. of Med.*, 10th Dist. Franklin No. 12AP-374, 2013-Ohio-1205, ¶ 51. "'Whether the defendant has employed the requisite care must be determined from the testimony of experts' and that a medical malpractice trial may produce a 'battle of the experts.' In such a case, it is 'within the province of the trier of fact to weigh the medical testimony and to resolve the conflicting opinions.'

Where competent, credible evidence exists which, if believed, would support a trial court's finding that a physician has not breached the accepted standard of care in treating a patient, this court will not disturb that finding as being against the manifest weight of the evidence." *Id.*, quoting *Gordon v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1058, 2011-Ohio-5057, ¶ 77.

{¶19} The court agrees with defendant's contention that the magistrate is the finder of fact and is entitled deference in his findings of credibility. The record is replete with facts that indicate Dr. Fowler's testimony to be better explained, better supported with the medical evidence, and more persuasive than Dr. Petrilli's testimony. At least at the time of his deposition, Dr. Petrilli grossly misunderstood the meaning of a standard of care within the medical community. (Transcript 155: 10-24; 157). According to his deposition, Dr. Petrilli spends far less time in the active clinical practice of medicine than defendant's expert, Dr. Fowler. Dr. Petrilli performs only two or three surgeries a month and sees patients once a week. (Transcript 34: 7-24). In contrast, Dr. Fowler is in the operating room two to four days a week, completing five to ten surgeries a week. The rest of the week he holds at least one, if not two full days of clinic. (Transcript 534: 1-14). Dr. Fowler is also the President of the Society of Gynecologic Oncologists (SGO), the primary academic and clinical society for gynecologic oncologists dedicated to improving cancer care for women with gynecological malignancies. (Transcript 535: 9-24). Importantly, the magistrate noted the following in his opinion:

> a. Indeed, the decision whether to allow Dr. Petrilli to testify as an expert in this case was a fairly close one. Dr. Petrilli's testimony wandered off topic repeatedly and he went out of his way to render an array of criticisms, many of which had no bearing on the outcome. Dr. Petrilli's opinions were lacking in clarity and somewhat difficult overall to understand, and while plaintiff's counsel laid out a more comprehensive and methodical approach in his closing argument, Dr. Petrilli did not substantiate or even touch upon some of those arguments. The burden of proof in this case requires expert testimony to demonstrate that a breach in the

> standard of care proximately caused Mrs. Becerra's death, but Dr. Petrilli's testimony on those matters was clearly outweighed by Dr. Fowler's.

(Magistrate's opinion, p. 32).

{¶20} Upon review, Dr. Fowler's testimony directly controverted Dr. Petrilli's testimony that Mrs. Becerra required immediate surgical intervention on post-op day three. Per Dr. Fowler, after a patient has had abdominal surgery, such as a hysterectomy, and the fascial incision dehisces, but the skin is intact, the bowel is contained within the abdomen, and the patient had no other findings, then there is no need for immediate surgery. Instead, the standard of care dictated patient observation, which is the procedure defendant's agents followed in this situation. (Transcript 540: 2-12). Next, it was not unusual for a hysterectomy patient to not have flatus or a bowel movement on post-op day 3. (Transcript 555: 18-24; 556: 1-2). Moreover, Dr. Fowler noted that Mrs. Becerra did not have various symptoms that would indicate a bowel obstruction, including severe pain, increased pulse rate, low blood pressure, high respiratory rate, low white blood cell count, high serum lactate. (Transcript 559: 17-24). Instead, her post-operative course was better explained by her undiagnosed liver cirrhosis, which can cause significant complications and elevate the risk of death for a patient who undergoes abdominal surgery. (Transcript 562: 9-24; 563: 1-24; 564: 21-24; 565: 1-14). Lastly, the court also notes that plaintiff did not conclusively establish that Mrs. Becerra ever suffered from sepsis as a result of the alleged wound dehiscense.

{¶21} As such, the court agrees with the magistrate's finding that the diagnosis, care and treatment rendered by defendant's medical professionals complied with the standard of care. Therefore, plaintiff's second objection is OVERRULED.

III. Request to take additional evidence

{¶22} Plaintiff also requests that the court take expert testimonial evidence regarding the pathology report for the segments of bowel removed by Dr. Geisler on September 26, 2010. Plaintiff's complaint was originally filed in 2012. To date, plaintiff has had close to five years to develop her theories of the case and identify experts necessary to her claim. In her objections and supplemental objections, plaintiff fails to identify any exceptional circumstances necessitating the need to take additional evidence at this juncture pursuant to Civ.R. 53(D)(4)(b). Consequently, plaintiff's request is DENIED.

{¶23} In summary, plaintiff did not demonstrate that placing an NG tube after Mrs. Becerra's first instance of projectile vomiting was required under the standard of care. Consequently, plaintiff's first objection is OVERRULED. Next, upon review, the court agrees with the magistrate's decision that defendant's theory regarding the high risk of death caused by Mrs. Becerra's undiagnosed liver cirrhosis was better supported by the presented evidence. As such, plaintiff's second objection is also OVERRULED. Judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

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ROSA ESTRADA, Admx. Plaintiff v. UNIVERSITY OF TOLEDO MEDICAL CENTER Defendant	Case No. 2012-07218 Judge Patrick M. McGrath JUDGMENT ENTRY

{¶24} For the reasons set forth in the decision filed concurrently herewith, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, the objections are OVERRULED and the court adopts the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. 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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