[Cite as *Crawford v. Bellevue Hosp.*, 2023-Ohio-2709.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Silas Crawford, Administrator of the Estate of Shanoah Ray Wilson et al.

Appellant/Cross-Appellee

v.

The Bellevue Hospital, et al.

Appellees/Cross-Appellants

Court of Appeals No. E-22-039

Trial Court No. 20200CV00361

DECISION AND JUDGMENT

Decided: August 4, 2023

* * * * *

Lurlia A. Oglesby, for appellant/cross-appellees

Martin E. Goff, John Wasung, and Beth A. Wittmann, for appellees/cross-appellants

* * * * *

SULEK, J.

{¶ 1} This appeal and cross-appeal are before the court following the Erie County Court of Common Pleas' September 8, 2022 judgment entry granting summary judgment to appellees/cross-appellants, The Bellevue Hospital and Max L. Pavlock, D.O. ("Bellevue"), in a medical negligence/wrongful death action commenced by

appellant/cross-appellee, Silas Crawford, as administrator of the estate of Shanoah Wilson ("Crawford"). Although the action was timely commenced, Crawford failed to set forth an issue of fact for trial; thus, the judgment of the trial court is affirmed.

I. Facts and Procedural History

A. The Preceding Events and Original Lawsuit

{¶ 2} On May 12, 2017, Wilson, who had previously been diagnosed with COPD, diabetes, hypertension, depression, and chronic pain, was admitted to the hospital complaining of having difficulty breathing. Dr. Pavlock, Wilson's primary care physician, diagnosed her with bronchitis. The prescribed treatment included a combination of medications including Prednisone, Oxycodone, Albuterol, Ambien, Losartan, Xanax, and Lyrica. Wilson's patient records do not indicate any respiratory distress while she was hospitalized and taking the medications.

{¶ 3} On May 17, 2017, Wilson was discharged from the hospital with instructions to continue taking the same prescribed medications, some at lower doses. Wilson died approximately 16 hours after being released.

{¶ 4} On May 17, 2019, Crawford, alleging that he had been appointed administrator of Wilson's estate, commenced a wrongful death action under R.C. 2125.01 and on behalf of Wilson's beneficiaries. Though probate court proceedings had commenced, it is undisputed that Crawford had not been appointed administrator of the estate at this time or prior to the expiration of the statute of limitations.

{¶ 5} The complaint alleged that Bellevue's and Dr. Pavlock's evaluation and treatment of Wilson was below the acceptable standard of care in that they knew or should have known that discharging Wilson when her condition was unstable "could lead to respiratory failure and death" and that the combination of prescribed drugs "would likely result in serious adverse events, including respiratory failure and death." The complaint stated that as a proximate result of the defendants' negligence, the plaintiffs suffered mental anguish and loss of comfort and support and were entitled to damages.

{¶ 6} Crawford also failed to attach an affidavit of merit to the complaint as required under Civ.R. 10(D)(2); he then filed a motion for an extension of time to file the affidavit. The trial court granted a 90-day extension.

{¶ 7} On June 3, 2019, Bellevue filed a motion to dismiss arguing that Crawford did not have standing to commence the action because he had not been appointed administrator. Eight days later, however, Crawford filed an amended complaint reflecting that he had been appointed administrator on June 7, 2019. The remaining allegations in the amended complaint were otherwise identical to the allegations set forth in the original complaint. Crawford contemporaneously filed an amended motion requesting an extension of time to file his affidavit of merit.

{¶ 8} The trial court subsequently denied Bellevue's motion to dismiss. It also granted Crawford's amended motion for an extension of time to file an affidavit of merit. The court ultimately dismissed the amended complaint without prejudice on October 11, 2019, after Crawford failed to file the affidavit.

B. The Present Action

{¶ 9} On October 9, 2020, Crawford, as administrator of the estate, refiled the action along with a request for an extension of time to file his affidavit of merit.

{¶ 10} On November 2, 2020, Bellevue opposed Crawford's request for an extension of time and filed a motion to dismiss the complaint. Bellevue's motion to dismiss argued that the relevant statutes of limitations had passed prior to Crawford's June 7, 2019 appointment as administrator of the estate; thus, he had no standing to act on the estate's behalf. Crawford opposed the motion.

{¶ 11} On December 11, 2020, the trial court denied the motion finding that based on the language in R.C. 2125.02(C), the action was not time-barred as the administrator need only be appointed prior to the conclusion of the wrongful death action, not at its inception. The affidavits of merit were filed on February 5, 2021. On July 28, 2022 Crawford filed the deposition of his expert, Dr. Luis Perez.

{¶ 12} On August 1, 2022, Bellevue filed its motion for summary judgment. Bellevue argued that as to the hospital, Crawford's expert, Dr. Perez, offered no opinion as to whether Wilson was unstable at discharge and whether the hospital or any personnel were negligent. As to Dr. Pavlock, Bellevue argued that although Dr. Perez opined that Pavlock breached the standard of care by failing to obtain a pulmonology consult, it failed to assert how the consult could have aided him in treating Wilson. Bellevue disputed the claim that several of the prescribed medications were known to cause respiratory depression and that the combination of such medications was negligent; it

noted Perez's deposition testimony indicating that the combination of such medications, if taken as prescribed, was "reasonably safe." Bellevue's expert, Dr. Richard Veglienti, stated that Wilson had been taking the same medications during her hospitalization, without any indication of respiratory distress, and was prescribed decreased dosages upon discharge. Dr. Veglienti stated that it was "highly unlikely that the opiates prescribed" caused her death and that Wilson "more likely than not" died of causes unrelated to the combination of prescribed medications.

{¶ 13} In opposition, Crawford argued that an explanation as to how a pulmonologist would have aided in Wilson's treatment was immaterial because Dr. Pavlock breached the standard of care by failing to order the consult. Crawford argued that Bellevue misstated Dr. Perez's deposition testimony regarding the drug combination and that Perez only agreed that Wilson had not shown any respiratory distress prior to her hospitalization. Perez stated that Wilson's respiratory issues worsened during her hospitalization and that "he could not say whether the cause of the worsening was the combination of medications or a cold." Crawford cited Perez' explanation: "I would have to say that the medications causing [respiratory] depression is more likely than not a possibility."

{¶ 14} Crawford further argued that issues of fact remained regarding a connection between Wilson's "chronic" opioid use and her death. Perez opined that although Dr. Pavlock was "tapering" the opioid dosage, he should have been "weaning" her off of it based on evidence of noncompliance in her use of her narcotic pain

medication. Finally, Crawford rejected the assertion that an autopsy was necessary to establish the wrongful death claim. Crawford supported the motion with the February 26, 2022 unsworn report and August 26, 2022 affidavit of Dr. Perez. Bellevue filed a motion to strike Dr. Perez's affidavit and related exhibits as being inconsistent with his prior deposition testimony.

{¶ 15} On September 8, 2022, the trial court granted Bellevue's motion for summary judgment. The court determined that Crawford failed to offer expert testimony supporting the claim that Wilson was prematurely discharged. Noting a lack of evidence in the medical records supporting Dr. Perez's deposition testimony, the court rejected the assertion that the dangerous drug combination resulted in respiratory depression and, ultimately, caused Wilson's death. Finally, the court referenced Perez's deposition testimony and subsequent submission of his affidavit. The court noted that to the extent the affidavit conflicted with the earlier deposition, it would not act to create a genuine issue of fact to defeat summary judgment. The court denied Bellevue's motion to strike as moot. This appeal and cross-appeal followed.

II. Assignments of Error

{¶ 16} Crawford raises the following assignment of error:

> The trial court erred in granting summary judgment to the Defendants when it determined that Plaintiff failed to produce sufficient Rule 56 evidence or testimony to support proximate cause.

{¶ 17} Bellevue's cross-appeal raises the following assignment of error:

The trial court erred in denying defendants' motion to dismiss plaintiff's complaint as barred by the statute of limitations.

III. Law and Analysis

A. Bellevue's Cross-Appeal

{¶ 18} Bellevue asserts that the trial court erred by failing to grant its motion to dismiss this action as barred by the statute of limitations. It contends that Crawford lacked standing to file the original complaint because he had not been appointed administrator of the estate until after the filing of the complaint and the expiration of the statute of limitations. Thus, Bellevue maintains that the original complaint was a legal nullity and that the savings statute was unavailable to extend the time for refiling.

{¶ 19} Crawford, however, maintains that his post-complaint appointment as administrator did not impact the viability of the action or the availability of the savings statute in his subsequent action.

{¶ 20} A motion to dismiss based on a statute of limitations claim is properly categorized as a Civ.R. 12(B)(6) motion for failure to state a claim for which relief can be granted. In order to "'conclusively show that the statute of limitations bars the action, the complaint must demonstrate both the relevant statute of limitations and the absence of factors which would toll the statute, or make [] it inapplicable.'" *Warren v. Estate of Durham*, 9th Dist. Summit No. 25624, 2011-Ohio-6416, ¶ 6, quoting *Tarry v. Fechko Excavating, Inc.*, 9th Dist. Lorain No. 98CA007180, *2 (Nov. 3, 1999). An appellate court's review of an adjudication of a motion to dismiss pursuant to Civ.R. 12(B)(6) is de

novo. *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 12, citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. *See Doe v. Robinson*, 6th Dist. Lucas No. L-07-1051, 2007-Ohio-5746, ¶ 17.

1. Crawford had Standing to File the Original Complaint

{¶ 21} "Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim." *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 9. "If an individual or one in a representative capacity does not have a real interest in the subject matter of the action, that party lacks the standing to invoke the jurisdiction of the court." *Countrywide Home Loans, Inc. v. Montgomery*, 6th Dist. Lucas No. L-09-1169, 2010-Ohio-693, ¶ 11; *see also Mousa v. Mt. Carmel Health Sys., Inc.*, 10th Dist. Franklin No. 12AP-737, 2013-Ohio-2661, ¶ 12. Whether standing exists is a question of law that an appellate court reviews de novo. *Women of the Old West End, Inc. v. Toledo City Council*, 2021-Ohio-3267, 178 N.E.3d 133, ¶ 13 (6th Dist.), citing *Image Group of Toledo, Inc. v. Holland-Springfield Twp. Joint Economic Dev. Zone*, 2017-Ohio-4470, 93 N.E.3d 343, ¶ 9 (6th Dist.).

{¶ 22} With respect to who may properly file a wrongful death action, R.C. 2125.02 relevantly provides:

> (A)(1) Except as provided in this division, a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and

the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.

{¶ 23} "[T]he term 'personal representative' means either the executor or administrator of the decedent's estate." *Slater v. Ohio Dept. of Rehab. and Corr.*, 2018-Ohio-1475, 111 N.E.3d 492, ¶ 16 (10th Dist.), citing *Ramsey v. Neiman*, 69 Ohio St.3d 508, 512, 634 N.E.2d 211 (1994). "The personal representative brings a wrongful death action for the injuries suffered by the beneficiaries of the decedent as a result of the death." *Mousa*, at ¶ 11. "'[T]he statute is satisfied if the action is merely brought in the representative's name.'" *Toledo Bar Assn. v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-170, 921 N.E.2d 1056, ¶ 29, quoting *In re Estate of Ross*, 65 Ohio App.3d 395, 400, 583 N.E.2d 1379 (11th Dist.1989).

{¶ 24} The concurring opinion in *Ramsey*, which three other justices joined, interpreted R.C. 2125.02(A) and (C) to require only that the personal representative be appointed prior to judgment or settlement, and not prior to the filing of a complaint. *Ramsey* at 514. The opinion reasoned that "[s]ummary judgment would provide the appropriate mechanism to screen out those plaintiffs who have not received court appointment after filing their complaints." *Id.*

{¶ 25} Ohio appellate courts have also examined the timeliness of wrongful death actions in instances where the plaintiff had not yet been appointed as administrator of an estate when the action commenced and the statute of limitations expires.

{¶ 26} In *Eichenberger v. Woodlands Assisted Living Residence, L.L.C.*, 2014-Ohio-5354, 25 N.E.3d 355, ¶ 2 (10th Dist.), the plaintiff filed a wrongful death complaint alleging that he was the personal representative of the decedent's estate. In June 2011, the plaintiff amended the complaint to reflect that he had officially been appointed administrator of the estate. *Id.* The trial court dismissed the case, presumably on the basis that the plaintiff did not have standing on the date he commenced the action. *Id.* On appeal, the court determined that the standing argument was more properly characterized as whether the plaintiff, as personal representative of the decedent and acting on behalf of the beneficiaries, had the capacity to sue. *Id.* at ¶ 3. The court concluded that, unlike standing, capacity to sue is not jurisdictional and not subject to dismissal under Civ.R. 12(B)(1). *Id.*

{¶ 27} On remand, the trial court granted summary judgment to the defendant facility finding that the statute of limitations had run and the amended complaint did not relate back to the filing of the original complaint. *Id.* at ¶ 5. The court of appeals reversed concluding that the action related back to the original filing for limitations purposes.

{¶ 28} In so holding, the court emphasized that the Ohio Civil Rules embodies the idea that cases should be determined on their merits. *Id.* at ¶ 32, quoting *Peterson v. Teodosio*, 34 Ohio St.2d 161, 175 297 N.E.2d 113 (1973). And that the "purpose of a statute of limitations 'is to promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have

faded and witnesses have disappeared.'" *Id.* at ¶ 33, quoting *Kinney v. Ohio Dept. of Adm. Servs.*, 30 Ohio App.3d 123, 126, 507 N.E.2d 402 (10th Dist.1986).

{¶ 29} In its analysis, the court also distinguished *Gottke v. Diebold, Inc.*, 5th Dist. Licking No. CA-3484, 1990 WL 120801 (Aug. 9, 1990), which Bellevue relies on in the instant case. In *Gottke*, the trial court dismissed the complaint filed by the decedent's daughter as the personal representative of her mother's estate. At the time, however, the decedent's husband had been appointed as the executor of the estate. *Id.* at *1. The appellate court affirmed the decision and noting that "the doctrine of relation back does not apply where the plaintiff misrepresents his/her capacity" and, after she was made aware of the defect prior to the expiration of the statute of limitations, she failed to remedy the deficiency. *Id.* at *3-4. *See Eichenberger* at ¶34-35.

{¶ 30} Finally, the *Eichenberger* court noted that the outcome was not altered by the fact that the plaintiff knew he had not been appointed the legal representative of decedent's estate when he commenced the action. The court concluded:

> we do not believe that a pleader's good or bad faith necessarily impacts the analysis under Civ.R. 15(A). The only relevant limitation on the relation-back principle espoused by Civ.R. 15(C) is that "the claim * * * asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." In this instance, the claim asserted in the amended complaint is identical to that set forth in the original complaint. Similarly, Civ.R. 17(A) states that "[n]o

> action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for * * * substitution."

Id. at ¶ 36, quoting Civ.R. 15(C); Civ.R. 17(A).

{¶ 31} Similar to *Eichenberger*, in *Taneff v. HCR ManorCare, Inc.*, 2015-Ohio-3453, 41 N.E.3d 209, (9th Dist.), a wrongful death action, the court of appeals concluded that the relation back doctrine applied to prevent the running of the statute of limitations. The court stressed that the requirement that the action be brought in the name of the personal representative should be liberally construed as it is not an "essential term" to the action. *Id.* at ¶ 21-22, quoting *Douglas v. Daniels Bros. Coal Co.*, 135 Ohio St. 641, 647-648, 22 N.E.2d 195 (1939). The court explained that Ohio law permits liberal amendments to complaints in order that a case be decided on its merits and that substitution, rather than dismissal as the proper remedy. *Id.* at ¶ 23-24, citing *Stone v. Phillips*, 9th Dist. Summit No. 15908, 1993 WL 303281 (Aug. 11, 1993); *De Garza v. Chetister*, 62 Ohio App.2d 149, 155, 405 N.E.2d 331 (6th Dist.1978).

{¶ 32} Here, Crawford's representative capacity, relating to the right or ability to maintain the case, was required to be established prior to a determination in the matter. *Neiman*; *Eichenberger*. The amendment of the complaint reflecting his status as administrator had no bearing on the causes of action or the real parties in interest. *Taneff* at ¶ 24-25; Civ.R.15(C). Further, there is no evidence that like *Gottke*, 5th Dist. Licking No. CA-3484, 1990 WL 120801, another individual had been appointed as representative

and Bellevue was timely notified of the action and Crawford's claims. Thus, Bellevue was not prejudiced by the substitution of Crawford as the representative once he was appointed.

2. Savings Statute

{¶ 33} Next, it is necessary to analyze whether R.C. 2305.19(A), Ohio's saving statute, authorized the refiling of this action following the trial court's dismissal of the amended complaint in the original lawsuit based on Crawford's failure to file an affidavit of merit as required by Civ.R. 10(D)(2)

{¶ 34} R.C. 2305.19(A), Ohio's saving statute, permits a timely-filed claim that has failed "otherwise than upon the merits" to be filed in a new action if that new action is filed within one year after such failure or within the period of the original applicable statute of limitations, whichever is later. The saving statute only applies when the original suit and the new action are substantially the same. *Andrews v. Scott Pontiac Cadillac GMC, Inc.*, 6th Dist. Sandusky No. S-88-37, 1989 WL 57618, *1 (June 2, 1989), citing *Children's Hosp. v. Dept. of Pub. Welfare*, 69 Ohio St.2d 523, 525, 433 N.E.2d 187 (1982).

{¶ 35} Relevant here, a dismissal based on the failure to comply with Civ.R. 10(D)(2) is not on the merits and, therefore, must be without prejudice. *Beegle v. S. Pointe Hosp.*, 8th Dist. Cuyahoga No. 96017, 2011-Ohio-3591, ¶ 25, citing *Fletcher v. Univ. Hospitals of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 20. Accordingly, the trial court's dismissal of the first action allowed Crawford to refile

the action within one year. Based on the foregoing, the trial court did not err in denying Bellevue's motion to dismiss. Bellevue's assignment of error in its cross-appeal is not well-taken.

B. Summary Judgment

{¶ 36} Crawford's sole assignment of error is that the trial court erred in granting summary judgment in favor of Bellevue.

{¶ 37} An appellate court reviews the grant or denial of a motion for summary judgment de novo, applying the same standard as the trial court. *Bliss v. Johns Manville*, —— Ohio St.3d ——, 2022-Ohio-4366, —— N.E.3d ——, ¶ 12. Under Civ.R. 56(C), a trial court shall grant summary judgment only where (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party.

{¶ 38} Crawford brought a claim for medical negligence which, under Ohio law, required him to present testimony from a qualified expert establishing the standard of care and concluding that it was not met. *Sylvester v. Siverhus*, 6th Dist. Lucas No. L-02-1084, 2002-Ohio-6688, ¶ 7, citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130, 346 N.E.2d 673 (1976). The "'failure to provide the recognized standards of the medical community is fatal to the presentation of a prima facie case of medical malpractice.'" *Dazley v.*

Mercy St. Vincent Med. Ctr., 6th Dist. Lucas No. L-17-1304, 2018-Ohio-2433, ¶ 32, quoting *Bruni* at 130.

{¶ 39} Once a duty and breach of that duty is established, "'the plaintiff must prove causation through medical expert testimony in terms of probability to establish that the injury was, *more likely than not*, caused by the defendant's negligence.'" (Emphasis added.) *Chalmers v. HCR ManorCare, Inc*., 2017-Ohio-5678, 93 N.E.3d 1237, ¶ 37 (6th Dist.), quoting *Roberts v. Ohio Permanente Med. Group*, 76 Ohio St.3d 483, 485, 668 N.E.2d 480 (1996).

1. Dr. Perez's Affidavit

{¶ 40} Crawford argues that he met the Civ.R. 56(C) standard through Dr. Perez's deposition and affidavit expert testimony. Crawford asserts that the trial court erred by rejecting Dr. Perez's affidavit based on its conclusion that it contradicted his deposition testimony.

{¶ 41} Ohio law provides that when the affidavit of a nonparty, retained expert submitted under Civ.R. 56(C) conflicts without explanation with a prior deposition on material facts, the affidavit may not act to create a genuine issue preventing summary judgment. *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913, ¶ 41. "But where more recent testimony merely explains, supplements, or clarifies the earlier testimony rather than contradicts it, it may be considered to create a genuine issue of material fact sufficient to defeat a motion for summary judgment." *Dazley*, 6th Dist. Lucas No. L-17-1304, 2018-Ohio-2433, at ¶ 37, citing *Purcell v. Norris*, 10th Dist.

Franklin No. 04AP-1281, 2006-Ohio-1473, ¶ 12. Whether an expert's more recent testimony contradicts his prior deposition testimony and, if so, whether a sufficient explanation has been offered for the conflict creates a question of fact for the trial court to resolve. *Id.,* citing *Duck v. Cantoni*, 4th Dist. Washington No. 11CA20, 2013-Ohio-351, ¶ 32; *Pettiford* at ¶ 40. *See Miller v. The Toledo Hosp.*, 6th Dist. Lucas No. L-16-1211, 2017-Ohio-2691, ¶ 19-21.

{¶ 42} Bellevue claims that the following statements in Perez's affidavit and prior deposition testimony are in conflict:

> [T]he drug cocktail Dr. Pavlock prescribed for Mrs. Wilson [was] more dangerous and fell well below the standard of care for physicians. More likely than not, that combination of drugs prescribed by Dr. Pavlock for Mrs. Wilson and being taken by Mrs. Wilson at the time of her death, caused her death from respiratory failure.

And the deposition:

> Q: Given the fact that the combination of medications that Dr. Pavlock prescribed at discharge were chronic medications, unchanged dosages except maybe lowered, and the patient expressed no prior demonstrated respiratory depression, and it was clinically improved through the process of hospitalization, what mechanism are you proposing for why the chronic meds, if taken at prescribed amounts, would 16 hours after discharge cause a respiratory depression causing death?

A: Well that's what I'd consider the key question that I was asked to consider. Here we have a relatively young patient, I believe she was 40 years old, some chronic conditions but nothing out of the ordinary, hypertension, obesity, COPD, we see those patients almost every day in the office and they do fine. * * *. So it's not a question of whether the combination did it, it's a matter of the combination in this particular patient, in this particular situation, and I'm done with my answer.

Q: Okay. You agree that what happened after she was at home is unknown to you, correct?

A: Exactly what happened, it is unknown to me, correct.

* * *

Q: * * *. Doctor, you testified that you thought that she probably took more than the prescribed amount of Xanax during the period between when she filled the prescription and when she was found dead, correct?

* * *

A: That is more likely than not what happened, yes.

* * *

Q: And, Doctor, the original question I asked you was with all that we've been talking about, what is the mechanism you're proposing now was the cause of respiratory depression with the use of these chronic meds if taken her prescription?

A: If taken per prescription? Because she didn't have any issues prior, I would say probably would have been relatively safe.

Reviewing the above statements, Dr. Perez's deposition testimony and affidavit testimony are inconsistent and no explanation was offered in the affidavit for the discrepancy. Thus, the trial court did not err in rejecting Dr. Perez's subsequent, inconsistent affidavit.

2. Combination of Medications and Causation

{¶ 43} Crawford next argues that a genuine issue of material fact remains as to whether the combination of medications prescribed by Dr. Pavlock caused Wilson's death. Crawford contends that Dr. Perez's testimony that, more likely than not, the combination of drugs prescribed resulted respiratory depression which caused Wilson's death was sufficient to withstand summary judgment on the causation issue. Crawford also contends that Wilson's "chronic opioid use" and "issues with compliance" increased the possibility of respiratory issues.

{¶ 44} Dr. Perez testified in his deposition that Wilson's medical records contained no evidence of any respiratory depression prior to her hospitalization. He stated that she had worsening respiratory issues which precipitated her hospitalization. Dr. Perez opined that her condition "could have been due to the combination of medications, it could have been due to something else." He agreed that he could "not point to anything specific in the medical records." The following exchange took place:

Q: Is it fair to say that you can't say more probable than not to a reasonable degree of medical certainty that the worsening of her symptoms, respiratory symptoms prior to the hospitalization was caused by this combination of medication?

A: I would have to disagree. I would say somebody with poorly controlled COPD on this combination of medications, I would have to say that the medications causing respiratory depression is more likely than not a possibility.

{¶ 45} Dr. Perez further opined that while in the hospital, Wilson's medications were administered by nursing staff at the prescribed dosing levels. Perez stated that upon discharge, Wilson was given prescriptions similar to those she had been taking. Dr. Perez agreed that when Wilson was found deceased 16 hours following discharge, her precise time of death was unknown, what and how much medication she had ingested, and whether she had suffered from respiratory depression immediately preceding her death.

{¶ 46} Reviewing the relevant testimony, Crawford failed to provide sufficient expert testimony supporting the argument that the combination of drugs prescribed to Wilson, more likely than not, proximately caused her death. Dr. Perez could not pinpoint any instances of respiratory depression caused by the medications either during or following her hospitalization and could only speculate as to the events leading to her death.

3. Failure to Order a Pulmonary Consult

{¶ 47} Crawford's next alleged error is the trial court's rejection of his claim that Dr. Pavlock's failure to order a pulmonology consult fell below the acceptable standard of care and was a proximate cause of Wilson's death. Crawford argues that because Bellevue's expert failed to refute his claim, a triable issue of fact remained. Bellevue claims that Dr. Perez's statement, without competent evidence as to what a treatment a pulmonologist would have offered, was insufficient to create an issue of fact.

{¶ 48} Courts have observed that

> "the mere breach of duty to refer a patient to a specialist for treatment will not of itself make out a prima facie case of negligence against the general practitioner. * * * It must appear that the breach of the duty to refer to a specialist in fact caused the plaintiff's injury, and this can be shown only if the treatment the plaintiff received was in some way inferior to the treatment he would have received from a specialist. Thus, in order to make out a case of negligence based on a breach of duty to refer a patient to a specialist for treatment, the plaintiff must also present evidence from which the trier of fact may determine that in the treatment which he in fact administered, the defendant failed to exercise that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by specialists in good standing under like circumstances."

Schmitz v. Blanchard Valley OB-GYN, Inc., 63 Ohio App.3d 756, 759, 580 N.E.2d 55 (3d Dist.1989), quoting *Larsen v. Yelle*, 310 Minn. 521, 525-526, 246 N.W.2d 841 (1976).

{¶ 49} During his deposition, Dr. Perez stated that Wilson's multiple hospitalizations evidence that her COPD was "poorly controlled" and that Dr. Pavlock breached the standard of care failing to order a pulmonology consultation. The following exchange then took place:

> Q: As a family physician, what aspect of this patient's signs or symptoms or underlying illness are you unqualified to assess, diagnose and treat?
>
> A: I can't think of any.
>
> Q: And you're not a pulmonologist, are you?
>
> A: Not currently.
>
> Q: Were you in the past.
>
> A: No.
>
> Q: Are you gonna be in the future?
>
> A: I don't think so.
>
> Q: Okay. So you can't say what a pulmonologist would have done differently in this presenting circumstance, fair?
>
> A: Yes, I'm not qualified to give an opinion of pulmonology standard of care.
>
> * * *

Q: You're not qualified to say what treatment course might have been undertaken by a pulmonologist in this presenting circumstance, correct?

A: Yeah, that's correct. I could not opine on what a pulmonologist would have done.

{¶ 50} Reviewing the relevant parts of the record, even if Crawford's evidence on the claimed breach of the standard of care was sufficient to withstand summary judgment, the claim still required evidence that the alleged breach caused Wilson's death. This necessitated some competent evidence as to the course of treatment that a pulmonologist would offer beyond that provided by Dr. Pavlock, which Crawford failed to present. Thus, Crawford's failure to consult claim is rejected.

{¶ 51} Based on the foregoing, the court finds that no genuine issue of fact remains and the trial court did not err in granting summary judgment in Bellevue's favor. Crawford's assignment of error is not well-taken.

IV. Conclusion

{¶ 52} Upon consideration, the September 8, 2022 judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, Crawford is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Christine E. Mayle, J. _____
JUDGE

Myron C. Duhart, P.J. _____
JUDGE

Charles E. Sulek, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.supremecourt.ohio.gov/ROD/docs/.