

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Michele A. Melvin, Administrator, :  
 :  
Plaintiff-Appellant, :  
 :  
v. : No. 10AP-975  
 : (C.C. No. 2007-09135)  
The Ohio State University Medical Center, :  
 : (REGULAR CALENDAR)  
Defendant-Appellee. :

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D E C I S I O N

Rendered on June 30, 2011

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*Faust, Harrelson, Fulker, McCarthy & Schlemmer, LLP, John E. Fulker and William J. Fulker*, for appellant.

*Michael DeWine*, Attorney General, *Karl W. Schedler* and *Daniel R. Forsythe*, for appellee.

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APPEAL from the Ohio Court of Claims

TYACK, J.

{¶1} The estate of Joseph W. Wilson ("Wilson's estate"), is appealing from an adverse verdict in the Ohio Court of Claims. For the reasons that follow, we affirm the judgment of the Ohio Court of Claims.

{¶2} On appeal, Wilson's estate assigns five errors for our consideration:

I. THE TRIAL COURT ERRED IN PERMITTING DEFENDANT-APPELLANT TO CHALLENGE THE CORONER'S FINDING AS TO THE CAUSE OF THE DEATH OF APPELLANT'S DECEDENT IN CONTRAVENTION OF THE PLAIN

LANGUAGE OF § 313.39 [sic] OF THE REVISED CODE OF OHIO.

II. THE TRIAL COURT ERRED IN FAILING TO APPLY, OR EVEN TO CONSIDER, THE NON-BINDING, REBUTTABLE PRESUMPTION TO WHICH THE CORONER'S REPORT IS ENTITLED.

III. THE TRIAL COURT ERRED IN PERMITTING TESTIMONY ON THE ISSUE OF LIABILITY IN DIRECT CONTRAVENTION OF RULE 601 (D) OF THE OHIO RULES OF EVIDENCE.

IV. THE FINDINGS OF FACT AND THE DECISION OF THE TRIAL COURT ARE WHOLLY UNSUPPORTED BY ANY COMPETENT EVIDENCE.

V. THE DECISION OF THE TRIAL COURT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

{¶3} Decedent, Joseph W. Wilson, was diagnosed in the fall 2006 with a potentially cancerous polyp. The polyp required surgery and Wilson was admitted to The Ohio State University Medical Center ("OSU Med. Center") on December 10, 2006. Wilson was cleared by his cardiologist for surgery on December 13, 2006. It was necessary to clear Wilson due to his multiple health problems including congestive heart failure, a prior heart attack, pacemaker dependency, anemia, a prior stroke, diabetes, and poor renal function.

{¶4} The surgery was successful in removing the polyp, but Wilson had difficulty recovering from the surgery. Still, OSU Med. Center said that Wilson had stabilized enough to transfer him to a long-term care facility in Piqua, Ohio, on December 24, 2006.

{¶5} On the evening of December 25, the next day, Wilson complained of abdominal pain and was admitted to the Upper Valley Medical Center where he was

treated in the emergency room at about 2:30 a.m. On December 26, Wilson's condition deteriorated and he was pronounced dead at 2:50 a.m.

{¶6} The Montgomery County Coroner's Office listed the cause of death as "[A]cute peritonitis due to surgical wound dehiscence." "Dehiscence," in lay terms, means "a splitting open." In this case, the term refers to a splitting open of a surgical wound.

{¶7} The medical claim filed against OSU Med. Center did not allege that the colon surgery to remove the polyp was negligently performed. Wilson's estate instead claims that OSU Med. Center was negligent in its failure to diagnose and treat peritonitis which in turn resulted in Wilson's death.

{¶8} OSU Med. Center has consistently contested the coroner's report and asserted that Wilson died as a result of other medical problems, especially congestive heart failure. OSU Med. Center also contested whether Wilson suffered peritonitis following the surgery. The magistrate with the Ohio Court of Claims found that the treatment of Wilson at all times at OSU Med. Center met the accepted standard of care. This became the judgment of the court.

{¶9} With this background, we turn to the individual assignments of error.

{¶10} The first assignment of error asserts that, according to R.C. 313.19, the trial court erred in permitting OSU Med. Center to contest the coroner's findings without first challenging them in the Miami County Court of Common Pleas.

{¶11} The relevant statute, R.C. 313.19, reads:

The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless

the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death.

{¶12} The binding effect of R.C. 313.19 has been affirmed, but explained by the Supreme Court of Ohio in *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St.3d 27. The coroner's factual determinations concerning the manner, mode, and cause of death create a nonbinding, rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary. The statute does not compel the fact-finder to accept, as a matter of law, the coroner's factual findings concerning the manner, mode, and cause of decedent's death. See *Vargo* at paragraph one of the syllabus.

{¶13} OSU Med. Center presented competent credible evidence to rebut the presumption in the coroner's report. OSU Med. Center argued that Wilson did not die of peritonitis and offered an alternative theory of congestive heart failure and cardiac arrest.

{¶14} The magistrate found in favor of OSU Med. Center finding the opinions of OSU Med. Center's experts to be more persuasive and found that OSU Med. Center and its employees appropriately determined that Wilson did not exhibit the clinical symptoms of peritonitis.

{¶15} Wilson's estate, relying on *Vargo*, argues that it is necessary for OSU Med. Center to bring an action in Miami County, the county of decedent's death, to direct the coroner to change his decision as to the cause of death before it may challenge the coroner's findings in its defense. This is not the holding of *Vargo*. As clearly stated in the syllabus of *Vargo*, the coroner's report creates a nonbinding, rebuttable presumption that the fact-finder is not compelled to accept.

{¶16} If OSU Med. Center or any party wished to actually change the coroner's decision then they would be required to file in the court of common pleas of the county of the decedent's death. However, that was not OSU Med. Center's objective. It merely wished to overcome the presumption that the coroner's decision creates in this civil lawsuit. The Ohio Court of Claims found OSU Med. Center succeeded.

{¶17} The first assignment of error is overruled.

{¶18} The second assignment of error asserts that the trial court failed to apply the rebuttable presumption that the coroner's report is entitled to in its decision and that the magistrate was required to make a finding as to the cause of death if it overcame that presumption.

{¶19} As previously stated, *Vargo* holds that there is a nonbinding, rebuttable presumption created by the coroner's decision in the *absence* of competent reliable evidence to the contrary.

{¶20} The magistrate thoroughly examined competent credible evidence contrary to the coroner's decision. There was not an absence of such evidence. Once the presumption was overcome, it no longer exists. Further, the magistrate was not required to make findings as to the cause of death as the court found that OSU Med. Center met the accepted standards of care. As noted earlier, a judge with the Ohio Court of Claims adopted the magistrate's decision with little additional analysis.

{¶21} The second assignment of error is overruled.

{¶22} The third assignment of error asserts that the trial court erred in admitting evidence of liability from an expert witness, Dr. Vincent Di Maio, who is not competent to testify under Evid.R. 601(D).

{¶23} The pertinent section of Evid.R. 601(D) reads:

Every person is competent to be a witness except:

\* \* \*

(D) A person giving expert testimony on the *issue of liability* in any claim asserted in any civil action against a physician \* \* \* or hospital arising out of the diagnosis, care, or treatment of any person by a physician \* \* \* unless the person testifying is licensed to practice medicine \* \* \* and unless the person devotes at least one-half of his or her professional time to the active clinical practice \* \* \*.

(Emphasis added.)

{¶24} Turning to Dr. Di Maio's situation, Evid.R. 601(D) clearly requires that Dr. Di Maio be found not to be a competent witness on the issue of liability. He retired from clinical practice which consisted of a major portion of his job responsibilities. If he was permitted by the trial court to testify on the "issue of liability," he was permitted to testify on an issue for which he was not competent to testify. To evaluate this assignment of error, we must carefully review Dr. Di Maio's testimony to determine if he testified on the issue of liability.

{¶25} Dr. Di Maio testified via a videotaped deposition taken on May 22, 2009. He described himself as a physician in the private practice of forensic pathology, clinical pathology and forensic pathology. He is board certified in anatomical pathology, clinical pathology and forensic pathology. As a pathologist, he did not spend the majority of his time seeing living medical patients. What contact he had was reduced when he retired at the end of calendar year 2006. After retirement, he maintained a position as a professor in the Department of Pathology with the University of Texas Health Science Center. He

also maintained his position as editor of the American Journal of Forensic Medicine and Pathology.

{¶26} Dr. Di Maio testified that he performed approximately 9,000 autopsies and supervised 27,000 to 30,000 autopsies. Included in that number was at least one autopsy on a person who died of peritonitis. The person's abdominal cavity contained a medium amount of septic fluid. The external surfaces of the bowel, peritoneal cavity, liver and spleen were covered with fibrinous exudates, or pus.

{¶27} Dr. Di Maio was provided material related to Wilson and prepared a report as a result. The essence of the report was that Wilson died of heart disease and not from peritonitis, as stated in the coroner's report.

{¶28} As noted above, the estate of Joseph Wilson asserted that Wilson died from peritonitis, as indicated in the coroner's report. OSU Med. Center asserted that Wilson died from heart disease. Dr. Di Maio was not competent, under Evid.R. 601(D), to give expert testimony on the "issue of liability."

{¶29} We have interpreted "liability" in this context to mean fault or duty and breach of duty; thus, the rule precludes non-clinician expert testimony on these topics. See *Lessler v. Ohio State Univ. Hosp.* (May 8, 1997), 10th Dist. No. 96API10-1276, citing *McCrorry v. State* (1981), 67 Ohio St.2d 99, 104 (addressing the experts who may testify as to "fault or liability" under the rule), and *Wise v. Doctors Hosp. N.* (1982), 7 Ohio App.3d 331, 333-34. See also *Karpinski v. Lim*, 7th Dist. No. 03 C0 64, 2004-Ohio-3037, ¶8 (stating that "[m]any courts have defined the use of the word 'liability' in this rule as: fault, duty and breach, or standard of care"), and cases cited therein. The rule does not preclude non-clinician expert testimony concerning causation or damages, however.

{¶30} Dr. Di Maio did not testify that OSU Med. Center was or was not liable for the death of Wilson. Instead, he gave testimony which totally undercut the Wilson's estate's whole theory of why OSU Med. Center was liable, namely its failure to diagnose peritonitis which became lethal.

{¶31} Since Dr. Di Maio never testified for OSU Med. Center about whether or not they rendered appropriate medical care, under our reading of Evid.R. 601(D), he did not give testimony about the "issue of liability." Therefore, he did not give testimony which he was not competent to give. Evid.R. 601(D) was not violated.

{¶32} The third assignment of error is overruled.

{¶33} The fourth and fifth assignments of error are interrelated and therefore will be addressed together.

{¶34} Verdicts which are supported by competent, credible evidence will not be reversed as being against the manifest weight of the evidence. See *C. E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279.

{¶35} The evidence that Wilson died from heart disease was competent and credible. Wilson was slightly under 6 feet tall and weighed approximately 250 pounds. He had a serious heart attack before, which led to significant scarring of his heart and related cardiovascular systems. He suffered from diabetes and had been treated for coronary insufficiency problems right up until the time of his bowel surgery. He had a pacemaker and an automatic internal cardio-defibrillator. His heart was very significantly enlarged, with a proximal left ventricle. He had a 95 percent narrowing of the proximal left anterior descending coronary artery and significant (75 percent) narrowing of the right and circumflex coronary arteries due to atherosclerosis. In his weakened state following

surgery and a significant hospitalization, his serious heart and cardiovascular problem could well have been fatal.

{¶36} The fourth and fifth assignments of error are overruled.

{¶37} All five assignments of error having been overruled, the judgment of the Ohio Court of Claims is affirmed.

*Judgment affirmed.*

BROWN and FRENCH, JJ., concur.

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