

[Cite as *Zemmelman v. Ohio Dept. of Rehab. & Corr.*, 2008-Ohio-2445.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

CONNIE F. ZEMMELMAN, Admx.

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

[Cite as *Zemmelman v. Ohio Dept. of Rehab. & Corr.*, 2008-Ohio-2445.]

Case No. 2005-05680	- 3 -	DECISION
---------------------	-------	----------

Case No. 2005-05680

Judge J. Craig Wright

DECISION

{¶1} Plaintiff brought this action alleging claims of wrongful death and medical negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability. At all times relevant to this action plaintiff's decedent, Sean Schwamberger, was an inmate in the custody and control of defendant at Pickaway Correctional Institution (PCI) pursuant to R.C. 5120.16.

{¶2} On Friday, April 11, 2003, at approximately 9:00 p.m., Schwamberger presented to PCI's "med bay" complaining of a possible spider bite on his left thigh. He was seen by a nurse. Because he presented to the infirmary after PCI's medical director, Adil Yamour, M.D., had left for the weekend, the nurse telephoned Dr. Yamour at his home and described Schwamberger's condition. Dr. Yamour prescribed a ten-day course of oral penicillin and advised that Schwamberger clean the wound with hydrogen peroxide and cover it with antibiotic dressing two times per day.

{¶3} On April 12, 2003, Schwamberger returned to med bay complaining of pain and increased swelling in his left thigh. Dr. Yamour was contacted again and he prescribed a cane and a lower bunk restriction for Schwamberger. Dr. Yamour also ordered Schwamberger to appear for doctor's sick call on April 14, 2003, but he did not appear.

{¶4} On April 18, 2003, Schwamberger returned to med bay complaining of back pain and a sharp pain in his right lower ribs. Dr. Yamour examined Schwamberger at that time and recommended that he be transported to the emergency room at The Ohio State University Medical Center (OSUMC) but Schwamberger refused. On April 19, 2003, Schwamberger returned to med bay and was transported to the emergency room at OSUMC. A chest x-ray and an EKG were taken with normal results. Schwamberger was prescribed Motrin for pain and he was returned to PCI. On April 20, 2003, Schwamberger was returned to the emergency room at OSUMC with complaints of chest pain and shortness of breath. He was admitted for further evaluation and treatment. Schwamberger died at OSUMC on April 29, 2003.

{¶5} Plaintiff asserts that defendant was negligent in its treatment of Schwamberger; specifically, that the suspected spider bite was in fact a staph infection known as "MRSA" (methicillin-resistant staphylococcus aureus); that defendant's

employees fell below the standard of care for treating MRSA; and that Schwamberger died as a result of an MRSA infection.

{¶6} Adil Yamour, M.D., testified that he worked at PCI from 6:00 a.m. to 2:00 p.m. Monday through Friday, but that he was on-call 24 hours per day. Dr. Yamour explained that on April 11, 2003, he was first telephoned by a nurse regarding Schwamberger's complaint of a spider bite. Dr. Yamour testified that he saw Schwamberger for the first time on April 18, 2003. At that visit, Dr. Yamour recommended that Schwamberger be transported to OSUMC for lab tests that could not be performed at PCI. However, Schwamberger refused to go to OSUMC. Dr. Yamour testified that he never examined Schwamberger's leg wound, but that he recommended appropriate treatment based on a nurse's description of the wound.

{¶7} Pauline Hadinger, RN, testified that in April 2003 she worked at PCI from 3:00 p.m. to 11:00 p.m. Although they worked at different times, Hadinger testified that she could always reach Dr. Yamour on-call if necessary. Hadinger did not specifically recall Schwamberger but testified that her handwriting appears in his medical records. (Joint Exhibit 19.) According to Hadinger, the medical records show that on April 11, 2003, at 2100 hours, Schwamberger was escorted to med bay complaining that he thought he had a spider bite. She testified that she could not make a diagnosis but that the blister on Schwamberger's thigh looked like a mosquito bite and that no fluid was draining from it.

{¶8} Plaintiff's expert, Gary Richwald, M.D., a volunteer professor affiliated with UCLA Medical School and UCLA School of Public Health, testified that defendant's employees did not meet the accepted standard of medical care in their treatment of Schwamberger from the time of the initial diagnosis of a spider bite until the second time that he was transported to OSUMC. Dr. Richwald opined that Schwamberger died of sepsis caused by an overwhelming MRSA infection in his organs and blood. Dr. Richwald further opined that the initial site of the MRSA infection was the wound on

Schwamberger's left thigh and that the infection spread into Schwamberger's bloodstream from that location.

{¶9} Regarding the appropriate standard of care, Dr. Richwald testified that he would have expected either an incision and drainage of the leg wound, a culture of the wound, or treatment with an antibiotic on April 11, 2003. Dr. Richwald criticized the choice of antibiotic that was used, stating that "Pen K" (the oral penicillin that Dr. Yamour had prescribed) was outdated and had not been commonly used for at least the past ten years. Dr. Richwald also stated that Schwamberger should have been seen by a doctor within 24 hours of his initial contact at med bay.

{¶10} Dr. Richwald described the swelling of Schwamberger's leg noted on April 12, 2003, as a "red flag" of the presence of a dangerous organism. Dr. Richwald criticized Dr. Yamour's treatment of Schwamberger on April 18, 2003, because Dr. Yamour did not examine Schwamberger's leg wound to verify the spider bite diagnosis that was based upon what a nurse had described to him over the telephone. Although Schwamberger's complaints on April 18, 2003, were of back and rib pain, Dr. Richwald opined that Dr. Yamour should have taken all of Schwamberger's symptoms into account to try to diagnose his condition.

{¶11} Dr. Richwald also stated that in view of the aggressive nature of MRSA and the close contact among inmates in an institutional setting, Dr. Yamour's lack of follow-up treatment of Schwamberger's leg wound fell below the applicable standard of care.

{¶12} Ian Baird, M.D., defendant's medical expert, testified that he was licensed to practice medicine in Ohio and that he was board-certified in internal medicine and infectious disease. Based upon the records in this case, Dr. Baird opined that on April 13, 2003, Schwamberger was suffering from cellulitis (inflammation) on his left thigh. Dr. Baird opined that after a few days Schwamberger's leg wound began to improve. Dr. Baird stated that an infection in Schwamberger's leg was not the proximate cause of his death. Rather, Dr. Baird opined that Schwamberger was no more than a carrier of

the MRSA bacteria and that his death was caused by an overwhelming infection secondary to pneumonia. Dr. Baird testified that the form of pneumonia that killed Schwamberger was very rare. Dr. Baird testified that even if Schwamberger had been treated with an MRSA-sensitive antibiotic, he would have died from pneumonia. Dr. Baird also testified that on April 11, 2003, there was no reason to suspect MRSA in the leg wound.

{¶13} Terrance Baker, M.D., defendant's other medical expert, testified that he was board-certified in family practice and that he had treated skin conditions such as abscesses and cellulitis for more than 25 years. Dr. Baker defined an abscess as a collection of fluid beneath the skin caused by infection. He defined cellulitis as swelling usually caused by a bacterial infection. Dr. Baker testified that a culture cannot be taken of cellulitis because there is nothing to drain. However, he stated that an abscess can be incised and drained and that the fluid in an abscess can then be cultured.

{¶14} Dr. Baker testified that MRSA is a common bacteria, and that there are two types of MRSA: hospital-acquired MRSA and community-acquired MRSA. Dr. Baker explained that hospital-acquired MRSA usually affects patients with compromised immune systems. However, Dr. Baker stated that he first learned about the existence of community-acquired MRSA in 2004, when a number of his patients had topical skin infections or abscesses that did not respond to conventional treatment and were resistant to almost every antibiotic except Bactrim.

{¶15} Dr. Baker opined that the standard of care for treatment of skin infections changed from 2003 to 2004, after medical professionals became aware of the existence of community-acquired MRSA. The course of treatment for community-acquired MRSA changed from treatment with conventional antibiotics to a standard of closely-monitoring the infection for resistance to conventional antibiotics and then changing the prescribed antibiotics if no improvement were noted.

{¶16} Dr. Baker opined to a reasonable degree of medical probability that based upon the medical records in this case, Schwamberger presented with the signs and

symptoms consistent with a spider bite, and that both the nursing staff and Dr. Yamour met the appropriate standard of care in effect at that time. Dr. Baker noted that Schwamberger showed signs of improvement in that Schwamberger did not need his cane by April 15, 2003. Dr. Baker also opined that the leg wound and the pneumonia that killed Schwamberger were two independent disease processes that were not causally related. Dr. Baker also opined that it was not possible to diagnose MRSA on April 11 or April 12, and that even on April 19 Schwamberger did not show symptoms of MRSA. Dr. Baker testified that Joint Exhibit 759, an autopsy photo of Schwamberger's left thigh, shows that the wound on Schwamberger's leg was healing at the time of his death, and that there was no active infection in the wound. Dr. Baker opined that Schwamberger died from pneumonia.

{¶17} Kevin Runyon, RN, testified that he was employed by defendant at PCI from September 1999 to December 2002 as a chronic care nurse. He left that position to work for the Department of Health from December 2002 to March 2005 as an infectious disease control consultant, serving as liaison between the health department and correctional institutions.

{¶18} Runyon stated that prior to 2003, he knew of very few sources of information that were available to correctional health care providers regarding MRSA. Runyon stated that it was not until July or August 2004 that the HIV and Hepatitis Education Prison Project published an article regarding community-acquired MRSA in correctional settings. This publication, known as the "HEPP Report" was disseminated to the correctional facilities in Ohio via fax. Runyon testified that he did find two articles that had been published in 2002 in the Mortality Morbidity Welfare Report produced by the Centers for Disease Control. One article addressed a 2002 MRSA outbreak in a Mississippi prison system and the other concerned an outbreak in jails in Los Angeles County, California. However, Runyon testified that three other leading resources for correctional institutions, the National Commission on Correctional Health Care, the American Correctional Association and the Federal Bureau of Prisons, had not

published any articles regarding community-acquired MRSA in the institutional setting prior to April 2003.

{¶19} Plaintiff argues that the standard of care required Schwamberger to be placed on an MRSA-sensitive antibiotic, that prescribing penicillin breached the standard of care, and that the breach proximately caused his death.

{¶20} “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) a breach of that duty, and (3) proximate causation between the breach of duty and the death.” *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St.3d 86, 92, citing *Bennison v. Stillpass Transit Co.* (1966), 5 Ohio St.2d 122, paragraph one of the syllabus.

“In order to establish medical malpractice, it must be shown by a preponderance of 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 and proximate result of such doing or failing to do some one or more of such particular things.” *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, paragraph one of the syllabus.

{¶21} The court finds that Dr. Baker’s testimony that Schwamberger died of pneumonia was more persuasive than Dr. Richwald’s testimony that Schwamberger died of an MRSA infection. Moreover, the court finds that even if an MRSA infection were the cause of death, plaintiff has failed to prove by a preponderance of the evidence that defendant caused a breach of the standard of care owed to plaintiff’s decedent. The court is persuaded that the condition known as community-acquired MRSA was not widely acknowledged in the medical community in 2003 and that plaintiff has failed to prove that defendant’s employees fell below the standard of care in existence at the time. For the foregoing reasons, the court finds that plaintiff has failed

Case No. 2005-05680	- 10 -	DECISION
---------------------	--------	----------

to prove her claims by a preponderance of the evidence and, accordingly, judgment shall be rendered in favor of defendant.

Case No. 2005-05680

- 11 -

DECISION

[Cite as *Zemmelman v. Ohio Dept. of Rehab. & Corr.*, 2008-Ohio-2445.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

CONNIE F. ZEMMELMAN, Admx.

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2005-05680

Judge J. Craig Wright

JUDGMENT ENTRY

[Cite as *Zemmelman v. Ohio Dept. of Rehab. & Corr.*, 2008-Ohio-2445.]

[Cite as *Zemmelman v. Ohio Dept. of Rehab. & Corr.*, 2008-Ohio-2445.]

This case was tried to the court on the issue of liability. 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.

J. CRAIG WRIGHT
Judge

cc:

David A. Singleton Ohio Justice & Policy Center 215 East 9th Street, Suite 601 Cincinnati, Ohio 45202	Eric A. Walker Assistant Attorney General 150 East Gay Street, 23rd Floor Columbus, Ohio 43215-3130
--	--

HTS/cmd
Filed May 7, 2008
To S.C. reporter May 21, 2008