

[Cite as *Milum v. Dept. of Rehab. & Corr.*, 2008-Ohio-3645.]

# Court of Claims of Ohio

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65 South Front Street, Third Floor  
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614.387.9800 or 1.800.824.8263  
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JOSEPH MILUM

Plaintiff

v.

DEPARTMENT OF REHABILITATION  
AND CORRECTION

Defendant

[Cite as *Milum v. Dept. of Rehab. & Corr.*, 2008-Ohio-3645.]

Case No. 2005-07909	- 3 -	MAGISTRATE DECISION
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Case No. 2005-07909

Judge Joseph T. Clark  
Magistrate Steven A. Larson

MAGISTRATE DECISION

{¶1} Plaintiff brought this action alleging medical negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant at the Pickaway Correctional Institution (PCI) pursuant to R.C. 5120.16. On Sunday, April 24, 2005,<sup>1</sup> at approximately 8:00 a.m., plaintiff reported to a PCI nurse that he had an open wound under his right arm. Plaintiff was examined on April 25 by the institutional doctor, Bernard Oppong, D.O., and diagnosed with a folliculitis, or inflamed hair follicle. Plaintiff was given an antibiotic and ordered to report to a nurse twice a day to have the area cleaned and dressed. Plaintiff followed Dr. Oppong's orders, but by Friday, April 29, the condition had worsened. Because Dr. Oppong does not work weekends, plaintiff had to wait until Monday, May 2, to be examined. After the examination, Dr. Oppong prescribed an intravenous antibiotic and ordered an emergency transfer to the Ohio State University Medical Center (OSUMC). Plaintiff was admitted on May 3 at OSUMC where he was diagnosed with necrotizing fasciitis as a result of a staph infection known as MRSA (methicillin-resistant staphylococcus aureus). To stop the spread of the infection, plaintiff underwent a "forequarter" amputation to his right side, meaning that his right arm and shoulder were amputated. After two months of treatment at OSUMC, plaintiff was discharged to defendant's custody.

{¶3} Plaintiff asserts that defendant's employees were negligent in his treatment. Specifically, plaintiff asserts that Dr. Oppong's initial diagnosis of folliculitis was incorrect; that defendant's medical staff failed to properly and timely diagnose the infection as MRSA, and that defendant's employees fell below the standard of care for treating MRSA; and that his amputation was a result of the negligence of defendant's medical staff.

{¶4} Chris Dove, LPN, testified that he cleaned and dressed plaintiff's wound on Friday, April 29 at approximately 5:30 p.m. According to Dove, plaintiff's wound was draining "quite a bit" and plaintiff stated that he was in a lot of pain and unable to sleep. Dove testified that he noted plaintiff's condition on his chart and informed the nurse in

charge, RN Alan Dunkle, of plaintiff's condition. Dunkle informed Dove that a phone call would be placed to Dr. Opping.

{¶5} Dunkle testified that after Dove informed him of the change in plaintiff's condition, he called and left a message for Dr. Opping. When Dr. Opping returned the call Dunkle read him the note that Dove had made on plaintiff's chart. At 8:30 p.m., Dunkle noted in plaintiff's medical record that he had called Dr. Opping, that Dr. Opping had prescribed Darvocet, and that plaintiff was scheduled for an appointment with Dr. Opping. (Joint Exhibit A.)

{¶6} On Sunday, May 1, at approximately 5:00 p.m., plaintiff's wound was cleaned and dressed by Dunkle, who noted in plaintiff's medical record that there were "three open areas, dime size, draining copious amounts of tan drainage" under plaintiff's right arm. According to the note, plaintiff was instructed to see Dr. Opping the next morning. (Joint Exhibit A.)

{¶7} Dr. Opping testified that he was on duty at PCI Monday through Friday during normal business hours and that he did not work weekends, but that he was on call 24 hours a day via a pager. Dr. Opping testified that after he had examined plaintiff on April 25 he did not see plaintiff again until May 2 and that he was surprised at how plaintiff's condition had worsened during the week. Dr. Opping stated that he did not recall being contacted by Dunkle on April 29 concerning plaintiff's condition. According to Dr. Opping, had he been so notified, he would have ordered that plaintiff be transferred to OSUMC for emergency treatment.

{¶8} "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

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<sup>1</sup>All dates referenced are calendar year 2005.

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.

{¶9} Plaintiff presented the expert testimony of David Weber, M.D., a professor and the medical director of occupational health at the University of North Carolina Chapel Hill. Dr. Weber testified that defendant’s employees did not meet the standard of care in their treatment of plaintiff, beginning with Dr. Oppong’s initial diagnosis. Specifically, Dr. Weber testified that the applicable standard of care required Dr. Oppong to note plaintiff’s vital signs on his chart, which was not done, and that his diagnosis of folliculitis was incorrect. According to Dr. Weber, based upon the symptoms noted in plaintiff’s medical records, plaintiff was likely suffering from cellulitis on April 25. Additionally, Dr. Weber opined that a culture of plaintiff’s wound should have been performed to check for infection. However, Dr. Weber opined that the treatment Dr. Oppong prescribed was proper for both cellulitis and folliculitis, and that the deviation from the standard of care at this point in plaintiff’s treatment was minor.

{¶10} Dr. Weber testified that the breach of the standard of care that resulted in amputation occurred after Dr. Oppong’s initial diagnosis. Specifically, Dr. Weber testified that the standard of care required the nurses who were treating plaintiff to inform Dr. Oppong on April 29 of the changes in plaintiff’s condition. Dr. Weber further testified that if Dr. Oppong was notified of plaintiff’s condition about which Dunkle testified, then a breach of the standard of care occurred when Dr. Oppong did not take immediate action to treat plaintiff. According to Dr. Weber, a complaint by the patient that he is in such pain that he cannot sleep is a “hallmark” of a deep tissue infection. Dr. Weber testified that the standard of care requires treatment with intravenous antibiotics and a surgical evaluation. Dr. Weber testified that Dunkle’s notation that plaintiff’s wound was draining a copious amount of tan liquid at 5:00 p.m. on May 1 indicated that plaintiff had developed necrotizing fasciitis, a bacterial infection of the

fascia, the layer of tissue that separates the skin from the muscles. According to Dr. Weber such an infection causes tissue death. Dr. Weber testified that once plaintiff's infection had developed into necrotizing fasciitis, amputation was necessary to save his life.

{¶11} Upon reviewing plaintiff's medical records, Dr. Weber opined to a reasonable degree of medical certainty that amputation would not have been necessary if he had been treated in accordance with the appropriate standard of medical care on either April 29 or April 30.

{¶12} Defendant's expert, George Gianakopoulos, M.D., is a physician on the staff at both Riverside and Grant Hospitals in Columbus, Ohio. He is board-certified in internal medicine with a speciality in infectious diseases. Dr. Gianakopoulos testified that Dr. Oponng's initial diagnosis and treatment of plaintiff on April 25 was within the applicable standard of care. According to Dr. Gianakopoulos, there is no evidence to suggest that Dr. Oponng's initial diagnosis of a folliculitis was incorrect, although plaintiff probably suffered from cellulitis on April 25. Dr. Gianakopoulos testified that Dr. Oponng prescribed the proper treatment given his initial diagnosis of a folliculitis.

{¶13} Similarly, after reviewing plaintiff's medical records, Dr. Gianakopoulos concluded that the care plaintiff received on April 29 was within the standard of care based upon the context of the initial diagnosis. According to Dr. Gianakopoulos, transfer to OSUMC for treatment on April 29 was not necessary, although he also testified that it is difficult to determine from the records whether plaintiff's infection was improving. Dr. Gianakopoulos testified that surgery was not necessary on April 29 because it did not appear that plaintiff had developed necrotizing fasciitis. However, Dr. Gianakopoulos testified that necrotizing fasciitis is unpredictable and difficult to diagnose and treat. Dr. Gianakopoulos offered no medical opinion as to whether a different course of treatment on either April 30 or May 1 would have averted amputation.

{¶14} Based upon the foregoing, the court finds Dr. Weber's testimony regarding the applicable standard of care to be more persuasive than that of Dr. Gianakopoulos.

Based upon Dr. Weber's testimony and the evidence presented at trial, the court finds that Dr. Oppong was notified of plaintiff's worsening condition on April 29 and that he committed a breach of the appropriate standard of care when he did not order plaintiff's immediate transfer to OSUMC for emergency care. The court further finds that this breach was the proximate cause of plaintiff's forequarter amputation. Accordingly, judgment is recommended in favor of plaintiff.

*A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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STEVEN A. LARSON  
Magistrate

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cc:

Anne M. Valentine Gerald S. Leeseberg 175 South Third Street Penthouse One Columbus, Ohio 43215-5134	Brian M. Kneafsey Jr. Stephanie D. Pestello-Sharf Susan M. Sullivan Assistant Attorneys General 150 East Gay Street, 18th Floor Columbus, Ohio 43215-3130
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Magistrate Steven A. Larson

MR/cmd  
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