

STATE OF MICHIGAN
COURT OF APPEALS

DUJUAN LIGONS, Personal Representative of the
Estate of EDRIS LIGONS,

FOR PUBLICATION
August 18, 2009

Plaintiff-Appellee/Cross-Appellee,

v

No. 278622
Oakland Circuit Court
LC No. 06-073762-NH

CRITTENTON HOSPITAL, a/k/a CRITTENTON
HOSPITAL MEDICAL CENTER,

Defendant-Appellee/Cross-
Appellant,

Advance Sheets Version

and

DAVID BRUCE BAUER, M.D., and
ROCHESTER EMERGENCY GROUP, P.C.,

Defendants-Appellants/Cross-
Appellees.

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

FITZGERALD, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's conclusion that the affidavits of merit were insufficient to comply with the requirements of MCL 600.2912d. I would affirm the order denying defendants' motions for summary disposition.

Plaintiff's decedent, Edris Ligon, went to the Crittenton Hospital emergency room on January 22, 2002, complaining of abdominal pain. Defendant Dr. David Bruce Bauer, M.D., treated plaintiff, but she was discharged from the hospital. The following day, Ligon was seen by her treating physician, Dr. Ghiath Tayeb, who then sent Ligon to the hospital. Ligon was admitted, but she eventually died on January 30, 2002. Plaintiff alleges that Dr. Bauer and defendant Rochester Emergency Group, P.C., were professionally negligent because they failed to properly diagnose and treat Ligon for a suspected perforated colon.

On or about June 8, 2005, plaintiff sent a notice of intent (NOI) to Dr. Bauer, the P.C., and Crittenton Hospital, which set forth the following factual basis for the medical malpractice claim:

Edris Ligons was a 54-year-old woman, with a history of colon polyps, with one atypical polyp found on a previous colonoscopy. She came to Crittenton Hospital for an out-patient follow-up colonoscopy on January 14, 2002. Dr. Tayeb noted during the procedure that the colon was very tortuous and pressure had to be applied to reach the cecum. The clinical diagnosis was diverticulosis and hemorrhoids.

On January 22, 2002 Mrs. Ligons presented to the Emergency Department at Crittenton with a four-day history of vomiting, diarrhea, chills, and fever. She had a fever of 102.4. She had abdominal tenderness on examination. She had a WBC [white blood cell count] of 15,400. An abdominal x-ray showed an abnormal gas pattern with mildly dilated small bowel loops, and paucity of gas or bowel content in the colon. The report indicated that this could reflect early or partial bowel obstruction. The radiologist specifically recommended progress views. She was treated for gastroenteritis and dehydration. She was given antibiotics and fluids. She was discharged within six hours.

She went to Dr. Tayeb's office on the 23rd due to severe pain. She was immediately sent to the Emergency Department. Examination revealed changes consistent with peritonitis because of a perforated colon. She developed sepsis. Exploratory laparotomy revealed an extensive pelvic abscess, and surgical resection was not possible. Despite extensive medication, the sepsis that developed due to the perforated colon led to multiple organ failure and death on January 29, 2002.

In relevant part, the notice further set forth the following with respect to the requirements of MCL 600.2912d:

C. THE MANNER THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED:

- u. Failed to admit the patient to the hospital on January 22, 2002;
- v. Failed to obtain appropriate [consultations] on January 22, 2002 such as surgery and/or GI;
- w. Failed to obtain progress x-rays of the abdomen and a CT scan on January 22, 2002 prior to discharging the patient;
- x. Crittenton Hospital is responsible for it's [sic] employees and actual or ostensible agents involved in the treatment of Edris Ligons;
- y. Crittenton Hospital negligently supervised their agents, servants and/or employees;
- z. Crittenton Hospital negligently granted staff privileges to their agents, servants, and/or employees;

- aa. Crittenton Hospital negligently hired their agents, servants, and/or employees;
- bb. Rochester Emergency Group is responsible for the negligence of Dr. Bauer pursuant to respondeat superior;
- cc. Dr. David Bauer is specifically responsible for Paragraphs a, c through n, q, r, t through w;
- dd. Crittenton Hospital is responsible for all paragraphs not identified in bb.^[1]

D. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE:

See paragraphs B and C above.

E. THE MANNER IN WHICH THE BREACH OF THE STANDARD OF PRACTICE OR CARE WAS THE PROXIMATE CAUSE OF THE INJURY CLAIMED IN THE NOTICE:

As a direct and proximate result of the negligence and malpractice alleged above Edis Ligons experienced conscious pain and suffering and ultimately died due to the negligence.

On April 7, 2006, plaintiff filed a complaint against Dr. Bauer, the P.C., and Crittenton Hospital. The complaint alleges that defendants were guilty of negligence and malpractice by failing to admit Ligons to the hospital on January 22, 2002, and by failing to obtain appropriate consultations on January 22, 2002. The complaint further alleges that as a result of the negligence and malpractice, Ligons suffered serious and permanent injuries resulting in her death on January 30, 2002.

Along with the complaint, plaintiff provided two affidavits of merit. One affidavit, signed by Dr. George Sternbach, set forth, in relevant part, the following actions that should have been taken or were omitted by the health professional/facility in order to have complied with the applicable standard of care:

- v. Admit the patient to the hospital on January 22, 2002;
- w. Obtain appropriate [consultations] on January 22, 2002 such as surgery and/or GI;^[2]

¹ I have omitted paragraphs a through t since they simply assert “boilerplate” language that could apply to any malpractice case.

² I have omitted paragraphs a through u are since they simply assert “boilerplate” language that could apply to any malpractice case.

Dr. Sternbach further stated that “[a]s a direct and proximate cause of the imprudent acts and omission committed by the individuals identified herein, Edris Ligons, died.” A second affidavit, signed by Dr. Fred Thomas, stated, “It is my opinion that had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate [consultations] on January 22, 2002, as outlined in Dr. Sternbach’s affidavit that Edris Ligons would not have died.”

On March 23, 2007, Dr. Bauer and the P.C. filed a motion for summary disposition pursuant to MCR 2.116(C)(7), asserting, in part, that the affidavits of merit did not comply with MCL 600.2912d(1). The trial court disagreed, concluding that the affidavits of merit were substantially in compliance with the statute, and entered an order denying the motion for summary disposition on May 22, 2007.

On appeal, Dr. Bauer and the P.C. argue that the affidavits of merit did not comply with MCL 600.2912d(1)(a) because they failed to articulate the applicable standard of care, and did not comply with MCL 600.2912d(1)(d) because they failed to set forth a sufficient statement of the manner in which the alleged breach of the standard of care was the proximate cause of the alleged injury. I disagree.

One affidavit of merit stated the applicable standard of care:

The reasonable care, diligence and skill ordinarily and/or reasonably exercised and possessed by similarly staffed and equipped hospitals under the same or similar circumstances.

The degree of reasonable care, diligence, learning judgment, and skill ordinarily and reasonably exercised and possessed by physicians/healthcare providers under the same or similar circumstances.

With regard to the issue of how the breach of the standard of care proximately caused decedent’s injuries, the affidavit of merit signed by Dr. Sternbach stated, “As a direct and proximate cause of the imprudent acts and omission committed by the individual identified herein, Edris Ligons, died.” The affidavit of merit signed by Dr. Fred Thompson stated, “It is my opinion that had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate [consultations] on January 22, 2002, as outlined in Dr. Sternbach’s affidavit that Edris Ligons would not have died.”

When reviewing the standard of care along with the relevant paragraphs listed under the heading relating to the manner the applicable standard of practice or care was breached, the affidavit of merit sufficiently informed Dr. Bauer and the P.C. regarding the applicable standard of practice or care as required by MCL 600.2912d(1)(a). The affidavit of merit was likewise critical of Dr. Bauer’s failure to “[a]dmit the patient to the hospital on January 22, 2002” and “[o]btain appropriate [consultations] on January 22, 2002.” Although the affidavits of merit do not specify how these inactions caused Ligons’s death or how any of these actions could have prevented Ligons’s death eight days later, “there is no real guesswork in coming to the conclusion” that had these consultations been obtained, Dr. Bauer would have discovered the perforated colon and then surgery could have been performed on the colon. Under these circumstances, I would hold that the affidavits of merit were sufficient to comply with the

statutory requirements and to satisfy the affidavit requirement's purpose of deterring frivolous medical malpractice claims by verifying through the opinion of a health professional that the plaintiff's claims are valid. *Barnett v Hidalgo*, 478 Mich 151, 163-164; 732 NW2d 472 (2007). To dismiss plaintiff's claim under these circumstances would be to elevate form over substance, which I decline to do.

/s/ E. Thomas Fitzgerald