IN THE COURT OF CLAIMS OF OHIO

LINDA BROWN Plaintiff v. THE OHIO STATE UNIVERSITY WEXNER MEDICAL CENTER Defendant	Case No. 2019-01118JD Magistrate Holly True Shaver DECISION OF THE MAGISTRATE

{¶1} Plaintiff brings this action alleging claims of medical negligence arising from her care and treatment by defendant's employees, Nhung Pham, M.D., and Rebecca Kuennen, M.D. The issues of liability and damages were bifurcated, and the case proceeded to trial on the issue of liability.

Findings of Fact

{¶2} Plaintiff, Linda Brown, has suffered from recurring sinus infections since 2012. Plaintiff routinely sought medical treatment at both defendant's Gahanna Urgent Care (also referred to as After Hours) and defendant's OSU Morehouse Clinic (Morehouse). Plaintiff suffers from a number of allergies. On February 21, 2015, plaintiff went to her optometrist, Su-Pei Li, O.D., complaining that her right eye had been burning for a week. (Def. Ex. L.2.) Dr. Li diagnosed plaintiff with edema (swelling) of her right eyelid and punctate keratitis of her right eye, where the front surface of the eye was showing inflammation and dryness. (Id.) Dr. Li told plaintiff to discontinue wearing contact lenses and prescribed an antibiotic ointment and eyedrops. (Id.) On February 26, 2015, plaintiff saw Dr. Li again and complained of a painful left eye, with swollen left upper and lower eyelids. (Def. Ex. L.3.) Dr. Li diagnosed plaintiff with edema of the eyelid and acute atopic conjunctivitis and prescribed an antihistamine eye drop. (Id.) On April 2, 2015, plaintiff saw Nhung Pham, M.D., at After Hours, with complaints of nasal congestion,

cough, headache, and eyes reddened with discharge. (Joint Ex. JA., p. 601.) Dr. Pham diagnosed plaintiff with acute conjunctivitis. (Id., p. 613.) On April 13, 2015, plaintiff was examined by a different doctor at Morehouse with complaints of "red eye." (Id., p. 623-4.) It was noted that plaintiff had chronic conjunctivitis of unclear underlying etiology, and she was referred to an ophthalmologist for a consultation. (Id., p. 627.) On April 16, 2015, plaintiff first saw Dr. Rebecca Kuennen as a new patient. In the medical records from that visit, plaintiff presented with eye discharge, eye redness and eye watering, with crusting and matting of both eyes in the morning. (Joint Ex. JB, p. 694.) Plaintiff also reported that she had scabs on her left upper lid with pain for two weeks. (Id.) Plaintiff reported a history of intermittent tearing, causing raw spots on eyelids with burning, and swollen eyelids since February, with worse swelling in her left eye. (Joint Ex. JB, p. 695.) Dr. Kuennen diagnosed plaintiff with rosacea blepharoconjunctivitis of both eyes. (Id., p. 696.) On May 14, 2015, plaintiff saw Dr. Kuennen for a follow-up appointment, and at that time, her eyes were still red. (Joint Ex. JB, p. 704.) Plaintiff complained that both eyes "are still red and burn." (Id., p. 713.)

{¶3} On June 3, 2015, plaintiff was seen by a different doctor at Morehouse for a cat scratch. (Id., p. 714.) On June 11, 2015, plaintiff saw Dr. Kuennen for a follow-up appointment and stated that two weeks ago, her left upper eyelid was swollen and felt like it was filled with fluid. (Id., p. 749.) She happened to take cipro for a cat scratch on her chest. After she was told to discontinue doxycycline and begin cipro, the change in swelling improved dramatically. (Id.) Plaintiff reported that her left eyelid did not seem 100 percent resolved, but it was much better. (Id.) Plaintiff also was seen on September 21, 2015 by a nurse practitioner at After Hours when she complained of bilateral eye redness and irritation, with some yellowish drainage with matting in the mornings. (Joint Ex. JA, p. 803.) She was diagnosed with bilateral conjunctivitis and was prescribed an antibiotic eye drop. (Id., p. 805.) Plaintiff's sister, Marie Bahensky, testified that in 2015, she noticed that plaintiff's eyes were red and that she had dark coloring underneath. Bahensky remarked that plaintiff was constantly going to the doctor about her eyes, but her condition did not improve and that Bahensky encouraged plaintiff to switch doctors to Ohio Health from OSU because Bahensky did not think that plaintiff's doctors knew what they were doing.

{¶4} Plaintiff traveled to New Jersey to visit family for Thanksgiving in 2015.[1] Plaintiff's Ex. 3A is a photograph of plaintiff and her grandson, Benny. In the photo, taken on Thursday, November 26, at 3:56 p.m., plaintiff testified that she thought her left eye looked "tired." Plaintiff's daughter-in-law was concerned about plaintiff's left eye on Friday, November 27. Plaintiff flew back to Columbus on Saturday, November 28.

Sunday, November 29

{¶5} On Sunday, November 29, plaintiff's left eye was hurting, and she sought treatment at After Hours. Dr. Pham treated plaintiff at that visit. Plaintiff testified that she told Dr. Pham that her eye hurt more than it had ever hurt before. The medical records from her office visit with Dr. Pham show that plaintiff was examined at 2:19 p.m. and state the following: "Linda Brown is a 55 year old female who presents complaining of redness, swelling of left upper eye lid and discharge from left eye gradual 3 days ago. Patient states that she [is] very sensitive to environment, she went to her son's house for Thanksgiving and had a reaction to something. Per patient ha[d] similar reaction before when she stayed at another place few years ago. Per patient at that time antibiotics were prescribed did not really help til she started taking oral steroids. Denies history of allergies but she has sensitive skin. Denies change in vision or photophobia. A little crusting on eyelashes this am per patient. No fever. Well otherwise." (Joint Ex. JA, p. 863.)

{¶6} Plaintiff explained at trial that at an earlier, unrelated time, she had stayed in a hotel room that was very dusty, and that she was prescribed either an antibiotic or an antihistamine with steroids. Dr. Pham wrote in the medical record that plaintiff had a temperature of 98.4 degrees, that she was "smiling, nonill appearing except noted swelling and redness of left upper eyelid." (Id., p. 865.) Although plaintiff was not sure whether Dr. Pham had asked her to move her eyes during this appointment, she recalled that Dr. Pham used a flashlight to examine her. The medical records state: "Eyes: EOM (extra-occular movement) are normal. Pupils are equal, round, and reactive to light. There is swelling and redness of left upper eyelid. Skin appears dry and lichenified. No increased warmth. Mild tenderness to palpation. Mild injection of conjunctiva." (Id., p.

[1] All dates in this portion of the decision refer to the year 2015.

866.) Dr. Pham diagnosed plaintiff with "eye swelling suspect allergic reaction/contact dermatitis." (Id.) Dr. Pham prescribed a "Medrol dospak, polytrim" and advised plaintiff to "Follow up with primary care provider if no improvement. Reevaluate sooner if worse. Patient comfortable and agreeable with plan." (Id.) Despite the medical record, plaintiff testified that her left eye was swollen shut during this visit and she did not believe that Dr. Pham had opened her left eyelid or examined her left eye. Plaintiff did not take any photographs of her face on Sunday, November 29. After the appointment with Dr. Pham, plaintiff filled her prescriptions and took the prescribed medications. Plaintiff stated that the Medrol dose pack was similar to a medication that she had taken previously.

Monday, November 30

{¶7} On the morning of November 30, plaintiff's left eyelid was worse, had blisters, and was swollen shut. Plaintiff realized that she needed to see her eye doctor. Plaintiff took a picture of her face at 8:25 a.m. (Plaintiff's Ex. 3B.) Plaintiff contacted her optometrist, Dr. Su-Pei Li, and made the first available appointment.[2] The notes from the visit with Dr. Li state: "four days swollen upper lid left eye, last two days gotten worse, expressing mucous from lashes, started out itchy and then bumps formed." (Joint Ex. JC, p. 1.) Dr. Li noted that plaintiff complained of "itchy eyes." (Id.) Dr. Li did not perform a complete exam, which she testified would include dilation of the pupils, but she performed a slit-lamp exam on both eyes, externally and internally. Dr. Li testified about her exam findings, as stated in Joint Ex. JC, p. 2. Plaintiff's pupils were "Equal Round Reactive to Light & Accommodation;" plaintiff's pupils were normal and she did not show signs of afferent pupillary defect; Dr. Li asked plaintiff to move her eyes up and down and found plaintiff's "Extraocular Muscles Full and Smooth"; plaintiff's "Uncorrected Visual Acuity" was "OD 20/400; OS 20/400," which means that her vision was 20/400 without eyeglasses; [3] plaintiff's eyelids and lashes were noted to be "Clear OD; Edema UL OS grade 2" which Dr. Li explained meant that her right eyelids and lashes were clear, but her left upper lid showed moderate swelling: grade 2 on a 1 to 4 scale. The remainder of

[2] Plaintiff has not brought a claim regarding Dr. Li's care in this case.

[3] OD means right eye; OS means left eye; OU means both eyes.

Dr. Li's notes state: "Conjunctiva: Clear & White OU; Cornea: Clear OU; Anterior Chamber: Deep & quiet, no cell or flare OU; Iris: Within normal limits OU." (Joint Ex. JC, p. 2.) Plaintiff and Dr. Li both testified that Dr. Li used the slit lamp to examine plaintiff's eyes. However, plaintiff disputed Dr. Li's testimony that she opened her left eyelid to examine her eye. Plaintiff testified that her left eye was swollen shut and was adamant that the interior of her left eye was not examined. Dr. Li diagnosed plaintiff with a "hordeolum internum left upper eyelid," which Dr. Li described as inflammation from an infection of the meibomian glands being clogged inside the upper lid of the left eye. Dr. Li stated that plaintiff had distinct bumps inside the eyelid. Dr. Li referred plaintiff to Dr. Kuennen for confirmation of diagnosis and treatment. (Id.) Dr. Li called Dr. Kuennen's office and scheduled an appointment for plaintiff at 1:30 p.m. Plaintiff remembers Dr. Li saying that she "needed to be seen today" when she called Dr. Kuennen's office. Dr. Li testified that because plaintiff reported that the condition had worsened over the past two days, she did not want plaintiff to wait for treatment, and she thought it was urgent that plaintiff see a specialist.

{¶8} Once plaintiff arrived at Dr. Kuennen's office, she was taken to the waiting room and then was seen by ophthalmic technician, Leslie Valentino. According to plaintiff, because her left eye was swollen shut, Leslie could not check her left eye. In the base ophthalmology exam section, Valentino's notes state: "Visual Acuity (Snellen – Linear) Right 20/20, Left unable due to swelling." (Joint Ex. JB. p. 873.) Plaintiff took the medications from Dr. Pham to Dr. Kuennen to show her what she had been prescribed. Plaintiff had taken the Sunday and Monday doses of the Medrol dose pack before she saw Dr. Kuennen. Dr. Kuennen's notes state: "Swollen Eyelid. Left upper lid x 3 days, went to After Hrs Clinic 11/29/15 & given polymyxin & oral pred dose pack." (Id., p. 868.) Dr. Kuennen diagnosed plaintiff with preseptal cellulitis of her left eye. (Id.) Dr. Kuennen prescribed oral Keflex, an antibiotic, and had plaintiff continue with the Medrol dose pack and the polymyxin eyedrops that Dr. Pham had prescribed. (Id., p. 874-5.) Dr. Kuennen wrote in the medical record: "Preseptal cellulitis OS – worsening over last 4-5 days – left eye completely swollen shut – ocular motility wnl (within normal limits)." (Id., p. 878.) Dr. Kuennen asked plaintiff to return in about 4 days for follow-up care. (Id.) Plaintiff recalled that Dr. Kuennen asked her to move her eyes up, down, left, and right during the

examination, but plaintiff was adamant that Dr. Kuennen did not open her left eye. Plaintiff stated that Dr. Kuennen told her if it got worse or if she could not move her eyeball she should go to the ER. However, plaintiff denied that Dr. Kuennen warned her to look for signs of a bulging eyeball (proptosis) or that the infection of her eyelid could spread to the back of her eye. Plaintiff testified that Dr. Kuennen made her feel like she was going to be okay.

{¶9} After the appointment, plaintiff waited in line at Dr. Kuennen's office to make a follow-up appointment, and while in line, she took a photo of her face. (Plaintiff's Exhibit 3D, taken at 2:53 p.m.) Plaintiff testified that this photo shows that her face was swollen near her temple, she had blisters on her eyelid, and her nose was swollen. Plaintiff drove to the pharmacy and picked up her prescriptions. Plaintiff arrived home between 4 and 5 p.m. Plaintiff testified that at around 4:30 p.m., it became painful to move her eyeball. Plaintiff felt like her condition was getting worse. Once she got home, she took photos of her face and sent them to her son, Bryan, and her sister, Marie Bahensky. (Plaintiff's Ex. 3E and 3F, taken at 5:09 p.m. and 5:10 p.m., respectively.) After receiving those photos, Bahensky told plaintiff that she was taking her to the ER. Bahensky testified that the pictures plaintiff sent were "horrific, like a monster freak picture." Bahensky testified that plaintiff's eye was bulging. Bahensky could not believe what she saw. Although Bahensky suggested that they go to Riverside Hospital, plaintiff stated that she told her sister to take her to OSU because OSU had all her medical records, and plaintiff did not think she could give an accurate history of her illness because she felt so bad.

{¶10} Once at the ER, plaintiff was seen and treated right away. Plaintiff arrived at the ER at 6:23 p.m. and was examined by a nurse at 6:24 p.m. (Joint Ex. JF, p. 886.) The nurse's notes state: "Pt's left eye is red, swollen shut and pt states very painful. Pt was at her eye doctor's office today where she was given an antibiotic. Pt states she had a fever of 100 this afternoon, and did take Tylenol. Pt states the eye doctor told her to come to the ED if her eyeball became painful to move which pt states started about 4:30. Pt's left side of her face is red and warm to the touch. Pt states this has been spreading in the last hour. Pt also complains of pain to her left ear and her neck." (Joint Ex. JF, p. 887.) It was noted that plaintiff had pain with EOM that was significant, and that she had

a history of Factor 5 Leiden mutation (FVL). (Id.) Plaintiff was admitted for "superior orbital vein thrombosis with FVL and pre- and post-septal cellulitis, concern for cavernous vein thrombosis." (Id., p. 886.) Plaintiff was admitted to the ER at 7:00 p.m. (Joint Ex. JF, p. 880.)

{¶11} During her time in the ER, plaintiff took more photos. (Plaintiff's Ex. 3G, taken at 6:30 p.m.; Plaintiff's Ex. 3H, taken at 7:50 p.m.) Plaintiff continued to feel bad, and she testified that the doctors were concerned about the pressure in and around her eye. Plaintiff remembers being placed on IV antibiotics. Plaintiff underwent surgery on her eyelid, a canthotomy, to relieve pressure. Plaintiff stated that the doctors told her she was in a life-or-death situation, and that they were concerned that the infection might spread to her brain. Plaintiff stated that she was told that she could go blind if surgery were performed. Bahensky stayed the night in the ER with plaintiff. According to Bahensky, many medical personnel were going in and out of plaintiff's room. Bahensky felt a sense of doom and testified that when the doctors told her to get plaintiff's sons to the hospital, she feared that plaintiff might die.

{¶12} Plaintiff underwent multiple surgeries on her left eye and the areas around it, including an orbital wall decompression, a sphenoid sinusotomy, a total ethmoidectomy, and drainage of an orbital abscess. (Joint Ex. JF, p. 881.) Plaintiff remained in the hospital for approximately two weeks. Plaintiff now suffers from permanent double vision in her left eye.

{¶13} Plaintiff alleges that Dr. Pham was negligent when she failed to properly diagnose and treat plaintiff's presenting condition; that she negligently prescribed a steroid (Medrol dose pack) during an active, uncontrolled infection, which suppressed plaintiff's immune system and allowed the infection to spread; and that she negligently failed to send plaintiff to the ER for imaging studies and the administration of IV antibiotics. Plaintiff alleges that Dr. Pham's negligence allowed the infection to worsen, significantly reducing plaintiff's chances of a better outcome. Plaintiff alleges that Dr. Kuennen was negligent when she failed to properly diagnose and treat orbital cellulitis; that she negligently continued the prescription of a Medrol dose pack in the presence of an active, uncontrolled infection; and that she negligently failed to send plaintiff to the ER for imaging

studies and the administration of IV antibiotics, which caused a loss of chance for a better outcome and led to permanent injuries.

Testimony of Treating Physicians at Issue

{¶14} Nhung Pham, M.D., is board-certified in internal medicine and is licensed in Ohio. As an urgent care provider, she deals with acute illnesses. Dr. Pham testified that during patient visits, she generally has before her a clear computer screen, a face sheet, the patient's medical history, including a medication list, and any noted allergies. Dr. Pham stated that the medical records presented as trial exhibits have more information than what was available to her during plaintiff's visit. Dr. Pham did not look at plaintiff's prior medical records during her visit on November 29. Dr. Pham did not have an independent recollection of the visit with plaintiff and stated that she was relying on the medical records from the visit to refresh her recollection. On November 29, Dr. Pham treated plaintiff as a new patient because she was not aware that she had seen plaintiff before. Plaintiff's chief complaint was that she had a reaction to something at her son's house. Dr. Pham did not do a vision check. Dr. Pham testified that according to the medical records, she touched plaintiff's left eye, and that there was mild tenderness to palpation but no warmth in the area. Dr. Pham's records show that plaintiff had redness and swelling of her left, upper eyelid, and that the skin of her eyelid was dry and lichenified. Dr. Pham stated that lichenification is a description of the skin being dry and flaking. Dr. Pham stated that she did not document plaintiff's right eye, but she would have looked at both eyes to check movement. Dr. Pham diagnosed plaintiff with "allergic reaction/contact dermatitis" and prescribed a Medrol dosepak and Polytrim (antibiotic eye drops) for conjunctivitis. Dr. Pham explained that conjunctivitis has multiple causes: allergic, viral, or bacterial. Dr. Pham prescribed the medication so that plaintiff's condition would not turn into bacterial conjunctivitis from plaintiff rubbing her eyes. Dr. Pham testified that she did not refer plaintiff to an ophthalmologist or directly to the ER because there was no indication for it.

{¶15} Dr. Pham stated that until there is severe pain, pain with eye movement, and proptosis (bulging of the eye), the condition is not orbital cellulitis. Dr. Pham stated that she does not treat orbital cellulitis, and that if plaintiff had shown signs of it, she would

have referred her to an ophthalmologist. Dr. Pham stated that plaintiff did not tell her that she was suffering from sinusitis. Dr. Pham based her diagnosis on plaintiff's statement that she had a reaction to something while she was visiting her son, along with plaintiff's presentation with dry lichenification of her left eyelid. Dr. Pham testified that cellulitis is an infection, and a patient with cellulitis would appear with skin that is warm to the touch. Dr. Pham also stated that orbital cellulitis presents with symptoms such as severe eye pain, pain with eye movement, inability to open the eye, change in vision, and proptosis. According to Dr. Pham, during this visit, plaintiff had no signs of orbital cellulitis, and her eye exam was unremarkable except for the swelling of her eyelid.

{¶16} Dr. Pham stated that she prescribed a Medrol dose pack, which is a steroid that is taken over a 6-day period on a weaning dosage, because it was indicated for plaintiff's condition. Dr. Pham stated that two full doses of Medrol dose pack would be 44 milligrams: 24 plus 20 milligrams over two days. Dr. Pham stated that she does not typically prescribe topical steroids for the eye because they can cause skin thinning and breakdown, and if they are rubbed into the eye, a patient can lose vision, or develop cataracts or glaucoma. Dr. Pham explained that Polytrim is an antibiotic eye drop, and that she prescribed it because plaintiff stated that she had experienced crusting of the eye, and she did not want plaintiff to introduce an infection into her eye by rubbing it. Dr. Pham stated that she did not prescribe an oral antibiotic or order any imaging studies at that time because neither was warranted. Dr. Pham stated that she did not believe that plaintiff had orbital cellulitis at the time of her visit. Dr. Pham acknowledged that her differential diagnosis was not contained in the medical records.

{¶17} **Dr. Rebecca Kuennen, M.D.,** is a board-certified ophthalmologist and is licensed in the state of Ohio. Dr. Kuennen agreed that plaintiff was not a new patient to her on November 30 but stated that she usually does not look at a patient's past medical records prior to an office visit. Dr. Kuennen did not review Dr. Pham's note during or prior to plaintiff's visit on November 30.

{¶18} Dr. Kuennen stated that plaintiff did not have contact dermatitis, but, rather, she had preseptal cellulitis. Dr. Kuennen would not have prescribed a steroid to treat plaintiff. However, she did not tell plaintiff to discontinue the Medrol dose pack that had

been prescribed by Dr. Pham because she was concerned that if she abruptly stopped it, the inflammation could get worse.

{¶19} Dr. Kuennen agreed that the orbital septum usually prevents an infection on the front of the eye (preseptal) from spreading to the back of the eye (orbital) but noted that the septum must be intact to prevent the infection from spreading. Dr. Kuennen agreed that the sinuses are a way for infection to reach the back of the eye. Dr. Kuennen testified that preseptal cellulitis can be caused by an infection in the skin of the eyelid, an infection in adjacent structures to the eye, by sinus infections, and by an infection in the bloodstream. Dr. Kuennen stated that orbital cellulitis is caused most commonly by an infection in the ethmoid sinus. Dr. Kuennen stated that orbital cellulitis is rare, but she has seen it approximately 20 times in her career. Dr. Kuennen stated that preseptal cellulitis is more common, and that she sees that in approximately five to ten patients per month. To treat preseptal cellulitis, she would prescribe a broad-spectrum antibiotic that covers skin infections, like Keflex. Dr. Kuennen stated that the signs of orbital cellulitis include pain with eye movement, restricted eye movement, proptosis in any degree, a decrease in vision, and an afferent pupillary defect. Dr. Kuennen testified that if she suspected orbital cellulitis but was not sure, she would order a CT scan for confirmation. Dr. Kuennen agreed that orbital cellulitis is a dangerous condition, and that time is of the essence. Dr. Kuennen stated that once orbital cellulitis is diagnosed, the treatment is to start IV antibiotics in the hospital, have close follow up, and possibly do another CT scan in a few days to see if an orbital abscess develops, which should be drained. Dr. Kuennen agreed that IV antibiotics may prevent an orbital abscess from occurring.

{¶20} Although both plaintiff and Dr. Kuennen agree that plaintiff's left eyelid was swollen shut on November 30, Dr. Kuennen testified that she opened plaintiff's left eyelid during her examination. Plaintiff denies this, and Dr. Kuennen's medical records do not specifically mention that she physically opened plaintiff's left eyelid. Dr. Kuennen also testified that she did a palpation and pushed on plaintiff's eye. Plaintiff denies this as well, and it is not documented in the medical records. The medical records from the visit show that Dr. Kuennen noted that plaintiff's upper and lower left lids showed edema and erythema, and that the conjunctiva of her left eye showed "1+ injection." (Joint Ex. JB, p. 873.) Dr. Kuennen stated that the pressure in plaintiff's left eye did not feel high, and that

the inside of her eye was very quiet. Dr. Kuennen stated that she tested plaintiff's ocular motility by asking plaintiff to move her eyes left, right, up, and down to rule out orbital cellulitis. Dr. Kuennen testified that she advised plaintiff that if she noticed a change in vision, any restriction of motility, or proptosis to go immediately to the ER. The medical records do not reflect this; rather, it is noted that plaintiff should return in about four days. (Id., p. 878.)

{¶21} When asked what specific steps she took to rule out orbital cellulitis, Dr. Kuennen stated that she opened her left eyelid, checked her vision, and looked at her pupils. Dr. Kuennen testified that she was focused on eye motility and pain, and that she also checked for proptosis. In this case, Dr. Kuennen believes that plaintiff had preseptal cellulitis that spread to orbital cellulitis. Dr. Kuennen testified that it was a very rapid progression in this case, and that plaintiff was "fine" when she left her office.

{¶22} Dr. Kuennen stated that she is familiar with the Chandler stages of orbital cellulitis. Defendant's Ex. O is a photo of post-septal (Chandler II) orbital cellulitis. Dr. Kuennen testified that if the person in this photo were in her office and she could not open their eye, she would send them for a stat CT. Dr. Kuennen stated that the photo that plaintiff took at 8:25 a.m. is similar to what Dr. Kuennen remembers plaintiff appearing like on November 30. However, Dr. Kuennen denied that the photo taken at 2:53 p.m. was similar to what she remembered plaintiff appearing like. Dr. Kuennen stated that if she could not open plaintiff's eye, and her eye looked like the photo taken at 2:53 p.m., she would have sent plaintiff to the ER for a CT scan to rule out orbital cellulitis. Dr. Kuennen agreed that it is not appropriate to prescribe steroids in an uncontrolled orbital cellulitis.

{¶23} On rebuttal, plaintiff testified that Dr. Kuennen did not physically open her left eye, and that Dr. Kuennen did not tell her that she might have an infection behind her left eye.

Plaintiff's Experts

Dennis Miller, M.D.

{¶24} Plaintiff's first expert witness, Dennis Miller, M.D., is a physician in the state of New York, who is board-certified in both internal medicine and infectious diseases.

Dr. Miller spends approximately 85 percent of his professional time in the active clinical practice of medicine.

{¶25} Dr. Miller discussed the differences among contact dermatitis, allergic reactions, preseptal cellulitis, and orbital cellulitis. Dr. Miller stated that contact dermatitis could present in one or both eyes, however, contact dermatitis typically occurs when someone touches an irritant and then touches their skin. An example of something that causes contact dermatitis is poison ivy. Dr. Miller stated that eye redness from an allergic reaction typically occurs in both eyes and would subside once the person is no longer exposed to the allergen. Dr. Miller stated that both preseptal and orbital cellulitis are bacterial infections of the eye. Dr. Miller stated that preseptal cellulitis, anterior to the orbital septum, is more common than orbital cellulitis, which occurs behind the orbital septum. Dr. Miller has encountered preseptal cellulitis approximately 15 to 20 times in his career, whereas he has encountered orbital cellulitis only three times in his career. Dr. Miller stated that the risks to a patient with a bacterial eye infection include destruction of muscles and nerves around the eye, damage to the optic nerve causing blindness, damage to the structure of the eye, damage to arteries and veins, and the most severe outcome would be infection spreading to the brain and causing a brain abscess.

{¶26} Upon review of the records and depositions in this case, Dr. Miller stated that plaintiff appeared to have a "smoldering infection" that had been going on for months prior to the time that plaintiff sought treatment on November 29. Dr. Miller mentioned that when plaintiff had been treated for a cat scratch in the summer, her chronic eye redness improved after she had been prescribed antibiotics.

{¶27} With regard to plaintiff's visit with Dr. Pham, Dr. Miller testified that contrary to plaintiff's testimony, the medical records show that on November 29, plaintiff's left eye was not completely swollen shut. However, Dr. Miller was critical of Dr. Pham misdiagnosing plaintiff with contact dermatitis and prescribing oral steroids. According to Dr. Miller, Dr. Pham failed to recognize the infection process that was going on. Dr. Miller stated that steroids inhibit the immune response and mask signs and symptoms of infection. Dr. Miller also stated that it was a deviation from the standard of care to prescribe steroids on November 29, because plaintiff was suffering from a severe bacterial infection of the eye: preseptal cellulitis. Dr. Miller opined to a reasonable degree

of medical probability that the standard of care for an internist, an urgent care physician, or an opthalmologist on November 29 was to admit plaintiff to the hospital for IV antibiotics and order imaging studies to determine whether it was preseptal or orbital cellulitis. Dr. Miller also opined that Dr. Pham breached the standard of care by failing to review plaintiff's prior medical records to see that she had been on multiple oral and topical antibiotics for eye redness and discharge. Dr. Miller opined that if Dr. Pham had sent plaintiff to the ER on November 29, the earlier administration of IV antibiotics would have prevented plaintiff from having surgery. Dr. Miller agreed that Dr. Pham's notes on November 29 do not state that plaintiff exhibited proptosis, decreased eye motility, or a significant change in vision, all of which are signs of orbital cellulitis. However, Dr. Miller noted that plaintiff did complain of pain in eye during her visit with Dr. Pham, and that plaintiff's left eye was red, swollen, and had a discharge.

{¶28} With regard to Dr. Kuennen, Dr. Miller stated that she had treated plaintiff multiple times from April to November, and that she should have taken a culture of any drainage of plaintiff's eye prior to the November visit. Dr. Miller was also critical of Dr. Kuennen's failure to review plaintiff's past medical records which would have revealed a smoldering infection with repeated courses of antibiotics. Dr. Miller stated that plaintiff had preseptal cellulitis on November 29, which evolved into orbital cellulitis on November 30. Dr. Miller opined that it was a deviation from the standard of care for Dr. Kuennen to not immediately send plaintiff to the ER. The photographs and medical records show that at the time of plaintiff's visit with Dr. Kuennen, plaintiff was complaining of a tacky discharge from her eye, pain in the eye, and an infection of her eyelid. Dr. Miller stated that at the time of the visit with Dr. Kuennen, it was clear that plaintiff was suffering from a severe infection, that IV antibiotics were required, and that a CT scan was necessary to determine the extent of infection, the origin of infection, and any abscess that might require surgical intervention. Dr. Miller stressed that IV antibiotics take time to work, and that the delay in plaintiff's admission to the ER made a difference with the severity of the infection. Dr. Miller opined that Dr. Kuennen's deviations from the standard of care directly and proximately led to the complications plaintiff suffered, including surgery.

{¶29} Dr. Miller stated that the source of the infection, whether from the ethmoid sinus or from the skin or bloodstream, is not relevant to his opinions on the standard of

care. Dr. Miller stated that the photographs show that it was clear that plaintiff was suffering from an accelerating process. Dr. Miller stated that progressive swelling of the eye is a sign of orbital cellulitis. Dr. Miller stated that the photographs show that something was rapidly progressing in plaintiff's eye. Dr. Miller stated that Dr. Kuennen's diagnosis of preseptal cellulitis was wrong, and there is nothing in the record to show that she opened plaintiff's left eye that day. The photographs show that plaintiff's eye was swollen shut. According to Dr. Miller, the notes from the visit with Dr. Kuennen do not show that she performed an exam of plaintiff's left eye. Dr. Miller also stated that plaintiff had a low grade fever in Dr. Kuennen's office, which is another sign of infection. Dr. Miller acknowledged that the ER notes state that plaintiff's eyeball became painful to move around 4:30 p.m. on November 30, and that the left side of her face was red and warm to the touch. Dr. Miller acknowledged that these two signs of orbital cellulitis were not present in the notes from Dr. Kuennen's examination.

{¶30} Dr. Miller was not critical of the care that plaintiff received in the ER, because IV antibiotics and imaging studies were ordered right away. Dr. Miller stated that more likely than not, IV antibiotics given four to five hours earlier would have stopped the progression of infection or at least limited the extent of surgery. Dr. Miller acknowleged that plaintiff's infection continued to progress in this case after she was started on IV antibiotics.

William May, M.D.

{¶31} Plaintiff's second expert, William May, M.D., testified that he is a board-certified ophthalmologist, licensed in Nevada and California. Dr. May has treated thousands of patients with eye infections, including staph infections of the eye. Dr. May stated that 100 percent of his professional time is spent in the active clinical practice of ophthalmology. Dr. May performs eye surgery and teaches ophthalmology residents.

{¶32} Dr. May explained that the orbital septum is a tissue plane between the cartilaginous portion of both upper and lower lids and the bone at the rim of the orbit that protects the eye socket. Dr. May stated that there is no evidence in this case that plaintiff's orbital septum was breached. Dr. May explained that the orbital septum is usually extremely effective in preventing preseptal cellulitis from penetrating through to

become orbital cellulitis. Dr. May stated that if a doctor diagnoses preseptal cellulitis, they should also consider orbital cellulitis. Dr. May stated that the development of a disease is a progression, and it is important to diagnose eye diseases as early as possible, because if left undiagnosed, pressure on the optic nerve can cause blindness.

{¶33} In contrast to Dr. Miller, Dr. May testified that in this case, plaintiff never had preseptal cellulitis; it was orbital cellulitis from the beginning. Dr. May stated that bacteria traveled from the ethmoid sinus across the laminate papericia, a thin bone, to get into the orbit. Dr. May stated that the vast majority of cases of orbital cellulitis originate from bacteria in the ethmoid sinus. Dr. May stated that orbital cellulitis can originate from an active sinusitis or just from the bacteria in the lining of the sinus. Dr. May stated that identifying orbital cellulitis at the earliest possible point in time will result in a better outcome for the patient. Dr. May warned that orbital cellulitis can be fatal.

{¶34} Dr. May stated that he has no criticisms of the care that plaintiff was provided in the ER. Dr. May stated that the CT scan taken in the ER showed proptosis. Dr. May explained that plaintiff underwent a lateral canthotomy and cantholysis, which was a procedure to disconnect the tendon that holds the eye in the socket from the bone to release pressure. Dr. May stated that the procedure saved plaintiff from blindness. Dr. May also stated that plaintiff underwent an orbital decompression surgery and four sinusectomies. Dr. May stated that operations behind the eye should be avoided because they can cause harm to vision, including double vision. Dr. May explained that the ER physicians acted appropriately by administering IV antibiotics and delaying surgery for 24 hours to see if the IV antibiotics had enough time to eliminate the need for surgery.

{¶35} With regard to Dr. Pham, Dr. May stated that she misdiagnosed plaintiff with contact dermatitis, when plaintiff presented with an active bacterial infection. Dr. May stated that contact dermatitis presents with severe itching and “weepiness,” and is usually caused by soap, linens, or chemicals that contact the skin. Dr. May noted that plaintiff’s symptoms on November 29 did not include itching or weepiness. Dr. May also criticized the fact that Dr. Pham prescribed steroids, the Medrol dose pack, in the face of an active infection, because a side effect of steroids is to make an active bacterial infection worse. Dr. May stated that if Dr. Pham had sent plaintiff for a CT scan on November 29, the scan would have shown inflamed orbital tissue. Dr. May opined to a reasonable degree of

medical probability that Dr. Pham deviated from the standard of care by failing to make the appropriate diagnosis of orbital cellulitis, by prescribing steroids, and by failing to order a CT scan. Dr. May further opined that Dr. Pham's deviations from the standard of care proximately caused a foreseeable worse outcome for plaintiff because they resulted in both a delay of the proper diagnosis and the steroids allowed the infection to worsen before antibiotics were administered. Dr. May opined that if Dr. Pham had complied with the standard of care, it would have been much less likely for plaintiff to undergo the orbital decompression and sinus surgeries.

{¶36} Regarding Dr. Kuennen, Dr. May testified that it is very important to consider orbital cellulitis with signs of an eye infection, and orbital cellulitis should have been included in Dr. Kuennen's differential diagnosis list. Dr. May stated that Dr. Kuennen's failure to diagnose orbital cellulitis was a serious mistake. In addition, Dr. May stated that the prior visits that Dr. Kuennen had with plaintiff, where plaintiff had been diagnosed with sinusitis, raise concerns because chronic sinusitis is a risk factor for orbital cellulitis. Dr. May opined to a reasonable degree of medical probability that Dr. Kuennen's failure to diagnose orbital cellulitis and send plaintiff directly to the ER for the administration of IV antibiotics and imaging studies delayed the proper care plaintiff required and that delay proximately caused additional damage to plaintiff. Dr. May stated that there is a "tipping point" with orbital cellulitis, and that Dr Kuennen's failure to diagnose plaintiff with orbital cellulitis allowed the infection to go past the tipping point where antibiotics alone could not cure the infection. Dr. May opined that the infection more likely than not caused permanent damage to plaintiff, including double vision, and although there are surgeries designed to improve double vision, with the level of damage that plaintiff has suffered, she would still have side double vision if she had additional surgeries. When asked whether the surgery or the infection caused plaintiff's double vision, Dr. May acknowledged that it is "very hard to tease out." However, Dr. May stated that plaintiff had a chance of avoiding this outcome on both November 29 and 30, and that she had a higher likelihood of avoiding this outcome on November 29 because she would have had an additional 24 hours of IV antibiotics.

{¶37} On cross-examination, it became apparent that Dr. May offered his opinions based on the mistaken assumption that plaintiff's left eye was swollen shut on November

29. Dr. May acknowledged that when plaintiff saw Dr. Pham there was no evidence of proptosis, decreased eye motility, or pain with eye movement.

{¶38} Dr. May testified that when Dr. Kuennen examined plaintiff on November 30, plaintiff likely had proptosis and limited eye movement. Dr. May criticized Dr. Kuennen for not considering orbital cellulitis on her differential diagnosis. Dr. May stated that the latest point in time that the correct diagnosis could have been made and plaintiff could have recovered without surgery was at 3:00 p.m. on November 30. Dr. May stated that in the photo taken at 2:53 p.m. while plaintiff was waiting in line at Dr. Kuennen's office to schedule her next appointment, he sees obvious orbital cellulitis. Dr. May testified that there was no doubt in his mind that the photo showed orbital cellulitis at that time and stated that if Dr. Kuennen had immediately sent plaintiff to the ER, she would have received IV antibiotics and would have had a better outcome. Dr. May added that Dr. Kuennen could have called the ER to let them know that plaintiff needed imaging studies and IV antibiotics if she had referred plaintiff directly to the ER, which would have sped up the process.

Defendant's Experts

Bruce Farber, M.D.

{¶39} Bruce Farber, M.D., testified that he is an infectious disease physician licensed to practice in New York. Dr. Farber spends more than 50 percent of his professional time in the active clinical practice of medicine. Dr. Farber testified that an infection is not diagnosable during the incubation period, and that it is only diagnosable once it reaches a critical mass. Dr. Farber also stated that corticosteroids do not suppress the immune system unless they are used for two weeks or longer. Dr. Farber disagreed with Dr. May's opinion that taking two doses of a Medrol dose pack would have suppressed plaintiff's immune system. Dr. Farber stated that Medrol dose packs are prescribed commonly for poison ivy, and that the two doses that plaintiff took were a "trivial amount."

{¶40} Dr. Farber stated that preseptal cellulitis needs to be treated aggressively so that it does not cross into orbital. Dr. Farber was not provided with the photographs of plaintiff's face when he wrote his expert report but testified that he has since viewed the

photographs and they do not change his opinion. Dr. Farber opined that administration of IV antibiotics on November 29 would not have changed the outcome in this case. Dr. Farber stated that antibiotics take time to work, and that there was not enough time in this case to prevent the development of an abscess or thrombosis. Dr. Farber stated that the development of the thrombosis of the orbital vein was a "quirky" part of this case, and that antibiotics would not have changed that. Dr. Farber also stated that if Dr. Kuennen had sent plaintiff directly to the ER for a CT scan and IV antibiotics, there would not have been a significantly different outcome. Dr. Farber stated that there was a very short time window in this case, and that administration of IV antibiotics four hours earlier would not have changed anything. Dr. Farber also stated that he believed the source of the infection was not the sinuses, but, rather, the skin. However, Dr. Farber agreed that the source of the infection does not matter because the treatment approach would be the same whether the infection originated in the skin or the sinuses.

{¶41} On cross-examination, Dr. Farber stated that it was more likely than not that the infection started before the thrombosis. Dr. Farber stated that antibiotics kill the dividing organisms, but antibiotics cannot stop the inflammatory response. Dr. Farber stated that it generally takes antibiotics 24 to 48 hours to see any effects. Dr. Farber stated that most of the damage in this case was caused by inflammation in a closed space in the eye. Dr. Farber stated in retrospect, the infection was in the orbit when Dr. Kuennen saw plaintiff, and it may have been there on November 29. However, Dr. Farber stated that no one can definitively say when the infection began. Dr. Farber stated that even with the benefit of hindsight, the outcome in this case could not be altered.

Andrew Lee, M.D.

{¶42} Andrew Lee, M.D., a neuro ophthalmologist, is board certified in ophthalmology in the state of Texas. Dr. Lee spends fifty percent of his professional time in the active clinical practice of medicine. Dr. Lee explained that he encounters patients with preseptal cellulitis approximately once every 3 to 5 months, and patients with orbital cellulitis approximately 2 times per year. Dr. Lee stated that signs of orbital cellulitis include lack of extra ocular motility, proptosis, change in vision, and an abnormal pupil exam. Dr. Lee explained that extra ocular motility is restricted when eye muscles are

inflamed; that proptosis occurs when tissue behind the eye is inflamed and pushes the eyeball forward; that a change in vision occurs when the optic nerve is damaged; and that an afferent pupillary defect occurs when there is a difference between the pupils in reaction to light. Dr. Lee stated that not all cases of orbital cellulitis present with a change in vision. Dr. Lee stated the signs of preseptal cellulitis include a swollen eyelid and inflammation in front of the septal wall.

{¶43} Dr. Lee opined that Dr. Pham did not deviate from the standard of care by not sending plaintiff to the ER. Dr. Lee explained that plaintiff presented with a red and swollen eyelid that was not hot to the touch, and her eyelid appeared lichenified, which means it was dried out and scaly. Dr. Lee also noted plaintiff's extra ocular motility was normal. Dr. Lee opined that Dr. Pham made a reasonable diagnosis of contact dermatitis based upon plaintiff's appearance and the history that plaintiff provided to Dr. Pham. Dr. Lee also stated that when plaintiff saw Dr. Pham, the medical records reflect that plaintiff did not show signs of orbital cellulitis: there was no finding of proptosis, no decreased eye motility, plaintiff did not complain of vision changes and her pupils appeared normal. Dr. Lee opined that if a CT scan were taken on November 29, it would have been extremely unlikely to have shown signs of inflammation behind the eye because of plaintiff's presentation. Dr. Lee further opined that it was within the standard of care to prescribe a Medrol dose pack because it appeared that plaintiff had an allergic reaction. Dr. Lee described a thrombosis of the superior ophthalmic vein as a blood clot that appeared in the vein that carries blood from the eye to the heart. Dr. Lee acknowledged that steroids have been associated with thrombosis, and that it is possible that the Medrol dose pack affected the thrombosis but could not say that it was more likely than not that the Medrol dose pack caused the thrombosis. Dr. Lee opined that Dr. Pham met the standard of care because she checked for signs of orbital cellulitis, and they were not present on November 29.

{¶44} Dr. Lee testified that Dr. Kuennen met the standard of care because she looked for signs of orbital cellulitis during her examination of plaintiff on November 30. Specifically, Dr. Lee stated that Dr. Kuennen found that plaintiff had normal eye motility and no signs of proptosis. Dr. Lee further testified that the medical records from the visit with Dr. Kuennen support the contention that Dr. Kuennen examined plaintiff's left eye.

Dr. Lee stated that preseptal cellulitis is not an emergency and is not referred to the emergency department. Dr. Lee also opined that Dr. Kuennen's decision to continue the Medrol dose pack for inflammation and to prescribe Keflex for infection was appropriate.

{¶45} Dr. Lee discussed the notes from the ER. Dr. Lee noted that on admission, plaintiff complained of pain and fever, and pain with eye movement, which plaintiff reported had started at 4:30 p.m. The ER notes also show that the left side of plaintiff's face was red and warm to the touch, which had been spreading in the last hour. Dr. Lee noted that these were new and worse symptoms. According to Dr. Lee, the signs of orbital cellulitis likely began within an hour of plaintiff's arrival to the ER. Dr. Lee explained that the ER records show that plaintiff developed a superior ophthalmic vein thrombosis and infection behind the eye. Plaintiff was diagnosed with compartment syndrome in the orbit, which was caused because of the thrombosis, or, blockage of the vein, along with infection and inflammation in the orbit. Dr. Lee stated that a lateral canthotomy and cantholysis was performed around midnight on the night that plaintiff was admitted to the ER to release the pressure that was developing behind her eye. Dr. Lee explained that after approximately 24 hours of IV antibiotic therapy, an orbital decompression surgery was performed because an abscess behind the eye needed to be drained, and the infection was still causing damage. After a review of the ER records, Dr. Lee opined that if Dr. Kuennen had sent plaintiff to the ER immediately, it was unlikely that anything would have changed, because it was likely that plaintiff would still have required an orbital decompression surgery.

{¶46} On cross-examination, Dr. Lee stated that preseptal cellulitis can be an early sign of orbital cellulitis, and that orbital cellulitis can present with redness and swelling of the eyelid. Dr. Lee acknowledged that he stated in his expert report that plaintiff presented with signs of both sinusitis and preseptal cellulitis on November 29 and 30. However, neither Dr. Pham nor Dr. Kuennen diagnosed plaintiff with sinusitis, and Dr. Pham did not diagnose plaintiff with preseptal cellulitis. Dr. Lee stated that staph aureus bacteria, which was drained from the abscess, is commonly found in the ethmoid sinus and on the skin. Dr. Lee stated that the ethmoid sinus is the sinus most commonly involved with cases of orbital cellulitis because the septal wall is thinnest there, and bacteria can cross into the orbit from the ethmoid sinus. At trial, Dr. Lee stated that he

could not say with certainty where the origin of the bacteria was, but in his deposition, he stated that it was more likely than not that the infection began in the sinuses. Dr. Lee stated that staph aureus is more likely to cause a problem in chronically inflamed sinuses. Dr. Lee noted that along with the orbital decompression, plaintiff underwent the surgical removal of the linings of her sinuses in this case, and it is reasonable to assume that the sinus surgery was performed to alleviate the source of the staph infection. Dr. Lee explained that the abscess was located inside the intraconal space of the orbit. Dr. Lee stated that in this case, the medial wall of the skull was removed to allow for decompression of the orbital compartment syndrome and for drainage of the abscess and sinuses. Dr. Lee stated that the risk of double vision as a result of removal of the medial wall was outweighed by the need to drain the abscess and sinuses and to resolve the compartment syndrome.

{¶47} Dr. Lee testified at trial that an earlier referral to the ER on November 29 would not have made a difference, however, in his deposition, Dr. Lee stated that he could not say whether an earlier referral would have made a difference. Dr. Lee agreed that a patient does not have to exhibit every symptom of orbital cellulitis to be diagnosed with orbital cellulitis. Dr. Lee stated that only ten percent of patients with orbital cellulitis require surgery, and that the course of treatment for orbital cellulitis is to quickly be placed on IV antibiotics so that the infection does not develop into a life-threatening situation. Dr. Lee stated that in this case, there were multiple factors that led to the thrombosis including the infection and possibly the steroids. Dr. Lee stated that plaintiff's Factor V Leiden deficiency did not cause the thrombosis but was a precipitating factor for the thrombosis. Dr. Lee stated that the thrombosis was probably caused by the extent of the infection. Dr. Lee noted that there continued to be progression of the infection despite the IV antibiotics in the ER.

{¶48} Dr. Lee stated that in the photo taken at 2:53 p.m., he saw lid edema and erythema, but no sinus involvement. In the photo taken at 5:10 p.m., Dr. Lee stated that if plaintiff presented for care at this time, orbital cellulitis should have been considered based upon lid appearance. Dr. Lee stated that plaintiff did not present with symptoms of orbital cellulitis until she was at the ER.

{¶49} Dr. Lee stated that the minimum standard of care was to check for the signs and symptoms of orbital cellulitis: proptosis, eye movement problems, loss of vision, and afferent pupillary defect. Dr. Lee stated that despite the photographs, plaintiff did not exhibit signs and symptoms of orbital cellulitis when she was examined by Drs. Pham and Kuennen.

Conclusions of Law and Analysis

{¶50} The court, as the trier-of-facts, is free to give weight to the evidence and to believe all, part, or none of the testimony of the witnesses. *See State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus; *State v. Green*, 10th Dist. Franklin No. 03AP-813, 2004-Ohio-3697, ¶ 24. Plaintiff is required to establish her civil claims by a preponderance of the evidence. *See Weishaar v. Strimbu*, 76 Ohio App.3d 276, 282, 601 N.E.2d 587 (8th Dist.1991). A preponderance of the evidence "is defined as that measure of proof that convinces the judge or jury that the existence of the fact sought to be proved is more likely than its nonexistence." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 54.

{¶51} To succeed on a medical malpractice claim, a plaintiff is required to establish the following: (1) the standard of care within the medical community; (2) a defendant's breach of that standard of care; and (3) proximate cause between the breach and the plaintiff's injuries. *Carter v. Vivyan*, 10th Dist. Franklin No. 11AP-1037, 2012-Ohio-3652, ¶ 16. Ohio law "imposes on physicians engaged in the practice of medicine a duty to employ that degree of skill, care and diligence that a physician or surgeon of the same medical specialty would employ in like circumstances. * * * Whether negligence exists is determined by the relevant standard of conduct for the physician. That standard is proved through expert testimony. * * * Neither the expert nor the standard is limited by geographical considerations. * * *." *Berdyck v. Shinde,* 66 Ohio St.3d 573, 579, 613 N.E.2d 1014 (1993). Additionally, the custom of the profession dictates the standard of care for a medical doctor:

> '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 * * *.'

Littleton v. Good Samaritan Hosp. & Health Ctr., 39 Ohio St.3d 86, 93, 529 N.E.2d 449 (1988), quoting *Bruni v. Tatsumi*, 46 Ohio St. 2d 127, 346 N.E.2d 673 (1976), paragraph one of the syllabus. The failure to diagnose a condition can serve as a basis for finding medical malpractice "if a given set of circumstances would lead a physician of ordinary skill, care and diligence to reach a particular diagnosis" and the physician's failure "proximately causes injury to the patient." *Katko v. Ohio State Univ. Hosp.*, 10th Dist. Franklin No. 90AP-1117, 1991 Ohio App. LEXIS 3747, at * 14 (Aug. 6, 1991).

{¶52} Upon review of the evidence, the magistrate makes the following findings. Plaintiff has a documented medical history of sinusitis and recurring eye redness, starting in 2014 and continuing through 2015. Plaintiff was referred to Dr. Kuennen for recurring eye problems in April 2015, and had multiple follow-up appointments with her prior to Thanksgiving 2015. Plaintiff also sought treatment many times at defendant's After Hours clinic prior to Thanksgiving 2015.

{¶53} When plaintiff presented to Dr. Pham on November 29, plaintiff's eye had been swollen and red for three days. Although plaintiff testified that her eye was swollen shut at that time, the medical records and plaintiff's expert, Dr. Miller, support Dr. Pham's testimony that plaintiff's eye was not swollen shut on November 29, and that Dr. Pham examined plaintiff's pupils. Dr. Pham, an urgent care provider, examined plaintiff and diagnosed her with contact dermatitis. The evidence shows that plaintiff did not have contact dermatitis on November 29, but, rather, she exhibited the following symptoms of preseptal cellulitis: redness, swelling of her left upper and lower eye lids, crusting on her eyelashes, and a discharge from her left eye which had started three days earlier. Although Dr. Pham described plaintiff's left eye as lichenified, which is dry and scaly, and she found no increased warmth, which would be a sign of infection, she did note that that there was mild "ttp", or, tenderness to palpation. The magistrate finds that mild ttp is another way of saying that plaintiff's left eye hurt when Dr. Pham touched her eyelid with her hand. The magistrate finds that Dr. Pham misdiagnosed plaintiff with contact

dermatitis because she based her diagnosis on plaintiff's statement that she had a reaction to something at her son's house. However, based upon the notes from Dr. Pham's visit, plaintiff's testimony, and the testimony of all the experts, the magistrate finds that a physician of ordinary skill, care and diligence would have diagnosed plaintiff with preseptal cellulitis on November 29, given plaintiff's clinical presentation. The magistrate also finds that Dr. Pham's failure to diagnose plaintiff with preseptal cellulitis was a deviation from the standard of care. Furthermore, the magistrate finds that plaintiff has proven, by a preponderance of the evidence, that Dr. Pham's failure to prescribe antibiotics, and her decision to prescribe steroids when plaintiff exhibited symptoms of an active infection, breached the standard of care. The magistrate further finds that Dr. Pham's misdiagnosis allowed the infection to worsen, and that the progression of the infection without timely administration of antibiotics proximately caused harm to plaintiff. Therefore, the magistrate recommends that judgment be rendered in favor of plaintiff on plaintiff's claims regarding Dr. Pham's conduct.

{¶54} Turning to Dr. Kuennen, the magistrate finds that plaintiff was an established patient of Dr. Kuennen, and Dr. Kuennen knew or should have known of plaintiff's medical history of recurring eye redness and sinus infections, because the electronic medical record was available to her. Plaintiff has proven with her testimony, the medical records, and photographs that her condition had worsened on the morning of November 30. Indeed, the photographs that plaintiff took on November 30 beginning at 8:25 a.m. are striking. In contrast to Dr. Pham's description of plaintiff's left eyelid being dry and flaky on November 29, the photograph taken at 8:25 a.m. on November 30 shows that plaintiff's eyelid was red, swollen shut, and that blisters had formed. The magistrate finds that a reasonable ophthalmologist would have diagnosed plaintiff with a suspected case of orbital cellulitis on November 30, instead of simply diagnosing preseptal cellulitis, based upon the photographs taken at 8:25 a.m. and 2:53 p.m. on November 30, plaintiff's medical history, the testimony of Dr. May and Dr. Lee, and the medical records. Dr. Kuennen even testified that if plaintiff had presented to her looking like she appears in the photograph taken at 2:53 p.m., and she was not able to open her eyelid, she would have immediately sent her to the ER. The problem with Dr. Kuennen's testimony is that the photograph at 2:53 p.m. was taken while plaintiff was standing in line in Dr. Kuennen's

office to make a follow-up appointment. The magistrate finds that it is more probable than not that plaintiff's presentation during her visit with Dr. Kuennen at 1:30 p.m. closely resembled the photograph taken at 2:53 p.m. Based upon the photographs, Dr. Kuennen's exam notes, Dr. May's testimony, Dr. Lee's testimony, and Defendant's Exhibit O, the magistrate finds that plaintiff exhibited signs of both sinusitis and orbital cellulitis when Dr. Kuennen examined her. The magistrate further finds that it is unclear whether Dr. Kuennen actually opened plaintiff's left eyelid during her November 30 visit. Although the notes from that visit describe the conjunctiva of the left eye being injected, or red, the notes also state that her left eyelid was swollen shut and that no vision test was performed. Plaintiff testified credibly that Dr. Kuennen did not open her eye on November 30 because it was too painful. The magistrate finds Dr. Kuennen's testimony that she opened plaintiff's left eye was not particularly persuasive or credible. The magistrate further finds that Dr. Kuennen breached the standard of care when she did not send plaintiff to the ER for imaging studies and IV antibiotics. Although it is apparent that plaintiff had additional worse symptoms of orbital cellulitis at the ER, including pain with eye movement, the magistrate finds that defendant's expert, Dr. Lee, testified credibly and persuasively that a patient does not have to exhibit all four signs of orbital cellulitis for it to be diagnosed. Comparing the photograph taken at 2:53 p.m. with the textbook example of orbital cellulitis in Defendant's Exhibit O, the magistrate finds that plaintiff had signs and symptoms of orbital cellulitis when she sought treatment from Dr. Kuennen on November 30. Specifically, the magistrate finds that plaintiff exhibited redness and swelling of her eyelid, along with swelling of her nose and sinus area at 2:53 p.m. The magistrate finds that Dr. Kuennen's failure to diagnose orbital cellulitis and send her immediately to the ER for IV antibiotics and imaging studies was a breach of the standard of care.

{¶55} The more difficult question is whether Dr. Pham's and Dr. Kuennen's negligence was a proximate cause of plaintiff's subsequent injuries. Dr. Farber testified that even if Dr. Pham or Dr. Kuennen had immediately sent plaintiff to the ER for IV antibiotics, the infectious process was set in motion, and it was inevitable that plaintiff would undergo surgery due to the orbital abscess and the vein thrombosis. However, the magistrate finds Dr. Farber's testimony in this regard unpersuasive for two reasons. First,

defendant's expert, Dr. Lee, acknowledged that only ten percent of patients diagnosed with orbital cellulitis require surgery. Second, Dr. Lee testified that most likely, the infection started before the thrombosis, and both Dr. Lee and Dr. Kuennen acknowledged that orbital cellulitis can cause an orbital abscess. All experts in this case agree that the ER providers' decision to wait and see if the IV antibiotics alleviated the need for surgery was appropriate. Dr. Farber's testimony that it was a foregone conclusion that plaintiff would have had extensive surgery no matter whether Dr. Pham or Dr. Kuennen sent plaintiff to the ER is undermined by the ER physicians' course of conduct in administering IV antibiotics for 24 hours and waiting to see if surgery could be avoided. The magistrate also finds that Dr. May's testimony that IV antibiotics at 3:00 p.m. would have made a difference in this case was credible and persuasive, based upon his extensive experience treating eye infections. The magistrate finds that plaintiff has proven by a preponderance of the evidence that the delay caused by both Dr. Pham's and Dr. Kuennen's misdiagnosis allowed the infection to progress, which proximately caused the extensive surgery that plaintiff underwent and her subsequent permanent double vision. Accordingly, judgment is recommended in favor of plaintiff. The magistrate recommends that a hearing on damages be scheduled in the normal course.

{¶56} *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).*

HOLLY TRUE SHAVER
Magistrate

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Sent to S.C. Reporter 12/12/22