[Cite as *Hogrefe v. Mercy St. Vincent Med. Ctr.*, 2014-Ohio-2687.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Kelly Hogrefe, et al.	Court of Appeals No. L-13-1265
Appellants	Trial Court No. CI0201203290
v.	
Mercy St. Vincent Medical Center, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: June 20, 2014

* * * * *

James S. Casey and Daniel S. Cody, for appellants.

James E. Brazeau, Jean Ann S. Sieler and Jason M. Van Dam, for appellees Mercy St. Vincent Medical Center and Alisa Hanneman, O.T.

Mike DeWine, Ohio Attorney General, and Jeffrey S. Greenley, Assistant Attorney General, for appellees Frank Pompo, M.D. and James Lyions, M.D.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellants, Kelly and Kyle Hogrefe, appeal the judgment of the Lucas County Court of Common Pleas, granting summary judgment in favor of appellees,

Mercy St. Vincent Medical Center (MSVMC) and Alisa Hanneman, and denying appellants' motion to amend their complaint to reflect the fact that appellees, Frank Pompo, M.D., and James Lyions, M.D., are employees of the University of Toledo. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} This appeal stems from a medical malpractice action brought by appellants, in which they alleged that Kelly received substandard treatment following an ATV accident that occurred on May 30, 2011. At 3:30 p.m. on that day, Kelly was riding as a passenger on an ATV when the vehicle lifted off the ground as it crossed over a set of railroad tracks, causing Kelly's right foot to slide off the foot peg. Kelly's leg was fractured in the accident. Kyle immediately requested an ambulance, and Kelly was transported to the emergency room at Wood County Hospital. Because there were no surgeons to treat Kelly's injury at Wood County Hospital, she was transferred to MSVMC on the night of May 30, 2011.

{¶ 3} Appellants first met Kelly's surgeon, Dr. Arun Patel, the following morning. After appellants discussed the incident with Dr. Patel, Kelly underwent surgery to repair her fractured leg.[1]

{¶ 4} At around 12:00 a.m. on June 1, 2011, Kelly began to experience numbness in the buttocks. Upon noticing the numbness, Kelly informed the nurses that were on

[1] Prior to this time, Kelly's pain was limited to her leg. Specifically, she stated in her deposition that she was not experiencing back pain or numbness prior to her surgery.

duty at the time. Approximately eight hours later, Hanneman, who is an occupational therapist, visited Kelly in order to begin the process of rehabilitating her leg. During the course of the therapy, Kelly urinated on herself. Although she witnessed the incident, Hanneman did not notify Dr. Patel.

{¶ 5} Dr. Patel conducted a post-operative visit with Kelly between 11:00 a.m. and 12:00 p.m. on June 1, 2011. Despite Dr. Patel's insistence that he was not informed of Kelly's numbness and incontinence at this time, Kelly stated in her deposition that she notified Dr. Patel of the symptoms during the post-operative visit. Specifically, Kelly stated:

> Q: Tell me about — tell me what you recall about that interaction with Dr. Patel.
>
> A: I was expressing my concern about the numbness and that it was getting worse as the day progressed and that I was urinating on the floor and on myself.
>
> Q: And do you recall what the response was from Dr. Patel?
>
> A: He thought that it might have to do with positioning, the way I was laying, or the anesthesia.

{¶ 6} Kyle was with Kelly at the time she told Dr. Patel of the numbness and incontinence. In his deposition, Kyle stated the following with respect to Dr. Patel's knowledge of Kelly's symptoms:

Q: Tell me, was there a conversation when Dr. Patel came in that morning around — between 11 and 12?

A: Yes, there was.

Q: Okay. Tell me about that.

A: It was many of the same things that we expressed concern with with the nurses, with the occupational therapist, a lot of numbness, you know, she had — she had urinated herself, um, that — a lot of the same stuff we'd told this — you know, the nursing staff and the occupational therapist before, you know, having a hard time going to the bathroom, wasn't sure that she had to.

Q: What was his response?

A: Ah, his response was positioning, change positions, ah, could be the * * * anesthetic, and it was something that would — that would go away.[2]

{¶ 7} Dr. Patel visited Kelly again during the early evening hours of June 1, 2011. At that time, Kelly reiterated her concerns about numbness and incontinence, and explained how those conditions had deteriorated since Dr. Patel's morning visit. Dr. Patel remained unconcerned about the numbness and incontinence, opining that those

[2] Dr. Patel disputes appellants' version of the events, stating that Kelly told him that she was "doing fine" during the post-operative visit. In support, Dr. Patel cited a discharge order that was completed by Dr. Lyions at 12:19 p.m. on June 1, 2011. The discharge order was subsequently cancelled at Kelly's insistence because she was not ready to go home.

conditions were caused by Kelly's positioning. However, sometime between 9:00 p.m. and 10:00 p.m., Kelly demanded to see a doctor because her condition was worsening. The nurse promptly contacted Dr. Pompo, who was on duty at the time. Dr. Patel was notified of the situation as well.

{¶ 8} Dr. Patel visited Kelly at around 12:00 a.m. on June 2, 2011. An MRI was eventually ordered, the results of which revealed that a bundle of nerves located at the lower end of Kelly's spinal cord were compressed, a condition known as cauda equina syndrome. Due to the urgency of the situation, Dr. Patel began to take steps to procure a surgeon to operate on Kelly as soon as possible. However, before a surgeon could be located, neurosurgeon Patrick McCormick and MSVMC resident Sean Crowley decided to transfer Kelly to Cleveland Clinic for immediate surgery.

{¶ 9} Kelly was air-lifted to the Cleveland Clinic on the morning of June 2, 2011.[3] Kelly's surgery began at 10:58 a.m. The surgery was generally successful in relieving the spinal cord compression. However, Kelly still experiences total numbness in her left foot and occasional urination upon sneezing or vomiting.

{¶ 10} In light of the complications following surgery, appellants filed their complaint on May 14, 2012, alleging medical malpractice against Dr. Patel, MSVMC, Lisa Miller, R.N., Judith Jones, R.N., Sean Crowley, M.D., and Hanneman. Additionally, appellants named Dr. Pompo and Dr. Lyions as defendants.

[3] Dr. Patel stated that he would not have ordered Kelly's transfer because he would have been able to get her into surgery sooner if she remained in Toledo.

{¶ 11} In their complaint, appellants incorrectly alleged that Pompo and Lyions were employees of MSVMC, when in fact they were employed by the University of Toledo at the time of the incident.[4] Pompo and Lyions subsequently filed a motion to dismiss pursuant to Civ.R. 12(B)(1) on July 25, 2013, arguing that the Court of Claims had exclusive jurisdiction to hear the claims brought against them for actions taken in the course of their employment with the University of Toledo. Two weeks later, appellants filed a motion to amend their complaint along with a motion to stay the action pending a petition for removal to the Court of Claims. In their motion to amend the complaint, appellants asserted that they simply misidentified MSVMC as Pompo and Lyions' employer. Thus, they requested leave to amend their complaint in order to substitute the University of Toledo as the appropriate employer. In response, Pompo and Lyions argued that appellants' motion to amend should be denied because the complaint, even as amended, suffered from the same jurisdictional defect that was the subject of the motion to dismiss.

{¶ 12} On October 25, 2012, the trial court issued its ruling on the pending motions. Noting appellants' concession that the amended complaint would remain jurisdictionally defective, the trial court denied appellants' motion to amend their complaint. Further, the court granted Pompo and Lyions' motion to dismiss.

{¶ 13} Six months later, on April 10, 2013, MSVMC filed a motion for summary judgment on behalf of itself, Hanneman, nurses Miller and Jones, and Dr. Crowley.

[4] The parties agree that the University of Toledo is an instrumentality of the state of Ohio.

Miller, Jones, and Crowley were subsequently dismissed without prejudice by appellants pursuant to Civ.R. 41(A)(1), leaving only MSVMC and Hanneman as parties to the motion for summary judgment.[5]

{¶ 14} In its motion, MSVMC argued that it was entitled to summary judgment in light of Kelly's testimony that she informed Dr. Patel of her numbness and incontinence when he visited her at noon on June 1. Because Kelly could have undergone surgery that afternoon, MSVMC argued that Hanneman's failure to inform Dr. Patel of Kelly's symptoms at an earlier time was not a proximate cause of Kelly's injuries. Further, MSVMC attached an expert's affidavit from Dr. Douglas Geiger, wherein Dr. Geiger stated that surgery for cauda equina syndrome should take place within 48 hours of the onset of symptoms.[6] Since Kelly first experienced symptoms during the early morning hours of June 1, 2011, and underwent surgery for the condition at 10:58 a.m. on the following morning, surgery took place well within the 48-hour window. Thus, Dr. Geiger opined, "Mrs. Hogrefe's outcome probably would not have been any different had she proceeded to surgery sooner than 10:58 a.m. on June 2, 2011."

{¶ 15} In responding to MSVMC's motion, appellants argued that summary judgment was improper because there was a genuine issue of material fact regarding whether Kelly actually informed Dr. Patel of her symptoms at noon on June 1. Despite

[5] Appellants also dismissed Dr. Patel without prejudice pursuant to Civ.R. 41(A)(1) on October 30, 2013.

[6] Dr. Patel also indicated in his deposition that the "window of opportunity" for surgery to treat cauda equina syndrome is 48 hours.

deposition testimony from both Kelly and Kyle to the effect that Kelly informed Dr. Patel of her symptoms at the noon visit, appellants cited Dr. Patel's deposition testimony in which he insisted that he was not informed of the incontinence at that time. Given the conflicting testimony, appellants argued that the trial court was required to accept Dr. Patel's statements as true in an effort to construe the evidence in a light most favorable to appellants.

{¶ 16} In support of their argument that Hanneman's failure to advise Dr. Patel of Kelly's symptoms caused Kelly's injuries, appellants offered the opinions of three experts. First, appellants attached the affidavit of Dr. John Butler, who stated the following, in relevant part:

> It is my belief that Alisa Hanneman was negligent in failing to ensure that Dr. Patel learned of Kelly's symptoms on the morning of June 1, 2011. These symptoms manifested an acute change in this patient's condition which required the treating physician to be notified. * * * Kelly Hogrefe's symptoms on the morning of June 1, 2011 manifested an urgent surgical condition which required surgery to be performed on June 1, 2011 to avoid permanent neurologic [complications]. The failure of Alisa Hanneman to ensure that Dr. Patel learned of Kelly's condition was a cause of this patient not being operated upon until June 2, 2011, at which time it was too late to avoid permanent neurologic injury to Kelly Hogrefe. * * * I have read the affidavit of Dr. Douglas Geiger. I disagree with his opinion

that occupational therapist Hanneman was not negligent and that surgery performed on June 1, 2011 would not have changed the outcome. It is my opinion that the failure to act on the part of Alisa Hanneman as an employee of St. Vincent Hospital was a cause of this patient's injuries and damages.

{¶ 17} Further, appellants presented the opinion of Dr. John Conomy, who stated:

> Occupational therapist Hanneman, while not responsible for understanding that the patient's numbness and incontinence were signs of [cauda equina syndrome], was negligent for not recognizing these symptoms as a change in the patient's condition and notifying the treating physician, Dr. Patel. * * * This syndrome required surgery on June 1, 2011 to avoid permanent neurologic injury. * * * I have read the affidavit of Douglas [Geiger], MD. I disagree with his opinions as to the care provided by occupational therapist Hanneman and his opinions related to causation in this matter.

{¶ 18} Finally, appellants offered the testimony of nurse Mary Jane Smith, who opined that Kelly's numbness and incontinence at 8:30 a.m. on June 1, 2011, which Hanneman was aware of, represented an acute change in condition that should have been communicated to the nurses and Dr. Patel.

{¶ 19} Upon consideration of the parties' arguments and the relevant evidence in the record, the trial court granted MSVMC's motion for summary judgment. In its

decision, the trial court noted an "obvious deficiency" with the opinions of appellants' experts. While they insisted that Kelly's injuries resulted from Hanneman's failure to make Dr. Patel aware of Kelly's symptoms, none of the experts appeared to take into consideration appellants' testimony that they discussed Kelly's symptoms directly with Dr. Patel at least two times on June 1, with the first instance occurring between 11 a.m. and noon. The trial court noted that Dr. Patel, rather than getting Kelly into surgery as soon as he learned of her symptoms, reassured Kelly that the symptoms were attributable to her positioning and the surgical anesthesia. Further, Dr. Patel remained unconcerned when Kelly informed him that her symptoms were worsening sometime between 5 p.m. and 6 p.m. on June 1. With these facts in view, the trial court found that "plaintiffs' experts either disregarded or discounted vast portions of the evidence that they reviewed, instead opting to speculate."

{¶ 20} As to appellants' contention that the trial court, in construing the evidence in a light most favorable to the non-moving party, was required to believe Dr. Patel's testimony over their own testimony, the trial court stated the following:

> [Kelly] points to no rule or case law suggesting or allowing that such a construction of evidence involves disregarding her own unequivocal and un-recanted testimony regarding the factual basis supporting her claims. In this case, her testimony establishes that she first made Patel aware of her numbness and incontinence between 11 a.m. and noon of June 1st at the latest. None of the experts (who are competent to do so) opine that Patel's

> receipt of such knowledge at that time (the time asserted by [Kelly]) was too late to allow him to facilitate surgical intervention on June 1st (as [Kelly's] experts command), or to otherwise avoid [Kelly's] claimed damages and injuries. For these reasons, even if it is assumed that Hanneman * * * deviated from the standard of care, the conclusion that such deviation was a cause or *the* cause of diagnostic and/or surgical delay is therefore completely speculative. (Emphasis sic.)

{¶ 21} Ultimately, the trial court found that appellants failed to demonstrate that Hanneman's failure to inform Dr. Patel of Kelly's symptoms caused Kelly's injuries. Consequently, the trial court granted MSVMC's motion for summary judgment.

{¶ 22} Three weeks after the motion was granted, appellants filed a motion for reconsideration of the trial court's judgment. In their motion for reconsideration, appellants argued that the trial court erred in granting MSVMC's motion for summary judgment. In support of their argument, appellants referenced testimony contained in the depositions of Dr. Butler and Dr. Conomy. Although these depositions were taken two weeks prior to the trial court's decision granting summary judgment, they were not part of the record before the trial court at that time. Rather, the depositions were offered by appellants for the first time in support of their motion for reconsideration.

{¶ 23} Finding no error in its decision granting MSVMC's motion for summary judgment, the trial court denied appellants' motion for reconsideration. At the outset, the court noted that the evidence relied upon by appellants was not part of the record.

However, the court proceeded to consider the additional evidence anyhow. After doing so, the court found that the testimony contained in the depositions failed to rectify the deficiencies found in the experts' affidavits, particularly on the issue of causation. In his deposition, Dr. Butler acknowledged that Dr. Patel could have had Kelly in surgery by 5:00 p.m. on June 1 if he had known of the incontinence by noon, resulting in a normal neurological outcome. Thus, despite Hanneman's failure to report Kelly's symptoms to Dr. Patel,

> a break in the chain of causation occurred when [Dr. Patel] learned of the symptoms from another source. In order for * * * Hanneman to "share" in the causation of the surgical delay, it would have to be demonstrated that the physicians would have actually acted upon * * * Hanneman's information, even though [Dr. Patel] did not act upon [his] own same knowledge. The only way one could reach this conclusion is through improper speculation.

{¶ 24} Following the trial court's denial of appellants' motion for reconsideration, appellants filed this timely appeal.

B. Assignment(s) of Error

{¶ 25} On appeal, appellants assign the following errors for our review:

> 1. The Trial Court erred in deciding that Plaintiffs' testimony would be believed over the testimony of Dr. Patel.

2. The Trial Court erred when it found the law of Intervening-Superseding causation applicable to this case.

3. Assuming the law of Intervening-Superseding causation applies to the factual circumstances of this case, the Trial Court usurped the function of the jury by finding the superseding cause both "new" and "independent."

4. The Trial Court made impermissible credibility judgments in making its ruling.

5. The Trial Court erred and abused its discretion when it refused to allow Plaintiffs-Appellants to amend their Complaint and name University of Toledo as the employer of two resident physicians properly named in the Complaint.

II. Analysis

A. The Trial Court Did Not Err in Granting Summary Judgment.

{¶ 26} In their first assignment of error, appellants contend that the trial court erred in granting MSVMC's motion for summary judgment upon a finding that appellants failed to establish a causal link between Kelly's injuries and Hanneman's failure to inform Dr. Patel of Kelly's symptoms.

{¶ 27} We review a trial court's decision on summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). In so doing, we employ the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61

Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 28} The following four elements must be satisfied in order to prevail on a claim of medical malpractice: (1) the medical professional owed a duty to the patient (2) the medical professional breached this duty; (3) the breach was a proximate cause of the patient's injuries; and (4) damages. *Miller v. Defiance Regional Med. Ctr.*, 6th Dist. Lucas No. L-06-1111, 2007-Ohio-7101, ¶ 12, citing *Trevena v. Primehealth, Inc.*, 171 Ohio App.3d 501, 2006-Ohio-6535, ¶ 52 (11th Dist.). Thus, in this case, appellants were required to prove that Hanneman had a duty to inform Dr. Patel of Kelly's symptoms on June 1, that she breached that duty, and that said breach was the proximate cause of her injuries.

{¶ 29} In its decision, the trial court determined that a genuine issue of material fact existed as to duty and breach. Nonetheless, summary judgment was granted on

causation grounds based upon appellants' testimony that they informed Dr. Patel of Kelly's symptoms at noon on June 1.

{¶ 30} On appeal, appellants contend that the trial court failed to construe the evidence in their favor as required under Civ.R. 56. While acknowledging their own statements indicating that Kelly informed Dr. Patel of her symptoms at noon on June 1, appellants argue that there is a conflict in the evidence that must be resolved in their favor on summary judgment. Specifically, appellants highlight Dr. Patel's statement that he was not informed of Kelly's symptoms during his post-operative visit with Kelly at noon on June 1. Appellants contend that the trial court should have resolved the evidentiary conflict in their favor by disbelieving their own testimony and choosing instead to believe Dr. Patel's version of the events.

{¶ 31} Appellees, for their part, contend that Civ.R. 56(C) requires the trial court to resolve factual conflicts in the evidence by accepting the non-moving party's version of the events. In their appellate brief, appellees state:

> No one disputes Civ.R. 56's requirement that, upon motion for summary judgment, the nonmoving party is entitled to have the evidence presented construed "most strongly" in his or her favor. * * * Without citing any support, Appellants ask this Court to remove all limits on this "most strongly" language and construe it in such a way that forces a court to accept evidence that is contradictory to the nonmoving party's own repeated, unequivocal, and unrecanted version of events solely for the

purpose of defeating summary judgment. That is not how Civ.R. 56 works, nor should it.

{¶ 32} Having considered the parties' arguments, the issue we must resolve in addressing appellants' first assignment of error is whether a trial court, in construing the evidence in a light most favorable to the nonmoving party under Civ.R. 56, must accept the nonmovant's version of events as true over conflicting favorable testimony. Based upon our examination of Ohio law, this precise issue has not been addressed. Thus, we look to the manner in which this issue has been resolved in other jurisdictions for guidance.

{¶ 33} At the outset, we note that, with respect to the summary judgment standard contained in the Federal Rules of Civil Procedure (which is substantively similar to the standard in the Ohio Rules of Civil Procedure), the United States Supreme Court has stated that the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Omlor v. Cleveland State Univ.*, 10th Dist. Franklin No. 86AP-966, 1988 WL 4669, *1 (Jan. 19, 1988), *rev'd on other grounds* (finding that the mandate to construe the evidence in a light most favorable to the nonmovant requires that the nonmovant's version of the facts "be accepted as true to the extent that that version of the facts is supported by the evidence or by reasonable inferences from such evidence"); *Towns v. N.E. Mississippi Elec. Power Assn.*, 478 Fed.Appx. 244, 247 (5th Cir.2012) ("For purposes of summary judgment, we must accept

[the nonmoving party's] version of events."). In addressing situations where the evidence contains conflicting testimony and the nonmovant's testimony is unfavorable to the nonmovant, the Eleventh Circuit Court of Appeals has stated:

> When the nonmovant has testified to events, we do not (as urged by Plaintiffs' counsel) pick and choose bits from other witnesses' essentially incompatible accounts (in effect, declining to credit some of the nonmovant's own testimony) and then string together those portions of the record to form the story that we deem most helpful to the nonmovant. Instead, when conflicts arise between the facts evidenced by the parties, we credit the nonmoving party's version. Our duty to read the record in the nonmovant's favor stops short of not crediting the nonmovant's testimony in whole or part: the courts owe a nonmovant no duty to disbelieve his sworn testimony which he chooses to submit for use in the case to be decided. *Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir.2005).

{¶ 34} In *Sullivan v. City of Satsuma*, S.D. Alabama No. 04-0473-WS-M, 2005 WL 2895983 (Oct. 28, 2005), the court applied the holding in *Evans* and concluded:

> *Evans* would plainly forbid this Court from allowing Sullivan [the nonmovant] to "pick and choose" portions of the defense evidence that contradict his own sworn testimony in stitching together a set of facts to survive Rule 56 scrutiny. Under the clear language of *Evans*, on summary judgment this Court must credit Sullivan's version of events as a unified

> whole. In that regard, neither Sullivan nor this Court may cherry pick the parts of Sullivan's story that help his cause, then selectively ignore the remainder. Likewise, *Evans* precludes this Court on summary judgment from crediting defense evidence over contradictory testimony by Sullivan merely because the former casts his claims in a rosier hue. Simply put, *Evans* espouses an "in for a penny, in for a pound" rule. If a plaintiff's sworn narrative of events is part of the summary judgment record, then the legal viability of his case must be ascertained by reference to that narrative, taken as a whole, not just the portions that he finds convenient or helpful. Thus, the rule promulgated by *Evans* is that a plaintiff cannot disavow his own testimony in favor of conflicting defense evidence that better suits his purposes on summary judgment. *Id.* at *3.

{¶ 35} Having examined the foregoing case law, we are persuaded that the trial court did not err in construing the evidence under Civ.R. 56. As was true in *Sullivan*, the evidence in this case includes testimony from the nonmovant that, if believed, would result in summary judgment for the movant. In order to escape such a result, appellants are attempting to "cherry pick" the portions of Dr. Patel's testimony that suits their needs, asking this court to disbelieve *their own* testimony in the process. In light of the persuasive reasoning set forth in *Evans* and *Sullivan*, *supra*, we conclude that appellants' argument is without merit. Further, for reasons more fully set forth below in our

discussion of appellants' second assignment of error, we find that the trial court properly granted MSVMC's motion for summary judgment.

{¶ 36} Accordingly, appellants' first assignment of error is not well-taken.

B. The Trial Court Did Not Err in Denying Appellants' Motion for Reconsideration.

{¶ 37} In their second assignment of error, appellants argue that the trial court erred when it found the law of intervening superseding cause applicable to this case in its decision on appellants' motion for reconsideration. Alternatively, in their third assignment of error, appellants argue that the trial court usurped the function of the jury by finding the superseding cause both "new" and "independent." Since these assignments are interrelated, we will address them simultaneously.

{¶ 38} When reviewing a trial court's decision on a motion for reconsideration of a grant or denial of summary judgment, we apply a de novo standard of review. *D.I.C.E., Inc. v. State Farm Ins. Co.*, 6th Dist. Lucas No. L-11-1006, 2012-Ohio-1563, ¶ 55, citing *Dunn v. N. Star Resources, Inc.*, 8th Dist. Cuyahoga No. 79455, 2002-Ohio-4570, ¶ 10. Thus, we "afford no deference to the trial court's decision and independently review the record in the light most favorable to the non-movant to determine whether summary judgment is appropriate." *Dunn* at ¶ 10; *see also Thayer v. Diver*, 6th Dist. Lucas No. L-07-1415, 2009-Ohio-2053, ¶ 26.

{¶ 39} The Supreme Court of Ohio has stated that a health care practitioner has a duty to "inform the attending physician of a patient's condition." *Albain v. Flower*

Hosp., 50 Ohio St.3d 251, 265, 553 N.E.2d 1038 (1990), *overruled on other grounds by Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 628 N.E.2d 46 (1994). Further, the breach of that duty raises issues of proximate cause. *Id.* "Even assuming that a nurse breached this duty to inform the attending physician of a patient's condition, it must further be shown that such breach was the proximate cause of the patient's injury." *Id.* In order to establish proximate cause, the plaintiff must demonstrate that, "had the nurse informed the attending physician of the patient's condition at the proper time, the physician would have altered his diagnosis or treatment and prevented the injury to the patient." *Id.*, citing *Shumaker v. Oliver B. Cannon & Sons, Inc.*, 28 Ohio St.3d 367, 369, 504 N.E.2d 44 (1986); *Cooper v. Sisters of Charity*, Ohio St.2d 242, 254, 272 N.E.2d 97 (1971).

{¶ 40} In denying appellants' motion for reconsideration, the trial court began by highlighting appellants' attempt to support the motion with evidence not before the court at the time it granted summary judgment, namely the deposition testimony of Drs. Conomy and Butler. While the court was skeptical of the admissibility of such evidence, it considered the evidence nonetheless.

{¶ 41} Upon consideration of the newly submitted evidence, the court found that the motion failed to "offer any newly discovered or previously unavailable evidence that demonstrates the merits of Plaintiff's claim." The court found that "the Motion does not explain how Conomy and Butler's deposition testimonies differ from or rectify the deficiencies already found in their affidavits." In its analysis, the trial court noted Dr.

Butler's deposition testimony, wherein he conceded that Dr. Patel could have treated Kelly within the acceptable timeframe had he been made aware of her symptoms by noon on June 1. Because appellants both testified that Dr. Patel *was* made aware of Kelly's symptoms by that time, the trial court once again found that appellants failed to carry their burden on causation. The trial court further rejected appellants' argument that Hanneman and Dr. Patel were *both* negligent. Instead, the court concluded that Dr. Patel's failure to hasten Kelly's surgical treatment upon being notified of her symptoms at noon on June 1 operated as an intervening and superseding cause and created a "break in the chain of causation."

{¶ 42} In their appellate brief, appellants argue that the trial court's application of intervening superseding causation was misplaced. In support of their argument, appellants cite *Berdyck v. Shinde*, 66 Ohio St.3d 573, 613 N.E.2d 1014 (1993) and *Heise v. Orra*, 8th Dist. Cuyahoga No. 66172, 1995 WL 79794 (Feb. 23, 1995).

{¶ 43} In *Berdyck*, the plaintiff, Donna Berdyck, was a pregnant patient under the treatment of Dr. S.G. Shinde. Berdyck had a history of preeclampsia, a condition whereby the kidneys are weakened and protein is spilled in the urine. One of the symptoms of preeclampsia is pain in the upper abdominal region.

{¶ 44} Thirty-eight weeks into her pregnancy, Berdyck began to experience abdominal pains that eventually led her to drive to the hospital. Upon her arrival, Berdyck was transferred to the obstetrics unit. Lynne Pickett, who was a nurse within the obstetrics unit, began to care for Pickett. Berdyck explained that she was experiencing

upper abdominal pain, nausea, and a headache. She also informed Pickett that she was unable to pass urine. Pickett then examined Berdyck's blood pressure and found it to be elevated. Pickett did not relay this information to Dr. Shinde, but continued to monitor Berdyck. Twenty minutes later, Pickett took a second blood pressure reading. After learning that Berdyck's blood pressure was still elevated, Pickett contacted Dr. Shinde and conveyed Berdyck's second blood pressure reading. Dr. Shinde concluded that Berdyck was suffering from a gastric disturbance from flu and dehydration, and ordered Pickett to observe Berdyck's blood pressure closely.

{¶ 45} Five minutes after her conversation with Dr. Shinde, Pickett took another blood pressure reading, and found that Berdyck's blood pressure remained elevated. Pickett did not inform Dr. Shinde of the subsequent blood pressure reading. Shortly thereafter, Berdyck suffered a grand mal seizure, resulting in paralysis of her left side. Although her paralysis improved, Berdyck never made a full recovery.

{¶ 46} Berdyck proceeded to file a complaint against Dr. Shinde and the hospital for medical malpractice. During the course of the proceedings, it was agreed that Berdyck's seizure could have been prevented if Dr. Shinde would have administered magnesium sulfate shortly after being contacted by Pickett. Thus, Dr. Shinde acknowledged substandard care, but insisted that his negligence was not the sole proximate cause of Berdyck's seizure. Ultimately, the hospital filed a motion for summary judgment, which was granted by the trial court. The court reasoned that Berdyck's claim would "require nurses to engage in the practice of medicine when their

only duty to the patient is to inform the attending physician of the patient's condition and to follow the physician's orders related to the patient's care." *Id.* at 577.

{¶ 47} On appeal, this court found that there was a question of fact as to whether Pickett breached her duty of care toward Berdyck. *Berdyck v. Shinde*, 6th Dist. Ottawa No. 90-OT-060, 1991 WL 225112, *7 (Nov. 1, 1991). Thus, we reversed the trial court's grant of summary judgment. *Id.*

{¶ 48} On appeal to the Supreme Court of Ohio, the issue was whether the negligence of Dr. Shinde relieved the hospital of liability for a breach of Pickett's duty of care. The court found that Dr. Shinde's stipulation as to liability did not absolve the hospital from liability, because Dr. Shinde indicated that he would have been more likely to properly diagnose the preeclampsia had Pickett provided him with "a fuller report of Berdyck's symptoms." *Berdyck*, 66 Ohio St.3d at 584, 613 N.E.2d 1014. The court concluded that the evidence could lead a reasonable jury to conclude that Dr. Shinde's negligence and the hospital's negligence were "concurring proximate causes of Berdyck's injuries." *Id.* at 585. In reaching its conclusion, the court set forth the following rule:

> The intervention of a responsible human agency between a wrongful act and an injury does not absolve a defendant from liability if that defendant's prior negligence and the negligence of the intervening agency cooperated in proximately causing the injury. If the original negligence continues to the time of the injury and contributes substantially thereto in

conjunction with the intervening act, each may be a proximate, concurring cause for which full liability may be imposed. * * *

In order to relieve a party of liability, a break in the chain of causation must take place. A break will occur when there intervenes between an agency creating a hazard and an injury resulting therefrom another conscious and responsible agency which could or should have eliminated the hazard. * * * However, the intervening cause must be disconnected from the negligence of the first person and must be of itself an efficient, independent, and self-producing cause of the injury. *Id.* at 584-85.

{¶ 49} Here, appellants cite to *Berdyck* to support their argument that the trial court erroneously applied intervening and superseding causation. However, we see no flaw in the trial court's application of the rule set forth in *Berdyck*. Moreover, we find the facts in *Berdyck* to be distinguishable from the case sub judice. Indeed, the physician in *Berdyck* never received the information necessary to make a proper diagnosis prior to the seizure, namely the subsequent blood pressure reading showing that Berdyck's blood pressure remained elevated. The same is true of the defendant physicians in *Heise, supra*. Here, on the other hand, Dr. Patel was notified of Kelly's symptoms by Kelly herself. Further, such notification occurred at a time that would have allowed Kelly to receive proper surgical treatment, as acknowledged by appellants' own experts.

{¶ 50} With this distinction in mind, the trial court concluded that Dr. Patel's delay in getting Kelly into surgery after being informed of her symptoms at noon on June 1 broke the chain of causation. Under *Berdyck*, such a break could only occur if Dr. Patel was a "conscious and responsible agency" which could or should have eliminated the hazard arising from Hanneman's failure to inform. *Id.* at 584. Appellants' own expert, Dr. Butler, stated that Dr. Patel was capable of getting Kelly into surgery by 5:00 p.m. on June 1 if he was informed about the symptoms at noon. Further, Dr. Butler testified that surgery by 5:00 p.m. would have resulted in a normal outcome. In addition, Dr. Patel's inaction after being informed of Kelly's symptoms was not connected to Hanneman's alleged negligence. Thus, under *Berdyck*, the chain of causation relating to Hanneman's alleged negligence was severed when Kelly informed Dr. Patel of her symptoms at noon on June 1.

{¶ 51} Furthermore, appellants have failed to establish that Dr. Patel would have hastened Kelly's surgery had Hanneman informed him of Kelly's symptoms earlier on June 1. Indeed, even after hearing Kelly's complaints of numbness and incontinence at noon on June 1, Dr. Patel remained steadfast in his conclusion that the symptoms were due to Kelly's positioning and the anesthesia that she received during her leg surgery. He reiterated that diagnosis in the early evening of June 1 when Kelly explained to him that her symptoms were worsening. Appellant has presented no evidence to suggest that Dr. Patel would have made a different diagnosis if he received the same information at an earlier time from Hanneman. On the contrary, Dr. Patel testified that he would have

needed to verify the symptoms with Kelly before arriving at a diagnosis regardless of the information provided to him by Hanneman.

{¶ 52} In light of the foregoing, we conclude that the trial court did not err when it found the law of intervening superseding cause applicable to this case in its decision on appellants' motion for reconsideration. Thus, appellants' second assignment of error is not well-taken. However, our analysis does not end there. In their third assignment of error, appellants alternatively argue that the trial court improperly usurped the function of the jury by finding the superseding cause both "new" and "independent."

{¶ 53} It is true that "the issue of intervening causation generally presents factual issues to be decided by the trier of fact." *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 269, 617 N.E.2d 1068 (1993). Additionally, the analysis involved in deciding whether intervening causation applies "involves a weighing of the evidence, and an application of the appropriate law to such facts, a function normally to be carried out by the trier of facts." *Cascone v. Herb Kay Co.*, 6 Ohio St.3d 155, 160, 451 N.E.2d 815 (1983). Further, the court in *Cascone* stated the following:

> Where the facts are such that reasonable minds could differ as to whether the intervening cause was a conscious and responsible agency which could have or should have eliminated the hazard, whether the intervening act or cause constituted a concurrent or superseding cause, and whether the intervening cause was reasonably foreseeable by the original party guilty of negligence, present questions for submission to a jury which

generally may not be resolved by summary judgment. *Id.* at paragraph two of the syllabus.

{¶ 54} Despite the presumption that intervening causation issues must generally be resolved by the trier-of-fact, we have previously indicated that "where reasonable minds could not differ on such questions, they may be decided as a matter of law." *Hicks v. Prelipp*, 6th Dist. Huron No. H-03-028, 2004-Ohio-3004, ¶ 8. By way of example, in *Wesley v. Walraven*, 4th Dist. Washington No. 12CA18, 2013-Ohio-473, the court of appeals affirmed the trial court's grant of summary judgment in favor of James Walraven. Walraven had hosted a graduation party where a man was stabbed to death following an altercation with a boy, C.L. As the host of the party, Walraven was sued by the decedent's estate for wrongful death. In affirming the trial court's grant of summary judgment, the court of appeals began by noting that questions of intervening causation are typically reserved for the jury. However, the court stated that, under the circumstances, "a reasonable person could only conclude that C.L.'s use of self-defense to repel the decedent's attack was an intervening and superseding cause." *Id.* at ¶ 55; *see also Pendry v. Barnes*, 18 Ohio St.3d 27, 29, 479 N.E.2d 283 (1985) (finding that summary judgment was proper because any negligence on the part of a car owner who left keys in the ignition and the car running was, as a matter of law, superseded by the acts of a person who stole the car and subsequently injured another in an accident).

{¶ 55} In the present action, we find that a reasonable person, viewing the evidence in a light most favorable to appellants, could only conclude that Dr. Patel's

inaction after learning of Kelly's symptoms at noon on June 1 was an intervening and superseding cause. Accordingly, appellants' third assignment of error is not well-taken.

C. The Trial Court Did Not Make Impermissible Credibility Determinations.

{¶ 56} In their fourth assignment of error, appellants assert that the trial court's judgment entries relating to MSVMC's motion for summary judgment and appellants' motion for reconsideration contained impermissible credibility determinations. In particular, appellants argue that the trial court erred in its treatment of the causation opinions of their experts.

{¶ 57} In its entry granting summary judgment, the trial court stated the following with respect to Dr. Butler's conclusions on causation:

> [Dr. Butler] states that Plaintiff's "symptoms started with numbness and progressed in the morning of [June 1st] to the incontinence of urine," and that the symptoms "manifested an urgent surgical condition which required surgery to be performed on June 1, 2011 to avoid permanent neurologic sequelae." Thus, the June 2nd surgery was too late to avoid permanent neurologic injury to Plaintiff. However, Butler does not define "urgent," nor does he indicate a specific surgical time frame that would be appropriate for and consistent with an "urgent" situation, particularly in circumstances requiring life flight transport of the patient to the surgical facility of the physician's choice. His only comment is that it must have

been performed on June 1st given that Plaintiff's symptoms started with numbness and progressed to incontinence "in the morning of June 1st."

{¶ 58} The court found that Dr. Butler's time frame was "vague" and noted that "unlike Geiger who generally cites to 'reliable scientific literature' for his suggested forty-eight hour surgical window, Butler gives no specific basis for his assertion." The court also stated that Dr. Conomy's "bare opinion" that Kelly's surgery was untimely performed was lacking in foundation and inconsistent with Evid.R. 702(C). Even assuming, arguendo, that the foregoing statements by the trial court constitute improper credibility determinations, we find that appellants suffered no prejudice.

{¶ 59} Even if the experts' affidavits were taken at face value, appellants failed to create a genuine issue of material fact with respect to causation. Indeed, in further evaluating the affidavits, the court noted:

> Perhaps the more obvious deficiency with Butler's and Conomy's opinions is their insistence that the extent of [Kelly's] injuries are a result of Hanneman's or the other employees' failure to make Patel aware of Plaintiff's symptoms which prevented earlier diagnosis and surgery. * * *
>
> While [Kelly's] experts all indicated that they had reviewed pertinent depositions relative to forming their opinions, none of them acknowledge or address [Kelly's] own testimony that she relayed her symptoms to the resident physician on his morning round of June 1st; that she directly relayed her symptoms to Patel between 11 a.m. and noon on

June 1st; [MSVMC nurse Christy] Schober's testimony that Schober asked the resident physician to discuss the symptoms with [Kelly] between 1 p.m. and 2 p.m. on June 1st; or Schober's testimony that she told Patel of [Kelly's] symptoms between 5 p.m. and 7 p.m. on June 1st.

Both [Kelly] and [Kyle] testified, unequivocally, that they discussed [Kelly's] symptoms directly with Patel at least two times on June 1st. Their testimony is clear that Patel came to [Kelly's] room sometime between 11 a.m. and noon on June 1st, with two other gentlemen. [Kelly] told him of her numbness and incontinence but, according to their testimony, Patel attributed the symptoms to her positioning and the surgical anesthesia. [Kelly] next saw Patel around five or six o'clock on the evening of June 1st. [Kelly] again relayed to him that she was still experiencing incontinence and her numbness was worsening. But again, according to [Kelly], Patel attributed the same to anesthesia and positioning, and indicated that it was likely to go away. * * *

Accordingly, it is clear that [Kelly's] experts either disregarded or discounted vast portions of the evidence that they reviewed, instead opting to speculate. * * * Because these experts do not have personal knowledge of when Patel was informed of [Kelly's] symptoms, they must rely on the evidence of record to arrive at such a conclusion. * * *

> In this case, [Kelly's] testimony establishes that she first made Patel aware of her numbness and incontinence between 11 a.m. and noon of June 1st at the latest. None of the experts (who are competent to do so) opine that Patel's receipt of such knowledge at that time (the time asserted by [Kelly]) was too late to allow him to facilitate surgical intervention on June 1st (as [Kelly's] experts command), or to otherwise avoid [Kelly's] claimed damages and injuries.

{¶ 60} As noted above in our discussion of appellants' first assignment of error, the trial court properly accepted appellants' own testimony as true in its effort to construe the evidence in a light most favorable to appellants. Drs. Butler and Conomy asserted that surgery was required on June 1 in order to prevent neurologic injury. Even if those assertions are true, their subsequent conclusion that Hanneman's delay in informing Dr. Patel of Kelly's symptoms caused Kelly's injuries fails to account for appellants' testimony that Dr. Patel was informed of said symptoms by Kelly herself at noon on June 1. Thus, we agree with the trial court that appellants' evidence fails to show that notification by noon on June 1 was too late for Dr. Patel to facilitate surgery. To the contrary, Dr. Butler testified during his deposition that such notification would allow for surgical treatment by 5 p.m. on June 1, making the experts' causation conclusions even more tenuous.

{¶ 61} Accordingly, appellants' fourth assignment of error is not well-taken.

D. The Trial Court Did Not Abuse its Discretion in Denying Appellants' Motion to Amend Their Complaint.

{¶ 62} In their fifth assignment of error, appellants argue that the trial court erred in denying their motion to amend the complaint to add the University of Toledo (as employer of Drs. Lyions and Pompo) as a defendant.

{¶ 63} We review the trial court's denial of appellants' motion to amend for an abuse of discretion. *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illum. Co.*, 60 Ohio St.3d 120, 122, 573 N.E.2d 622 (1991). An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 64} Regarding amendments to pleadings, Civ.R. 15 provides, in relevant part:

> (A) Amendments
>
> A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires.
>
> * * *

(D) Amendments where name of party unknown

When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, *must aver in the complaint* the fact that he could not discover the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant. (Emphasis added.)

{¶ 65} Here, appellants do not argue that they were entitled to leave as a matter of course. Thus, we must resolve whether the trial court erred in refusing to grant leave to appellants to amend their complaint.

{¶ 66} Appellants insist that equity favors amendment in this case, because they were unaware that Pompo and Lyions were employees of the University of Toledo. Pompo and Lyions contend that the trial court properly denied appellants' motion to amend because the amended complaint would have contained the same jurisdictional defect as the original complaint. In particular, Pompo and Lyions note that the Ohio Court of Claims possesses exclusive jurisdiction over them as state employees, and also over the University of Toledo as a state entity.

{¶ 67} We have previously upheld a trial court's denial of a motion to amend the complaint where the amendment to the complaint would not withstand a motion to dismiss. *Hollinghead v. Bey*, 6th Dist. Lucas No. L-99-1351, 2000 WL 1005205, *9

(July 21, 2000). Moreover, the Eight District has stated: "Where an amendment to the complaint would have been futile, the trial court * * * does not abuse its discretion in denying the motion." *State ex rel. Brewer-Garrett Co. v. MetroHealth Sys.*, 8th Dist. Cuyahoga No. 87365, 2006-Ohio-5244, ¶ 17.

{¶ 68} In this case, we find that appellants' efforts to substitute the University of Toledo for MSVMC would have been futile. As appellants readily acknowledge, the University of Toledo is a state entity. Thus, under Ohio law, suits seeking damages from the university must be brought before the Court of Claims. R.C. 2743.02. Because the trial court lacked subject matter jurisdiction over the university, the amendment would not have withstood a motion to dismiss. Consequently, we cannot conclude that the trial court abused its discretion in denying the motion to amend under Civ.R. 15(A).

{¶ 69} Appellants also argue that they were entitled to amend their complaint under Civ.R. 15(D). This argument is easily disposed of, however, because appellants failed to comply with the terms of Civ.R. 15(D). The original complaint did not contain an averment that appellants could not discover the name of Pompo and Lyions' employer. Further, the summons does not contain the words "name unknown." Thus, appellants were not entitled to amend their complaint under Civ.R. 15(D). *See Franks v. Village of Newburch Hts.*, 8th Dist. Cuyahoga No. 52814, 1987 WL 17913 (Oct. 1, 1987) (affirming trial court's denial of motion to amend where the plaintiff failed to include the words "name unknown" on the summons).

{¶ 70} Accordingly, appellants' fifth assignment of error is not well-taken.

III. Conclusion

{¶ 71} Having found each of appellants' assignments of error not well-taken, we affirm the judgment of the Lucas County Court of Common Pleas. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE