

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

YVONNE MILLER as Personal Representative
Of Estate of JASON A. MILLER, Deceased,

Plaintiff,

CASE NO. 19-112386-NH

-vs-

JUDGE JOSEPH J. FARAH

RANDOLPH SCHUMACHER M.D., et al,

OPINION AND INTERIM ORDER RE
MOTION FOR PARTIAL SUMMARY
DISPOSITION RE NURSING CLAIMS

Defendant.

At a session of said Court held in the City of
Flint, County of Genesee, State of Michigan
On the 25th day of February, 2022.

PRESENT: HONORABLE JOSEPH J. FARAH, CIRCUIT JUDGE.

FILED

FEB 25 2022

GENESEE COUNTY CLERK
BY
DEPUTY CLERK

Introduction

In this medical malpractice case, Yvonne Miller, as Personal Representative of the Estate of Jason Miller, seeks compensation for professional negligence causing his death. Defendants include Dr. Randolph Schumacher, Hurley Medical Center, and Geriatric and Medical Specialists of Michigan PLC. The Court is called on to determine whether Hurley bears responsibility for Jason's¹ death because its nurses did not press Jason's treating physician, Dr. Schumacher, harder on ordering a radiology consult or related endeavors to address a PICC line² problem.

At this juncture, the Court is called on to decide Hurley's motion under MCR 2.116(C)(10), no genuine issue of material fact, pertaining to its liability through the actions or inactions of its nurses,³ Rhonda Conley, Laura E. Heath, Tonya Anderson, and Shumatria L. Cleveland.⁴

¹ This Court intends no disrespect by the use of Mr. Miller's first name, but rather to distinguish his treatment with the legal efforts of the Estate.

² A PICC line is defined in the parties' papers as a peripherally inserted central catheter. It is a long thin tube inserted through a vein in the arm and passes through larger veins near the heart allowing for administration of medication or liquid nutrition. See the Estate's response brief at page 4, note 1.

³ There were other aspects to this summary disposition motion this Court heard at oral argument, but it was agreed by the counsel and Court that the decisions on other aspects of the case – ostensible agency liability and a damages claim for lost wages – would be better informed by waiting for pending appellate decisions involving those contentions.

⁴ See the Estate's First Amended Complaint at page 21, paragraph 98.

The Court has reviewed full, ample briefing and conducted lengthy oral argument and now releases this "interim" opinion. The Court uses the term interim because it contemplates there will be further decisions after release of appellate court guidance on the ostensible agency and lost wages damages issues. To not disadvantage any party, the Court will reissue this decision under even date as those eventually forthcoming should any party wish to make use of their opportunities for review.

Background

Jason Miller was a patient of Dr. Schumacher. Jason first saw Dr. Schumacher at Fenton Heath Care where Dr. Schumacher performed a medical history and physical examination on August 14, 2014. Three days later, Jason had a medical incident at Fenton and wound up being transferred via ambulance to Hurley. (Although there may be some dispute about the details, that dispute is not germane to this aspect of the motion.) Jason had lost consciousness after taking medications and was, accordingly, transferred to Hurley.

More saliently, however, Jason had been at Fenton to receive intravenous antibiotics for a long term foot infection. A PICC line was the mechanism to supply the medication. Jason arrived at Hurley on the 17th of August. While the entire time period of Jason's treatment between August 14 and August 23, 2014 is important, it is the 17th to the 23rd – his time at Hurley – that is salient. On the 23rd Jason suffered a pulmonary embolism causing cardiac arrest, as alleged, leading to his death months later.

Jason was admitted to Hurley through the emergency department and a Dr. Hauff provided care to Jason. Dr. Schumacher became Jason's attending physician. Dr. Schumacher saw his patient on August 18, 2014 – some 20 hours after admission – and performed a physical exam and evaluation. On August 20, 2014, an infectious disease consultant, Dr. Hasan, ordered an ultrasound for possible deep vein thrombosis, or DVT. Test results were positive for DVT or a clot.⁵

Dr. Schumacher's office was called. The evening nurse practitioner, Amy Zimmerman, ordered the PICC line be removed and administration of a blood thinner, Xarelto, to treat the clot. Efforts were undertaken to remove the PICC line, including a warm compress, but these efforts were only partially successful and only about half of the PICC line was removed (20 cm, with 20 cm remaining). Nurse practitioner Zimmerman was informed of these marginal results and asked for an x-ray to see if the PICC line was kinked or knotted. It was not. The radiologist resident, Dr. John Hanna, on informing nurse Conley that x-rays were negative, "suggested to inform pts physician of x-ray and warm his arm again with warm blankets and try removing again. If unable to slide out easily to obtain further orders pts physician."

⁵ Apparently, based on the record, use of a PICC line warrants care for monitoring for complications and, as here, a clot.

Nurse practitioner Zimmerman did not order further consults. Nurse Conley tried without success to remove the PICC line with warm blankets. Nurse Anderson monitored the PICC line for redness, pain or swelling.

Apparently at 4:30 or around that time, Jason left the floor to go smoke a cigarette. Public Safety personnel helped return him to his room and he was told of the facility's no smoking policy.

Dr. Schumacher saw his patient during the evening of August 21, 2014. He was aware of the DVT diagnosis, the partial removal of the PICC line, and the administration of Xarelto. Dr. Schumacher did not regard the PICC line as an emergency even with the DVT. In essence, Dr. Schumacher believed Jason's situation was being properly addressed and he did not seek other consults from specialists. He was later made aware that Jason had showered and the PICC line had released, albeit likely because Jason had pulled it out.

Nurse practitioner Zimmerman saw Jason in the afternoon of August 22. She noted his general appearance as comfortable and in no acute distress. Unfortunately, during the evening of the next day, Jason was found unresponsive in a bathroom with the door locked. From there, he went downhill and died months later, generating the instant lawsuit.

The Estate's Claims

The claims against the hospital through the nurses' actions or inactions are stated in Count III of the First Amended Complaint, pages 21-24, paragraphs 97-106. Particularly at page 21, paragraph 99, the pleading delineates six aspects of actions or inactions comprising this segment of the cause of action. However, although originally recited in subparagraphs (a)-(f), the contentions have been refined to just one stated in 99a, and readings as follows:

99. The applicable standard of practice/care required that defendant Hurley Medical Center, by and through its nursing staff, to timely and appropriately do all of the following, which they failed to do and are, therefore, professionally negligent:

a. Request a consult with a vascular surgeon, an interventional radiologist, or other appropriate specialist to remove the PICC line in a timely fashion.

It is on this claim Hurley challenges through its motion for summary disposition.

Standard of Review

A motion for summary disposition is reviewed to determine whether a genuine issue of material facts exists based on a record of the pleadings, depositions, admissions, and other documentation evidence. The record is reviewed in a light most favorable to the non-moving party. Where no genuine issue of material fact exists, judgment for the movant is appropriate. Where, however, the nonmoving party creates a genuine issue of material fact, summary disposition is inappropriate and the matter must be left for determination by the jury. See *Maiden v Rozwood*, 461 Mich 109, 119 (1999) and *Quinto v Cross and Peters Co.*, 451 Mich 358, 362 (1996).

Elements of a Medical Malpractice Claim

The appellate courts have clearly delineated the elements of a medical malpractice claim as requiring a plaintiff to demonstrate (1) applicable the standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and injury. *Woodard v Custer*, 473 Mich 1, 6 (2005).

Analysis

Prudence suggests a first order of business being articulation of a precise and crystalized statement of the gravamen of the Estate's claim against Hurley through the action or inaction of Hurley's nurses. And just as significantly, Hurley's argument for dismissal requires a clear statement of the grounds for its motion.

Without the Court falling prey to oversimplification, the Estate contends the PICC line stayed in too long, certainly should have been removed on diagnosis of the DVT, that the nurses should have done more to prevail upon Dr. Schumacher to call for assistance on removing the PICC line and consequently the failure to do these things resulted in a pulmonary embolism leading to Jason's eventual death. These averments coalesce around the gravamen of the Estate's claim that there should have been a request for consultation with a vascular surgeon, an interventional radiologist, or other specialist.

Hurley's attack on this aspect of the Estate's claim is somewhat two-pronged: It challenges as murky just what it is the Hurley nurses were to do to persuade Dr. Schumacher to seek a consult with a vascular surgeon or an interventional radiologist as described above. Hurley backs up this claim of nebulousness by pointing out that the Estate's experts cannot even state with certainty a cogent standard of care and how the Hurley nurses violated that standard of care. Hurley doubles down here and adds that causation remains – irrespective of any shortcomings regarding standard of care and breach – an insurmountable obstacle for the Estate because Dr. Schumacher testified he would not

have done anything differently had the Hurley nurses⁶ done more to persuade him to seek the consults described.

Both aspects of Hurley's requests will be discussed below, however, to differing degrees, and albeit in a different order.

A. Proximate Causation

In a nutshell, the Estate maintains that, had the nurses done more to persuade Dr. Schumacher, he would have done more concerning the PICC line and the pulmonary embolism would have never happened (or at least would have been less likely). But Hurley contends that the flow of this argument comes to a screeching halt when Dr. Schumacher testified he would have done nothing differently, thereby breaking the causal connection between the nurses' actions and his. Before turning to the legal arguments in this vein, the Court will establish the factual predicates.

The record indicates that Dr. Schumacher was aware of Jason's hospitalization at Hurley and saw him on August 17. He was further aware that there was a problem with the PICC line and that a DVT had been diagnosed and Xarelto prescribed to combat the clot ostensibly. The record further indicates that Dr. Schumacher did not believe the partially in/partially out PICC line was an emergency situation. He testified the appropriate step of prescribing a blood thinner was taken and nothing further was needed. The record reflects Dr. Schumacher saw his patient on August 21 ostensibly with the PICC line in-and-out because later on he was advised it had come out (likely after Jason's shower and possibly because Jason pulled it out).

In any event, the record is clear that Dr. Schumacher was copasetic with Jason's treatment for the PICC line problem, whether in or out. The prescribed medication and monitoring seemed to suffice. Hurley contends that this is the end of it: no level of exhortation by the Hurley nurses was going to prompt different action by Dr. Schumacher and he as much said so. End of story, says Hurley.

But the Estate says otherwise and backs up its position with citation to two appellate court cases specifically addressing a failure to act on nurses' information and urgings. See *Martin v Ledingham, M.D.*, 488 Mich 987-988 (2010) and *Ykimoff v Foote Memorial Hospital*, 285 Mich App 80 (2009). Hurley replies that the Estate's cases are distinguishable and that, despite the legal bobbing and weaving, Dr. Schumacher's testimony remains the knockout punch on causation. Because the Estate presses the cited

⁶ The Court draws a distinction between the Hurley nurses as named and Dr. Schumacher's nurse practitioner, Amy Zimmerman. The motion papers state that nurse practitioner Zimmerman could have ordered consults with specialized practitioners where the Hurley nurses could not. But whatever nurse practitioner Zimmerman could have done and didn't do cannot be laid at the feet of non-employer Hurley.

cases and it disputes that they are controlling and seems significant to the issue, the Court is prompted to conduct a focused analysis of *Martin* and *Ykimoff*.

In *Martin*, the Court of Appeals upheld summary disposition for defendant hospital against a claim by that defendant hospital nurses failed to report the worsening post-surgical condition of the patient. Similarly, testimony was presented that the doctor involved would have done nothing differently, thereby disconnecting any supposed breach from the injury (lack of proximate cause). However, the Supreme Court reversed with directions to the Circuit Court to deny the motion for summary disposition. The Supreme Court, however, seemed to focus, in any event, on the standard of care element, not proximate causation and found a genuine issue of material fact that had to be left to the jury, despite the doctor indicating no change in treatment would have occurred. But as can be gleaned from *Martin*, the decision was at least in part driven by what the appellate court saw as a transgression of the rule that summary disposition is not appropriate where credibility must be evaluated. Finding such a shortcoming, the Supreme Court reversed and cited Judge Gleicher's concurring opinion in *Ykimoff, supra*.

In *Ykimoff, supra*, a three-member panel wrote three separate decisions. Making matters worse, the *Ykimoff* panel interpreted the then recent decision by the Court of Appeals in *Martin*, analyzed it⁷ and the authority on which it is based, and determined its holding should be limited. Further complicating things for analytical purposes, the *Ykimoff* court's decision was released as a published opinion July 16, 2009, nearly a year and a half before the Supreme Court reversed *Martin*. And *Ykimoff* was denied leave to appeal – in the same volume and on the same page *Martin* was reversed! So determining where *Martin* and *Ykimoff* leave their holdings in relationship to the instant matter is no easy task, but the Court believes the following may be discerned.

First, where a failure to inform a medical professional is maintained, it may not necessarily follow that liability may be precluded if the medical professional testified that, had he or she been so informed, the actions taken would have been no different. But, second, such an indication may indeed cut off liability based on a lack of proximate cause where credibility determination need not be made concerning the medical professional's stated position. Third, if the statements made and actions taken by the medical professional were consistent, and included the medical professional's observations of the patient, the stated conclusion that no different action would have been taken is fortified as a roadblock to proving causation.

In the instant matter, a total failure to inform is not in play. Nor is a vivid worsening condition from surgery. The instability of a PICC line and whether that instability was properly addressed frames the issue. The record reflects that Dr. Schumacher was aware of Jason's hospitalization, knew about the PICC line problem, knew about the DVT determination, knew that Xarelto had been prescribed to thin the blood in an effort to control

⁷ The *Ykimoff* court cited no less than five applicable cases from outside Michigan jurisdictions, some cited by *Martin*.

the clot and that repeated efforts had been undertaken to dislodge the half-in/half-out PICC line. Moreover, as its counsel at oral argument, Dr. Schumacher twice "laid eyes" on the patient, could see the PICC line and later heard it had come out.⁸

Accordingly, *Martin* and *Ykimoff* do not detain the Court in arriving at the conclusion that proximate cause is a missing element regarding the Estate's claim of nursing negligence. *Martin*, even in the Supreme Court's decision, is distinguishable because it dealt a failure to inform, for the most part⁹ as opposed to as, here, the level of insistence by the nurses to the doctor to obtain consults to address the PICC line problem. The Court is unpersuaded.¹⁰ The facts here should not call for the rejection of Hurley's contention. Dr. Schumacher's testimony that he would have not done anything differently is a potent blow to the Estate's obligation to create a genuine issue of fact under MCR 2.116(C)10. The Court, therefore, sustains Hurley's position that summary disposition is warranted under the appellate cases and MCL 600.2912a(2).

B. Standard of Care and Breach

Given the Court's ruling on proximate causation as defeating the Estate going forward with this aspect of the claim, the Court will spend considerably less time in discussion on the standard of care argument.¹¹ The Court is as well concerned about the nebulous nature of the claim as to just what verbiage is used to describe precisely what it is nurses were to do. Were they to insist on, strongly advise, implore, repeatedly request, and/or urge Dr. Schumacher to order consults? Given that they could not order such consults themselves ("ordering" has never been alleged to be within the nurses' bailiwick and is, frankly, a non-issue), what they could do they did do, and doing more would have done little to ameliorate the situation by prompting additional efforts by Dr. Schumacher. Compare *Rampe v Community General Hospital*, 241 AD 2d 817 (1997) cited in *Ykimoff*, *supra*, at 97.

Conclusion

Based on the foregoing, only Hurley's motion as to the nursing allegations is GRANTED at this juncture.

⁸ This determination has, of course, nothing to do with any claimed liability on Dr. Schumacher's part for any claimed mishandling of the situation regarding the PICC line, an issue not before the Court in Hurley's motion. See *Martin*, at page 162, note one, explaining the circumstances may give rise to doctor liability but not hospital liability.

⁹ The Court notes *Martin* seemed to focus on the standard of care.

¹⁰ The Estate's nursing experts do not add much to the Estate's contention regarding proximate cause. Their assertions were at best muddled or aspirational, leaving much to be desired.

¹¹ This is commensurate with Hurley's motion papers which heavily focus on the proximate cause aspect of Hurley's motion. Hurley's reply brief does the same.

IT IS SO ORDERED.



JOSEPH J. FARAH, Circuit Judge

Dated 2/25/22