[Cite as *Everhart v. Coshocton Cty. Mem. Hosp.*, 2013-Ohio-2210.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Machelle Everhart, Individually and as Administrator of the Estate of, Todd Everhart, Deceased,	:	
Plaintiff-Appellant,	:	
		No. 12AP-75
v.	:	(C.P.C. No. 08CVA-01-1385)
Coshocton County Memorial Hospital, et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 30, 2013

Colley Shroyer & Abraham Co., L.P.A., *David I. Shroyer*, and *Eleni A. Drakatos*, for appellant.

Hammond Sewards & Williams, *Frederick A. Sewards*, and *Scott E. Williams*, for appellee Mohamed Hamza, M.D.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant, Machelle Everhart ("appellant"), individually and as the administrator of the estate of Todd Everhart, deceased, ("Mr. Everhart"), appeals from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Mohamed Hamza, M.D. ("Dr. Hamza"), on appellant's claims for medical malpractice and negligence. Because we find there is a genuine issue of material fact as to whether Dr. Hamza received the X-rays and the radiology report, and thus there is a genuine issue of material fact as to whether or not a

physician-patient relationship existed, which in turn generates a duty of care, we reverse.

I. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} Appellant is the widow of Mr. Everhart. Mr. Everhart was involved in a motor vehicle accident in the early morning hours of December 21, 2003, and was taken to the emergency room at Coshocton County Memorial Hospital ("Coshocton Hospital"). In the emergency room, Mr. Everhart was treated by Rajendra M. Patel, D.O. ("Dr. Patel"). Dr. Patel ordered various X-rays, including chest X-rays, and initially read the chest X-rays as normal. Due to the severity of Mr. Everhart's injuries, Mr. Everhart was transferred by Life Flight to The Ohio State University Medical Center, and therefore he was not admitted to Coshocton Hospital. However, the chest X-rays were later read by the radiologist who came on duty that morning, Joseph Mendiola, M.D. ("Dr. Mendiola"). After reading the X-rays, Dr. Mendiola dictated a report, which was transcribed after Dr. Mendiola's shift ended that day. Dr. Mendiola's impression of the chest X-ray noted a "[f]ocal opacity in the right upper lobe which may represent a lung contusion." (R. Marlene Hostetler deposition, exhibit No. 6, 2, Radiology Consultation; *see also* Dr. Mendiola's deposition, 19-20.) Despite the variance between the emergency room doctor's reading of the chest X-ray as normal and his own reading as the radiologist, in which he described a "focal opacity," Dr. Mendiola did not prepare a discrepancy notification.

{¶ 3} The following day, December 22, 2003, Linda Magness, M.D. ("Dr. Magness"), the radiologist on duty, approved Dr. Mendiola's report and authorized its release and distribution to various departments and physicians, pursuant to Coshocton Hospital's policy. This process simply involved the press of a button on a computer and did not involve any review of Dr. Mendiola's work.

{¶ 4} One of the physicians who was on the distribution list to receive a copy of the X-ray films and the radiology report was Dr. Hamza. Dr. Hamza was employed by Medical Services of Coshocton and worked at the Warsaw Medical Clinic (a "doing business as" DBA of Medical Services of Coshocton). Dr. Hamza also had privileges at Coshocton Hospital. Pursuant to his agreement with Coshocton Hospital, Dr. Hamza

was assigned to serve as the backup physician on the day that Mr. Everhart presented to the emergency room.

{¶ 5} The backup physician is named and listed on the backup schedule for each day. The purpose of the backup physician is to give the patient a physician he can follow up with after discharge if he so desires.[1] The assigned backup physician is to receive a copy of all reports generated from a patient's emergency room visit. Because Mr. Everhart did not provide the name of a family physician upon his arrival at the emergency room, Dr. Hamza was assigned to Mr. Everhart as his backup physician, pursuant to Coshocton Hospital's policy. In this case, Dr. Hamza was to receive a copy of the X-rays as well as the radiology report and copies of any other reports generated from the emergency room visit. While there is physical evidence demonstrating that Dr. Hamza received the emergency room report, a demographic sheet, and a short stay report, the X-rays and radiology report were not found with the other reports at the Warsaw Medical Clinic and Dr. Hamza denies ever receiving them. Mr. Everhart did not contact Dr. Hamza or the Warsaw Medical Clinic for a follow-up appointment and Dr. Hamza had no contact with Mr. Everhart.

{¶ 6} In August 2006, nearly three years later, Mr. Everhart presented to Coshocton Hospital complaining of various symptoms including abdominal pain, nausea, vomiting, hematuria, and a cough. Ultimately, he was diagnosed with advanced stage lung cancer and passed away two months later, in October 2006. Prior to the cancer diagnosis in August 2006, Mr. Everhart was not advised by Coshocton Hospital, Medical Services of Coshocton, The Ohio State University Medical Center, or any other physician of the opacity on his lung that was present in the December 2003 X-rays.

{¶ 7} On January 25, 2008, appellant filed a complaint alleging claims for medical malpractice and wrongful death against Coshocton Hospital and several physicians, including Dr. Hamza. Appellant alleged Coshocton Hospital and numerous physicians deviated from the standard of care when they failed to properly send, receive, and act upon Mr. Everhart's chest X-ray films and radiology report demonstrating a

[1] If Mr. Everhart had been admitted to Coshocton Hospital, rather than transferred to The Ohio State University Medical Center, Dr. Hamza would have been assigned as his attending physician.

lung opacity, and that the failure to communicate these findings resulted in Mr. Everhart being uninformed about the opacity.

{¶ 8} Dr. Hamza denied ever receiving Mr. Everhart's chest X-rays and radiology report, and therefore asserted that he had no duty toward Mr. Everhart. Witnesses employed by Coshocton Hospital and Medical Services of Coshocton testified via deposition as to the process and procedure utilized by those organizations in sending, receiving, and delivering reports generated from an emergency room visit. Many of these witnesses testified that, after a patient is released from the emergency room, the reports generated by the emergency room visit are sent to the backup physician. In 2003, some reports could be sent both by fax and by physical delivery to the physicians' mailboxes, while other reports could only be physically placed in the mailboxes. X-rays and radiology reports could only be physically delivered to the physicians' mailboxes.

{¶ 9} R. Marlene Hostetler ("Ms. Hostetler"), the radiology manager at Coshocton Hospital, testified that radiology consults were communicated to the backup physician listed on the report via the physician's mailbox, which is physically located in the medical records department. Ms. Hostetler described the process as follows. First, the transcriptionist types the report dictated by the radiologist. The radiologist then releases it for distribution. Next, the transcriptionist prints a "batch" of reports. The printed reports are taken by the transcriptionist to the radiology clerk in the front office. Finally, the clerical staff from the radiology department separates the reports and delivers them to the physicians' mailboxes in the medical records department.

{¶ 10} Ms. Hostetler testified that, because Dr. Hamza was listed as the backup and/or attending physician, based on the hospital's procedure, he would have been provided with a copy of the chest X-ray and radiology report in his mailbox. She stated there was no way to tell who specifically delivered the documents because it is not just one person's job to deliver the reports. She testified that everyone in the department shares in the responsibility to make sure that it gets done. Ms. Hostetler further testified the radiology department does not do anything to confirm that the backup physician has received the report and the clinic does not send anything back to confirm receipt of the report.

{¶ 11} When asked about the frequency with which physicians would call in 2003 to complain about not receiving a radiology report, Ms. Hostetler testified: "It happened, not that often, but it did happen sometimes." (Ms. Hostetler's deposition, 32.) Ms. Hostetler was unable to explain the circumstances under which it would have happened.

{¶ 12} Sharon Eicholtz, the director of new technology implementation at Coshocton Hospital, testified a copy of the radiology report was printed on December 22, 2003, but she was unable to determine if it was actually delivered to Dr. Hamza. She testified those reports were routinely delivered to a physician's mailbox, but there was no way to confirm that the report was actually placed into Dr. Hamza's mailbox. She further testified she did not recall receiving any complaints in 2003 from physicians or departments indicating that the computer system showed a copy had been printed of a radiology report, but that the physician had not received a copy of it.

{¶ 13} Kathy Bauman, senior director of professional services at Coshocton Hospital, testified that in 2003, radiology reports, unlike some other reports, such as a short-stay report, were never delivered via fax, but were instead batch printed in hard form and delivered to the physicians' individual mailboxes. The radiology department is responsible for taking those printed reports and placing them into the mailboxes. She further testified she was unaware of any physicians complaining in 2003 that they were not receiving the radiology reports in their mailboxes.

{¶ 14} Melissa Snider ("Ms. Snider"), the clinical operations manager for Medical Services of Coshocton, testified that physicians working for Medical Services of Coshocton at the Warsaw Medical Clinic received reports via fax and via their physical mailboxes at the hospital. She testified the medical assistant or the receptionist for the Warsaw Medical Clinic would collect the reports and give them to the physician for his review. The physician would then indicate what action, if any, should be taken. If no action was required, and if the patient was not an established patient of the clinic, a medical chart was not set up and the reports were not logged into the computer. However, the reports were placed in a "one-time file" in case the patient called to schedule an appointment, at which time the report would be retrieved and a chart

created. The reports placed in the "one-time file" were kept for one year before being moved to a storage location, where they would be stored indefinitely.

{¶ 15} Based upon her review of the medical records at the Warsaw Medical Clinic, Ms. Snider testified Mr. Everhart was never a patient of Dr. Hamza. The clinic did not have a chart for Mr. Everhart or any computerized records. However, the day before her deposition, Ms. Snider did locate records for Mr. Everhart in one of the storage boxes containing one-time files. Ms. Snider testified that she located an emergency room report, a demographic sheet, and a short-stay report. The box did not contain X-ray films or a radiology report for Mr. Everhart.

{¶ 16} Dr. Magness, the radiologist who signed off on Dr. Mendiola's radiology report, also provided deposition testimony. Dr. Magness testified Dr. Mendiola did not prepare and submit a discrepancy notification form, which was used to alert emergency room physicians of a variance between the emergency room's reading of the X-rays and the reading of the radiologist. Dr. Magness testified she would have prepared a discrepancy notification form. Dr. Magness testified that, after she released a radiology report at the request of the transcriptionist, the report was batch printed and went to predetermined destinations, including to any physicians whose names were on the report, to Dr. Magness for billing purposes, to the hospital, and a copy to the X-ray jacket. Based upon the records in this case, Dr. Magness testified that the X-ray reports would have gone to Dr. Patel, Dr. Hamza, Dr. Magness, the hospital, and the X-ray jacket. She further testified the copy for Dr. Hamza would have been hand-delivered by someone in the X-ray department and placed in his mailbox.

{¶ 17} In his deposition, Dr. Hamza testified he served as a backup physician for Coshocton Hospital and was on the hospital's monthly backup calendar. Dr. Hamza confirmed that patients who come into the emergency room and do not have a family physician are assigned a backup physician in the event the patient wants follow-up, outpatient care after discharge. Dr. Hamza testified Mr. Everhart never contacted him for follow-up care or to schedule an appointment and he never saw Mr. Everhart as a patient. He further testified that he never received the chest X-ray or radiology report for Mr. Everhart.

{¶ 18} Dr. Hamza testified that if he had received Mr. Everhart's chest X-ray and the X-ray report identifying a possible lung opacity, he would have wanted to follow up by performing another X-ray or a CT scan. Dr. Hamza acknowledged there have been other situations where X-ray reports were delivered to his mailbox by Coshocton Hospital before the patient had contacted the office for an appointment. In those situations, it was his practice to review the X-ray, make suggestions if necessary, and give it to a nurse or other staff member to initiate the appropriate action. Dr. Hamza testified that most of the time, he was the person who picked up the items that were placed in his mailbox in the medical records department.

{¶ 19} According to Dr. Hamza, if he received X-rays from a patient's emergency room visit as the backup physician, he took action on them. If he had received the X-rays and the X-ray report at issue, he testified the standard of care would have required him to review them and contact the patient to follow-up by repeating the X-ray or CT scan in a week or two, regardless of whether or not Mr. Everhart contacted his office for an appointment.

{¶ 20} On October 2, 2008, Dr. Hamza moved for summary judgment, claiming he had no physician-patient relationship with Mr. Everhart and, therefore, he did not owe Mr. Everhart a duty of care. Consequently, Dr. Hamza argued he had not breached a duty of care toward Mr. Everhart and appellant could not prove her cause of action for medical malpractice against him. Appellant requested additional time to conduct discovery before responding and eventually filed a memorandum in opposition to Dr. Hamza's motion for summary judgment. Attached to appellant's memorandum was the affidavit of appellant's expert, Harlan D. Meyer, M.D. ("Dr. Meyer").

{¶ 21} In his affidavit, Dr. Meyer averred Dr. Hamza had a duty to review reports that were distributed to him, regardless of whether or not he ever saw the patient, whether or not the patient contacted him, or whether or not the patient was transferred from Coshocton Hospital. Dr. Meyer testified if Dr. Hamza received Mr. Everhart's radiology report, the standard of care required Dr. Hamza to notify Mr. Everhart and/or his physicians of the need for follow-up care. Dr. Meyer further averred that Dr. Hamza, as the assigned backup physician, "had a duty of care requiring him to act upon the radiology report if it was delivered to him or his office." (Plaintiff's Reply to the Motion

for Summary Judgment Filed by Defendant Mohamed Hamza, M.D., exhibit No. 1, Meyer Affidavit, ¶ 11; R. 309.)

{¶ 22} Supplemental memoranda were then filed by both appellant and Dr. Hamza. On March 8, 2010, Dr. Hamza filed a reply memorandum. On April 21, 2010, the trial court filed a decision and entry granting Dr. Hamza's motion for summary judgment. However, several other parties remained active in the case and the trial court's April 21, 2010 entry with respect to Dr. Hamza was not final and appealable, as it did not contain Civ.R. 54(B) certification language.

{¶ 23} On August 25, 2011, appellant filed a motion for reconsideration of the trial court's decision granting summary judgment in favor of Dr. Hamza.[2] On September 8, 2011, Dr. Hamza filed a memorandum in opposition. On January 3, 2012, the trial court denied appellant's motion for reconsideration but also issued a nunc pro tunc entry regarding its April 21, 2011 decision and entry granting summary judgment in favor of Dr. Hamza, in which it indicated it would refile that original decision and entry with Civ.R. 54(B) certification language for appeal purposes. A nunc pro tunc decision and entry granting Dr. Hamza's motion for summary judgment was then filed on January 3, 2012, with Civ.R. 54(B) certification language. This timely appeal now follows in which appellant asserts a single assignment of error for our review.

II. ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE MOHAMED HAMZA, M.D.

III. STANDARD OF REVIEW

{¶ 24} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are

[2] Filed with the motion for reconsideration was an alternative motion in limine and motion for oral argument.

found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 25} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 26} When seeking summary judgment on the ground that the non-moving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the non-moving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the non-moving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

IV. ARGUMENTS AND ANALYSIS

A. Appellant's Arguments

{¶ 27} In her sole assignment of error, appellant argues the trial court erred by granting summary judgment in favor of Dr. Hamza because: (1) there is a genuine issue of material fact as to whether a physician-patient relationship existed between Dr. Hamza and Mr. Everhart, due to the nature of Dr. Hamza's agreement with Coshocton Hospital to serve as a backup physician, and (2) there is a genuine issue of material fact as to whether Dr. Hamza received the radiology report for Mr. Everhart because the question hinges on the credibility of the witnesses.

{¶ 28} The underlying theory of the case advanced by appellant is that Coshocton Hospital and numerous physicians deviated from the standard of care when they failed to properly send, receive, and act upon the X-ray films and radiology reports generated from Mr. Everhart's visit to the emergency room following a motor vehicle accident. Consequently, the failure to communicate the findings from those X-rays resulted in Mr. Everhart being uninformed about the opacity on his lung. Appellant argues that, if the relevant medical providers had properly read and communicated those findings to Mr. Everhart, his lung cancer would have been diagnosed at a much earlier stage and he would have had a more favorable prognosis.

{¶ 29} Appellant argues Dr. Hamza undertook a duty to Mr. Everhart when he contractually agreed to act as the back up physician for patients presenting to the emergency room at Coshocton Hospital without a family doctor on the day that Mr. Everhart arrived at the hospital, despite his lack of direct contact with Mr. Everhart. Appellant relies upon *Lownsbury v. VanBuren*, 94 Ohio St.3d 231 (2002), as authority to support her position that a physician-patient relationship was established. Pursuant to *Lownsbury*, appellant argues a contractual obligation to the hospital or the patient can form the basis of a physician-patient relationship, even without affirmative action on the part of the physician to personally see or treat the patient, that in turn gives rise to a duty. Appellant argues it was Dr. Hamza's duty to contact Mr. Everhart if, after reviewing the records, he recognized a need for follow-up care. Appellant further criticizes the trial court's attempt to distinguish this case from *Lownsbury* by claiming it is inapplicable because this case does not involve a teaching hospital or the supervision of residents.

{¶ 30} Additionally, appellant argues Dr. Hamza's claim that he never received the radiology report is disputed by competent evidence. Based upon Evid.R. 406 and the deposition testimony regarding the hospital's routine practice of delivering X-rays and radiology reports to backup physicians, appellant asserts there is evidence demonstrating that Dr. Hamza received the reports and a jury would be entitled to infer that Dr. Hamza did in fact receive the reports. Appellant submits the trial court's improper conclusion that she must provide actual confirmation that Dr. Hamza received

the X-rays and radiology report in order to meet her burden of proof is an unnecessary and impossible hurdle.

{¶ 31} Appellant also argues the existence of the one-time file, which was located in the storage facility and contained some emergency room documents (but not the X-rays or the radiology report), raises at least a presumption that Mr. Everhart's records were provided to Dr. Hamza. Furthermore, appellant submits the fact that both the medical records and medical billing departments of Coshocton Hospital had a copy of the radiology report in their files raises a question of fact as to whether Dr. Hamza, who was also on the list of recipients, was sent and received a copy. At a minimum, appellant argues the evidence establishes a genuine issue of material fact as to whether or not Dr. Hamza received the X-rays and the radiology report. Moreover, appellant argues it is an issue of credibility, which is not appropriate for summary judgment.

{¶ 32} Finally, appellant argues the triggering event for the existence of a physician-patient relationship is not the receipt of the report, but rather, the fact that a duty already existed due to the contractual agreement between Dr. Hamza and Coshocton Hospital. Appellant contends part of the contractual agreement included reviewing the documents received from the patient's emergency room visit and following up if the documents indicated a need for follow-up care. Appellant submits any determination that Dr. Hamza owed no duty to Mr. Everhart simply based on a purported failure to receive the X-rays and the radiology report is contradicted by *Lownsbury* and by the contractual agreement between Dr. Hamza and Coshocton Hospital.

B. Dr. Hamza's Arguments

{¶ 33} Dr. Hamza submits that, pursuant to his agreement with Coshocton Hospital and Medical Services of Coshocton, his obligation here was to see Mr. Everhart in follow up if one or both of these events occurred: (1) Mr. Everhart contacted him or his office after his discharge from the emergency room and requested a follow-up appointment, and/or (2) he received documents generated by Mr. Everhart's emergency room visit and those documents, upon review, revealed the need for follow-up treatment.

{¶ 34} Dr. Hamza argues he owed no duty of care to Mr. Everhart because neither of these events occurred. First, it is undisputed that Mr. Everhart never contacted Dr. Hamza or Medical Services of Coshocton for a follow-up appointment. Second, Dr. Hamza contends he was never provided with the X-rays or the radiology report.

{¶ 35} Dr. Hamza does not dispute that, as the backup physician, if he received Mr. Everhart's X-ray film and radiology report, he would have a duty to review those records, regardless of whether Mr. Everhart contacted him for a follow-up appointment. Because he never received either of these documents, Dr. Hamza argues a duty of care toward Mr. Everhart was never invoked and he had no duty to take any further action concerning Mr. Everhart's care.

{¶ 36} Dr. Hamza also argues his agreement with Coshocton Hospital to serve as a backup physician did not establish a physician-patient relationship with Mr. Everhart, pursuant to *Lownsbury*, and without such a relationship, he is not liable to Mr. Everhart for medical malpractice. Dr. Hamza criticizes appellant's reliance on *Lownsbury* and argues *Lownsbury* is not applicable here because it was limited to physicians providing residents with supervision at a teaching hospital. He argues Coshocton Hospital is not a teaching hospital and he was not supervising residents in this situation. Even if the principles in *Lownsbury* are applicable here, Dr. Hamza argues he did not contract for or otherwise assume a duty to provide care for Mr. Everhart.

{¶ 37} Dr. Hamza disputes appellant's contention that the triggering event for duty is not the receipt of the X-rays or the radiology report and that the duty was already in existence. Dr. Hamza argues that, unless or until the X-rays and radiology report were actually received by him or his office, no duty of care arises. Dr. Hamza argues this lack of duty is supported by the affidavit of appellant's expert, Dr. Meyer, who averred that if Dr. Hamza received the radiology report for Mr. Everhart, he had a duty to review the report and to notify Mr. Everhart and/or his physicians of the need for follow-up care. Neither Dr. Meyer nor anyone else testified the duty was already present without receipt of the radiology report. Consequently, Dr. Hamza argues he had a duty to review reports distributed to him and that duty of care required him to act on the radiology report if it was delivered to him or his office, but if it was not delivered or received, no duty of care attached.

{¶ 38} Dr. Hamza further argues appellant has the burden of showing that Dr. Hamza received a copy of the X-rays and radiology report. While appellant claims Dr. Hamza *should have* received a copy of the reports, Dr. Hamza argues the determinative evidence shows he did not. Dr. Hamza disputes appellant's assertion that she has presented circumstantial evidence that he received the reports by simply introducing testimony identifying the hospital's practice of delivering reports to physicians at the hospital. Dr. Hamza argues appellant has only shown what the hospital's policy and procedure was at that time, not that it was actually followed. Dr. Hamza further argues the procedure is not foolproof, citing the testimony of radiology manager, Ms. Hostetler, who testified that, on occasion, physicians would not receive radiology reports.

{¶ 39} Finally, Dr. Hamza argues the question at issue here does not hinge on the credibility of the witnesses. He argues there is no conflicting testimony or weighing of the evidence involving the dispositive fact of whether or not he received the radiology report, since the only thing appellant has shown is the hospital's procedure for providing X-ray and radiology reports to physicians. Dr. Hamza argues appellant has not identified a witness that can provide testimony that conflicts with the evidence he has produced demonstrating he did not receive the X-ray and radiology reports. None of the witnesses can testify that Dr. Hamza did in fact receive the reports, there is no evidence to show that the radiology report and X-rays were actually delivered, and no witness testified he or she physically placed the report in Dr. Hamza's mailbox. Thus, Dr. Hamza asserts there is no question of fact which would justify reversal of the trial court's order granting summary judgment in favor of him.

C. Analysis

1. The elements of malpractice

{¶ 40} In order to prevail on a claim for medical malpractice, three elements must be demonstrated by the plaintiff: (1) the existence of a standard of care within the medical community, (2) the defendant's breach of that standard of care in failing to provide treatment in conformity with that standard, and (3) proximate cause between the medical negligence and the injury. *Robertson v. Mt. Carmel E. Hosp.*, 10th Dist. No. 09AP-931, 2011-Ohio-2043, ¶ 22; *Adams v. Kurz*, 10th Dist. No. 09AP-1081, 2010-Ohio-2776, ¶ 11; *Williams v. Lo*, 10th Dist. No. 07AP-949, 2008-Ohio-2804, ¶ 11;

Campbell v. Ohio St. Univ. Med. Ctr., 10th Dist. No. 04AP-96, 2004-Ohio-6072, ¶ 10. The failure to establish any of these elements is fatal to a medical malpractice claim. *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130-31 (1976).

{¶ 41} " '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 (1988), quoting *Bruni* at paragraph one of the syllabus. "Expert testimony is generally necessary to prove the elements of medical negligence where the factors involved are beyond the common knowledge and understanding of the jury." *Campbell* at ¶ 10.

{¶ 42} The existence of a duty is an essential element in a medical malpractice case. *Lownsbury* at 235, citing *Littleton* at 92. The duty of care is predicated upon the existence of a physician-patient relationship. *Lownsbury* at 235. *See also Wazevich v. Tasse*, 8th Dist. No. 88938, 2007-Ohio-5062, ¶ 48 ("the legal issue of whether a duty is owed arises from the existence of a physician-patient relationship"). However, "[t]he question of whether a physician-patient relationship exists is a very fact and case specific inquiry and depends upon preliminary questions of fact that must be determined by the fact finder." *Id.*, citing *Lownsbury*. A doctor who "contracts, agrees, undertakes or otherwise assumes" an obligation to care for a particular class or type of hospital patient can have a relationship and a corresponding duty, even if he or she never sees the patient. *Id.* at ¶ 29. A physician-patient relationship may arise from circumstances evincing the physician's consent to act for the patient's medical benefit. *Id.*

2. Application of *Lownsbury*; contractual agreement

{¶ 43} Appellant seems to argue Dr. Hamza had a physician-patient relationship with Mr. Everhart (and therefore owed him a duty of care) by virtue of his contractual agreement with Coshocton Hospital to serve as the backup physician on the day Mr.

Everhart presented to the emergency room. Appellant argues her position is supported by the Supreme Court of Ohio's decision in *Lownsbury*. We disagree.

{¶ 44} In *Lownsbury*, the plaintiffs argued a physician-patient relationship was established between a supervisory physician at a teaching hospital and a patient. The supervisory physician moved for summary judgment on the grounds that a physician-patient relationship does not exist between an on-call physician and a hospital patient unless the physician was in direct contact with the patient or was actively involved in the patient's care. The court characterized the issue before it as follows:

> [W]hether a physician-patient relationship can be established between a *supervisory physician at a teaching hospital* and a hospital patient without evidence that the physician was either in direct contact with the patient, consulted by the treating residents, or otherwise actively involved in the patient's care.

(Emphasis added.) *Id.* at 235.

{¶ 45} In reaching its decision, the Supreme Court stated:

> [W]e hold that a physician-patient relationship can be established between a physician who contracts, agrees, undertakes, or otherwise assumes the obligation *to provide resident supervision at a teaching hospital* and a hospital patient with whom the physician had no direct or indirect contact.

(Emphasis added.) *Id.* at 241.

{¶ 46} Based upon the foregoing, we believe the holding in *Lownsbury* is limited to circumstances involving a supervisory physician who is responsible for residents providing care in an institutional environment or who undertakes specific duties to supervise the residents in a teaching hospital. Those circumstances are not present in the case before us and, thus, we do not find *Lownsbury* to be applicable to the facts and circumstances of this case.

{¶ 47} First, *Lownsbury* involved circumstances where an attending physician failed to supervise the resident physicians. Here, Dr. Hamza was not required to supervise the work of residents. Second, the events in *Lownsbury* occurred at Akron

City Hospital, which was a teaching hospital. Here, there has been no evidence introduced to even suggest that Coshocton Hospital is a teaching hospital.

{¶ 48} As further support for our belief that *Lownsbury* has a limited application, and thus is not applicable to the circumstances here, we note that the *Lownsbury* court specifically reviewed cases from other courts in which those courts considered whether, and under what circumstances, a duty of care was owed by a supervisory physician to a patient actually cared for by a resident. In fact, the cases reviewed, cited, and relied upon by the court in *Lownsbury*, are all in the context of the duty of care owed by a supervisory physician who did not have direct contact with the patient but who was responsible for supervising the residents who provided the care.[3] The courts in those cases "recognize[d] that physicians who practice in the institutional environment may be found to have voluntarily assumed a duty of supervisory care pursuant to their contractual and employment arrangements with the hospital." *Id*. at 238.

{¶ 49} Second, in *Lownsbury*, the court reviewed the contract between the supervising physician, who was employed by an obstetrical and gynecological corporation, and Akron City Hospital. The court also reviewed the consent form signed by the patient setting forth the conditions of admission to Akron City Hospital. The consent form explained that the hospital was a teaching institution, that students may participate in care under appropriate supervision, and that the patient would be under the professional care of a medical doctor known as the attending physician. The court determined the consent form constituted substantial evidence that the supervising physician was required to take an active role in supervising the hospital's residents and caring for its patients.

{¶ 50} In the instant case, we know very little about the contract between Dr. Hamza as an employee of Medical Services of Coshocton and Coshocton Hospital, although appellant urges us to consider Dr. Hamza's contractual obligation. We do not have a copy of the contract and our only insight comes from the information provided by Dr. Hamza in his deposition. We have no way of knowing specifically what the contract required Dr. Hamza to do, outside of Dr. Hamza's own testimony, as appellant has failed

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[3] *See Mozingo v. Pitt Cty. Mem. Hosp., Inc.*, 331 N.C. 182 (1992); *Maxwell v. Cole*, 126 Misc.2d 597 (1984); and *McCullough v. Hutzel Hosp.*, 88 Mich.App. 235 (1979).

to provide this information. And, we know nothing at all about whether Mr. Everhart signed any consent forms prior to or at the time of treatment in the emergency room. This is an additional way in which the circumstances here differ from those found in *Lownsbury*, and thus make it inapplicable.

{¶ 51} We disagree with appellant's assertion that the trial court improperly adopted the standard set forth in *McKinney v. Schlatter*, 118 Ohio App.3d 328 (12th Dist.1997), which was expressly rejected by *Lownsbury*. Nowhere did the trial court reference the *McKinney* case. Additionally, the trial court did not reject the existence of a physician-patient relationship based upon the three-prong test set forth in *McKinney*, which analyzed the relationship based upon the physician's participation in the patient's diagnosis and course of treatment and upon the physician's duty owed to the hospital. Instead, the trial court simply found this case to be distinguishable from *Lownsbury* and that this physician's obligations were different than those of the supervising physician in *Lownsbury*.

{¶ 52} Furthermore, in *Lownsbury*, two experts testified as to the nature of the supervisory physician's duties and also testified that the attending physician had a responsibility as the supervising physician to familiarize himself with the patient's clinical condition, review the patient's tests conducted by the residents, and to formulate a plan. In the instant case, there is expert testimony averring that, if Dr. Hamza received the X-rays and radiology reports and did nothing, he breached the standard of care. This is an issue which we will analyze and discuss in the next section. However, it is important to note that there is no expert testimony stating that Dr. Hamza owed a duty of care to Mr. Everhart pursuant to the existence of a physician-patient relationship simply by way of his agreement with Coshocton Hospital to act as the backup physician for individuals presenting to the emergency room without a family physician.

{¶ 53} Finally, at least one other court has concluded that the principle in *Lownsbury* does not extend beyond teaching hospitals. *See Bergenstein v. Sawhny*, N.D.Ohio No. 1:04 CV 1373 (July 19, 2006) (*Lownsbury* related solely to the malpractice liability of a supervisory physician at a teaching hospital who had no contact with the patient; there is no suggestion that *Lownsbury* extends beyond teaching hospitals).

{¶ 54} Therefore, we find that a physician-patient relationship (and thus a duty of care) did not exist simply by virtue of a contract between Dr. Hamza and Coshocton Hospital. Moreover, we do not find *Lownsbury* to be applicable to the circumstances here. We find Dr. Hamza had a contractual duty to the hospital to serve as the backup physician on the day that Mr. Everhart presented to the emergency room. However, based upon applicable case law and the testimony and evidence before us in the record, that duty was not triggered or invoked with respect to Mr. Everhart until one of two things occurred: (1) Mr. Everhart contacted Dr. Hamza or his office for follow-up care, or (2) Dr. Hamza received the X-rays and/or radiology report, the results of which would have required him to take action by contacting Mr. Everhart or his physicians about scheduling follow-up care. It is undisputed that the first scenario did not occur. The second scenario is in dispute.

{¶ 55} Although appellant also seemingly attempts to argue that receipt of the other emergency room documents (the short-stay report, the emergency room report, and the demographic sheet) should be enough to trigger a duty of care toward Mr. Everhart because the emergency room report references the fact that X-rays were taken, appellant has provided no support for this argument. Appellant has failed to point to any expert testimony that supports her contention that mere reference to the taking of X-rays as stated in an emergency room report was sufficient to trigger a duty of care, without receipt of the actual X-rays or the radiology report. *See generally Korreckt v. Ohio Health*, 10th Dist. No. 10AP-819, 2011-Ohio-3082 (where the record did not contain evidence that the resident conveyed sufficient information to give rise to a duty for the supervising physician to report to the hospital immediately to examine the patient and there was no expert testimony indicating that sufficient information was conveyed to the supervising physician so as to require him to immediately see and evaluate the patient in order to satisfy the applicable standard of care as defined by the expert, summary judgment in favor of the supervising physician was appropriate).

{¶ 56} Additionally, appellant complains that the trial court erred in interpreting Dr. Meyer's affidavit to mean that Dr. Hamza had a duty of care *only if* the X-rays and radiology report were delivered to Dr. Hamza and that such a duty could not arise if that condition precedent did not occur. Appellant argues Dr. Meyer's affidavit did not use

the word "only." While this is true, nevertheless, we find Dr. Meyer's lack of use of the word "only" to be irrelevant. What is significant is that neither Dr. Meyer nor anyone else testified that receipt of those other emergency room reports was sufficient to trigger the duty of care. Instead, Dr. Meyer averred that if Dr. Hamza received the radiology report, the standard of care required him to notify the patient and/or his physicians of the need for follow-up care.

{¶ 57} Thus, we find the triggering event for the existence of a physician-patient relationship is not simply the existence of a contract between Dr. Hamza and Coshocton Hospital, but the receipt of the radiology report, which contained findings indicating that follow up care was necessary. Dr. Hamza had a physician-patient relationship that established a duty to act in order to comply with the standard of care if he received the radiology report. Accordingly, a physician-patient relationship could exist between Dr. Hamza and Mr. Everhart if Dr. Hamza did in fact receive the X-ray and radiology reports, the reports indicated the need for follow-up treatment, and Dr. Hamza failed to act on them. We shall now address that issue.

3. Receipt of X-rays and radiology reports; routine practice

{¶ 58} Appellant argues the granting of summary judgment in favor of Dr. Hamza was improper because there remains a genuine issue of material fact as to whether Dr. Hamza received the X-rays and radiology report. Appellant contends that if Dr. Hamza received the reports and failed to act upon them, he breached the duty of care. Because resolution of this issue hinges on the credibility of the witnesses, appellant argues summary judgment is improper.

{¶ 59} Dr. Hamza testified that if he had received the X-rays and the radiology reports, the standard of care would require him to act and to notify Mr. Everhart of the need for follow-up treatment. Notably, appellant's expert, Dr. Meyer, provided a similar opinion, stating Dr. Hamza's duty to Mr. Everhart was to review reports that were distributed to him and if he had received the radiology report, the standard of care would require him to notify the physician and/or patient of the need for follow-up care.

{¶ 60} However, Dr. Hamza contends he never received the reports, and therefore his duty was never invoked. Appellant, on the other hand, contends she has produced evidence demonstrating that Coshocton Hospital followed its routine practice

of delivering copies of the X-rays and the radiology report to Dr. Hamza, and pursuant to Evid.R. 406, this is sufficient to create a genuine issue of material fact as to whether or not Dr. Hamza received these documents.[4] Dr. Hamza submits that appellant has the burden of showing he received a copy of the X-rays and the radiology report and argues that none of the hospital witnesses can testify that Dr. Hamza did in fact receive the report, only that he *should have* received the report.

{¶ 61} Evid.R. 406 reads as follows:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

{¶ 62} "Evidence of habit or routine has also been stated to require that the person or organization engaged in the behavior must do so regularly enough to make it probable that that person or organization behaved in a specific manner on that occasion." *Sprouse v. Allstate Ins. Co.*, 10th Dist. No. 89AP-131 (Oct. 17, 1989). "Evid.R. 406 has been applied in both business and medical contexts to establish that the witness's routine practice was adhered to in the situation before the court as to which the witness has no particular recollection." *Burris v. Lerner*, 139 Ohio App.3d 664, 671 (8th Dist.2000). *See also State v. Ouch*, 10th Dist. No. 08AP-79, 2008-Ohio-4894, ¶ 18.

{¶ 63} In *Burris*, Evid.R. 406 was applied to establish that the witness's routine practice was adhered to in a situation where the witness had no particular recollection of the event. In that case, the patient died of a myocardial infarction the following night after a referring physician sent the patient to a cardiologist for a stress test, due to complaints of pain and the existence of multiple risk factors for coronary artery disease. The cardiologist interpreted the results the evening of the test. Based upon certain abnormalities, the cardiologist testified it would have been his routine practice to call

[4] We note that appellant's arguments and references to routine practice are vague in the sense that she made no specific reference to Evid.R. 406 in either her motion before the trial court or in her brief before this court. It was not until oral argument that counsel specifically referenced Evid.R. 406, which thereby made her true argument more clearly recognizable.

the referring physician to relay the results the same evening he was interpreting the results. The cardiologist had no express recollection of calling the referring physician and was not in the habit of making notes of such calls, yet believed he did make the call. The cardiologist further testified that, if he had been unable to reach the referring physician, he would have left a message with her answering service to contact him.

{¶ 64} The referring physician, on the other hand, testified she had a clear recollection that she did not receive a call from the cardiologist and was not advised of the abnormality. The referring physician moved for summary judgment on the grounds that the evidence in the record showed an absence of sufficient underlying facts to trigger the standard of care as set forth by the plaintiff's expert. The plaintiff's expert testified the standard of care would have required the referring physician to make a reasonable effort to contact the patient, inform him of the results, assess his situation clinically, and admit the patient to the hospital. Had this occurred, the expert opined the patient would have survived.

{¶ 65} The *Burris* court determined the evidence as to whether the referring physician was notified of the abnormal test results was the critical factual issue in the case and found that the cardiologist's testimony as to his custom and practice, pursuant to Evid.R. 406, was sufficient to controvert the referring physician's testimony that she never received a call, and therefore did not violate the duty of care by failing to take further action. Thus, the trier of fact had to determine which of the two doctors to believe. "The credibility issue inherent in the conflict of testimony is for the finder of fact to resolve." *Id*. at 673. As a result, the Eighth District determined there were disputed issues of material fact and it was error to grant summary judgment in favor of the referring physician.

{¶ 66} We believe the rationale in *Burris* is applicable to the case before us. Contrary to the trial court's belief, appellant was not required to produce confirmation or affirmative proof that the X-ray and radiology reports were in fact delivered to Dr. Hamza's mailbox in order to survive summary judgment pursuant to Evid.R. 406. Although the record lacks testimony from a specific hospital employee claiming that he or she placed the X-rays and the radiology reports in Dr. Hamza's mailbox, and there is

no physical confirmation of delivery to Dr. Hamza's mailbox, neither is required here, given the application of Evid.R. 406.

{¶ 67} We find that genuine issues of material fact remain as to whether or not Dr. Hamza received the X-ray and radiology reports because there is conflicting testimony on this issue. Dr. Hamza's testimony that he did not receive the X-rays and radiology report (and thus had no opportunity to review and act upon it) must be weighed against the testimony given by the hospital and clinic staff members who claim that it would have been delivered to him in the ordinary course of the hospital's routine practice and procedure. In this case, there is evidence on both sides of the issue.

{¶ 68} For example, the fact that the X-rays and radiology report were successfully delivered to others on the distribution list, such as the medical records and medical billing departments of Coshocton Hospital, supports appellant's claim that those reports were also delivered to Dr. Hamza. On the other hand, the fact that the X-rays and radiology report were not located in the one-time file with the other emergency room documents located in storage for Mr. Everhart tends to support Dr. Hamza's contention that he never received the reports. There was also testimony that, on occasion in 2003, a physician had complained that he or she had not received a radiology report. Quite simply, the resolution of this issue comes down to a weighing of the evidence and the credibility of the witnesses. Because receipt of these reports remains in dispute, this issue is not one which is appropriate for summary judgment.

{¶ 69} Accordingly, we sustain appellant's sole assignment of error.

V. DISPOSITION

{¶ 70} In conclusion, we sustain appellant's sole assignment of error. The judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of Dr. Hamza is hereby reversed, and we remand this matter back to the trial court for further proceedings.

Judgment reversed;
cause remanded.

BRYANT and TYACK, JJ., concur.
