

KYLE MICHALEK, etc., et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY
WEXNER MEDICAL CENTER

Defendant

Case No. 2020-00497JD

Judge Patrick E. Sheeran

DECISION

{¶1} Plaintiff Kyle Michalek, individually, and as administrator of the estate of Stephanie L. Michalek, deceased, and Plaintiff A.E.M., a minor, by and through Kyle Michalek, have brought a civil lawsuit against Defendant The Ohio State University Wexner Medical Center. Plaintiffs' civil lawsuit stems from (1) the death of Stephanie L. Michalek on February 23, 2019, at The Ohio State University Wexner Medical Center (OSUWMC) following Stephanie's transfer to OSUWMC from another hospital, and (2) A.E.M.'s birth by perimortem cesarean section (C-section) on February 23, 2019, at OSUWMC.

{¶2} The case proceeded to a bench trial on issues of liability and damages. Upon consideration of the evidence, the Court concludes that Plaintiffs have not proven by a preponderance of the evidence that Defendant OSUWMC should be liable for Plaintiffs' claims against Defendant OSUWMC.

I. Background

{¶3} On August 13, 2020, Plaintiffs filed a Complaint against Defendant OSUWMC, in which Plaintiffs maintain that, as a direct and proximate result of Defendant OSUWMC's negligence, Stephanie L. Michalek sustained injuries and complications that led to her death on February 23, 2019. Plaintiffs also maintain in the Complaint that Defendant OSUWMC's breach of a duty of care owed to Stephanie L. Michalek resulted in A.E.M.'s birth by emergency C-section at 29 weeks gestation. Plaintiffs asserted the following

claims in the Complaint: (1) medical negligence claim for injuries sustained by Stephanie L Michalek (a survivorship claim); (2) claim of loss of spousal consortium, (3) wrongful death claim for the death of Stephanie L. Michalek; (4) medical negligence claim for injuries to A.E.M. and (5) claim of negligent infliction of serious emotional distress for injuries sustained by Kyle Michalek. (Complaint.)

{¶4} Defendant OSUWMC filed an Answer in which it denies liability, but in which it admits:

- (1) Kyle Michalek is the duly appointed Administrator of the estate of Stephanie L. Michalek, as reflected by Letters of Authority attached to the Complaint (Answer, ¶ 1);
- (2) At all times relevant, Defendant OSUWMC employed certain individuals who were acting within the course and scope of their employment when they provided medical care to Stephanie L. Michalek (Answer, ¶ 5);
- (3) Stephanie L. Michalek was a patient at OSUWMC on February 23, 2019 (Answer, ¶ 8);
- (4) Kyle Michalek was present during portions of Stephanie L. Michalek's hospital admission (Answer, ¶ 13);
- (5) Defendant OSUWMC received a letter from Plaintiffs on February 24, 2020, extending the statute of limitations for some of Plaintiffs' claims pursuant to R.C. 2305.113 (Answer, ¶ 14);
- (6) At all times complained of in the Complaint, Stephanie L. Michalek was a patient of OSUWMC (Answer, ¶ 17); and
- (7) Defendant OSUWMC had a duty to provide medical care to Stephanie L. Michalek that complied with the accepted standards of care. (Answer, ¶ 18.)

A. Bench trial held on issues of liability and damages. Partial directed verdict granted in favor of Defendant The Ohio State University Wexner Medical Center.

{¶5} On April 11-14, 2022, the Court held a bench trial by means of Zoom video conferencing on issues of liability and damages.¹ Before witnesses were called to testify, Plaintiffs withdrew the claim of negligent infliction of serious emotional distress. Trial proceeded on the remaining claims: (1) medical negligence claim for injuries sustained by Stephanie L. Michalek before her death (a survivorship claim); (2) claim of loss of spousal consortium, (3) wrongful death claim for the death of Stephanie L. Michalek; and (4) medical negligence claim for injuries to A.E.M.

¹ Before trial began, the parties stipulated to the authenticity of Joint Trial Exhibits 1, 2, and 3. And before trial, the parties also stipulated that (1) “the physicians identified to offer a standard of care opinion regarding liability or non-liability of Defendant is pursuant to Evid.R. 601(E), competent to do so,” (2) “they waive the right to appeal any issue relating to expert witness competency pursuant to Evid.R. 601(E) and/or pursuant to the decision in *Johnson v. Abdullah*, ___ Ohio St.3d ___, 2021-Ohio-3304, 136 N.E.3d 581”, (3) “[t]his stipulation is intended to allow the parties physicians-experts to opine on the standard of care pursuant to the above Evidence Rule at the time of trial, particularly given the timeframe of the allegations up to and including the time of decedent’s demise in February 2019,” and (4) “[t]he parties make no further express or implied stipulation, which is limited to witness competency only as it relates to Evid.R. 601(E) and *Johnson, supra*.” (Amended Stipulation, March 9, 2022.)

At trial, Defendant waived objection to Plaintiffs’ filing of the deposition of Alex Constable, an economist, on the day of trial. See Civ.R. 32(A) (“[e]very deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing”).

At trial, the parties also filed a Stipulation, which provides

1. As a consequence of Stephanie Michalek’s death, two life insurance policies paid an indemnity death benefit to Kyle Michalek who is the as administrator of the estate of Stephanie Michalek, deceased.

2. The combined amount of these two life insurance indemnity death benefits is \$205,000.00.

3. The parties make this stipulation through counsel to predetermine the amount of insurance proceeds for the court’s further determination in the event there is a Plaintiff’s verdict, and in the event that a setoff is found by the court to apply.

In a footnote in the Stipulation, the parties state: “The parties leave open the determination whether or not gifts to a Go Fund Me account are also subject to a potential setoff to be determined, if applicable, after trial, per agreement of the parties and the court at the March 9, 2022 pretrial.” (Stipulation, filed April 14, 2022.)

{¶6} At trial, the parties presented the testimony of several witnesses, including certain members of Defendant OSUWMC’s medical team that cared for Stephanie L. Michalek, Stephanie’s mother, Stephanie’s father, Stephanie’s sister, Stephanie’s brother, Kyle Michalek, Stephanie’s mother-in-law, and Stephanie’s father-in-law. The parties also presented expert testimony, as well as other evidence.

{¶7} At the close of Plaintiffs’ evidence, pursuant to Civ.R. 50, Defendant OSUWMC moved for a partial directed verdict as to the medical negligence claim for injuries to A.E.M. The Court granted Defendant OSUWMC’s motion and announced its reasons therefor at trial. On the last day of trial, at the close of all the evidence, Defendant OSUWMC moved for a partial directed verdict on the issue of proximate causation. That same day Defendant OSUWMC filed a written document labeled “Authorities For Defendant’s Motion For Directed Verdict.” The Court took Defendant OSUWMC’s second motion for a partial directed verdict under advisement. The Court permitted Plaintiffs to respond, in writing, to Defendant OSUWMC’s motion and to include their written response with post-trial briefing that the Court had requested in place of oral closing arguments. The Court informed the parties that it intended to rule on Defendant OSUWMC’s second motion for a partial directed verdict in its written decision in this case. The Court later received post-trial briefing from the parties.²

{¶8} Plaintiffs generally maintain that Defendant OSUWMC’s medical team’s failure to administer magnesium sulfate to Stephanie L. Michalek constituted a breach of the standard of care, which, in turn, proximately caused Stephanie’s death and resulted in a compensable loss of consortium to Kyle Michalek. In Plaintiffs’ post-trial brief, Plaintiffs assert that

the standard of care required Dr. Schneider [attending physician at OSUWMC] be notified that a high-risk pregnant patient he agreed to receive as a transfer had arrived at the hospital by helicopter and that [Stephanie L.

² Plaintiffs filed a post-trial brief on June 2, 2022—instead of June 1, 2022—as ordered by the Court. (Entry, April 15, 2022.) The Court accepts Plaintiffs’ untimely post-trial brief.

Michalek] be seen by an experienced doctor and not just a first-year intern during the patient's first three hours at the hospital. Further, the standard of care required that Stephanie be given magnesium sulfate while she was in the triage area at Ohio State because she had been diagnosed with preeclampsia with severe features.

(Plaintiffs' Post-Trial Brief, 6.) Plaintiffs dispute that OSUWMC is entitled to a directed verdict on the issue of proximate cause because, according to Plaintiffs, cases cited by OSUWMC in its motion are not applicable to a medical malpractice case like this case. Plaintiffs maintain that their expert's opinions on causation in this case are based on the expert's review of the medical records, depositions, the expert's experience in the field of obstetrics and gynecology and Plaintiffs maintain that their expert's opinions are consistent with what OSUWMC's own doctor wrote in the autopsy and what Dr. Schneider even listed as a cause of death on the death certificate.

{¶9} Defendant OSUWMC contends that its medical team's treatment of Stephanie L. Michalek was within the standard of care, that its medical team's treatment did not proximately cause the death of Stephanie L. Michalek, and that it is not liable for a loss of consortium because its treatment was in accord with the applicable standard of care.

{¶10} At issue are the following: (1) whether Defendant OSUWMC's medical team's care of Stephanie L. Michalek constituted medical negligence, which proximately caused injury to Stephanie and proximately caused Stephanie's death, and (2) whether Kyle Michalek sustained a compensable loss of consortium. Whether Defendant OSUWMC's medical team's care constituted medical negligence as to A.E.M., which, in turn, proximately caused injury to A.E.M., has been decided by directed verdict in favor of Defendant OSUWMC.

II. Findings Of Fact

1) Kyle Michalek met Stephanie at Ohio University, when he and Stephanie were students at Ohio University. Kyle and Stephanie began dating in 2005. Kyle and Stephanie were married in 2012.

2) On February 22, 2019, Stephanie was thirty-four years old, was employed as a nurse, and was pregnant with A.E.M.

3) During the evening of February 22, 2019, Stephanie assisted with preparations for a party (which was scheduled for the next day at the couple's home in Utica, Ohio) where the gender of A.E.M. was to be revealed to guests at the party.

4) During the evening of February 22, 2019, Stephanie complained of feeling unwell. Stephanie agreed to go to a hospital to be evaluated.

5) Kyle and another family member accompanied Stephanie to Knox Community Hospital, Mt. Vernon, Ohio, where Stephanie presented to the emergency room for evaluation, care, and treatment. Stephanie complained of, among others, abdominal pain. An ultrasound was performed to determine the cause of Stephanie's abdominal pain. Michael Sullivan, M.D., who cared for Stephanie at Knox Community Hospital, arranged to have Stephanie transferred to OSUWMC for further evaluation, care, and treatment.

6) During the early hours of February 23, 2019, Stephanie was transported to OSUWMC by air medical transport. Kyle Michalek did not accompany Stephanie to OSUWMC on the air medical transport. Instead, Kyle, who was accompanied by his mother, drove to OSUWMC where Kyle met Stephanie in the triage area.

7) Alexandra Bell, M.D., who at the time was a first-year resident and a member of Defendant OSUWMC's care team, met with Stephanie upon her arrival to the triage unit. Dr. Bell assessed Stephanie's medical condition. Dr. Bell noted her findings and evaluation in the medical record. Dr. Bell reported that Stephanie had multiple episodes of emesis in transit to OSUWMC. Dr. Bell also reported that Stephanie had "rapid onset peri-umbilical pain and back pain." Dr. Bell noted that Stephanie exhibited a small amount of bright red blood after Dr. Bell performed a cervical examination. Dr. Bell

listed a diagnosis of preeclampsia with severe features by blood pressure. Dr. Bell deferred ordering magnesium sulfate. (Joint Exhibit, 000011.)

8) Dr. Bell conferred with Emily Cassell, M.D., who, at that time, was a third-year resident, about Stephanie's condition and a plan of care for Stephanie. Dr. Bell also "staffed" Stephanie's case to Dr. Gee, a physician who, at that time, was a fellow in maternal and fetal medicine at OSUWMC.

9) Patrick Schneider, M.D. was assigned as Stephanie's attending physician at OSUWMC. Dr. Schneider did not speak with staff from Knox Community Hospital. Dr. Schneider did not meet with Stephanie after her arrival to the triage unit. Dr. Schneider inaccurately noted in Stephanie's medical record that "I interviewed and examined the patient with the resident" and "Patient verbalized understanding and all questions answered." (Joint Exhibit 3, 000008.)

10) Defendant OSUWMC's plan of care for Stephanie included using labetalol to treat Stephanie's elevated blood pressure and ordering another ultrasound of Stephanie's abdomen.

11) Stephanie was taken to the radiology department at OSUWMC, which was located on a different floor, for an ultrasound.

12) When Stephanie returned from the radiology department to the triage unit, preparations were made to transfer Stephanie to the labor and delivery unit.

13) While Stephanie moved herself from one bed to another bed, Stephanie had an episode of "snoring loudly," according to Kyle Michalek who witnessed the episode.³

14) Defendant OSUWMC's medical team determined that Stephanie was experiencing a life-threatening cardiac event. A Code Blue was called. Dr. Schneider responded and assisted with advanced cardiac life support. Certain OSUWMC staff kept Kyle Michalek and his mother apprised of efforts to resuscitate Stephanie.

³ The Court finds Kyle Michalek's testimony about what he witnessed in Stephanie's hospital room is credible.

15) Despite Dr. Schneider's and Defendant OSUWMC's medical team's efforts, Stephanie died on February 23, 2019.

16) A.E.M. was born by perimortem C-section on February 23, 2019, at about 29 weeks gestation. A.E.M. was transferred to the neonatal intensive care unit and remained there for forty-nine days.

17) The death certificate for Stephanie L. Michalek lists "cardiac arrest" as the immediate cause of death, due to (or as a consequence of) "suspected amniotic fluid embolism," due to (or as a consequence of) "placental abruption from severe preeclampsia," due to (or as a consequence of) "eclamptic seizure." (Joint Exhibit 3, 00132, 00138.)

18) Following Stephanie's death, an autopsy was performed. (Joint Exhibit 3, 000110-000119.)

19) Stephanie's remains were cremated.

20) The Probate Court of Licking County, Ohio, appointed Kyle Michalek as the administrator of Stephanie L. Michalek's estate, on December 10, 2019.

21) Kyle Michalek remarried in November 2021.

III. Conclusions Of Law

A. Degree of Proof, Weight of the Evidence, Doctrine of Respondeat Superior, and Elements of Negligence.

1) Plaintiffs are required to establish their civil claims by a preponderance of the evidence. See *Merrick v. Ditzler*, 91 Ohio St. 256, 260, 110 N.E. 493 (1915) ("[i]n the ordinary civil case the degree of proof, or the quality of persuasion as some text-writers characterize it, is a mere preponderance of the evidence"); *Weishaar v. Strimbu*, 76 Ohio App.3d 276, 282, 601 N.E.2d 587 (8th Dist.1991). A preponderance of the evidence "is defined as that measure of proof that convinces the judge or jury that the existence of the fact sought to be proved is more likely than its nonexistence." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 54.

2) On the trial of a civil case (or criminal case), the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The Court is the trier-of-facts in this case. The Court therefore is free to give weight to the evidence, and the Court is free to believe all, part, or none of the testimony of the witnesses who have appeared at trial before the Court in this case. See *State v. Green*, 10th Dist. Franklin No. 03AP-813, 2004-Ohio-3697, ¶ 24.

3) The Ohio Supreme Court has recognized that, in the medical context, “because only individuals practice medicine, only individuals can commit medical malpractice.” *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 14. But the Ohio Supreme Court also has recognized that, under the doctrine of respondeat superior, a hospital “is liable for the negligent acts of its employees.” *Berdyck v. Shinde*, 66 Ohio St.3d 573, 577, 613 N.E.2d 1014 (1993), citing *Klema v. St. Elizabeth's Hosp. of Youngstown*, 170 Ohio St. 519, 166 N.E.2d 765 (1960).

4) Defendant OSUWMC has admitted that it employed certain individuals who were acting within the course and scope of their employment when they provided medical care to Stephanie L. Michalek (Answer, ¶ 5). Under the doctrine of respondeat superior, Defendant OSUWMC therefore may be liable for any negligent acts of its employees when they provided medical care to Stephanie L Michalek during her hospitalization at OSUWMC.

5) The Ohio Supreme Court has identified elements to establish negligence of a hospital employee as follows: “To establish the negligence of a hospital employee, an injured party must demonstrate that a duty of care was owed to the injured party by the employee, that the employee breached that duty, and that the injuries concerned were the proximate result of the breach.” *Berdyck v. Shinde*, 66 Ohio St.3d 573, 577, 613 N.E.2d 1014 (1993).

6) Defendant OSUWMC has admitted that it had a duty to provide medical care to Stephanie L. Michalek that complied with the accepted standards of care.

(Answer, ¶ 18.) The Court concludes that, as a matter of law, Defendant OSUWMC, through its medical team, owed a duty of care to Stephanie L. Michalek and A.E.M. that complied with accepted standards of care. See *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989) (“[t]he existence of a duty in a negligence action is a question of law for the court to determine. * * * There is no formula for ascertaining whether a duty exists”).⁴

B. Dispute about the applicable standard of care, breach of duty of care, and proximate causation.

{¶11} The parties dispute (1) the applicable standard of care, (2) whether Defendant OSUWMC’s medical team breached the applicable standard of care, and (3) whether such breach proximately caused Stephanie’s death. Plaintiffs essentially maintain that Defendant OSUWMC’s medical team breached the applicable standard of care by failing to administer magnesium sulfate (which is used to protect a pregnant woman from seizures), and such a breach proximately caused Stephanie’s death and A.E.M.’s extended stay in the neonatal care unit. Plaintiffs also maintain that Dr. Patrick Schneider (Stephanie’s attending physician at OSUWMC) should have evaluated Stephanie after her arrival to the triage unit, as Stephanie was a high-risk patient.

{¶12} Defendant OSUWMC essentially contends that its medical team’s care conformed to the applicable standard of care, because, under the applicable standard of

⁴ The Ohio Supreme Court has stated:

“The modern provision of medical care is a complex process becoming increasingly more complicated as medical technology advances. Large teaching hospitals * * * care for patients with teams of professionals, some of whom never actually come in contact with the treated patient but whose expertise is nevertheless vital to the treatment and recovery of patients.

“* * *

“Medical professionals may be held accountable when they undertake to care for a patient and their actions do not meet the standard of care for such actions as established by expert testimony. * * *” (Citations omitted.) * * *

Lownsbury v. VanBuren, 94 Ohio St.3d 231, 236-237, 762 N.E.2d 354 (2002), quoting *Mozingo v. Pitt Cty. Mem. Hosp., Inc.*, 331 N.C. 182, 188-189, 415 S.E.2d 341 (1992).

care, magnesium sulfate was required to be used intrapartum, during delivery, or for 12-24 hours after delivery. Defendant OSUWMC contends that, when Stephanie arrived at OSUWMC, she was not in labor, labor was not imminent and, consequently, the use of magnesium sulfate was not required under the applicable standard of care. Defendant OSUWMC further contends that, because it provides medical education and training to future and current physicians, it was proper for a first-year resident, third-year resident, and a fellow in maternal and fetal medicine to evaluate Stephanie's condition and develop a plan of care while under the supervision of an attending physician.

1. Survivorship Claim, Claim of Loss of Spousal Consortium, and Wrongful Death Claim.

{¶13} Plaintiffs' survivorship claim, claim of loss of spousal consortium, and wrongful death claim generally are based on a contention that OSUWMC's medical team breached the standard of care in its treatment of Stephanie Michalek.⁵ The Supreme Court of Ohio has discussed the standard of care of a medical doctor, as follows:

The standard of care required of a medical doctor is dictated by the custom of the profession:

"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

⁵ "[A] survival action brought to recover for a decedent's own injuries before his or her death is independent from a wrongful-death action seeking damages for the injuries that the decedent's beneficiaries suffer as a result of the death, even though the same nominal party prosecutes both actions." *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, ¶ 7. "As opposed to a survival claim, through which a decedent's estate may recover for the injuries suffered by the decedent before his death, a wrongful-death claim belongs to the decedent's beneficiaries. Compare R.C. 2125.02(A)(1) with R.C. 2305.21." *Peters* at ¶ 10.

surgeon would have done under like or similar conditions and circumstances * * *.”

Littleton v. Good Samaritan Hosp. & Health Ctr., 39 Ohio St.3d 86, 93, 529 N.E.2d 449 (1988), quoting *Bruni v. Tatsumi*, 46 Ohio St. 2d 127, 346 N.E.2d 673 (1976), paragraph one of the syllabus.

{¶14} Whether a standard of care articulated by an expert witness governs a duty of care is a question of fact, determined from all relevant facts and circumstances. See *Berdyck v. Shinde*, 66 Ohio St.3d 573, 584, 613 N.E.2d 1014 (1993); *Burton v. Elsea*, 4th Dist. Scioto No. 97CA2556, 1999 Ohio App. LEXIS 6401, at *32 (Dec. 27, 1999), citing *Strother v. Hutchinson*, 67 Ohio St. 2d 282, 423 N.E.2d 467 (1981) (“disputes as to both the conduct of the parties and the standard of care are questions for the jury”). *But see Hudson v. Arias*, 106 Ohio App.3d 724, 731, 667 N.E.2d 50 (8th Dist.1995) (“[w]hile other jurisdictions have held that experts’ conflicting testimony as to the applicable standard of care constitutes a question of fact for the jury, [*Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 383 N.E.2d 564 (1978)] and [*Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976)] hold that an expert may testify only to the defendant physician’s school and specialty or to a ‘minimum standard of care common to all specialties’ regarding the procedure at issue” (footnote omitted)). The Tenth District Court of Appeals has explained:

With few exceptions, the trier of fact must determine the applicable standard of care in a medical malpractice case from the testimony of expert witnesses. In *Turner v. Children’s Hosp., Inc.* (1991), 76 Ohio App. 3d 541, 602 N.E.2d 423, we explained:

Ordinarily, the issue of whether the physician has employed the requisite care must be determined from the testimony of experts, unless the standard of care is sufficiently obvious that laymen could reasonably evaluate the physician’s conduct. * * * Such expert testimony serves to aid

the trier of fact in determining if there was malpractice. For, although customary practice is evidence of what a reasonably prudent physician would do under like or similar circumstances, it is not conclusive in determining the applicable standard required. *Id.* at 548.

Wheeler v. Wise, 133 Ohio App.3d 564, 569, 729 N.E.2d 413 (10th Dist.1999).

{¶15} At trial, both parties presented the Court with expert testimony about the applicable standard of care.

{¶16} Plaintiffs' expert witness, Martin Gubernick, M.D., an obstetrician-gynecologist, opined that Defendant OSUWMC's care deviated from good and acceptable practice because (1) an intern (Dr. Bell)—not the attending physician (Dr. Schneider)—saw Stephanie after she arrived to OSUWMC, (2) three hours elapsed before Dr. Schneider became aware that Stephanie—a high-risk patient—had been admitted for care, and (3) the standard of care required the use of magnesium sulfate. Dr. Gubernick opined that it was more likely than not that, if magnesium sulfate had been administered to Stephanie, then an eclamptic seizure that Stephanie sustained would not have occurred since magnesium sulfate reduces the risk of eclamptic seizures and, consequently, Stephanie's seizure would not have resulted in an arrhythmia and death. Notably, Dr. Schneider (Stephanie's attending physician at OSUWMC) testified that, based on his research and practice, he would have ordered magnesium sulfate for Stephanie but, in his view, Dr. Bell and Defendant OSUWMC's medical team followed the standard of care by not prescribing magnesium sulfate.

{¶17} Ashi Daftary, M.D., an obstetrician-gynecologist, with a subspecialty in maternal and fetal medicine, testified on behalf of Defendant OSUWMC. Dr. Daftary opined that Defendant OSUWMC's protocol of having an intern (Dr. Bell) assess Stephanie, Dr. Bell's consultation with a more experienced resident (Dr. Cassell) to prepare a treatment plan, and Dr. Bell's presentation of Stephanie's case to Dr. Gee is consistent with the operation of an academic medical center, based on Dr. Daftary's

experience and training. According to Dr. Daftary, the absence of a medical note by Dr. Cassell or by Dr. Gee in Stephanie's medical record is "immaterial." Dr. Daftary also opined that the order for another ultrasound was warranted as part of the evaluative process regarding Stephanie's complaints about abdominal pain. Dr. Daftary further opined that the order for another ultrasound was warranted given that Stephanie's blood pressure, although it was elevated, had been lowered to an acceptable threshold to allow for another ultrasound. Dr. Daftary also opined that the standard of care required the use of magnesium sulfate for seizure prophylaxis, as part of the intrapartum process and for twenty-four hours after birth. Dr. Daftary testified that he agreed with Defendant OSUWMC's medical team's decision to defer the use of magnesium sulfate. Dr. Daftary noted that the autopsy of Stephanie demonstrated that her liver showed effects of preeclampsia, a medical complication that restricts blood flow to multiple organs. Dr. Daftary opined that, even if Defendant OSUWMC's medical team had treated Stephanie with magnesium sulfate, such treatment would not have prevented Stephanie's death. Dr. Daftary opined that Stephanie sustained an arrhythmia secondary to a preeclamptic process, which, in turn, caused decreased blood flow and changes to the electrical rhythm of Stephanie's heart.

{¶18} Dr. Baha Sibai, an obstetrician-gynecologist with a subspecialty in maternal and fetal medicine, testified on Defendant OSUWMC's behalf. Dr. Sibai testified about the medical complication of preeclampsia in pregnancy (which is characterized by, among other things, high blood pressure in a pregnant woman and protein in the urine of a pregnant woman), and preeclampsia's effects on a pregnant woman's organs, and an unborn child. Dr. Sibai testified that eclampsia, for which preeclampsia is a precursor, affects blood vessels in a pregnant woman's organs, including the brain such that ischemia and seizure may result. Dr. Sibai also testified that preeclampsia progresses in a pregnant woman until a woman's delivery of a baby and placenta. Dr. Sibai further testified that magnesium sulfate reduces the risk of seizures, but it does not prevent all seizures, and magnesium sulfate does not reduce the risk of all eclampsia. Dr. Sibai

noted that some women dislike the use of magnesium sulfate because a loading dose of magnesium sulfate may cause nausea and vomiting. Dr. Sibai noted that physicians may be selective in using magnesium sulfate intrapartum, during delivery, or within 12 to 24 hours post-partum.

{¶19} Dr. Sibai opined that Stephanie’s preeclampsia progressed rapidly. Dr. Sibai further opined that an acute hypoxic event led to a cardiac event, as part of Stephanie’s preeclampsia, and that the autopsy results of Stephanie’s liver, which showed evidence of preeclampsia, may explain the right upper quadrant pain that Stephanie experienced, notwithstanding that laboratory results of Stephanie’s liver enzymes were reported as normal. Dr. Sibai testified that Stephanie’s seizure-like activity was not a classic eclamptic seizure and that it was “very unlikely” that a seizure caused Stephanie’s arrhythmia.

{¶20} Stephanie’s autopsy results seemingly support Dr. Sibai’s opinions. Stephanie’s autopsy states, in part,

Based on the clinical history and anatomic findings, the most likely immediate cause of death was sudden cardiac death due to fatal arrhythmia in the setting of eclampsia. * * * Notably, there was no evidence of intracranial hemorrhage.

Additional anatomic findings that may be related to the preeclampsia-eclampsia include pan-lobular necrosis of the left lobe of the liver and mild peripheral edema.

(Jt. Exhibit, 000111.)

{¶21} The Court finds that, in general, the opinions of Plaintiffs’ expert witness, Dr. Martin Gubernick, M.D., as to the necessity for the administration of magnesium sulfate, are less persuasive than the opinions of OSUWMC’s expert witnesses, Ashi Daftary, M.D., and Baha Sibai, M.D. Unlike Drs. Daftary and Sibai, Dr. Gubernick does not have advanced training in maternal and fetal medicine. Dr. Sibai—who has lectured and written extensively—has focused his professional research on the complications and

outcomes of pregnant women with preeclampsia and eclampsia. But the Court is persuaded by Dr. Gubernick's opinion that Dr. Schneider breached a standard of care by not actively supervising Stephanie's care after Stephanie's admission to OSUWMC.

{¶22} Upon consideration of the evidence, the Court concludes that, since Defendant OSUWMC had a residency program in obstetrics/gynecology at the time of Stephanie's hospitalization, it was not improper for a first-year resident (Dr. Bell), third-year resident (Dr. Cassell), and a fellow in maternal and fetal medicine (Dr. Gee) to evaluate Stephanie's condition and develop a plan of care while under the supervision of an attending physician (Dr. Schneider). However, in the Court's view, there is simply no evidence that Dr. Schneider actually "supervised" Stephanie's case after Stephanie was admitted to OSUWMC. The evidence shows that Dr. Schneider was not even made aware of Stephanie's presence at OSUWMC until about three hours had passed following Stephanie's admission to OSUWMC. Were Stephanie not an emergency patient, the Court might treat this failure differently, but she clearly was, and time was of the essence. Thus, the failure in the chain of notification is a clear breach of the standard of care. The Court concludes that, under the facts of this case, the failure of Defendant's staff to notify Dr. Schneider of Stephanie's presence, and the subsequent failure of Dr. Schneider to supervise Stephanie's case constitutes negligence. See *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 45 ("negligence is conduct that falls below the reasonable standard of ordinary care and relates to protecting against foreseeable risks to others"). Nonetheless, the Court does not conclude that Defendant's staff's or Dr. Schneider's negligence constituted the proximate cause of Stephanie's injury or death, or both. See *Whiting v. State Dept. of Mental Health*, 141 Ohio App.3d 198, 202, 750 N.E.2d 644 (10th Dist.2001), citing *Osler v. Lorain*, 28 Ohio St. 3d 345, 347, 504 N.E.2d 19 (1986) ("negligence is without legal consequence unless it is a proximate cause of an injury").⁶

⁶ Under Ohio law, cause in fact and proximate cause are distinct. See *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, ¶ 48. The standard test for establishing cause

{¶23} Based on the evidence, the Court finds that the applicable standard of care dictated the use of magnesium sulfate from the onset of labor, during delivery, or for 12-24 hours after delivery. However, Dr. Schneider's testimony that he would have ordered magnesium sulfate for Stephanie does give the Court some pause about this finding concerning the applicable standard of care, especially since Dr. Schneider gave very good reasons as to why he would have ordered magnesium sulfate in this case. Standards of care necessarily evolve over time; otherwise, we would still be in the medical Dark Ages. And it may well be that the standard of care for cases of this type *should* evolve to the position stated by Dr. Schneider. Nonetheless, this Court concludes that the standard of care has not yet changed, and there is insufficient evidence for this Court to conclude otherwise; therefore, a failure to use magnesium sulfate earlier during Stephanie's admission at OSUWMC was not medical negligence, as the weight of the evidence is that this failure does not constitute medical negligence.

in fact is "but for" causation. *Ackison* at ¶ 48. In *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St.3d 82, 84-85, 671 N.E.2d 225 (1996), the Ohio Supreme Court explained that "a defendant's conduct is a cause of the event (or harm) if the event (or harm) would not have occurred *but for* that conduct; conversely, the defendant's conduct is not the cause of the event (or harm) if the event (or harm) would have occurred regardless of the conduct." (Emphasis sic). And in *Ackison*, the Ohio Supreme Court stated, "Once cause in fact is established, a plaintiff then must establish proximate cause in order to hold a defendant liable." *Ackison* at ¶ 48.

In *Jeffers v. Olexo*, 43 Ohio St.3d 140, 143, 539 N.E.2d 614 (1989), the Ohio Supreme Court discussed the concept of proximate cause:

"Proximate cause is a troublesome phrase. It has a particular meaning in the law but is difficult to define. It has been defined as: 'That which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated.' 65 C.J.S. § 103 Negligence pp. 1130-1131. * *

*" *Corrigan v. E. W. Bohren Transport Co.* (C.A. 6, 1968), 408 F. 2d 301, 303.

Accord Aiken v. Indus. Com., 143 Ohio St. 113, 117, 53 N.E.2d 1018 (1944) (noting that in the field of torts "the proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred"). In *Clinger v. Duncan*, 166 Ohio St. 216, 223, 141 N.E.2d 156 (1957), the Ohio Supreme Court noted: "Ordinarily, the existence of both negligence and proximate cause are, in a jury trial, questions of fact for the determination of the jury under proper instructions from the court."

{¶24} The Court holds that Plaintiffs have proven by a preponderance of the evidence that Dr. Schneider's failure to supervise Stephanie's case constituted negligence, but, because Dr. Schneider's negligence is not the proximate cause of Stephanie's injury or death, or both, liability for Stephanie's injury or death, or both, may not be imputed to Defendant OSUWMC under a theory of respondeat superior. The Court further holds that Plaintiffs have failed to prove by a preponderance of the evidence that Defendant OSUWMC, through its medical team, breached the applicable standard of care by deferring the use of magnesium sulfate in Stephanie's treatment, since, based on the evidence, Stephanie was not in labor when she presented to OSUWMC.

{¶25} Because Plaintiffs have failed to demonstrate by a preponderance of the evidence all the elements of negligence, the Court concludes that Plaintiffs' survivorship claim of medical negligence fails and Plaintiffs' claim of wrongful death based on negligence also fails. See *Whiting v. State Dept. of Mental Health*, 141 Ohio App.3d 198, 202, 750 N.E.2d 644 (10th Dist.2001) ("[a]ll of the elements of negligence must be demonstrated for a plaintiff to recover under a theory of negligence"); *Bodnar v. Hawthorn of Aurora Ltd. Partnership*, 11th Dist. Portage No. 2006-P-0002, 2006-Ohio-6874, ¶ 31, citing *Whiting, supra*. Accord *Ault v. Hall*, 119 Ohio St. 422, 164 N.E. 518 (1928), paragraph one of the syllabus (holding that "[a] presumption of negligence is never indulged from the mere fact of injury, but the burden of proof is upon the plaintiff to prove the negligence of the defendant and that such negligence is a proximate cause of injury and damage").

2. Derivative Claim of Loss of Spousal Consortium

{¶26} A claim for loss of consortium is a derivative claim in that the claim is dependent upon a defendant's having committed a legally cognizable tort upon a spouse who suffers bodily injury. *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 93, 585 N.E.2d 384 (1992). Because Plaintiffs have not proven by a preponderance of the evidence that Defendant OSUWMC should be held liable for the tort of medical negligence or the

wrongful death of Stephanie based on negligence, the Court concludes that the claim for loss of consortium fails.

IV. Conclusion

{¶27} Plaintiffs have not proven by a preponderance of the evidence that (1) Defendant OSUWMC should be held liable for medical negligence for care given to Stephanie L. Michalek, (2) Defendant OSUWMC should be held liable as to a claim of Stephanie's, wrongful death based on medical negligence, or (3) Defendant OSUWMC should be held liable for a derivative claim of loss of consortium. Defendant OSUWMC is entitled to a partial directed verdict in its favor on Plaintiffs' medical negligence claim for injuries to A.E.M., for reasons announced at trial. Defendant OSUWMC's motion for partial directed verdict on the issue of proximate causation is moot.

PATRICK E. SHEERAN
Judge

[Cite as *Michalek v. OSU Wexner Med. Ctr.*, 2022-Ohio-3378.]

KYLE MICHALEK, etc., et al.

Plaintiffs

v.

THE OHIO STATE UNIVERSITY
WEXNER MEDICAL CENTER

Defendant

Case No. 2020-00497JD

Judge Patrick E. Sheeran

JUDGMENT ENTRY

{¶28} For reasons stated in the Decision filed herewith, judgment is rendered in favor of Defendant. Defendant's motion for partial directed verdict on the issue of proximate causation is DENIED as moot. Costs are assessed against Plaintiffs and Defendant equally. The Clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK E. SHEERAN
Judge

Filed August 17, 2022
Sent to S.C. Reporter 9/26/22