

12-1069

FILED
2012 JUL 26 PM 1:00
SATHY S. DELOACH, CLERK
KANAWHA COUNTY CIRCUIT COURT
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TERESA DELLINGER, individually and
In Her Capacity as Executrix of the Estate of
AMBER DELLINGER, Deceased,

Plaintiff,

v.

Civil Action No. 09-C-681
Hon. Paul Zakaib, Jr.

CHARLESTON AREA MEDICAL CENTER, INC.
And PEDIATRIX MEDICAL GROUP, P.C.,

Defendants.

**ORDER GRANTING
PEDIATRIX MEDICAL GROUP, P.C.'S MOTION FOR SUMMARY JUDGMENT**

CAME THIS DAY, the parties, Plaintiff, Teresa Dellinger individually and in her capacity as Executrix of the Estate of Amber Dellinger by and through counsel, John Wooton, Charleston Area Medical Center, Inc. by and through counsel Richard Jones and Flaherty, Sensabaugh & Bonasso PLLC, and Pediatrix Medical Group, P.C. ("Pediatrix"), by and through counsel, Tamela J. White, Bernard S. Vallejos and Farrell, White & Legg PLLC, and pursuant to defendant Pediatrix's Renewed Motion for Summary Judgment. Following the Court's consideration of the record before it as well as oral argument by both parties, the Court FINDS and ORDERS as follows.

FINDINGS OF FACT

1. Plaintiff filed this medical malpractice action on April 14, 2009 pursuant to the provisions of the West Virginia Medical Professional Liability Act (MPLA), W. VA. CODE §§ 55-7B-1 *et seq.* (2003). In her Complaint she named Charleston Area Medical Center, Inc. alleging *inter alia* that its employees and agents negligently failed to maintain Amber Dellinger's airway proximately causing her death.

2. On May 14, 2009, plaintiff Amended her Complaint to name Pediatrix on the basis that Pediatrix was allegedly negligent in failing to treat and properly manage Amber Dellinger's airway proximately causing her death. Pediatrix was served with the Amended Complaint on June 1, 2009. Pediatrix made an entry of appearance on June 30, 2009.
3. The Court entered a Scheduling Order dated September 23, 2010, which established the following deadlines:
 - a. Plaintiff's Expert Witness Disclosure: January 3, 2011
 - b. Defendants' Expert Witness Disclosure: March 4, 2011
 - c. End of Discovery: May 3, 2011
 - d. Trial Date: August 1, 2011
4. On January 14, 2011, Plaintiff made her expert witness disclosure identifying Marc Weber, M.D. as her liability expert. Plaintiff identified Robert Rufus as her economist.
5. Discovery continued and by agreement of the parties was mutually extended past May 3, 2011.
6. Marc Weber, M.D., J.D. was deposed on May 18, 2011.
7. On May 20, 2011, Pediatrix filed a Motion for Summary Judgment on the basis that plaintiff failed to establish a *prima facie* claim for standard of care deviation or causation as to it and the one physician employed by it that was involved in Amber Dellinger's care. W. VA. CODE 55-7B-3 (2003); *Farley v. Shook*, 218 W. Va. 680, 629 S.E.2d 739 (2006).

8. On July 12, 2011, plaintiff responded to Pediatrix's Motion for Summary Judgment, the response being of record. No Rule 56(e) affidavit or other evidence was provided in opposition to the Motion.
9. On June 21, 2001, plaintiff filed a Motion for Continuance on the basis that her expert witness, Marc Weber, M.D., J.D. was unavailable to appear personally at trial.
10. The parties appeared for a pretrial conference on July 15, 2011, during which the Court heard oral argument on plaintiff's Motion for Continuance and Pediatrix's Motion for Summary Judgment. The Court granted the Motion for Continuance and denied Pediatrix's Motion for Summary Judgment, over objection.
11. On July 15, 2011, trial of this matter was rescheduled and set for March 12, 2012.
12. On July 18, 2011, defendant Pediatrix noticed the deposition of plaintiff's economic expert, Laura Savory Miller, an economist with Rufus & Rufus, A.C.
13. On July 21, 2011, defendant Pediatrix deposed Laura Savory Miller.
14. On July 27, 2011, plaintiff noticed the deposition of CAMC nurse, Kelly Wooten.
15. On August 4, 2011, plaintiff deposed Kelly Wooten.
16. On February 23, 2012, Pediatrix renewed its Motion for Summary Judgment, the motion being of record.
17. On February 29, 2012, Plaintiff provided a Response to the Motion for Summary Judgment and did not submit any Rule 56(e) evidence in opposition to the Motion, the response being of record.
18. On March 5, 2012, the parties appeared at the Pretrial for the March 12, 2012 trial date. The Court took the Renewed Summary Judgment under advisement pending settlement negotiations and ORDERED the parties to report to the Court no later than noon on

March 7, 2012 as to the status of resolution, the parties complying and notifying the Court on March 7, 2012 that the matter had not been resolved.

19. The underlying medical facts and evidence in the case is as follows.
20. Then six (6) year old Amber Dellinger ("the patient") presented to the Emergency Department at Raleigh General Hospital on September 18, 2007 with complaints of headache and fever for several days. She was noted to have "several scattered bug bites" on her body. Her headache and fever appeared to resolve during that visit and she was discharged and instructed to return if her condition worsened.
21. The next day, on September 19, 2007, her parents took her back to Raleigh General Hospital for headache and fever, as well as complaints of nosebleed, vomiting, abdominal pain and backache. She had swollen glands in her neck. A lumbar puncture was performed and showed an elevated white blood cell count. The patient was diagnosed with a urinary tract infection and "headache and fever, rule out partially treated meningitis." She was admitted to the pediatrics floor at Raleigh General Hospital.
22. The patient was subsequently transported to Charleston Area Medical Center, Women's and Children's Division ("CAMC") by ambulance on September 21, 2007, for continued care. While at CAMC, the patient was diagnosed as being infected with the La Crosse Virus and La Crosse Encephalitis, a condition where the La Crosse Virus invades and attacks the brain.
23. Early in the morning on September 23, 2007, at 2:15 a.m., the patient complained of pain at her IV site in her left arm. Her IV was leaking. Employees of CAMC became involved in attempting to start a new IV. During that process, the patient began having focal seizure activity. She lost consciousness and required intervention. CAMC nurses

- and pediatric medical resident employed by CAMC, Anita Hawks, D.O. attended to the patient during this time.
24. The patient was transferred to the Pediatric Intensive Care Unit ("PICU") at CAMC between 2:30 a.m. and 2:45 a.m. Pediatrix's employed physician, Manuel Caceres, M.D. was contacted by CAMC Resident Dr. Hawks. Dr. Caceres was/is a pediatric intensive care physician.
25. Various interventions were initiated by Dr. Caceres and Dr. Hawks to address the patient's condition. One of the orders given was for a blood gas to be collected and performed. Other orders included medications to address the patient's seizures.
26. At approximately 3:35 a.m., Dr. Hawks informed Dr. Caceres that the patient was showing signs of break-through seizure activity which meant that measures taken up to that time were not stopping her seizures. Dr. Caceres provided additional instructions to Dr. Hawks. Dr. Caceres arrived at CAMC to evaluate the patient no later than 3:50 a.m.
27. It is uncontested that the blood gas results were first available to Dr. Caceres at approximately 3:50 a.m. and Dr. Caceres then proceeded to intubate the patient.
28. The patient died on September 24, 2007. She had La Crosse Encephalitis.
29. Plaintiff disclosed Marc Weber, M.D., J.D. as her sole expert witness to testify regarding the alleged negligence of Pediatrix/Dr. Caceres in this matter.
30. Dr. Weber testified that the Resident, Dr. Hawks, met the applicable standard of care. Deposition of Marc Weber, M.D., J.D., p. 92:15-19.
31. Dr. Weber testified that he had no criticism of Pediatrix/Dr. Caceres through 3:45 a.m. *Id.* at p. 108:8-14.

32. Dr. Weber testified that his sole standard of care criticism in the case was that the patient needed airway management. *Id.* at p. 106:22-24. He testified that the triggering event for airway management by Pediatrix/Dr. Caceres was the receipt of the blood gas results at 3:50 a.m. *Id.* at p. 106:17-21, 107:18-22. He also testified that once the blood gas results were available, that Pediatrix/Dr. Caceres met the standard of care with respect to airway management. *Id.* at p. 108:15-22.
33. Dr. Weber testified that he could not give an opinion that the death was preventable if any alternative intervention had occurred. *Id.* at p. 112:8-20.

CONCLUSIONS OF LAW

1. Rule 56(b) of the West Virginia Rules of Civil Procedure provides, "A party against whom a claim, counterclaim, cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in the party's favor as to all or any part thereof." W. VA. R. CIV. P. 56(b).
2. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. VA. R. CIV. P. 56; *Mueller v. American Electric Power Energy Services*, 214 W. Va. 390, 392-93, 589 S.E.2d 532, 534-35 (2003).
3. Summary Judgment should be granted "when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 143 W. Va. 160, 133 S.E.2d 770 (1963).

4. In other words, “[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).
5. “The circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. Pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).
6. “If the moving party makes a properly supported motion for summary judgment and cannot show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.” Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).
7. “A dispute about a material fact is ‘genuine’ only when a reasonable jury could render a verdict for the nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceeding before the circuit court.” *Poweridge Unit Owners Ass’n v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996).
8. In medical malpractice cases such as this, “[i]t is the general rule that . . . negligence or want of professional skill can be proved only by expert witnesses.” Syllabus Point 2, *Roberts v. Gale*, 149 W. Va. 166, 139 S.E.2d 272 (1964).” Syl. Pt. 4, *Estate of Fout-Iser ex rel. Fout-Iser v. Hahn*, 220 W. Va. 673, 649 S.E.2d 246 (2007).

9. "When a particular defendant's failure to meet the standard of care is at issue in medical malpractice cases, the sufficiency and nature of proof required is governed by West Virginia Code § 55-7B-7(a) (2003), which specifically provides that: 'The applicable standard of care and a defendant's failure to meet the standard of care, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court.'" Syl. Pt. 5. *Estate of Fout-Iser ex rel. Fout-Iser v. Hahn*, 220 W. Va. 673, 649 S.E.2d 246 (2007).
10. Plaintiff's sole liability expert, Dr. Marc Weber, admitted that Pediatrix/Dr. Caceres met the applicable standard of care with respect to the patient. He also admitted that he was unable to testify that Pediatrix/Dr. Caceres proximately caused or contributed to the patient's death.
11. During his deposition, Dr. Weber admitted that Dr. Caceres met the applicable standard of care in his evaluation, care and treatment of the patient:

Q. So you would expect Dr. Caceres, that once he is told about the blood gas results, that that is when you would find that he needed to intervene with the patient?

A. In terms of airway management, yes.

Q. And airway management is your exclusive criticism in this case?

A. Yes.

...

Q. Okay. So I want to make sure. You have no criticism of Dr. Caceres before 3:45 a.m.; correct?

A. I don't have any criticism prior to the time that he was aware or should have been aware of the blood gas result. That's correct.

...

Q. And all of his other care was at all times appropriate and within the standard of care?

A. I believe so, yes.

Deposition of Marc Weber, M.D., J.D., p. 106:17-24, p. 108:8-14, pp. 108:23 through 109:1.

Q. You have no basis to say that Dr. Caceres knew about the blood gas results before 3:45 to 3:50 a.m.; isn't that true?

A. I don't have a basis for that. That's correct.

...

Q. And you have no basis or fact to dispute Dr. Caceres' testimony that the blood gas was first available to him when he arrived; correct?

A. That's correct.

Id. at p. 107:18-22, p. 111:17-21.

Q. And once he was aware of the blood gas result, Dr. Caceres completed the intubation effectively and timely, did he not?

A. That's correct. Once he arrived in the unit, it was a rapid sequence, intubation that was done without any apparent complications.

...

Q. And after he arrived, he immediately, timely and appropriately completed an intubation?

A. Correct.

Id. at p. 108:15-22, p. 111:22-25.

Q. So, with respect to the timing of intubation, once Dr. Caceres had the available blood gas, he acted appropriately and within the standard of care; right?

A. Yes. Once he had the result, that's correct.

Id. at p. 112:2-7.

12. Dr. Weber also admitted he could not opine that Dr. Caceres proximately caused any injury to the patient:

Q. Even if someone assumes that the blood gas result should have been given to Dr. Caceres earlier, you cannot quantify any injury that happened to this patient because of the blood gas not being given to him before 3:50 a.m., isn't that true?

A. Correct. And the delay in intubation, I can't quantify it.

Q. You cannot say more likely than not that this patient would have lived if the blood gas value would have been given to Dr. Caceres earlier?

A. That's correct.

Id. at p. 112:8-20.

13. There is no material dispute of fact that Pediatrix/Dr. Caceres was not provided with the information that Dr. Weber defines as triggering the duty to intubate the patient—the blood gas result—prior to 3:50 a.m. It is undisputed that once the 3:50 a.m. blood gas results were available to Pediatrix/Dr. Caceres, he met the appropriate standard of care by properly and timely intubating the patient.
14. There is no material dispute of fact that Pediatrix/Dr. Caceres did not proximately cause or contribute to the patient's death. Dr. Weber admitted his inability to testify as to proximate causation with respect to the timing of the intubation. He also admitted that he could not say that the patient more likely than not would have lived if the blood gas result had been given to Dr. Caceres earlier than 3:50 a.m.
15. Summary Judgment is proper for Pediatrix because no genuine issue of material fact exists for determination as to its alleged negligence. Plaintiff cannot make a sufficient showing on the essential elements of breach of the standard of care or proximate causation with respect to Pediatrix. As Dr. Weber admits, Pediatrix/Dr. Caceres met the applicable standard of care in this matter and did not proximately cause or contribute to the patient's death.
16. Plaintiff has not and cannot establish a *prima facie* case of medical professional liability as to Pediatrix Medical Group, P.C. and summary judgment is proper. W. VA. CODE 54-7B-3 (2003); *Farley v. Shook*, 218 W. Va. 680, 629 S.E.2d 739 (2006).

WHEREFORE, it is hereby ADJUDGED, ORDERED and DECREED that Pediatrix Medical Group, P.C.'s Motion for Summary Judgment is GRANTED. All exceptions and objections are noted and preserved.

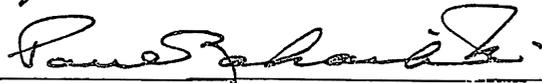
The Clerk of the Court is directed to send certified copies of this *Order Granting*
Pediatric Medical Group, P.C.'s Motion for Summary Judgment upon its entry to the following
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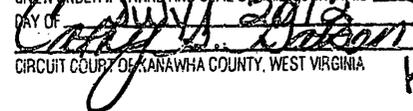
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Entered on this 26th day of July, 2012.


Honorable Paul Zakaib, Jr., Judge

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 27
DAY OF July, 2012
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA KH