

**85-LW-4357 (5th)**

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Michael WINEGARDNER, et al., Plaintiffs-Appellants,

v

Lewis H. URLING, M.D., et al., Defendants-Appellees.

No. 31-CA-85.  
5th District Court of Appeals of Ohio, Fairfield County.  
Decided on November 22, 1985.

Civil Appeal from the Court of Common Pleas

Case No. 53337

Gerald S. Leeseberg, Wolske & Blue, Columbus, Ohio, for plaintiffs-appellants.

John M. Alton, Sue Dill Calloway, Lane, Alton & Horst, Gerald Draper, Bricker & Enkler, Columbus, Ohio, for defendants-appellees.

OPINION

WISE, Judge.

This is an appeal from a summary judgment entered by the Court of Common Pleas of Fairfield, Ohio. On June 6, 1983, Natalie Winegardner (Natalie), a minor by and through her father and next friend, Michael Winegardner (Appellants), filed a complaint for damages resulting from injury sustained during her birth on June 30, 1979, at the defendant-appellee, Lancaster-Fairfield Community Hospital (Hospital); also her parents, Michael and Margaret Winegardner (Parents), claim damages for their loss of consortium and the medical expenses incurred on behalf of their daughter.

The original complaint named Dr. Urling, the obstetrician who delivered Natalie, Hospital, and ten John and Jane Does, agents and/or employees of Hospital. Dr. Urling and Hospital were alleged to have been guilty of medical malpractice in their care and treatment of Natalie.

An amended complaint was filed on August 27, 1984, adding Juett Cooper (Cooper) and Inhalation Therapy Services (ITS) as defendants. Cooper was a respiratory therapist employed by ITS, and ITS had a contract to provide respiratory services to Hospital. Appellants claim that ITS, acting by and through its agent Cooper, "was negligent in the rendering of medical and allied medical services prior to, during, and subsequent to the birth" of Natalie, and "as a direct and proximate result of the negligence," Natalie sustained serious injuries (amended complaint, paragraph 20).

Subsequently, Dr. Urling was dismissed and the case proceeded against Cooper, ITS, and Hospital. On February 10, 1985, Cooper, ITS, and Hospital moved for summary judgment based on the premise 1) that Appellants' claims were barred by the statute of limitations contained in R.C. 2305.11; @1 and 2) that Appellants failed to provide "the requisite expert opinion necessary to establish medical malpractice." (Page 5 of Hospital's motion for summary judgment, and page 8 of Cooper's and ITS' motion for summary judgment).

Appellants oppose the motions on the grounds that the claim against Appellees, Cooper, ITS, and Hospital, was not a claim for medical malpractice, but rather was one of negligence against an individual whose occupation is not among those enumerated in R.C. 2305.11 or within the common law definition of "malpractice," and, therefore, neither R.C. 2305.11(A) or (B) bars an action against the respiratory technician or those vicariously liable for his negligent acts; that their claim is governed by the two-year statute of limitations for bodily injury contained in R.C. 2305.10 which is tolled during minority pursuant to R.C. 2305.16. Appellants further contend that the affidavit and deposition of Dr. Crawford created a genuine issue of material fact. The trial court filed its judgment entry on July 10, 1985, stating inter alia:

After reviewing the memoranda in support of and in opposition to said Motions and after reviewing the pleadings, depositions and affidavits timely filed in this action, this Court concluded that there is no genuine issue as to material fact and that said defendants are entitled to judgment as a matter of law. Having construed the evidence most strongly in favor of plaintiffs, this Court concluded from such evidence that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiffs. (Emphasis added)

Appellants timely appealed from the July 10, 1985, judgment entry.

Prior to our discussion of the merits of this appeal, we feel constrained to comment on the presentation of same. This cause involves a charge of medical malpractice against a doctor (now dismissed) and negligent conduct by a highly trained technician in the performance of his duties. The issues herein are argued by learned attorneys who, in this day of growing legal malpractice, ought to be wary of their own possible negligence in the "treatment and care" of their clients' affairs. Counsel for Appellants fails to comply with App.R. 16(2)^a statement of the assignments of error presented for review^rather a Statement of Issues are presented for review.

Counsel for Appellees, Cooper and ITS, makes the statement at page 1 of his brief: "Both motions were sustained on May 23, 1985, from which plaintiffs have appealed to this court." Not so. The May 23, 1985, filing was the court's MEMORANDUM and not his judgment entry. The MEMORANDUM contained the following: "Counsel for the defendant may forthwith prepare entries in granting summary judgment." The file transmitted to this court reveals no response thereto either by way of docket entry or proffered judgment entry. The only judgment entry filed in re the summary judgment motions was the judgment entry of July 10, 1985. Moreover, Appellants' notice of appeal specifically specifies that the appeal is from the July 10, 1985, judgment entry.

Counsel for Appellee-Hospital with refreshing candor states at page 21 of his brief:

At this time Lombard v. Good Samaritan Medical Center (1982), 69 Ohio State 2nd 471, is controlling with respect to hospital agents other than physicians. [We emphatically agree.] Although Lombard would require this court to rule that the actions complained of do not fall under the common law definition of malpractice

Then, surprisingly the next follows:

it is respectfully submitted that the dissenting opinion of Justice Holmes provides a more rational approach to the controversy and the determination of the proper statutory limitation. Therefore, his opinion should be adopted as the controlling law on this subject in Ohio.

Counsel surely is not seriously suggesting that this court, or any court, adopt dissents as the rule of law, or is he suggesting only that it apply in this case because it conveniently serves his position?

Cutting through all of the obfuscation, this court chooses to decide this case on its merits and will consider Appellants' "Statement of Issues Presented for Review" as a single assignment of error, namely: that the trial court erred in sustaining appellee's motions for summary judgment for the reason that the pleadings, depositions, and affidavits timely filed show that there is a genuine issue as to a material fact and that appellees are not entitled to judgment as a matter of law.

We sustain that assignment of error; our reasons follow.

As to the issue of the statute of limitation, we agree that Lombard v. Good Samaritan Medical Center, supra, requires this court to hold "that the actions complained of do not fall under the common law definition of malpractice," and R.C. 2305.11 is inapposite.

Rather, Appellants have alleged negligence against individuals whose occupations are not among those enumerated in R.C. 2305.11(A) or within the common-law definition of "malpractice." Therefore R.C. 2305.11(A) may not bar an action against a hospitals who are their employers. (Emphasis added)

Lombard v. Good Samaritan Medical Center (1982), 69 Ohio St.2d 471, 473-474.

The trial court, prior to any judgment entry and pursuant to Civ.R. 56(E) and 6(B), granted Appellants' motion to supplement the affidavit by filing Dr. Crawford's deposition which along with Crawford's affidavit establishes a genuine issue of material fact. Crawford affidavit states:

[I]t is my opinion that the hospital, medical and allied personnel attending the delivery and resuscitation of Natalie Winegardner at the time of her birth deviated from the accepted standards of care of reasonably skillful and careful health care providers under the same or similar circumstances.

Crawford Deposition, at page 28:

Q.What suggests to you that there was a lack of immediate response?

A.The fact that nobody was there, and if this respiratory therapy service is contracting with the hospital to provide this type of service, it needs to be available on an immediate basis; that would mean that somebody needs to be available 24 hours a day in a hospital where one would expect they could respond more quickly than they did. (Emphasis added)

Crawford Deposition, at page 56:

Certainly, at the time of birth, I think if she had received appropriate resuscitation and stabilization, she could be expected to be normal today.

Appellees offer contra testimony through the affidavit and deposition of Dr. Urling, therefore, a disputed fact issue is presented.

The judgment of the trial court is reversed and this matter is remanded to that court for further proceedings according to law and not inconsistent with this opinion.

PUTMAN, P.J., and TURPIN, J., concur.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is reversed, and this matter is remanded to that court for further proceedings according to law and not inconsistent with the Memorandum-Opinion filed herein.

Pursuant to the command of Syllabus Three (3) of North v. Pa. Ry. Co. (1969), 9 Ohio St.2d 169, we certify that the following facts are both material and genuinely disputed:

- 1) When did Cooper arrive at the delivery room?
- 2) Whenever he arrived, was that arrival time reasonable?

NORMAN J. PUTMAN, P.J.

EARLE E. WISE, J.

IRA G. TURPIN, J.

Footnote 1 .Hospital relies on the one-year statute of limitation under R.C. 2305.11(A), while admitting that it cannot assert the four-year statute of R.C. 2305.11(B) because Appellants commenced their action against Hospital within the four-year period. ITS claims to be a hospital and asserts that the claim against them is barred by R.C. 2305.11(B)

because it was asserted more than four years after the negligent act occurred.