

2010 WL 9047421 (Ohio Com.Pl.) (Trial Motion, Memorandum and Affidavit)
Court of Common Pleas of Ohio.
Butler County

Robert WEHNER, MD, individually and as Executor of the Estate of Madeline R. Wehner, Deceased,

v.

HERITAGE SPRING OF WEST CHESTER, Defendants.

No. CV 2009 97 3034.
October 11, 2010.

**Memorandum of Plaintiff in Opposition to Defendant's Motion in Limine to
Exclude the Testimony of Plaintiff's Expert Testimony John H. Fullerton, M.D.**

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Judge [Craig D. Hedric](#).

Defendant's Motion attempts to exclude testimony by Plaintiffs expert Dr. John Fullerton as to the issue of why Mrs. Wehner died. The challenge is based upon [Daubert v. Merrell Dow Pharmaceutical, Inc., 509 US 579 \(1993\)](#) and an Ohio Decision [Valentine v. Conrad](#), 110 OhioSt3d 442 (2006). For the following reasons the Motion is not well taken and should be overruled.

First, there is no question that Dr. Fullerton qualifies as an expert witness within his field of specialty in geriatric medicine and rehabilitation medicine. During his discovery deposition, Dr. Fullerton testified as to a number of failings on the part of Heritagespring's nursing staff which ultimately lead to the death of Madeline Wehner.

At page 21 of his deposition, Dr. Fullerton stated:

“And I think I put a little note there that it is important to note, in my experience, that when an elderly woman like this doesn't get mobilized right away and rehabbed right away, particularly during that first week to ten days post-op, and she develops protein energy or protein calorie malnutrition, at least 70% or more of these folks are dead in a year. I mean, in other words, by the time she got to Drake, her rehab potential, in my opinion had been destroyed. And then she was, in effect, doomed short of a miracle to come out of it alive.”

At page 22 and 23 of his discovery deposition, Dr. Fullerton stated:

“That goes to inability of pressure ulcer to heal properly, which goes to denying the rehab potential, which goes to increased delirium and confusion, which we saw, which really makes it almost impossible to rehab somebody as well. At least to the cascade, which is this multiple organ system stuff, organs failing, sepsis and premature death.

And I think what's important in a case like this, in my opinion, we are not talking about a Heritagespring's stay of six weeks or something like that. We are talking about almost a ten day stay. You look at the picture before and the picture after and a very short period of time, which is the critical period to get somebody mobilized and rehabbed and then we have just a terrible outcome which I think is predictable based on the negligent care that went on there that had to have gone on there.

And then I put - remember the trajectory and short critical period of time, ‘capable with **elder abuse**’ is what I put but I wasn't going to go on record as saying it was more likely than not at this point.”

Following that testimony, defense counsel asked this question:

Question: "Doctor, you mentioned that in your experience that of someone, an elderly person who sustains a hip fracture, if you don't get them mobilized within seven to ten days, the rehab potential is gone? Am I saying that right?"

Answer: "Or you will lose most of the rehab potential in most of the cases."

Question: "Can you point to some medical literature, some study that has been done that backs that opinion?"

Answer: "No, no. I am testifying based upon my experience and training and history and role as a medical director at much of facilities over a lot of years."

Question: "You're fully away of the studies that have shown that the elderly who sustain hip fractures that the mortality of such individuals is 50% of one year?"

Answer: "Right. There were some studies that I reviewed over the years that have it in that range, sure."

Question: "Does some studies have it higher?"

Answer: "Some studies have it lower, some studies have it higher?"

Question: "Fifty percent would be a fairly reasonable estimate of mortality of one year after an elderly person sustains a hip fracture?"

Answer: "Well in terms of- yes on a postulation basis, I agree with you. Now on an individual basis, which is what we are dealing with here, you are looking at an individual patient, the snap shot before hand was a pretty darn good one, and I put her in that club of having less than a 50% mortality a year later after a fracture."

In other words, Doctor Fullerton recognizes that there are studies in the medical literature relating to percentage of mortality in patients like Madeline Wehner and that in his experience her odds of living past one year are increased the sooner the patient is mobilized for rehab and where negligent care delays that mobilization, death can ensue as it did in this case.

Defendant has offered nothing to suggest that Dr. Fullerton's observations and his clinical experience in working with this type of patient are unreliable or unscientific. In essence, Defendant is asking Dr. Fullerton to produce a study which would deliberately not mobilize patients like Madeline Wehner and compare her with a group of patients who did receive proper treatment to determine what the odds of survivability would be. Obviously, such an experiment would be inhumane and unethical.

The "window of opportunity" that Dr. Fullerton talks about is not unknown among medical providers of patients like Madeline Wehner. For instance, one of the defense experts, Shane Craycraft, R.N., agrees that there "is a working window, if you will, of - a normal clinical pathway that people would follow with - with therapy." At page 31 of his discovery deposition (which testimony was discussed in the video deposition of Craycraft to be played in this case) Craycraft was listing areas where he disagreed with Dr. Fullerton and stated the following:

"The primary purpose that I saw - or one of the thoughts that was being outlined was this idea of mobilization, that Heritagespring had a window of opportunity, if you will, that was missed. And there is - there is a working window, if you will, of a normal clinical pathway that people would follow with- with therapy. And one of the things that knocks this window off a little bit and- is that Ms. Wehner spent an unusually long period of time at Christ Hospital from our perspective, from a skilled nursing facility perspective. Most residents are out of the hospital in three to four days and come to a skilled nursing facility. They

are stabilized at a skilled nursing facility for medical reasons. And then, once they are stable enough in their ability, then they progress and then you start increasing therapy.

But with the window, the seven to ten days that I saw mentioned might have been post-operatively, that you have a window, the vast majority of that was spent at Christ Hospital. And that window is not a rock solid seven to ten - it adjusts for every - for every resident.”

Basically what Craycraft says is that indeed there is a window of opportunity but because Madeline Wehner remained at Christ Hospital for a longer period of time post-operatively before she was transferred to Heritagespring, you cannot blame the Heritagespring's medical providers for not mobilizing her within this time frame. Whether a jury will believe Craycraft or Dr. Fullerton remains to be seen. The point is that Defendant's own expert recognized the existence of what Dr. Fullerton has referenced in his testimony. Beginning at page 32 of his discovery deposition, Dr. Fullerton was asked the following questions and gave the following answers:

Question: “Is your testimony they weren't attempting to mobilize, then, at Heritagespring?”

Answer: “No, I think they were, but I think, again, I am putting on my expert rehab hat right now and you take - you get a patient like this and you know you are supposed to know what you are getting. I think that they knew or should have known what they were getting, somebody that hadn't been that mobilized, somebody who is at risk for malnourishment, somebody who already had some lesions meaning the areas were threatened, someone who was already diminutive, somebody who is, you know, you are going to have to control their pain to get them up, all these kinds of things.

You don't have much buffer period. You don't have much of a window that's just the reality of the rehab world. I do a lot of it, and I know when I get that patient we, as an interdisciplinary team, we kind of attack the situation and get that patient on the right platform to give them their chance at rehab. And that's really just what was not done here. That recognition of Oh my gosh, this person really has been post-operatively hasn't been mobilized.

This person really does have pressure lesions already, this person is diminutive, has no margin for error on the nourishment, this person is elderly, she is moderately demented. It's going to take some time. We have to move on her or we are going to lose her. And that's - I treat patients like this every day. That's what happened here, I believe.”

In providing this testimony, Dr. Fullerton has offered a number of reasons why the negligence of the Heritagespring's nursing staff caused Madeline Wehner's death. In summary, his opinions and conclusions are reliable and based on reliable evidence. His testimony should not be excluded.

Respectfully submitted,

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