

ORIGINAL

No. 2010-0297

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NO. 24783

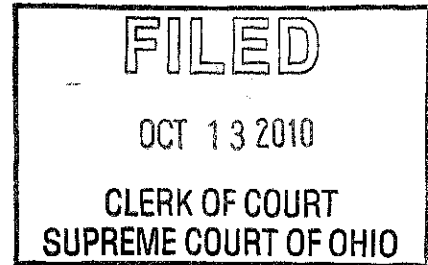
LONNDA LOUDIN

Plaintiff-Appellee,

v.

RADIOLOGY & IMAGING SERVICES, INC., et al.,

Defendants-Appellants



**MERIT BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE
IN SUPPORT OF PLAINTIFF-APPELLEE, LONNA LOUDIN**

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (hereinafter "OAJ"). OAJ is comprised of approximately 2,000 attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

This *Amicus Curiae* intervenes in this appeal on behalf of Plaintiff-Appellee, Lonna Loudin. OAJ urges this Court to carefully consider the issues presented herein. The Ninth District Court of Appeals correctly applied Ohio Law to the facts of this case in reversing the grant of Summary Judgment by the Court of Common Pleas of Summit County, Ohio. The decision of the Appellate Court permitted Plaintiff-Appellee, Lonna Loudin to seek compensation under existing Ohio Law for her claim for the damages she suffered as a result of the delay in diagnosis, including her damages for negligent infliction of emotional distress.

The Ninth District Court of Appeals concluded that Plaintiff-Appellee could present the evidence regarding her medical malpractice claim to a jury. The Court specifically determined that conflicting evidence existed regarding whether, if an earlier diagnosis had been made, Ms. Loudin would have had a smaller, localized, Stage I cancer; it would not have doubled in size; it would not have metastasized to the lymph nodes; and, it would have not increased to Stage IIA. Ultimately, the Court of Appeals held that “[v]iewing the evidence in the light most favorable to Ms. Loudin, reasonable minds could conclude that the 13-month delay in diagnosis was the proximate cause of the growth and metastasis of her breast cancer.” *Loudin v. Radiology & Imaging Services, Inc.* (2009), 85 Ohio App.3d 438, 455, 2009-Ohio-6974, ¶48.

Once the Ninth District Court of Appeals determined that Plaintiff-Appellee suffered a physical injury, no question existed under established Ohio Law that Plaintiff-Appellee could

recover damages for negligent infliction of emotional distress. Despite the contention of Defendants-Appellants and *Amici Curiae*, no new cause of action was created by the Appellate Court.

This Court has carefully considered and developed the cause of action for negligent infliction of emotional distress in a number of cases. Defendants-Appellants and the *Amici Curiae* are asking this Court to ignore precedent and, in essence, eradicate the cause of action for negligent infliction of emotional distress. They are asking this Court to go beyond the “tort reform” passed by the General Assembly and further restrict the right of injured Ohio Citizens to recover damages for injuries caused by the negligence of a medical provider. As set forth herein, Plaintiff-Appellee established that she is entitled to have her case determined by a jury because she has produced evidence on each element of her claims.

LAW AND ARGUMENT

OAJ’S PROPOSITION OF LAW: A PLAINTIFF CAN RECOVER DAMAGES FOR THE TORT OF NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS WHEN THE PLAINTIFF SUFFERS A CONTEMPORANEOUS PHYSICAL INJURY.

This case presents a straightforward question of whether Plaintiff-Appellee, Lonna Loudin, can recover under Ohio Law for the damages suffered by the negligence of the Defendants-Appellants. No new cause of action is being created; rather, century-old law is being applied.

In 1908, this Court held that “[n]o liability exists for acts of negligence causing mere fright or shock, unaccompanied by contemporaneous physical injury, even though subsequent illness results, where the negligent acts complained of, are neither willful nor malicious.” *Miller v. Baltimore & Ohio S.W. R.R. Co.* (1908), 78 Ohio St. 309 (Syllabus No. 3)(overruled by *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St.3d 131 (Syllabus). The converse of this

holding was that liability existed for fright or shock accompanied by contemporaneous physical injury.

The subsequent evolution of the tort of negligent infliction of emotional distress was discussed by this Court in *Paugh v. Hanks* (1983), 6 Ohio St.3d 72. Initially, recovery for emotional distress was permitted under the law as a “parasitic” or “pain and suffering” damages as set forth in *Miller*. *Id.* at 75. In *Paugh*, this Court noted that:

Unless there existed a primary cause of action in a recognized area of tort liability, there would be no allowance for the recovery of mental harm damages. Thus, mental suffering was deemed genuine and compensable if and only if it was ‘parasitic’ to a provable physical injury connected with an accepted tort cause of action. *Id.*

Next, this Court held that a claim for negligent infliction for serious emotional distress could be made even though no contemporaneous physical injury occurred. *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St.3d 131 (Syllabus). The plaintiff in *Schultz* was operating a motor vehicle when an 8-foot ¼’ thick foot sheet of glass fell off of a truck, hit the highway and smashed into his windshield. The plaintiff did not suffer any physical injuries. *Id.* at 132. This Court held that he could recover for his serious emotional distress.

Paugh was decided three months after *Schultz* and recognized a claim for negligent infliction of emotional distress on the part of a bystander. *Paugh*, 6 Ohio St. 3d 72 (Syllabus No. 3). In order to recover, the bystander must have reasonably appreciated the peril which took place, and, as a result of this cognizance or fear of peril, have suffered serious emotional distress. The victim need not have suffered actual physical harm. *Id.* at 80.

This cause of action was further clarified when this Court held that when a plaintiff receives a contemporaneous physical injury, the emotional distress did not need to be severe and

debilitating to be compensable. *Binns v. Fredendall* (1987), 32 Ohio St.3d 244 (Syllabus, No. 1). *Binns* reiterated the long-standing rule recognized in *Miller* in 1908.

The foregoing cases were distinguished from cases where no actual harm exists. *Heiner v. Moretuzzo* (1995), 73 Ohio St.3d 80, 1995-Ohio-65. This *Heiner* line of cases can be characterized as cases in which a false positive exists. Relying on *Heiner*, Defendants-Appellants and their *Amici Curiae* contend that no physical injury exists in the present case and no actual peril exists; thus, they contend that Plaintiff-Appellee has no claim for emotional distress. In so contending, they are asking this Court to ignore the evidence presented in this case and abandon a century of law so that Plaintiff-Appellee will be denied compensation.

The Ninth District Court of Appeals provided a thorough analysis of Ohio Law and the injury suffered by Plaintiff-Appellee in this case. The Court of Appeals concluded that:

...[R]easonable minds could find that Dr. Patterson's deviation from the standard of care proximately caused Ms. Loudin to suffer a significant increase in the size of a malignant breast tumor and allowed the cancer to spread beyond the site of the original tumor and into her lymph nodes. Thus, each day that the cancer remained undiagnosed and untreated cause further damage to Ms. Loudin's body. Under the circumstances, the growth and metastasis of cancer are contemporaneous physical injuries that any support a claim for negligent infliction of emotional distress that is not severe and debilitating...
Loudin v. Radiology & Imaging Services, Inc. (2009), 85 Ohio App.3d 438,450 2009-Ohio-6974, ¶31.

The surprising contention from the Defendants-Appellants and *Amici Curiae* is that the growth of a malignant tumor and metastasis of cancer are not physical injuries. Even more surprising is the contention that a physical injury cannot occur unless the plaintiff appreciates that the injury exists. Apparently, Defendants-Appellants and *Amici Curiae* would have this Court limit recovery in foreign object cases to only those cases in which the plaintiff appreciated that the foreign object was in his or her body.

The Tennessee Court of Appeals defined “injury” as follows:

Injury is any wrong or damage done to another. *See Vance v. Schulder*, 547 S.W.2d 927, 932 (Tenn.1977). Legally speaking, to injure another person signifies an act or omission against that person's rights that results in some damage. *See Barnes v. Kyle*, 202 Tenn. 529, 536, 306 S.W.2d 1, 4 (1957). Any want of skillful care or diligence on a physician's part that sets back a patient's recovery, prolongs the patient's illness, increases the plaintiff's suffering, or, in short, makes the patient's condition worse than if due skill, care, and diligence had been used, constitutes injury for the purpose of a medical malpractice claim. *See Boryla v. Pash*, 960 P.2d 123, 129 (Colo.1998); *Rogers v. Kee*, 171 Mich. 551, 137 N.W. 260, 265 (1912); *Bechard v. Eisinger*, 105 A.D.2d 939, 481 N.Y.S.2d 906, 908 (1984); *Tomcik v. Ohio Dep't of Rehab. & Corr.*, 62 Ohio Misc.2d 324, 598 N.E.2d 900, 902 (Ct.Cl.1991).
Church v. Perales, (Tenn. App. 2000), 39 S.W.3d 149, 171.

The Tennessee Court of Appeals concluded that the plaintiff in *Boryla v. Pash*, (Colo.1998), 960 P.2d 123, 129 suffered an injury due to the growth of the cancer and that the plaintiff suffered an injury as described by the Ohio Court of Claims in *Tomcik v. Ohio Dep't of Rehab. & Corr.*, (1991), 62 Ohio Misc.2d 324. In *Tomcik*, the Court of Claims stated that:

‘...[A]ny want of the proper degree of skill or care which diminishes the chances of the patient's recovery, prolongs his illness, increases his suffering, or, in short, makes his condition worse than it would have been if due skill and care had been used, would, in a legal sense, constitute injury.’ *Craig v. Chambers* (1867), 17 Ohio St. 253, 261.
Id. at 327.

In *Tomcik*, the plaintiff's breast cancer also grew as a result of a delay in diagnoses. *Id.* at 330.

Clearly, Ms. Loudin suffered a physical injury as a result of the delay in treatment.

If one were to compare the injury suffered by Plaintiff-Appellee in the present case with injuries in other cases where the plaintiffs were entitled to recover, such as those described in the Merit Brief of Plaintiff-Appellee, it would become apparent that there is no doubt that Plaintiff-Appellee suffered an injury. For example, when a plaintiff was injected with HIV-contaminated lidocaine, she suffered both physical injury and fear of physical consequences resulting from the injection. *Bright v. The Rardin Family Practice Medical Center*, 2006 Ohio 5037, ¶20 (10th Dis.,

Sept. 28, 2006). The Tenth District Court of Appeals concluded that the injection with the contaminated drug distinguished the case from *Heiner*. *Id.* at ¶21.

More than twenty (20) years ago, the New Jersey Supreme Court determined that:

Plaintiff's evidence of physical injury proximately caused by defendant's malpractice included the growth in size of the tumor and, arguably, the infiltration or the increased infiltration of plaintiff's cancer into the ducts surrounding the original cancer site. In addition to compensation for these physical injuries, Mrs. Evers also should be able to receive damages for any resultant emotional anguish and mental distress...

Evans v. Dollinger (N.J. 1984), 95 N.J. 399, 471 A.2d 405, 412.

The above-cited cases can only lead to one conclusion--that the Plaintiff-Appellee suffered a physical injury as a result of the failure to diagnose her cancer earlier. The tumor doubled in size and the cancer spread to her lymph nodes. This Court is aware that the medical community and health insurance companies advocate for the early detection of cancer and other medical conditions. Yet, these same entities want to deny Plaintiff-Appellee compensation for her injuries that resulted from the failure to detect her condition at an earlier point in time.

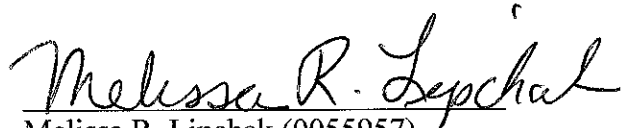
Courts have carefully considered the tort of negligent infliction of emotional distress in an effort to balance the right of a person to recover for their injuries with the prevention of filing of claims that lack merit. This balancing has been accomplished by requiring a contemporaneous physical injury and/or requiring the individual to be a bystander. Does this Court doubt that Plaintiff-Appellee has a meritorious claim?

CONCLUSION

Plaintiff-Appellee, Lonna Loudin, has produced evidence to show that the Defendants-Appellants are not entitled to judgment as a matter of law. The Ninth District Court of Appeals applied a long line of cases, dating back to at least 1908, that specifically recognize the right of a plaintiff to recover damages for emotional distress when that plaintiff has suffered a

contemporaneous physical injury. The Court of Appeals did not create a new right. The Court of Appeals did not allow a plaintiff to circumvent the statutes passed under the name of “tort reform.” The Court of Appeals straightforwardly held that Defendants-Appellants were not entitled to judgment as a matter of law, leaving the jury to determine the issues of negligence, proximate cause and damages—just as it should be.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent on this 13th day of

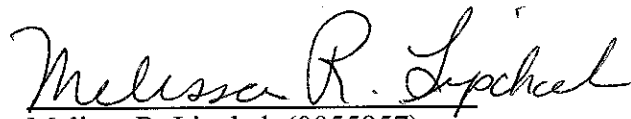
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