IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO

BENJAMIN BARBATO, et al.	:	
	:	
Plaintiffs-Appellants,	:	
	:	
vs.	:	Appeal Case No. 2005 CA 00044
	:	
SANJIV KHETARPAL, MD, et al.	:	
	:	On Appeal From the Stark County
Defendant-Appellees.	:	Court Of Common Pleas
	:	Case No. 2002 CV 01214

BRIEF OF AMICUS CURIAE THE AMERICAN MEDICAL ASSOCIATION AND THE OHIO STATE MEDICAL ASSOCIATION

Catherine C. Little (0068391)
Law Office of C.C. Little, P.A.
4100 Corporate Square, Ste. 160
Naples, Florida 34104
(239) 213-0402
Counsel for Plaintiffs-Appellants

Patrick O'Malley (0026605)
55 Public Square, Ste. 1500
Cleveland, Ohio 44113
(800) 550-0606
Trial Counsel for Plaintiffs-Appellants

D. Cheryl Atwell (0014328)
Reminger & Reminger Co. LPA
200 Courtyard Square
Akron, Ohio 44308
(330) 375-1311
Counsel for Defendants-Appellees,
Zev Randy Maycon, M.D. and
Gastroenterology Associates, Inc.

D. Brent Mulgrew (0006128)
The Ohio State Medical Association
3401 Mill Run Drive
Hilliard, Ohio 43026
(614) 527-6762
Counsel for Amicus Curiae
The American Medical Association and
The Ohio State Medical Association

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I. Statement of Interest of *Amici Curiae*

Amicus the American Medical Association ("AMA"), an Illinois nonprofit corporation, is the largest professional association of physicians, residents and medical students in the United States. Its nearly 250,000 members practice in every state and in every medical specialty. The objects of the AMA are to promote the science and art of medicine and the betterment of public health.

Amicus the Ohio State Medical Association ("OSMA"), is a statewide professional association representing 15,000 Ohio physicians, residents and medical students. The OSMA is dedicated to improving the practice of medicine for physicians, their staffs and patients, by advocating their position, saving them time and money, and promoting the medical profession. The OSMA is affiliated with the AMA on the national level and county medical societies on the local level.[1]

The AMA, the OSMA, and their physician members have a direct and important interest which will be affected by the outcome of this case. *Amici* have adopted numerous policies deploring unfounded and excessive litigation against physicians for claims of medical malpractice. One aspect of such excess is the inclusion of clearly blameless physicians as defendants in cases that might otherwise have a core of legitimacy. If a physician has some peripheral connection with the plaintiff's medical care, he or she is likely to be swept into the suit, regardless of his or her individual conduct. Inclusion is supposedly justified under the theory that the physician should have

[1] The AMA and the OSMA are participating in this brief in their own persons and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, non-profit state medical societies to represent the views of organized medicine in the courts.

somehow anticipated and prevented the wrongful conduct of others, with little or no consideration to the standards and protocols of medical practice.

Not only does excessive litigation impose a substantial financial expense upon *amici*'s members, it also burdens the medical profession and the entire health care system in less tangible ways. Malpractice lawsuits induce "defensive medicine," causing physicians, consciously or unconsciously, to order unnecessary tests and emphasize self-protection against possible litigation exposure, at the expense of balanced and economical patient care. Even a lawsuit that ends successfully for the physician can cause extreme stress and wasted effort.

Public awareness of these litigation burdens diminishes the number of applicants to medical school, and it sometimes causes promising medical students to factor in litigation risk avoidance as a significant consideration when choosing a medical specialty or a place to practice. It may even induce practicing physicians to move to another state, whose malpractice climate they may deem more hospitable, or to quit the practice of medicine altogether.

The AMA and the OSMA recognize that malpractice lawsuits against their members are an inevitable aspect of the American system of justice. However, justice also assumes an element of good faith on the part of the lawyers who file those suits. These lawyers are charged, by statute (R.C. §2323.51(A)(2)(a)(ii)), by court rule (Ohio Civ. R. 11), and by the ethical canons of the profession (Ohio EC 7-25; Ohio DR 7-102) with a due consideration of the burdens imposed on the persons they are suing.

For the reasons set forth below, the AMA and the OSMA urge this Court to affirm the decision of the lower court, upholding the previous ruling of Judge Roger Lile

regarding the frivolous conduct of Attorney Little, as detailed further in the following Statement of the Case and Facts, Argument and Conclusion below.

II. Statement of the Case and Facts.

The AMA and the OSMA adopt the Statement of the Case and the Statement of Facts as set forth in the Brief of Defendants-Appellees, Zev Randy Maycon, M.D. and Gastroenterology Associates, Inc. However, those statements address issues beyond those of this brief. To provide a context for *amici*'s arguments,[2] this brief will therefore restate the most pertinent facts.

Dr. Maycon, the individual appellee with an interest in this appeal, was "on call" during the night of April 12-13, 2001. He became Mr. Barbato's treating physician at about 5:00 p.m. on April 12, 2001, after Mr. Barbato had been admitted to Mercy Medical Center. Mr. Barbato was under the care of the nursing staff during the night and the next morning. The nurses called Dr. Maycon at about 6:30 p.m. on April 12, 2001 with a report on Mr. Barbato, who seemed to be in stable condition at that time. Later, Mr. Barbato complained of abdominal pain and other ailments, but the nurses made no further attempt to contact Dr. Maycon or any other physician associated with Mercy Medical Center. Instead, they administered medications to Mr. Barbato.

The symptoms persisted, however, and at about 9:30 on the morning of April 13, 2005 Mrs. Barbato called Dr. Maycon's office. When she explained Mr. Barbato's symptoms to him, he immediately recognized the need for and ordered more drastic medical care, probably saving Mr. Barbato's life.

[2] This brief is directed only to appellants' fourth assignment of error, which encompasses their fifth and sixth issues presented for review. The question is whether, under the facts of this case, the plaintiffs could assert a claim in good faith against Dr. Maycon and his employer without the supporting testimony of a qualified expert witness.

Catherine C. Little, the initial attorney for the Barbatos and the real party in interest among appellants, sued Dr. Maycon, asserting that he should have examined Mr. Barbato of his own volition, without waiting for the "call" from the nursing staff. She filed the suit without obtaining an expert witness opinion that Dr. Maycon had breached a recognized duty of care. Although Ms. Little later retained a physician, Dr. Stuart Finkle, to evaluate the case, Dr. Finkle never suggested that Dr. Maycon had breached his duty of care. In fact, while he opined that certain of the other defendants were at fault, he affirmatively declined to criticize Dr. Maycon.

Despite the absence of supporting expertise, Ms. Little refused to dismiss Dr. Maycon from the lawsuit. Rather, when Dr. Maycon's attorney made this request, Ms. Little demanded a monetary payment. Ultimately, Mr. Barbato's trial attorney did consent to a voluntary dismissal of Dr. Maycon. In the meantime, Dr. Maycon incurred considerable expense and personal distress.

The trial court sanctioned Ms. Little for bad faith pleading, in violation of R.C. §2323.51(A)(2)(a)(ii). That sanction is the subject of this appeal.

III. Argument

A. Summary of Argument

A fundamental objective of tort law is to induce adherence to reasonable, ascertainable standards of conduct. Perfection is not required; nor is conformity to rules that would not be reasonably apparent to an ordinarily prudent person. *Prosser and Keeton on the Law of Torts* (5th Ed. 1984), at 173. For physicians, this general principle mandates that they use reasonable care and skill in their medical judgments, with the

determination of reasonableness to be measured by the accepted standards of the medical profession. *Id.*, at 187, 189.

There was no suggestion in this case that Dr. Maycon fell in any way short of these requirements. It was the burden of Mr. Barbato and Ms. Little to adduce and prove such shortcoming. Here, they not only knew that they could not meet this burden, but they had substantial evidence from their own expert witness of just the contrary. Lawyers, like physicians, are subject to objective standards of conduct, and in this case Ms. Little violated those standards.

Ms. Little's excuse for keeping Dr. Maycon in the case is that it should have been within the province of the jury, acting on its own judgment and without expert witness testimony, to have determined that Dr. Maycon should have examined Mr. Barbato before he actually did. Had this occurred, she contends, the pain Mr. Barbato suffered before proper treatment would have been reduced. This argument is not only bad law, it is also bad public policy.

B. Physicians Should be Free from Medical Malpractice Liability if They Act Within the Accepted Standards of Their Profession.

Physicians have limited time and limited energy. They cannot be everywhere at once. As a practical matter they must rely on support personnel, such as a nursing staff, for assistance. They have a right to assume that other health care professionals and health care institutions, such as nurses and hospitals, are performing their functions competently and within accepted protocols.

While such reliance must necessarily have reasonable limits, those limits are set by the standards of the medical profession. If physicians cannot rely on such professional standards, as opposed to retrospective conclusions of non-medical professionals, then

they are without guidance. The practice of medicine in a modern setting becomes, as a practical matter, impossible.

The law in Ohio is clear. It is the burden of the plaintiff in a case for medical malpractice to establish the recognized standards of the medical community and to demonstrate that those standards have been violated. Proof of those standards must necessarily be demonstrated through qualified expert testimony. Failure to meet that burden is fatal to the plaintiff's case. *Mooney v. Cleveland Clinic Foundation*, 65 F.Supp.2d 682 (N.D. Ohio 1999); *Bruni v. Tatsumi*, 46 Ohio St. 2d 127, 346 N.E.2d 673 (1976). By requiring a proffer of such expert testimony, the court protects the defendant physician from unsubstantiated litigation, while at the same time preserving the right to a trial of a legitimately aggrieved plaintiff.

No argument is advanced that Dr. Maycon violated the accepted standards of the medical profession or that those standards were somehow inappropriate in this situation. In fact, Mr. Barbato and Ms. Little did not even offer evidence of what those standards were. That evidence would have required the opinion of a medical expert, and no medical expert was willing to state such an opinion. Under *Bruni* and its numerous progeny, therefore, they did not have a case, and Ms. Little, at least, knew or should have known that they did not have a case.

What Ms. Little did say was that it is "within the common knowledge of the ordinary person" to determine what was a reasonable medical practice in this situation. Little Brief, at 27. In other words, the jury should have been free to speculate, based on hindsight and its own subjective beliefs, as to whether Dr. Maycon should have conducted his patient rounds earlier in the day.

Jurors do not have "common knowledge" of hospital protocols, and they have no way of knowing when a physician, without any contraindications, is wrong to rely on the care of a hospital nursing staff. While there are cases which hold that, in exceptional circumstances, jurors my be able to discern a breach of duty by a physician without expert medical testimony, Ms. Little cannot point to a single holding that a physician has a duty greater than that imposed by the reasonable and accepted standards of the medical profession. In fact, *Finley v. United* States, 314 F.Supp. 905, 912 (N.D. Ohio 1970), states that the "common knowledge and experience" exception applies only when the physician's purported negligence "has been so gross as to be within the comprehension of laymen."

There was nothing "gross" about Dr. Maycon's relying on the care of the hospital nursing staff during the night of April 12th-13th, until he had some reason to believe that further care was needed. If there were some valid basis for believing that Dr. Maycon were negligent, then Dr. Finkle – or perhaps some other expert – would have said so. The fact that Dr. Finkle was willing to criticize the care of others but was unwilling to criticize Dr. Maycon speaks volumes.

Ms. Little argues, in effect, that although the breach of medical standards was not apparent to her own expert, Dr. Finkle, it should have been within the province of the jury to perceive it. Ms. Little asks this Court to endorse an outcome based on conjecture and sympathy over an outcome based on the rule of law. This is not the law of Ohio, and it is not even a reasonable argument for an extension of the law.

Medical procedures are both technical and complex. The outcomes are uncertain. The results of failure can be life altering – even life ending. In such situations, second

guessing is inevitable. Is someone to blame for an unfavorable outcome? Could something more have been done? Might someone else have had more skill?

Physicians must have confidence that, if they are found to have acted within the reasonable and accepted standards of their profession, the law will find them free of liability. They are entitled to be judged under an objective standard. *Laughran v. Kettering Memorial Hospital*, 126 Ohio App.3d 468, 710 N.E.2d 773, 776 (1998). The AMA and the OSMA urge this Court to recognize the need for these boundaries and to affirm the lower court's order of sanctions.

C. The Proliferation of Medical Malpractice Lawsuits Imposes a Heavy Burden on the Medical Profession and on the Health Care System.

The cost of medical malpractice litigation is enormous. Costs can be felt directly, by payments for liability or for trial defense. They can also be felt indirectly, by the practice of "defensive medicine" or a distorted choice of career options among medical students, residents, and practicing physicians. This burden is felt by physicians particularly and by the health care system generally, within Ohio and within the country at large. While it is not for this Court to remove that burden entirely, it is for this Court to apply the accepted law against frivolous litigation when an appropriate case arises.

On April 27, 2005, the Ohio Department of Insurance reported that more than one-third of the physicians it had surveyed plan to retire in the next three years due to high medical malpractice insurance premiums. The Department of Insurance further found that two-thirds of all responding physicians had refused to treat high-risk patients. The Department of Insurance characterized medical liability in Ohio as being "in a state of crisis." *See Final Report and Recommendations of the Ohio Medical Malpractice Commission*, at 6. (Available at http://www.ohioinsurance.gov/agent/medmal.htm).

While it is difficult to measure the cost of medical malpractice litigation for the country as a whole, the cost of increased federal government payments alone is approximately $47.5 billion per year. Office of the Assistant Secretary for Planning and Evaluation, United States Department of Health and Human Services, "Confronting the New Health Care Crisis, Improving Health Care Quality & Lowering Costs by Fixing our Medical Liability System." (2002).[3] The average defense cost of medical malpractice suits brought to trial is over $90,000. Even in cases where the claim was dropped or dismissed, the defense costs averaged $17,408. Physician Insurers Association of America, "Claim Trend Analysis" (2004).

Compared to the enormous costs, the benefits to injured patients of medical malpractice litigation is modest. Only $ .28 of every dollar of insurance premiums is paid in indemnity – the rest is consumed in attorneys' fees and administrative expenses. R. A. Anderson, *Defending the Practice of Medicine*, 164 Archives of Internal Medicine 1173, 1175 (June 14, 2004); Office of the Assistant Secretary for Planning and Evaluation, United States Department of Health and Human Services, "Confronting the New Health Care Crisis, Improving Health Care Quality & Lowering Costs by Fixing our Medical Liability System." (2002). Overall, more than 70% of medical liability claims in 2003 were closed without payment to the plaintiff. Of the 5.8% of claims that went to a jury verdict, the defendants won 86.2% of the time. Physician Insurers Association of America, "Claim Trend Analysis" (2004).

[3] Federal government outlays include payments for Medicare, Medicaid, the State Children's Health Insurance Program, the Veterans' Administration, and health insurance coverage for federal employees.

The total costs, though, go beyond the monetary expenditures in litigation. Physicians, like all individuals, adapt to their situation. Those adaptations are not always positive for public health.

The economy has limited resources available for health care, and some of that is spent on the ordering of tests and treatments primarily to help avoid lawsuits. The cost of this defensive medicine is estimated at $70 to $126 billion per year. Office of the Assistant Secretary for Planning and Evaluation, United States Department of Health and Human Services, "Addressing the New Health Care Crisis: Reforming the Medial Litigation System to Improve the Quality of Health Care" (2003).

Defensive medicine can take other forms as well, such as physicians' referring patients to safety net hospitals or academic health centers or declining to take call in the emergency department. R. Berenson, *et al.*, Center for Studying Health System Change, *Medical Malpractice Liability Crisis Meets Markets: Stress in Unexpected Places* (2003). 45% of hospitals have reported that professional liability concerns have resulted in the loss of physicians and/or reduced coverage in emergency departments. American Hospital Association, "Professional Liability Insurance Survey" (2003).

Medical students and residents, being acutely aware of the burden created by medical malpractice litigation, may determine their careers based on risk-avoidance. Medical residents' growing concerns about liability issues cause them to avoid choosing high-risk specialties or practicing in states with reputations for litigious climates. 62% of medical residents reported that liability issues were their top professional concern in 2003. Merit, Hawkins & Assoc. Summary Report: 2003 Survey of Final Year Medical Residents. 48% of students in their third or fourth year of medical school indicated that

the liability situation was a factor in their specialty choice, and 39% said the medical liability environment was a factor in their decision about a state in which they would like to complete residency training. American Medical Association Survey: Medical Students' Opinions of the Current Medical Liability Environment (2003), available at http://www.ama-assn.org/ama1/pub/upload/mm/31/ms-mlrhighlights.pdf.

A recent *New England Journal of Medicine* report declares: "in spite of the mission of malpractice law to improve the quality of care through deterrence – indeed, perhaps because of it – the fear of litigation obstructs progress in ensuring patient safety." D. Studdert, *et al.*, 350 New Eng. J. Med. 283, 287 (2004).

The AMA and the OSMA do not contend that it is for this Court to cure all the imperfections in the system of medical malpractice liability. It is, though, right that this Court enforce the laws now on the books. If implemented fairly and as intended, these laws will alleviate the more egregious instances of litigation abuse. The lower court found, based on more than sufficient evidence, that Ms. Little's conduct was sanctionable under R.C. §2323.51(A)(2)(a)(ii), and it entered judgment accordingly. *Amici* ask that this Court affirm that decision.

Conclusion

Dr. Maycon, until he was alerted otherwise, had no reason to think that Mr. Barbato was under any medical distress or required anything more than routine nursing care. When he was alerted, he acted promptly and responsibly. He may have saved Mr. Barbato's life. Nothing in the record suggests that Dr. Maycon gave less than reasonable, diligent care or that he was dilatory in making his patient rounds.

Nevertheless, Ms. Little, Mr. Barbato's attorney, sued Dr. Maycon, claiming that, somehow, he should have done more. She had no basis for believing that he had violated any recognized standard of medical practice. In fact, her own expert found otherwise. Her assertion, that the jury could have determined the timeliness of Dr. Maycon's patient examinations based on its "common knowledge," defies the facts of this case and any reasonable interpretation of tort law.

The lower court, in its discretion, found that Ms. Little had violated R.C. §2323.51(A)(2)(a)(ii). That decision was based on the facts and the law, and it should be affirmed.

Respectfully submitted,

_____

D. Brent Mulgrew
Attorney for *Amicus Curiae*

D. Brent Mulgrew (0006128)
The Ohio State Medical Association
3401 Mill Run Drive
Hilliard, Ohio 43026
(614) 527-6762

Attorneys for *Amicus Curiae*

Of Counsel:
Leonard A. Nelson
The American Medical Association
515 N. State Street
Chicago, Illinois 60610
(312) 464-4600

Certificate of Service

I do certify that the foregoing brief was served on the persons indicated, by depositing copies in the United States mail on this _____ day of May, 2005.

D. Cheryl Atwell
Reminger & Reminger
200 Courtyard Square
80 South Summit Street
Akron, OH 44308
Counsel for Defendants-Appellees,
Zev Randy Maycon, M.D. and
Gastroenterology Associates, Inc.

Catherine C. Little
4100 Corporate Square, #160
Naples, Florida 34104
Counsel for Appellants

Patrick O'Malley
55 Public Square, Ste. 1500
Cleveland, OH 44113
Trial Counsel for Appellants

_____

D. Brent Mulgrew
The Ohio State Medical Association
3401 Mill Run Drive
Hilliard, OH 43026

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