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IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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DAPHNE E. BARBEE; FINN T. BARBEE, and RUSTAM A. BARBEE,
Plaintiffs-Appellants,

v.

THE QUEEN'S MEDICAL CENTER; and WILLIAM YARBROUGH, M.D.
Defendants-Appellees

AND

DOE DEFENDANTS 1-10, Defendants

NO. 28084

2008 OCT 31 AM 8:31
E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII
FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 04-1-0766)

OCTOBER 31, 2008

RECKTENWALD, C.J., WATANABE AND FUJISE, JJ.

ORDER RE: MOTION FOR RECONSIDERATION

Plaintiffs-Appellants Daphne E. Barbee, Finn T. Barbee and Rustam A. Barbee (collectively Plaintiffs) filed a Motion for Reconsideration of Decision Dated September 30, 2008 (Motion). This court, having reviewed the Motion and this court's September 30, 2008 opinion (Opinion), together with the record and files in this case, and having fully considered the arguments set forth in the Motion, hereby grants the motion in part and denies it in part, as follows:

The issues that this court addressed in the Opinion were: (1) whether the circuit court erred in limiting the testimony of Dr. Peter Bretan and Dr. Sean Keane, and (2) whether

the Plaintiffs were required to introduce expert medical testimony to establish the cause of Mr. Lloyd Barbee's death, and if so, whether they introduced such testimony. We concluded that the circuit court did not err in its rulings regarding Drs. Bretan and Keane, or if it did err, such error was harmless. We also concluded, based on the precedents of the Hawai'i Supreme Court and this court, see, e.g., Devine v. Queen's Medical Center, 59 Haw. 50, 52, 574 P.2d 1352, 1353 (1978); Craft v. Peebles, 78 Hawai'i 287, 305, 893 P.2d 138, 156 (1995); Phillips v. Queen's Medical Center, 1 Haw. App. 17, 18, 613 P.2d 365, 366 (1980), and decisions from other jurisdictions, that Plaintiffs were required to introduce expert medical testimony establishing the cause of Mr. Barbee's death and that they had failed to do so.

We have carefully considered the arguments raised by Plaintiffs in their Motion, and they do not lead us to conclude that the analysis or conclusions reached in the Opinion were incorrect.

We are, however, making several amendments to the factual background discussion of the Opinion. On page 2 of the Opinion, the following sentence shall be amended, with material to be deleted in brackets and new material underscored:

> There was testimony and records introduced at trial indicating that he [He] had a history of cancer, hypertension, Type 2 diabetes, glaucoma, esophageal stomach reflux, pseudogout, and anemia.

On page 4 of the Opinion, the following sentence is deleted:

> At 4 p.m., Nurse Cosindas or a unit assistant took Mr. Barbee's vital signs, and Nurse Cosindas performed a physical examination of Mr. Barbee.

It shall be replaced by the following sentence and footnote:

> Nurse Cosindas testified that at 4 p.m., either she or a unit assistant took Mr. Barbee's vital signs, and Nurse Cosindas performed a physical examination of Mr. Barbee.[FN5]
>
> > [FN5] Plaintiffs dispute whether Mr. Barbee's vital signs were taken at 4 p.m., and further contend that Mr. Barbee should have been assigned to a unit providing more frequent monitoring. Because we find that there was insufficient expert medical testimony on causation, see section V.C.3 infra, we do not address the issue of whether the Plaintiffs introduced sufficient evidence establishing negligence, and limit the factual background accordingly.

On page 11 of the Opinion, the following sentence shall be amended,[1] with material to be deleted indicated in brackets:

> [Daphne declined to put Mr. Barbee on life support, and] Mr. Barbee was taken to the ICU, where he died shortly thereafter.

An amended opinion is being filed concurrently with this order. The Clerk of the Court is directed to make the necessary distribution of this order and the amended opinion, and notify the publishing agencies of the changes.

The Motion is denied in all other respects.

On the motion:

Andre' S. Wooten
for Plaintiffs-Appellants

Mark Recktenwald

Corinne K A Watanabe

Aaron D Ton Jürgens

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[1] We make this amendment in consideration of the private nature of the decision of whether to put Mr. Barbee on life support, and because the omission of the reference to that decision does not change the analysis or outcome of the Opinion.