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NO. 17-CI-002399
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JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
JUDGE ANGELA MCCORMICK BISIG
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MEDIAS 2022

KENDRA J. SMITH, et al.

PLAINTIFFS

v. **PLAINTIFFS' TRIAL MEMORANDUM**

UNIVERSITY MEDICAL CENTER, INC. d/b/a
UNIVERSITY OF LOUISVILLE HOSPITAL, et al.

DEFENDANTS

**** **

Kendra J. Smith, individually, as Administratrix of the Estate of Justin M. Smith, deceased, and as Next Friend and Natural Parent of N.S., L.S., and O.S., by counsel, hereby submit their Trial Memorandum pursuant to Paragraph 14 of this Court's Trial Order dated November 21, 2018.

I. FACTS OF THE CASE

This is a medical malpractice action originating from the care provided to the decedent, Justin Smith, who died after the ingestion of the antibiotic trimethoprim-sulfamethoxazole, also known as Bactrim. During his life, Justin sustained three separate incidents of drug-induced aseptic meningitis ("DIAM"), each of which was immediately preceded by the ingestion of Bactrim. In 2005, at the age of 16, Justin was first prescribed Bactrim in connection with a urinary tract infection. Within several hours of the ingestion of Bactrim, he began having meningitis-type symptoms and was hospitalized at Kosair Children's Hospital on May 17, 2005 ("First Meningitis"). During his hospitalization, the treating infectious disease doctor identified four potential causes on the differential diagnosis for this First Meningitis, one of which included "Drug-Induced Aseptic Meningitis ("DIAM").

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More than eleven years later in June of 2016, as part of preparation for a surgery following a motor vehicle accident, Justin was once again prescribed Bactrim. This time it was prescribed prophylactically by his orthopedic surgeon at University of Louisville Physicians Outpatient Clinic. After starting Bactrim, Justin again was hospitalized the next morning with meningitis symptoms at University of Louisville Hospital (“**Second Meningitis**”).

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During Justin’s hospitalization and upon discharge from his Second Meningitis, the Defendant, Dr. Arnold, the infectious diseases doctor overseeing Justin’s care, never informed Justin to discontinue his prescription to Bactrim. Indeed, unlike in the First Meningitis where the doctors included DIAM on the differential diagnosis, Dr. Arnold was unaware of such an illness being caused by meningitis, and had, in fact, when asked, told the Plaintiffs that it was actually helpful for Justin to have taken Bactrim. As such, when Justin was advised that there were no further orders from the orthopedic team and that his surgery was still scheduled for the following week, he believed he was to continue taking Bactrim upon discharge.

As a result, when Justin returned home from the hospital on the evening of June 25, 2016, he took another dose of Bactrim. Within hours, Justin experienced his third case of DIAM (“**Third Meningitis**”). Justin’s mother rushed him back to University of Louisville Hospital to the Emergency Room. Upon arrival, the Emergency Services Sign-In Sheet was completed, stating that the reason for the visit was “bad reaction to meds.” However, it was too late. Within thirty-six hours, Justin’s brain had herniated through the meninges, and he was pronounced brain dead.

During his deposition, Dr. Arnold conceded that he did not know that Bactrim could cause meningitis, and thus, did not have it on his differential diagnosis at any point

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in time when he treated Justin. In fact, Dr. Arnold conceded that he did not know of the association between Bactrim or other medications and meningitis until this lawsuit was filed.

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Dr. Arnold saw Justin on six occasions when Justin was hospitalized during the Second Meningitis. Justin's wife, Plaintiff Kendra Smith, interacted frequently with Dr. Arnold and when Justin's condition improved, Justin did as well. Both of them on separate occasions asked Dr. Arnold if the Second Meningitis episode could have been caused by Bactrim. On more than one occasion, Dr. Arnold dismissed this idea. In fact, at his deposition, Dr. Arnold testified that when Kendra and Justin asked whether Justin's prescription to Bactrim could have been the cause of his symptoms, his thinking at the time was that it was actually a "good thing" that Justin had taken Bactrim.

During Justin's hospitalization, Dr. Arnold testified he did not believe the meningitis was bacterial, and each of the viral tests he ordered were negative. As such, Dr. Arnold was unable to identify a cause, and despite being told that Justin had meningitis once before, Dr. Arnold did not obtain the Kosair Children's Hospital medical records for Justin's First Meningitis. Had Dr. Arnold obtained the records from Kosair Children's Hospital, he would have seen that the treating infectious disease doctors for Justin included DIAM caused by Bactrim as part of their differential diagnosis in 2005.

Dr. Arnold also never consulted the primary textbook on infectious diseases from which infectious disease doctors are trained, Mandell, Douglas, and Bennett, *Principles and Practices of Infectious Diseases*, which provides on the very first chart in the chapter on meningitis that the differential diagnosis should include drugs, and specifically

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Bactrim as a cause.¹ In addition, the prescribing information for Bactrim in the Physicians' Desk Reference also lists DIAM as a known danger of Bactrim. Indeed, a simple search on a basic online search engine for the words "Bactrim" and "meningitis" would yield the same result. By assuming he had the universe of information regarding reactions to Bactrim in his head, Dr. Arnold avoided discovering not only what was in the textbook on infectious diseases, but also something that is contained in numerous basic medical resources and online literature available to Dr. Arnold regarding Bactrim or meningitis.

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At trial, the Plaintiffs will establish that the standard of care requires an infectious disease to know that medication, including Bactrim, is a potential cause for meningitis, and include that as part of the differential diagnosis. And since it is exceptionally rare that someone is diagnosed with meningitis more than once, the Plaintiffs will establish that the standard of care also requires an infectious disease doctor to look for a common thread and to consider medication as the cause for meningitis. And because it should have been on the differential diagnosis, and Justin had suffered through two meningitis

¹ Pursuant to the Civil Jury Trial Order, No. 14, attached as **Exhibit A** is a photostatic copy of some of the authorities used to support Plaintiffs' position, including (i) Mandell, Douglas, and Bennett, *Principles and Practices of Infectious Diseases Principles and Practices of Infectious Diseases*, pp. 1084, 1132; (ii) M. M. Bai, MD and S. Glass, MD, "Drug-induced Aseptic Meningitis: An Uncommon, Challenging Diagnosis" MD Magazine (published Dec. 10, 2007) at <https://www.mdmag.com/journals/resident-andstaff/2005/2005-12/2005-12_02>; (iii) J. Lockwood, MD and D. Carr, MD, "Drug-induced aseptic meningitis secondary to trimethoprim/sulfamethoxazole: a headache to be aware of," Case Report from the Canadian Association of Emergency Physicians, (2013); (iv) J. E. Greenlee, MD, "Recurrent Meningitis," Merck Manual (Aug. 2019) at <<https://www.merckmanuals.com/home/brain,-spinal-cord,-and-nerve-disorders/meningitis/recurrentmeningitis>>; (v) M. Tebruegge and N. Curtin, Epidemiology, Etiology, Pathogenesis, and Diagnosis of Recurrent Bacterial Meningitis, 2008 Clin. Microbiol, (July 2008) at <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2493086/>>; (vi) K. Bruner, MD, C. Cooper, MD, and K. White, MD, "Trimethoprim-sulfamethoxazole- induce aseptic meningitis – not just another sulfa allergy," Annals of Allergy, Asthma, & Immunology (published Aug. 11, 2014); (vii) M. Repplinger and P. Faulk "Trimethoprim-sulfamethoxazole- induce aseptic meningitis," the American Journal of Emergency Medicine (2011); (viii) L. Hazell and S. A.W. Shakir, "Under-Reporting of Adverse Drug Reactions: A Systematic Review," available <https://pubmed.ncbi.nlm.nih.gov/16689555/> and (ix) "5 Minute Consult: Aseptic Meningitis," Lipincott Discovery at <<https://5minuteconsult.com/collectioncontent/3-197009/patient-handouts/aseptic-meningitis>>, Drug Safety (2006).

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illnesses immediately after taking Bactrim, he should have been told to never take Bactrim again.

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In May of 2017, Kendra, individually, and in her representative capacities filed suit against Dr. Arnold, and his employer, ULP, since Dr. Arnold was unaware of DIAM and failed to advise Justin not to take his prescribed Bactrim in anticipation of his scheduled surgery following his second episode of DIAM. After Justin's death, Dr. Arnold's employer, ULP did not seek to distance itself from Dr. Arnold. In fact, not only did ULP fail to conduct an investigation concerning the care or treatment of Justin by Dr. Arnold, during the course of this lawsuit, ULP has disputed all wrongdoing against Dr. Arnold, while designating him as an expert to testify on the standard of care in this lawsuit.

The Plaintiffs will put on proof that between Justin's Second Meningitis on June 16, 2016 and his Third Meningitis on June 26, 2016, Dr. Arnold failed to advise Justin to never take Bactrim again and that Justin ultimately died because of Dr. Arnold's ignorance. That evidence will support the Plaintiffs' position that Dr. Arnold acted with gross negligence and that Dr. Arnold's employer, ULP, ratified that gross negligence.

The Defendants designated Dr. Brad Spellberg as a witness that specializes in the field of infectious diseases to testify on whether Dr. Arnold's conduct violated the standard of care, and the Plaintiff designated Dr. Keith Armitage to testify on those same topics. Both Dr. Armitage and Dr. Spellberg conceded in their depositions that the standard of care requires infectious disease doctors to have on their differential diagnosis that these symptoms could have been caused by Bactrim.

Despite Justin suffering from three separate episodes of meningitis (each of which immediately preceded by the ingestion of Bactrim), the Defendants have asserted that the fact Justin died of DIAM caused by Bactrim is somehow a disputed fact issue in this case.

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However, Dr. Armitage and Dr. Spellberg have both testified DIAM due to Bactrim caused Justin's death. Indeed, Dr. Arnold, himself, testified to the same thing, that Justin died of DIAM due to Bactrim. Even Defendants' own counsel conceded to this fact in pleadings in this case in June of 2020.

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The Plaintiffs are seeking damages in the form of compensatory damages for Justin's wrongful death: \$2,879,705.00, past medical expenses: \$188,730.43, pain and suffering: \$1,000,000.00, loss of consortium for Kendra Smith: \$1,500,000.00, loss of consortium for N.S.: \$1,500,000.00, loss of consortium for L.S.: \$1,500,000.00, and loss of consortium for O.S.: \$1,500,000.00.

On April 26, 2021, the Jefferson Circuit Court denied the Defendants' Motion for Summary Judgment on punitive damages, recognizing that a reasonable jury could find that Dr. Arnold acted with wanton or reckless disregard for Justin's life and safety while treating him. On the same day, the Court denied the Defendants' Motion for Summary Judgment against Dr. Arnold's employer, ULP, finding that there was a "genuine issue of material fact" as to "whether ULP ratified Dr. Arnold's conduct." The Plaintiffs are currently seeking \$3,000,000.00 in punitive damages against the Defendants.

II. QUESTIONS OF FACT

The following questions of fact will need to be decided by the jury:

- a. Did Dr. Arnold exercise the degree of care and skill expected of a reasonably competent infectious disease doctor under the same or similar circumstances in this case?
- b. Did Dr. Arnold breach the standard of care by failing to instruct Justin Smith not to take Bactrim again after his Second Meningitis?
- c. Did Dr. Arnold breach the standard of care by not knowing about DIAM or that Bactrim could cause meningitis?
- d. Did Dr. Arnold breach the standard of care by failing to obtain Justin

Smith's medical records after he suffered his Second Meningitis?

- e. Did Dr. Arnold breach the standard of care by failing to look for a common thread when Justin Smith suffered from meningitis a second time?
- f. What sums of money will fairly and adequately compensate the Plaintiffs for their losses, including: Justin Smith's wrongful death; physical pain and suffering and mental anguish experience by Justin Smith and his Estate; Justin Smith's funeral and burial expenses; medical expenses by Justin Smith; and loss of consortium by the Estate of Justin Smith.
- g. Did Dr. Arnold act grossly negligent when treating Justin Smith?
- h. Did ULP ratify that gross negligence?
- i. If determined that Dr. Arnold acted grossly negligent, what amount of punitive damages should be awarded to the Estate of Justin Smith?
- j. If determined that Dr. Arnold acted grossly negligent and ULP ratified that gross negligence, what amount of punitive damages should be awarded to the Estate of Justin Smith?

III. ISSUES OF LAW APPLICABLE TO THE FACTS OF THE CASE

Both the Plaintiffs and the Defendants have filed Motions involving issues of law applicable to the facts of this case. The issues of law are set out in the Plaintiffs' Motions *in Limine*, Defendants' Motions *in Limine*, and Defendants' Motion to Exclude Certain Testimony of Plaintiffs' Expert, Dr. Keith Armitage. Issues of law also have to be decided relating to the jury instructions. Additional evidentiary issues will likely arise during the trial of this matter.

IV. EVIDENTIARY QUESTIONS ANTICIPATED

The evidentiary questions anticipated are set out in the Plaintiffs' Motions *in Limine*, Defendants' Motions *in Limine*, and Defendants' Motion to Exclude Certain Testimony of Plaintiffs' Expert, Dr. Keith Armitage.

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V. LIST OF ALL PENDING MOTIONS AND MATTERS

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On August 8, 2022, the Court heard arguments on Plaintiffs' Motions *in Limine* and on Defendants' Motion to Exclude Certain Testimony of Plaintiffs' Expert, Dr. Keith Armitage. The Court ruled upon Plaintiffs' Motions during the hearing and three of Defendants Motions. The balance of approximately 25 more Motions *in Limine* filed by the Defendants remain outstanding.

Respectfully Submitted,

/s/ John D. Cox

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CERTIFICATE OF SERVICE

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It is hereby certified that the foregoing was filed electronically this 10th day of August 2022 using the KYeCourts' eFiling System, which will send a copy of same to the persons listed below:

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