

FILED
COURT OF CLAIMS
OF OHIO

2013 JUL 29 PM 2:52

IN THE COURT OF CLAIMS
STATE OF OHIO

SARAH FUDACZ
2435 Copland Boulevard
Toledo, OH 43614-5508;

and

PAUL FUDACZ, JR.
2435 Copland Boulevard
Toledo, OH 43614-5508;

and

PAUL FUDACZ, SR.
2435 Copland Boulevard
Toledo, OH 43614-5508;

and

ELLEN FUDACZ
2435 Copland Boulevard
Toledo, OH 43614-5508;

and

CHRISTOPHER FUDACZ
630 W. Schubert Ave. Apt. 1
Chicago, IL 60614

and

MARIE FUDACZ
2435 Copland Boulevard
Toledo, OH 43614-5508

and

JOHN FUDACZ, a minor by and through
his mother, ELLEN FUDACZ
2435 Copland Boulevard
Toledo, OH 43614-5508;

2013-00441

Case No. _____

JUDGE: _____

and
JOSEPH FUDACZ, a minor by and through
mother, ELLEN FUDACZ
2435 Copland Boulevard
Toledo, OH 43614-5508;

Plaintiffs,

v.

THE UNIVERSITY OF TOLEDO
MEDICAL CENTER
3000 Arlington Avenue
Toledo, OH 43614;

Defendant.

COMPLAINT

For their Complaint against Defendant, The University of Toledo Medical Center, Plaintiffs Sarah Fudacz, Paul Fudacz Jr., Paul Fudacz Sr., Ellen Fudacz, Christopher Fudacz, Marie Fudacz, John Fudacz, and Joseph Fudacz state as follows:

Preliminary Statement

1. This Complaint is brought by members of the Fudacz family for damages suffered by them caused by an utterly botched kidney transplant surgery that occurred at The University of Toledo Medical Center (“Defendant” or “UTMC”) on August 10, 2012. As more fully set forth below, UTMC, through the negligence of its employees and agents, threw away a kidney being donated by Plaintiff Paul Fudacz Jr. (“Paul Jr.”) to his older sister, Plaintiff Sarah A. Fudacz (“Sarah”), who at age 24 suffered from end-stage renal disease. Paul Jr.’s kidney was considered a “perfect match” for Sarah. Sarah seeks damages she has suffered and will continue

to suffer due to the loss of Paul Jr.'s perfect kidney. Paul Jr. seeks damages he has suffered and will continue to suffer for having to undergo a painful and risky surgery, and for having to live the rest of his life with only one kidney, all in vain. Paul Fudacz Sr. and Ellen Fudacz, Sarah and Paul Jr.'s parents, seek damages for loss of consortium and for the serious emotional distress inflicted upon them by Defendant UTMC, its agents and employees. Finally, Christopher Fudacz, Marie Fudacz, John Fudacz, and Joseph Fudacz – all siblings of Sarah and Paul Jr. – seek damages for loss of consortium.

2. Pursuant to R. Civ. P. 10, an Affidavit of Merit is attached hereto as Exhibit 1.

Parties

3. Plaintiff Sarah A. Fudacz ("Sarah") is an individual who currently resides in Toledo, Ohio, and was the intended recipient of a kidney to be donated by her younger brother, Paul Fudacz Jr.

4. Plaintiff Paul Fudacz Jr. ("Paul Jr.") is an individual who currently resides in Toledo, Ohio. On August 10, 2012, Paul Jr. had his right kidney surgically removed at UTMC for purposes of being donated to his sister, Sarah.

5. Plaintiffs Paul Fudacz Sr. ("Paul Sr.") and Ellen Fudacz ("Ellen") are husband and wife, and are the parents of Sarah and Paul Jr. Paul Sr. and Ellen reside in Toledo, Ohio.

6. Plaintiff Christopher Fudacz, age 26, is the brother of Sarah and Paul Jr., and he resides in Chicago, Illinois.

7. Plaintiff Marie Fudacz, age 23, is the sister of Sarah and Paul Jr., and she resides in Toledo, Ohio.

8. Plaintiff John Fudacz, age 17, is a minor and the brother of Sarah and Paul Jr., and he resides with his parents in Toledo, Ohio.

9. Plaintiff Joseph Fudacz, age 11, is a minor and the brother of Sarah and Paul Jr., and he resides with his parents in Toledo, Ohio.

10. Defendant UTMC is a medical school and hospital located in Toledo, Lucas County, Ohio, and is an entity and/or instrumentality of the State of Ohio. UTMC employs physicians, nurses, and other personnel to evaluate, care for, and treat patients at its hospitals, clinics, and outpatient facilities, and provides medical training and education to students, residents, and nurses. At all times pertinent herein, Plaintiffs Sarah Fudacz and Paul Fudacz Jr. were patients under the care of various physicians, residents, nurses, and other employees and/or agents of UTMC.

Facts Common to All Claims

11. In March 2012, Sarah was diagnosed with end-stage renal disease. At the time, Sarah was only 23 years old. Her condition quickly deteriorated, and by the end of May 2012, she was required to undergo painful dialysis treatments.

12. Members of the Fudacz family were tested for their compatibility with Sarah for possible kidney donation. Sarah's younger brother, Paul Jr., was deemed the most compatible. In fact, given his health, age, and other compatibility "markers," Paul Jr. was considered a "perfect match."

13. Paul Jr. agreed to donate one of his kidneys to his sister, and on August 10, 2012, both Paul Jr. and Sarah presented to UTMC for the scheduled transplant surgeries.

14. Paul Jr. was taken to surgery first for purposes of removing his right kidney. Sarah's surgery was to begin later in the morning after Paul's kidney was removed and was available for transplantation. Dr. Michael A. Rees, M.D., a UTMC employee and the then-director of renal transplantation at UTMC, was the surgeon in charge of the transplant procedure for both Paul Jr. and Sarah.

15. At approximately 12:00 pm on August 10, 2012, Paul Jr.'s right kidney was surgically removed, and the kidney was placed in a "slush machine" in the operating room for temporary storage until it could be moved to Sarah's operating room.

16. At approximately 1:00 pm, while Paul Jr. was in the process of being "closed" by Dr. Rees, Judith K. Moore, R.N., a nurse employed by the UTMC, returned to Paul Jr.'s operating room after taking a lunch break. Nurse Moore removed the contents of the slush machine (which still included Paul Jr.'s kidney), walked down the hall to a utility room and flushed the contents (including Paul Jr.'s kidney) down a disposal "hopper" used for the disposal of medical waste. Nurse Moore later told investigators that "she thought the kidney was in the recipient's room because that is what usually happens." While the kidney was later recovered, it was deemed unusable because it was intermingled with other infected and/or non-sterile medical waste.

17. According to reports of the incident, Nurse Moore was not in the operating room when Dr. Rees announced that the kidney was being placed in the slush machine, and she was never informed of this fact when she returned.

18. While this was occurring, Sarah had been fully prepared for surgery and was under anesthesia in her operating room. After it was discovered that Paul Jr.'s kidney had been flushed down the hopper, Sarah was revived from anesthesia and taken to recovery.

19. Meanwhile, Paul Sr. and Ellen were in the designated hospital waiting room anxiously awaiting word about the medical condition of their two children and the outcome of the transplant procedure. In the waiting room, Paul Sr. and Ellen kept current on the progress of both Paul Jr.'s and Sarah's surgeries through a combination of phone calls from the operating room staff to the waiting room attendant and through a monitor located on the wall. The monitor identified each individual patient (by a code) and listed the patients' status, *e.g.*, whether "in surgery" or "in recovery."

20. A little after noon, the phone in the waiting room rang and the receptionist informed Paul Sr. and Ellen that all was going well with Paul Jr.'s surgery and that his kidney had been successfully removed.

21. Approximately one hour later, the phone in the waiting room rang again and the attendant asked for Paul Sr. and Ellen. The attendant informed Paul Sr. and Ellen that Sarah (not Paul Jr.) had been moved to the recovery room. Paul Sr. and Ellen were confused by this news since Sarah's surgery was supposed to last five to six hours, and there would be no reason for her to be in recovery unless something was wrong. The attendant confirmed that Sarah (not Paul Jr.) had been moved to recovery and that a nurse would come to talk to Paul Sr. and Ellen. At around the same time, Sarah's status on the monitor went from "in surgery" to "in recovery."

22. Now even more alarmed and concerned by what they were being told, Paul Sr. and Ellen began to think the worst and suffered severe emotional distress, including that Paul Jr.

might be dead or that something terrible with Sarah had prevented the transplant from going forward, which would likely mean her premature death due to her disease.

23. Paul Sr. and Ellen went to the pre-op area in an effort to get answers. The nurses in the pre-op area were visibly nervous and upset, and refused to provide Paul Sr. and Ellen with any more information beyond that provided earlier by the attendant and the monitor.

24. After an extended period of time during which Paul Sr. and Ellen waited anxiously without any word, Dr. Rees finally arrived, grabbed Paul Sr. and Ellen, led them out of the pre-op area and informed them that “your kids are fine, but something bad has happened.” Dr. Rees then informed Paul Sr. and Ellen of the devastating news: Paul Jr.’s kidney had been flushed down a medical waste hopper due to a “stupid mistake.”

25. Horrified at what had happened to their children, Paul Sr. and Ellen immediately went to see Sarah in recovery, who was awake but in disbelief and angry. Sarah told her parents how, when she first woke up and saw that he did not have an incision from a transplant surgery, she immediately thought Paul had died in surgery and that this prevented the transplant from happening.

26. While the news of what actually happened relieved Sarah’s concern for Paul Jr., it did nothing to relieve her, her parents, and the entire Fudacz family’s fear about Sarah’s future prognosis and life expectancy given that Paul Jr.’s kidney had been destroyed through UTMC’s gross negligence and recklessness.

27. Later, after recovering from anesthesia, Paul Sr. and Ellen were forced to tell Paul Jr. that his sacrifice, intended to save his sister’s life, was in vain.

28. As a result of the botched transplant procedure, UTMC's transplant department underwent extensive investigation by state and federal officials and was found to be *out of compliance* with federal Medicare and Medicaid requirements. UTMC's living kidney transplant program was therefore suspended. Two nurses (Nurse Moore and another nurse, Melanie Lemay) had their employment with UTMC terminated and/or were forced to retire, UTMC's administrator of surgical services (Edwin Hall) was placed on paid administrative leave, and Dr. Rees was replaced as the director of renal transplantation.

29. On November 13, 2012, Sarah received a replacement kidney transplant in Colorado. In the months between the botched transplant surgery at UTMC and her successful transplant, Sarah suffered through additional painful dialysis, four painful surgeries related to her dialysis treatments, and was forced to live through the uncertainty of whether she would ever find a kidney suitable for transplant before dying. When compared to Paul Jr.'s kidney, Sarah's new kidney is a poorer match and of poorer quality. Because of that, she has a higher risk of rejection (among other complications), and in all likelihood, she will need another replacement transplant sooner than she otherwise would have.

Count I
(Medical Negligence – Sarah and Paul Jr.)

30. Plaintiffs incorporate all prior paragraphs as if fully restated herein.

31. Through its employees and agents (including but not limited to Dr. Rees, Nurse Moore, and Nurse Lemay), Defendant UTMC's medical care and treatment of Paul Jr. and Sarah fell below the accepted standards of care, skill, treatment, and diligence for health care providers under the same or similar circumstances, by, among other things: (1) removing Paul Jr.'s kidney

from the operating room and dumping it down a medical waste hopper; (2) failing to properly communicate the whereabouts of Paul Jr.'s kidney and preventing it from being mistakenly removed from the operating room; (3) failing to adequately supervise the operating room and its staff to ensure proper communication concerning the whereabouts of Paul Jr.'s kidney and to prevent it from being mistakenly removed from the operating room; (4) failing to ensure adequate supervision and communication in the operating room; and (5) failing to have adequate policies in place to prevent the disposal of viable organs.

32. As a direct and proximate result of the gross negligence of Defendant and its employees, agents, and/or servants, Plaintiffs Paul Jr. and Sarah have sustained and in the future will continue to sustain damages including severe physical pain and suffering, additional medical expenses and treatment, severe and permanent mental and emotional distress, wage losses and other out-of-pocket losses.

33. As a further direct and proximate result of the gross negligence of Defendant, its employees, agents, and/or servants, Plaintiffs Paul Sr. and Ellen have incurred and in the future will continue to incur wage losses, expenses, and costs for the medical care and treatment of Sarah and/or Paul Jr., all in amounts to be proven at trial.

Count II
(Parental Loss of Consortium – Paul Sr. and Ellen)

34. Plaintiffs incorporate all prior paragraphs as if fully restated herein.

35. As a direct and proximate result of the negligence of the Defendant, its employees and/or agents, Plaintiffs Paul Fudacz Sr. and Ellen Fudacz sustained and will continue to sustain a loss of the services, society, companionship, comfort, love and solace of their son, Paul Jr.

36. As a further direct and proximate result of the negligence of the Defendant, its employees and/or agents, Plaintiffs Paul Fudacz Sr. and Ellen Fudacz sustained and will continue to sustain a loss of the services, society, companionship, comfort, love and solace of their daughter Sarah.

Count III
(Sibling Loss of Consortium)

37. Plaintiffs incorporate all prior paragraphs as if fully restated herein.

38. As a direct and proximate result of the negligence of the Defendant, its employees and/or agents, Plaintiffs Christopher, Marie, John, and Joseph Fudacz sustained a loss of the services, society, companionship, comfort, love and solace of their brother Paul Jr. and their sister Sarah, and will continue to sustain the loss of the same in the future due to the permanent nature of the injuries to Paul Jr. and Sarah.

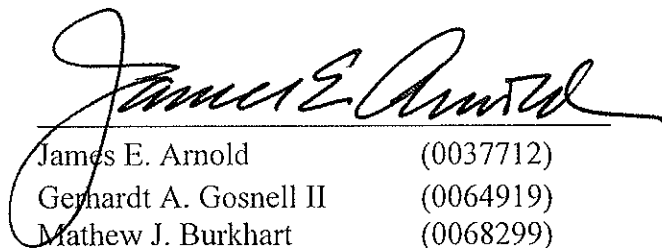
Count IV
(Negligent Infliction of Emotional Distress – Paul Sr. and Ellen)

39. Plaintiffs incorporate all prior paragraphs as if fully restated herein.

40. As a direct and proximate result of the negligence of the Defendant, its employees and/or agents, Plaintiffs Paul, Sr. and Ellen Fudacz suffered and will continue to suffer serious and permanent emotional distress.

Wherefore, Plaintiffs individually demand judgment against Defendant in excess of \$25,000.00, plus interest, the costs of this action, and any other relief this Court deems appropriate.

Respectfully submitted,



James E. Arnold (0037712)
Gerhardt A. Gosnell II (0064919)
Mathew J. Burkhart (0068299)

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Counsel for Plaintiffs

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THE STATE OF OHIO

SARAH A. FUDACZ, *et al.*,

Plaintiffs,

v.

THE UNIVERSITY OF TOLEDO
MEDICAL CENTER,

Defendant.

Case No.

AFFIDAVIT OF MERIT

I, John P. McVicar, M.D., after being first duly cautioned and sworn, do hereby depose and state as follows:

1. I am a medical doctor currently licensed in the state of California. I am Board Certified in general surgery, and am currently a Professor of Surgery at the University of California, Davis Medical Center, Division of Transplant Surgery.
2. I devote at least three-fourths of my professional time in the active clinical practice of organ transplant surgery or its instruction in an accredited school.
3. I am familiar with the applicable standards of care in this case.
4. I have reviewed the medical records reasonably available to me concerning the allegations raised by the Plaintiffs in this case arising from the medical treatment of Paul Fudacz Jr. and Sarah Fudacz on August 10, 2012, at The University of Toledo Medical Center.
5. It is my opinion that the applicable standards of care were breached by employees and/or agents of The University of Toledo Medical Center and that these breaches caused injury to the Plaintiffs.

FURTHER AFFIANT SAYETH NOT.



John P. McVicar, M.D.

Sworn to and subscribed before me on 25th
day of July, 2013.

Nina H Smith
Notary Public



notary signature