IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KHADIJA LAVALAIS, *et al.*,	)	CASE NO. CV 12 791743
Plaintiffs,	)	
	)	JUDGE BRENDAN J. SHEEHAN
v.	)	
THE CLEVELAND CLINIC FOUNDATION,	)	**OPINION AND JUDGMENT ENTRY**
Defendant.	)	

I. ISSUES PRESENTED.

This matter is before the Court on Defendant The Cleveland Clinic Foundation's (CCF's) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted pursuant to Civ.R. 10(D) and 12(B)(6). The issues have been fully briefed to the Court.

For purposes of this motion, the Court accepts Plaintiffs' allegations as true. Accordingly, the facts presented in the Complaint are as follows:

Plaintiff Khadija Lavalais and Plaintiff Reginald Lavalais are husband and wife, residing in Cuyahoga County. CCF owns and operates numerous hospital and medical facilities including an acute care hospital facility at its Main Campus located at 9500 Euclid Avenue, Cleveland, Ohio. On October 17, 2011, Plaintiff Khadija Lavalais, a long time patient at CCF Main Campus with a self-described "complex medical history", was admitted to the hospital for evaluation of a "thunderclap headache". She was diagnosed with "pan sensitive *e. coli* urosepsis" (a urinary tract infection) and prescribed the antibiotics Rocephin initially and then Cipro thereafter. Mrs. Lavalais was discharged from the hospital on October 28, 2011.

Mrs. Lavalais was readmitted to CCF Main Campus on November 10, 2011 with profuse diarrhea attendant to a clostridium difficile (*c. diff.*) infection.

C.diff. is a bacteria that may be found in the colons of a small percentage of the healthy population. Exposure to *c. diff* usually does not cause illness in healthy adults because intestinal bacteria controls it. However, when the population of "good" intestinal bacteria is disrupted, most commonly through antibiotic use, *c. diff* may overpopulate the colon, emitting a toxin that causes diarrhea and potential damage to the colon itself. Broad-spectrum antibiotics such as penicillin, cephalosporins (including Rocephin), and fluoroquinolones (including Cipro) are especially linked to *c.diff* infections due to their effect on the body's "good" bacteria. *C. diff* may spread via spores that are inert and metabolically inactive. The spores themselves do not cause disease but they are also very hardy so they are difficult to kill in the environment with disinfectants. The spores, when transmitted to hands, utensils and foods, are swallowed and become active in the intestinal tract. Under normal circumstances, patients who contract a *c. diff* infection improve once they stop taking antibiotics. In more serious cases, severe damage to the colon occurs.

Mrs. Lavalais was placed in isolation and administered antibiotics to treat the *c.diff.* She avers: "Despite the fact that an order was entered on November 10 calling for 14 days of isolation Plaintiff was discharged home on Flagyl, an antibiotic used to treat *c. diff.* infections, on November 12, 2011."

Mrs. Lavalais was readmitted to CCF Main Campus on November 26, 2011 with pseudomembranous colitis secondary to recurrence of the *c. diff* infection. She underwent

surgery for a total colectomy (complete removal of the colon), a loop enterostomy[1] (passage into the patient's small intestine through the abdomen with an opening to allow for drainage or to insert a feeding tube), and placement of a feeding tube. Mrs. Lavalais was discharged on December 8, 2011 and remains dependent upon tube feeding.

Mr. and Mrs. Lavalais brought this action on September 19, 2012 asserting claims of premises liability and loss of consortium against CCF. Plaintiffs maintain that CCF failed to provide "a safe and hygienic environment for the delivery of medical care" and that CCF's rate of *c. diff* infection is the fourth highest in Ohio. Mrs. Lavalais asserts that: "Despite specific knowledge of the hazard posed by the presence of *c.diff* bacilli, and despite specific knowledge of the rate of inpatient infection while at CCF Main Campus was twice that of any other CCF facility the employees of Defendant CCF failed to warn Plaintiff of the latent danger posed by high rate of *c. diff* infection for inpatients and the dangers associated with that disease." Complaint, ¶ 28.

CCF filed the current Motion to Dismiss on the grounds that Plaintiffs have asserted medical claims which must be filed with an affidavit of merit or are subject to dismissal pursuant to Civ.R.10(D).

II. LAW AND ANALYSIS.

A. Standard of Review.

Defendant CCF's motion is brought, in part, pursuant to Civ. R. 12(B)(6). A motion to dismiss brought pursuant to Civ.R. 12(B)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St. 2d 242, 327 N.E.2d

[1] The Complaint states that Mrs. Lavalais underwent a "loop enterotomy". Because an enterostomy would be more commonly required in conjunction with feeding tube placement, the Court interprets Plaintiff's allegation as a typographical error. In either event, the actual procedure performed does not affect the disposition of this matter.

753 (1975), quoting *Conley v. Gibson*, 355 U.S. 41, 45, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957). All factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Further, the court is confined to the allegations of the complaint. *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991); *AAA American Const., Inc. v. Alpha Graphic*, 8th Dist. Case No. 84320, 2005 Ohio 2822.

"While a complaint attacked by a * * * motion to dismiss does not need detailed factual allegations, the [plaintiffs'] obligation to provide the grounds for their entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Parsons v. Greater Cleveland Reg'l Transit Auth.,* 8th Dist. Case No. 93523, 2010 Ohio 266 at ¶ 11, citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Conclusory statements in a complaint not supported by facts are not afforded the presumption of veracity and are insufficient to withstand a motion to dismiss. *Id.*; *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988). See also *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989).

Specifically, Defendant CCF seeks dismissal of Plaintiffs' Complaint pursuant to Civ.R.10(D)(2) that requires any complaint asserting a medical claim includes one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The failure to file a Civ.R. 10(D)(2) affidavit is contested by way of a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008 Ohio 5379, 897 N.E.2d 147, ¶ 13.

B. Plaintiffs' Premises Liability Claim.

Premises liability is a specific form of ordinary negligence. As with all negligence claims, to prevail on her premises liability claim, Mrs. Lavalais must establish that (1) CCF owed a duty of care to her, (2) CCF breached that duty, and (3) CCF's breach proximately caused the plaintiff to be injured. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006 Ohio 6362, 857 N.E.2d 1195, P 21, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). The applicable duty in premises liability cases is determined by the relationship between the landowner and the plaintiff. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996 Ohio 137, 662 N.E.2d 287. Plaintiff maintains that she was a business invitee of CCF. Business invitees are persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner. *Light v. Ohio University*, 28 Ohio St. 3d 66, 68, 502 N.E.2d 611 (1986), citing *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951). A landowner owes an invitee the duty to exercise ordinary and reasonable care, which includes keeping the premises in a reasonably safe condition and warning the invitee of latent or concealed defects of which the landowner has or should have knowledge. *Hairston v. Gary K. Corp.*, 8th Dist. No. 87199, 2006 Ohio 5566, ¶9 citing *Scheibel v. Lipton*, 156 Ohio St. 308, 323, 102 N.E.2d 453 (1951); see, also, *Light, supra*, 28 Ohio St.3d at 68.

The circumstances that may lead to a premises liability claim related to bacterial infection were presented in *Gallo v. Buccini/Pollin Group*, C.A. No. 04C-11-017, 2008 Del. Super. LEXIS 106, 2-5 (Mar. 28, 2008). The plaintiff and her family stayed at an Embassy Suites Hotel that offered a pool and spa. The spa's water pumps were broken so the spa's water was not circulating through the filtration system. While the defendant maintained that signs were posted on the doors entering the pool area and by the spa's operating switch to notify guests that the spa

was out of order, the plaintiff denied seeing any warning signs. The plaintiff used the spa and developed a rash on her body within two days after exposure to the untreated water. She was diagnosed with hot-tub folliculitis, a condition is caused by an infection of the hair follicles by a species of bacteria that is frequently present in hot tubs, spas and swimming pools. She underwent numerous medical procedures for several months thereafter, including treatment for *c. diff* resulting from her antibiotic use, and eventually fully recovered. The plaintiff sued Embassy Suites under a theory of premises liability related to the allegedly unsafe condition on the property.

The facts in *Gallo* are similar to the facts presented in the current case to the extent that both Mrs. Lavalais and Mrs. Gallo were business invitees who later suffered physical injuries allegedly arising from conditions on premises. Critically, however, Mrs. Lavalais was a business invitee at a hospital to receive medical treatment. She was not merely visiting another patient at the facility or engaging in any other non-medical activity. Because certain claims against hospitals are specific statutory requirements under Ohio law, the distinction in the type of premises and the nature of the claimant's presence on the premises are critical to determining whether Plaintiffs' claim may proceed as a premises liability claim.

Premises liability claims against hospitals have been similarly scrutinized in other states. For example, in *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658 (Tex. 2010), a patient fell while recuperating from surgery when the hospital bed's footboard gave way. He sued the hospital for negligence related to (1) failure to properly train and supervise its nursing staff, (2) failure to provide adequate patient assistance, (3) failure to provide a safe environment, and (4) providing a negligently assembled and maintained hospital bed. The trial court dismissed the claims as being a health care claim not supported by affidavit as required by Texas statute and

numerous appeals ensued. Ultimately, the case was heard by the Texas Supreme Court in *Marks v. St. Luke's Episcopal Hosp.*, Tex.S.Ct. No. 07-07832009, Tex. LEXIS 636 (August 28, 2009), in which the court determined that the claims related to the bed were not health care claims. However, approximately one year later, in *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658 (Tex. 2010)(plurality opinion), the court withdrew its earlier opinion and determined that all of the asserted claims, including claims related to the structure of the bed, were health care claims. The court reasoned that: "Whether the underlying claim involves a health care provider's negligent act or omission, or the patient's exposure to some other safety risk, the relationship between the injury causing event and the patient's care or treatment must be substantial and direct for the cause of action to be a health care liability claim ...". *Id.* at 664. The court found that provision of safe medical equipment "specific to a particular patient's care or treatment is an integral and inseparable part of the health care services provided" and implicates a health care liability claim. *Id.*

As may be similarly applicable under Ohio law, the court stated:

> Although health care providers and patients may well be premises owners or occupiers and invitees, the Legislature has imposed requirements on suits by patients against health care providers that differ from general requirements for suits by invitees against premises owners or occupiers. If Marks had been a guest in a hotel when his bed fell, his fall could well have given rise to a premises liability claim. But he was not a hotel guest; he was a patient receiving health care in a hospital. There is a difference because of the [state health care claims legislation].

Id. at 670-671 (internal references omitted).

Thus, while Plaintiffs characterize their claim as one of premises liability only, the premises at issue is a hospital. A review of Ohio law applicable to hospitals and medical claims

is necessary to determine whether Plaintiffs' claim may proceed as an ordinary premises liability claim.

C. Medical Claims Under Ohio Law.

Ohio law provides:

> (A) Except as otherwise provided in this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the cause of action accrued.
>
> * * *
>
> (E) As used in this section:
>
> (1) **"Hospital" includes any person, corporation, association, board, or authority that is responsible for the operation of any hospital licensed or registered in the state**, including, but not limited to, those that are owned or operated by the state, political subdivisions, any person, any corporation, or any combination of the state, political subdivisions, persons, and corporations. "Hospital" also includes any person, corporation, association, board, entity, or authority that is responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care, and treatment to individuals. "Hospital" does not include any hospital operated by the government of the United States or any of its branches.
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> * * *
>
> (3) **"Medical claim" means any claim** that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and **that arises out of the medical diagnosis, care, or treatment of any person**. "Medical claim" includes the following:
>
> (a) Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person;

(b) **Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies:**

(i) **The claim results from acts or omissions in providing medical care.**

(ii) The claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.

(c) Claims that arise out of the medical diagnosis, care, or treatment of any person and that are brought under section 3721.17 of the Revised Code

R.C. 2305.113 (emphasis supplied).

The line between a medical claim as defined by the statute and other claims is not always clear. Courts in this state have been confronted with the issue on numerous occasions and various criteria have developed as a framework for analysis.

In *Rome v. Flower Mem. Hosp.*, 70 Ohio St. 3d 14, 635 N.E.2d 1239 (1994), the Supreme Court addressed a pair of consolidated cases interpreting the term "medical claim". Plaintiff Rome fell and suffered injury while being prepared for an x-ray examination. In the second case under review, plaintiff Eager was being transported to physical therapy in a wheelchair, when the wheelchair collapsed causing injury to him. The Supreme Court held that in both instances that the plaintiffs were receiving services that were "ancillary to and an inherently necessary part" of their treatments or diagnosis. *Id.* at 16. This test has been applied to a host of similar cases, largely involving the patient falling or being dropped during transport, to find that the plaintiff's claims fell within the statutory definition of "medical claims". *See, e.g., Long v. Warren Gen. Hosp.*, 121 Ohio App. 3d 489, 700 N.E.2d 364 (11th Dist. 1997)(patient fell while retrieving a pillow as directed by orderly); *Biltz v. Marymount Hosp.*, 120 Ohio App.3d 526, 698 N.E.2d 483 (8th Dist. 1997) (patient fell from emergency room bed while suffering a seizure); *Cooke v.*

Sisters of Mercy, 12th Dist. No. CA97-09-181, 1998 Ohio App. LEXIS 2009 (May 4, 1998) (patient fell during transport from chair to bed, then had overhead trapeze device collapse several times during use); *Harris v. Youngstown Osteopathic Hosp.*, 7th Dist. No. 95 CA 129, 1998 Ohio App. LEXIS 4125 (Aug. 26, 1998) (patient burned by heating pad administered after surgery); *Flynn v. St. Vincent Mercy Medical Ctr.*, 6th Dist. No. L-01-1241, 2001 Ohio App. LEXIS 4378 (Sept. 28, 2001) (patient dropped during transfer from surgery gurney to hospital bed); *Taylor v. Meridia Huron Hosp.*, 8th Dist. No. 80121, 2002 Ohio 3449 (patient fell from CT scan machine).

However, not all claims against medical providers are "medical claims". As the Ohio Supreme Court recognized in *Browning v. Burt*, 66 Ohio St. 3d 544, 557, 613 N.E.2d 993 (1993), a hospital's performance of its independent duties which do not directly involve diagnosis or the medical care and treatment of patients are not "medical claims". Thus, where common maintenance errors have caused injury, courts have found that the plaintiff's claims are not "medical claims". For example, in *Balascoe v. St. Elizabeth Hospital Med. Ctr.*, 110 Ohio App.3d 83, 673 N.E.2d 651 (7th Dist. 1996), the plaintiff was an emergency room patient and was unable to get in or out of the hospital bed without assistance. Nonetheless, she left her bed to use the bathroom without calling for assistance. On her way back to the bed, she slipped and fell on a piece of plastic left on the floor. She filed a complaint against the hospital alleging negligent maintenance of its premises. The court characterized the plaintiff's claim as "a standard negligent maintenance claim unfortunately occurring on hospital premises." *Id.* at 85.

Similarly, in *Tayerle v. Hergenroeder*, 11th Dist. No. 98-G-2195, 1999 Ohio App. LEXIS 5931 (Dec. 10, 1999), the plaintiff was struck by the spring-loaded door to the waiting room upon attempting to exit the physician's offices. The impact of the door caused her fall and suffer resulting injuries. The court found that plaintiff's claim was in the nature of a "slip and

fall" case that happened to have occurred in a physician's office. Because the plaintiff's injuries did not result from medical diagnosis, care, or treatment, her claim was not a "medical claim".

Finally, in *Summers v. Midwest Allergy Assocs.*, 10th Dist. No. 02AP-280, 2002 Ohio 7357, the plaintiff was struck on the head by a cabinet that broke loose from the wall while she was receiving treatment at an allergy clinic. The plaintiff brought an action against the clinic alleging that it negligently failed to maintain the premises in a safe condition by allowing the wall cabinet to deteriorate into such an unsafe condition that it fell from the wall. The plaintiff also alleged that the clinic was negligent in allowing her to drive home after it determined that she had sustained a concussion as a result of being struck by the cabinet. The court found that plaintiff's premises liability claim related to maintenance of the cabinet was not a "medical claim" because: "There was no medical employee responsible for exercising professional expertise that was either responsible for, or could have eliminated, her injury. Further, plaintiff's injuries did not result from the use of an instrument or apparatus generally used in a health care setting."

Mrs. Lavalais does not contend that she slipped on debris left littering the floor or that any furniture fell on her during her hospitalization. She maintains that she contracted *c. diff* as a result of CCF's failure to notify her of the Main Campus' rate of *c. diff* infections prior to her decision to enter the hospital. A review of cases involving the transmission of infectious agents at hospitals is instructive in further determining the nature of Mrs. Lavalais' claims.

D. Claims Involving Transmitted Infections.

There is little, if any, case law in Ohio concerning claims for infections negligently transmitted by a hospital. It appears, however, that recent cases in other jurisdictions are uniformly treated as medical claims.

In *Mariner Health Care of Nashville, Inc. v. Robins*, 321 S.W.3d 193, 209 (Tex. 2010), the daughter of a woman who died in a nursing home brought a medical malpractice claim based, in part, on the nursing home's breach of the standard of care for infection prevention related to *c. diff.*

In *Bars v. Palo Verde Hosp.*, Cal.App. No. E036019, 2005 Cal. App. Unpub. LEXIS 9326, 9-13 (Oct. 12, 2005), the plaintiff sued a hospital for medical malpractice and premises liability based on complications she suffered after a hysterectomy and staphylococcus aureus infection at the incision site allegedly as a result of unsafe conditions caused by construction activities at the hospital. The court found that the plaintiff's injuries plaintiff in fact suffered a single injury, which fell with the scope of the medical malpractice statute. *See, also, Chavous v. Richmond County Hospital Authority*, 313 S.E.2d 492 (Ga. 1984)(staph infection treated as medical negligence); *St. Paul Fire & Marine Insurance Company v. Prothro*, 590 S.W.2d 35; (Ark. 1979)(same).

In *Cashio v. Baton Rouge General Hospital*, 378 So. 2d 182, 184-185 (La. 1979), the plaintiff brought a premises liability claim against a hospital arising from a "hospital staph" infection acquired in conjunction with open heart surgery. The court rejected the plaintiff's claim as a premises liability claim finding that "one of the obligations of a hospital to a patient is to provide clean and sterile facilities" and that plaintiff's claim arose from a breach of that duty. As such, the plaintiff's claim was one of malpractice under the relevant state law. The plaintiffs argued that the claim was not a malpractice claim because it was "not based upon health care or professional services rendered but rather upon the duty owed by a premises owner." The court again disagreed and found that an integral part of medical treatment is the furnishing of a clean and sterile environment for all patients.

The court concluded:

> We therefore cannot agree with plaintiff's contention that the hospital is being sued solely as a premises owner and not as a health care provider. A plaintiff cannot control the progress and procedure of his claim by semantically designating one capacity of two or more belonging to the defendant as the desired one when the statute requires a procedure if the claim fits within its definition. That the duty breached is owed by an owner does not prevent the claim from being one against a health care provider and so subject to the procedure in the [medical malpractice] Act. A contrary conclusion would permit plaintiffs to avoid the application of the Act by alleging ownership of the premises by the hospital, a practically universal situation. We do not ascribe that intent to the legislature.

Id. at 184-185.

In *Yates-Williams v. Nihum*, S.D.Tex. No. NO. H-09-2554, 2010 U.S. Dist. LEXIS 91865, 14-22 (Sept. 3, 2010), the plaintiff sued hospital after she developed a severe post-operative Methicillin-resistant Staphylococcus epidermis ("MRSE") infection within her spine. Her claims against the hospital were based upon its alleged breached its duty of care by failing to provide her doctor with sterile surgical instruments and solutions and further failed to: (1) to maintain reasonably safe premises; (2) to provide a reasonably safe operating room; (3) to inform the plaintiff of the hospital's surgical-site infection rate for laminectomies; (4) to inform the hospital staff of the surgical-site infection rates; (5) to close the neurosurgical operating room; (6) to carry out the hospital's infection control plan; and (7) to take corrective measures to reduce the surgical-site infection rate. The court found that plaintiff's attempts to assert a premises liability claim against the hospital were amounted to attempting an "end-run" around the medical malpractice pleading statute.

The court summarized its analysis:

> [The plaintiff]'s proposed premises liability claim is a health care liability claim under Texas law. The Texas legislature has narrowed the definition of "'health care liability claim' so that safety claims must be directly related to health care." [The plaintiff]'s allegation that the Hospital's negligence caused an MRSE infection to result from her surgery is a claim directly related to her health care. Because [the plaintiff]'s premises liability claim is in substance a health care liability claim, it is futile to raise it as a separate ground for relief. Yates-Williams may not amend her pleadings to assert this claim.

Id. at 14-22.

In *Kimberly F. v. Mary Hitchcock Mem. Hosp.*, 1st Cir. No. 93-1438, 1993 U.S. App. LEXIS 31541, 9-28 (Dec. 3, 1993), the plaintiff contracted genital herpes after giving birth at the defendant hospital's facility. The plaintiff alleged that the unsanitary conditions of the hospital, including the failure of nurses to wash their hands or wear gloves in conjunction with performing nursing duties, caused her to be contaminated with the herpes virus. Of particular relevance to the case at bar is the following summary of testimony at trial:

> The next question bearing on the issue was: "Do you have an opinion, based on reasonable medical probabilities, as to whether or not the hospital was the probable source of -- general source of Kimberly F.'s infection in August of 1986?" Dr. Kahn answered that the infection was clearly associated with the plaintiff's hospitalization.

Id. at 13.

While none of the cited cases are binding upon this Court, all of them are instructive. Construing Plaintiffs' claims in a most favorable light, they would be required prove at trial that CCF owed them a duty, that it breached that duty, and that the breach proximately caused the injuries at issue. Plaintiffs' case necessarily requires expert medical testimony for at least two of those issues: the alleged breach of the duty and proximate causation. Unlike cases where debris

clutters a hospital floor, the extent of *c. diff* contamination within a room or a facility is not readily observable and falls outside the realm of lay experience.

Similarly, while most jurors could be expected that picking up litter or sweeping a floor would remediate common premises hazards, the protocol for minimizing *c.diff* transfer are not within the general knowledge of lay persons. Expert testimony would be required to establish Plaintiffs' allegations that CCF breached its duty in controlling *c. diff* at its Main Campus. This is not a case of standard negligent maintenance that unfortunately occurred on hospital premises. It is a case addressing a medical hazard within a medical provider's facility that requires specific infection control protocols.

Expert medical testimony would also be required to establish that the source of Mrs. Lavalais' *c. diff* infection was the CCF facility to establish proximate causation.

Plaintiff asserts that the duty breached by CCF was not necessarily the duty to control *c. diff* infections at its Main Campus but its duty to warn of the latent defect on the premises. Mrs. Lavalais has alleged that CCF negligently failed to warn her of a higher rate of c. diff. infections at the Main Campus. She maintains that she would have chosen to receive her medical treatment at another facility had she known of the allegedly increased risk of infection at the Main Campus. Warning patients of hospital-acquired infections prior to receiving treatment at a facility is a facet of informed consent to treatment. A cause of action for failure to obtain

informed consent is a "medical claim" in which:

> [The] patient bears the burden to present expert medical testimony identifying the material risks and dangers of the medical procedure and showing that one or more of those undisclosed risks and dangers materialized and proximately caused injury. Expert testimony is necessary because these elements of the tort require the knowledge, training, and experience of a medical expert to assist the jury in rendering its verdict.

White v. Leimbach, 131 Ohio St. 3d 21, 22, 2011-Ohio-6238, 959 N.E.2d 1033.

Thus, even under Plaintiffs' alternate theory, expert medical testimony would be required to explain the purported undisclosed risk and, again, to establish the proximate cause of the injury.

The circumstances surrounding Mrs. Lavalais choice of the Main Campus for medical treatment, including any disclosures of risks inherent in hospitalization, were "ancillary to and an inherently necessary part" of her treatments or diagnosis. This finding is underscored by the necessary proof, much of it inescapably expert medical testimony. As such, the Court finds Mrs. Lavalais' claim is a "medical claim" as is her husband's derivative claim for loss of consortium.

III. CONCLUSION.

Plaintiffs have asserted "medical claims" as defined in R.C. 2305.113. The gravamen Plaintiffs' Complaint is medical malpractice requiring expert medical testimony. Plaintiffs did not file an affidavit of merit or seek to demonstrate good cause for an extension to file an affidavit as required by Civ.R.10(D)(2). Accordingly, **DEFENDANT THE CLEVELAND CLINIC FOUNDATION'S (CCF'S) MOTION TO DISMISS FOR FAILURE TO STATE**

A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO CIV.R. 10(D) AND 12(B)(6) IS GRANTED. PLAINTIFFS' COMPLAINT IS DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

JUDGE BRENDAN J. SHEEHAN

Dated: 1/24/13

CERTIFICATE OF SERVICE

A copy of the foregoing was sent via regular mail and email to the following this 24th day of January, 2013:

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