

**RECENT OHIO SUPREME COURT RULING
RE: FEAR OF CANCER**

On April 28, 2004, the Ohio Supreme Court ruled that a skin-cancer patient could not sue a laboratory for negligent infliction of severe emotional distress (fear of cancer spreading) when the laboratory negligently destroyed a biopsy sample so that it could not be tested. Plaintiff had skin cancer, a melanoma, that was removed. To determine whether the cancer had spread, Plaintiff's physician removed four lymph nodes near the melanoma site. These were the only lymph nodes available for laboratory testing to determine if the cancer had spread. Two lymph nodes were sent to a laboratory that performed a traditional test and found that the cancer had not spread. The other lymph nodes were sent to a different, specialized laboratory that was to perform a non-standard biopsy test that would have given Plaintiff nearly 100% assurance that his skin cancer had not spread. Unfortunately, the frozen lymph nodes were negligently allowed to thaw and were unusable. Since Plaintiff had no other lymph nodes that could be tested, he claimed severe emotional distress because he could never receive assurance that his cancer would not spread, i.e. he would live the rest of his life in fear of his cancer recurring.

Ohio law has long held that severe emotional distress is compensable without a contemporaneous physical injury. The case law, however, involved fact situations where the Plaintiff, although not physically injured, was physically very close to a traumatic event and developed severe emotional distress as a result of experiencing or witnessing the trauma. The Ohio Supreme Court determined that the skin cancer patient in Ohio was not placed in immediate risk of physical harm by the Arizona laboratory that negligently handled the biopsy specimen. Also, Plaintiff clearly did not witness the Arizona laboratory's negligence. Stated differently, the court concluded that the laboratory's negligence neither caused cancer to develop, and even if the cancer eventually spread, it would not be the proximate result of the laboratory's failure to test the lymph nodes.

The court distinguished fear of cancer cases involving asbestos and tuberculosis through workplace exposure. In the asbestos cases, the Plaintiffs were actually diagnosed with asbestosis and, thus, could demonstrate a reasonable fear of cancer stemming from their current disease. In the tuberculosis case, a man died from the disease, and his wife and daughter tested positive for latent tuberculosis and, thus, could reasonably fear the development of active tuberculosis. Those cases applied a zone-of-danger test confining recovery to people who sustained a physical insult and were placed in immediate risk of physical harm. The skin-cancer patient was not placed in immediate risk of physical harm by the laboratory's negligence because the traditional biopsy test was negative, i.e. the more sophisticated testing was not standard and, therefore, not necessary, i.e. the failure to have a second negative test result did not put Plaintiff in immediate risk of physical harm.

This was a four to three decision with a stinging dissent. Since the plaintiff had no additional lymph nodes to be tested, he would live the rest of his life in fear of recurring cancer, i.e. the patient lost the chance to be nearly 100% assured that his skin cancer would not spread.

The case citation is *Dobran v. Franciscan Medical Center*, 102 Ohio St. 3d 54 (2004), and seems to stand for the proposition that negligent infliction of severe emotional distress claims must be based upon the plaintiff being physically very close to the traumatic event producing the stress.

- Philip J. Weaver, Jr.
Smith Marshall, LLP
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