

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Christine Fluhrer as mother and Personal)
Representative of the Estate of Shiree Wilson,)
Plaintiff,)
vs.)
United States of America, Dr. Robert Zabenko,)
Dr. Julius R. Theophilus, Dr. Lloyd A.)
McPherson, and John Doe I-X and Jane Roe)
I-X,)
Defendants,)

Civil No. 4:15CV-165

Complaint

COMES NOW the Plaintiff, Christine Fluhrer and for her cause of action against the above-named Defendants alleges and states as follows:

JURISDICTION

I.

That the Federal District Court has jurisdiction pursuant to 28 U.S.C. §1331; 28 U.S.C. §2675, and 28 U.S.C. §1346.

PARTIES

II.

Christine Fluhrer, is the Personal Representative of Shiree Wilson's estate. Shiree Wilson was Christine Fluhrer's adult daughter.

III.

Shiree Wilson was an enrolled member of the Turtle Mountain Band of Chippewa Indians, who resided in the City of Belcourt, County of Rolette, State of North Dakota. The acts and omissions occurred in the Northwestern Division, District of North Dakota.

IV.

The Defendant, United States of America is responsible for providing federal health services to members of federally-recognized American Indian Tribes.

V.

The Defendant, United States of America, operates Aberdeen Area Indian Health Services located in Aberdeen, South Dakota is an agency of the U.S. Department of Health and Human Services-Indian Health Services which works in conjunction with its 13 Service Units to provide health care services to approximately 94,000 Native Americans residing on reservations located in North Dakota, South Dakota, Nebraska and Iowa. The Defendant, United States of America, specially operates Quentin N. Burdick Memorial Healthcare Facility, an Indian Health Service Provider in Belcourt, North Dakota.

VI.

The Defendants, Dr. Robert Zabenko, Dr. Julius Theophilus, and Dr. Lloyd McPherson, are employees of the United States of American and working at Quentin N. Burdick Memorial Healthcare Facility in Belcourt, North Dakota providing inpatient and outpatient health care to Shiree Wilson and other Tribal Members residing on the Turtle Mountain Band of Chippewa Indian Reservation.

VII.

Due to insufficiency of medical records received by Plaintiff and her legal counsel, the identities of Jane Roe I-X and John Doe I-X cannot be determined at this time. When the true identities of such persons are determined during discovery, leave of court will be requested to amend the Complaint and these parties will be identified.

FACTS

VIII.

On or about January 22, 2014, Shiree Wilson passed away in her home after being discharged from the Quentin N. Burdick Memorial Healthcare Facility Emergency Room, Indian Health Services (“IHS”) the day before, only a week after giving birth to her son. She was only 24 years old.

IX.

Prior to her death, on January 10, 2014, Shiree visited Dr. Robert Zabenko at IHS for a preoperative visit to prepare her for a planned and scheduled cesarean section to give birth to her son. Shiree was 39 weeks pregnant. Previous prenatal checkups showed that her baby had a Frank breech presentation, meaning that the buttocks of the baby are in place to come out first during delivery and the legs of the baby are straight up in front of the body with the feet near the head. Giving a vaginal birth would have been dangerous for both mother and child.

X.

The January 10, 2014, visit recorded her blood pressure, 136/75 (normal), noted that she had a Body Mass Index (“BMI”) of 41, and made note of her history of a heart murmur. Shiree’s pre-operative blood work revealed a high white blood count, which indicates a possible infection, and she complained of a mild nonproductive cough.

XI.

On January 14, 2014, Shiree was admitted to the Quentin N. Burdick Memorial Heath Care Facility for a primary cesarean. Dr. Zabenko successfully delivered Shiree’s son. Shiree’s blood pressures during the surgery and in the recovery room were normal.

Shiree remained in the hospital for two days and was discharged on January 16, 2014. No follow up x-rays or examinations were done to follow up on Shiree's significantly high white blood cell count or Shiree's cough. Dr. Julius Theophilis, who is the Chief Dental Officer and a Dentist, provided discharge and exitcare patient information to Shiree.

XII.

On or about January 21, 2014 at 8:14 a.m., Shiree went back to the IHS emergency room. Shiree was seen by Dr. Lloyd McPherson, the attending emergency room physician, about an hour after her arrival. Shiree told Dr. McPherson she had recently gone through a cesarean surgery, was experiencing a shortness of breath that had started suddenly and was only getting worse. She told Dr. McPherson she was in pain. Shiree also complained of a persistent dry cough that was increasing in frequency.

XIII.

A physical examination and various medical tests done in the IHS emergency room revealed that Shiree's blood pressure was significantly high at 167/105, that Shiree had a heart murmur, that her white blood cell count was high, that her respiratory rate was increased, that her right lung showed some infiltration, that her lungs had "possible fluid overload," and that her heart was "mildly enlarged," that is, her cardiac silhouette was at the upper limits of normal for size. The radiologist stated that the "patient *definitely* has a *possible* atypical-type pneumonia."

XIV.

Despite Shiree's medical history of hypertension and heart murmurs, her high 167/105 blood pressure, and test results, Shiree was discharged from the IHS

emergency room. Shiree was told by Dr. McPherson - who discussed Shiree with Dr. Richard Larson, the attending admitting hospital physician - that Shiree was diagnosed with bilateral atypical pneumonia and could be treated as an outpatient with decongestants and oral antibiotics.

XV.

The same day, January 21, 2014, Shiree returned home as instructed by Dr. McPherson and Dr. Larson.

XVI.

The following day, January 22, 2014, Shiree collapsed and died on the floor of her home. Shiree passed away before the ambulance could arrive to try to resuscitate her. Her body was transported back to the hospital. Her relatives stood by helpless.

XVII.

On January 23, 2014, Dr. Mark Koponen, the Medical Examiner, did a complete autopsy at the University of North Dakota pathology department. Significantly, he found that Shiree's heart weighed 580 grams, which is twice the normal heart weight for Shiree's BMI and that Shiree had severe pulmonary congestion and edema.

XVIII.

Defendants were careless, reckless, and negligent in the care and treatment of Shiree and departed from accepted local and national standard of medical practice for physicians, including, but not limited to:

- a. Failure to order any follow-up blood work or x-rays following Shiree's January 10, 2014, cesarean section to diagnose her high white blood cell count or cough;

- b. Failure to take appropriate measures to diagnose Shiree in a timely and appropriate fashion during her January 21, 2014, IHS emergency room visit, which resulted in her death;
- c. Failure to consult with an OB/GYN physician to evaluate Shiree after she went to the IHS emergency room only days after her cesarean section;
- d. Failure to consult with a cardiologist when Shiree's tests showed an enlarged heart whose silhouette was at the upper limits of normal for Shiree's size, and possible pulmonary fluid overload;
- e. Failure to consult with a pulmonologist when Shiree's tests showed that she "definitely has a possible atypical-type pneumonia" and a possible pulmonary fluid overload;
- f. Failure to admit Shiree from the emergency room directly into the hospital, specifically into the intensive care unit, where she could have been properly monitored and evaluation;
- g. Failure to develop a differential diagnosis that took Shiree's medical history, physical examinations, and medical tests into consideration;
- h. Failure to admit Shiree to the hospital, making the medical decision to discharge and treat her as an outpatient.

XIX.

Defendants failed to possess and exercise that degree of knowledge, skill and care ordinarily possessed and exercised by other healthcare agencies and facilities to provide medical care to Shiree given her medical history and symptoms.

XX.

Defendants failed to possess and exercise that degree of knowledge and skill ordinarily possessed and exercised by other physicians engaged in the profession and in providing medical services, constituting medical malpractice.

XXI.

For the foregoing reasons, as a direct and proximate result of the negligence and recklessness of the Defendants, Shiree suffered and died at the age of 24, leaving her newborn son and husband behind.

XXII.

The damages and injuries to Shiree were occasioned solely by the carelessness, recklessness, and negligence of Defendants without any contributing fault or part of Shiree.

XXIII.

The damage and injuries to Shiree were caused by the carelessness, recklessness, and negligence of Defendants in failing to comply with Federal and State standards of care in diagnosing and treatment of Shiree.

XXIV.

As a proximate result of the aforesaid, Shiree died, leaving a newborn baby boy motherless.

XXV.

Christine Fluhrer, mother of the deceased and Personal Representative of the Estate of Shiree Wilson served a claim pursuant to the Federal Tort Claim Act, 28

U.S.C. §2671, *et seq.* on Quentin Burdick Memorial Health Care Facility on July 7, 2014. (Ex. A).

XXVI.

That the aforementioned claim was received by the United States Department of Health and Human Services on July 16, 2014. (Ex. B).

XXVII.

On November 17, 2014, Plaintiff provided the Defendant with documentation it requested on July 16, 2014. (Ex. C).

XXVIII.

On June 17, 2015, Plaintiff provided the Defendant with supplemental evidence of a Medical Expert Opinion from Dr. Gary A. Milzner. (Ex. D).

XXIX.

That Plaintiff's claim for relief pursuant to the Federal Tort Claim Act has not been ruled upon. It has been well over the six month Statute of Limitations period when Plaintiff initially provided Defendant with documents to review. Pursuant to 45 C.F.R. §35.2(b) and 28 U.S.C. §2675(a) the Plaintiff may consider the claim denied by the Defendant. (Ex. B).

WHEREFORE Plaintiff prays for relief as follows:

1. For economic damages in an amount to be proven at trial, but not less than \$75,000.
2. For non-economic damages in an amount to be proven at trial
3. Attorney's fees, costs and disbursements incurred herein.
4. For such other relief the Court deems proper.

Dated this 16 day of November, 2015.

PRINGLE & HERIGSTAD, P.C.

By: 

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