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COURT OF APPEALS

STATE OF NEW YORK

KEITH ORSI, ET AL.,

Appellants,

-against-

No. 50

SUSAN HARALABATOS, M.D., ET AL.,

Respondents.

20 Eagle Street
Albany, New York 12207
February 13, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 50, Orsi.
2 Counselor, would you like any rebuttal
3 time?

4 MS. HEITZ: One minute, please, Your Honor.

5 CHIEF JUDGE LIPPMAN: One minute, sure.

6 MS. HEITZ: One minute.

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MS. HEITZ: May it please the Court, Dana
9 Heitz from Silberstein, Awad & Miklos on behalf of
10 the infant plaintiff, Keith Orsi.

11 Your Honors, unlike the work of the
12 legislature at issue in the case that was just before
13 ours, in this one we have a very on-point statute
14 that is unambiguous on its face and that needs to be
15 applied as written. However, the decision on appeal
16 was issued in complete derogation of the statute.

17 CHIEF JUDGE LIPPMAN: What's the statute,
18 counselor?

19 MS. HEITZ: It's General Obligations 3-111,
20 Your Honor.

21 CHIEF JUDGE LIPPMAN: Is that your main
22 argument in this case?

23 MS. HEITZ: That is our main argument,
24 exactly.

25 JUDGE GRAFFEO: Is that a preserved issue

1 in the trial court?

2 MS. HEITZ: At the trial court level, it
3 was not, because the issue of intervening cause was
4 never put to the trial court. That's the entire
5 problem with this, that the Appellate Division's
6 decision was issued on grounds which are not
7 substantiated anywhere in the record.

8 JUDGE GRAFFEO: Do we need that provision
9 for you to win this appeal?

10 MS. HEITZ: No; it would dispose of it most
11 readily, but we do also have triable issues of facts
12 that are presented on the record.

13 CHIEF JUDGE LIPPMAN: What are the triable
14 issues of fact, counselor, putting aside the GOL?

15 MS. HEITZ: Well, putting aside the GOL, we
16 have issues about - - - you know, if the matter
17 should go to trial, there's proof that we intend to
18 present, which is - - - which is supported by our
19 expert's affirmation on summary judgment that the
20 infection was able to travel from the skin, along the
21 portal presented by the Kirschner wires, to the bone,
22 where it was allowed to fester and where the
23 defendant had the opportunity to interrupt it on
24 April 19th - - -

25 CHIEF JUDGE LIPPMAN: You don't think - - -

1 MS. HEITZ: - - - when she acknowledged an
2 infection.

3 CHIEF JUDGE LIPPMAN: What's your answer to
4 the implication in the appellate decision that
5 there's a superseding event, the not appearing at the
6 appointments? What - - - why doesn't that foreclose
7 your claim?

8 MS. HEITZ: There are two reasons. The
9 first is that it's completely disallowed by the
10 General Obligations Law, which again - - -

11 CHIEF JUDGE LIPPMAN: And put that aside
12 for the time being.

13 MS. HEITZ: Putting that aside, it's also
14 unsubstantiated by any evidence in the record. The -
15 - -

16 CHIEF JUDGE LIPPMAN: What about the
17 dueling experts; what does that tell us or doesn't
18 tell us?

19 MS. HEITZ: Well, what it doesn't tell us
20 is that the defense on - - - they submitted two
21 board-certified physicians' affirmations to the trial
22 court as well as to the Appellate Division. These
23 two board-certified experts have reviewed the record,
24 and nothing in it led any of them to - - - led either
25 of them to consider the negligence of the infant

1 plaintiff's parents, nor that any outside action,
2 whatsoever, constituted a - - -

3 JUDGE GRAFFEO: Let me ask; did your - - -

4 MS. HEITZ: - - - superseding cause.

5 JUDGE GRAFFEO: Did your expert present any
6 evidence in the summary judgment papers that this - -
7 - the infection leading to the osteomyelitis was
8 present before the parents missed the next three
9 appointments?

10 MS. HEITZ: Yes, Your Honor. I have two
11 points with respect to what our expert said. First
12 of all, our expert's affirmation is the only evidence
13 in the record that acknowledges the missed
14 appointments and has any opinion whatsoever on their
15 significance, and that's presented at page 1079 of
16 the record.

17 Again, that's in contrast to both the
18 defendant physician experts who did not acknowledge
19 any significance as to these missed appointments
20 whatsoever. And secondly - - -

21 JUDGE GRAFFEO: I guess I'm asking where do
22 we look in the record to see that the plaintiff's
23 expert here indicated that this infection existed bef
24 - - - that they would have been able to detect or
25 that there was a lack of following proper medical

1 procedures before those missed appointments.

2 MS. HEITZ: Right. Well, as of April 16th

3 - - -

4 JUDGE GRAFFEO: His affidavit and where do
5 we find it?

6 MS. HEITZ: Yes, as of April 16th - - -
7 there was a blood test that was ordered on April
8 15th; it was completed the following day, on April
9 16th. It showed - - - it showed values of white
10 blood cell count, ESR and C-RP, which were in the
11 normal to high normal range. Our expert reports - -
12 -

13 JUDGE SMITH: But that's inconsistent with
14 then-existing osteomyelitis, right?

15 MS. HEITZ: Well, the expert put forth
16 opinion evidence on the issue that - - - that these
17 high normal levels of elevation, in view of the
18 clinical picture as of April 15th, indicated an
19 infection that either had not yet resolved, or else
20 it was in the middle of - - -

21 JUDGE SMITH: Okay.

22 MS. HEITZ: - - - recurring.

23 JUDGE SMITH: Okay. I mean, I understand
24 your point, but my question was, at that point he
25 didn't have osteomyelitis; you say he had an

1 infection that was dangerous and ultimately led to
2 osteomyelitis.

3 MS. HEITZ: Correct.

4 JUDGE SMITH: Have I correctly understood
5 your argument?

6 MS. HEITZ: Yes, Your Honor. And then
7 further to continue towards Judge Graffeo's point, as
8 of April 19th, the fact that Dr. Haralabatos
9 prescribed topical Cefzil indicates that she was
10 aware of an infection. It was her duty, at that
11 point, and our expert establishes this, to determine
12 the depth of the infection and to rule out the most
13 severe condition.

14 CHIEF JUDGE LIPPMAN: What could she have
15 done to determine that?

16 MS. HEITZ: As of April 19th - - -

17 CHIEF JUDGE LIPPMAN: What does your expert
18 say that she should have done?

19 MS. HEITZ: The expert states that she
20 should have treated the child as though he had the
21 most severe form of infection. She - - - he should -
22 - - or I'm sorry, the defendant should have treated
23 the infant for osteomyeli - - - most - - - excuse me,
24 osteomyelitis, until it was proven that that is not,
25 in fact, what the child had.

1 JUDGE SMITH: Well, she said - - -

2 MS. HEITZ: So therefore, she should have -

3 - -

4 JUDGE SMITH: - - - she said prophylactic
5 antibiotics, as I see.

6 MS. HEITZ: Correct.

7 JUDGE SMITH: Meaning, he doesn't have it
8 yet, but he might get something; you better give him
9 - - - you better give him antibiotics.

10 MS. HEITZ: Exactly. And what she - - -

11 CHIEF JUDGE LIPPMAN: Your - - -

12 MS. HEITZ: - - - should have done, also -
13 - -

14 CHIEF JUDGE LIPPMAN: Your argument is that
15 that would have been standard practice, and to not do
16 it was not standard practice? And - - -

17 MS. HEITZ: Exactly, Your Honor.

18 CHIEF JUDGE LIPPMAN: And you'll tell me;
19 your argument is it doesn't - - - therefore it
20 wouldn't have mattered whether they missed the next
21 three appointments or not?

22 MS. HEITZ: That's exactly right, Your
23 Honor.

24 CHIEF JUDGE LIPPMAN: That's enough to, at
25 least, get you past this stage?

1 MS. HEITZ: To create a question of fact,
2 exactly. And again, a submission of it is in the
3 record, which we challenged.

4 JUDGE GRAFFEO: A question of fact, on
5 what? On prox - - - it's enough for the proximate
6 cause issue - - -

7 MS. HEITZ: Correct.

8 JUDGE GRAFFEO: - - - for you to surmount
9 the defendant's summary judgment motion?

10 MS. HEITZ: I'm sorry, enough for us to get
11 - - - to defeat the defendant's summary judgment
12 motion?

13 JUDGE GRAFFEO: Yes.

14 MS. HEITZ: And I would just like to make
15 one more point also.

16 JUDGE GRAFFEO: Your answer is yes - - -

17 MS. HEITZ: Is yes - - - yes.

18 JUDGE GRAFFEO: - - - to that question?

19 MS. HEITZ: And just one more point with
20 respect to what Dr. Haralabatos should have done on
21 April 19th when the child was in her office is that
22 our expert also suggests that she should have ordered
23 serial blood testing, so that the one serial blood
24 test - - - or the one blood test which took place - -
25 -

1 JUDGE SMITH: But isn't it - - -

2 MS. HEITZ: - - - on the 15th - - -

3 JUDGE SMITH: I mean, isn't it just
4 inherently - - -

5 MS. HEITZ: - - - wasn't essential.

6 JUDGE SMITH: - - - I mean, you say it's an
7 issue of fact, but here you have a doctor who was
8 seeing this boy very frequently and asking the
9 parents to come back just a few days later. And the
10 parents, through no fault of the doctor, skipped,
11 what, a couple of weeks - - - two, three weeks.

12 MS. HEITZ: No, Your Honor. I believe it
13 was - - - the first missed appointment was on April
14 22nd, and the last was on May 3rd. So it was a
15 period of about ten days.

16 JUDGE SMITH: So - - - well, okay, but they
17 didn't - - - between April 19 and May 3rd they did
18 not see the doctor?

19 MS. HEITZ: That's correct.

20 JUDGE SMITH: And they were sup - - -

21 MS. HEITZ: There was also - - -

22 JUDGE SMITH: And the doctor had wanted to
23 see him?

24 MS. HEITZ: I'm sorry?

25 JUDGE SMITH: The doctor had wanted to see

1 the child in that time. Isn't that - - - isn't - - -

2 MS. HEITZ: As a matter of routine follow-
3 up, yes.

4 JUDGE SMITH: Isn't it - - -

5 MS. HEITZ: There was no urgency - - -

6 JUDGE SMITH: I mean, isn't it - - - I
7 mean, in effect, isn't it speculation to say that
8 when he - - - that if he'd come - - - that if the
9 child had come back when he was supposed to, just a
10 few days after April 19th, that it would have made no
11 difference?

12 MS. HEITZ: No, it's not speculative.
13 First of all, let me just state that to resolve it
14 against the infant plaintiff would be contrary to any
15 fault of the infant plaintiff, of course; he was four
16 years old at the time of the incident.

17 JUDGE SMITH: Well, but - - - well - - -

18 MS. HEITZ: But - - -

19 JUDGE SMITH: I mean, we're not - - - yes,
20 but we're not talking about contributory fault. If
21 there's a - - - if there was a set of facts - - - I
22 mean, if the - - - whether it's parental negligence
23 or not, if the parental negligence is so extreme that
24 you can't decide, with any degree of certainty,
25 whether the alleged malpractice caused any harm at

1 all, well, that's a complete defense. The statute
2 doesn't bar that.

3 MS. HEITZ: It's entirely unsupported by
4 the record.

5 JUDGE SMITH: Okay.

6 MS. HEITZ: And furthermore, we suggest
7 that it would be barred by the General Obligations
8 Law.

9 JUDGE SMITH: Well, wait a minute. Suppose
10 you really have a case in which there's overwhelm - -
11 - there's negligence by the parents so disastrous
12 that it's impossible for anyone to say, with any fair
13 - - - with any reasonable assurance whether the
14 doctor did any harm at all; you're saying that's
15 barred by the General Obligation Law?

16 MS. HEITZ: As it's written, yes. And
17 furthermore, I would just like to point out that we
18 do have triable issues of fact as to the defendant's
19 negligence here - - - or as to the defendant's
20 departures from standards of care here. It's not as
21 - - -

22 JUDGE SMITH: Yeah, I think - - - yeah, as
23 I understand it, the Appellate Division recognized
24 that, too.

25 MS. HEITZ: Correct.

1 CHIEF JUDGE LIPPMAN: Okay, counselor,
2 anything else?

3 MS. HEITZ: Not until rebuttal. Thank you.

4 CHIEF JUDGE LIPPMAN: Okay. Thanks,
5 counselor.

6 MR. KRAUS: Good afternoon. My name is
7 Eric Kraus. I represent the respondents.

8 CHIEF JUDGE LIPPMAN: Counsel, why doesn't
9 their expert create a factual issue that at that
10 point in time, before the child was not brought to
11 the later appointments, why doesn't that create an
12 issue of fact on a serious injury to the child? Why
13 - - - why isn't that at least debatable - - -

14 MR. KRAUS: Bec - - -

15 CHIEF JUDGE LIPPMAN: Based on their
16 expert's view that they should have done a complete
17 battery of blood tests and they should have given a
18 prophylactic, you know, dose of - - -

19 MR. KRAUS: Antibiotics?

20 CHIEF JUDGE LIPPMAN: Yes.

21 MR. KRAUS: Yes. Two points, or perhaps -
22 - -

23 CHIEF JUDGE LIPPMAN: Or that the - - -

24 MR. KRAUS: Perhaps - - -

25 CHIEF JUDGE LIPPMAN: - - - whatever that

1 other drug was just wasn't sufficient.

2 MR. KRAUS: Yeah, so first of all, the drug
3 that was provided by Dr. Haralabatos on April 19th,
4 it's not topical. I know that there's a - - -

5 CHIEF JUDGE LIPPMAN: Whatever it is; go
6 ahead.

7 MR. KRAUS: It was an antibiotic.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. KRAUS: And Dr. - - - the plaintiff's
10 expert doesn't dispute that that was an inappropriate
11 drug to try to see whether that would eradicate the -
12 - -

13 CHIEF JUDGE LIPPMAN: Superficially,
14 they're arguing - - - and again, this is at this
15 stage in the proceeding, they're arguing that that
16 goes against standard practice; that standard
17 practice would have been to look, you know what this
18 can cause, you know, this kind of infection, the
19 damage to the bone, and that standard practice would
20 be to prophylactically treat it as if it was an
21 infection.

22 MR. KRAUS: What's missing, though, is the
23 proximate cause part of that argument, because a very
24 important critical fact for us to look at is what the
25 plaintiff's expert says about a particular date in

1 time: April 26th of 2004. That is the only date
2 where the plaintiff's expert actually alleges a
3 departure and makes the proximate cause connection.
4 April 26th is the date when he says, on that date,
5 and not before, had there been blood testing on that
6 date, that would have revealed that there was an
7 infection. That date would have permitted Dr.
8 Haralabatos to take - - -

9 JUDGE PIGOTT: Didn't - - -

10 MR. KRAUS: - - - protec - - -

11 JUDGE PIGOTT: Didn't the doctor say that
12 the post-operative care departed from the standards
13 of medical prac - - - on both February 15th and
14 February 19th?

15 MR. KRAUS: April.

16 JUDGE PIGOTT: Excuse me, April, right.
17 April - - - saying that, you know, the x-rays were
18 not sufficient, and - - - and more stuff that I won't
19 go into.

20 MR. KRAUS: Yes, and that's my point - - -

21 JUDGE PIGOTT: All right.

22 MR. KRAUS: - - - Your Honor.

23 JUDGE PIGOTT: Well, so it wasn't April
24 26th; it was - - -

25 MR. KRAUS: Well, no, my point about April

1 26th is that's the only date when plaintiff's expert
2 says there was both a departure and the proximate
3 cause element was also established.

4 JUDGE PIGOTT: They said "failure to
5 properly treat the skin infection around the pin
6 sites on 15th and the 19th".

7 MR. KRAUS: Well, sure, first of all, Dr.
8 Haralabatos had blood work on April 19th - - -

9 JUDGE PIGOTT: Right.

10 MR. KRAUS: From April six - - -

11 JUDGE PIGOTT: I'm just saying what they
12 said, and - - -

13 JUDGE SMITH: But their experts say she
14 should have repeated the blood work.

15 MR. KRAUS: And he says you should have
16 repeated it on the 26th.

17 JUDGE PIGOTT: "And should have gotten a
18 wound" - - -

19 MR. KRAUS: And - - -

20 JUDGE PIGOTT: "And should have gotten a
21 wound culture" - - -

22 MR. KRAUS: I mean - - -

23 JUDGE PIGOTT: - - - "And should have
24 gotten a wound culture from the pin sites and applied
25 antibiotics." And on February 19th, "should have had

1 further x-rays and blood work". In essence, it was a
2 failure to rule out osteomyelitis.

3 MR. KRAUS: Yes, so there - - - there's no
4 question there's not, at least - - -

5 CHIEF JUDGE LIPPMAN: But what's not clear
6 about that, what Judge Pigott just read to you?

7 MR. KRAUS: What's - - - I'll tell you.

8 CHIEF JUDGE LIPPMAN: Again, we're not
9 taking it as the truth, but - - -

10 MR. KRAUS: No, I understand.

11 CHIEF JUDGE LIPPMAN: - - - that's what the
12 expert - - -

13 MR. KRAUS: I understand the posture in
14 which - - -

15 CHIEF JUDGE LIPPMAN: - - - says. I mean,
16 what I'm focusing on: why isn't there a question of
17 fact, irrespective of what went on after the 19th?

18 MR. KRAUS: I'm going to put aside all
19 issues about the departures.

20 JUDGE PIGOTT: Okay.

21 MR. KRAUS: As you pointed out, or perhaps
22 one of your colleagues pointed out, the Appellate
23 Division spoke to that issue and I don't want to take
24 any time on that.

25 JUDGE PIGOTT: Proximate cause.

1 MR. KRAUS: Right, proximate cause. So the
2 only issue with proximate cause is whether the claim
3 departures was the proximate cause of the injuries
4 that flow from the osteomyelitis.

5 JUDGE PIGOTT: Did they say - - -

6 MR. KRAUS: But - - -

7 JUDGE PIGOTT: Did they say that there was
8 an intervening superseding cause?

9 MR. KRAUS: Did the court say it?

10 JUDGE PIGOTT: Yeah.

11 MR. KRAUS: It's implicit in its opinion
12 that the failure of the parents to - - -

13 JUDGE PIGOTT: Yeah.

14 MR. KRAUS: It's - - - it's really the - -
15 -

16 JUDGE PIGOTT: Doesn't the - - -

17 MR. KRAUS: It's not so much the failure of
18 the parents to do anything; it's the fact that Dr.
19 Haralabatos had no opportunity, after April 19th, to
20 do anything - - -

21 CHIEF JUDGE LIPPMAN: But you read that
22 into it - - -

23 MR. KRAUS: - - - for this child.

24 CHIEF JUDGE LIPPMAN: - - - because they
25 cite Wilkins? Or what's - - - well, how do you know

1 that that's what they're saying?

2 MR. KRAUS: Because what they say is that
3 there's a failure to establish proximate cause, which
4 is exactly the argument that we presented to the
5 Appellate Division.

6 JUDGE PIGOTT: But isn't that what your
7 opponent was arguing? He was saying you can't bring
8 - - - 3-111 prevents you from - - - and I know you
9 agree with that on the comparative, but the
10 intervening cause, as I understand it, has to be
11 extraordinary. You know, it can't be - - - you know,
12 it can't be a missed appointment.

13 MR. KRAUS: I - - -

14 JUDGE PIGOTT: I'm not arguing for the
15 plaintiff here, but it's got to be something
16 extraordinary, not just, you know, what you normally
17 expect in the course of treating someone - - -

18 MR. KRAUS: Let me make two - - -

19 JUDGE PIGOTT: - - - right?

20 MR. KRAUS: - - - respond to that in two
21 ways. First of all, it's not just that it has to be
22 extraordinary, it can also simply be that the
23 intervening occurrence doesn't flow naturally from
24 the defendant's conduct. And surely, the absence of
25 a patient to care for doesn't flow from Dr.

1 Haralabatos' conduct at all.

2 JUDGE SMITH: How - - -

3 JUDGE GRAFFEO: Can I ask you something
4 really basic? Was there ever a time that the child
5 was presented without some evidence of an infection?
6 Was there any time that the - - - that the doctor saw
7 - - -

8 MR. KRAUS: Yes.

9 JUDGE GRAFFEO: - - - this boy when there
10 wasn't pus or redness or something at the pin - - -

11 MR. KRAUS: I - - -

12 JUDGE GRAFFEO: - - - site?

13 MR. KRAUS: I think that there were all - -
14 - lots of different things going on. There was - - -
15 over the course of time, from the date of the surgery
16 forward, there were times when it seemed that he was
17 infection-free, but in the critical time period, it
18 appeared that either there was something going on
19 because of the movement around the pin sites, not
20 necessarily an infection, or that there was a topical
21 superficial infection. But there was never - - -

22 JUDGE SMITH: But they say - - - but they
23 say you should have assumed the worst. Yeah, it
24 could have been - - - it could have been something
25 minor, but maybe it wasn't.

1 MR. KRAUS: So we did. And this is what we
2 did. Number one, we prescribed antibiotics, which
3 was given to the patient aft - - - on or after April
4 19th. We did x-rays, we examined the child, and most
5 importantly, we ordered blood work, which at the last
6 visit - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but - - -

8 MR. KRAUS: - - - available - - -

9 CHIEF JUDGE LIPPMAN: But their expert says
10 that that's not enough; that's not standard practice
11 - - -

12 MR. KRAUS: Yes - - -

13 CHIEF JUDGE LIPPMAN: - - - that this is
14 such a serious danger that, you know, that you,
15 again, in Judge Smith's words, assume the worst and
16 you treat it as such.

17 MR. KRAUS: And so we did. We gave the
18 child antibiotics and we - - -

19 CHIEF JUDGE LIPPMAN: No, but - - -

20 MR. KRAUS: - - - continued to monitor - -
21 -

22 CHIEF JUDGE LIPPMAN: - - - their expert
23 says that's not sufficient.

24 MR. KRAUS: No, that's right, and what - -
25 -

1 CHIEF JUDGE LIPPMAN: But I'm not saying -
2 - -

3 MR. KRAUS: What he says, if I may, Your
4 Honor - - -

5 CHIEF JUDGE LIPPMAN: Sure.

6 MR. KRAUS: - - - I'm sorry. The only
7 thing that the defendant's - - - that the plaintiff's
8 expert says that was a departure and was a proximate
9 cause of the injury was the failure to test the blood
10 on April 26th.

11 JUDGE SMITH: Well, what about the not
12 giving the pra - - - propho - - - what do you call
13 it, prophylactic course of antibiotics?

14 MR. KRAUS: He had a prophylactic course of
15 antibiotics; that's the Cefzil that was administered
16 on April 19th.

17 JUDGE READ: So your argument is what, that
18 the only thing he says is there was an absence of an
19 activity on April 26th, but you didn't have any
20 opportunity to do that because the patient didn't
21 show up?

22 MR. KRAUS: The plaintiff - - - if I may -
23 - -

24 JUDGE READ: Is that what your - - - is
25 that what your argument is?

1 MR. KRAUS: Yes. Our argument is that when
2 the plaintiff's expert says, at page 1081 of the
3 record - - - he says, "In my opinion" - - - I'm
4 sorry, it's 1083 of the record, "In my opinion,
5 blood testing on April 26th would have revealed that
6 Cefzil was not working." And that's the first time -
7 - -

8 CHIEF JUDGE LIPPMAN: Yeah, but you keep
9 going back to the 26th - - -

10 MR. KRAUS: Yes.

11 CHIEF JUDGE LIPPMAN: - - - but we're
12 talking about what he says about the - - - the 19th -
13 - -

14 MR. KRAUS: But he doesn't say that
15 anything going on, on the 15th or the 19th - - -

16 CHIEF JUDGE LIPPMAN: They say - - -

17 MR. KRAUS: - - - was the proximate cause -
18 - -

19 CHIEF JUDGE LIPPMAN: He says - - -

20 MR. KRAUS: - - - of the injury.

21 CHIEF JUDGE LIPPMAN: That's what I'm not
22 following - - -

23 MR. KRAUS: Okay. Let me - - -

24 CHIEF JUDGE LIPPMAN: - - - is that it's -
25 - - in very clear terms he says this is the practice

1 that should be taken at that time, that if there's a
2 very serious possibility that there could be
3 permanent damage, and therefore that you do a
4 prophylactic dose and you do a complete battery of
5 blood tests. What I'm not following is - - -

6 MR. KRAUS: And I'm not arguing - - -

7 CHIEF JUDGE LIPPMAN: - - - what is unclear
8 about that, and you go to the 26th, and we hear you,
9 and I - - - I understand what he said about that.

10 MR. KRAUS: Yes.

11 CHIEF JUDGE LIPPMAN: But why isn't it just
12 clear that - - -

13 MR. KRAUS: Because - - -

14 CHIEF JUDGE LIPPMAN: - - - that that's
15 what he's saying?

16 MR. KRAUS: And I mean, we'd have to talk
17 to the plaintiff's expert about why it's unclear, but
18 this is why it's unclear: with regards to the 26th,
19 he said it would have prevented the osteomyelitis.

20 JUDGE SMITH: But isn't - - -

21 MR. KRAUS: With regards - - -

22 JUDGE SMITH: Isn't he saying that you
23 should have ordered repeat blood testing on the 19th,
24 and that if you had done so, you would have found out
25 sooner?

1 MR. KRAUS: No, because he acknowledges
2 that on the 19th the blood work would be no
3 different, you would not have revealed the
4 osteomyelitis on the 19th even if - - -

5 JUDGE SMITH: But he - - -

6 MR. KRAUS: - - - you had done blood work.

7 JUDGE SMITH: Doesn't he say that they
8 should have - - - you should have prescribed
9 antibiotics on the 15th?

10 MR. KRAUS: Yes, he does, but he doesn't
11 say - - -

12 JUDGE SMITH: And you didn't.

13 MR. KRAUS: That's - - - and I'm not
14 arguing the departure issues.

15 JUDGE SMITH: Okay.

16 MR. KRAUS: But if you look at what the
17 doctor says - - - it's at paragraph - - - I'm sorry,
18 it's on page 1084 of the record. He says that this
19 could have or this might have prevented the
20 osteomyelitis, and the only time he says it - - -
21 something would have prevented the osteomyelitis is
22 when he's referring to the event of the 26th.

23 JUDGE PIGOTT: But Judge - - - going back
24 to what Judge Graffeo suggested earlier, is that, you
25 know, every time this patient showed up there

1 appeared to be something of an infectious nature.

2 MR. KRAUS: Yes.

3 JUDGE PIGOTT: And it went on and on and on
4 and on. And what the plaintiff's expert says is that
5 - - - points to those early days and says, you know,
6 if you'd done more, if you'd done more, if you'd done
7 more, you wouldn't have had - - - you know, you would
8 have diagnosed it sooner.

9 MR. KRAUS: That's so speculative and
10 untrue, because for instance, he criticizes the
11 x-rays because they were, quote, "limited x-rays".

12 JUDGE PIGOTT: Yeah.

13 MR. KRAUS: But those x-rays were
14 undertaken at a time before even plaintiff's expert
15 says the osteomyelitis was present - - -

16 JUDGE SMITH: Yeah, but he says - - -

17 MR. KRAUS: - - - and he - - -

18 JUDGE SMITH: - - - he says that after the
19 - - - but after the cast was off you should have
20 repeated the x-ray, on the 19th?

21 MR. KRAUS: And I believe that there were
22 repeat x-rays on the 15th and the 19th, and there
23 were no further x-rays possible after that. And he
24 does not say that osteomyelitis would have been
25 diagnosable or observable on x-ray, even on the 19th.

1 The fact is, what he says, definitively, is that it's
2 not diagnosable until the 26th. That's why that's
3 such a critical date for us.

4 CHIEF JUDGE LIPPMAN: Okay. Thanks,
5 counselor.

6 MR. KRAUS: Thank you, Your Honors.

7 CHIEF JUDGE LIPPMAN: Thanks.

8 Counselor, do you have any rebuttal?

9 MS. HEITZ: Your Honors, I'm at the court's
10 disposal to answer any questions, but - - -

11 JUDGE SMITH: What about the Cefzil? Why
12 didn't prescribing the Cefzil meet the problem of
13 failing to prescribe antibiotics?

14 MS. HEITZ: Because in addition to assuming
15 that it was a skin infection at that point, while the
16 defendant, in fact, had the duty to assume that it
17 was the worst, exactly like you said, that it was in
18 fact a bone infection, and to treat it accordingly,
19 she also failed to prescribe any serial blood testing
20 which would have allowed her to assess the - - -

21 JUDGE SMITH: So are you saying that if
22 they had done serial blood testing or an x-ray, they
23 would have used some other antibiotic?

24 MS. HEITZ: It's possible that would result
25 in viewing the facts in a light most favorable to the

1 defendant on this - - -

2 JUDGE SMITH: Well, I mean, does your
3 expert say that?

4 MS. HEITZ: The expert does not, no.

5 JUDGE SMITH: What - - - I guess, where
6 does it spell out - - - I understand where it spells
7 out what the doctor did wrong; where does it spell
8 out exactly what would have happened if she'd done it
9 right?

10 MS. HEITZ: Exactly what would have
11 happened. She - - - she would have had the
12 opportunity to - - - well, basically, at the time the
13 plaintiff - - - the infant plaintiff returned to the
14 hospital on May 4th, our expert states that the ESR
15 values and - - - were so high and the x-ray showed
16 bone infection of such a severe degree, that had
17 serial blood testing been performed after the - - -
18 the 22th or the 26th, that the values would have
19 increased so dramatically so as to indicate that the
20 Cefzil was ineffective - - -

21 JUDGE SMITH: How could the - - -

22 MS. HEITZ: - - - and required us to have
23 it treat - - -

24 JUDGE SMITH: - - - blood testing have been
25 performed on days when the kid wasn't there?

1 MS. HEITZ: I'm sorry, Judge?

2 JUDGE SMITH: Those were days when the
3 parents didn't bring the child in.

4 MS. HEITZ: That's correct. Those are also
5 days, therefore, which cannot be held against the
6 infant - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but - - -

8 MS. HEITZ: - - - but furthermore, there's
9 - - -

10 CHIEF JUDGE LIPPMAN: But what the judge is
11 pointing out, I think, is what about on the 15th and
12 the 19th about what - - - what should have been done
13 by the doctor.

14 MS. HEITZ: What about it, exactly?

15 CHIEF JUDGE LIPPMAN: What about - - - what
16 shows that if she had done certain things, this
17 problem would not have happened?

18 JUDGE READ: What does your expert say
19 about that?

20 MS. HEITZ: Sorry. Well, the expert says
21 that as - - - specifically as to when the infection
22 began is not the relevant inquiry. What is relevant
23 is that on the 19th, when the defendant noted the
24 beginning of the infection, that that is when she had
25 the opportunity to intervene, that if she had taken

1 the measures at that point, that she would have
2 stopped the infection's progression, or at least
3 curbed it sharply.

4 JUDGE SMITH: Where does it say that?

5 JUDGE GRAFFEO: Do you have a record cite
6 or can you leave a record cite with the - - -

7 CHIEF JUDGE LIPPMAN: If you can find it,
8 read it now.

9 MS. HEITZ: Sure. Specifically as to - - -
10 as to the treatments?

11 JUDGE SMITH: Well, what you just said,
12 that if - - - that she had the opportunity, it would
13 have stopped the infection.

14 JUDGE READ: On the 15th or the 19th.

15 MS. HEITZ: Um-hum. Your Honors, I'm
16 sorry; I don't have this at my ready disposal. I'm
17 happy to continue looking, but I believe it is in our
18 papers as well.

19 CHIEF JUDGE LIPPMAN: Okay. If you want,
20 you'll leave the cite with the clerk.

21 MS. HEITZ: Very good, Judge.

22 CHIEF JUDGE LIPPMAN: All right?

23 MS. HEITZ: Yes.

24 CHIEF JUDGE LIPPMAN: Okay. Thank you
25 both.

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MS. HEITZ: Thank you.

CHIEF JUDGE LIPPMAN: Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of KEITH ORSI, et al. v. SUSAN HARALABATOS, M.D., et al., No. 50 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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