Illinois Association of Defense Trial Counsel
Springfield, Illinois | www.iadtc.org | 800-232-0169
IDC Quarterly | Volume 23, Number 4 (23.4.40)

Health Law Update

By: Roger R. Clayton, Mark D. Hansen, and J. Matthew Thompson
Heyl, Royster, Voelker & Allen, P.C., Peoria

First District Appellate Court Addresses Proximate Cause Defense in Case of Third-Party Intervening Physician in *Buck v. Charletta*

In *Buck v. Charletta*, 2013 IL App (1st) 122144, the Illinois Appellate Court First District addressed the line of cases where proximate cause is contingent on the actions of an intervening third party. Previously in Illinois, a plaintiff's medical malpractice claim would fail if there was no evidence that the third party would have done anything differently if provided additional or different information. In other words, if a plaintiff alleges that a physician or nurse was negligent for failing to provide additional or different information to another treating physician, but there is no evidence that the treating physician would have acted any differently given the additional information, then a causal connection is absent.

In *Buck*, however, the appellate court determined that a question of material fact might exist as to proximate cause if a plaintiff's expert witnesses testify that the third-party intervening physician would have acted differently, even if the third-party physician himself testifies that he would not have. Defense attorneys should carefully consider *Buck* in defending similar cases so that facts can be developed throughout discovery to distinguish *Buck*.

Background

In *Buck*, the plaintiff was seen for neck pain by her orthopedic surgeon ("surgeon") who ordered x-rays and an MRI. *Buck*, 2013 IL App (1st) 122144, ¶ 3. The test results were read by the defendant radiologist ("radiologist"), who contracted with Midwest Orthopaedics. *Id.* The radiology image showed a density in the plaintiff's lung, which the radiologist detailed in his MRI report, recommending that follow-up chest x-rays be taken. *Id.* ¶ 10. The report clearly stated that a malignant tumor could not be ruled out. *Id.* The radiologist's practice was to read the images remotely and then upload his final report to a server owned by Midwest Orthopaedics for use by the ordering physician. *Id.* ¶ 9. The radiologist uploaded the plaintiff's MRI report in this manner and admittedly had no personal communication with the surgeon regarding his findings. *Id.* ¶ 11.

At his discovery deposition, the surgeon testified that he saw and reviewed the radiologist's MRI report and that he considered the reference to the lung mass clinically significant. *Id.* ¶ 15. The surgeon testified that he reviewed the report with the plaintiff and advised her to see her primary-care physician, which she said she would do. *Buck*, 2013 IL App (1st) 122144, .15 ¶ Most importantly, the surgeon testified that his understanding of the MRI report would not have been any different if the radiologist would have called or

otherwise contacted him personally to discuss the report. *Id.* ¶ 21. The surgeon testified that, even if the radiologist had contacted him personally, his management of the plaintiff would have been the same. *Id.*

The plaintiff, on the other hand, testified that the surgeon never discussed the MRI report with her, that she was never provided a copy of the report, and that she was never referred for further follow-up. *Id.* ¶ 35. She testified that, as a former oncology nurse, she was familiar with the meaning of a "lung mass" and "malignant lung tumor," which she associated with death. *Id.* She stated that if the surgeon had recommended she follow up with additional chest x-rays, she definitely would have. *Id.*

The plaintiff retained three expert witnesses to testify: two radiologists and a health-care consultant specializing in medical record-keeping. *Buck*, 2013 IL App (1st) 122144, .44 ¶ The record-keeping expert testified that, because the surgeon's records did not mention that the plaintiff was told about the MRI report, it showed that the findings and recommendations were not effectively communicated by the radiologist to the surgeon or to the plaintiff's primary-care physician. *Id.* ¶ 45. The expert radiologists both testified that the radiologist breached the standard of care by failing to personally communicate his findings to the surgeon and that this failure resulted in a one-year delay in diagnosis and treatment. *Id.* ¶ 47-50.

In light of these facts, the radiologist moved for summary judgment, arguing that any alleged breach of the standard of care was not a proximate cause of the plaintiff's injury because nothing that he did or failed to do impacted the surgeon's treatment. *Id.* ¶ 52. The surgeon testified that he received the MRI report, noted the abnormal findings, appreciated the clinical significance, and would not have done anything differently if the radiologist communicated personally with him. *Id.*61 ,52 ¶¶ . The trial court initially denied the motion for summary judgment, but upon a motion to reconsider, entered summary judgment in the radiologist's favor for lack of proximate cause. *Id.* ¶ 54.

Even if a Third-Party Intervening Provider Testifies that He Would Not Have Treated the Plaintiff Any Differently Given Additional Information, a Question of Fact Might Still Exist Based upon Expert Testimony

The appellate court, citing *Gill v. Foster*, 157 Ill. 2d 304 (1993), and *Snelson v. Kamm*, 204 Ill. 2d 1 (2003), first examined cases holding that where proximate cause is contingent on the actions of an intervening third party, as a matter of law, a plaintiff cannot prevail on his medical malpractice claim if there is no evidence that the third party would have done anything differently. *Buck*, 2013 IL App (1st) 122144, ¶¶ 62-69. The court, however, distinguished *Gill* and *Snelson*, finding that, in each of those cases, there was no factual dispute regarding what a medical professional might have done if provided certain information by the allegedly negligent medical provider. *Id.* ¶ 69.

In *Gill*, the plaintiff alleged that a nurse was negligent in failing to communicate the plaintiff's complaint of chest pain to the treating physician, resulting in the treating physician's failure to diagnose her condition. *Id.* ¶ 63 (citing *Gill*, 157 Ill. 2d at 309-10). The Illinois Supreme Court held that, because the physician was aware of the chest pains and still failed to diagnose the plaintiff's condition, the nurse's failure to communicate the complaint could not have been a proximate cause of the failure to diagnose. *Id.* ¶ 65 (citing *Gill*, 157 Ill. 2d at 311).

In *Snelson*, the plaintiff alleged that nurses were negligent in failing to disclose pain complaints and the placement of a catheter to the treating physician, which resulted in a delayed diagnosis and significant tissue death. *Id.* ¶ 66 (citing *Snelson*, 204 Ill. 2d at 11-16). But, the treating physician testified that he was in possession of the nurses' notes indicating that a catheter had been placed and that the nurses had provided him with all necessary information. *Id.* ¶ 67 (citing *Snelson*, 204 Ill. 2d at 15). Therefore, the trial court entered judgment notwithstanding the verdict in favor of the nurses. *Buck*, 2013 IL App (1st) 122144, ¶ 68 (citing *Snelson*, 204 Ill. 2d at 23). The Illinois Supreme Court upheld the trial court's decision, finding that, because

the treating physician knew of the pain complaints and the catheter, there was no causal connection between the nurses' alleged negligence and the physician's delayed diagnosis. *Id.* ¶ 68 (citing *Snelson*, 204 Ill. 2d at 44).

Nevertheless, the *Buck* court determined that a question of fact might still exist, even when the intervening third party testifies that he would not have acted differently given additional information. *Id.* ¶ 69. In determining that a fact question might be created by a plaintiff's expert testimony, the *Buck* court relied on a passage from *Snelson*, stating:

> Our supreme court disagreed and called this argument a "red herring" because it assumes that doctors would not be willing to tell the truth about whether the conduct of others affected their decision making ability and because "a plaintiff would always be free to present expert testimony as to what a reasonably qualified physician would do with the undisclosed information and whether the failure to disclose the information was a proximate cause of the plaintiff's injury in order to discredit a doctor's assertion that the nurses' omission did not affect his decisionmaking."

Id. (quoting *Snelson*, 204 Ill. 2d at 45-46). The appellate court commented that the plaintiff took the "litigation advice
offered by our supreme court" in presenting her experts' testimony. *Id.* ¶ 70.

Even though the surgeon testified that his management of the patient would not have changed if he had been contacted personally by the radiologist, the First District found this issue to be one of fact in light of the plaintiff's expert anesthesiologists' opinions that the failure to personally communicate was a breach of the standard of care and resulted in a one-year delay in diagnosis and treatment. *Id.* In particular, the court was convinced that this question was one of fact because, contrary to the surgeon's testimony, the plaintiff testified that he never discussed the MRI report with her or provided her a copy. *Buck*, 2013 IL App (1st) 122144, ¶ 71. The court found this testimony consistent with the fact that the plaintiff was an oncological nurse familiar with the term mass and with her testimony that if she would have been informed of the contents of the report she would have followed up with another physician. *Id.* Therefore, the First District held that a jury should have been allowed to determine whether or not the surgeon should have acted differently in treating the plaintiff if the radiologist communicated the findings to him personally. *Id.* ¶¶ 71, 73.

Conclusion

The decision in *Buck* will provide a plaintiff a stronger argument against summary judgment in similar cases if the plaintiff's expert witnesses testify that the intervening third party physician would have acted differently if provided additional or different information. The *Buck* court, however, seemed particularly convinced that a question of fact existed because the testimony of the third-party intervening physician, the surgeon, and the plaintiff differed dramatically as to how the surgeon in fact treated the plaintiff. This circumstance, in turn, seemed to persuade the court that a jury could believe logically the plaintiff's expert testimony that the surgeon's treatment would have been different, despite his testimony to the contrary. When confronted with *Buck*, practitioners could readily distinguish the decision if there is no question of fact regarding the treatment rendered by the intervening third-party provider. In other words, if the treatment rendered is not disputed and the intervening provider testifies that he would not have acted differently given additional information, *Buck* could be limited in its application.

About the Authors

Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.*, where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues, medical malpractice and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the Illinois Association of Defense Trial Counsel (IDC), the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, president and board member of the Illinois Association of Healthcare Attorneys, and past president and board member of the Illinois Society of Healthcare Risk Management. He co-authored the Chapter on Trials in the IICLE Medical Malpractice Handbook.

Mark D. Hansen is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He has been involved in the defense of cases involving catastrophic injury, including the defense of complex cases in the areas of medical malpractice, products liability, and professional liability. Mark has defended doctors, nurses, hospitals, clinics, dentists, and nursing homes in healthcare malpractice cases. He received his undergraduate degree from Northern Illinois University and law degree from University of Illinois College of Law. Mark is a member of the Illinois Association of Defense Trial Counsel and is a former co-chair of the Young Lawyers Committee, former ex officio member of the Board of Directors, and has served as chair for various seminars hosted by the IDC. He is also a member of the Illinois Society of Healthcare Risk Management, the Abraham Lincoln American Inn of Court, and the Defense Research Institute.

J. Matthew Thompson is an associate in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He practices primarily in the area of general tort defense. He received his B.S. in Accounting from Culver-Stockton College in 2005 and his J.D. *cum laude* from Southern Illinois University School of Law in 2008.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at **www.iadtc.org**.

Illinois Association of Defense Trial Counsel, PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org