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Health Law

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Isn't Every Party Entitled to be Represented by its Own Attorney? Take Note of *Gapinski v. Gujrati*

The Illinois Appellate Court, Third District, recently released its opinion in *Gapinski v. Gujrati*, 2017 IL App (3d) 150502, which addressed several important issues on appeal. However, of particular note is the court's determination that the trial court did not abuse its discretion in preventing lawyers representing a party from delivering opening and closing statements and questioning witnesses. This is a troubling finding as it appears to impinge on the right of a party to choose and be represented at trial by its own attorney. The basis of the court's finding, that the interests of an agent and principal in a vicarious liability claim are identical, often may not be true at all.

Background

Gapinski involved allegations of a misdiagnosis of metastatic cancer against a pathologist and the pathologist's employer. The facts set forth in the opinion are long and complicated due to the various issues considered on appeal, but only those relevant to the legal representation are necessary to consider for purposes of this article.

The plaintiff filed suit in February 2011 against the pathologist and her employer. *Gapinski*, 2017 IL App (3d) 150502, ¶ 6. From February 2011 until February 2014, the pathologist and her employer were jointly represented by the same law firm. *Id.* ¶ 7. In February 2014, approximately four months prior to the start of trial, the pathologist sought leave of court to substitute a new law firm to represent her. *Id.* The reason the pathologist sought to substitute attorneys is not stated in the opinion, and it is not clear that it was made part of the record.

The plaintiff objected to the motion to substitute "based on the timing . . . which was filed close to the scheduled start of trial," and raised the "potential adverse consequences substitution of counsel would have on the trial date." *Id.* ¶¶ 7, 38. However, there is no indication that the substituting law firm sought to delay the trial or anything else to support the plaintiff's objection .*See* Ill. Sup. Ct. R. 13(c)(3) (motion to withdraw "may be denied by the court if the granting of it would delay the trial of the case, or would otherwise be inequitable").

Ultimately, the plaintiff proposed that the substitution be allowed, but that the trial court require "the defense attorneys to take turns or alternate questioning witnesses and allow[] only one of them at a time to represent the defendants." *Gapinski,* 2017 IL App (3d) 150502, ¶ 7. The trial court agreed with the plaintiff and allowed the substitution of counsel, but ordered that counsel for the pathologist and her employer were "allowed to participate only one at a time during the trial." *Id.* ¶¶ 7, 36, 39. In other words, either the pathologist's attorney or the employer's attorney could give the opening statement, closing argument, and question each witness, but not both.

At trial, the jury found in favor of the plaintiff and awarded her nearly $2 million in damages. The defendants' appeal raised this issue, among others.

No Reversible Error in Prohibiting a Party's Attorney From Giving an Opening, Closing, or Cross-Examining Witnesses

On appeal, the court framed the issue as "whether the trial court erred when it barred [the pathologist] and [her employer] from dual representation." *Id.* ¶ 35. The defendants argued that by barring the attorneys for each defendant from actively participating in the trial, the trial court limited counsel for each defendant to representing his client only half the time. Further, each time a defense attorney was participating in the trial, he was expected to represent the interests of the other defendant, a non-client. *Id.* ¶ 36.

In a cursory fashion, the court found no abuse of discretion in the trial court's limitation of representation." *Id.* ¶¶ 38-39. First, the court pointed out that the case had been pending for three years before the motion for substitution was filed, and the trial was scheduled to start in just four months. Based upon this, the court found that the trial court "arguably" could have denied the motion to substitute outright. *Id.* ¶ 38. The court also referenced the plaintiff's concerns of potential adverse consequences on the trial date. *Gapinski,* 2017 IL App (3d) 150502, ¶ 38. Yet, there is no indication that anyone, including the substituting law firm, sought to continue the trial date.

The court then moved on to the trial court's finding that allowing both defense attorneys to participate at trial would be redundant and unnecessary. *Id.* ¶ 39. Because the plaintiff's claim against the employer was based upon vicarious liability, the court found the defendants had a "commonality of interests." *Id.* It also pointed out that each defendant was allowed to present its own expert witnesses. Based upon this, the court found that the defendants were not prejudiced by the trial court limiting their representation by counsel at trial. *Id.*

Justice Carter wrote a special concurrence, which addressed this issue in much more depth. *Id.* ¶ 61 (Carter, J., specially concurring). The theme of his concurrence was that the "parties' litigation interests [were] nominally the same" or even that the parties had "identical interests." *Id.* ¶¶ 62, 64.

He found that while the due process clauses of the United States and Illinois Constitutions requires allowing litigants "meaningful participation" at trial, it does not mean parties with common interests have a right to overlap questions and arguments. *Gapinski,* 2017 IL App (3d), .63 ¶He then turned to Illinois Rule of Evidence 611, which provides for the mode and order of questioning witnesses and presenting evidence, and Illinois Rule of Evidence 403, which allows for the exclusion of cumulative evidence. Based upon these rules, Justice Carter found no rule prohibiting judges from splitting the examination of witnesses and presentation of arguments between attorneys representing parties with identical interests. *Id.* ¶ 64. Finally, Justice Carter reached back to English common law from the early 1800s, which apparently involved twenty defendants having to choose one defense attorney to represent them because their interests were "precisely the same." *Id.* ¶ 65 (citing *Chippendale v. Masson*, 171 Eng. Rep. 56 (1815)).

Justice Carter pointed out the trial court's concern with protecting witnesses from unduly confusing and excessive questioning and repetitive arguments. Based upon a trial court's power to control trial procedure, Justice Carter found that a trial judge may "split examination of witnesses and divide the opening statements and closing arguments between counsel for separately represented defendants with identical interests." *Id.* ¶ 68.

The Timing of the Substitution Should Have Been Irrelevant

As noted above, in *Gapinski*, the court focused on the timing of the motion for substitution three years into the litigation and about four months before trial as a justification for the trial court's decision because "[a]rguably, the trial

court would have been within its discretion to deny [the pathologist's] motion to substitute outright." *Id.* ¶ 38. However, this focus seems to be misplaced because the opinion does not detail any prejudice the plaintiff would have suffered by the substitution. While the court discussed the plaintiff's concern about "potential adverse consequences substitution of counsel would have on the trial date," there is no indication that the substituting attorney ever sought to continue the trial date. *Id.* In fact, after the substitution was allowed, the trial apparently proceeded as scheduled.

If the substitution was going to impact the trial date seemingly for counsel to "catch up," why would it take any shorter period of time based upon the trial court's decision to allow the substitution but limit representation? Wouldn't counsel still need to be equally prepared to participate, either by questioning the witnesses himself or consulting with the co-defendant's attorney about topics he believed to be important?

Gapinski seemingly ignores the direction provided by the Illinois Supreme Court in *Sullivan v. Eichmann*, 213 Ill. 2d 82 (2004). The *Sullivan* court recognized the "established right of a party to discharge his attorney at any time with or without cause, and to substitute other counsel, for a client is entitled to be represented by an attorney in whose ability and fidelity he has confidence." *Sullivan*, 213 Ill. 2d at 90 (quoting *Savich v. Savich*, 12 Ill. 2d 454, 457-78 (1957) (internal quotation marks omitted)). The only limitation on the right to substitute counsel is where substitution would "unduly prejudice" the opposing party or "interfere with the administration of justice." *Sullivan*, 213 Ill. 2d at 91 (quoting *Filko v. Filko*, 127 Ill. App. 2d 10, 17 (1st Dist. 1970) (internal quotation marks omitted)).

In *Sullivan*, the supreme court found that the trial court abused its discretion in denying substitution of counsel, even though doing so required delay of hearing on the defendant's motion for summary judgment in a case where the plaintiff had repeatedly missed discovery deadlines, including a deadline for the disclosure of an expert witness. The *Sullivan* court found it was abuse of discretion to deny the plaintiff representation by an attorney in whose "ability and fidelity" she had confidence. *Sullivan*, 213 Ill. 2d at 93.

Based on *Sullivan*, the substitution of counsel in *Gapinski* should have been allowed. As set forth above, the *Gapinski* court detailed no prejudice to the plaintiff or delay in the administration of justice. Therefore, the pathologist had the "right . . . to discharge [her] attorney at any time with or without cause, and to substitute other counsel . . . in whose ability and fidelity [s]he ha[d] confidence." *Sullivan*, 213 Ill. 2d at 90. The *Gapinski* court did not detail any reason or motivation behind the pathologist's motion to substitute. Perhaps she had lost confidence in her previous attorney, or at least, had more confidence in the substituting attorney. Regardless of her motivation, the pathologist should not have been denied the right to substitute counsel.

All Defendants Were Entitled to be Represented by Counsel

The appellate courts have long recognized that when a plaintiff chooses to sue multiple defendants, each defendant is entitled to present an expert witness in her own defense. This is true even where the multiple experts are cumulative and also support the defense of co-defendant physicians. *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 36; *Tsoukas v. Lapid*, 315 Ill. App. 3d 372, 383 (1st Dist. 2000).

The same principle should have applied in the situation presented in *Gapinski*. The plaintiff chose to sue both the pathologist and her employer, so each was entitled to present its own defense through its own attorney. The plaintiff could have chosen to sue just the pathologist or just her employer, but did not. Whatever prejudice would have resulted to the plaintiff in having each defendant present its own defense was brought on by the plaintiff herself. Presumably, the

plaintiff saw a benefit to suing both the pathologist and her employer and should have been prepared for whatever drawbacks also accompanied that decision.

The Interests of an Agent and Principal are Not Always Identical

The court's decision in *Gapinski*, along with Justice Carter's concurrence, were based in large part on the idea that the pathologist and her employer had identical interests because this was a vicarious liability claim, and therefore, neither was prejudiced by being forced to be represented by the other's attorney. *Gapinski*, 2017 IL App (3d) 150502, ¶¶ 39, 62, 68. There was no discussion, however, that sometimes a physician and her employer may have very different interests at trial, especially in a medical malpractice case.

A physician has distinct interests when sued for medical malpractice. An adverse result can harm the physician's reputation. It also results in reporting to the Illinois Department of Financial and Professional Regulation and the National Practitioner Databank, which can adversely impact a physician's licensure or result in other penalties.

While a physician's employer typically is interested in the defense of the physician that is sued, the employer also must consider the interests of the organization itself. For instance, the employer may wish to settle a case or focus heavily on limiting damages at trial if the case presents financial or reputational risks to the organization.

However, the *Gapinski* court did not consider these issues, finding instead that the pathologist and her employer had identical interests. Based upon this incorrect assumption, the court took away the pathologist's right to choose her own attorney.

Conclusion

Unquestionably, *Gapinski* is a concerning decision for defense counsel and their clients. Unless it is reconsidered and overturned, certain strategic decisions should be considered. If the defense of a physician and employer will be split, counsel should recommend that this be done as early in the litigation as possible. This would eliminate any concerns with a substitution of counsel close to trial. Furthermore, the *Gapinski* court made clear that the issue is left to the trial court and will only be reviewed for abuse of discretion. *Gapinski*, 2017 IL App (3d) 150502, ¶ 37. Therefore, if counsel can persuade the trial court to allow each attorney to represent his or her own client fully, it will not amount to reversible error.

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