A REGIONAL MIDWEST LAW FIRM

MEDICOLEGAL MONITOR

A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

First Quarter 2018

A Word from the Practice Chair

Friends:

It is an honor to introduce myself as our new Practice Chair. Before bringing you up to date on our latest firm news, please indulge me a bit while I reflect upon my friend and predecessor, Dave Sinn, who served as the Chair of our Practice for many years. Dave is one of the most effective trial attorneys I have had the good fortune to work with in my legal career. In addition to being an excellent lawyer, Dave displays a keen ability to put jurors into the shoes of his physician clients. In doing so, Dave is able to effectively illustrate the skill, dedication, and compassion exhibited by his professional clients who are typically faced with the need to make quick and informed decisions, often in life-threatening situations. Dave's track record in the courtroom speaks for itself. So, I begin my term with some very large shoes to fill. It is reassuring to note that, although Dave has stepped down as Chair, we continue to call on him to share his skill and experience with our practice and our clients.

2018 marks a time of change and growth for Heyl Royster. Our firm has always been dedicated to serving our clients wherever our legal services are needed. When I started with the firm as a law clerk in 1985, Heyl Royster had three offices and covered a large geographic swath of Illinois. As I write these opening remarks some 30 years later, I am very pleased to report that the firm opened its St. Louis office on April 2, 2018 – putting us at seven different locations in two states. Like many of our clients, who are expanding on a regional basis, our lawyers are strategically placed to handle cases in Illinois, Missouri, Iowa, Wisconsin and Indiana.

2018 also marks our continued growth as a practice. We have added lawyers to assist in the handling of professional liability and healthcare cases in each of our seven offices. For the second year running, we are hosting a Professional Liability Claims Handling Seminar in Itasca, Illinois. The seminar will be held at the Westin Chicago Northwest on May 3, 2018. You will find both our agenda and a registration portal at: www.heylroyster.com. As in 2017, we will be reviewing some of the recent legal developments and social trends that impact our ability to ensure that physicians, nurses, and hospitals are afforded a fair trial. After considering topics such as technology in the courtroom, focus groups & mock trials, millennial jurors, and tactics for avoiding finger pointing, we will gather for cocktails and hors d'oeuvres.

We hope to see you all on May 3rd in Itasca.

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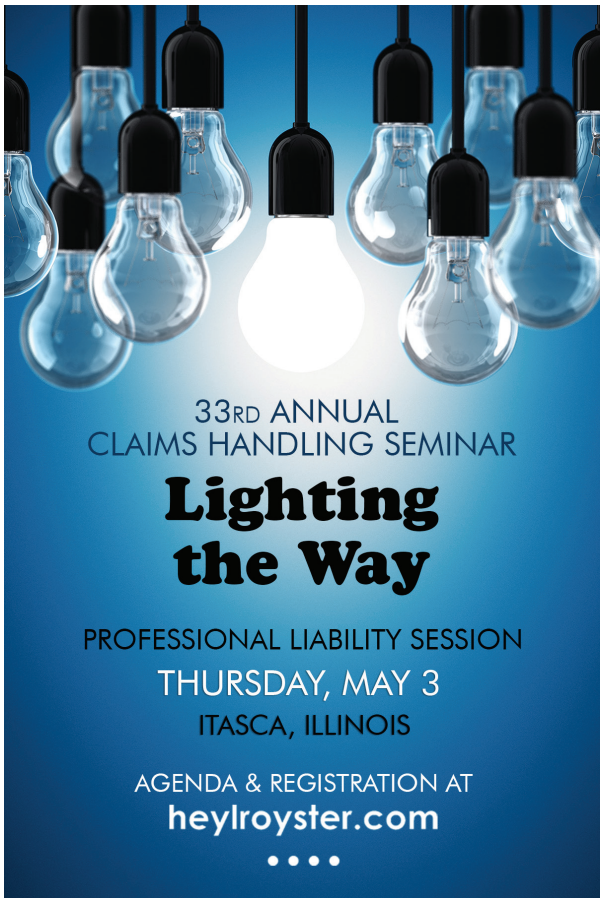

Illinois Supreme Court Holds Hospital Not Liable Under the Doctrine of Apparent Agency

By: Richard Hunsaker, rhunsaker@heylroyster.com

In its recent ruling in the case of *Yarbrough v. Northwestern Memorial Hospital*, 2017 IL 121367, the Illinois Supreme Court reversed the holding of the Illinois First District Appellate Court that a hospital could be found liable under the doctrine of apparent agency for the negligence of an independent family practice clinic that was not sued by the plaintiffs. *Yarbrough* involved a case in which the first district held that Northwestern Memorial Hospital could be found vicariously liable for negligence ascribed to an un-sued party, Erie Family Health Center. Erie Family Health Center is a Federally Qualified Health Center that relies upon federal grants and Medicaid cost reimbursement. It does not require medical insurance. Instead, its purpose is to serve populations with limited access to health care.

Background

The plaintiff (Yarbrough) alleged that Erie Family Health Center employees were the actual or apparent agents of Northwestern Memorial Hospital. Yarbrough had asked an unnamed staff person at Erie where she would deliver her baby. She was informed that she would have her ultrasounds done at Northwestern Medicine Prentice Women's Hospital and would probably deliver her baby at Northwestern Memorial Hospital. During this same visit, Yarbrough received informational materials regarding tours of the hospital's birthing/delivery area, having the installation of an infant car seat inspected at Northwestern Memorial Hospital, and attending birthing classes at Northwestern Memorial Hospital. Based upon this information, Yarbrough believed that Erie and Northwestern Memorial Hospital were one-and-the-same entity, particularly because she was told that she would give birth at the hospital.

On an interlocutory appeal, the first district found that a hospital could be held liable for the conduct of employees affiliated with an unrelated, independent clinic that is not a party to the action against the hospital (see Like Elvis, Has Apparent Agency Left the Building?).

The first district rejected Northwestern's argument that a prior case, *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511 (1993), was inapplicable in this case because the alleged negligent conduct did not occur at the hospital. The appellate court held that nothing in the *Gilbert* decision limits a plaintiff from recovering against a hospital "merely because the negligent conduct of the physician did not occur in the emergency room or some other area within the four walls of the hospital." *Yarbrough v. Northwestern Memorial Hospital*, 2016 IL App (1st) 141585, ¶ 40 (quoting *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 727 (1st Dist. 1997)). The appellate court also held that a plaintiff is not required to name the individual physician or his or her employer as a defendant in order to hold the hospital vicariously liable as the principal.

Supreme Court Analysis

The Illinois Supreme Court reversed the first district, noting that the plaintiff sought treatment at Erie Family Health Center, but was seeking to impose liability on Northwestern Memorial Hospital. The court observed that Erie is neither owned nor operated by Northwestern. While Erie Family Health receives some charitable financial and technical assistance from Northwestern, Erie Family Health is a Federally Qualified Health Center that relies heavily on federal grants and Medicaid reimbursement to provide underserved communities with primary and preventative care regardless of an individual's ability to pay. Erie's employees are considered federal employees, and suits against Erie or its employees can only be maintained under the Federal Torts Claim Act. Erie does not utilize the Northwestern name. There is no Northwestern-related branding or the use of Northwestern's trademark purple color by Erie Family Health. As such, the Supreme Court found the first district's reliance on the *Malanowski* decision to be misplaced, noting that unlike *Malanowski*, the care outside of the hospital did not occur at a hospital affiliated clinic or practice.

In reversing the first district, the Illinois Supreme Court reiterated that the doctrine of implied agency remains viable and applicable to modern health care scenarios where there has been consolidation of practices and clinics under a hospital or system name in order to achieve cost savings. The court stated that in order to establish liability under the doctrine of apparent authority, a plaintiff must show that: "(1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence." *Yarbrough*, 2017 IL 121367, ¶ 69.

Justice Theis delivered the judgment of the court, with opinion. Chief Justice Karmeier and Justices Thomas and

Garman concurred in the judgment and opinion. The decision was accompanied by dissent, joined by two justices.

Recommendations

While the Illinois Supreme Court's holding is a positive development for hospitals and large practice groups, it is clear that the court continues to adhere to the *Gilbert* analysis. *Gilbert* generally makes a hospital responsible for the professionals working in the hospital where no notice has been given to patients that the professionals from whom care is provided are independent and unaffiliated. Moreover, the court considered what it termed the "realities of modern hospital care." In particular, a hospital will be considered the apparent principle of an independent caregiver where the hospital holds itself at as a provider of care and undertakes no effort to inform the patient that the care in question was provided by "independent contractors." The court noted specifically that the "realities" recognized in the *Gilbert* decision are "even more true today." Notably, the court observed that hospitals have consolidated to improve their finances and also entered into "rebranding initiatives" which allow practice groups to use hospital logos while technically retaining their individual names.

It was very significant to the Illinois Supreme Court that the facility where the care was given was not owned by the hospital and did not display the hospital logo or branding symbol. With these factors in mind, it is very important to consider the following:

1. Is the doctor who is alleged to be an apparent agent part of a practice group which is affiliated with the hospital? For example, is the practice group which employs the physician owned by a corporate entity related to the hospital?
2. Does the practice group market itself as a physician group affiliated with the hospital?
3. Does the hospital list the physician on its website?
4. Has the hospital followed the dictates of *Gilbert*?
    a. Has the patient been notified that physicians working in the hospital and providing care are not employees of the hospital and are independent contractors?
    b. Has the hospital taken steps to overcome the presumption that those who provide care at the hospital are not agents or employees of the hospital?
    c. There should be notifications contained in consents to be signed by the patient, signs posted throughout the hospital and conspicuous language contained on websites that physicians are *not* agents of the hospital but independent providers of care.

Conclusion

The *Yarbrough* decision is important because the outcome rests upon principles of fundamental fairness. In *Yarbrough*, Northwestern Memorial Hospital was clearly targeted for care provided at a remote and independent facility. However, the Illinois Supreme Court made it clear that it will continue to adhere to the principles articulated in the *Gilbert* decision and, where appropriate, look to the "realities of modern medicine" which include consolidation of practices under the ownership of or alignment with a particular hospital or group. *Gilbert* was issued twenty five years ago. A close analysis of *Yarbrough* reveals that the Supreme Court is sensitive to the fact that physicians have clearly become more aligned with large hospital organizations or practice groups closely affiliated with preferred networks which are promoted and marketed to the public. It is important to understand and evaluate business relationships and marketing initiatives when establishing policies designed to insulate a hospital from the acts of a physician or provider who seems to qualify as an independent contractor. Aggressive marketing and consolidation efforts on the business side of the equation will likely make it easier to convince a court to allow a claim of apparent agency.

Richard Hunsaker is Chair of the firm's Professional Liability Practice. He is an experienced trial lawyer who has taken more than 30 cases to trial in the course of his 30-year career. In the medical realm, he has defended complicated cases for doctors, nurses, hospitals, nursing homes, and a range of healthcare providers and systems. Richard helped open the firm's St. Louis office where he currently serves as that office's Managing Partner. Richard is also a trained mediator. He is currently on the mediation panel for United States Arbitration and Mediation's Midwest office in St. Louis, MO.

Second District Issues Opinion Limiting Expert Testimony Regarding Proximate Cause and Plaintiff's Use of Voluntary Dismissal to Avoid Directed Verdict and Retain Additional Experts

By: J. Matthew Thompson, mthompson@heylroyster.com

The Second District Appellate Court recently issued its decision in *Freeman v. Crays*, 2018 IL App (2d) 170169. In this case, the appellate court addressed two important subjects. First, the court considered whether a family practice physician could testify how a cardiologist would have treated a patient. Second, the court considered whether a plaintiff can voluntarily dismiss a claim on the eve of trial to avoid a directed verdict, and add necessary expert witnesses in a refiled action. This decision is positive from the aspect of limiting expert testimony, but presents challenges regarding a plaintiff's use of a voluntary dismissal and right to refile the action.

Background

The defendant was a family practice physician who treated the decedent for hypertension and prescribed medication. A lawsuit was filed after the decedent suffered cardiac arrest, alleging that the defendant physician failed to diagnose severe coronary artery disease and enlarged heart and failed to refer the decedent to a cardiologist.

The plaintiff's only expert witness was a family practice physician, Dr. Finley Brown. The plaintiff did not have a cardiology expert. At the final pre-trial conference, the trial court granted the defendant physician's motion to bar Dr. Brown from offering opinions regarding the standard of care of a cardiologist or treatment that a cardiologist would have recommended. In fact, the plaintiff did not object to this motion, and readily admitted Dr. Brown could not provide such testimony because he "is not a cardiologist." In light of this, the trial court expressed skepticism that the plaintiff would be able to prove proximate cause (*i.e.* that the alleged breaches of the standard of care caused the plaintiff's death), but the case proceeded.

Dr. Brown's evidence deposition was then taken. Contrary to the trial court's order, Dr. Brown testified that the defendant physician's failure to refer the decedent to a cardiologist deprived the decedent of a chance to survive because a cardiologist would have provided treatment to improve circulation. Dr. Brown admitted he did not have "the skill, or the training, or the knowledge to complete a detailed and comprehensive cardiac work-up." Nonetheless, Dr. Brown claimed he was qualified to provide testimony about how a cardiologist would have treated the decedent because he: (1) had worked closely with cardiologists and was familiar with the treatments that might have been administered; (2) had taken a special interest in the field of advanced lipidology; and (3) had attended several lectures and completed a two-day course. Dr. Brown testified that a cardiologist *might* have performed bypass surgery, angioplasty, stent placement or prescribed medication. But, Dr. Brown admitted he was not certain how a cardiologist *would* have treated the decedent, and he further admitted that the choice of how to treat is always left to a cardiologist. Dr. Brown even admitted that a cardiologist would have to evaluate whether prescribing lipid-lowering drugs was safe, rather than a family practice physician like himself. Dr. Brown repeatedly admitted that he could not say what a cardiologist actually would have done.

Based upon these admissions, the trial court barred Dr. Brown from testifying that a cardiologist would have prevented the death. Dr. Brown's opinions were all based upon the premise that a cardiology referral should have been made, and Dr. Brown admitted that he did not know what treatment a cardiologist would actually provide.

Trial began and a jury was picked, but before the jury was sworn in, the plaintiff moved for voluntary dismissal. The defendant did not object to the plaintiff's motion for voluntary dismissal or request sanctions pursuant to Supreme Court Rule 219(e), and the trial court granted the plaintiff's motion to voluntarily dismiss with the parties to bear their own costs.

Within a few days, the plaintiff refiled her claim, which is allowed within 1 year of a voluntary dismissal. However, the plaintiff also disclosed an intent to call an expert cardiologist in the refiled case. The defendant physician asked the trial court to adopt the orders from the prior case, and requested the trial court bar the plaintiff from calling the cardiology expert pursuant to Rule 219(e). The trial court granted this motion and barred the plaintiff's newly disclosed cardiology expert. Although the plaintiff had an absolute right to voluntarily dismiss and refile, the trial court found this was "exactly the type of refiling that should be barred under Supreme Court Rule 219(e)" because "[a]ll the rulings were made, the cards were on the table, the plaintiff was facing a very likely motion for directed verdict, and then voluntarily dismissed . . . to avoid the consequences of the Court's rulings on the proximate cause

issue." The trial court then granted the defendant's motion for summary judgment and dismissed the plaintiff's claim.

Proximate Cause Opinions Must Always be Expressed to a Reasonable Degree of Medical Certainty

The plaintiff first argued that Dr. Brown's causation opinions should not have been barred because a lower threshold should be applied to Dr. Brown's causation testimony since the plaintiff was presenting a "lost chance" theory (*i.e.* decreased chance of survival) , rather than a traditional medical malpractice claim.

The appellate court flatly rejected this argument. It found that proximate cause testimony must be expressed to a reasonable degree of medical certainty, even in a "lost chance" case. The plaintiff argued that, in a "lost chance" case, an expert does not have to testify that subsequent treatment *would* have been effective, but only that it *could* have. The court rejected this argument, finding that the bar for causation opinions is not lowered in a "lost chance" case. Instead, an expert must testify to a reasonable degree of medical certainty that the negligence proximately caused the the lost chance of recovery. The court noted that the "door is not opened for speculation as to whether a defendant doctor's negligence deprived the patient of the opportunity to undergo treatment that could have been effective," and the expert's opinions must be expressed to a reasonable degree of medical certainty.

Plaintiff's Family Practice Expert Was Not Qualified to Testify How a Cardiologist Would Have Treated the Decedent

The plaintiff admitted in the trial court that Dr. Brown was not qualified to testify about a cardiologist's standard of care, which should have resolved this issue. Contrary to this admission, on appeal the plaintiff argued that Dr. Brown was qualified because he worked closely with cardiologists and was familiar with the methods, procedures, and treatments a cardiologist might recommend.

The appellate court rejected this argument. The court acknowledged that a physician in one expertise is not prohibited from testifying as to the care of another expertise, but the plaintiff failed to establish adequate foundation for Dr. Brown's opinions in this case.

Dr. Brown admitted that he referred all of his patients with cardiovascular issues to a cardiologist, and that he did not have the "skill, or the training, or the knowledge to complete a detailed and comprehensive cardiac work-up." The court noted that, although Dr. Brown may have had general awareness of the treatments a cardiologist *might* have recommended, he admitted that the ultimate decision is always left to a cardiologist. Dr. Brown could not say how a cardiologist would actually have treated the decedent.

The court found that Dr. Brown's testimony was properly barred because it was contingent and speculative. Because Dr. Brown could not testify to a reasonable degree of medical certainty how a cardiologist would have effectively treated the decedent, Dr. Brown lacked the foundation to testify that the defendant physician's alleged negligence was a proximate cause of the death.

Application of Rule 219(e) In Determining Whether the Plaintiff Could Add a Cardiology Expert in the Refiled Case

The appellate court then considered the trial court's application of Rule 219(e), barring the plaintiff from presenting a cardiology expert. Illinois Supreme Court Rule 219(e) provides:

> A party shall not be permitted to avoid compliance with discovery deadlines, orders or applicable rules by voluntarily dismissing a lawsuit. In establishing discovery deadlines and ruling on permissible discovery and testimony, the court shall consider discovery undertaken (or the absence of same), any misconduct, and orders entered in prior litigation involving a party. The court may, in addition to the assessment of costs, require the party voluntarily dismissing a claim to pay an opposing party or parties reasonable expenses incurred in defending the action including but not limited to discovery expenses, expert witness fees, reproduction costs, travel expenses, postage, and phone charges.

The committee comment at issue provides:

> Paragraph (e) addresses the use of voluntary dismissals to avoid compliance with discovery rules or deadlines, or to avoid the consequences of discovery failures, or orders barring witnesses or evidence. This paragraph does not change existing law regarding the right of a party to seek or obtain a voluntary dismissal. However, this paragraph does clearly dictate that when a case is refiled, the court shall consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred. The consequences of

> noncompliance with discovery deadlines, rules or orders cannot be eliminated by taking a voluntary dismissal. Paragraph (e) further authorizes the court to require the party taking the dismissal to pay the out-of-pocket expenses actually incurred by the adverse party or parties. . . Paragraph (e) does not provide for the payment of attorney fees when an action is voluntarily dismissed.

Applying Rule 219(e) in this case, the appellate court found that the plaintiff should not have been barred from calling a cardiology expert without further hearing, at which point the trial court should consider the traditional factors for barring evidence or witnesses, including: (1) surprise to the adverse party, (2) the prejudicial effect of the witness's testimony, (3) the nature of the testimony, (4) the diligence of the adverse party, (5) whether there was a timely objection to the witness's testimony, and (6) the good faith of the party calling the witness. Within this framework, a trial court should assess the "misconduct of a party in the original action and any sanctions entered against him therein."

The appellate court reversed the trial court's order barring the cardiologist and dismissing the plaintiff's claim. The appellate court directed the trial court to reconsider the issue in light of the six-factor framework. According to the appellate court, the trial court applied the wrong standard, inappropriately barring the plaintiff's cardiologist solely because the plaintiff moved for voluntary dismissal to avoid an inevitable directed verdict.

While the appellate court did not actually find that the plaintiff should be allowed to present the cardiology expert in the refiled action, it agreed with the plaintiff's argument that she had been "essentially a compliant litigant" in the underlying action and simply failed to anticipate the trial court's finding that Dr. Brown could not provide proximate cause testimony. The appellate court excused the plaintiff's actions as merely "poor legal judgment." The appellate court implied that the plaintiff could not have known that Dr. Brown lacked foundation to provide proximate cause testimony. However, this is hard to square with the plaintiff's admission at the final pre-trial conference that Dr. Brown could not say how a cardiologist would have treated the decedent – presumably the plaintiff knew this long before the final pre-trial conference, and did not just miraculously come to this conclusion at the hearing.

Defendants Should Consider Seeking Expenses Under Rule 219(e)

The trial court's order granting the plaintiff's motion to voluntarily dismiss provided that the parties were to bear their own costs. Apparently, the defendant did not request costs or expenses under Rule 219(e), a courtesy often extended. In the future, however, defendants should carefully consider requesting costs and expenses when confronted with a similar situation.

The *Freeman* court suggested that the trial court could have imposed monetary sanctions under Rule 219(e) before allowing the voluntary dismissal. Other courts have approved the imposition of hundreds of thousands of dollars in costs and expenses against a plaintiff requesting voluntary dismissal on the eve of trial.

If a defendant requests costs and expenses under Rule 219(e), it could blunt the *Freeman* court's more liberal findings about adding expert witnesses in a refiled action. For instance, if a defendant is awarded costs and expenses, the parties could agree to wave payment if the plaintiff agrees not to refile the action. Facing significant costs and expenses, a plaintiff may agree to such a deal.

Conclusion

Freeman is useful to support motions to bar an opinion witness from providing expert testimony outside the scope of the witness's expertise. It is positive for medical professional defendants in that regard. The court's findings about adding expert witnesses following a voluntary dismissal, on the other hand, are troubling. Defense attorneys can establish facts contrary to *Freeman* in the trial court in order to limit its impact. Additionally, defendants should consider seeking costs and expenses in such situations, which might provide leverage to prevent the claim being refiled.

J. Matthew Thompson has experience handling all aspects of medical malpractice litigation, from inception of a plaintiff's claim through trial and appeal. He has successfully defended multiple medical malpractice actions through jury trial, resulting in verdicts in favor of the firm's clients.

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Heyl Royster is a regional Midwest law firm with more than 120 lawyers and seven offices located in Illinois (Peoria, Champaign, Chicago, Edwardsville, Rockford, and Springfield) and Missouri (St. Louis). The firm provides legal services for businesses and corporations, professionals, healthcare organizations, governmental entities, universities, insurance carriers, and other major institutions. Heyl Royster lawyers have successfully defended clients in all of the federal courts and in each of the 102 counties in the State of Illinois, as well as in courtrooms in Indiana, Iowa, Missouri and Wisconsin. Our attorneys also counsel clients on all aspects of business life. Through our lawyers' participation in bar and industry activities, we identify and help develop trends in the law which we believe will be of benefit to our clients.

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