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A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

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A Word From the Practice Chair

Once again it is our pleasure to offer to our highly esteemed and valued medical clients and their insurers an update on what is happening in the medical liability arena in Illinois. Our first article is authored by Matt Thompson of our Peoria office who keeps very busy defending doctors in courtrooms these days. The new constraints he describes on separate counsel for your employer in a trial are significant but it's simply too early to tell how great an impact these constraints will have on trial outcomes. While it may be an advantage to have your employer's lawyer give an opening and closing statement and present expert witnesses to the jury, it's more importantly an absolute right to any defendant in a trial. This issue will ultimately find its way to the Illinois Supreme Court.

Mike Denning of our Rockford office must have written this article about the same time of night that Thomas Jefferson wrote the Declaration of Independence. Mike has practically been living in Northern Illinois courtrooms and deposition venues this year. *Pro se* lawsuits are often nothing more than a nuisance and are often dispatched at an early stage, but be vigilant. Don't hesitate, even a minute, to inform your professional liability insurer if you are served with a Summons and Complaint even by a *pro se* litigant. Your insurer will refer the claim to the best law firm available, but the best law firms are often not available if a co-defendant has notified their insurer of the claim before you do. In that instance, time lost is talent lost.

While the new rules promulgated by the constant flow of reported cases from our appellate courts are disheartening to Illinois professionals, the bottom line remains the same. We continue to win about 90 percent of the medical malpractice cases our firm takes to trial and we don't expect recent changes in Illinois law to necessarily change our success rate in the near future. We thank you for your time and attention, which we know is valuable. We are indeed honored to play an integral role in the protection and preservation of the medical community here in the Midwest.

David R. Sinn
Chair, Professional Liability Practice
dsinn@heylroyster.com

Is Every Party Entitled to be Represented by the Lawyer of its Choice? Make Note of *Gapinski v. Gujrati*

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

In *Gapinski v. Gujrati*, 2017 IL App (3d) 150502, the Illinois Appellate Court addressed several important issues. Of particular note, however, is the court's finding that the trial court had discretion to prohibit lawyers representing two different defendants from giving opening and closing statements and questioning witnesses. This is a troubling finding, because it could prevent a party from being represented at trial by an attorney of his or her own choosing. The court based its decision on the presumption that in a medical malpractice case the interests of a physician and his or her employer are identical, which is not always true.

Background

Gapinski involved allegations of a misdiagnosis of metastatic cancer against a pathologist and the pathologist's employer. The facts of the case are complicated, but only those relevant to this article require discussion.

The plaintiff filed suit in February 2011 against the pathologist and her employer. From February 2011 until February 2014, the pathologist and her employer were jointly represented by the same law firm. In February 2014, approximately four months prior to the start of trial, the pathologist sought to be represented by a different law firm. The employer would continue to be represented by the previous law firm. The reason the pathologist sought to substitute attorneys is not stated in the opinion.

The plaintiff objected to the motion to substitute attorneys because it was filed close to the start of trial and raised the "potential adverse consequences substitution of counsel would have on the trial date." However, there is no indication that the pathologist or her new lawyer sought to delay the trial date.

Later, the plaintiff asked the trial court to allow the new lawyer to be substituted on behalf of the pathologist, but that the trial court require "the defense attorneys to take turns or

(continued on next page)

alternate questioning witnesses and allow[] only one of them at a time to represent the defendants." The trial court agreed with the plaintiff. The trial court allowed the new lawyer to be substituted, but ordered that 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 filed an appeal as to this issue, among others.

Appellate Court: No Reversible Error in Limiting Representation at Trial

The appellate court found the issue to be "whether the trial court erred when it barred [the pathologist] and [her employer] from dual representation." 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.

In short order, the appellate court found that the trial court had discretion to limit representation as it did. First, the court pointed out that the case had been pending for three years before the motion to substitute attorneys was filed, and the trial was scheduled to start in just four months. For this reason, the appellate court found that the trial court "arguably" could have denied the motion to substitute outright. The court referenced the plaintiff's concerns of "potential" adverse consequences on the trial date. But, there is no indication that anyone actually sought to delay the trial date.

The appellate court then moved on to the trial court's finding that allowing both defense attorneys to participate at trial would be redundant and unnecessary. The plaintiff's claim against the employer was solely for vicarious liability, *i.e.,* liability for the acts of an employee. For this reason, the appellate court found the defendants had a "commonality of interests," and therefore, the defendants were not prejudiced by the trial court limiting their representation at trial.

Justice Carter wrote a concurring opinion that addressed this issue in more detail, agreeing that the trial court did not abuse its discretion. The theme of his concurring opinion was that the defendants' "litigation interests [were] nominally the same" or even that the parties had "identical interests."

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."

The Plaintiff Chooses Which Parties to Sue, and Those Parties Sued are Entitled to be Represented by the Lawyer of Their Choice

The Illinois Appellate Court has repeatedly recognized that when a plaintiff chooses to sue multiple defendants, each defendant is entitled to present an expert witness in his or her own defense. This is true even if the multiple expert witnesses 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). For instance, if two anesthesiologists were sued by the plaintiff, each would be entitled to present its own expert witness, even if each of the expert witnesses supported the defense of the co-defendant anesthesiologist.

The same principle should have applied 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. Apparently, the plaintiff saw a benefit in suing both the pathologist and her employer, and the plaintiff should have been prepared for whatever drawbacks accompanied that decision.

Unless a Continuance was Sought, the Timing of the Request to Substitute Attorneys Should Have Been Irrelevant

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." However, this focus is misplaced because the appellate court did not mention any prejudice the plaintiff would have suffered. The court discussed the plaintiff's concern about "potential adverse consequences substitution of counsel would have on the trial date," but there is no indication that the substituting attorney ever asked to continue the trial date. In fact, after the substitution was allowed, the trial apparently proceeded as scheduled.

Gapinski fails to take account of the direction provided by the Illinois Supreme Court in *Sullivan v. Eichmann*, 213 Ill. 2d 82 (2004). There, the Supreme 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." The Supreme Court found that the only limitation on this right is where substitution would "unduly prejudice" the other party or "interfere with the administration of justice."

In *Sullivan*, the plaintiff had missed several discovery deadlines and a deadline for disclosing expert witnesses. The defendant physician then moved for summary judgment because the plaintiff had no evidence of a violation of the standard of care. It was not until the hearing on this motion for summary judgment that the plaintiff sought to substitute a new attorney, at which time the trial court denied the request. The Supreme Court ultimately found that the trial court abused its discretion in denying substitution of counsel, even though doing so required delay of hearing on the physician's. The Supreme Court found it was abuse of discretion to deny the plaintiff representation by an attorney in whose "ability and fidelity" she had confidence.

Based on *Sullivan*, the substitution of counsel in *Gapinski* should have been allowed generally. 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."

The Interests of a Defendant Physician and a Defendant Employer are Not Always Identical, Especially in a Medical Negligence Case

The decision in *Gapinski* was based in large part on the assumption 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. Oddly, the court did not consider 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 settlement or verdict for the plaintiff can harm the physician's reputation. It also requires 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. Therefore, a physician typically has a distinct interest in vigorously defending his or her care.

While a physician's employer is also typically interested in strongly defending the physician, the employer also must consider the interests of the organization itself. For instance, in a high-profile case or one with significant damages, the employer may wish to settle or focus heavily on limiting damages at trial if the case presents financial or reputational risks to the organization. Similarly, a defendant physician and his partners may disagree about whether a case should be settled or defended.

However, the *Gapinski* court did not consider these scenarios, which are not uncommon. Instead, the court found that the pathologist and her employer necessarily had identical interests, and based upon this incorrect assumption, the court took away the pathologist's right to choose her own attorney.

Recommendations

Gapinski is a concerning decision for physicians, hospitals and all other health care providers. Until it is reconsidered or overturned, though, some considerations should be taken into account. First, if the defense of a physician and employer is to be split, this should be done as early in the litigation as possible to eliminate any concerns with a substitution of counsel close to trial. Additionally, the *Gapinski* court made clear that the issue is left to the trial court. Therefore, if the defendants can persuade the trial court to allow each attorney to represent his or her own client fully, that decision will not be reversed on appeal.

J. Matthew Thompson concentrates his practice in the defense of medical malpractice and healthcare litigation. He regularly defends physicians, advanced practice nurses, nurses, hospitals and clinics in professional liability and institutional negligence claims involving significant injury or death. Matt 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.

Pro se Complaints for Wrongful Death or Survival Damages: Void or Amendable?

By: Michael Denning, mdenning@heylroyster.com

Medical malpractice cases involving allegations of wrongful death and survival damages may give rise to the most serious claims any professional will face in their career. These cases are typically brought by experienced lawyers, and allegations are established by expert witnesses in the appropriate field. But what happens when the next of kin tries to prosecute one of these claims *pro se*, *i.e.,* without the assistance of counsel? In many jurisdictions, such an attempt constitutes the unauthorized practice of law and the complaint is void. In other jurisdictions, the pleading is defective but can be properly amended if signed by a licensed attorney. Depending on the applicable statute of limitations as well as other potential defenses, the legal significance to the defendant cannot be understated.

In many jurisdictions, courts have held that a *pro se* litigant is entitled to represent herself in her own personal interest, but a non-attorney cannot represent the interests of another person or class of people. Since claims sounding in wrongful death or survival must, by definition, be brought in a representative capacity, bringing them *pro se* amounts to the unauthorized practice of law. In some states, a pleading signed by a person who is not licensed to practice law is a nullity. In other words, the pleading itself is void *ab initio,* and it does nothing to toll the statute of limitations or protect the estate's right to recover damages. This is commonly known as "the nullity rule." In other states, the pleading is subject to being stricken, but is considered an amendable defect.

The Illinois Appellate Court provides an excellent analysis of the "nullity rule" in *Ratcliffe v. Apantaku,* 318 Ill. App. 3d 621 (1st Dist. 2000). In *Ratcliffe*, the plaintiff – a non-lawyer and the daughter of the decedent – filed a medical malpractice complaint against numerous defendants *pro se*, alleging causes of action under the Illinois Wrongful Death Act and Illinois Survival Act. The defendants moved to dismiss the complaint on a number of grounds. The appellate court considered, among other issues, whether it was proper for a *pro se* litigant to represent a decedent's estate in a wrongful death or survival action. The appellate court found that it was improper, even though the *pro se* litigant had been appointed by the trial court as the administrator of the decedent's estate.

The appellate court relied upon another Illinois appellate court's decision in *Blue v. People of the State of Illinois,* 223 Ill. App. 3d 594 (2d Dist. 1992). In *Blue*, the court held that "[a] pleading signed by a person who is not licensed to practice law in this State is a nullity even if a duly licensed attorney subsequently appears in court. Where one not licensed to practice law has instituted legal proceedings on behalf of another, the suit should be dismissed; if the suit has proceeded to judgment, the judgment is void and will be reversed." *Blue*, 223 Ill. App. 3d at 596.

The court also explained that medical malpractice and wrongful death cases are complex matters that require the expertise of an attorney, and a non-lawyer cannot properly represent the interests of others (*i.e.*, heirs) because such representation amounts to the unauthorized and illegal practice of law by a non-lawyer.

A number of states take the same approach as Illinois in strictly applying the nullity rule, including Arkansas, Nebraska, and Virginia.

Some states however, have found that while these *pro se* complaints are technically improper, they represent amendable defects. For example, South Carolina, "like other jurisdictions, limits the practice of law to licensed attorneys." *Brown v. Coe,* 365 S.C. 137, 139 (2005). However, the South Carolina Supreme Court has permitted amendment of these defective pleadings, meaning the case survives and continues against the defendants. Other states that have permitted amendment of the defect include Missouri, New Jersey and Kentucky.

It seems that the states that apply the nullity rule without permitting amendments to cure the defect see the nullity rule as a deterrent against improper *pro se* representation. The states that permit parties to cure these defective pleadings by amendment allow it so as to protect the interests of the individuals represented by the *pro se* plaintiff, thus refusing to penalize them for the unauthorized practice of law by another person.

However, even in states that follow the nullity rule fairly strictly and do not permit curing the defect by amended pleadings when the statute of limitations has expired, there are examples where reviewing courts have wavered from that prohibition in fairly obscure or convoluted factual scenarios. *See Janiczek v. Dover Management Co.,* 134 Ill. App. 3d 543 (1st Dist. 1985) (reinstating complaint filed by disbarred lawyer on behalf of former client), and *Pratt-Holdampf v. Trinity Medical Ctr.,* 338 Ill. App. 3d 1079 (3d Dist. 2003) (reinstating complaint filed *pro se,* but at the direction of retained counsel who filed an appearance shortly after complaint filed). In fact, in June 2017, the appellate court in the Chicago-based first district issued a terse opinion overruling the circuit court's dismissal of a *pro se* action based on the nullity rule. *Holloway v. Chicago Heart & Vascular Consultants, Ltd.,* 2017 IL App (1st) 160315. The appellate court found that because it appeared that the *pro se* plaintiff filed suit only to avoid the impact of the statute of limitations while she sought counsel, the nullity rule should not have barred her claim, irrespective

of the fact that she had sought counsel and been turned down on a number of occasions over many months. The nullity rule is not absolute, but cases like *Janiczek* and *Holloway* should be the exception, not the rule.

Defense counsel and anyone engaged in the defense of professional liability claims must be aware of the existence of the nullity rule as a defense to *pro se* claims. A careful review of your jurisdiction's adherence to the nullity rule and any departures from it is necessary to exhaust all possible defenses to the claim.

Michael Denning concentrates his practice on medical malpractice and nursing home litigation. In addition to defending physicians and long term care facilities in malpractice litigation and personal injury claims, Mike also handles a myriad of administrative issues for long term care facilities, including involuntary discharge proceedings, licensure issues, fraud and abuse claims, and other litigation. He has represented physicians as well as Fortune 500 companies, local businesses, professionals and insurance companies in a variety of cases. Mike is a Martindale-Hubbell AV rated lawyer who currently chairs the firm's Long Term Care/Nursing Home practice group.

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For More Information

If you have questions about this newsletter, please contact:

David R. Sinn
Heyl, Royster, Voelker & Allen, P.C.
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601-6199
Phone (309) 676-0400; Fax: (309) 676-3374
E-mail: dsinn@heylroyster.com

Please feel free to contact any of the following attorneys who concentrate their practice in the defense of physicians, dentists, nurses, and medical institutions:

Peoria, Illinois 61601
300 Hamilton Boulevard
P.O. Box 6199
Phone (309) 676-0400; Fax (309) 676-3374

David R. Sinn - dsinn@heylroyster.com
Nicholas J. Bertschy - nbertschy@heylroyster.com
Roger R. Clayton - rclayton@heylroyster.com
Mark D. Hansen - mhansen@heylroyster.com
Rex K. Linder - rlinder@heylroyster.com
J. Matthew Thompson - mthompson@heylroyster.com

Chicago, Illinois 60602
33 N. Dearborn Street
Seventh Floor
Phone (312) 853-8700

Andrew J. Roth - aroth@heylroyster.com
Maura Yusof - myusof@heylroyster.com

Edwardsville, Illinois 62025
105 West Vandalia Street
Suite 100, Mark Twain Plaza III
P.O. Box 467
Phone (618) 656-4646; Fax (618) 656-7940

Richard K. Hunsaker - rhunsaker@heylroyster.com
Ann C. Barron - abarron@heylroyster.com

Rockford, Illinois 61105
120 West State Street
PNC Bank Building, Second Floor
P.O. Box 1288
Phone (815) 963-4454; Fax (815) 963-0399

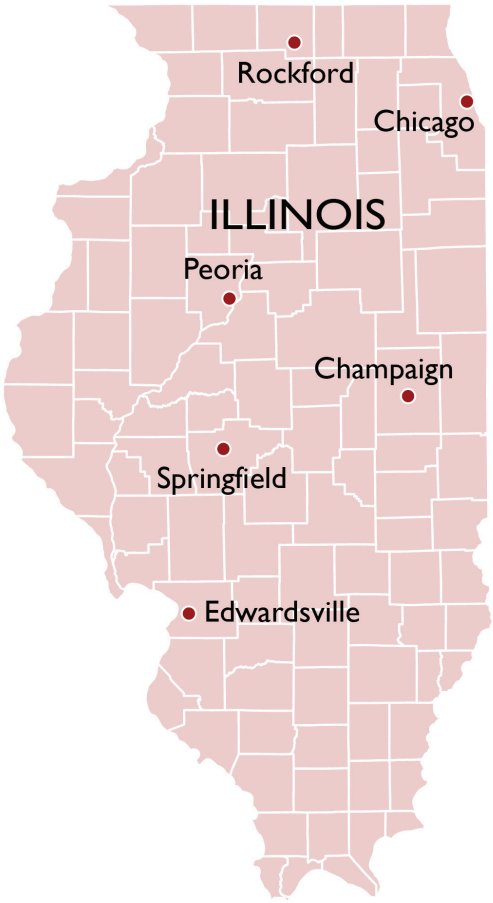
Douglas J. Pomatto - dpomatto@heylroyster.com
Jana L. Brady - jbrady@heylroyster.com
Michael J. Denning - mdenning@heylroyster.com
Scott G. Salemi - ssalemi@heylroyster.com

Springfield, Illinois 62791
3731 Wabash Avenue
P.O. Box 9678
Phone (217) 522-8822; Fax (217) 523-3902

Adrian E. Harless - aharless@heylroyster.com
John D. Hoelzer - jhoelzer@heylroyster.com
Theresa M. Powell - tpowell@heylroyster.com
J. Tyler Robinson - trobinson@heylroyster.com

Chmpaign, Illinois 61824
301 North Neil Street
Suite 505
P.O. Box 1190
Phone (217) 344-0060; Fax (217) 344-9295

Renee L. Monfort - rmonfort@heylroyster.com
Cheri A. Stuart - cstuart@heylroyster.com
Daniel P. Wurl - dwurl@heylroyster.com
Jay E. Znaniecki - jznaniecki@heylroyster.com



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www.heylroyster.com

Appellate Advocacy
Craig Unrath
cunrath@heylroyster.com

Arson, Fraud and First-Party Property Claims
Dave Perkins
dperkins@heylroyster.com

Business and Commercial Litigation
Tim Bertschy
tbertschy@heylroyster.com

Business and Corporate Organizations
Deb Stegall
dstegall@heylroyster.com

Civil Rights Litigation/Section 1983
Keith Fruehling
kfruehling@heylroyster.com

Class Actions/Mass Tort
Patrick Cloud
pcloud@heylroyster.com

Construction
Mark McClenathan
mmcclenathan@heylroyster.com

Employment & Labor
Brad Ingram
bingram@heylroyster.com

Governmental
John Redlingshafer
jredlingshafer@heylroyster.com

Insurance Coverage
Jana Brady
jbrady@heylroyster.com

Liquor Liability/Dramshop
Nick Bertschy
nbertschy@heylroyster.com

Long Term Care/Nursing Homes
Mike Denning
mdenning@heylroyster.com

Mediation Services/Alternative Dispute Resolution
Brad Ingram
bingram@heylroyster.com

Product Liability
Rex Linder
rlinder@heylroyster.com

Professional Liability
Renee Monfort
rmonfort@heylroyster.com

Railroad Litigation
Steve Heine
sheine@heylroyster.com

Toxic Torts & Asbestos
Lisa LaConte
llaconte@heylroyster.com

Trucking/Motor Carrier Litigation
Matt Hefflefinger
mhefflefinger@heylroyster.com

Workers' Compensation
Toney Tomaso
ttomaso@heylroyster.com

Scan this QR Code for more information about our practice groups and attorneys

Peoria
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601
309.676.0400

Champaign
301 N. Neil St.
Suite 505
PO Box 1190
Champaign, IL 61824
217.344.0060

Chicago
33 N. Dearborn Street
Seventh Floor
Chicago, IL 60602
312.853.8700

Edwardsville
105 West Vandalia Street
Mark Twain Plaza III
Suite 100
PO Box 467
Edwardsville, IL 62025
618.656.4646

Rockford
120 West State Street
PNC Bank Building
2nd Floor
PO Box 1288
Rockford, IL 61105
815.963.4454

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822