A MIDWESTERN LAW FIRM

MEDICOLEGAL MONITOR

A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

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A Word from the Practice Chair

Heyl Royster has been a premier downstate medical malpractice defense firm in Illinois for many decades. That has been in part due to the effectiveness of our trial attorneys and in part to intense mentoring and planned succession. At Heyl Royster we strive to be as proud of our successors as we are of our own successes. I have enjoyed editing this newsletter and serving as Chair of our Professional Liability Practice these past 25 years, but it is now time to "pass the torch." I plan to enjoy trying medical malpractice cases in Illinois for at least the foreseeable future, and I look forward to turning these administrative duties over to lawyers who have been nurtured to succeed and, in fact, improve upon our brand.

I am pleased to inform you that Richard Hunsaker of our Edwardsville office will now succeed me as Chair of our Professional Liability Practice. Rick has tried a number of medical malpractice cases both in Northern Illinois when he was in our Rockford office and in Southern Illinois where he was born and now practices. Rick has never tasted defeat in the courtroom in a medical malpractice case. I wish I could say that of myself, but I'm very proud to say it of Rick. I have no doubt that Rick is a full repository of everything Lyle Allen taught us about medical malpractice litigation. Rick has been notably successful and so I'm very hopeful that you will choose to continue to benefit from his exceptional expertise as a medical malpractice defense lawyer. I could say the same for about 20 of our colleagues at Heyl Royster; Rick and I would feel privileged to identify each and every one of them to you if the need arises.

In this edition, we have scholarly articles from Matt Thompson and Tyler Pratt. Matt's article talks about defense lawyers asserting their right to prepare former hospital employees for participation in litigation against their former employers. Tyler's article addresses the use of special interrogatories in a medical malpractice trial and their importance as an internal validator of the jury's verdict.

Appellate Court Addresses *Ex Parte* Communications Between Hospital Counsel and Formerly Employed Nurse Involved in Subject Care

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

In its recent decision in *Caldwell v. Advocate Condell Medical Center*, 2017 IL App (2d) 160456, the Appellate Court, Second District, addressed issues relating to *ex parte* communications between a hospital's attorney and a formerly employed nurse who provided care to the plaintiff's decedent. Among other issues, the court considered whether such *ex parte* communications were protected by attorney-client privilege and whether they constituted *Petrillo* violations. Ultimately, the court reached the reasonable conclusion that the *ex parte* (outside the presence of plaintiff's attorney) communications were privileged and allowed under the *Petrillo* doctrine.

Background

The decision includes a very detailed set of facts, but for purposes of discussing the issues addressed in this column, a limited discussion of the facts suffices. The decedent, Jeannette DeLuca (DeLuca), was admitted to the hospital late one evening for emergency surgery on her eye. *Caldwell*, 2017 IL App (2d) 160456. The surgery was completed just after midnight, and DeLuca was returned from the PACU to her room on a medical/surgical floor around 12:45 A.M. *Id.* DeLuca had no issues through the night, and ordered breakfast the next morning around 6:30 A.M. A rapid-response call was then placed at 7:20 A.M., and the responding nurses discovered pieces of the breakfast in the patient's mouth. DeLuca had experienced a choking incident and died due to asphyxiation.

The plaintiff then filed suit alleging that the hospital's agents failed to adequately monitor DeLuca postoperatively, failed to ensure she had recovered from surgery sufficiently to eat, and allowed her to each without ensuring her dentures were in her mouth. Specifically, the issue regarding the

(continued on next page)

dentures related to whether DeLuca's lower partial plate was ever removed for surgery, and if so, whether it was replaced at the time of choking.

One witness in the case was Kathleen Likosar (Likosar), who was the nurse manager on DeLuca's floor and a member of the rapid response team. When Likosar was presented for her discovery deposition, she was still employed by the hospital. During Likosar's discovery deposition, the hospital's attorney objected to questions about *ex parte* communications between Likosar and the hospital's attorney on the basis of attorney-client privilege.

Shortly before trial, the hospital's attorney contacted plaintiff's counsel to inform him that Likosar was retiring and moving out of state, so the hospital's attorney intended to take her evidence deposition. Similar to the discovery deposition, plaintiff's counsel again objected to hospital counsel's assertion of attorney-client privilege for *ex parte* communications with Likosar.

The plaintiff then moved to bar Likosar's evidence deposition due to the attorney-client privilege assertion, among other reasons. The plaintiff argued that attorney-client privilege was improperly asserted because Likosar was not a member of the hospital's control group and not an employee at the time of the evidence deposition. The trial court overruled this motion and allowed Likosar's evidence deposition to be introduced at trial.

The jury returned a verdict in favor of the hospital, and the plaintiff appealed. Among other issues, the plaintiff argued that Likosar's evidence deposition should not have been allowed at trial because: (1) the hospital's attorney improperly asserted attorney-client privilege for communications with Likosar, and (2) the hospital's attorney violated the *Petrillo* doctrine by engaging in *ex parte* communications with Likosar after she retired from the hospital.

Attorney-Client Privilege

On appeal, the plaintiff argued that there was no attorney-client privilege between the hospital's attorney and Likosar, and therefore, the trial court erred in allowing the evidence deposition to be presented at trial. The basis of the plaintiff's argument was that attorney-client privilege could not apply because Likosar was no longer a hospital employee when certain *ex parte* communications occurred before her evidence deposition, and Likosar was never a part of the hospital's control group. The plaintiff also argued that the insurer-insured privilege could not apply, despite the fact that Likosar was covered by the hospital's self-insured retention. The plaintiff asserted this was true because Likosar never provided care before DeLuca went into distress, Likosar was never sued individually, and the statute of limitations had run.

The appellate court pointed out that the hospital never claimed Likosar was part of its control group, and never asserted this as a basis of the privilege. Instead, the court pointed out that "[a] nonparty insured may assert the attorney-client privilege if the insured made the statement at issue when the possibility existed that [the insured] would be made a defendant in lawsuits that might arise as a result of the [incident]." Because Likosar was an agent of the hospital and insured under its self-insured trust, the court found the *ex parte* communications between Likosar and the hospital's attorney privileged. The fact that Likosar was no longer employed by the hospital at the time of trial was irrelevant to her status as an agent of the hospital when care was rendered.

Petrillo Doctrine

The plaintiff next contended that the pre-evidence deposition *ex parte* communications between the hospital's attorney and Likosar violated the *Petrillo* doctrine, which should have resulted in the evidence deposition being barred.

The plaintiff's reliance on *Baylaender* was clearly misplaced because hospitals operate under the Hospital Licensing Act, 210 ILCS 85/1, *et seq.* This issue was addressed by the Illinois Supreme Court in *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21 (2001). In *Burger*, the Illinois Supreme Court upheld a provision of the Hospital Licensing Act providing:

> The hospital's medical staff members and the hospital's agents and employees may communicate, at any time and in any fashion, with legal counsel for the hospital concerning the patient medical record privacy and retention requirements of this Section and any care or treatment they provided or assisted in providing to any patient within the scope of their employment or affiliation with the hospital.
>
> *Burger*, 198 Ill. 2d at 44, citing 210 ILCS 85/6.17(e).

Following the *Burger* decision, another provision was added to the Hospital Licensing Act, providing that:

> Notwithstanding subsections (d) and (e), for actions filed on or after January 1, 2004, after a complaint for healing art malpractice is served upon the hospital or upon its agents or employees, members of the hospital's medical staff who are not actual or alleged agents, employees, or apparent agents of the

> hospital may not communicate with legal counsel for the hospital or with risk management of the hospital concerning the claim alleged in the complaint for healing art malpractice against the hospital except with the patient's consent or in discovery authorized by the Code of Civil Procedure or the Supreme Court rules.

210 ILCS 85/6.17(e-5). Even under this provision, a hospital's attorney is allowed to communicate *ex parte* with members of the medical staff who were employees, agents, or alleged agents at the time of the subject care. The only purpose of subsection (e-5) is to prohibit *ex parte* communications between hospital counsel and members of the medical staff who were independent contractors (*i.e.*, non-employees).

For instance, the Senate's sponsor of the legislation adding subsection (e-5) stated that:

> Now, the – the Trial Lawyers initially wanted a bill that would completely overturn the Supreme Court[']s *Burger*] opinion. Based on my reading of the opinion, I think the [*Burger*] court was correct in wanting to protect the hospital's ability to interview its own employees when an adverse event had occurred without intrusion by a plaintiff's attorney, because that would be necessary for issues of public health. On the other hand, it appears that some hospitals were abusing this by then interviewing non-employees, independent contractors, who for other purposes of litigation they denied as having any agency or – responsibility over, but they still wanted the same protection in terms of being able to interview them ex parte.

Ill. 93rd Gen. Assemb., Reg. Sess., Sen. Trans., p. 135, Apr. 8, 2003. Similarly, the House of Representative's sponsor of the same legislation indicated that subsection (e-5):

> deals with the circumstance in which a medical malpractice case has already been filed against the hospital. This Bill provides that defense counsel cannot speak with physicians who are not otherwise agents in the case.
>
> Ill. 93rd Gen. Assemb., H.R. Trans., p. 235, May 21, 2003.

Pointing to *Burger*, the *Caldwell* court found that *ex parte* communications between the hospital's attorney and Likosar were appropriate due to the employment relationship that existed at the time Likosar cared for DeLuca. The fact that Likosar was no longer employed by the hospital at the time of her evidence deposition was irrelevant.

Conclusion

Like any other employer, a hospital commonly experiences turnover in its employees, including its employed physicians and nurses. This may be for any number of reasons, such as retirement, relocation, or simply other opportunities. In *Caldwell*, the appellate court appropriately applied relevant statutory and decisional law in determining that a hospital's attorney is allowed to communicate with a physician or nurse employed by the hospital at the time care was rendered to a patient-plaintiff, even if the employment relationship later ended. In reaching this conclusion, the court provided a certain level of comfort to defense attorneys, who constantly must consider the reach of the *Petrillo* doctrine.

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.

Special Interrogatories: Be Careful What You Ask For

By: Tyler Pratt, tpratt@heylroyster.com

A medical malpractice trial is concluded by the jury's return to the court room with a general verdict in favor of either the defendant or the plaintiff. However, any lawyer trying a medical malpractice case is entitled to ask that the jury also make specific findings on ultimate issues in the case, such as whether a given defendant was negligent or whether a given defendant was approximate cause of the injury or death at issue. These separate questions are known as special interrogatories.

The use of special interrogatories is one of the most effective tools to reverse an adverse result. There are at least four advantages to giving special interrogatories: 1) they provide a method of checking the correctness of the general verdict; 2) they compel the jury to give detailed consideration to important issues; 3) they may show that some errors were not prejudicial and provide a basis for curing others; and 4) they may have a salutary effect on the morale of the jury. *See* Wicker, Special Interrogatories to Juries in Civil Cases, 35 YALE L.J. 296, 301 (1925). Testing the veracity of a jury's verdict, however, does not come easily and there are many

pitfalls associated with their use. The Illinois Appellate Court, Second District, recently reminded us of this in *Stanphill v. Ortberg*.

Background

In *Stanphill v. Ortberg*, 2017 IL App (2d) 161086, Keith Stanphill suspected that his wife, Susan, was having an extramarital affair. After finding romantic e-mails to his wife from one of her co-workers, he committed suicide. During the last month of his life, Keith lost nearly 15 pounds, walked around in a lethargic state, was pale, his eyes were sunken, his work performance slipped, and he had effectively withdrawn from participation in the church of which he had been a lifelong member. Susan believed Keith needed help and arranged for him to see a counselor.

Keith met Lori Ortberg, a licensed clinical social worker who was employed by Rockford Memorial Hospital. Ortberg's responsibilities included assessing whether her patients posed threats of imminent suicide or potentially lethal violence. Ortberg had Keith complete a questionnaire as to his psychological condition. On that questionnaire, Keith indicated that he had (1) feelings of harming himself or others most of the time; (2) feelings of sadness most of the time; (3) sleep changes most of the time; (4) appetite changes all of the time; (5) feelings of anxiety, nervousness, worry, and fear all of the time; (6) sudden unexpected panic attacks most of the time; and (7) feelings of being on the verge of losing control most of the time. Keith also indicated on the questionnaire that he was seeing a primary care physician for "mood." After meeting with Ortberg for a one hour assessment, she charted he was experiencing adjustment disorder and was not suicidal in spite of the fact that he told her he thought a lot about harming himself or others most of the time. Nine days later he killed himself in his garage with carbon monoxide from his car. Plaintiff, Zachary Stanphill, Keith's son and the administrator of his estate, subsequently filed a wrongful death and survival action against Ortberg and Rockford Memorial Hospital.

At trial, plaintiff presented experts who testified Ortberg was negligent for not doing a more thorough assessment, that it was reasonably foreseeable at the time of her interview that the patient was at high risk of suicide, and that Ortberg misdiagnosed Keith with adjustment disorder rather than major depression.

In response, defendants presented Terri Lee, a licensed clinical social worker, who testified that Ortberg conducted a thorough assessment and complied with the standard of care for a reasonably careful licensed clinical social worker in her one-hour counseling session with Keith. Lee believed that Keith was not suicidal on the day he met with Ortberg because he scheduled a follow-up date with the counselor Ortberg recommended. Lee testified that someone who is planning to kill himself does not make an appointment for a future date.

Defendants also presented Dr. Steve Hanus, a psychiatrist, who said Keith's suicide was not reasonably foreseeable because (1) Ortberg specifically documented that Keith had no ideas of suicide; (2) he had not made a suicide attempt before; (3) there was no family history of suicide; (4) the EAP documentation demonstrated that Keith was working; (5) he was religious and receiving pastoral care; (6) he was living with his in-laws, with whom he had a close relationship; (7) he was seeing his children every day; (8) he was keeping up with his hygiene; (9) at the end of the EAP session, he had agreed to outpatient therapy; and (10) he had actually scheduled a follow-up appointment.

At a jury instruction conference, the defendants asked the court to submit the following special interrogatory to the jury:

> Was it reasonably foreseeable to Lori Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005?

Stanphill, 2017 IL App (2d) 161086, ¶ 16. The defendants drew this wording from the First District's decision in *Garcia v. Seneca Nursing Home,* 2011 IL App (1st) 103085. The jury returned a verdict of almost $1.5 million in plaintiff's favor together with a "No" answer to a special interrogatory.

The trial court subsequently entered judgment in favor of the defendants, based on the special interrogatory answer. After hearing the plaintiff's post trial motion, the trial court ruled it had to follow *Garcia*, a nursing home suicide case in which the first district in 2011 approved of the same language in a special interrogatory that produced a defense verdict. In the opinion, however, the trial court criticized the *Garcia* decision because it approved a special interrogatory that was confusing and misleading to the jury. In doing so, the trial court suggested that

> if we're going to give any kind of a special interrogatory in a suicide case where the defendant is allegedly negligent for not foreseeing the suicide, that the special interrogatory needs to not have the defendant's name in it. It needs to say was it foreseeable or was it reasonably foreseeable to a reasonably careful social worker that so and so would commit suicide on such and such a date.

Stanphill, 2017 IL App (2d) 161086, ¶ 19.

The plaintiff appealed, arguing that the jury's answer to the special interrogatory was not irreconcilable with the general verdict or, alternatively, that the special interrogatory should never have been given. The second district agreed and reversed the trial court and remanded with directions to enter judgment for the plaintiff on the general verdict.

Appellate Court: The Special Interrogatory Was Not Inconsistent with the General Verdict

The appellate court began its analysis by reciting that special interrogatories are designed to be the "guardian of the integrity of a general verdict in a civil jury trial," and they "test the general verdict against the jury's determination as to one or more specific issues of ultimate fact." In fact, an answer to a special interrogatory controls the judgment when it is "inconsistent" with the general verdict. In order to establish this, the special interrogatory must be "clearly and absolutely irreconcilable with the general verdict."

The court found that this special interrogatory answer was not necessarily inconsistent with the general verdict because here the jury could conclude that because she was negligent in the performance of her duties when she counseled Keith on September 30, 2005, it was not reasonably foreseeable to *her* that Keith would commit suicide 9 days later. Consequently, the special interrogatory and the general verdict were not clearly and absolutely irreconcilable and the trial court should have entered judgment in favor of the plaintiff.

Appellate Court: The Special Interrogatory Was Not in the Proper Form

Even if the court found that the special interrogatory was inconsistent with the general verdict, the court would still hold that the answer should not prevail over the general verdict because the special interrogatory was not in the proper form. In reaching this conclusion, the court recited that proximate cause has two requirements: cause in fact and legal cause. Legal cause, which was at issue in this case, is established if an injury was foreseeable as the type of harm that a *reasonable person* would expect to see as a likely result of his conduct. Moreover, although the foreseeability of an injury will establish legal cause, the extent of the injury or the exact way in which it occurs need not be foreseeable.

The special interrogatory in this case, however, was not in the proper form, because it did not ask whether Keith's suicide was foreseeable as the type of harm that a *reasonable person* (or a *reasonable* licensed clinical social worker) would expect to see as a likely result of her conduct. Rather, the interrogatory asked whether Keith's suicide was foreseeable to Ortberg. By substituting "Lori Ortberg" for a "reasonable person" or a "reasonable licensed clinical social worker," the interrogatory distorted the law and became ambiguous and misleading to the jury. The court reasoned that although a reasonable person or a reasonable licensed clinical social worker might have been able to foresee Keith's suicide, that does not mean that Ortberg (who according to the plaintiff's theory did not act reasonably) would have. As such, the court concluded the interrogatory was confusing and should not have been given.

In so ruling, the court further distinguished the *Garcia* special interrogatory because *Garcia* did not address whether a special interrogatory was proper when it asked if suicide was foreseeable through the eyes of a specific person. Since *Garcia* did not squarely address the argument raised here, the court did not need to consider it and could reverse the trial court's decision on this basis as well.

Conclusion

As illustrated by this decision, great care needs to be taken when drafting special interrogatories. Not only does the appropriate form have to be used, but the interrogatory must be worded in such a way that if answered, would be clearly and absolutely irreconcilable with the general verdict. If it is not, there is a significant likelihood of reversal on appeal.

Tyler Pratt concentrates his practice in the area of civil litigation, with an emphasis on medical malpractice, professional liability, and professional regulation/licensure. He regularly defends physicians, nurses, hospitals, and clinics in professional liability claims involving significant injury or death. Tyler also represents clients in trucking, business and commercial, and estate litigation as well as estate planning matters, including powers of attorney, probate administration, wills, and trusts.

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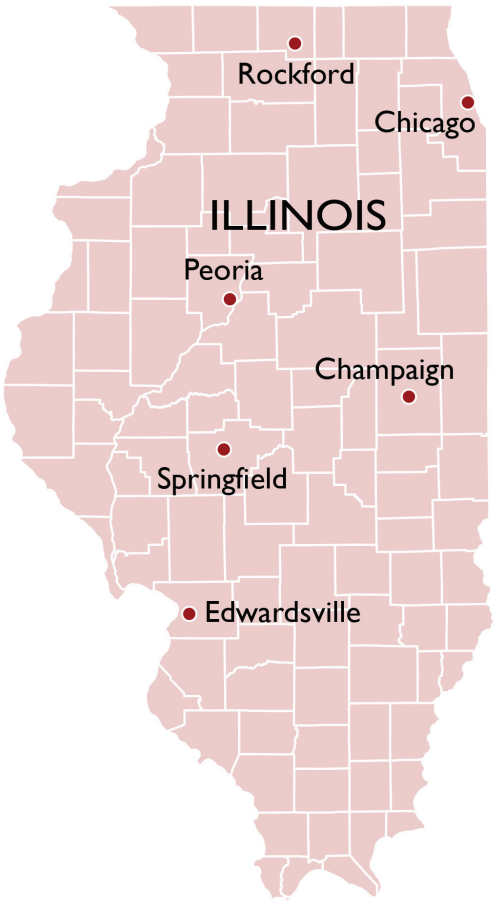

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