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····Medicolegal Monitor

NEWSLETTER FIRST QUARTER 2020

A Word from the Practice Chair

COVID-19: The Rapidly Changing Litigation Landscape

We are pleased to share our latest edition of the *Medicolegal Monitor*. At the risk of stating the obvious, this edition comes in the midst of a historic and unprecedented response to a purely medical crisis. Though our nation has endured polio and Spanish flu epidemics in the distant past, the vast majority of our society has never lived through a national medical crisis.

From the legal side of the equation, you will note that there have been a number of significant governmental developments regarding the provision of medical services during the COVID-19 pandemic. Both Federal and State governments have enacted special legal protections during the crisis for those engaged in caring for COVID-19 patients. As with most governmental responses, the provisions are imperfect and raise a number of legal questions. We have included updates regarding these developments within this edition of the Medicolegal Monitor. Also, we will continue to post legal updates on Heyl Royster's webpage under our News tab. You can find these at: www.heylroyster.com. We encourage you to visit our webpage and, as always, contact any of our practice group leaders should you have a legal issue which needs attention.

The medical profession's response to the COVID-19 crisis illustrates both the magnitude of the challenge as well as the commitment of hospitals, physicians, nurses, and medical technicians to patients in need, often at great risk to themselves and their family members. It is heartbreaking to read of the worldwide impact COVID-19 has had on the ranks of physicians and other care providers who have unselfishly responded to this crisis. Your response is a vivid reminder of what motivates us as lawyers representing and defending the medical profession. We are privileged to represent and defend skilled and committed medical professionals dedicated to the health and well-being of our communities.

One final observation. It goes without saying that what is presented in the courtroom is vastly different than what routinely transpired between patients and their medical providers. A troubling trend in recent years is an increase in the planned and orchestrated litigation tactic of casting medical providers in a poor light to instill anger and resentment among jurors. It is no secret that many plaintiff's lawyers tailor the presentation of evidence in calculated ways to stoke jury anger and resentment. Empirical evidence illustrating the link between juror anger and large verdicts against medical providers lies at the heart of this disturbing litigation tactic. If there is a silver lining to COVID-19, it is a parting of the smoke screen fostered by those who target the medical community. Though recent developments may have an impact on our current plans, Heyl Royster is in the process of planning and developing a client seminar in the Fall of 2020. One of the principal topics will involve discussion of tools which physicians and their attorneys can use to neutralize unfair and misleading litigation tactics. The COVID-19 response will be at the forefront of this discussion. Stay tuned for announcements on seminar dates and locations.

In closing, please allow Heyl Royster and its lawyers to express our appreciation and gratitude for the unprecedented and remarkable response to COVID-19 on the part of our medical professional clients. You are the best.

Richard K. Hunsaker
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Illinois Governor Grants Certain Health Care Providers Civil Immunity in Latest Executive Order

By: Emily Perkins, eperkins@heylroyster.com

On April 1, 2020, Illinois Governor, JB Pritzker, issued Executive Order (2020-19) in response to the COVID-19 outbreak. According to the Order, certain health care providers are deemed to be immune from civil liability for any injury or death alleged to have been caused by any act or omission that occurs while engaged in the course of rendering health care services in response to the COVID-19 pandemic, unless it is established that the injury or death was caused by gross negligence or willful misconduct. This Executive Order is authorized by the Illinois Emergency Management Agency Act and will remain in effect for the duration of the Gubernatorial Disaster Proclamation, which currently extends through April 30, 2020.

The Executive Order defines Health Care Facilities, Health Care Professionals, and Heath Care Volunteers. Nursing homes, emergency medical services, mental health centers, and any government-operated health care site are all covered Health Care Facilities. Health Care Professionals include all licensed or certified health care or emergency medical services workers who are providing authorized services at a Health Care Facility or working under the direction of Illinois Emergency Management Agency (IEMA) or the Illinois Department of Public Health (IDPH) in response to the Gubernatorial Disaster Proclamation. Health Care Volunteers consist of all volunteers or medical or nursing students who are similarly providing authorized services or working under the direction of IEMA or IDPH.

Pursuant to the Executive Order, rendering assistance in support of the State's response to the disaster further requires Health Care Facilities to cancel or postpone elective surgeries and procedures.

The purpose of the Executive Order is to encourage health care providers to provide medical care and treatment to those afflicted with COVID-19 without fear of future liability.

For questions relating to Executive Order 2020-19 or its interpretation, please contact any of the Heyl Royster Professional Liability attorneys.

Emily Perkins, Peoria Office

Emily concentrates her practice in the areas of employment/labor law, governmental law, Section 1983 civil rights litigation, and medical malpractice. She is involved in various employment matters, including hostile work environment issues, discrimination, and retaliation claims against employers. She works with employers of public entities in negotiating collective bargaining agreements and defending against unfair labor practice charges. She also drafts and negotiates a wide variety of contracts ranging from severance agreements to large business contracts, including purchase, consulting, license, and software agreements. While in law school, Emily also served as the President of the Student Bar Association. Her article "Regulating Appearance in the Workplace: An Employer's Guide to Avoid Employment Discrimination Lawsuits" was chosen as a winner in the *National Law Review* writing competition and published in February of 2014.

PREP Act Immunity for COVID-19 Activities

By: Ann Barron, abarron@heylroyster.com

On March 17, 2020, Alex Azar, the Secretary of the Department of Health and Human Services (HHS) issued a declaration pursuant to the Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. §247d-6d, relating to COVID-19. The Declaration certifies that the spread of COVID-19 constitutes a public health emergency. The March 17 Declaration was backdated to February 4, 2020 and will remain in place until October 1, 2024, unless shortened earlier.

The PREP Act can provide immunity to covered entities and individuals from liabilities stemming from the use of qualified products and processes, also known as countermeasures, to combat matters constituting a public health emergency. For the PREP Act to apply, the Secretary of HHS must issue a declaration after a determination that a disease constitutes a public health emergency.

As a result of the Declaration, Immunity under the PREP Act relating to COVID-19 precludes any and all claims under Federal or State law for a loss that is caused by, arises out of, or relates to, the administration to an individual or use of a covered countermeasure. Loss includes claims for death, physical, mental or emotional injury or disability, and any need for medical monitoring. A loss can also include property damages and business interruption losses. The immunity protection applies "without regard to the date of the occurrence, presentation or discovery of the loss." There is a rebuttable presumption that the administration or use of a countermeasure was for a threat covered by the Declaration and a claimant will likely have to produce evidence to overcome the presumption.

There are limitations on the scope of immunity. The PREP Act does not provide immunity for willful misconduct. The Act defines willful misconduct as an act or omission that is undertaken intentionally to achieve a wrongful purpose or in disregard of a known or obvious risk that is so great to make it highly probably that harm will outweigh the benefit.

The grant of immunity can apply to manufacturers, distributors, program planners, and qualified persons and their officers, agents, and employees. The immunity also applies to the United States, its departments (such as the veterans administration), and Federal employees. Qualified persons include licensed health care professionals and other individuals authorized to prescribe, administer and dispense covered countermeasures under the law of the state in which the covered countermeasure was prescribed, administered, or dispensed.

Under the PREP Act and Declaration, covered countermeasures include antiviral and other drugs, diagnostics, devices, and vaccines used to treat, diagnose, cure, prevent, or mitigate COVID-19 or a virus mutating therefrom. The covered countermeasures can include qualified pandemic or epidemic products, security countermeasures, and drugs or devices for investigational or emergency use.

In its guidance, the Secretary has interpreted the act to preclude "liability claims alleging negligence by a manufacturer in creating a vaccine or negligence by a health care provider in prescribing the wrong dose, absent willful misconduct." 85 Fed. Reg. at 15200. In addition, the liability protection may extend to slip and fall injuries or injuries from vehicle collisions involving a recipient receiving a countermeasure at a retail store serving as an administration or dispensing location. *Id*. The application of PREP Act immunity will be considered on a case by case basis and will likely be subject to future litigation and interpretation.

Heyl Royster's attorneys remain available to help you respond to the COVID-19 public health emergency and its impacts on your operations.

Ann Barron, Edwardsville Office

Ann began her legal career in 1994, serving as a law clerk to the Honorable James D. Heiple of the Illinois Supreme Court. After her clerkship, Ann worked for two law firms in the St. Louis area. She represented clients in environmental, class action, commercial, and personal injury matters pending throughout the country. Her clients included railroads, refiners, utilities, municipalities, health care entities, franchisors, and auto manufacturers. Ann has represented clients before the Seventh Circuit Court of Appeals, the Illinois Supreme Court and various appellate courts in Illinois and Missouri.

Supreme Court of Missouri Overturns a Negligent Credentialing Claim

By: Richard Hunsaker, rhunsaker@heylroyster.com

Factual Background

Thomas Tharp sued St. Luke's Surgicenter-Lee's Summit LLC, alleging it negligently granted surgical privileges to the surgeon who laparoscopically removed his gall bladder at the center. *Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC, 587 S.W.3d 647 (Mo. 2019)*. Tharp alleged the surgeon damaged his hepatic duct and common bile duct during the procedure, causing bile leakage, inflammation, and liver damage. Following a trial, the jury returned its verdict in Tharp's favor, awarding him damages in the amount of $2.3 million.

Appeal

In a 6-1 decision written by Judge W. Brent Powell, the Supreme Court of Missouri reversed the judgment. In doing so the majority held that the plaintiff failed to present sufficient evidence to support his negligent credentialing claim. In particular, there was insufficient evidence to show the surgeon was unqualified or generally careless or to show the surgical center's act of credentialing the surgeon caused the patient's injuries. The court further noted that before St. Luke's can be held liable for an independent physician's negligence, the plaintiff must show that St. Luke's owed him a duty, breached that duty, and he was injured as a result. In its motions for directed verdict and for judgment notwithstanding the verdict, St. Luke's asserted the evidence failed to satisfy all the necessary elements of negligent credentialing because there was no evidence showing Tharp's surgeon was unqualified to conduct the gall bladder procedure and credentialing the surgeon did not cause Tharp's injuries. Because it is foreseeable that incompetent or generally careless physicians could injure the center's patients, and because Tharp was St. Luke's patient, the surgical center owed him a duty to credential only competent and careful physicians. But St. Luke's did not breach this duty when it granted staff privileges to Tharp's surgeon. Although the surgeon did not disclose all the lawsuits he had defended in his application for staff privileges, as required by St. Luke's bylaws, there was no evidence showing that the number of lawsuits made him unqualified, generally careless or that he lacked the knowledge, skill, and experience necessary to operate on patients like Tharp without creating unreasonable risk of injury. Further, because there was no evidence showing the surgeon was unqualified to perform laparoscopic gall bladder surgeries, there was insufficient evidence to support finding St. Luke's act of credentialing the surgeon caused Tharp's injuries.

Supreme Court Analysis

Breach of Hospital bylaws

The hospital's bylaws required all physicians seeking credentials to report all prior malpractice suits. The surgeon at issue did not list all the malpractice claims directed against him. The Missouri Supreme Court held that a breach of the hospital's bylaws (requiring the surgeon to report all prior malpractice suits) was not enough to support a negligent credentialing claim, and found no evidence that the grant of staff privileges to the surgeon was the proximate cause of the injury.

In evaluating the nature of the relationship between a modern healthcare facility and its medical staff, the Supreme Court majority observed that "physicians working under staff privileges are typically independent contractors, not hospital employees," and that "staff privileges allow physicians to utilize a healthcare facility to admit and treat patients as independent care providers rather than as employees of the facility." *Tharp*, 2019 Mo. LEXIS 53, at **2, 6. Under appropriate circumstances, a negligent credentialing claim can provide an avenue for potential liability against a hospital for injury caused by an independent contractor. The appropriate analysis is whether the hospital gathered pertinent information to make a reasonable decision on whether to grant or withhold privileges. The proper inquiry, in assessing a negligent credentialing claim, is whether the physician was competent and possessed the necessary knowledge, skill, and experience to perform his job without creating unreasonable risk of injury to others.

Significantly, one of the requirements in the hospital's bylaws was full disclosure of all prior malpractice suits, with the failure to do so being possible grounds to automatically remove a physician from staff privilege consideration. The evidence at trial showed the surgeon failed to list on his application each suit he had defended over his career. There was no evidence that addressed the surgeon's qualifications to perform surgery. The plaintiff's own expert admitted there was no "magical number" of malpractice suits that shows a surgeon is unqualified. Plaintiff's expert cited a statistical study showing physician malpractice claim rates vary widely depending, in large part, on the medical specialty involved. "Even acts of repeated negligence do not support finding a surgeon is incompetent when there is no evidence

that shows a surgeon generally lacks a professional ability." *Id*. *21, Fn. 3. Accordingly, the Missouri Supreme Court concluded that the plaintiffs failed to present a legally sufficient negligent credentialing claim.

Proximate Cause

The Court also found the plaintiffs failed to prove the credentialing of the surgeon was the proximate cause of the injury. It was not enough to prove that but for the credentialing, the surgeon could not have performed the surgery that produced the injury. Instead, the plaintiffs must prove the injury was the natural and probable consequence of the surgeon's incompetence. The court observed that "even a supremely qualified, competent, and careful physician may nevertheless injure a patient through an isolated negligent act." *Id*. at *16.

Conclusion

The Missouri Supreme Court has provided guidance to Missouri lower courts and practitioners prosecuting or defending a negligent credentialing claim. For hospitals, it is important to recognize the distinction between "agency" claims, which rely on the negligence of the physician versus neglegent credentialing claims, which focus on separate and distinct claims of hospital negligence. Absent credible evidence of a physician's incompetence generally, and the negligent failure of a hospital to discover the incompetence and act accordingly, courts should dispose of these claims via dispositive motion.

The opinion did not address whether the negligent credentialing theory conflicts with Mo.Rev.Stat. § 538.210.4, which provides, in part, that "[n]o health care provider whose liability is limited by the provisions of this chapter shall be liable to any plaintiff based on the actions or omissions of any other entity or individual who is not an employee of such health care provider . . . ." Negligent credentialing liability necessarily depends on the negligent act or omission of a non-employee physician. In the event this argument is raised, it is unclear how the Court would address the apparent conflict of law.

It is also worthwhile to note that Missouri's approach differs from that of its sister state, Illinois. In Illinois, the most recent Supreme Court opinion on negligent credentialing claims can be found in *Klaine vs. Southern Illinois Hospital Services*, 2016 IL 118217. In Klaine, the Illinois Supreme Court held that materials evaluated by the hospital are not necessarily shielded from disclosure pursuant to the Illinois' Credential Act, Section 15(h). Despite the differences in law regarding credentialing, it is reasonable to expect that Illinois will require proof of a proximate cause. Whether Illinois applies a similar standard for evaluating negligent credentialing claims remains to be seen.

Richard Hunsaker, St. Louis Office

Throughout his 30-year career, Richard has served as a speaker on a variety of legal topics including medical malpractice, jury selection, doctor-patient confidentiality, civil procedure, evidence law updates and environmental law. Most recently, he co-authored a chapter on case evaluation in the Medical Malpractice Handbook published by the Illinois Institute for Continuing Legal Education.

First District Holds Experts Redesignated as Consultants Are Entitled to Consultant's Privilege Against Disclosure

By: Emily Perkins, eperkins@helyroyster.com

The first district recently held that a party who previously disclosed a witness pursuant to 213(f)(3) as a controlled expert may later redesignate that witness to be a consultant pursuant to Rule 201(b)(3). *Dameron v. Mercy Hospital & Medical Center*, 2019 IL App (1st) 172338.

Facts and Procedure

In *Dameron*, the plaintiff filed a medical malpractice claim against Mercy Hospital and Medical Center and several medical professionals, alleging that she sustained injuries following a surgical procedure. *Dameron*, 2019 IL App

(1st) 172338, ¶ 4. Throughout the discovery process, the plaintiff answered the defendants' interrogatories and disclosed Dr. David Preston as a controlled expert witness pursuant to Illinois Supreme Court Rule 213(f)(3). *Id.* ¶ 5; see Ill. S. Ct. R. 213(f)(3). In accordance with the rule, the plaintiff further disclosed that Dr. Preston would testify as to the results of the plaintiff's comparison electromyogram (EMG) and/or nerve conduction study (EMG study), which were scheduled to be performed in the following days. *Dameron*, 2019 IL App (1st) 172338, ¶ 5. The plaintiff did not disclose a written report prepared by Dr. Preston pursuant to the rule since the tests had not yet been conducted. *Id*.

Several months later, the plaintiff advised opposing counsel that Dr. Preston was mistakenly disclosed as a controlled expert witness and filed a motion to designate Dr. Preston as a non-testifying expert consultant pursuant to Illinois Supreme Court Rule 201(b)(3). *Dameron*, 2019 IL App (1st) 172338, ¶¶ 6-7, citing Ill. S. Ct. R. 201(b)(3). Plaintiff's counsel argued that because Dr. Preston was redesignated as a consultant, his opinions were privileged from discovery. *Id*. ¶ 7. The trial court denied plaintiff's motion to redesignate Dr. Preston as a consulting expert and ordered counsel to produce Dr. Preston's records relating to the plaintiff's EMG study. *Id*. ¶¶ 7, 9. The plaintiff refused to comply with the court's order and the court found her in contempt. *Id*. ¶ 9. The plaintiff appealed. *Id*. ¶ 10.

Analysis

In this case, the first district considered whether a party who previously disclosed a witness as a testifying, controlled expert may thereafter redesignate that witness as a consultant whose opinions and work product are privileged from discovery, absent a showing of exceptional circumstances by the opposing party. *Dameron*, 2019 IL App (1st) 172338, ¶ 12. The court first looked to the law in Illinois, which provides that a party may withdraw an expert witness so long as the opposing party is given clear and sufficient notice to allow it to take the necessary action in light of the abandonment of the witness. *Id*. ¶ 19, citing *Taylor v. Kohli*, 162 Ill. 2d 91, 97 (1994). In doing so, however, the court noted that the plaintiff in this case also sought to redesignate Dr. Preston from a controlled expert witness to a non-testifying consultant whose reports and opinions are protected from discovery pursuant to the privilege set forth in Rule 201(b)(3). *Dameron*, 2019 IL App (1st) 172338, ¶ 19. Therefore, the court looked to federal case law for additional guidance. *Id*. ¶ 22.

Similar to the Illinois rules, the Federal Rules of Civil Procedure also distinguishes an expert whose opinions may be presented at trial and a non-testifying expert employed only for trial preparation. *Dameron*, 2019 IL App (1st) 172338, ¶ 22, citing *San Román v. Children's Heart Center, Ltd.*, 2010 IL App (1st) 091217, ¶ 23. Prior to 2009, the majority of federal courts concluded that a party had the ability to change the designation of an expert witness. *Dameron*, 2019 IL App (1st) 172338, ¶ 23, citing *Davis v. Carmel Clay Schools*, No. 1:11-cv-00771-SEB-MJD, 2013 U.S. Dist. LEXIS 70251, at *22 (S.D. Ind. May 17, 2013). Furthermore, in 2009, the Seventh Circuit Court of Appeals recognized that "[a] witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report has been disclosed, and a deposition conducted, to the status of a trial-preparation expert whose identity and views may be concealed." *Dameron*, 2019 IL App (1st) 172338, ¶ 24, citing *Securities & Exchange Commission v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009). However, none of the federal cases distinguished situations where only the expert's identity was disclosed from those where the expert's report had been disclosed. *Dameron*, 2019 IL App (1st) 172338, ¶ 24.

In *Davis*, the court determined what constituted the "designation" of an expert witness. *Dameron*, 2019 IL App (1st) 172338, ¶ 25, citing *Davis*, 2013 U.S. Dist. LEXIS 70251, at **5-6. In doing so, the *Davis* court held that once the expert's report was disclosed to the opposing party, the expert ceased to enjoy protection from discovery by the opposing party. *Dameron*, 2019 IL App (1st) 172338, ¶ 25. However, the court in *Davis* concluded "'it is clear that prior to producing the expert report, courts

[have found] that a party can change a testifying expert to a non-testimonial expert without losing the protections' from discovery, absent exceptional circumstances." *Id.*, citing *Davis*, 2013 U.S. Dist. LEXIS 70251, at *24.

The court noted that Illinois Rule 213(f)(3) provides that for a "controlled expert witness, the party must identify: *** (iv) any reports prepared by the witness." Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2018). *Dameron*, 2019 IL App (1st) 172338, ¶ 26. In *Dameron*, the plaintiff disclosed the identity of her expert, but had not yet disclosed his report because at the time she submitted her answers to interrogatories, Dr. Preston had not yet conducted the examination of the plaintiff. *Id*.

The defendants argued that they were entitled to the results of the EMG study since Dr. Preston was previously disclosed as a testifying expert. *Dameron*, 2019 IL App (1st) 172338, ¶ 27. The court rejected each, noting the following: (1) Dr. Preston could not be considered one of plaintiff's treating physicians, (2) the plaintiff's disclosure of Dr. Preston was not considered a judicial admission, and (3) the plaintiff did not waive the consultant's privilege by disclosing Dr. Preston as her testifying expert witness. *Id*. ¶¶ 28-42. In addressing the waiver argument, the court ordered "plaintiff's attorney to produce 'Dr. Preston's records regarding his June 1, 2017 comparison EMG study' on the plaintiff." *Id*. ¶ 50. The EMG study was absent from the record on appeal and therefore the court could not conclude that the material sought was of a purely concrete nature or that the production of the EMG study had the potential to expose Dr. Preston's thought processes. *Id*. Therefore, the court held that Dr. Preston's EMG study was protected by the consultant's work product privilege.

Conclusion

The first district held that a testifying expert witness who has been disclosed, but timely withdrawn by a party prior to disclosure of his or her report, may be redesignated a Rule 201(b)(3) consultant and entitled to the consultant's privilege against disclosure, absent exceptional circumstances. Dameron, 2019 IL App (1st) 172338, ¶ 55. In authoring its opinion, the court made clear that its ruling would have been different had Dr. Preston's report been in existence at the time the plaintiff disclosed him as the controlled expert. Id. ¶ 41. The holding in Dameron reiterates the importance of contemplating who to disclose and when to disclose an expert in medical malpractice cases.

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