A MIDWESTERN LAW FIRM

MEDICOLEGAL MONITOR

A REVIEW OF MEDICAL LIABILITY AND HEALTHCARE ISSUES

HEYL ROYSTER

Second Quarter 2015

A Word From the Practice Group Chair

Our lead article by Mark Hansen and Melissa Schoenbein underscores the need to focus on the issues of the case early in medical malpractice litigation. It is difficult to focus until you have seen all of the medical records that pertain to a given transaction. You also need to dictate or draft during your review of those documents, which facts determined treatment choices and which facts in those records show what contributed to the outcome complained of. This is an effort that requires a significant time investment, but one that can avoid embarrassment at trial and likewise avoid reversal of a good trial verdict. I have asked some of my physician clients to make a list of all of their opinions in the case so that we can be certain they are all published to our opponents before trial starts.

Matt Thompson's article is about why Illinois courts will no longer protect ER physicians from responding to medical emergencies in medical wards outside the ER. Unfortunately, it now has much broader application since an even more recent decision by the Illinois Appellate Court, Third District, wherein they found a specialist on call established a physician-patient relationship and therefore became liable to the patient when the consultant took a call from an ICU doctor who provided the consultant with some of the lab values and obtained suggestions on patient care from that consultant. The curbside consult is not yet dead but if you are being questioned by anyone while on call, the odds are that you have legal responsibility for any answer you give. Arousing from a deep sleep to answer the phone has never been more dangerous.

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

Appellate Court Issues Harsh Reminder that Physicians Must Supplement Prior Deposition Testimony with Any New Opinions Before Trial

By Mark Hansen and Melissa Schoenbein
mhansen@heylroyster.com
mschoenbein@heylroyster.com

"I'm not exactly sure what caused her death," Victor Eloy, M.D., the deceased patient's gastroenterologist, told the jury. *Fakes v. Eloy*, 2014 IL App (4th) 121100, ¶ 28.

This trial testimony of the gastroenterologist in a medical malpractice suit against him directly contradicted his deposition testimony in which he stated that to a reasonable degree of medical certainty the patient's bleeding esophageal varices caused her death. In *Fakes v. Eloy*, the court held the defendant's inconsistent testimony violated Supreme Court Rule 213, the rule requiring controlled expert witnesses to seasonably supplement their responses with new information.

(continued on next page)

In this issue . . .

Factual Background

On November 26, 2004, a 63-year-old named Laura Alice Powell, the decedent, sought emergency medical care after she vomited a considerable amount of blood. The next day, the decedent died as a result of a condition known as bleeding esophageal varices, which is bleeding of the veins in her esophagus. In November 2006, her estate filed a medical malpractice suit against Dr. Eloy and Internal Medicine Subspecialty Associates, Ltd.

Fakes called Dr. Eloy to testify as an adverse witness at trial. This occurs in almost every medical malpractice trial. Dr. Eloy is board-certified in internal medicine and gastroenterology. He testified that on November 22, 2004, five days before the decedent died, he examined her by performing an upper endoscopy and colonoscopy. Dr. Eloy's pre-procedural diagnosis was that the decedent suffered from "cirrhosis of the liver secondary to hepatitis C." In Dr. Eloy's procedural report, he diagnosed the decedent with a "grade II of IV esophageal varices."

When the decedent arrived at the emergency room ("ER") on November 26, 2004, the ER personnel notified Dr. Eloy. At about 11:30 p.m., Dr. Eloy examined the decedent. Dr. Eloy opined the decedent's esophageal varices bled earlier but "had stopped bleeding by the time he examined her because decedent was not (1) vomiting blood, (2) passing blood clots through the rectum, or (3) experiencing 'dark tarry stools,' which were symptoms of such a condition." Dr. Eloy did not perform an upper endoscopy on the decedent. Dr. Eloy did admit performing that procedure would have revealed if she was bleeding or not. Dr. Eloy transferred her to the ICU and scheduled an endoscopic evaluation with variceal banding for 10:30 a.m. the next morning. In his report, Dr. Eloy partly diagnosed the decedent with "gastrointestinal bleeding suspect secondary to esophageal varices." Dr. Eloy was notified two times throughout the evening with new developments, with the latest one at 5:30 a.m. Dr. Eloy did not arrive until sometime after the decedent had died. His final diagnosis of the decedent's condition was a "massive upper gastrointestinal bleed presumed secondary to esophageal varices."

Conflicting Testimony

At Dr. Eloy's discovery deposition, he testified to a reasonable degree of medical certainty that he believed the esophageal varices bleed caused the decedent's death. Yet, at trial the plaintiff's attorney asked Dr. Eloy: "What is your opinion as to a reasonable degree of medical certainty as to the cause of [decedent's] death?" Dr. Eloy answered, "I'm not exactly sure what caused her death. I believe that variceal bleed had something to do with it. But the clinical presentation, something happened to decedent around two o'clock in the morning that changed the clinical picture entirely." Dr. Eloy went on to testify, "I think it contributed to her death, but not the cause of her death." Dr. Eloy testified to the jury he did not offer any other cause of death in his deposition. Fakes objected to Dr. Eloy's cause of death testimony at trial on the grounds it violated the disclosure requirements of Rule 213. The objection was overruled.

In March 2012, the jury returned a verdict in favor of Dr. Eloy, and an appeal followed. The appellate court addressed several issues, including whether Dr. Eloy violated Rule 213. Rule 213 mandates that a physician (or any other expert) may not testify to an opinion at trial unless that opinion has already been disclosed by a sworn interrogatory answer, an expert opinion disclosure or deposition testimony.

Email Newsletter Available

Would you like to receive the Heyl Royster *Medicolegal Monitor* Newsletter electronically? Just send an e-mail request to newsletters@heylroyster.com. You'll be able to enjoy the most environmentally-friendly way of receiving our professional liability and healthcare news! (Please note: the electronic version will arrive as a link to a pdf document.)

Defense Verdict Reversed

On appeal, the court first noted three undisputed facts: (1) Dr. Eloy was a controlled expert witness, (2) he opined at his discovery deposition that to a reasonable degree of medical certainty, the decedent's death was caused by her bleeding esophageal varices, and (3) Dr. Eloy did not seasonably supplement or amend his prior deposition testimony as required by Rule 213(i). Fakes stated in her brief to the court that her claim was confined to Dr. Eloy's statement that he was "not exactly sure what caused her death." In response, Dr. Eloy contended Fakes focused only on four lines of the deposition, and that his opinion did not "preclude additional opinions as to other contributing factors." Dr. Eloy reasoned it was "nothing more than extrapolation or a logical corollary of the opinions which he had already given, including that which was contained in the medical literature produced by him, and provided to Fakes at the time of his deposition."

Defendants and their attorneys must be vigilant to update their opinion disclosures if a physician develops new or different opinions . . . .

The appellate court found Fakes was entitled to rely on Dr. Eloy's deposition testimony. The court reasoned that if Dr. Eloy believed other factors contributed to decedent's death, he had a duty to comply with the strict requirements of Rule 213(i) by supplementing his deposition. Therefore, the court held Dr. Eloy's undisclosed testimony was improper under Rule 213.

The appellate court next turned to the appropriate remedy for the violation of Rule 213. The court noted three remedies are available, depending on the severity of the violation. "[T]he opposing party may move to (1) strike only the portion of the testimony that violates the rule, (2) strike the witness's entire testimony and bar the witness from testifying further, or (3) have a mistrial declared."

Here, the appellate court noted the cause of the decedent's death was critical in determining whether Dr. Eloy complied with the appropriate standard of care. Further, Fakes had the absolute right to expect Dr. Eloy to provide the same unqualified opinion testimony at trial as he did in his deposition, that to a reasonable degree of medical certainty, the decedent's death was caused by bleeding esophageal varices. Instead, the court noted, Dr. Eloy provided several variances of this at trial. The court rejected Dr. Eloy's argument that these versions were only an extension of his disclosed opinion.

The court concluded this type of violation, one where an undisclosed opinion on a critical issue is offered before the trier of fact, warranted a reversal of the trial court's decision. Therefore, the court reversed the jury's verdict in favor of the defendants and ordered a new trial.

Conclusion

Defendants and their attorneys must be vigilant to update their opinion disclosures if a physician develops new or different opinions than those contained in disclosures or expressed at depositions. Where cause of death is a critical issue to an action, physicians are required to seasonably supplement their testimony. *Fakes v. Eloy* is a reminder to all parties of the requirement to supplement their disclosures as necessary as well as of the unfortunate consequences if rules governing disclosure of testimony and opinions are violated.

Mark Hansen has extensive experience in complex injury litigation, with an emphasis in medical malpractice, professional liability, and product liability. Mark regularly defends medical providers in professional liability actions involving significant injury or death.

Melissa Schoenbein focuses her practice in the area of civil litigation, including medical malpractice and professional liability.

Illinois Supreme Court Rules Against Emergency Room Physicians in Interpretation of Good Samaritan Act

By Matthew Thompson
mthompson@heylroyster.com

In *Home Star Bank and Financial Services v. Emergency Care and Health Organization, Ltd.*, 2014 IL 115526, the Illinois Supreme Court significantly narrowed the scope of immunity afforded to physicians under the Good Samaritan Act. Additionally, the Court's decision is likely to impact emergency medicine physician contracts and hospital policies, and lead to future litigation regarding those entitled to immunity under the Act.

Factual Background

The defendant was an emergency room physician employed by another defendant, Emergency Care and Health Organization, Ltd. (ECHO), which had an exclusive emergency room services agreement with the hospital. ECHO paid the physician hourly for his work in the ER. The physician's employment contract required that he abide by hospital policies, one of which required an ER physician to respond to code blue alerts in the hospital and direct the code blue team.

During his shift, the physician responded to a code blue for the plaintiff, an inpatient on another floor that the physician had never met or treated. The physician attempted to intubate the plaintiff, but the plaintiff ultimately suffered permanent brain damage, resulting in a negligence action being filed against the physician and ECHO.

The patient was not billed for the physician's services for responding to the code blue. Therefore, based upon prior interpretations of the Good Samaritan Act, the physician and ECHO moved for summary judgment because no bill was generated for the physician services. The circuit court granted summary judgment.

The Good Samaritan Act

Immunity under the Act was originally limited to physicians providing emergency care without fee "at the scene of a motor vehicle accident or in case of nuclear attack." The legislature, however, amended the original Act multiple times, and it currently reads:

> Physicians; exemption from civil liability for emergency care. Any person licensed under the Medical Practice Act of 1987 or any person licensed to practice the treatment of human ailments in any other state or territory of the United States who, in good faith, provides emergency care without fee to a person, shall not, as a result of his or her acts or omissions, except willful or wanton misconduct on the part of the person, in providing the care, be liable for civil damages. 745 ILCS 49/25.

In *Home Star Bank*, the Court set out to resolve whether the term "without fee" is ambiguous, and if so, how that term should be interpreted.

"Without Fee" Determined to be Ambiguous

The Supreme Court noted that, prior to 2012, the appellate court believed the term "without fee" was unambiguous, and therefore, interpreted it narrowly. However, the Supreme Court found the term "without fee" is "clearly capable of being understood by reasonable persons in more than one way." The Supreme Court relied upon various dictionary definitions of "fee," pointing out that some of those definitions included not only a charge, but also compensation or payment being received. As a result, the Court found the term "fee" broad enough to include a patient being billed or a physician being compensated.

Illinois Supreme Court Defines "Without Fee" More Broadly

Because the Illinois Supreme Court determined that "without fee" was ambiguous, it set out to define the term in a manner consistent with legislative intent. First, the Court pointed to dictionaries defining "Good Samaritan" and "good-samaritan law" to include those who voluntarily or gratuitously provide help or aid. Second, the Court cited the Act's statement of legislative purpose, which twice refers to those who "volunteer" their time. Third, the Court referred to legislative history, which purported to show that those voting for the Act intended immunity to extend to physicians voluntarily rendering care outside of an office or hospital setting, and not those receiving compensation. Fourth, the Court was persuaded by a decision from the California Court of Appeals, which found the purpose of a Good Samaritan law is to encourage physicians to act when they have no duty to do so, and to protect those providing services outside their typical area of expertise or working environment. Finally, the Court found that "the narrow definition previously adopted by the appellate court thwarts legislative intent," and one of the presumptions of statutory construction is that the legislature does not intend absurd, unjust or inconvenient results. The Court determined that the narrow definition could unjustly oppress the poor, because "[i]f the . . . doctor provided negligent emergency care to an indigent uninsured patient and the hospital did not bill the patient because it would not be able to collect payment, the doctor would be immune under the Act." For these reasons, the Court held that a "fee" exists when the patient is billed for services or the physician is compensated.

In addition to the fact that the physician was compensated for the time spent providing the treatment at issue, the Court noted that he was required by contract and hospital policy to respond to code blue alerts as part of his ordinary duties. The Court's focus on the requirement of employment to respond to code blue alerts may be essential to preserving the defense for a traditional Good Samaritan, who happens to be unlucky enough to be receiving compensation at the time of rendering care. For instance, a physician associated with a metropolitan medical group or hospital may have an agreement to travel to a rural location one day per week to see patients, and receive compensation for travel time. If that physician comes upon a car accident while traveling to or from the rural location, surely the physician is entitled to immunity for any care he provides. Similarly, if a salaried physician employed by a hospital provides emergency care while walking across the street to pick up lunch or while on the sidewalk smoking, that physician too should be entitled to immunity under the Act.

Conclusion

The Illinois Supreme Court's opinion in *Home Star Bank* significantly limits the scope of immunity afforded under the Good Samaritan Act. The decision is likely to impact emergency room physician contracts and hospital code blue policies. Emergency room physicians, their employers, and insurers, will undoubtedly have serious concerns about responding to code blue alerts, most often for patients the physician has never seen. Hospitals, on the other hand, may need experienced emergency medicine physicians responding to code blue alerts in certain situations, but hospitals may be forced to abandon that practice in light of the Illinois Supreme Court's decision. Furthermore, future clarification of the decision is almost certain, because physicians will be called upon to act as true Good Samaritans in situations where they are coincidentally being compensated. This decision should not preclude immunity in those situations, but a strict reading of the opinion may lead some courts to rule in such a manner.

Matt Thompson concentrates his practice in the area of civil litigation, including the defense of cases in the areas of medical malpractice and professional liability, products liability, and commercial litigation. Matt regularly defends physicians, nurses, hospitals and clinics in professional liability claims involving significant injury or death. He has also defended complex product liability actions involving catastrophic injury. He has successfully assisted in the defense of several medical malpractice actions to jury verdict. Matt also represents clients and their interests at depositions, and regularly argues significant motions before the trial courts, including summary judgment, dismissal, discovery, and pre-trial *in limine* motions.

Medical Malpractice Defense and Healthcare Attorneys

Peoria

Nathan Bach
Robert Bennett
Nicholas Bertschy
Roger Clayton
William Covey
Mark Hansen
Lisa LaConte
Rex Linder
Tyler Pratt
Greg Rastatter
David Sinn
Deb Stegall
Matthew Thompson

Chicago

Andrew Roth
Maura Yusof

Edwardsville

Ann Barron
Dominique de Vastey
Gregory Flatt
Keith Hill
Richard Hunsaker
Sara Ingram
Barry Noeltner

Rockford

Jana Brady
Michael Denning
Douglas Pomatto
Scott Salemi
Kathleen Stockwell
Brent Swanson
Charles Timmerwilke

Springfield

Declan Binninger
Adrian Harless
John Hoelzer
Michael Kokal
Theresa Powell
Tyler Robinson

Urbana

Keith Fruehling
Renee Monfort
Cheri Stuart, R.N.
Edward Wagner
Dan Wurl
Jay Znaniecki, D.D.S.

For More Information

If you have questions about this newsletter, please contact:

David R. Sinn
Heyl, Royster, Voelker & Allen
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
PO 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

Urbana, Illinois 61803
102 East Main Street
Suite 300
P.O. Box 129
Phone (217) 344-0060; Fax (217) 344-9295

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

HEYL ROYSTER

Below is a sampling of our practice groups highlighting a partner who practices in that area – For more information, please visit our website **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
Theresa Powell
tpowell@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
Craig Young
cyoung@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

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

Edwardsville
105 W. Vandalia St.
Mark Twain Plaza III
Suite 100
PO Box 467
Edwardsville, IL 62025
618.656.4646

Rockford
120 West State St.
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

Urbana
102 E. Main St.
Suite 300
PO Box 129
Urbana, IL 61803
217.344.0060