Medical Litigation Newsletter

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In This Issue

2011 Year in Review: Significant Medical Malpractice Decisions

By: Thomas R. Mulroy, III

2011 was a year of many important and interesting case decisions affecting the law of medical malpractice. In this article, we will focus primarily on those cases involving medical malpractice fact patterns, as opposed to purely procedural decisions having an incidental effect upon medical malpractice cases.

A number of cases were decided this year on issues of personal jurisdiction, statutes of limitations, discovery and the Medical Studies Act, the concept of legal duty, issues that can arise during trial (hearsay, failure of board certification exams, and "personal practice" testimony), and jury instructions.

Personal Jurisdiction

The Illinois Appellate Courts considered whether and to what extent certain actions were sufficient to satisfy the "minimum contacts" test of the Illinois long-arm jurisdiction statute.

In the case of *Unterreiner v. Pernikoff,* 2011 WL 5842783 (5th Dist. 2011), the court held that a follow-up phone call from a Missouri physician to the plaintiff did not satisfy the minimum contacts necessary for an Illinois court to impose personal jurisdiction over the physician. In that case, the plaintiff had received medical treatment from her physicians in Missouri. A lab result prompted a telephone call from the Missouri physician to the plaintiff. A phone conversation took place between the plaintiff in Madison County, Illinois and the defendant in Missouri. During this telephone call, the defendant advised the plaintiff to take more of her medication based upon the lab results. The Fifth District ruled that this telephone call in and of itself was not sufficient to establish the minimum contacts necessary for personal jurisdiction.

In contrast, the First District in *McNally v. Morrison,* 408 Ill.App.3d 248 (1st Dist. 2011) found that an Ohio expert witness had submitted to the jurisdiction of an Illinois court in connection with his agreement to perform expert witness consulting services for the plaintiff and her attorneys. In *McNally,* the plaintiff and her attorneys sued their retained expert witness for breach of contract, consumer fraud, and professional negligence after the expert contradicted his expert report at his deposition and

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We are pleased to report the following:

Dawn Sallerson and ***Kathryn E. Crossley*** of Hinshaw's Belleville, Illinois office defended a surgeon in a case in which plaintiff patient claimed that a bile leak following a laparoscopic cholecystectomy resulted from the surgeon's failure to control the cystic duct. The patient also alleged that the surgeon left town on a scheduled vacation following the patient's surgical procedure without securing an appropriate surgical alternate. Defense counsel responded that: (1) the medical evidence contradicted the patient's medical theory, and (2) as the only surgeon in the county at the time of the procedure, the surgeon did not have the luxury of securing another surgeon to care for his patients while he was out of town, but he did fully inform the patient of the foregoing facts and directed her to report to the emergency room should any issues arise. The jury returned a verdict for the surgeon in less than one hour.

Paul C. Estes and ***Jesse A. Placher*** of Hinshaw's Peoria, Illinois office defended an urgent care physician and others in a medical malpractice case stemming from the death of a three-year-old boy. The child was treated at a prompt-care facility on seven different occasions in 2003 for complaints of cough, ear and upper respiratory infections. The physician saw the child on January 12, June 18 and July 9, 2003. On each visit, symptomatic treatment was provided with an instruction to follow-up with the primary care physician, which did not occur until July 14, 2003. On July 23, 2003, the child arrested and was discovered to have non-Hodgkin's lymphoma. The child remained comatose and died on August 18, 2003. Plaintiff sought $1,275,000. The jury rendered a verdict for all defendants after deliberating for two hours.

Paul C. Estes and ***Patricia J. Naylor*** of Hinshaw's Peoria, Illinois office defended an orthopedic surgeon in a case involving a 73-year-old male who had sustained a hip fracture. The surgeon operated, utilizing the Gamma nail construct, but a failure of the set screw was later discovered. Due to risks associated with the patient's fresh DVT and anticoagulation status, the surgeon elected to reinsert the lag screw and place bone cement on the side of the femur to act as a restrictor cap to prevent remigration. This use of bone cement is not supported by any literature. The patient sustained sepsis and later transferred care to another orthopedic group and required two additional surgeries, including right total hip arthroplasty. Plaintiff argued that the surgeon violated the standard of care. The jury returned a verdict for the surgeon after deliberating for one hour.

testified that in fact the defendant physician had not deviated from the standard of care. The expert had attempted to argue that the only contract in existence was between the plaintiff and TASA (an expert witness referral company). The court rejected this argument and found the minimum contacts sufficient to impose personal jurisdiction over the Ohio expert.

Statute of Limitations

The First District of Illinois analyzed two cases under the "discovery rule," which tolls the commencement of the limitations period until the potential plaintiff possesses sufficient information concerning his or her injury and its cause "to put a reasonable person on notice to make further inquiries."

In *Hanks v. Cotler,* 2011 WL 4578603 (1st Dist. 2011) the court confirmed that a plaintiff need not know the full extent of their injuries before the Statute of Limitations begins to run. This was a fairly complicated fact pattern involving a large number of causes of action pleaded against many different defendants. In this case, the court explained that the allegations as set forth in the case were insufficient to constitute an "affirmative act or representation calculated to conceal [the] cause of action" and thus did not satisfy the fraudulent concealment exception found in 735 ILCS 5/13-215. Allegations regarding a diagnosis or failure to diagnose the nature and gravity of an illness in and of itself is insufficient to establish fraudulent concealment.

In *Mitsias v. I-Flow Corporation,* 2011 WL 4469514 (1st Dist. 2011) the First District ruled that a fact issue existed precluding summary judgment. In this case, the plaintiff had experienced severe pain in her shoulder and was diagnosed with the destruction of cartilage in her shoulder joint following surgery. During discovery in the suit against the surgeon, a physician had testified that a pain pump, used during the procedure, had recently been shown to be highly associated with cartilage loss. The testimony seemed to suggest that this cause and effect relationship was not known to the medical community during the two years following the patient's injury. Thus, the issue as framed by the court was how the discovery rule would be applied when the plaintiff is aware that an injury might have been wrongfully caused by one source, but is unaware that the injury might have been caused by another source and, in fact, could not be aware of that source because the causal link was as yet unknown to science and/or medical research. Since the court believed that a plaintiff should not be held to a "standard of knowing the inherently unknowable," the court ruled that there was a question of fact as to when the link between pain pumps and cartilage loss became known to medical science.

In one of the more shocking fact patterns of the year, the Illinois Supreme Court ruled in *Kaufman v. Jersey Community Hospital,* 241 Ill.2d 194 (2011), that the physician's conduct in licking a patient's breasts while under anesthesia did not "arise out of patient care" and thus the one year limitations period applicable to civil actions against the public entity applied instead of the two year limitations period "for actions involving patient care."

Discovery—622 Affidavits and the Medical Studies Act

In *Zangara v. Advocate Christ Medical Center,* 951 N.E.2d 1143 (1st Dist. 2011) the court ruled that the scope of permissible discovery prior to filing a 622 affidavit is not confined to the plaintiff's personal medical records, but is subject to the discretion of the trial court. In *Zangara,* the plaintiff's expert required certain information from the hospital prior to signing off on the health consultant report certifying the cause of action. Specifically, the expert wanted to know the MRSA infection rates experienced by patients at Christ Hospital during the nine months prior to the plaintiff's MRSA infection. In refusing to disclose this information, the hospital asserted the Medical Studies Act.

In rejecting this argument, the court ruled that the number of MRSA infections is merely an "incident of fact," there was no showing that the MRSA data had been generated specifically for use of a peer review committee, and finally, the plaintiffs only requested the number of infections between the relevant dates; the plaintiffs did not request documents or analyses generated specifically for the use of a committee to reduce morbidity or mortality or for improving patient care.

Legal Duty

The First District of Illinois addressed two cases involving the legal concept of "duty" in medical cases.

In *Hernandez v. Schering Corporation,* 2011 WL 4580587 (1st Dist. 2011) the plaintiff brought a products liability and negligence case against a drug manufacturer and against a nurse who gave an educational class on the drug, sponsored by the manufacturer. In this case, the plaintiff had been prescribed a drug by his physician, a drug which allegedly caused permanent vision loss. The basis of the plaintiff's complaint was that he had never been advised that vision loss was a potential side effect of the medication. However, the product insert clearly identified vision loss as a rare, but recognized side effect of the drug. Pursuant to the learned intermediary doctrine, the duty of a drug manufacturer to provide warnings runs only to the patient's physician, not the patient.

The patient attempted to sidestep this doctrine by arguing that the drug manufacturer and the nurse had "voluntarily undertaken a duty" to the plaintiff separate and apart from the learned intermediary doctrine by offering the classes instructing patients on the side effects of that drug (apparently there was no discussion in these classes of blindness as a side effect). The First District rejected this argument and ruled that since the physician testified that he recognized and accepted the responsibility for warning the plaintiff about the side effect of the drug in question and that the product insert clearly identified the potential side effect of the drug in question, the learned intermediary doctrine mandated that no duty from the drug manufacturer to the plaintiff existed. Notably, however, the court pointed out that this case did not involve any direct to consumer advertising; there was no evidence that the plaintiff had ever heard of this drug until his physician had prescribed it for him.

Also analyzing the question of "duty" is *Doe v. Planned Parenthood Chicago Area,* 956 N.E.2d 564 (1st Dist. 2011). In this case, the plaintiff sued Planned Parenthood following her abortion alleging wrongful death, negligent infliction of emotional distress, and violations of the Consumer Fraud Act. The basis of these claims was the allegation that Planned Parenthood had a duty to inform the patient that an abortion procedure "would terminate the life of a second patient, a living human being as a matter of biological fact." The court noted that while it was true there was a common law duty by doctors to inform patients of the foreseeable risks and results of a surgical procedure before obtaining consent to the proposed procedure, the defendant was not required to provide a different "scientific, moral, or philosophical viewpoint" on the issue of when life begins. The court strongly rejected the plaintiff's claim that whether or not a "duty" existed was a question of fact for a jury.

Trial Issues—Hearsay, Failure of Board Exams, and "Personal Practice" Testimony

The courts this year handed down a number of decisions which may be significant in controlling the introduction of evidence at trial. Perhaps two of the most important cases decided this year are *Serrano v. Rotman,* 406 Ill.App.3d 900 (1st Dist. 2011) and *Guski v. Raja,* 409 Ill.App.3d 686 (1st Dist. 2011). In the defense of a medical malpractice case, the medical records themselves are of paramount importance, especially in "failure to diagnose" cases. Often, the medical record does not support the presence of signs or symptoms which would lead to the diagnosis the plaintiff now contends should have been made.

Many medical malpractice defense attorneys have experienced the situation where the plaintiff or the plaintiff's family members wish to testify that they observed the plaintiff making certain statements or complaints, which, if true, would make the diagnosis more likely.

The First District has once again confirmed that such statements are inadmissible hearsay. For example, the controversy in *Serrano* surrounded whether or not the surgeon had been notified by the patient that she required medication for a blood clotting deficiency. The plaintiff wanted to testify that she had a pre-operative conversation with the anesthesiologist, who in turn had told the plaintiff that he would speak with the surgeon regarding the

medication. The plaintiff also wanted to testify that when the anesthesiologist returned, the anesthesiologist told her he had spoken with the surgeon and that the medication would be taken into surgery in case it was needed.

The court rejected this testimony as hearsay, and also rejected the plaintiff's argument that the "state of mind" exception should apply, finding that the state of mind exception applies only to the state of mind of the *declarant* and not the state of mind of someone other than the declarant. The plaintiff was attempting to offer the anesthesiologist's statements to show the *surgeon's* state of mind which was not an appropriate application of the state of mind exception.

The plaintiffs also tried to use the "state of mind" exception in the *Guski* case, alleging that the emergency room physician had failed to diagnose an impending subarachnoid hemorrhage. The medical records and the physician's testimony supported the absence of any complaints of severe headache at the time the patient presented to the emergency room. At trial, the plaintiff attempted to call the patient's ex-wife and the patient's son to testify that on the night the patient went to the emergency room he was complaining of a headache. The court rejected the argument that this testimony was relevant to show state of mind, finding that the plaintiff was simply attempting to use this testimony to bolster the plaintiff's theory of the case–that the plaintiff was suffering from severe headaches, a sign/indicator of a subarachnoid hemorrhage. "State of mind" was not relevant to any issue in the case.

Importantly, the *Guski* case also found that the trial court properly exercised its discretion in excluding criticisms of "charting deficiencies," finding that there was no expert testimony linking the alleged "charting deficiencies" to any injury. While *Guski* also involved an issue of board certification exam failure on the part of the defendant, the court found that the plaintiffs had waived the issue by failing to raise the issue at the time of trial.

In the case of *Babikian v. Mruz,* 2011 WL 3048175 although the First District found that defendants had waived the issue regarding the admissibility of board certification failure for purposes of appeal, the court addressed it anyway. The court clarified that when a defendant testifies as to the standard of care, his lack of board certification or failing portions of the board certification exam are admissible. This would seem to be true even, as under the facts of the *Babikian* case, when the plaintiff "entices" the defendant to testify as to standard of care by calling him as an adverse witness in his case in chief and posing the question to him at that time.

Finally, the First District addressed one fact pattern involving "personal practice" testimony in Illinois. *Taylor v. County of Cook,* 2011 WL 3112852 (1st Dist. 2011) Medical malpractice defense lawyers have all been made aware of the law regarding "personal practice" in Illinois. The old rule seemed to be that an expert witness's "personal practice" was not relevant in a medical malpractice trial. The case of *Walski v. Tisenga,* 72 Ill.2d 249 (1978) was often cited by defendants in support of this argument. However, the *Walski* case simply held that a plaintiff could not use an expert's "personal practice" as the *sole* basis for a standard of care violation against the defendant who had used a different practice. As the plaintiff argued, however, the law has been changed (or clarified) to indicate that an expert can be cross-examined regarding his personal practices if they deviate from what the expert contends was the appropriate standard of care in the case before the jury, relying upon *Galena v. Watson,* 354 Ill.App.3d 515 (2005) and *Schmitz v. Binette,* 368 Ill.App.3d 447 (2006).

The First District agreed with the rule permitting cross-examination of an expert with his "personal practice" in a general sense, but ruled that in this particular case, the expert could not be cross-examined with his "personal practice" testimony, because the court found that there was no inconsistency between what the expert indicated his personal practice was as compared to what he was testifying regarding the standard of care.

Jury Instructions

Another issue addressed in the *Taylor* case was jury instructions. With regard to IPI Civil 1995 No. 3.01 (which is now found in 1.01 "preliminary cautionary instructions") the court made the following change to the proposed IPI instruction:

> In evaluating the credibility of a witness, you may consider that witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement ~~or act~~ by the witness concerning an issue important to the case.[1]

The basis for rejecting that particular sentence was the court's ruling that the defense expert's testimony was not inconsistent with his prior conduct. The expert had testified that multiple treatment options exist within the standard of care but that the expert preferred one over others—the same testimony the court regarded as insufficient under the "personal practice" basis for cross-examination.

[1] The actual language struck from the prior IPI Civil 1995 3.01 were the words "or acted in a manner inconsistent."

With regard to IPI 3.03, the court made the following edit:

> Whether a party is insured or not insured has no bearing on any issue that you must decide. You must refrain from any inference, speculation, or discussion about insurance.
>
> If you find for the plaintiff, you shall not speculate about or consider any possible sources of benefits the plaintiff may have received or might receive. ~~After you have returned your verdict, the court will make whatever adjustments are necessary in this regard.~~

In striking through the final sentence, the *Taylor* trial court declared that it would not give the instruction in its original form because "it's a lie." The reviewing court ruled that the trial court had not abused its discretion in modifying the plaintiff's proposed IPI Civil No. 3.03 instruction.

The Illinois Supreme Court in the case of *Studt v. Sherman Health Systems,* 951 N.E.2d (2011) analyzed the question of whether IPI No. 105.01 correctly stated Illinois law on the standard of care in professional negligence cases.

The defendant argued that the instruction did not accurately state Illinois law in three ways: (1) the instruction insinuates that the evidence a jury may consider in determining the standard of care in a professional negligence case is identical to the evidence a jury may consider in an institutional negligence case; (2) the 2006 version is incomplete because it contains no reference to a professional's knowledge, skill, and care (using the term "reasonably careful"); and (3) the instruction implies that the jury may use its "personal knowledge" to determine the standard of care, as opposed to relying solely on the expert testimony presented in the trial.

The court ruled the jury instruction is improper insofar as it places expert testimony on par with bylaws, rules, regulations, policies and procedures and therefore does not accurately state Illinois law when it comes to the type of proof required for an institutional negligence claim versus a professional negligence claim. The court also agreed that the 2006 professional negligence IPI was incomplete because it contained no reference to the "knowledge, skill, and care of the professional" and therefore did not accurately state Illinois law as to the standard of care applicable in professional negligence actions. Finally, the court rejected the argument that the jury would be confused by the sentence indicating that the law does not say how a reasonably careful professional would act under the circumstances and "that is for the jurors to decide." Notably, despite the error contained in the instruction, the hospital was unable to secure a reversal of the verdict because it was a general verdict in the case involving both institutional negligence as well as professional negligence; the hospital submitted no special interrogatory which would have clarified upon what theory the jury was returning its verdict.

Medical Practice Noncompete Agreements After the *Reliance Fire Equipment* Case

By: Michael J. Leech

In determining whether to enforce the agreement of an employee not to compete with the employer following termination of employment, Illinois courts have long required a showing by the former employer of a legitimate business interest (other than simply excluding a potential competitor) requiring the protection afforded by the non-compete agreement. Historically, Illinois courts have examined two legitimate employer interests for this purpose: either "near-permanent" customer relationships or confidential business information.

In *Mohanty v. St. John Heart Clinic,* S.C., 225 Ill.2d 52 (2006), the Illinois Supreme Court appeared to hold that when such agreements involve physicians in the practice of medicine, it may be safely presumed without more that there was such a legitimate employer interest. Most commentators interpreted the decision to mean that in cases involving physicians' practices, the doctor-patient relationship was necessarily within the scope of a "near-permanent" customer relationship and a reasonable restriction would be upheld. But subsequently, two Illinois appellate decisions concluded that the "legitimate business interest" requirement had been invented by the appellate courts, was never endorsed by the Illinois Supreme Court and had no place in Illinois law. On December 1, 2011, in *Reliance Fire Equipment Co v. Arredondo,* No. 11871, the Illinois Supreme Court put that idea to rest, holding that it is a requirement of Illinois law to show such an interest.

The significance of the *Reliance Fire Equipment Co.* case goes well beyond that finding. For 36 years, agreements in which Illinois employees agreed to refrain from competitive activity following termination of employment have been judged under standards established by decisions of the Illinois appellate court without meaningful oversight and review by the Illinois Supreme Court. This was the first Illinois Supreme Court decision since the early 1970's providing any detailed discussion about what business interests could support enforcement of a non-compete agreement. The issue had dominated litigation over these agreements throughout that period. What the court said will engender much uncertainty and medical professionals are

fortunate to have the fairly recent Illinois Supreme Court precedent of *Mohanty* to reduce the uncertainty.

Reliance Fire Equipment Co. began by laying down a three-part test for enforcement of Illinois post-employment restrictions on competition: (1) the restriction must be no greater than required to protect a legitimate business interest, (2) the restriction must not impose an undue hardship on the employee and (3) the restriction must not harm the public interest. The court rejected the idea that only the protection of confidential information and near-permanent customer relationships could qualify as a "legitimate business interest." It did not indicate what other interests might be sufficient. The decision also rejected out of hand the longstanding approach to evaluating whether the employer has such a legitimate business interest. Replacing the painstaking analysis of a myriad of specific factors, an approach that governed the field for decades, is a "totality of the circumstances" test. The court's willingness to consider interests beyond than "near-permanent" customer relationships and confidential information is a hint that perhaps Illinois will be more open to upholding non-compete agreements in the future.

But no one knows for sure how the "totality of the circumstances" approach will play out in actual cases. While the court did not reject all of the case law developed on this issue in the past 36 years, it has devalued that precedent. Now the decisions should be viewed as "nonconclusive examples" of what is permitted or prohibited, as distinguished from "inflexible rules." Thus, all prior appellate court cases are, at best, limited to their specific facts. Which ones will ultimately be found to have been wrongly decided is impossible to know at this point. The court's citation of a requirement that the scope of the non-compete agreement be only what is needed to protect the employer's interest and that it not impose a hardship on the employee suggests that it may contemplate a shift in emphasis away from examining whether the employer has an legitimate interest and towards considering whether the restriction is sufficiently limited in what it prohibits.

There are conclusions in two narrow areas that are suggested by the language in the decision. It has historically been necessary for an employer to show actual use of confidential information by the former employee to enforce a non-compete agreement based on that interest. The court accurately recounted this requirement in reviewing the history, but left that requirement out of what it had to say about non-compete agreements based on confidential information going forward. This could mean that the court does not think that a showing of use of confidential information is required.

There has been controversy in recent years over the enforceability of agreements that require departing employees to refrain from recruiting their former co-workers for a period of time after termination. A federal district court noted some years back that neither of the grounds to support a non-compete agreement—near-permanent customer relationships and confidential information—was protected by such an agreement. This decision opens the door to allowing employers to argue that their interest in a stable workforce might be sufficient to support this kind of agreement.

What Should Be Done Now?

If the employee in question is *not* a medical professional, a legal review of the agreement is in order. Illinois law disallows most agreements that are too broad in what they cover, from either a line of work, time or geographical perspective. So it pays to be limited in what is prohibited. One approach that has been effective in recent years has been to prohibit the former employee only from doing business with or serving those patients or customers to whom the former employee was introduced to as a result of working for the employer. As noted above, consideration may also be given to short-term limits on recruiting employees the former employee met as a result of working for the employer for some period of time, perhaps six months or a year.

If the employee is a medical professional engaged to practice medicine, these suggestions are not so critical, but are still worth considering. The restriction in *Mohanty* was one that limited the doctor from practicing medicine/treating patients within a defined geographical radius of the former employer's place of business. So long as the distance is consistent with the locations of the residences of the patients of the former employer that the doctor treated, this should still be a safe approach if the duration of the limitation is just one year or two. If the non-compete agreement is in conjunction with the sale of a practice or a partnership arrangement, and the doctor whose work will be restricted will receive a significant payout for the sale or redemption of the partnership interest, then more expansive restrictions may be permitted, because in these situations Illinois law has long been more willing to enforce non-compete agreements with less scrutiny.