



Alerts

Trial Court Erred in Refusing Non-Pattern Loss of Chance Instruction

December 17, 2020

Health Care Alert

This alert was featured in Hinshaw's Annual Guide to Illinois Medical Malpractice Decisions: 2020 Edition

Issues

Must a physician obtain informed consent to discharge? Is the long-form proximate cause instruction sufficient in "loss of chance" theory cases?

Jill M. Bailey, Individually and as Independent Representative of the Estate of Jill J. Milton-Hampton, Deceased v. Mercy Hospital and Medical Center, Emergency Medicine Physicians of Chicago, LLC, et al., 2020 IL App (1st) 182702

Case Summary

A 42-year-old woman died following an alleged failure of emergency department (ED) providers to timely diagnose and treat her for sepsis or toxic shock syndrome due to a retained tampon. Defendants' theory was that she died of an unrelated condition, acute viral myocarditis. At trial, the evidence established that the patient declined a recommended admission to the hospital, but also that the ED physician failed to advise her about suspected sepsis or any life-threatening condition at discharge. Plaintiff tendered the pattern informed consent instruction (IPI Civil (2011) No. 105.07.01), but the trial court refused it. Plaintiff also tendered a non-pattern jury instruction on the loss of chance doctrine, which the trial court similarly denied. The jury returned a verdict for defendants and Plaintiff appealed in part from the trial court's denial of her tendered instructions.

On appeal, defendants argued that pattern informed consent instruction applies only to obtaining informed consent to perform a test or procedure, as opposed claims involving a physician's failure to advise about the risks of a medical condition at discharge. In overruling the trial court's decision, the appellate court reasoned that the jury should have been instructed on informed consent as plaintiff's theory was that the patient had been insufficiently advised about the material risks of leaving the hospital and therefore could not give informed consent prior to being discharged.

The appellate court also concluded that Plaintiff was entitled to a jury instruction on "loss of chance," because plaintiff's experts testified that patients have better outcomes if sepsis is treated early with antibiotics and that—to a reasonable degree of medical certainty—each hour of delay increases the risk of death by 7 percent. They also testified that it was probably more true than not that the patient would have survived with earlier treatment. The appellate court acknowledged that the trial court's refusal to read Plaintiff's non-pattern instruction of "loss of chance," and instead to read the long-form proximate cause instruction (IPI Civil (2011) No. 15.01), was in line with several appellate court decisions, it instead decided that the long-form proximate cause instruction was insufficient to instruct the jury in loss of chance cases. Notably, the appellate court stated that "if the trial court properly instructs the jury about the loss of chance theory, the theory will be properly before the jury, and the jury will likely give it more consideration." The *Bailey* court ultimately concluded that the trial court erred in refusing Plaintiff's non-pattern instruction, which read:

If you decided or if you find that plaintiff has proven that a negligent delay in the diagnosis and treatment of sepsis in Jill Milton-Hampton lessened the effectiveness of the medical services which she received, you may consider such



delay one of the proximate causes of her claims injuries or death.

Takeaway

This ruling confirms a jury can be instructed on informed consent claim in an alleged negligent discharge case and that non-pattern jury instructions can be used to inform the jury about the loss of chance doctrine theory of liability.

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