

Medical Malpractice - FAQ's

Answers to the most common questions we are asked when first meeting with physicians in medical malpractice claims

By: Robert C. Seibel , Seibel & Eckenrode, PC., Attorneys at Law

Q My office is in St. Louis County, and I never treated this patient in the City of St. Louis. How can this case be filed in the city?

Missouri's venue statutes can often be used to obtain City venue, even if the medical care took place outside the City limits. The consensus of the Plaintiffs' lawyers is that the City is a more hospitable venue for their clients' claims, as compared to neighboring counties. Unusual venue situations typically arise in cases with multiple Defendants. If only one Defendant "resides" in the City, the case can proceed in the City. This is true for corporations and individuals. For instance, if a corporation's registered agent is located in the City, venue in the City may be proper. If one of the Defendants does not reside in Missouri, there is a loophole of sorts in the venue statutes which allows a suit against a nonresident Defendant to be brought in any Missouri Court. Procedure then allows additional Defendants to be named to the existing suit. Once venue is properly established against one Defendant, venue remains proper even if Defendants added to the suit later have no connection to the City. Recent Court decisions involving County hospitals affiliated with a City-based parent corporation are not subject to City venue on that

basis alone. Finally, the Courts do not allow sham claims solely to obtain City venue, although it is difficult to successfully make this argument. In sum, we raise venue defenses when we can, but often end up defending claims in the City which have virtually no connection whatsoever to the City.

Q Since Plaintiff's counsel has not filed an affidavit, will my case be dismissed?

Perhaps, but probably not. In Missouri, the Plaintiffs' lawyer is required to file an affidavit within ninety (90) days of filing suit which states that an expert competent to testify has written a report stating that there is a reasonable basis to proceed with the claim. Courts have the ability to extend the ninety-(90) day requirement, and often do. Courts do not automatically review their cases to determine whether the statutory affidavit has been filed; it takes a motion on our part to raise the issue with the Court if Plaintiffs' counsel has not filed an affidavit within ninety (90) days. The remedy, however, is only a temporary dismissal of the Plaintiffs' claims, i.e. a dismissal without prejudice. Such a dismissal gives the Plaintiffs the absolute right under Missouri procedure to refile the claims within one year. While Plaintiffs' lawyers may use the affidavit requirement to allow the Courts to dismiss a suit which, for any number of reasons, Plaintiffs' counsel is reluctant to dismiss it on their own, there should be mini-

mal expectations on the part of a physician named in medical malpractice case that the affidavit requirement will yield an early dismissal of the lawsuit.

Q How long will it take for my case to get to trial?

This varies from Court to Court, but typically averages from eighteen (18) to twenty-four (24) months. From a statistical standpoint, medical malpractice cases are considered complex cases, and thus deserve more time to prepare for trial. Despite the differences between the pace of an urban docket compared to a rural docket, our experience is that the amount of time to trial is fairly consistent.

“Though this varies from court to court, a typical medical malpractice case takes from eighteen to twenty-four months to go to trial. Medical malpractice cases are considered complex cases, and thus deserve more time to prepare for trial.”

Q Who is the expert who will testify against me?

Early in the suit, we usually do not know the identity of the Plaintiffs’ testifying expert(s). Our standard practice is to submit interrogatories (written questions which Plaintiffs are required to answer under oath) to Plaintiffs asking for the identity of all experts. Typically, Plaintiffs defer disclosing their expert(s) until the depositions of the parties are completed, which can take up to a year. In those cases where the Court issues a scheduling order, the Court usually does not require expert(s)’ disclosures until the completion of these depositions. As such even though the Plaintiff will be required to eventually produce an expert, it is very unlikely that the identity of that expert will be known early in the process.

Seibel & Eckenrode is a five lawyer firm based in Clayton, MO concentrating on the defense of physicians in medical malpractice cases.

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Expert Not Needed For Med-Mal Std. Of Care Problem Was Obvious To ‘Average Layperson’

By KENNETH C. JONES

Where an 83-year-old woman went into respiratory crisis and died after undergoing a standard “barium swallow” test, her daughter could sue the hospital for wrongful death even without expert testimony on the standard of care, the Missouri Court of Appeals’ Western District has ruled.

This was because the average layperson could tell — without testimony from an expert — that something went wrong.

“We believe that the average non-physician layperson knows that when

the condition of a patient is altered unexpectedly during a medical procedure, a medical provider must determine the status of the patient and the cause of the alteration in order to know whether the matter involves an emerging threat to the life or condition of the patient,” wrote Judge James M. Smart Jr. for the court.

A directed verdict was reversed in *Seippel-Cress v. Lackamp, et al.*, MLW No. 26488, issued on May 23.

‘ B l a t a n t C a s e ’
“I applaud the Western District for this insightful opinion,” said Paul J. Passanante of St. Louis, whose practice includes plaintiffs medical malpractice.

“The court held that when a health care provider, as a result of something it did, recognized that a patient’s condition was deteriorating and did nothing to evaluate or treat the patient but instead discharged her, expert testimony is not required to establish negligence,” Passananta said.

“It is truly a matter of common sense, and the Western District did the right thing by reversing a directed verdict in such a blatant case of medical negligence.”

‘Provocative Issue’

But Robert C. Seibel, a St. Louis defense attorney, was critical of the decision. “My hope is that this decision is ultimately limited to its specific facts and that the court did not intend to relax the requirement for expert testimony to make a submissible medical malpractice claim.

“The court is clearly correct in holding that the plaintiff failed to introduce sufficient expert testimony to establish a prima facie case of medical negligence against the defendants,” Seibel said. “The provocative issue in the court’s decision is its reversal of the trial court’s directed verdict for the defendants on the theory that the medical issues were matters of common knowledge, and could be submitted without expert testimony.

“To me, that is a stretch. I sincerely doubt that many of us would feel comfortable stepping into a hospital’s radiology department and performing a barium swallow, much less taking it upon ourselves to properly evaluate a patient’s condition following such a procedure.

“To put these issues to a jury without the guidance of expert testimony on the standards of care is, at least in my view, unfair to a trained medical professional,” Seibel said.

The defendants’ attorney, D. Bruce Keplinger of Overland Park, Kan.,

said, “We got a directed verdict because the standard of care was not defined during the expert’s testimony, which left the jury to speculate whether there was a breach or not.

“The court of appeals really sidestepped that issue because it said the standard of care was within the ken of the average layperson.

“But ordinary laypeople don’t perform barium swallow tests,” Keplinger said.

“I’m also disappointed that after we very meticulously pointed out where the plaintiff put a number of ‘facts’ into her brief that weren’t in the record, the court accepted two of these ‘facts’ and based its decision on them.

“It’s very frustrating - these ‘facts’ were made up out of whole cloth.”

The plaintiff’s attorney, Ronald M. Sokol of St. Joseph, said, “The opinion reaffirms that in med-mal cases there are certain circumstances - granted, they are limited - that are within the general knowledge of the jury, and you don’t need an expert to explain them.”

Barium Swallow

In June 1993, 83-year-old Louise Seippel of St. Joseph was having difficulty swallowing solid foods. In fact, over the previous several months her weight had dropped to 70 pounds.

So her daughter Patricia SeippelCress and nephew Earl Seippel took her to Heartland Hospital West for testing.

At the radiology department, a barium swallow test was conducted by Phyllis Wiederholt, a speech pathologist, under the supervision of radiologist Dr. Robert

Lackamp. The procedure calls for the patient to swallow food or liquid in which barium has been dissolved while his or her esophagus is viewed with a fluoroscope.

Before the test Wiederholt found Mrs. Seippel to be alert, talking, smiling and cooperative, having no trouble breathing and expressing no complaints.

Mrs. Seippel was first given barium water, and no obvious problems were observed. Wiederholt then gave her applesauce containing the barium, to observe how she managed with a thicker medium.

She had difficulty with the thicker substance, holding it in the back of her throat, and aspirated - inhaled into her trachea and lungs - a small amount of the applesauce. She became tired and there was a noticeable pooling of the applesauce in her throat.

Wiederholt noticed a “gargly” sound and gave Mrs. Seippel water, which helped wash it down into the esophagus. Wiederholt noticed that the epiglottis ceased to function as Mrs. Seippel grew more fatigued - she opened her mouth and some of the material drained out.

The test was then terminated. Wiederholt, Dr. Lackamp and another hospital employee helped Mrs. Seippel onto a gurney. Dr. Lackamp contacted Mrs. Seippel’s regular physician to discuss whether Mrs. Seippel should be admitted to the hospital. Mrs. Seippel’s physician allowed Dr. Lackamp to decide whether to refer her to the emergency room or to send her home, and Dr. Lackamp decided to send her home.

Wiederholt brought Mrs. Seippel, still on a gurney, out of radiology where Mrs. Seippel’s daughter was waiting. Wiederholt accompanied Mrs. Seippel and her daughter to the hospital exit, and with the help of some ambulance attendants laid Mrs. Seippel into the car on her back.

No Instructions

Neither Wiederholt nor anyone else gave any instructions to Mrs. Seippel’s daughter or nephew. According to the daughter, Mrs. Seippel did not say anything at all on the way home, was not responsive to questions, and seemed to be breathing with shallow breaths.

At home, the family used a wheelchair to bring Mrs. Seippel into the house. When they got into the house, Mrs. Seippel’s head fell back and she did not seem to be breathing. Mrs. Seippel’s daughter gave her mother pulmonary resuscitation and someone dialed 911. An ambulance arrived shortly thereafter and took Mrs. Seippel to the emergency room of the hospital, where she was pronounced dead.

The daughter filed a wrongful death case against the hospital, Dr. Lackamp, and another physician. At trial, the plaintiff’s expert, Dr. Tuteur, testified that “if an appropriate evaluation and management occurred following the termination of the modified barium procedure, it is my opinion with reasonable medical certainty that her health...it would be reasonable to assume that she could have returned to her baseline health status.”

He also said that if the evaluation and therapy had been initiated “promptly and appropriately,” the consequences of the adverse event “would have been blunted and her death would have been delayed with reasonable

medical certainty,” and also testified with reasonable medical certainty that Mrs. Seippel’s death was directly related to the barium swallow procedure.

At the close of plaintiff’s case, the defendants moved for a directed verdict, contending that Dr. Tuteur had not defined a legal standard of care but simply used terms such as “a careful practitioner,” “norms of the profession,” “appropriate care,” and “substandard health care” — he never used as a reference point “that degree of skill and learning ordinarily used under the same or similar circumstances by the members of defendant’s profession.

The trial court granted the motion, and the plaintiff appealed.

Expert Testimony

Judge Smart acknowledged that “in the great majority of malpractice cases a submissible case may only be made by expert medical testimony.” But he also noted, quoting a 1959 case, that “where the conduct in question does not involve skill or technique in an area where knowledge of such is a peculiar possession of the profession and does involve a matter which any layman (or court) could know, then such ‘professional’ testimony is not necessary.

Smart referred to a 1971 case in which the Supreme Court held that a lack of expert testimony required dismissal of a medical malpractice case. But he also noted that the court “suggested...that there are cases in which the common knowledge of lay persons is enough to decide some negligence cases when it stated: ‘This is not the kind of case in which the lack of skill and care is so apparent as to be within the comprehension of lay jurors, requiring only common knowledge and experience to understand and judge without the guidance of professional testimony....’”

And in another case the court of appeals said, “Negligence amounting to malpractice can be proved by circumstantial evidence if that evidence, because of its character and circumstances, permits the trier of facts to draw rebuttable inferences based upon common knowledge or experience of nonprofessional or lay persons.

According to another case, the “exception to the requirement of proof by expert testimony from members of the medical profession in a medical malpractice case occurs when the act of negligence relied on involves a matter which is within the knowledge of laymen and is not within the exclusive knowledge of members of the medical profession.

“This exception, however, is tightly circumscribed in order to guard against the danger of permitting lay jurors to establish arbitrary standards

relative to matters beyond their common experience and knowledge and to decide crucial issues upon nothing more than speculation, conjecture and surmise.”

Turning to the Seipell case, Smart said, “We note, first of all, that the trial court was correct in ruling that plaintiff failed to establish that the barium swallow test was negligently performed. The expert testimony failed to show that the test was not conducted in accordance with the legal standard of care.”

But Smart agreed with the plaintiff’s argument that expert testimony was not needed.

“We believe that the average non-physician layperson knows that when the condition of a patient is altered unexpectedly during a medical procedure, a medical provider must determine the status of the patient and the cause of the alteration in order to know whether the matter involves an emerging threat to the life or condition of the patient,” he said.

So Obvious

“We believe that this is so obviously a responsibility of medical providers that it cannot be questioned. Therefore, to the extent that plaintiff’s evidence showed that Mrs. Seippel became unusually fatigued and uncommunicative, could not continue the test, and had to be placed on a gurney, there was a duty to find out why, and to find out whether she was at risk for an adverse event or was already experiencing a problem requiring attention.

“The evidence indicates that defendants did not check Mrs. Seippel’s blood pressure or pulse, listen to her lung sounds, or engage in any other evaluative procedures.

“We do not mean to say that the defendants in this case cannot produce medical evidence outside the awareness of lay persons which might show that under the specific circumstances of this case there was no need to monitor Mrs. Seippel’s vital signs or evaluate her condition,” Smart said.

“It is also possible that defendants could present medical evidence tending to show that such monitoring would have been to no avail. Thus, we do not say that defendants do not have defenses, we simply say that, on the face of the basic facts proved by plaintiff together with the causation testimony of Dr. Tuteur, a prima facie case was presented.

“Lay persons know that when there is an unexpected and unusual change in the condition of the patient which gives evidence that the patient is having significant difficulty, the medical provider cannot send that person

home, as though everything were normal, without attempting to determine what is wrong with that patient.

“Plaintiff had pleaded that it was negligence for the defendants to fail to ‘recognize the nature and extent of injury which [Mrs. Seippell suffered as a result of the aspiration,’ and there was evidence of at least some aspiration while she was in their care. There was also evidence that her epiglottis ceased to function properly as she became more tired. Plaintiff offered evidence that defendants failed to evaluate Mrs. Seippell’s condition and to determine why she tolerated the test so poorly.

“A *prima facie* case of negligence was created by the basic facts in light of the common knowledge and experience of laypersons,” Smart concluded, reversing the judgment.

*(The full text of the Western District’s opinion in Seippell-Cress v. Lackamp, et al., MLW No. 26488, is available from Missouri Lawyers Weekly - 14 pages.
Call (800) 685-2147.*