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• MEDICAL MALPRACTICE DEFENSE IN KANSAS AND MISSOURI •

LEGAL UPDATE

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Recent Verdicts and Opinions in Kansas and Missouri

Verdicts

Plaintiff's verdict in St. Louis City. A jury in St. Louis awarded $760,000 to the family of a woman who died after undergoing back surgery at St. Louis University Hospital. Plaintiffs submitted their claim under the theories of failure to timely give a blood transfusion and failure to obtain a timely surgical consult to repair a blood vessel. Last pretrial demand: $580,000. Last pretrial offer: $150,000 (withdrawn). Damages: $10,000 past economic, $600,000 past non-economic, and $150,000 future non-economic. *Watson v. Tenet Health Systems*, Case No. 22052-10050, Circuit Court of St. Louis City, Missouri (June 20, 2008).

Defense verdict in St. Louis City. A jury in St. Louis City returned a defense verdict in favor of a neurosurgeon who performed a cervical diskectomy and fusion. Plaintiffs, the surviving spouse and daughter of the patient, claimed that cardiac risk factors necessitated a pre-surgery cardiology consult. Defense argued that the patient had no significant cardiac risk factors that would warrant such a consult, and that a work-up would likely have been negative in any event. Last pretrial demand: $400,000. *Forbis v. Grubb*, Case No. 0622-CC05004, Circuit Court of St. Louis City, Missouri (July 28, 2008).

Defense verdict in St. Louis County. A jury in St. Louis County returned a defense verdict in favor of an OB-GYN and St. John's Mercy Medical Center where a mother claimed that a 43-minute delay in delivery caused her child to be born with spastic quadriplegic cerebral palsy. Last pretrial offer: unknown. Last pretrial demand: $6.9 million. Damages claimed: $18 million medical expenses and life care plan. *Stuck v. St. John's Mercy Medical Center*, Case No. 06CC-002094, Circuit Court of St. Louis County, Missouri (Sept. 26, 2008).

Defense verdict in Clay County. On November 3, 2008, a jury in Clay County found for the defendant doctors in a case where the plaintiff, who had a diabetic foot ulcer, claimed that a delay in amputating his toe led to a worsening infection, which ultimately led to amputation of his leg at the knee. Defendants argued that the patient had a long history of chronic diabetic foot ulcers which caused the necessary amputations, and that the surgeries were done appropriately. Damages claimed: $75,000 to $125,000 past medical expense, $155,000 to $231,000 future medical expense, and non-economic damages. *Barber v. Hall*, Case No. 07CV104002789CC, Circuit Court of Clay County, Missouri (Nov. 3, 2008).

Defense verdict in Johnson County, Kansas. A Johnson County, Kansas jury found in favor of the defendant doctors on November 10, 2008. Plaintiff sued her neurosurgeon, attending physician and radiologist, claiming that a delay in diagnosing and treating a compression lesion on her thoracic spine caused paralysis. Defendants argued that plaintiff's neurologic deficits were the result of a staph infection and ischemic changes causing a lack of blood supply to her spinal cord, which could not be treated surgically. Last pretrial demand: $200,000 from neurosurgeon and $990,000 each from attending and radiologist. Last pretrial offer: none. Damages claimed: $488,000 past medical expense, $1.2 to $1.8 million future medical expenses, and non-economic loss. *Khadavi v. Tenny*, Case No. 06CV1580, District Court of Johnson County, Kansas (Nov. 10, 2008).

Kansas Opinions

Informed consent. A medical malpractice plaintiff cannot make an "informed consent" case without proof of a causal connection between the alleged non-disclosure and her injuries. In *Rojas v. Barker*, 2008 WL 4889641 (Kan. Ct. App. Nov. 14, 2008), the plaintiff sued her surgeon for negligently performing ventral hernia surgery and failure to obtain informed consent. The trial court granted partial summary judgment on the informed consent claim based upon failure to establish causation, and the jury rendered a defense verdict on the negligent surgery claim. The appellate court affirmed the trial court's summary judgment on the informed consent claim, finding that plaintiff's

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theory that the doctor "failed to inform her he would be leaving town the day after an elective surgery ... and [would] not be available to provide any follow-up care or treatment" failed to establish causation. The court noted that "a plaintiff proves causation in an informed consent case by showing (1) an objectively reasonable patient would have declined treatment had the patient been advised of a material risk or danger; (2) the patient was not advised of a material risk or danger; and (3) that risk or danger materialized, resulting in harm to the patient." Here, the plaintiff failed to show a causal relationship between the doctor's failure to divulge that he would be out of town for a period of time and the patient's injuries.

Missouri Opinions

Vicarious liability and indemnity. A doctor who is found to be vicariously liable for the fault of another doctor has a proper action in indemnity. The culpable doctor has a duty to indemnify the non-culpable but vicariously liable doctor for the damages assessed in a medical malpractice suit. A R.S.Mo. § 537.060 release of the culpable doctor does not release the culpable doctor's duty to indemnify the vicariously liable doctor. *Fast v. Marsten*, 2008 WL 3895973 (Mo. App. W.D. Aug. 26, 2008).

Improper verdict directing instruction. In a medical malpractice case, a verdict directing instruction is improper, and it is reversible error to submit the instruction, where it gives the jury a "roving commission" to make a finding that is not supported by the evidence. In *Edgerton v. Morrison*, 2008 WL 4595367 (Mo. App. S.D. Oct. 16, 2008), plaintiff claimed that a surgeon failed to diagnose and treat his unhealed sternum post cardiac bypass surgery. The verdict director offered by plaintiff and used by the trial court read that the verdict must be for plaintiff if the jury believes that the doctor "failed to diagnose and treat [patient's] unhealed sternum with *rigid fixation* on or after September 5, 1989..." The appellate court found that the terminology "rigid fixation" failed to track the plaintiff's expert's testimony or theory of the case, and constituted a prejudicial roving commission because the term was not specifically defined by the instructions or evidence offered at trial.

Savings statute. The one-year savings statute begins to run on the date the voluntary stipulation of dismissal is filed, not on the date the order of dismissal is entered. The savings statute applicable to medical malpractice actions, R.S.Mo. § 516.230, provides that a new lawsuit may be commenced "within one year after such nonsuit [is] suffered." Under Missouri Supreme Court Rule 67.02, a voluntary dismissal constitutes a nonsuit because it allows a plaintiff to dismiss his case without order of the court at any time prior to the introduction of evidence at trial. The appellate court upheld the trial court's dismissal of the plaintiff's second lawsuit as barred by the statute of limitations (plaintiff was 10-days late). *Rickner v. Golfinopoulos*, 2008 WL 4755764 (Mo. App. W.D. Oct. 31, 2008).

Value of medical special damages

As an update to our October 21st newsletter and the topic of whether a plaintiff can submit medical expenses of the "amount billed" versus "amount paid" under R.S.Mo. § 490.715.5(2), Judge Hoven of the Franklin County Circuit Court reduced the amount of medical expenses that plaintiff could submit to the jury from $34,104, the amount billed, to $10,491, the amount paid to satisfy the obligation. *Gratzer v. Winchester*, Case No. 06AB-CC00306, Circuit Court of Franklin County, Missouri (Sept. 10, 2008).

Arbitration clauses in LTC admission agreements

The Missouri Supreme Court is considering the issue of whether pre-dispute arbitration clauses in nursing home admission agreements are enforceable. On October 29 and November 5, 2008, the Court heard oral arguments in *Lawrence v. Beverly Manor* and *Ward v. National Health Care Corp.*, respectively. Amicus briefs were filed by Missouri Association of Trial Attorneys for the plaintiffs, and the Missouri Chamber of Commerce for the defense. The Court will likely opine on the issues of whether pre-dispute arbitration clauses are enforceable *at all*, whether they are enforceable in a wrongful death setting, and who must be a signatory to effectively waive the right to a jury trial. We will provide an update after the Court issues its opinion. Audio files of the oral arguments, and the briefs in .pdf format, are available at: http://www.courts.mo.gov/page.asp?id=1977.

December 1, 2008

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** Brown & Ruprecht, PC would like to congratulate Stephen S. Brown and Matthew M. Merrill, co-chairs of the Medical Malpractice Litigation group, for being named "Super Lawyer" and "Rising Star," respectively, for Kansas and Missouri in 2008 by Law & Politics and the publishers of KC Magazine.*

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