IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

Maryland's highest court recently held that expert testimony establishing a non-party health care provider's negligence, to a reasonable degree of medical probability, is a mandatory prerequisite to establishing the so-called "empty chair" defense in a medical negligence action.

Expert Testimony Required to Establish the "Empty Chair" Defense in Medical Negligence Cases in Maryland

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In a case of first impression, the Maryland Court of Appeals held in *American Radiology Services v. Reiss*, that where a defendant in a medical negligence case asserts a defense theory relying on the negligence of a non-party health care provider as the cause of the plaintiff's alleged injury, expert testimony is required to establish the non-party's medical negligence and causation. *American Radiology Services, LLC, et al. v. Reiss*, 470 Md. 555, 236 A.3d 518 (Md. 2020). Thus, a defendant who pursues a so-called "empty chair" defense may do so only if the absent health care provider's negligence is supported by the same evidentiary standard that the plaintiff must satisfy in bringing the medical negligence claim against the defendant in the first instance.

In Maryland, as elsewhere, medical negligence must be established by expert testimony, except in those limited instances in which the defendant's deviation from the applicable standard of care is so obvious as to be within the common knowledge of the jury. *Id*. at 521[1]. In *Reiss*, argument of non-party physician negligence was introduced and the jury returned a defense verdict. The key question on appeal was whether evidence of non-party physician negligence had been properly admissible under the circumstances of the case.

Reiss arose from an alleged failure to diagnose and treat an enlarged lymph node. The plaintiff, Mr. Reiss, was diagnosed in 2011 with a cancerous kidney tumor accompanied by an enlarged lymph node. The tumor was surgically resected by his urologist, Dr. Davalos, who intentionally elected not to remove the lymph node because he determined that it was too close to the patient's inferior vena cava. Mr. Weiss's oncologist, Dr. DeLuca, concurred that the node could not be safely resected, and treated it medically. The node responded to treatment. Over the next four years, Dr. Deluca and another oncologist, Dr. Eugene Ahn, followed the status of the lymph node including by ordering a series of CT scans. A number of these scans were interpreted by radiologist, Dr. Bracey, who did not interpret the imaging as demonstrating lymphadenopathy but did raise questions about the diagnostic quality of the scans, which were performed without IV contrast dye. At least one scan was interpreted by another radiologist, Dr. Sung Lee Ahn, who likewise did not report lymphadenopathy. *Id*. at 522-23.

In 2015, CT imaging later confirmed by biopsy revealed that the lymph node had progressed and was both cancerous and inoperable. Mr. Reiss filed a medical malpractice action against Dr. Davalos and the radiologists, Drs. Bracey and Ahn, alleging that the lymph node could and should have been surgically removed before it became inoperable. Eventually, Mr. Reiss voluntarily dismissed his claim against Dr.

[1] All specific page citations to *Reiss* herein, are to the A.3d reporter.

Davalos, and he proceeded to trial only against the radiology defendants. *Id*. at 523.

All parties designated expert witnesses. The defendants disclosed experts who opined that they had neither violated the standard of care nor caused harm. Defendants also asserted within written discovery responses that Mr. Reiss's oncologists – who were not defendants in the case - had negligently caused his injuries. Defendants did not, however, include within their expert designations any disclosure that their experts would offer standard of care or causation opinions regarding the non-party physicians, although the disclosures did include a boilerplate sentence stating that defendants reserved the right to elicit opinions from plaintiff's expert witnesses. *Id*. at 523.

At trial, the Court did not permit defendants to cross-examine plaintiff's experts as to whether the non-party physicians had violated the standard of care and caused harm to Mr. Reiss. No expert testified that the non-party physicians committed malpractice. Defendants nonetheless argued in closing that the non-party physicians had been negligent and that their malpractice resulted in the avoidable progression of Mr. Reiss' cancerous lymph node to inoperable condition. The jury returned a verdict in the defendants' favor, finding that they had not breached the standard of care.

The intermediate appellate Court (the Court of Special Appeals) reversed the judgment of the trial court, finding that '"the radiologists could not generate a defense of non-party medical negligence without suitable expert testimony, to a reasonable degree of medical probability, that the non-party breached the standard of care."' *Id. at* 527 (quoting*, Reiss v. Am. Radiology Services, LLC*, 241 Md. App. 316, 211 A.3d 475 (2019)). The Court of Special Appeals expressed concern over the likelihood that the jury had been unduly influenced by defendants' assertions (unsupported by expert testimony to a reasonable degree of medical probability) of non-party physician negligence. *Id*.

Defendants appealed. The Maryland Court of Appeals granted *certiorari* and examined the following two questions:

1. In a medical negligence case, where a defendant denies liability and asserts negligence by a non-party physician as part of its defense, is expert testimony required to establish the non-party physician's negligence and that the negligence was a proximate cause of the harm?

2. If expert testimony is required to establish non-party medical negligence and the trial court erred in submitting the question of non-party medical negligence to the jury, was the error prejudicial?

For the reasons set forth below, we answer both questions in the affirmative.

Id. at 527–28.

In reviewing the applicable law, the Court of Appeals noted that existing Maryland law clearly recognized non-party medical negligence as relevant and admissible in medical malpractice cases (*Id.* at 529 (discussing cases)), but considered exactly *what standard* of proof of non-party negligence was required and, in that context, whether it mattered if the defendant had raised non-party negligence as an affirmative defense or only as part of a denial of the elements of negligence.

Ultimately, Maryland held that regardless of how it is asserted, evidence and argument of non-party medical negligence is permissible only where properly supported by expert testimony. The Court "agree[d] with the Court of Special Appeals that expert testimony is required to establish non-party medical negligence without regard to whether a defendant is raising the non-party medical negligence as an affirmative defense or in connection with a general denial of liability." *Id.* at 533. Finding persuasive the historical basis for the requirement of expert testimony in medical negligence cases as rooted in the notion that medical negligence and causation are beyond the common understanding a lay jury, the Court affirmed the intermediate appellate court, advancing this explanation:

> We hold that where a defendant elects to pursue a defense that includes non-party medical negligence, the defendant must produce the requisite expert testimony necessary to establish medical negligence and causation, unless the non-party's medical negligence is so obvious that ordinary laypersons can determine that it was a breach of the standard of care. We are not holding or requiring that the defendant must call his or her own expert to generate the issue to prove that a non-party physician or "the empty chair" was the negligent person. Consistent with our jurisprudence on the issue, assuming discovery rules are satisfied, the defendant may elicit expert standard of care testimony through cross-examination of plaintiff's expert, or may call an expert of his or her own, but the defendant is not required to call an expert of his or her own.

Id. at 534 (internal footnote citation omitted). Continuing, the Court confirmed that "produc[ing] the requisite expert testimony" means satisfying the familiar "reasonable degree of medical probability" standard. *Id.* at 535.

After so articulating its actual holdings, the Court then went on to examine the various arguments asserted by defense counsel as to how (a) the trial testimony of the testifying physicians had been sufficiently critical of the non-party physicians to establish their medical negligence, and (2) the introduction of argument of non-party negligence had been harmless error under the facts of the case. Both sets of arguments were rejected

by the intermediate appellate court and by the Court of Appeals, but those portions of the *Reiss* opinion help make the case an interesting read for trial practitioners in any jurisdiction.

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