Other Significant Medical Malpractice Cases Decided During the Past Year

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In addition to *Trattler v. Citron*[1] the appellate courts in Colorado decided other significant malpractice issues during the past year. These decisions included two supreme court decisions and two court of appeals decisions.

People v. Ramirez

Although the Colorado Supreme Court decision of *People v. Ramirez*[2] involved an underlying criminal case, it nevertheless addressed and decided evidentiary issues of great significance to malpractice cases regarding the admissibility of proffered expert opinion testimony that does not rise to the level of "reasonable medial probability" (or "reasonable medical certainty" in a criminal case). The query with regard to this issue was: although the opinion in and of itself cannot prove the proponent's case, why is it nevertheless not something that can't under the right circumstances be considered by the trier of fact to be taken into account with all the other evidence in determining whether its proponent has met his overall burden of proof? The answer given by the supreme court in *Ramirez* was that if the offered opinion testimony passes a proper C.R.E. 702 and 403 analysis by the trial judge, it should, and that prior law holding differently was "antiquated" and "not appropriate to deciding the admissibility of expert testimony under the Colorado Rules of Evidence [which is] the current standard."[3]

Ramirez involved the testimony of a certified pediatric nurse practitioner who had examined the alleged victim of sexual assault. She testified that the type of examination she conducted would reveal four possible findings:

> 1) "normal," which is the most common finding, 2) "non-specific," which could be a normal finding but also could be associated with sexual abuse, 3) suspicious," which "raises my index of suspicion" and is a finding that may well have been caused by sexual abuse but could have been caused by something else, and 4) "definitive," which is definite evidence of sexual abuse and is a very rare finding.[4]

Her findings in *Ramirez* rose to the level of number three, i.e., "suspicious," which she admitted, however, did not rise to a level of being based "on a reasonable degree of medical certainty."[5]

The trial court allowed the admission of the opinion over the defendant's objection, and upon conviction, the defendant appealed. The court of appeals in an unpublished decision, and based upon exiting precedent, reversed; ruling that the expert's opinion was inadmissible because it did not rise to the level of "a reasonable degree of medical certainty." On certiorari review, however the Colorado Supreme Court found differently; overruling in the process the 1990 Colorado Court of Appeals decision of *Songer v. Bowman*[6] and its own 1971 decision of *Daugaard v. People*,[7] which it determined had been based upon a "sufficiency of evidence [standard] rather than admissibility of expert testimony,"[8] as well as been based upon law which predated the Colorado Rules of Evidence, which is described as being "the modern standard for determining the admissibility of expert testimony."[9]

For those interested in the history of the phrases, *Ramirez* included an interesting discussion about the origin of the phrases "reasonable medical probability" and "reasonable medical certainty." It noted that in a law review article,[10] the author's research "suggests that the phrase[s] originated in Chicago some time between 1915 and 1930 and spread throughout other states due to adoption of models included in a best-selling manual on trial technique."[11] The author noted as well "that no consensus exists as to [their] meaning."[12]

Regardless, after making this determination that the rationale of *Songer* and *Daugaard* was outmoded and superseded by the rules of evidence; the court described the proper test for admissibility. It started with the C.R.E. 702 analysis described in *People v. Shreck*,[13] where the determination is whether the proffered testimony is "reliable," and "relevant." Reliability addresses a consideration of "whether the scientific principles underlying the testimony are reasonably reliable and

whether the expert is qualified to opine on such matters."[14] Although the proponent "'need not prove that the expert is undisputably correct or that the expert's theory is generally accepted in the scientific community. Instead, the [party] must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy Rule 702's reliability requirements.'"[15]

The court noted that the "relevancy" consideration, on the other hand, focuses on

> . . . whether the expert testimony would be useful to the fact finder. … Usefulness means that the proffered testimony will assist the fact finder to either understand other evidence or to determine a fact in issue. … Usefulness thus hinges on whether there is a logical relation between the proffered testimony and the factual issues involved in the case. … In determining whether the testimony would be helpful to the fact finder, the court should consider the elements of a particular claim, the nature and extent of that evidence in the case, the expertise of the proposed expert witness, the sufficiency and extent of the foundational evidence upon which the expert witness' is to be based, and the scope and content of the opinion itself.[16]

Further, after this C.R.E. 702 analysis occurs, the court noted as well, that the trial court

> must also apply its discretional authority under C.R.E. 403 to insure that the probative value of the evidence is not in some courts substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration is of undue delay, most of the time, or needless presentation of cumulative evidence.[17]

The court noted finally that "the standard of review" pertaining to the admissibility of such evidence is "highly differential," and thus not reversible by the appellate courts absent evidence that the trial court's exercise of discretion was manifestly erroneous.[18]

Morris v. Goodwin

Morris v. Goodwin[19] was a supreme court decision which reviewed the beneficial court of appeals decision of *Goodwin v. Morris*,[20] which held that C.R.S. § 13-21-101 requires the trial court to assess "pre-judgment interest on the amount of the **verdict of the jury**," and not on the amount reduced after application of the caps of the Health Care Availability Act (the "HCAA"). This was based upon the language of C.R.S. § 13-21-101, which states that when a plaintiff claims interest on damages "it is the duty of the court in entering judgment for the plaintiff in such action to add to the amount of **damages assessed by the verdict of the jury, or found by the court**, interest on such amount calculated at nine percent annually."[21]

The court of appeals had found this language to **not** be ambiguous and thus not in need of a legislative intent analysis. Although the defendant had argued that the words "or found by the court" permitted the court to award interest only in the amount ordered by the court after the application of the HCAA caps, the court of appeals disagreed and found the term "or found by the court" to apply only to a finding made by a judge during a bench trial. Thus, it reasoned that by its clear and unambiguous language, C.R.S. § 13-21-101(1) required the court to enter pre-judgment interest, i.e., interest accruing from the time the claim is filed until the time the judgment is satisfied (which is not limited by the HCAA caps),[22] on the amount of the **verdict**.

The court, however, disagreed and ruled that the phrase "or found by the court" could be subject to more than one interpretation. In its analysis it noted:

> For instance, as the court of appeals suggests, the phrase, "or found by the court," could refer to a finding made by a judge during a bench trial. However, nothing in the language of the statute suggests that the phrase, "or found by the court," should apply only when there has been no jury verdict. It is equally valid to interpret the phrase to refer to the court's assessment as to the amount of recoverable damages where, as here, the amount found by the jury is contrary to statutory law.[23]

After having found the language to have been subject to more than one reasonable interpretation, and thus "ambiguous," the supreme court engaged in statutory interpretation to determine that since the purpose of the pre-judgment interest statute was "to compensate a plaintiff separate for the time value of the award eventually obtained against the tortfeasor,"[24] the statutory scheme was intended only to award interest on the amount awarded for damages by the court in its final judgment. Thus, pre-judgment interest is awardable only on the amount awarded by the court to the plaintiff after application of the HCAA caps.

Hall v. Frankel

Hall v. Frankel[25] is a significant court of appeals decision written by Judge Roy that definitively addressed the important issue of whether and on what basis medical experts in one specialty can be allowed to testify about standards of practice applicable to other specialties. It addressed as well, the significant issue of whether and under what circumstances a physician can be held vicariously liable for the negligence of a "covering physician."

The case involved tragic consequences where the patient died from the effects of a "deep vein thrombosis" or "DVT," following surgery. The issue which arose in the trial is whether the treating pulmonologist and orthopedic surgeon adhered to proper standards for post-surgical management, where the DVT went unrecognized and undiagnosed, and soon resulted in the patient's

death. During the trial, the family utilized a standard of care expert regarding the proper recognition and care regarding DVT's, who was neither a pulmonologists nor an orthopedic surgeons. Both the defendant pulmonologist and the orthopedic surgeon objected to such testimony, arguing in essence that the family needed to call a pulmonologist with regard to their case against the pulmonologist, and an orthopedic surgeon with regard to their case against the orthopedic surgeon. The trial court, however, disagreed and overruled both their objections, reasoning that "the identification and treatment of blood clots in surgery are common in many branches of medicine, including hematology, pulmonology, and orthopedics," and thus allowed plaintiffs' witnesses "to testify to the standard of care to which any medical doctor would be held, regardless of whether the witness was a specialist and regardless of what his or her area of specialty, if any."[26] As set forth by the trial court in its reasoning:

> [M]y understanding is that when we look at these specialties, it's like the branching of a tree. There are certain things that they all have in common. There are certain basic medical notions that people know regardless of where they branched to. And if this is something that they all know, I'm probably going to let people who are in other specialties testify as long as the nature of their testimony is you need to know that because you're a doctor.[27]

Although this issue had seemingly already been addressed and ruled upon in *Melville v. Southward*,[28] it nevertheless was a frequent contention by defense counsel that an expert from one area of specialty was precluded from testifying as to what the standard of care was in another. Relying in large part on *Melville*, the court of appeals disagreed and affirmed the trial court's ruling allowing the testimony. As set forth in *Hall*, the lesson of *Melville* was that an expert could testify across specialties if *either* of two criteria were met:

> One, the expert has demonstrated, through skill, knowledge, training, or experience, a substantial familiarity with the defendant's specialty such that his or her opinion is as well informed as any other expert in the defendant's specialty. Or two, the expert has demonstrated that the standard of care for both specialties is substantially similar.[29] These criteria, i.e., "substantial familiarity" with the other specialty's standard, or a demonstration of "substantially similar standards" had been met in the trial. Thus, the trial court's decision to admit the opinions was affirmed.

The next issue addressed by *Hall* was important as well. It addressed the potential vicarious liability of one physician for the negligence of a "covering" physician. In *Hall*, the surgeon had delegated post-surgical care to a colleague. It was the colleague who gave the discharge order for the decedent which led to his untimely death two days later. The family alleged that the surgeon was the decedent's attending physician and, as such, was ultimately responsible for his care and treatment. This raised the important issue of whether a physician could be held vicariously liable for the negligence of such a "covering" physician. This was answered in the affirmative by the court of appeals, although it made clear that a demonstration of right to control the actions of the covering physician was essential for such a finding. Thus, although the court emphasized that "the relationship between an attending physician and a 'covering' physician is not, in and of itself, sufficient to establish an agency relationship from which vicarious liability can flow,"[30] where "the plaintiff can show a relationship between the two physicians such that the attending physician has the right to control the medical performance of the covering physician," vicarious liability can be found. [31]

Ochoa v. Vered

Ochoa v. Vered[32] was a court of appeals decision written by Judge Webb, which reaffirmed the viability of the "caption of the ship" doctrine in this state. It addressed, as well, the ability of a claimant to settle with and dismiss a claim against allegedly negligent nurses performing services in the operating room, without releasing his or her claims against the surgeon, who is the "captain of the ship," and thus vicariously responsible for the culpability of the released parties. Finally, it addressed the issue of the applicability of the doctrine of res ipsa loquitur in a captain of the ship setting, as well a reaffirmed the notion that in Colorado, res ipsa loquitur shifts the burden of proof, and not merely the burden of coming forward.

The facts in the case were reasonably simple and straight forward. In the course of an emergency caesarean section, a sponge was left in the plaintiff's abdomen, requiring another surgery a few days later. The nurses had reported to the surgeons that the sponges had been accurately counted. The patient thereafter brought suit against both the doctor and the nurses for malpractice. Prior to the trial, the plaintiff settled with the nurses and proceeded through with the trial against the surgeon. They tendered instructions which were used by the trial court, concerning the doctrines of captain of the ship as well as well as res ipsa loquitur. Both these instructions were utilized and at the conclusion of the trial, the jury rendered a substantial verdict against the surgeon. The surgeon appealed.

The surgeon's liability pertaining to the sponge count was based upon the captain of the ship doctrine: although the surgeon was not necessarily negligent in conducting the sponge count, he was responsible for the nurses who did conduct the sponge count.

At the outset, the surgeon contested the viability of the doctrine of the captain of the ship in the Colorado, referring the court to various out-of-state

cases that had rejected the doctrine "as inconsistent with increasing specialization in modern hospital procedures regarding division of responsibility."[33] The court rejected this argument, noted that other states **did** adhere to the doctrine, and noted further that the supreme court had confirmed the viability of the doctrine in the 1957 decision of *Beadles v. Metayka*[34] and that the court of appeals was bound by such determination, unless and until such issue was otherwise determined by the supreme court.

The court also rejected the surgeon's contention that the patient's dismissal of the nurses precluded the patient from pursuing her claim against the surgeon, because the negligence of the nurses was the foundation upon which the patient's claim against the surgeon was based. In rejecting such contention, the court noted that the settlement agreement stated that it "does not include claims against the remaining defendant, Eldad Vered, M.D."[35] Although Dr. Vered argued that releasing the primary tortfeasors, by law releases other tortfeasors whose liability is vicarious and dependant upon the capability of the released parties, and that the proper procedure for the plaintiff would have been for her to have negotiated a covenant not to sue with the nurses,[36] the court was not persuaded. Instead, the court, citing a Colorado U.S. District Court decision *Meyer v. Stern*[37] noted that it "perceive[d] no distinction between the release and the covenant for purposes of preserving a respondeat superior claim against the employer" - given that the settlement agreement "expressly reserved claims against the [physician.]"[38]

The argument concerning the application of the doctrine of *res ipsa loquitur* was significant as well. The surgeon argued that the jury should never have been instructed with regard to such, because, among other reasons, he was not in "exclusive control." The court of appeals found, however, that the control which is required as a prerequisite to the application of the captain of the ship doctrine was sufficient "control" to justify the instruction.

Further, and perhaps of greatest significance, the court of appeals refused to find error with the fact that the trial court had instructed the jury that the res ipsa loquitur doctrine required "the defendant to prove by preponderance of the evidence that he was not negligent." This is based upon the surgeon's argument that C.R.E. 301 states that "a presumption … does not shift to [the party against whom it is directed] the burden of proof." The court of appeals noted, however, that in *Stones Farm Supply, Inc. v. Deacon*,[39] the Colorado Supreme Court did, in fact, opine that res ipsa loquitur "requires the defendant to prove by preponderance of evidence that he was not negligent,"[40] and it is that concept that is incorporated into the applicable jury instruction.[41] The court reasoned at that point that "[g]iven this language, any tension between *Deacon* and Rule 301, must be resolved by the court."[42] This is good news for plaintiffs who bring surgical error cases, where the only effective and conscious witness to the operation, and indeed its official reporter by way of the operating report, is the physician accused of the malpractice.

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Endnotes

1 *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008).

2 *People v. Ramirez*, 155 P.3d 371 (Colo. 2007).

3 *Id*. at 374.

4 *Id*. at 373-4.

5 *Id*. at 372.

6 *Songer v. Bowman*, 804 P.2d 261 (Colo. App. 1990), *aff'd* 820 P.2d 1110 (Colo. 1991).

7 *Daugaard v. People*, 488 P.2d 1101 (Colo. 1971).

8 *Ramirez*, 155 P.3d at 372-3.

9 *Id*. at 372.

10 Jeff L. Lewin, *The Genesis and Evolution of Legal Uncertainty About "Reasonable Medical Certainty*," 57 MD. L. REV. 380 (1998).

11 *Ramirez*, 155 P.3d at 387, n. 6.

12 *Id*.

13 *People v. Shreck*, 22 P.3d 68 (Colo. 2001).

14 *Ramirez*, 155 P.3d at *Id*. at 380.

15 *Id*. at 379 (*quoting Mitchell v. Gencorp, Inc*., 165 F.3d 778, 781 (10th Cir. 1999)).

16 *Id*.

17 *Id*.

18 *Id*.

19 *Morris v. Goodwin*, 185 P.3d 777 (Colo. 2008).

20 *Goodwin v. Morris*, 159 P.3d 669 (Colo. App. 2006).

21 C.R.S. § 13-21-101(1) (emphasis added).

22 *See id*.

23 *Morris v. Goodwin*, 185 P.3d at 779-80.

24 *Id*. at 780.

25 *Hall v. Frankel*, 190 P.3d 852 (Colo. App. 2008).

26 *Id*. at 858.

27 *Id*.

28 *Melville v. Southward*, 791 P.2d 383 (Colo. 1990).

29 *Hall*, 190 P.3d at 859.

30 *Id*. at 860.

31 *Id*. at 861.

32 *Ochoa v. Vered*, 186 P.3d 107 (Colo. App. 2008).

33 *Id*. at 111.

34 *Beadles v. Metayka*, 311 P.2d 711 (1957).

35 *Ochoa*. 816 P.3d at 112.

36 *Cf. Dworak v. Olson Constr. Co*., 551 P.2d 198 (Colo. 1976).

37 *Meyer v. Stern*, 599 F. Supp. 295, 297 (D. Colo. 1984) (rejecting distinction between a covenant not to sue and a release with express provisions reserving claims for imposing vicarious liability under Colorado law).

38 *Ochoa*, 816 P.3d at 113.

39 *Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109, 1114, n. 10 (Colo. 1991).

40 *Ochoa*, 816 P.3d at 114.

41 *See* C.J.I.-CIV. 4th 9:17.

42 *See also id.* at Notes on Use.