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MISSOURI LAWYERS WEEKLY

November 30, 1998

News Story

Hospital Hit For \$2.7M After Doctor Failed To Do Surgery

Paraplegic Proved Agency Relationship

By Chris Brown

Could a 17-year-old woman injured in an auto accident prevail against a hospital after a neurosurgeon failed to perform emergency spinal surgery and left her a paraplegic?

A recent \$2.75 million verdict in Buchanan County Circuit Court indicates that the answer is yes.

Establishing that the neurosurgeon was the hospital's agent was essential to the claim, according to the woman's attorney, Grant L. Davis of Kansas City.

"A hospital is not ordinarily liable for the negligent acts of its doctors," said Davis. "We had to show an agency relationship existed between the neurosurgeon and hospital."

He proved the relationship with a number of facts, including that the hospital:

- recruited the neurosurgeon;
- paid his moving expenses;
- guaranteed him a minimum salary for the first two years after he moved; and
- later paid him \$150,000 a year just to be on call.

Nurses Also Negligent

In addition to her agency argument, the woman also claimed that the hospital was directly negligent because its nurses failed to notice her deteriorating condition and notify the doctor.

"Marianne Miller entered the hospital able to move her toes, feet and legs, and she still should have been able to move them when she left the hospital," said Davis.

"The neurosurgeon's plan was to delay surgery until the return of his partner from vacation. In the meantime, she was to be monitored for signs of neurological worsening. And if there was neurological worsening, he would perform emergency surgery.

"But the nurses didn't notice the clear signs of neurological worsening, and he didn't perform emergency surgery. And Marianne Miller is a paraplegic as a result."

The case was *Miller v. Heartland Regional Medical Center*, No. CV396-1770cc. A verdict report on the case appears on page five.

The Accident

Miller was injured in an auto accident as she was traveling to high school at 7:00 a.m. on Friday, Oct. 6, 1995. She was a backseat passenger in a friend's car. Her friend drove the car into a ditch, where it bottomed out violently. Miller felt back pain right away, and an ambulance was called to the scene.

"When the ambulance got there, she was able to move her toes, feet and legs, and had feeling in her toes, feet and legs. She was still able to move them and feel them when she got to the hospital," said Davis. "And at first, they didn't think there was anything wrong. They were just going to send her home."

But because Miller continued to complain of back pain, an X-ray was taken that revealed a fractured vertebra that was putting pressure on her spinal canal and interrupting the supply of blood and oxygen to the spinal cord.

"Her spinal cord had not been severed, but the flow of nutrients to the cord was being cut off by the pressure," said Davis. "And without the nutrients, her spinal cord below that point would eventually die. She needed to have the pressure on the cord relieved."

The attending neurosurgeon concluded that surgery was necessary to remove the offending bone. But he was not qualified to perform a crucial part of the surgery the insertion of rods and pins to stabilize the spine after the vertebra had been removed.

"You can't just take out a vertebra and leave the top half of the spine disconnected from the bottom half," said Davis. "That would create a catastrophic situation. They needed to stabilize her back with a 'Z-plate,' or rods and pins. And the problem was, this neurosurgeon wasn't capable of doing the stabilization."

The attending neurosurgeon decided to transfer the patient to a neurosurgeon in Kansas City for the surgery. But he was on vacation and would not be available until the following Thursday.

The attending neurosurgeon decided to schedule the operation for Monday with the partner and keep Miller at Heartland under observation. He left instructions with the nursing staff to watch her closely for signs of neurological worsening, and informed her family that he would perform emergency surgery if her condition deteriorated.

Monitored By Nurses

The neurosurgeon instructed the nurses to test Miller's neurological function on an hourly basis and inform him of any changes.

But although the records kept by the nursing staff reveal the steady worsening of Miller's neurological function over the weekend, the nurses failed to recognize the trend and did not inform the neurosurgeon.

"At 8:00 p.m. Friday night, she could no longer wiggle her toes," said Davis. "At 6:00 a.m. Saturday morning, she could no longer lift her legs."

"Her legs were getting weaker and her senses were getting duller. And that's what neurological deterioration is -- loss of strength and loss of sensation."

One reason the nurses failed to notice the changes in Miller's condition, according to Davis, is that they were unaware what her condition had been when she was admitted.

"On Friday night, a nurse wrote down her observation that Marianne couldn't wiggle her toes. But this nurse thought she could never wiggle her toes, so she didn't recognize it as a change.

"But if she had just looked six inches higher on the page, she would have seen it clearly written down that she could wiggle her toes earlier in the day."

Davis blames the neurosurgeon in part for the nurses' confusion about Miller's condition. "His 'baseline' description of her condition was lousy," said Davis.

But the emergency room description did indicate that Miller could move her toes, feet and legs, and had feeling in them.

Lack Of A System

Another problem was the lack of a systematic method for evaluating Miller's neurological function.

"They should have been testing the strength of her muscles every hour and recording numerical scores for each muscle group," said Davis. "They should have been checking every hour to see where she could feel and where she couldn't. If they had done this, they would have noticed the changes."

Davis insists on the importance of numerical measures for this kind of observation. "What they were doing instead is putting down what they saw in vague terms," he said. "One nurse who worked a 12-hour shift that weekend put down just 12 words at the beginning of the shift to describe her muscle strength and sensation, just a vague, cursory description. And then, each hour after that she just wrote, 'Neuro's unchanged.'"

At trial, two representatives of the hospital gave contradictory testimony in answer to Davis' questions about the lack of a system of measurement and reporting of neurological function. "One corporate designee said at trial that they teach the systematic tests that you're supposed to perform in these cases, and the way to record the scores," said Davis.

"But another supervising nurse said there's 'no standard' at the hospital for how it's supposed to be done that each nurse can do it her own way.

"But of course, if she had said anything else, she would have been admitting negligence on the part of the nurses, because the nurses were not performing the same systematic tests."

What To Report

The nurses and the neurosurgeon also had very different ideas about what the nurses were required to report. "The neurosurgeon left clear instructions that the nurses were supposed to inform him of any change," said Davis. "And the nurses all admitted that they knew this.

"But the nurses also said that it's a part of their job to decide when something is important enough to report. And they said that they didn't notice any changes that were that important."

The nurses were wrong, however, according to the testimony of one of Heartland's own emergency room physicians. He said that the changes in Miller's condition that were recorded but not noticed by the nurses indicated a medical emergency. "Their ER doctor said that the loss of her ability to wiggle her toes was 'worrisome,'" said Davis. "He said it showed that the loop of nerves was no longer intact, and that he would have considered it an emergency."

The nurses also took it upon themselves to record medical conclusions rather than raw data on Miller's chart. "A phrase like 'Neuro's unchanged' doesn't tell the doctor anything," said Davis. "He needs data from the tests so he can decide if her condition has changed in a significant way."

The neurosurgeon saw Miller at 9:00 a.m. on Saturday morning, more than 24 hours after her admission. But he only gave her a five-minute examination, and relied largely on the notes of the nurses for his conclusion that her condition was unchanged.

The notes did show that Miller's condition had worsened, including the report that she couldn't wiggle her toes. But the neurosurgeon admitted later that it was not his practice to test the toes to determine neurological function.

Two Bad Explanations

When the neurosurgeon examined Miller at 10:00 a.m. on Sunday, he noticed that she had lost strength in her legs and realized for the first time that her condition had worsened.

But in spite of his earlier assurances to the family that he would perform emergency surgery if her condition got worse, he decided to wait another 24 hours for the return of his partner.

"The admitting neurosurgeon gave two explanations bad explanations for his decision on Sunday not to perform surgery or transfer her where she could have the surgery. The first was that he could only do part of the surgery which had been true all along, and the second was that the transfer would take five hours.

"But what these explanations show is that she shouldn't have been kept there in the first place. And his decision

ignores that fact that hours do count in a situation like this. A delay of 12 hours or 24 hours could have a big effect on her condition."

The neurosurgeon also failed to inform Miller's family about her changed condition and his abandonment of the plan to perform emergency surgery. "He said he told the family, but both sets of her parents mother and step-father, and father and step-mother testified that he had not said anything to them.

"In fact, they all testified to the opposite that they had only been told that everything was going well. And they were very credible people three are teachers, and one is a principal.

"The doctor, the other hand, couldn't say when or where or even who he talked to. He said he was sure he told them because that's what he always does. He just wasn't persuasive."

Nor did the neurosurgeon treat Miller's condition like an emergency on Monday. "The didn't even do the surgery until Monday afternoon, during their regularly scheduled time in the OR."

The woman settled with the neurosurgeon for an undisclosed amount before trial.

Agent Of The Hospital

At trial, Davis argued that the hospital was negligent based on two theories of liability. The first was a direct negligence claim based on the nurses' negligence, and the second was a claim that the neurosurgeon was an agent of the hospital. The jury found the hospital liable on both claims.

Davis was able to prove the agency relationship.

"There were several things that were unique about the relationship of Heartland Hospital with this neurosurgeon," said Davis.

"Heartland wanted to maintain its status as a Level II Trauma Center so it wouldn't have to transfer out its neurological patients. But the requirements for a Level II Center include having a neurosurgeon on call 24 hours a day, 365 days a year.

"So Heartland went out and advertised for neurosurgeons to move to St. Joseph, and this neurosurgeon answered the ad. He also went through an interview process with the hospital administrators.

"And when they chose him, they paid his moving expenses and guaranteed him a minimum salary for the first two years after he moved."

After that initial two-year period was up, the contract between the neurosurgeon and the hospital became even more generous. "They paid him \$411 a day \$150,000 a year just to be on-call," said Davis. "And then he was paid even more when he was actually called in and performed surgery."

Davis said that *Glidewell v. S.C. Management, Inc.*, 923 S.W. 2d 940 (Mo. App. 1995), lays out the elements of an agency relationship.

"In *Glidewell*, the court discusses what is evidence of an agency relationship, and includes the recruiting of a doctor and paying his moving expenses," said Davis. "The relationship in this case fits in well with what the court laid out in *Glidewell*."

Final Judgment

The \$2.75 million verdict included \$1 million in non-economic damages. The jury apportioned 50 percent of the fault to the neurosurgeon and 50 percent to the nurses. Davis expects the court to reduce non-economic damages to \$513,000, in accordance with statutory caps. But he declined to speculate on the amount of the final judgment.

Davis has also won a \$7 million verdict and a \$6 million verdict in the past 18 months.

Scott S. Bethune was co-counsel with Davis in the case.

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