Professional Negligence Decisions Over the Past Two Years – A Review and Some Comments About Trends

By Francis V. Cristiano

Introduction

Consistent with a diminishing trend regarding jury trials, there has been a relative lack of appellate decisions rendered during the past two years addressing issues of medical or legal negligence. The ones the courts decided, however, were significant and worthy of discussion. This article reviews these decisions and then consistent with this issue's theme, comments on the trends they suggest—some more subtle than others.

Medical Negligence Cases

Supreme Court Decisions

Catholic Health Initiatives v. Earl Swensson Associates, Inc. – The Relationship of Rule 26 Expert Witness Disclosure Requirements to the Prejudice and Proportionality Analysis Required for Rule 37 Sanctions

Catholic Health Initiatives v. Earl Swensson Associates, Inc.[1] is an intriguing case. It involved a C.A.R. 21 petition regarding an issue of significant concern to professional negligence practitioners, i.e., the amended provisions of C.R.C.P. 26(a)(2)(B)(I), which took effect on July 1, 2015 (regarding expert witness disclosures), and whether they should be read in conjunction with the changes to C.R.C.P. 37, passed at the same time.

To eliminate the need for and considerable expense of expert witness depositions, the court amended Rule 26 to follow the lead of the federal rules by requiring that retained experts submit disclosures in the form of "a written report signed by the witness," eliminating the option of submitting a summary of their opinions. Further, to enhance its effectiveness for that purpose, the rule directed that "[t]he witness's direct testimony shall be limited to matters disclosed in detail in the report."[2] On the other hand, the court amended C.R.C.P. 37(c)(1) as well, directing that evidence preclusion should not occur where the failure to disclose was substantially justified, or alternatively, the "failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm." The rule provides for other possible sanctions in lieu thereof, such as after holding a hearing, "requiring payment of reasonable expenses including attorney fees caused by the failure," or "any of the actions authorized pursuant to subsections (b)(2)(A), (b)(2)(B), and (b)(2)(C) of this Rule." Also, in its comments, Rule 26 recognizes flexibility and a fair resolution of disputes based upon a full exploration of its merits, stating that "[r]easonableness and the overarching goal of a fair resolution of disputes are the touchstones."[3] In large part, these provisions simply codified the analysis and guidance the Colorado Supreme Court has continually and progressively articulated, beginning in 1994 in *J.P. v. District Court*,[4] and thereafter in *Todd v. Bear Valley Village Apts.*,[5] *Trattler v. Citron*,[6] and *Warden v. Exempla*,[7] that cases should be decided based on a full and fair exploration of their merits and not based upon the application of harsh and inflexible rules.

Regardless of this, in *Catholic Health Initiatives*, at trial, Judge Edward Moss viewed C.R.C.P. 26(a)(2)(B)(I) as establishing a hard and fast rule to be taken literally and in isolation from Rule 37, and he thereby granted the defendant's motion to strike plaintiff's expert as a witness, based upon its conclusion that plaintiff's expert, LePage's, cost estimation concerning costs of repairs to the hospital were not sufficiently detailed, and thus plaintiff's endorsement constituted a violation of the requirements of Rule 26(a)(2)(B)(I). In doing so, he rejected other less harsh alternatives suggested by the plaintiff. In rendering his order, the court explained that it believed Rule 26(a)(2)(B)(I) to be controlling and did not consider Rule 37(c)(1) in his analysis.[8]

Bright lines, however, while delivering certainty, oftentimes badly miss the mark if the idea is to afford a fair resolution of disputes based upon a full exploration of relevant evidence. In another setting, Justice Frankfurter, well described the problem of drawing bright lines while dissenting in the landmark decision of *Baker v. Carr*.[9] As he stated:

> This may be, like so many questions of law, a matter of degree. Questions have arisen under the Constitution to which adjudication gives answer although the criteria for decision are less than unwavering bright lines."[10]

In *Catholic Health Initiatives*, the trial court defeated the plaintiff's entire case by striking its expert based upon an unwavering line, something that very much seemed to lack any semblance of proportionality, as C.R.C.P. 37 calls for. The plaintiff thereafter petitioned for review under C.A.R. 21, and the Colorado Supreme Court granted its petition.

Consistent with this, the court in an excellently written unanimous decision by Justice Boatright, chose flexibility and the intent of Rule 37, over bright lines, and found that contrary to the trial court's opinion, the court must read Rule 26(a)(2)(B)(I) in conjunction with Rule 37(c)(1) He specifically stated that "Rule 37(c)(1) remains the controlling authority for determining sanctions for Rule 26 discovery violations, and that the trial court erred by not conducting the harm and proportionality analysis required by Rule 37(c)(1)."[11] In conclusion, the court stated:

> Accordingly, we hold that the harm and proportionality analysis under Colorado Rule of Civil Procedure 37(c)(1) remains the proper framework for determining sanctions for discovery violations. See, e.g., *Todd v. Bear Valley Vill. Apartments*, 980 P.2d 973, 978 (Colo. 1999) (laying out factors for the court to consider in its Rule 37(c)(1) analysis). As such, the trial court misapprehended the law and abused its discretion in excluding LePage as an expert without conducting the Rule 37(c)(1) harm and proportionality analysis.[12]

In this author's opinion, this case is a welcome and continued expression of the Colorado rules and trends of *J.P.*, *Todd, Trattler*, and *Warden*, emphasizing the goal of deciding matters based upon a full exploration of relevant evidence, and not by the application of inflexible and inappropriately harsh rules. The issue of an expert witness not confining their testimony to what was specifically set forth in their report, thereby undermining somewhat the effectiveness of a rule requiring an expert report versus a summary, was not directly addressed. But based upon the court's broad analysis, one would be hard pressed to assume that it wouldn't be subject to a Rule 37 analysis, as well.

In re Bailey and the Continuing Analysis of *Ex Parte* Meetings with Defense Counsel

In re Bailey[13] was a direct C.A.R. 21 appeal that dealt with *Samms v. District Court*[14] and *Reutter v. Weber*[15] issues (i.e., ex parte communications with treating physicians). The parties have argued the case, but the court has not announced its opinion. The story of the permissibility and scope of *Samms* conferences thereby continues, and the bar eagerly awaits the Colorado Supreme Court's analysis.

Colorado Court of Appeals Decisions

Although the above is the extent of recent Colorado Supreme Court decisions regarding medical negligence issues, there have been several interesting and informative court of appeals decisions, as well. In no order they are as follows:

Acierno v. Garyfallou – Attorney Misconduct, Reversible Error, and Costs Judgments

Acierno v. Garyfallou[16] is an interesting study and lesson on defense tactics and the extent of misconduct that appellate courts may leave undisturbed given the constraints of an abuse of discretion review standard, as well as the doctrine of harmless error. Its analysis is nevertheless interesting and informative. It as well, addressed § 13-16-105, C.R.S. and C.R.C.P. 54(d) and costs judgments, and with some reservation as to individual amounts, left little doubt that the devastating effects of such are anything but mandatory if you lose, as well as various other issues.

It is not an overstatement to say that the underlying facts of *Acierno* were horrific. Perhaps some of the readers of this article may have watched the profoundly moving 2007 movie "The Diving Bell and the Butterfly," which is the story of Jean-Dominique Bauby, the editor-in-chief of the internationally acclaimed French fashion magazine *Elle*. At the age of 43, he suffered a rare but devastating brain stem stroke resulting in a "locked-in syndrome," which left him with essentially normal intellectual functioning, but an almost completely paralyzed body. He was able to communicate only by blinking the one eye that was not surgically closed. Remarkably, however, by using a binary communication system with his eye lid either open or closed (respectively, yes or no), he was able to dictate to a patient and dedicated scrivener who would suggest letters to him, a memoir by the same name as the movie—one letter at a time. This was Mr. Acierno's tragic fate, as well. He, too, suffered a locked-in syndrome that he claimed would have been preventable had he been given reasonable care at the hospital to which an ambulance transported him before the brain stem stroke occurred.

Mr. Acierno, through his representatives, filed a medical negligence suit against his emergency room physician, Dr. Garyfallou, and his other treating physicians, as well as both hospitals where he had been treated. Except for Dr. Garyfallou, all defendants settled before trial. The case then proceeded to a jury trial on Mr. Acierno's negligence claims against Dr. Garyfallou.

After the presentation of evidence, defense counsel did two not particularly proper things.

First, before closing argument, Mr. Acierno had tendered the following jury

instruction concerning the applicable standard of care:

> To determine whether such a physician's conduct was negligent, you must compare that conduct with what a physician having and using the knowledge and skill of physicians practicing in the same specialty or holding themselves out *as having the same special skill and knowledge*, at the same time, would or would not have done under the same or similar circumstances.[17]

Defense counsel objected to the inclusion of the emphasized portion of the instruction, but the trial court overruled his objection and approved the instruction. During closing argument, defense counsel nevertheless used a PowerPoint slide that left out the portion of the standard of care instruction to which he had previously objected. Although plaintiff's counsel objected to such on the basis that it misstated the applicable standard of care, the court overruled the objection and advised that: "[t]he jury has the instructions. [It] can review them."[18] Defense counsel thereafter doubled down somewhat, and in his closing argument stated: "Who is the expert of the same specialty that came in and told you about the standard of care in this case? That's Dr. Rosenberg. That's Dr. Burcham. That's Dr. Hoffman. All emergency room physicians."[19]

Given all this, the trial court later reconsidered its failure to sustain Mr. Acierno's objection, and saw to it that plaintiff's counsel was able to address defense counsel's misrepresentations during his rebuttal argument, which he did.

Secondly, defense counsel in arguably responding to a contention made by plaintiff's counsel that Dr. Garyfallou was blaming everyone else except himself, argued that it was in fact plaintiff and not Dr. Garyfallou who was blaming everyone else, stating that plaintiff's experts "blamed every one of those defendants that settled, and they blamed Dr. Garyfallou." This was likely within permissible limits. As well, however, defense counsel cast aspersions towards plaintiff's counsel, and added in argument that it was Mr. Acierno's counsel "who retained these experts [and] blamed every one of those doctors who settled."[20]

His argument didn't end there. Instead, he added the following comments regarding the topic of the settling physicians:

> There are reasons that physicians settle cases that don't have anything to do with the standard of care. . . . Dr. Garyfallou has courage, conviction, and confidence. The courage to stand up before you and say my care was good. Conviction that his care was appropriate. And confidence that you as jurors will see that. Confidence that these other reasons for settling cases, runaway verdicts, runaway juries, media related to adverse care, will not cloud your judgment[.][21]

At this point, plaintiff's counsel strongly objected, and the trial court asked plaintiff's counsel if he wanted to consider a motion for a mistrial. Mr. Acierno's counsel responded affirmatively, and the trial court said it would take the motion under consideration.[22]

Although the trial court didn't grant the motion for a mistrial at that point, it did two things to rectify the prejudice. First, it admonished defense counsel in front of the jury and stated:

> Jurors, there was an objection to [defense counsel's] last comments, that objection was sustained. Those comments are to be utterly and completely disregarded by you. They were inappropriate and do not belong in this type of a proceeding.[23]

The court, as well, took a recess before rebuttal closing argument and discussed the matter further, and although the court rejected Mr. Acierno's motion for a mistrial, it stated that it was "not sure" that its previous admonition and instruction had been sufficient. It noted that plaintiff's counsel could address the issue of defense counsel misstating the jury instruction during his rebuttal argument.[24] After the recess, however, the trial court addressed the jury once more and stated:

> Jurors, I apologize for the longer-than-anticipated break. I feel that I have no choice but to reiterate to you that certain of those comments, certain of the statements that I cautioned you against earlier by [defense counsel] were, in my view beyond inappropriate and we've been discussing that.

The court again instructed the jury that the improper comments were "to be completely and utterly disregarded.[25]

After deliberation, the jury found in favor of the defendant. Following that, Mr. Acierno filed a motion for a mistrial, as well as a motion for a new trial under C.R.C.P. 59(d), citing defense counsel's tactics.[26] Although the trial court denied both these motions, as noted by the court of appeals, it observed in its decision rejecting the motions that:

> [D]efense counsel's "use of an abbreviated [s]tandard of [c]are [i]nstruction was careless and/or a deliberate attempt at jury nullification given his earlier objection to the Court's approved instruction," but the trial court noted that it "must presume that the jury followed the jury instructions and the verbal corrective instructions presented by the Court." It continued, "[t]herefore, while an extremely close call, the Court cannot find that [d]efense [c]ounsel's conduct, which was calculated, deliberate, and knowingly improper, was so pervasive and prejudicial to undermine the integrity of the jury's verdict."[27]

Of significance as well, Dr. Garyfallou thereafter moved for an award of $165,232.82 in costs pursuant to § 13-16-105, C.R.S. and C.R.C.P. 54(d).

The trial court, however, refused to award any costs noting that:

> (1) Mr. Acierno has "locked-in syndrome" meaning he will be "reliant, 24/7, on caregivers for his daily needs"; (2) Mr. Acierno "will never be able to earn an income"; and (3) any award of costs would be against Mr. Acierno personally. The court also observed that although Mr. Acierno had reached settlements with other defendants, that money had been placed in a trust "to provide for [p]laintiff's medical needs and daily care," and "[p]laintiff needs every dollar of [the money in the trust] for his survival."[28]

In doing such, the trial court relied upon case law that it reasoned gave it discretion to award or not award costs, particularly *Valentine v. Mountain States Mutual Casualty Co.*[29]

Mr. Acierno appealed the judgment in favor of the defendant and made numerous arguments.

His initial argument was that the judge should have granted his motion for mistrial and for a new trial under Rule 59(d). After all, the trial court had found the conduct of defense counsel to have been: "calculated, deliberate, and knowingly improper." The court of appeals, however, disagreed. It noted such things as "a mistrial is a drastic remedy that is warranted only when the prejudice to the moving party cannot be addressed by other means,"[30] and that "trial courts are in the best position to evaluate the prejudicial impact of misconduct by opposing counsel,"[31] such that the court of appeals reviews these types of issues on an abuse of discretion standard.[32] Based upon such, and particularly in light of the strong remedial measures taken by the trial court, as well as its careful consideration of plaintiff's motions, the court of appeals, although agreeing with the trial court that this case presented "an extremely close call,"[33] could not conclude that the trial court abused its discretion in denying Mr. Acierno's motions. Thus, the answer to the original question, i.e., how far an attorney can go at trial with misconduct, without suffering the consequence of getting a verdict favorable to his client reversed on appeal, is likely: "pretty far."

There were other issues raised on appeal as well.

Mr. Acierno also based his motion for new trial on his contention that a juror had slept through important portions of the trial. The court of appeals noted that Mr. Acierno had not made a contemporaneous objection, and therefore did not properly preserve the issue.[34] As well, the court of appeals noted that Mr. Acierno had failed to present sufficient evidence "to show that [the juror] missed crucial parts of the trial."[35]

Mr. Acierno further made a contention that the trial court should not have allowed, over his objections, ex parte communications with treating physicians based upon *Reutter v. Weber* and *Samms v. District Court*.[36] Relying, however, on the "in consultation with" exception to the physician-patient privilege at § 13-90-107(1)(d)(II), C.R.S., as well as the implicit waiver described in *Reutter* where "the risk that residually privileged information will be divulged during an interview is relatively high," the court of appeals rejected Mr. Acierno's contentions and ruled that the ex parte meetings had been proper.[37] The court also addressed an "undue influence" contention made by Mr. Acierno, which is based upon the Supreme Court's statement in *Samms* that undue influence, in addition to confidentially concerns, is a "legitimate concern" as well.[38] The court, however, rejected the contention, putting the onus on plaintiff to demonstrate the impossible, i.e. that there was "anything in the record evidencing such influence."[39] Although none of such will assist Mr. Acierno, as referenced above, the permissible parameters of *Samms* and *Reutter* continue to be explored by the Supreme Court, and specifically in the undecided case of *In re Bailey*.

Mr. Acierno contended on appeal that the trial court had erred in denying his motion for directed verdict on Dr. Garyfallou's affirmative defense of pro rata liability, given what plaintiff contended was a judicial admission enunciated in his counsel's closing argument that as distinguished from plaintiff, who was blaming everyone, Dr. Garyfallou wasn't blaming anyone – but nevertheless insisted on a proportionate fault instruction to the jury regarding the settling parties. The court of appeals, however, refused to yield, and concluded that there was "no evidence in this case that defense counsel's statement was deliberate and made with the intent of 'dispensing with proof' on the issue of pro rata liability," which it determined to be the criteria for a judicial admission based upon a counsel's closing argument.[40] It perhaps more accurately determined, as well, that the issue was moot since the jury had determined that Dr. Garyfallou wasn't negligent.

Mr. Acierno, finally attempted to invoke the "doctrine of cumulative error," that is an intriguing proposition relating to prejudicial error raised in criminal cases, which stands for the proposition that although certain errors in and of themselves may not be prejudicial enough to warrant reversal, cumulatively with other errors committed during the trial, they might.[41] The court of appeals noted, however, that such doctrine had in one division been rejected in this state with regard to civil cases.[42] As set forth by another division, the doctrine is derived from a defendant's due process right to a fair trial as guaranteed by the constitution.[43] The wisdom of this type of an analysis is somewhat questionable, since people certainly should be guaranteed fair trials in civil settings as well. It noted, however, without really deciding the issue of whether it can be properly considered in a civil setting, that even if it did consider the doctrine as viable in civil cases they had in fact rejected each of Mr. Acierno's contentions of error, such that the doctrine would not be applicable to the present case regardless.[44]

Finally, on cross-appeal by the defendant, the court of appeals addressed the trial court's rejection of Dr. Garyfallou's motion for assessment of costs pursuant to § 13-16-105 and C.R.C.P. 54(d). The trial court's reasoning concerning the basis for rejection was profound, emphasizing the absolute financial devastation caused to Mr. Acierno and his family by his "locked in syndrome," as well as language in *Valentine v. Mountain States Mutual Casualty Co.* that trial courts have "considerable discretion in determining whether to award costs and what amount to award"[45] and his conclusion that he thereby had authority to award costs or not. The court of appeals, however, found the analysis unavailing, noting instead that Mr. Acierno's argument was based upon a misreading of *Valentine*, stating that the language in *Valentine* that trial courts have "considerable discretion in determining whether to award costs and what amount to award," "refers to a court's discretion in deciding whether or not to award a party's request for a *particular* cost in a *particular* amount."[46] Thus, contrary to the hope raised by the language in *Valentine*, the court opined that trial courts do not, in fact, have any discretion to deny such awards in total, and most if not all the chilling effects of § 13-16-105, C.R.S., (as it has been interpreted in *Cherry Creek Sch. Dist. #5 v. Voelker*,[47] opening it up to *all* costs) remain. This is not something that is particularly supportive of the goals of "access to justice," particularly to those of us who can't afford to withstand $165,232.82 costs judgments, but would nevertheless like their day in court.

Pressey v. Children's Hosp. Colo. – Collateral Source Payments and the HCAA, and a Child's Rights to Claim Pre-Majority Medical Expenses

Pressey v. Children's Hosp. Colo.[48] involved a massive $17,839,784.60 verdict rendered in a medical negligence

claim involving birth trauma against the defendant, Children's Hospital Colorado (the "hospital"). After the trial, the trial court reduced plaintiff's damages to $1,000,000 based on the legislative directive in C.R.S. § 13-64-302 (1)(b), The plaintiff, nevertheless, filed a motion to exceed the cap for good cause pursuant to the same statute ultimately received a judgment against the hospital for $14,341,538.60. The hospital argued that the trial court had erred in assessing the damages by not allowing evidence of a collateral source (i.e., Medicaid benefits available to plaintiff), in the post-verdict proceeding to exceed the damages cap for good cause shown. The hospital contended that the legislative purpose of the Health Care Availability Act (the "HCAA") damages cap would be frustrated if the trial court is precluded from considering the actual losses of the plaintiff, including collateral sources—something, however, that might fly in the face of the contract exception to the collateral source rule[49] as defined in the Supreme Court's majority decision in *Volunteers of Am. Colo. Branch v. Gardenswartz*[50], which preludes any reference or consideration of collateral benefits received by the victim as a result of a contract entered into and paid for by the victim. Here, however, the facts were different from *Gardenswartz*, since the benefits the plaintiff received or would receive were from a governmental source the plaintiff had not directly paid for, as well as the fact that the issue was subject to the overlay effects of the HCAA.

The court of appeals, in a unanimous opinion written by Judge Graham (who had written the court of appeals' opinion in *Tucker v. Volunteers of Am. Colo. Branch*,[51] which *Gardenschwarz* affirmed), found that the contract exception of §13-21-111.6 applied notwithstanding the fact that the benefits were payable from a governmental source. He found as well that he could harmonize the HCAA caps with the collateral source contract exception of § 13-21-111.6. Thus, the amounts paid or payable on the bills by Medicaid were not proper considerations for the purposes of the trial court's analysis in the context of a motion to exceed that cap pursuant to § 13-64-302(1)(b) of the HCAA. Both these issues were significant. The analysis was as follows.

The opinion first included a bit a history lesson. As set forth by Judge Graham, common law provided that "compensation or indemnity received by an injured party from a collateral source, wholly independent of the wrongdoer and to which he had not contributed, will not diminish the damages otherwise recoverable from the wrongdoer."[52] To overcome what some believed was a resultant windfall, § 13-21-111.6 was passed during the era of "tort reform,", which abrogated the common law rule and created its own collateral source rule that allowed reference to and reduction for collateral benefits, but left as an exception benefits received as a result of a contract.[53] This is commonly referred to as the contract exception to the collateral source rule. In pertinent part, the statutory exception states:

> . . . that the verdict shall *not* be reduced by the amount by which such person . . . has been or will be wholly or partially indemnified or compensated *by a benefit paid as a result of a contract entered into and paid for by or on behalf of such person*. (Emphasis added).

The court expressed the rationale for such as follows:

> [T]he General Assembly "chose to allow a plaintiff to obtain the benefit of his contract, even if the award resulted in a double recovery." "This is consistent with the common law position that it is more repugnant to shift the benefits of the plaintiff's insurance contract to the tortfeasor in the form of reduced liability when the tortfeasor paid nothing toward the . . . benefits."[54]

In this case, however, the benefits were from Medicaid. Thus, they were not directly paid for by the plaintiff. The court of appeals nevertheless accepted plaintiff's argument that they should be included in the contract exception, based upon the following rationale:

> . . . In this case, Medicaid benefits are paid on behalf of [plaintiff], and she was required to enter into a written Medicaid application agreement to repay the state for any Medicaid benefits she receives for which she would not qualify under the federal guidelines. Under section 13-21-111.6, these benefits are dependent upon "a contract entered into . . . by or on behalf of" [plaintiff] for which she remains financially responsible. **We therefore consider Medicaid benefits to be an exception to the collateral source statute that ought not inure to the benefit of the tortfeasor**.[55]

Moreover, the court perceived no conflict between the HCAA provision which caps damages and the contract exception to the collateral source statute. It reasoned as follows:

> First, the contract exception applies to "any action . . . to recover damages for a tort . . . to [a] person," § 13-21-111.6, and does not exclude medical malpractice actions. Second, the HCAA is silent on the application of the contract exception. Third, there is nothing on the face of either that makes them inconsistent. And fourth, our review of the case law has revealed no case in which the contract exception to the collateral source statute

was found inapplicable to a post-verdict proceeding.[56]

The court, as well, rejected the hospital's argument that if the contract exception allows awards to exceed the cap, the HCAA would be rendered meaningless in cases with significant verdicts. The court noted that had the General Assembly intended to eliminate this type of recovery, it could have clearly stated so.[57] It stated as well, that the hospital's position was untenable "because it seeks to shift the cost of its negligence onto the taxpayer. . . . Even under the HCAA's purpose to cap damages to reduce liability, it is not the clear intent of the General Assembly to lay that liability at the feet of the citizens of Colorado."[58]

The court also rejected the hospital's contention that because plaintiff had presented evidence of the uninsured bill prices for future medical needs, it thus constituted a windfall to plaintiff. The court addressed this by again reiterating that "it [is] considered more just that the benefit be realized by the plaintiff in the form of double recovery rather than by the tortfeasor in the form of reduced liability."[59] It noted as well that even double recovery is doubtful given the rights of subrogation and reimbursement.[60]

The hospital's final contention regarding the cap, was that the trial court had abused its discretion in finding "good cause" to exceed the cap pursuant to § 13-64-302, C.R.S. Given, however, the broad deference that an appellate court gives a trial court on an abuse of discretion review, the court of appeals easily rejected this argument, particularly based upon the trial court's careful consideration of such based upon a multitude of factors "including past and future medical expenses, the purpose of the cap, the nature and degree of the injuries, the strength and certainty of the evidence of damages, Naomi's age, the amount and composition of the jury verdict, whether there is an overlap in the damage award, Naomi's life expectancy, lost future earnings and earnings capacity, and particular needs and losses."[61]

The hospital's next argument, however, was more telling. It contended that the actual plaintiff, Naomi, was not the responsible party for the past medical bills. Instead, it was Naomi's parents, and that their right to claim such had long passed based upon the running of the statute of limitations. Thus, the hospital contended that the claim for Naomi's pre-majority medical expenses belonged to the parents and not Naomi.[62] It is this argument that the court of appeals agreed with based upon old, but unreversed, Colorado Supreme Court precedent.

The problem in this case, as it is in many cases of this type, it that because of the tolling of the statute of limitations for a claim by a minor through the child's 18th birthday, the claim is typically not brought until well after the child is born. Among other things, a much better assessment as to the permanent effects of the birth trauma can be defined after the child matures. Only infrequently, therefore, is the action brought within three years from the child's birth. During this timeframe, however, any independent claims the parents might have, are subject to the running of the statute of limitations. Nevertheless, the court's analysis of the existing precedent was as follows.

The court noted that at common law, medical expenses of a minor child are the sole obligation of the parent, save and except for four defined exceptions including:

> (1) the minor child has paid or agreed to pay the expenses; (2) the minor child is legally responsible for payment (emancipation, death or incompetency of the parents); (3) if the parents waive or assign their right to recovery in favor of the minor; or (4) when recovery of expenses is permitted by statute.[63]

None of those situations existed in *Pressey*.

The court noted, that although there is a trend nationally to abandon the common law rule and hold that the right to recovery was the joint right of the parents and the child, the existing law of the Colorado Supreme Court[64] suggests a contrary rule. It noted that

> "While we may believe the better-reasoned result is that of those states that allow the parents and the injured minor child the right to recover pre-majority expenses (if there is no double recovery), we are bound by the decisions of the Colorado Supreme Court."[65]

Thus, it concluded that the right to recover these expenses lied only with the parents. Its reluctant language, however, strongly suggested that the Colorado Supreme Court itself, might desire to review the rule.

The court noted as well that notwithstanding the above, the Colorado Supreme Court has recognized that a parent may relinquish his or her right to a minor's pre-majority damages to the minor.[66] This, however, did not apply where there was no effort made by the parents to relinquish the right and assign it to the child prior to the expiration of the statute of limitations on the parents' claim.[67] Since that did not occur, there could be no relinquishment. Based upon all this, the court reversed the $2,461,735.60 trial court judgement the child received for her pre-majority economic damages.

The takeaway from this latter issue, however, is that the parents should assign or relinquish their rights to recover

for medical expenses of, if possible, to the child prior to the expiration of the statute of limitations regarding the parents' right to file such a claim such.

Given the significant nature of the issue, and the dated Colorado precedent, certiorari review was granted. The parties, however, have settled, and the Supreme Court's opinions concerning these issues, must wait.

Sovde v. Scott – Can a Party Call the Other's Expert at Trial Listed by the Other Party as a "May Call" Witness, Where the Other Party Withdraws Its Endorsement Shortly Before Trial?

Sovde v. Scott[68] involved profound injuries as well. The plaintiff contended that the defendants had negligently misdiagnosed—and thereby left untreated in a timely fashion—complications from a herpes simplex infection, such that an ensuing central nervous system ("CNS") disease process could have been averted. The case proceeded to trial, and the jury found that defendants had not been negligent.

The case is significant with regard to the not particularly uncommon issue that arises when one party seeks to call an expert witness endorsed by the other side at trial (by either live testimony or deposition), but not cross-endorsed by the other side, where the other party has identified the expert as being a "may call" witness, which certainly seems to be the preferred method of operation for most defense counsel given the leeway it gives them with no potential downside consequence.

In *Sovde*, the defendants had endorsed two experts, Drs. Reiley and Molteni, but only identified them as "may call" witnesses in the trial management order. The plaintiff had not cross-endorsed these two physicians in his C.R.C.P. 26 disclosures, nor stated that he would use their depositions at trial under C.R.C.P. 16(f)(3)(VI)(D). He did, however, in his disclosures reserve the right "to call any witnesses listed by . . . [d]efendants and any rebuttal or impeachment witnesses as may be deemed necessary, at the conclusion of [d]efendants' case."[69] Apparently not particularly liking everything that these doctors might testify to, 11 days before trial, defendants filed a motion effectively de-endorsing Dr. Reiley and "asked the trial court to exclude all of his '[d]eposition testimony, handwritten notes, and literature from the trial."[70] The next day plaintiff updated his witness list to include Dr. Reiley and served him with a subpoena. The defendants objected, and the trial court using a "balancing test" sustained defendants' objection, not allowing plaintiff to call Dr. Reiley.[71] In doing such, the trial court rendered the following explanation:

- There has been no reliance by [plaintiff] on the endorsement of Dr. Reiley. There's no specific cross endorsement for Dr. Reiley or otherwise an indication sufficient to the [c]ourt that [plaintiff was] relying upon Dr. Reiley being present; and
- There should be no prejudice to [plaintiff if the court does not allow him to call Dr. Reiley to testify]. Among other things, [he has his] own expert in pediatric neurology endorsed to testify in this case as well as a number of other witnesses.[72]

The trial court applied the same reasoning regarding Dr. Molteni and disallowed his testimony at well.

The court of appeals confirmed that such a decision was proper based upon the trial court's discretion in using a balancing test that "weighs factors such as whether the expert's testimony would be cumulative, thus liming the testimony's probative value; whether excluding the expert's testimony would result in unfair prejudice; and whether the opposing party failed to endorse its own expert, thereby demonstrating an attempt to 'piggyback' on the other party's preparation."[73]

The court of appeals suggested, however, that the party seeking to call the de-endorsed witness without cross-endorsement faces an uphill battle because the balancing test should recognize "that the party that originally endorsed the expert witness can suffer prejudice if the opposing party calls the withdrawn expert to testify," which might suggest to the jury that "[a party's] counsel had suppressed evidence which he had an obligation to offer [when the party withdrew an expert witness.] The opposite side of this argument, of course, is that such might be exactly what is going on, which contrary to being contra-supportive, is in fact, highly supportive of allowing that type of testimony, which bears with it probative value of coming from the other side's endorsed witnesses.

Perhaps the take away from this is for parties to consider much more liberally cross-endorsing the other side's experts, and it's not sufficient in this regard to merely state in pre-trial disclosures that the plaintiff might "call any witnesses listed by . . . [d]efendants and any rebuttal or impeachment witnesses as may be deemed necessary, at the conclusion of [d]efendants' case."

Legal Negligence Cases

Court of Appeals Decisions

Gallegos v. Lehouillier – Who Has the Burden of Proof Regarding a Non-Collectibility Issue

Gallegos v. Lehouillier[74] involved a significant issue in legal malpractice cases, i.e. the causation or damages defense, frequently utilized, that the civil claim that was lost as a result of the attorney's negligence, would not

have been collectible and thus, the plaintiff didn't suffer loss. The question arises with regard to such, is whether it is the burden of the plaintiff to affirmatively show that the judgment was collectible, or alternatively, the affirmative obligation of the defendant to prove the converse, i.e., that it was not collectible.

In *Lehouillier*, although the jury found the attorney defendants to have been negligent in handling the underlying case and causing the plaintiff to lose the claim, the trial court held that the plaintiff bore the burden of proving that the judgment was collectible. Given that there was no evidence that it was collectible, the judge dismissed the claim.

On appeal, however, the court of appeals, in a well written and searching split decision, disagreed. Of interest, it re-explored the oft-cited 1927 case of *Lawson v. Sigfrid.*[75] As noted by Judge Bernard for the majority, "[w]e encountered a mystery on the road to answering the central question in this case. The mystery concerns a ninety-year-old, one-and-one-quarter-page Colorado Supreme Court case, *Lawson v. Sigfrid*,"[76] which for most of those ninety years had been the basis of conclusions in this state that it was the burden of the plaintiff to prove collectability and not that of the defendant to prove uncollectibility. A closer analysis of *Lawson*, however, revealed, as one commentator had noted—and the majority agreed with—that although it established the relevancy of the issue of collectability in malpractice settings, it never defined who had the burden of proof.[77] However, it has been cited as supportive of such a definition by little more than rote reasoning in one authority after another.[78]

After it determined that it was thereby "writing on a blank slate as far as allocating the burden to prove collectibility is concerned,"[79] the court ventured on to determine what the proper rule should be in Colorado. Based upon an excellent and lengthy analysis indulged in by the majority, it adopted what it believed to be a better reasoned, albeit minority rule[80] that in its mind is gaining momentum, which is that the burden should be that of the defendant. It thereby reversed the trial court's dismissal and remanded it back for a new trial given that determination.

Judge Webb filed a concurring in part and dissenting opinion where although he agreed with the *Lawson* analysis, would nevertheless "follow the weight of case authority" and conclude that it was the plaintiff's burden to show collectibility, not the defendant's burden to show uncollectibility.[81]

The Colorado Supreme Court has since granted certiorari review.[82]

What All This Suggest About Trends

The theme of this edition is "trends." There are certainly several trends suggested by this case law—some more obvious than others. They include the following:

The Case and Rule Trends

Catholic Health Initiatives reemphasized one more time the Supreme Court's abiding commitment to the notion of a flexible and proportionate analysis with regard to evidence and witness preclusion, and thereby continued to affirm the liberal approach to such set forth in its previous decisions of *J.P., Todd, Trattler,* and *Warden,* as well as the embodiment of it in the modifications to C.R.C.P. 37, all of which seems to be an emphasis and reemphasis of the notion that disputes should be resolved on a full and fair exploration of available relevant evidence, and not by the application of inflexible and harsh rules of exclusion.

Acierno emphasizes that because of discretionary appellate review, it is difficult at a bare minimum, to reverse adverse judgments based upon contentions of misconduct by opposing counsel, once the trial court denies relief under Rule 59 or otherwise. It as well emphasizes the mandatory nature of § 13-16-105, C.R.S. in terms of the threshold issue of awarding costs to the prevailing party. This does not bode well for the higher goals of access to justice.

Pressey was clearly a beneficial case for plaintiffs and very much bolstered the contract exception to the collateral source rule as defined at § 13-21-111.6, C.R.S. The *Pressey* Court eliminated numerous arguments oftentimes made by defendants concerning whether collateral source benefits should be considered in determining whether to exceed the $1 million cap pursuant to § 13-64-302, C.R.S. of the Healthcare Availability Act for "good cause" shown. However, it ruled against the ability of a child to claim his or her pre-majority medical expenses, although such is likely correctible given a timely assignment or relinquishment from the parent to the child of their rights. Unfortunately, although a petition was granted for certiorari review, the parties settled and what the Colorado Supreme Court might or might not do with regard to this issue remains undecided.

Sovde perhaps emphasized the need to cross-endorse another side's experts, as well as de-emphasizes the probative value of an expert who had been de-endorsed by the other side.

With regard to legal negligence cases, *Lehouillier*, unraveled a 90-year mystery and likely put Colorado on the more enlightened course of who properly should have the burden of proof to show uncollectibility in legal malpractice cases.

A Subtler but Quite Disturbing Trend

The most profound trend, however, is the subtlest. A review of both the dearth and monetary values of medical malpractice cases appealed, reveals one undeniable trend; that is, that it is only very few of these cases that go to trial, and then only the cases that involve the right economics, i.e. those involving claims for catastrophic economic loss not materially affected by the otherwise severe caps of the HCAA. The rest seem to fall by the wayside.

This is consistent with a disturbing trend of lack of jury trials to resolve tort claims. In a recent article published in *Voir Dire*,[83] a publication by the American Board of Trial Advocates, whose members include trial attorneys from both sides with substantial demonstrated civil jury trial experience taken to verdicts, and whose credo is to preserve jury trials, Robert T. Eglet, an immensely successful trial attorney in Las Vegas, went through the numbers. He noted that from the mid-1930s, where the percentage of civil cases concluded by jury trial was 20%, it has steadily declined to well below 1% on a national basis now. In his mind "they continue to decline toward the effective rate of 0%."[84] In 1962, one out of six federal tort cases were resolved by jury trial. By 2002 the number was 1 out of 46, in 2010 it had dramatically dropped to 1 out of 136, and today he notes that only 1 out of 200 tort cases are resolved by jury trial, at least in the federal system.[85]

There are many reasons for this, including more laudatory causes, such as the rise of mediation in the civil litigation system, as well as other forms of alternative dispute resolution. There are reasons, however, that are not so well-based or well-intentioned. Each of us, of course, should perhaps search for the answers. In my mind, the dearth of cases and trials in the field of medical malpractice is profoundly affected by the cost-benefit analysis that must be made by prospective attorneys willing to take cases on contingent fee arrangements, which has been severely affected by the $300,000 cap for recovery of non-economic losses in medical negligence cases as set forth in the arguably misnamed Colorado "Healthcare Availability Act," versus the immense time, risk, and out-of-pocket costs that must, in modern day, be expended to be successful at trial in a medical malpractice case, which for many years has left the realm of even a healthy five figure estimate for total costs.

This is greatly compounded by the abject rejection of physicians, particularly in this state, to uphold standards and to be willing to testify against other physicians in malpractice cases, forcing plaintiffs to lose credibility with out of state experts, not to mention the extra $15,000 or so it takes to bring them in to testify. The lack of physicians willing to testify for plaintiffs affects a supply and demand dynamic and dramatically drives up the price for expert witness fees.

I personally have been confronted in obvious cases, with numerous well-intentioned local physicians who fully recognize and acknowledge the malpractice, but nevertheless refuse to testify, first because of their philosophic differences in physicians being subject to a tort system—as well as perhaps more egregious company policies that prohibit such. In one instance the physician's malpractice carrier, COPIC, directed the physician that it would be a "conflict of interest" to testify against another insured.

Added to this is the problem, highlighted in *Acierno*, of the very real potential for an adverse costs judgment, which some have likened to a mini-English rule, where the clients must be advised before trial of the risk that if they lose (a not unlikely possibility, given present day statistics of 90% plus, defense verdicts), an immense costs judgment will be rendered against them to potentially further devastate their already devastated life savings, or would they perhaps prefer to take the offer on the table that likely doesn't represent more than 50% of their loss, out of which they will receive a net distribution after payment of attorney fees and costs of likely no more than 50%.

In a wonderful description of what life was like for trial attorneys in the 1970's, Mr. Eglet describes in his article his first four years of practice with his boss and mentor Mitch Cobeaga. These were the days of limited discovery and investigation, where the files consisted of a couple hundred pages of documents, 20 answers to interrogatories, and perhaps transcripts of one or two, one-hour depositions. Cobeaga would go into Eglet's office on a Friday afternoon about once a month and ask if he had a "clean suit." Eglet always answered

"yes," although he noted that it would probably have made little or no difference what his answer was. Cobeaga would then drop a file on his desk and say, "Good. You're going to trial on Monday."[86] Beginning on Monday, the client, as well as the other side would have their day in court by way of a jury system that was first included as a right in the Magna Carta, and then fully embraced by our founding fathers in the seventh amendment to the constitution, as one of the founding cornerstones of this country's judicial system. These days have long since passed, for some good reasons, but many bad. The solution to this disturbing trend, which in Mr. Eglet's opinion has reached a crisis level, is one for which there are perhaps numerous opinions as well as causes. Regardless of one's opinion as to the causes, however, it's a disturbing trend that runs contrary to deep seated ideals concerning jury trials.

This as well has plenty to do with access to justice, which is no less than a first cousin to the above issue. Melissa Hart, our latest Colorado Supreme Court appointee, is a strong proponent of access to justice. She included in her application for the position,

> The reality of our legal market today is that more than 70 percent of individuals could not afford to hire an attorney to address important legal needs. This affordability of lawyers for most people is a crisis.[87]

Hopefully, with many committees being formed that are dedicated to the notion of "access to justice," and perhaps an improving awareness by our judiciary and others that access to justice is at a crisis level, some of this will be addressed and rectified. ▲▲▲

Francis V. "Frank" Cristiano is a long time CTLA member and member of its Board since 2003. He is as well, a member of the American Board of Trial Advocates. His offices are in the Cherry Creek area of Denver, and his practice emphasizes professional negligence, serious personal injury, and business torts. He is Trial Talk's professional negligence editor. He can be reached at 303-407-1777, or by email at frank@cristianolaw.com.

Endnotes:

[1] *Catholic Health Initiatives v. Earl Swensson Assocs*., *Inc.*, 2017 CO 94 (subject to revision upon final publication).

[2] The rules committee, however, chose to not include the additional language from the federal version that the report should be "prepared by" the expert, which clearly might compromise its effectiveness.

[3] C.R.C.P. 26, cmt. 21.

[4] *J.P. v. Dist. Court*, 873 P.2d 745 (Colo. 1994).

[5] *Todd v. Bear Valley Vill. Apts.*, 980 P.2d 973 (Colo. 1999).

[6] *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008).

[7] *Warden v. Exempla*, 291 P.3d 30 (Colo. 2012).

[8] *Catholic Health Initiatives*, 2017 CO 94.

[9] *Baker v. Carr*, 369 U.S. 186, 283, 82 S. Ct. 691, 746 (1962) (Frankfurter, J. dissenting).

[10] *Id*., 369 U.S. at 283, 82 S. Ct. at 746.

[11] *Catholic Health Initiatives*, 2017 CO 94 at ¶ 9.

[12] Id., at ¶ 15.

[13] *In re Hermacinski*, order to show cause, Colo. Sup. Ct., 17SC20 (Feb. 9, 2017).

[14] *Samms v. District Court*, 908 P.2d 520 (Colo. 1985).

[15] *Reutter v. Weber*, 179 P.3d 977 (Colo. 2007).

[16] *Acierno v. Garyfallou*, 2016 COA 91.

[17] *Id.* at ¶ 12.

[18] *Id.* at ¶ 13.

[19] *Id.*

[20] *Id.* at ¶ 14.

[21] *Id.*

[22] *Id.* at ¶ 16.

[23] *Id.* at ¶ 17.

[24] *Id.* at ¶ 19.

[25] *Id.* at ¶ 20.

[26] *Id.* at ¶ 22.

[27] *Id.* at ¶ 24.

[28] *Id.* at ¶ 71.

[29] *Valentine v. Mountain States Mut. Cas. Co*., 252 P.3d 1182, 1187 (Colo. App. 2011).

[30] *Id.* at ¶ 26.

[31] *Id.* at ¶ 28.

[32] *Id.*

[33] *Id.* at ¶ 30.

[34] *Id.* at ¶ 46.

[35] *Id.* at ¶ 47.

[36] *Samms v. District Court*, 908 P.2d 520 (Colo. 1985).

[37] *Acierno v. Garyfallou*, 2016 COA 91 at ¶ 56.

[38] *Samms*, 908 P.2d at 528.

[39] *Acierno*, 2016 COA 91 at ¶ 58.

[40] *Id.* at ¶¶ 62 and 63.

[41] *See People v. Krueger*, 296 P.3d 294, 310 (Colo. App. 2012).

[42] *Acierno*, 2016 COA 91 at ¶ 66 (citing *Neher v. Neher*, 2015 COA 103, ¶ 66).

[43] *Vista Resorts, Inc. v. Goodyear Tire & Rubber Co*., 117 P.3d 60, 76 (Colo. App. 2004).

[44] *Acierno*, 2016 COA 91 at ¶ 67.

[45] *Valentine v. Mountain States Mutual Casualty Co*., 252 P.3d 1182, 1187 (Colo. App. 2011).

[46] *Acierno*, 2016 COA 91, ¶ 80.

[47] *Cherry Creek Sch. Dist. #5 v. Voelker*, 859 P.2d 805 (Colo. 1993).

[48] *Pressey v. Children's Hosp. Colo.* 2017 COA 28.

[49] C.R.S. §13-21-111.6.

[50] *Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010).

[51] *Tucker v. Volunteers of Am. Colo. Branch*, 211 P.3d 708 (Colo. Ct. App., 2008).

[52] *Pressey*, 2017 COA 28 at ¶ 11.

[53] *Id.* at ¶ 12.

[54] *Id.* (quoting *Gardenswartz*, 242 P.3d at 1088 (Colo. 2010)) (citations omitted).

[55] *Id.* at ¶ 14 (*citing Gardenswartz*, 242 P.3d at 1088) (emphasis added).

[56] *Id.* at ¶ 18.

[57] *Id.* at ¶ 19.

[58] *Id.* at ¶ 20.

[59] *Id.* at ¶ 21 (quoting *Van Waters & Rogers, Inc. v. Keelan,* 840 P.2d 1070, 1074 (Colo. 1992)).

[60] *Id.*

[61] *Id.* at ¶ 46.

[62] *Id.* at ¶ 23.

[63] *Id.* at ¶ 28 (quoting *Betz v. Farm Bureau Mut. Ins. Agency of Kan., Inc.*, 269 Kan. 554, 8 P.3d 756, 760 (Kan. 2000)).

[64] *See Elgin v. Bartlett*, 994 P.2d 411, 416 (Colo. 1999).

[65] *Pressey v. Children's Hosp. Colo.* 2017 COA 28 at ¶ 31.

[66] *Id.* at ¶ 32.

[67] *Id.* at ¶ 35.

[68] *Sovde v. Scott*, 2017 COA 90 (subject to revision upon final publication).

[69] *Id*. at ¶ 15

[70] *Id.* at ¶ 11.

[71] *Id.* at ¶ 40.

[72] *Id.* at ¶ 41.

[73] *Id.* at ¶ 38 (citing *McClendon v. Collins*, 372 P.3d 492, 495 (Nev. 2016)).

[74] *Gallegos v. Lehouillier*, 2017 COA 35 (subject to revision upon final publication).

[75] *Lawson v. Sigfrid*, 83 Colo. 116, 262 P. 1018 (Colo. 1927)

[76] *Gallegos*, 2017 COA 35 at ¶ 25.

[77] See Michael P. Cross & Nicole M. Quintana, *Your Place or Mine?: The Burden of Proving Collectibility of an Underlying Judgment in a Legal Malpractice Action*, 91 Denv. U. L. Rev. 53, 54 (2014), available at http://www.denverlawreview.org/search/.

[78] *Gallegos*, 2017 COA 35 at ¶ 27.

[79] *Id.* at ¶ 53.

[80] *Id.* at ¶ 65.

[81] *Id.* at ¶ 107.

[82] *Lehouillier* v. Gallegos, No. 17SC312 (Nov. 13, 2017).

[83] Robert T. Eglet, *Exploring the Decline of the American Trial Lawyer*, Voir Dire, Summer 2017, 9-14.

[84] *Id*. at 9.

[85] *Id.* at 9-10.

[86] *Id.* at 11.

[87] *Hickenlooper picks CU professor for vacant Colorado Supreme Court seat, solidifying his legacy for the panel*, The Denver Post, December 15, 2017.