Medical Malpractice

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The Future of Expert Physician Testimony on Nursing Standard of Care

When the Illinois Supreme Court announced in June 2003 it would review the Second District’s decision in Sullivan v. Edward Hospital, 335 Ill. App. 3d 265, 781 N.E.2d 649 (2nd Dist. 2002), many medical defense attorneys simultaneously felt hope and fear. The hope was that the court would not only affirm the Second District’s holding that a physician was barred from offering opinions on the standard of care for nurses, but would also expand the holding to bar opinions by a physician on the sufficiency of communications by nurses to physicians, otherwise known as the Wingo exception. Wingo v. Rockford Memorial Hospital, 292 Ill. Ap. 3d 896, 686 N.E.2d 722 (2nd Dist. 1997). The fear was that the Supreme Court would affirm or overrule the Second District’s bar of the expert physician’s testimony as a discovery sanction, and then recognize the Wingo exception in dicta within the decision.

In an admirable show of judicial restraint, the Supreme Court did neither in its decision. Instead, the court simply stated, since the Second District did not discuss the merits of Wingo, it would also abstain from doing so. Taken on face value, that statement would lead one to believe that the Supreme Court’s decision in Sullivan v. Edward Hospital, 209 Ill. 2d 100, 2004 WL 228956 (Feb. 5, 2004), has no effect on the Wingo exception. However, one can argue that the court’s reasoning regarding general medical expert testimony in Sullivan tipped its hand as to the future treatment of the Wingo exception when that issue comes before the court: namely that physicians are not qualified to offer any opinions as to the standard of care for nurses because they are not licensed in the same school of medicine.

Sullivan v. Edward Hospital
Compliance With Supreme Court Rule 213

The Illinois Supreme Court issued its opinion in Sullivan v. Edward Hospital on February 5, 2004. The first issue that the court addressed in Sullivan was the propriety of the trial court striking, as a discovery sanction, the testimony of Dr. William Barnhart, the plaintiff’s expert physician, relating to Nurse Carrie Lewis’ communications with Dr. Amelia Conte-Russian, the patient’s treating physician. While the court upheld the trial court’s sanction, and affirmed the Second District’s ruling on the issue, the reasoning was based upon the old version of Supreme Court Rule 213, prior to the July 1, 2002, amendment that changed the classification and requirements for trial witness disclosures.

Using the pre-amendment version of Rule 213, the court applied the “strict compliance” holdings of Seef v. Ingalls Memorial Hospital, 311 Ill. App. 3d 7, 724 N.E.2d 115 (1st Dist. 1999), appeal denied 188 Ill. 2d 584, and Warrender v. Millsop, 304 Ill. App. 3d 260, 710 N.E.2d 512 (2nd Dist. 1999), to determine whether the plaintiff had properly disclosed her expert physician’s opinions...
regarding the communications between the nurse and physician. Once the plaintiff conceded that the specific opinion regarding the nurse’s failure to adequately communicate the patient’s condition to the treating physician was not included in her Rule 213 disclosure, the court waxed poetically on the purpose of the former Rule 213 and why the sanction of excluding the testimony was appropriate and not an abuse of discretion by the trial court. *Sullivan*, 2004 WL 228956 at *7-8.

While the requirements for disclosure of retained expert testimony have remained largely the same under revised Supreme Court Rule 213, the inclusion of the words “this rule is to be liberally construed to do substantial justice . . .” in Section (k) has had a practical effect in the courtroom since July 1, 2002. In fact, the plaintiff’s argument that the opinion was a “logical corollary” or “elaboration” might find a more sensitive ear under the amended Rule 213. The primary effect of the *Sullivan* court’s Rule 213 ruling was that it did not have to directly address the substance of the proffered testimony, and therefore determine whether the Second District’s holding in *Wingo* was consistent with the Supreme Court’s prior decisions regarding standard of care testimony.

### Physician’s Competency to Offer Testimony on Nursing Standard of Care

The trial court also struck the properly disclosed testimony of the plaintiff’s expert physician regarding the nursing standard of care, ruling that because the physician lacked a nursing license, he was incompetent to offer the testimony. The plaintiff argued to the Supreme Court that the trial court erred in striking her expert physician’s testimony relating to the nursing standard of care because Illinois law no longer holds that a health professional expert witness must always be a licensed member of the school of medicine about which the expert proposes to testify. *Id.* at *9. In support of this contention, the plaintiff cited the Illinois Supreme Court’s prior rulings in *Jones v. O’Young*, 54 Ill. 2d 39, 607 N.E.2d 224 (1992), and *Gill v. Foster*, 157 Ill. 2d 304, 626 N.E.2d 190 (1993), as well as Section 2-622 of the Illinois Code of Civil Procedure (735 ILCS 5/2-622), and the Second District’s ruling in *Wingo*.

When citing to *Jones* and *Gill*, the plaintiff focused on language in those decisions that reasoned that whether an expert was qualified to testify in a matter was not dependent on whether he is a member of the same specialty or subspecialty as the defendant, but rather, whether the opinions he intends to offer are matters within his knowledge and observation. This language, according to the plaintiff, signaled a retreat “from any rigid, formalistic rule” that the expert physician must be licensed in the same school of medicine as the target of his opinions. *Sullivan*, 2004 WL 228956 at *8.

The Supreme Court rejected the plaintiff’s arguments regarding *Jones* and *Gill*, recognizing that both decisions adopted the three-step analysis for admission of expert medical testimony as stated by the Illinois Supreme Court in *Purtill v. Hess*, 111 Ill. 2d 229, 489 N.E.2d 867 (1986). In the *Purtill* decision, the court articulated the requirements necessary to demonstrate an expert physician’s qualifications and competency to testify. The first requirement, citing *Dolan v. Galluzzo*, 77 Ill. 2d 279, 396 N.E.2d 13 (1979), was that the physician must be a licensed member of the school of medicine about which he proposed to testify. The second requirement was that the physician must demonstrate familiarity with the methods, procedures, and treatments ordinarily observed by other physicians, in either the same or a similar community. Finally, once the foundational requirements have been met, the trial court must determine whether the physician is qualified and competent to state his opinion as an expert regarding the standard of care. *Purtill*, 489 N.E.2d at 872. Should the expert physician fail to satisfy any of these foundational requirements, the trial court must disallow the expert’s testimony. *Jones*, 607 N.E.2d at 226.

The first requirement of *Purtill*, that a physician be licensed in the same school of medicine, was the focus of the Illinois Supreme Court’s analysis in *Sullivan v. Edward Hospital*. In coming to its conclusion, the court presented a detailed explanation of its previous holding in *Dolan*. In *Dolan*, the
court found that the Illinois legislature had recognized various schools of medicine, each with their own tenets, practices and regulations. Respecting this recognition, the court found as a result, the practitioner of a particular school of medicine is entitled to have his or her conduct tested by the standards of that school. The only way to ensure this entitlement, and to ensure fairness, is to require the expert witness to be licensed in the same school of medicine as the medical care provider to whom the testimony is directed. Dolan, 396 N.E.2d at 16. Therefore, the court ruled that the three-step analysis of Purtill, including the licensing requirement from Dolan, remains the law in Illinois regarding admissibility of expert medical testimony.

The plaintiff next argued that Section 2-622 of the Code of Civil Procedure evinced a legislative intent that physicians are competent to testify about the standard of care for the nursing profession. Section 2-622 requires, among other things, that the plaintiff attach to the complaint a written report from a physician supporting the allegations of negligence. If negligent conduct is alleged against a nurse, the report must be completed by a physician. 735 ILCS 5/2-622(a)(1).

The court dismissed this argument, stating the report required by Section 2-622 is merely a pleading requirement and has no bearing on the type of evidence relied upon at trial. Sullivan, 2004 WL 228956 at *10-11, citing DeLuna v. St. Elizabeth’s Hospital, 147 Ill. 2d 57, 588 N.E.2d 1139 (1992), and Lyon v. Hasbro Industries, Inc., 156 Ill. App. 3d 649, 509 N.E.2d 702 (4th Dist. 1987). The court further rejected the plaintiff’s argument by recognizing that both Jones and Gill were decided subsequent to the enactment of Section 2-622 and both cases upheld Dolan’s license requirement.

The plaintiff’s final argument in support of her position that Illinois law no longer requires that a health professional expert witness be a licensed member of the school of medicine about which the expert proposes to testify centered on the Second District’s decision in the Wingo case. The plaintiff reasoned that the Wingo exception should not be an exception at all, but rather the rule, thereby allowing her expert physician to offer standard of care opinions against the nurse at issue. The court rejected this argument, stating that the appellate court correctly reasoned that Wingo did not apply in this case. Sullivan, 2004 WL 228956 at *11. Most significantly, the Supreme Court stated that, since the Second District did not discuss the merits of Wingo, neither would the high court.

Having found all of the plaintiff’s arguments for the admission of her expert physician’s opinions on the nursing standard of care lacking, the court applied the licensing requirement set forth in Dolan to the facts of the case and determined the expert physician was not competent to testify. The court found that Dolan, in specifically recognizing the legislature’s establishment of nursing as a unique school of medicine, “unequivocally required that a health-care expert witness must be a licensed member of the school of medicine about which the expert testifies. Id. at *12.

Does Sullivan v. Edward Hospital Reveal the Supreme Court’s Position on Wingo v. Rockford Memorial Hospital?

Attribute it to wishful thinking or an overreading of the court’s opinion, but a majority of the medical defense attorneys with whom I have discussed the Sullivan decision have concluded that the court is tipping its hand in regards to the Wingo exception. They base this belief on several statements within the Sullivan decision.

First, the court “expressly reaffirm[ed] the license requirement of Dolan and its progeny and decline[ed] plaintiff’s invitation to deviate therefrom.” Id at *13. Further, the plaintiff portrayed the Dolan license requirement as “rigid and formalistic,” and the court made no attempt to dispute that portrayal.

Next, the Supreme Court recognized as persuasive the amicus brief filed by the American Association of Nurse Attorneys (TAANA) and agreed with its argument that the expert physician

Page 3 of 3
should not be allowed to offer expert testimony against the nurse at issue based upon his observation of nurses in general. *Id.* The court even cited the following portion of TAANA’s argument: “Nor would a nurse be permitted to testify that, in her experience, when she calls a physician, he/she usually responds in a certain manner. Such testimony would be, essentially, expert testimony as to the standard of medical care.” *Id.* at *12. The court also agreed with TAANA that a physician who has not completed an accredited program in nursing can neither qualify for licensure as a registered nurse nor even sit for the exam. Does the inclusion of these portions of the TAANA brief hint at the court’s leanings on the issue of the *Wingo* exception? Or is it simply surplusage in the opinion?

The court also cited to legal articles on the issue, such as *Proving Nursing Negligence* from the May 1991 issue of *Trial* magazine. P. Sweeny, *Proving Nursing Negligence*, 27 Trial 34, 36 (May 1991). In that article, the author argued “[a] physician’s statement that he or she often observes nurses and therefore knows what they do may be inadequate.”

The main rationale of the Second District’s decision in *Wingo* was there was no harm of a higher standard of care being imposed by the physician’s testimony relating to the nursing standard of care, because the standard of care at issue (what a nurse is required to communicate to a physician) was the same for physician and nurse. *Wingo*, 686 N.E.2d at 728-29. In so doing, the Second District recognized the communication at issue as standard of care testimony, rather than some hybrid communication. Therefore, the exception that the *Wingo* court created ignored the plain language of *Dolan*. The Illinois Supreme Court’s decision in *Dolan* simply does not provide an exemption for the licensing requirement that is dependent on the character of the standard of care testimony being offered. Neither is the licensing requirement dependent on whether the standard of care at issue is different between the schools of medicine at issue.

While the validity of the Second District’s decision in *Wingo* has not been addressed by the Illinois Supreme Court, federal courts have not been as hesitant. In a non-published opinion, *Swanson v. Keen, M.D.*, 2003 WL 21504722 (N.D. Ill.), the United States District Court for the Northern District of Illinois, used the *Wingo* decision as support for its holding that whether a physician is competent to testify as to the standard of care for nurses is dependent on the particular nursing practice in question. In *Swanson*, the Northern District found a physician competent to testify about the nurse’s failure to take an adequate medical history, because the history provided the physician with necessary information. *Swanson* 2003 WL 21504722 at *1. The court’s decision was devoid of any analysis of the *Dolan* licensing requirement.

**Conclusion**

While one could argue that this interpretation overreaches the Illinois Supreme Court’s decision in *Sullivan*, it is clear that the merit of the *Wingo* exception was at least debated by the panel. Justice Rarick’s dissent forcefully argued: “any factual distinctions are insignificant where the rationale behind the *Wingo* decision fully applies.” *Sullivan*, at *15. Justice Rarick reasoned that since the plaintiff’s expert physician’s particular expertise encompassed the proper standard of care for both physicians and nurses pertaining to patient fall protection, he would invoke the *Wingo* exception and allow the physician to testify on that issue.

So, while we wait for the Supreme Court to measure and weigh the Second District’s decision in *Wingo*, we must be content in knowing that none of the other justices on the panel joined Judge Rarick in his dissent. Perhaps this was just a case of judicial restraint, or perhaps this was the first shot across the bow of the *Wingo* exception. Either way, one cannot help but anticipate that the Illinois Supreme Court will address the issue sooner rather than later.

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