COURT FINDS IME PHYSICIAN LIABLE FOR MISDIAGNOSIS

FACTS

In April 2000, Jeremy Ritchie injured his back while at work. The seriousness of his injuries – a cervical spinal cord compression – was not recognized by those providers who initially evaluated him. Within two days of the injury, he reported his pain and numbness to Dr. Robinson at HealthSouth Occupational Medicine. He was then seen by Dr. Howe at Emergency Chiropractic. The chiropractors recommended to the workers' compensation carrier that Jeremy see a specialist to evaluate his symptoms. The carrier referred him to Dr. Krasner to perform an IME (independent medical evaluation). The carrier described Jeremy's injury as "a cervical and lumbar strain" and asked Dr. Krasner to conduct the evaluation and respond to the following:

1. Please describe the findings, diagnosis, prognosis and their relationship to the injury of 4-11-00.

2. Do you feel Mr. Ritchie's current symptoms exacerbated a pre-existing back condition? If so, do you feel he is now at a pre-injury status?

3. If not, to what extent do you feel his current symptomatology is attributable to the 4-11-00 industrial incident, and what treatment do you recommend?

4. Do you feel he is capable of regular work? If not, can he perform light work? Please list the restrictions.

Prior to the evaluation, Jeremy signed Dr. Krasner's notice, which explicitly stated that no doctor-patient relationship existed. Dr. Kraser examined Jeremy, ordered and reviewed an MRI of the lumbar spine, and reported to the carrier that Jeremy's "injury is stationary…there is no indication for supportive care…and there is no indication for any work restrictions…and I feel he is medically able to perform unrestricted work."

Based on Dr. Krasner's report, the carrier terminated Jeremy's benefits. Jeremy stated in an affidavit, "I was advised that my condition was stable, that I did not need further medical treatment, and that I could go back to work without restrictions." Jeremy continued to deteriorate but did not have insurance, so he did not seek further treatment. Eventually Jeremy saw Dr. Solomon, a neurologist who diagnosed him with cervical spinal cord compression. Jeremy immediately underwent spinal cord surgery, which prevented further deterioration of his spinal cord; but the undiagnosed spinal cord compression over the eight months prior to surgery caused part of the cord to die. Jeremy developed central pain syndrome, for which Dr. Solomon prescribed narcotics for pain, in addition to medications for sleep and to reduce his nerve and muscle spasms. In April 2004, Jeremy died of an accidental overdose.

In December 2002, prior to his death, Jeremy filed a medical malpractice complaint against Dr. Robinson, Dr. Howe, Emergency Chiropractics, Dr. Krasner, and others. After his death, the complaint was amended to include a wrongful death action and Dr. Solomon, the treating neurologist, was added as a defendant. However, during plaintiff's closing argument, plaintiff's counsel asked the jury to find no liability for Dr. Solomon. The jury returned a verdict in favor of plaintiffs (Jeremy's parents and child) for $5 million. The jury found Dr. Krasner 28.5 percent at fault, Emergency Chiropractic 37 percent at fault, Dr. Howe of Emergency Chiropractic 28.5 percent at fault, and Dr. Robinson six percent at fault. No fault was assigned by the jury to Jeremy or to Dr. Solomon. Dr. Krasner appealed to the state Court of Appeals.

The Arizona Court of Appeals affirmed the trial court's holding.

SIGNIFICANCE OF THIS CASE TO FORENSIC PHYSICIANS

At least the following findings of the Arizona Court of Appeals are relevant to physicians who perform IMEs:

1. ***Independent medical examiner owed the evaluee a duty of reasonable care despite the lack of a formal doctor-patient relationship:*** This court relied on the Arizona Supreme Court's opinion in *Stanley v. McCarver*, 208 Ariz. 219 (2004) which held that a duty may arise even in the absence of a doctor-patient relationship. The *Stanley* opinion provided factors for courts to consider when deciding whether a duty exists, including "whether the doctor was in a unique position to prevent harm, the burden of preventing harm, whether the plaintiff relied upon the doctor's diagnosis or interpretation, the closeness of the connection between the defendant's conduct and the injury suffered…" In this case, the court noted that Dr. Krasner performed the IME for the carrier; he reviewed Jeremy's records, examined him, ordered and reviewed an MRI of the lumbar spine, and rendered a report upon which the carrier and Jeremy relied. Jeremy stated in his deposition that "in reliance on Dr. Krasner's findings, I did not obtain additional medical care until several months later." The appellate court found that Dr. Krasner "assumed a duty to confirm to the legal standard of care for one with skill, training, and knowledge…toward Jeremy when he conducted the IME. Given that Dr. Krasner had that duty, whether there was a breach of that duty was a determination left to the jury." The court went on to clarify:

We do not hold that every IME physician has a duty of care in every situation. In this case, Krasner was hired to determine the extent of Jeremy's work-related injury and make treatment recommendations. By agreeing to do so, he assumed a duty to conform to the legal standard of reasonable conduct in light of the apparent risk. Therefore, we hold the trial court correctly held that Krasner owed a duty of reasonable care to Jeremy.

2. ***Limited liability agreement between evaluee and examiner did not eliminate the duty of care:*** The court noted that having the evaluee sign off on this disclaimer did not eliminate Dr. Krasner's duty to act reasonably.

3. ***The evidence in this case was sufficient to support jury finding that IME physician's misdiagnosis was, according to the court, "-partially the proximate cause of" evaluee's spinal cord injury and death:*** In order to

find a physician liable for medical malpractice, plaintiffs must show that the defendant physician's actions/inactions were a proximate cause of the damages suffered by plaintiff. In this case, to find proximate causation, the jury had to conclude that "it was more likely than not that [the] defendant's conduct was a substantial factor in bringing about the result, and if plaintiff's injury was a foreseeable consequence." Dr. Krasner argued that it was not foreseeable that Jeremy would die of a drug overdose four years after the evaluation. The appellate court found the following:

> Based on the record in this case, we cannot find that the jury erred in finding Krasner's misdiagnosis was partially the proximate cause of Jeremy's injury, and ultimately, to his death. The jury heard testimony from expert witnesses and reviewed volumes of evidence. Based on this, it reasonably could have found it foreseeable that Krasner's report prevented Jeremy from seeking treatment either because he relied on Krasner's report or because [the carrier] relied on the report, causing it to terminate Jeremy's workers' compensation coverage. Further the jury could have found Jeremy's physical deterioration and reliance on medication foreseeable.

OTHER NOTE-WORTHY PROCEDURAL POINTS

1. ***The treating physician's liability:*** Plaintiffs made their reluctance to name Dr. Solomon as a defendant known to the court and to other defendants. Plaintiffs' counsel never raised the issue of standard of care with Dr. Solomon's treatment. When asked about this by the court, plaintiffs' attorney responded that "the only reason I brought [Dr. Solomon] in is because two [defendants] named her as a non-party at fault." The trial judge indicated his displeasure with all parties for including Dr. Solomon. The defendants essentially agreed to allow Dr. Solomon to be dismissed, but this was after they had already alleged she was negligent, so the jury was allowed to consider assigning fault to her.

2. ***Statute of limitations:*** Dr. Krasner performed the IME in June 2000, and Jeremy filed the initial suit in December 2002, which is outside the two years that medical malpractice plaintiffs have to file suit in Arizona. While Dr. Krasner failed to raise this as a defense prior to judgment, the court noted that even if it had been raised timely, the action would not have been barred by the statute of limitations. Arizona follows the discovery rule; accordingly, "the statute does not start to run until the plaintiff possesses a minimum knowledge sufficient to recognize that a wrong has occurred and caused injury." In this case, the court found that there was "substantial evidence to support the theory that Jeremy did not have reason to investigate his medical malpractice claim until well within the two-year limitation period."

3. ***Witness immunity:*** Dr. Krasner argued that witness immunity shielded him from any negligent conduct associated with the IME. The court disagreed, stating, "[a]lthough we consider workers' compensation hearings that occur before administrative law judges judicial proceedings, the administrative process involved in reviewing a claim for compensation is not…[Dr. Krasner] conducted the IME for the benefit of [the carrier], not for a judicial proceeding."

RISK MANAGEMENT ADVICE

Given that courts are increasingly imposing duties on IME physicians, the risk management advice is as follows:

1. Understand the duties owed to the evaluee by a physician performing an IME.
2. Communicate clearly to manage the evaluee's expectations; such communication should include the fact that the IME is being performed at the request of a third party and that an IME is different from treatment.
3. Consider using a "consent to evaluation" agreement to document the nature of the evaluation and the physician's role. While this court did not find such an agreement in this case dispositive of the issue, it is still recommended to make it clear to the evaluee what the relationship is and is not.
4. Protect confidentiality by informing the evaluee to whom information will be disclosed and obtain the evaulee's written authorization prior to releasing information.
5. Inform the evaluee of significant medical findings and, if appropriate, recommend follow-up with another provider.
6. Confirm IMEs are covered within the scope of your professional liability insurance policy.
7. Understand that if treatment or advice is provided, the duty owed changes to the full duty owed by treating physicians.

CASE: *Ritchie v. Krasner*, 211 P.3d 1272 (Ariz. Ct. of App. 2009)

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