Evidence

Kimberly Boldt

SUBSEQUENT TREATING PHYSICIANS: BEWARE OF THE CAUSATION TROJAN HORSES

Medical malpractice actions can present any number of sticky evidentiary issues, but one that is particularly problematic is the scope of a subsequent treating physician's testimony at trial. The law on this subject stems from three very important Florida Supreme Court cases: (1) Saunders v. Dickens;1 (2) Cantore v. West Boca Medical Center, Inc.;2 and (3) Gutierrez v. Vargas.3 These cases demonstrate how the trial testimony of a subsequent treating physician can torpedo causation by cleverly shifting the plaintiff's burden of proof. Recognizing the problem, the Florida Supreme Court issued opinions limiting the scope of a subsequent treating physician's testimony at trial, thereby preventing the use of this improper tactic. In this article, we'll examine the law and a recent example of how this played out in one of our cases.

Let's start with the law which begins in 2014 with the Florida Supreme Court's decision in Saunders v. Dickens. There, doctors failed to order a cervical MRI which was called for given the plaintiff's symptoms. Had the MRI been performed, it would have revealed the plaintiff's cervical compression and the need for immediate surgery. The compression went untreated for months, ultimately rendering the plaintiff a quadriplegic. At trial, the defendant doctor called a subsequent treating physician to testify on his behalf. The subsequent treater claimed that, even if the defendant doctor had ordered the cervical MRI and the MRI showed the compression, he (the subsequent treater) would not have done anything differently. He testified that he would not have performed surgery at that time.

The defense lawyer argued extensively in closing that this testimony defeated the plaintiff's causation theory. In other words, according to the defense, had the defendant doctor complied with the standard of care set out by the plaintiff's expert, the outcome would have been no different because, as the subsequent treater testified, he would not have operated on the plaintiff. The plaintiff's lawyer objected, arguing that the defense was misstating Florida law. The trial court overruled the objections and allowed the defense lawyer to continue making the causation argument based on the subsequent treater's testimony. The jury (as you would expect) returned a defense verdict.

The Florida Supreme Court held that Florida law precluded the defendant doctor from utilizing the testimony of the subsequent treating physician to cut off causation: "a physician cannot insulate himself or herself from liability for negligence by presenting a subsequent treating physician who testifies that adequate care by the defendant physician would not have altered the subsequent care."4 This is because "allowing such testimony would place a burden on the plaintiff to somehow prove causation by demonstrating that a subsequent treating physician would not have disregarded the correct diagnosis or testing, contrary to his or her testimony and irrespective of the standard of care for the defendant physician."5 The law does not "require the plaintiff to establish a negative" — that is, if defendants are able to cut off causation by providing subsequent treater testimony, it "inappropriately adds a burden of proof that simply is not required under the negligence law of this State."6

It is important to note that the ultimate holding in Saunders was evidentiary in nature in that it limits the scope of what a subsequent treating physician can testify about at trial. What a subsequent treater would (or would not) have done had the defendant doctor followed the standard of care is "irrelevant and inadmissible": [T]estimony that a subsequent treating physician would not have treated the patient plaintiff differently had the defendant physician acted within the applicable standard of care is irrelevant and inadmissible and will not insulate a defendant physician from liability for his or her own negligence.7

Four years later, the Florida Supreme Court reaffirmed this rule in Cantore v. West Boca Medical Center, Inc. In Cantore, doctors diagnosed a 12-year-old child with hydrocephalus, a condition where a buildup of fluid in the brain can cause severe brain damage if not treated timely. The doctors and hospital failed to get the child timely transferred to another hospital that could provide the necessary treatment and, as a result, she suffered severe brain hemorrhaging and resulting brain damage.

At trial, the defendant hospital that should have affected a timely transfer presented testimony from the treating pediatric neurosurgeon who cared for the child at the receiving hospital. The plaintiff's theory of the case was that the delay in the transfer caused the catastrophic outcome, but in answering a series of hypothetical questions from defense lawyers, the treating neurosurgeon testified that the delay made no difference. The treating neurosurgeon claimed that the child would have been in the same condition prior to the surgery he performed "[r]egardless of whether [the child] had arrived at [the receiving hospital] an hour or two earlier" and, therefore, would have still suffered the same permanent brain damage."8

As in Saunders, the testimony from the subsequent treating physician torpedoed causation. The Cantore jury returned a defense verdict. On appeal, the Florida Supreme Court confirmed again that the admission of the subsequent treating surgeon's testimony was erroneous and prejudicial, requiring a new trial because it improperly broke the chain of causation:

[I]t is clear that the purpose of introducing the challenged testimony of [the subsequent treating surgeon's] testimony was to break the chain of causation between the alleged negligent conduct … and [the child's] injuries — i.e., to establish that [the child] still would have suffered permanent brain damage even if the hospitals and their staffs had effectuated a faster transfer. … Therefore, [the subsequent treating surgeon's] testimony on that point was "irrelevant and inadmissible," Saunders, 151 So. 3d at 443, and the trial court abused its discretion in allowing it to be read to the jury.9

Before we discuss Gutierrez v. Vargas, let's examine how this issue unfolded in one of our cases. A CT scan revealed that our client had a mass in his lung. Our client's pulmonologist performed a biopsy, but the results were inconclusive. The pathology report stated that the specimen was "consistent with" cancer but recommended further testing. Our client's pulmonologist did not conduct the further testing that was recommended, but rather, advised our client that he had lung cancer and referred him to a thoracic surgeon. The surgeon removed a lobe of our client's lung based on the diagnosis and referral from the pulmonologist. The post-surgery pathology revealed that the mass was an infection which could have, and should have, been treated with antibiotics. Our client did not have cancer and should never have undergone the surgery that was performed.

The surgeon was not a defendant in the case; he was never sued. He was the classic subsequent treating physician referenced in Saunders and Cantore. During his deposition, the surgeon testified that the correct diagnosis of the mass did not matter because he would have performed the surgery even if he knew the mass was just an infection. This testimony clearly violated the holdings in both Saunders and Cantore but the defense nonetheless sought to introduce it at trial.

The defendants designated the subsequent treating surgeon as an expert witness and tried to claim that, as a result of his "expert witness" status, he could testify that he would have removed our client's lung even if he had known the mass was an infection. The defense argued that the surgeon was a hybrid fact-expert witness as the Florida Supreme Court used that term in Gutierrez v. Vargas.

In Gutierrez, the Supreme Court held that treating physicians (who are not parties to the case) may testify as hybrid fact-expert witnesses, but only with respect to the care and treatment that they rendered to the plaintiff. Gutierrez does not permit a hybrid fact-expert witness to render after the fact opinions like a traditional expert would — they may only opine about the diagnoses they made at the time they were treating the patient.

The trial court in our case did not fall for the legally invalid distinction that the defense proposed. The trial court allowed the surgeon to testify at trial as a hybrid fact-expert witness under Gutierrez, but still enforced the restrictions on the scope of his testimony established by Saunders and Cantore. The trial court ruled that Gutierrez did not serve as a back-door to introducing the exact same testimony disallowed by Cantore and Saunders.

So be sure to keep Saunders and Cantore in your back pocket for the next time a subsequent treating physician tries to sabotage causation in your medical malpractice case. It doesn't matter what the treating physician would have done if things were different — that testimony simply cannot be admitted at trial. It is irrelevant and inadmissible. And don't let the trial court be fooled by a defendant designating the subsequent treater as an expert witness (or a hybrid fact-expert witness) like they tried to do in our case. The Florida Supreme Court never intended for its holding in Gutierrez to serve as a way around its holdings in Saunders and Cantore. You have the law necessary to protect your case against the causation Trojan horse by keeping a subsequent treating physician from shifting your burden of proof.

KIMBERLY L. BOLDT is a board certified appellate lawyer at Ratzan Weissman & Boldt, with substantial experience in complex civil litigation and appeals in state and federal court. Her experience includes complex commercial disputes, medical malpractice, products liability, insurance bad faith, insurance coverage, class actions and cases involving catastrophic loss and wrongful death. She has been lead appellate counsel in more than 100 reported appeals before three federal Circuit Courts of Appeals, the Florida Supreme Court and each of Florida's five District Courts of Appeal.

1 Saunders v. Dickens, 151 So. 3d 434 (Fla. 2014).

2 Cantore v. West Boca Medical Center, Inc., 254 So. 3d 256 (Fla. 2018).

3 Gutierrez v. Vargas, 239 So. 3d 615 (Fla. 2018).

4 Saunders at 442.

5 Id.

6 Id.

7 Id. at 443 (emphasis added).

8 Cantore at 262.

9 Id. at 263.