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Recent Developments: American Radiology Services, LLC v. Reiss

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RECENT DEVELOPMENT

AM. RADIOLOGY SERVS., LLC v. REISS: A DEFENDANT IN A MEDICAL MALPRACTICE ACTION ASSERTING NON-PARTY NEGLIGENCE AS AN AFFIRMATIVE DEFENSE MUST PRESENT EXPERT TESTIMONY TO A REASONABLE DEGREE OF MEDICAL PROBABILITY.

By: Alexa Mellis

The Court of Appeals of Maryland held that a defendant raising non-party medical negligence as a defense in a medical malpractice action bears the burden of producing expert testimony to establish that the non-party breached the standard of care and caused injury. *Am. Radiology Servs., LLC v. Reiss*, 470 Md. 555, 590 236 A.3d 518, 538 (2020). It is settled that expert medical testimony must be made to a reasonable degree of medical probability because the complex nature of medical science is beyond the comprehension of an average juror. *Id.* at 580, 236 A.3d 532. Medical negligence is not any less complex or more comprehendible to an average juror merely because it is raised as a defense. *Id.* at 591, 236 A.3d at 538. Thus, submitting a question of non-party medical negligence to a jury without sufficient expert testimony constitutes an abuse of discretion by the trial court. *Id.* at 588, 236 A.3d at 536.

Martin Reiss ("Reiss") was diagnosed with a kidney tumor and an enlarged lymph node in August 2011. While Dr. Davalos, Reiss' urologist, was able to remove the kidney tumor, he was unable to safely remove the lymph node. Reiss' oncologist, Dr. DeLuca, confirmed that the lymph node was cancerous and that it could not be safely removed. During the course of Reiss' treatment from August 2011 to September 2015, Dr. DeLuca ordered periodic CT scans to monitor the lymph node. Dr. Bracey and Dr. Ahn, employees of American Radiology Services, LLC (collectively "the Radiologists") interpreted Reiss' CT scans on various occasions, finding no enlargement of the lymph node. However, in December 2015, a third radiologist discovered that the lymph node had increased in size since the Radiologists evaluated the 2011 CT scan. Dr. DeLuca and Reiss' new oncologist, Dr. Eugene Ahn ("Dr. E. Ahn"), both concluded that the lymph node was cancerous and inoperable.

Reiss filed a medical malpractice action in the Circuit Court for Baltimore City against the Radiologists in May 2016, alleging that the cancerous lymph node could have been removed in 2011. Dr. DeLuca, Dr. Davalos, and Dr. E. Ahn ("the non-parties") were not parties to the action. Specifically, Reiss alleged that the Radiologists breached the standard of care when they failed

to notify Dr. DeLuca about the growth of the lymph node. At the conclusion of the trial, a question on the verdict sheet ("Question 6") required the jury to determine if a negligent act by one of the non-parties was a substantial factor contributing to Reiss' injuries. In its first deliberation, the jury affirmatively answered Question 6 and improperly returned a $4.8 million verdict for Reiss despite concluding the Radiologists were not liable. Upon further deliberation ordered by the court, the jury ultimately found for the Radiologists, determining that they had not breached the standard of care.

The Court of Special Appeals of Maryland reversed and remanded the case, finding that the Radiologists' failure to present expert testimony prevented them from advancing their defense of non-party medical negligence; it also concluded that the lower court erred in submitting the issue to the jury. *Reiss*, 470 Md. at 572, 236 A.3d at 527. The Court of Appeals of Maryland granted the Radiologists' petition for certiorari. *Id.*

The court first addressed the issue of what level of evidence was required to generate a jury question when a defendant asserts non-party medical negligence as a defense. *Reiss*, 470 Md. at 579, 236 A.3d at 531. In general, medical negligence and causation must be established by expert testimony. *Id.* at 581, 236 A.3d at 533. However, the Radiologists argued that asserting non-party medical negligence as an alternative theory of causation precluded them from meeting that evidentiary threshold. *Id.* at 582, 236 A.3d at 533. The court rejected this argument and affirmed the Court of Special Appeals, finding that expert testimony is required to establish non-party medical negligence, regardless of whether it is raised as an affirmative defense or as an alternative theory of causation in connection with a general denial of liability. *Reiss*, 470 Md. at 582, 236 A.3d at 533 (citing *Reiss v. Am. Radiology Servs., LLC*, 241 Md. App. 316, 341, 211 A.3d 475, 490).

The Court of Appeals of Maryland determined that the defendant's burden of production requires production of expert testimony to a reasonable degree of medical probability in order to properly enable the jury to make a factual finding that non-party medical negligence occurred. *Reiss*, 470 Md. at 583, 236 A.3d at 534. The court then articulated that a defendant could meet the burden of production by either providing its own medical expert or eliciting testimony from the plaintiff's expert through cross examination. *Id.*

Next, the Court of Appeals of Maryland addressed the Radiologists' contention that the testimony of Reiss' medical experts met the evidentiary threshold of a reasonable degree of medical probability to permit the issue to go to the jury. *Reiss*, 470 Md. at 585, 236 A.3d at 535. The court agreed with the intermediate appellate court that the generalized statements made by the experts, including their differences in professional opinion, were insufficient to rise to the level of the reasonable degree of medical probability standard. *Id.* at 587, 236 A.3d at 536. As a result, the court concluded that

the testimony elicited from Reiss' expert witnesses failed to show to a reasonable degree of medical probability that the non-parties breached the standard of care and caused Reiss' injuries. *Id.* at 585, 236 A.3d at 535. Due to the lack of appropriate testimony, the circuit court improperly submitted the question of non-party medical negligence to the jury. *Id.* at 587, 236 A.3d at 536.

Finally, the court determined whether submitting Question 6 to the jury on the verdict sheet constituted a prejudicial error. *Reiss*, 470 Md. at 587, 236 A.3d at 536-37. A prejudicial error arises "only when an error probably affected the verdict, not when it merely possibly did so." *Reiss*, 470 Md. at 588, 236 A.3d at 537 (citing *Armacost v. Davis*, 462 Md. 504, 524, 200 A.3d 859, 871 (2019)).

The Court of Appeals of Maryland affirmed, finding that the circuit court's error was prejudicial because the jury awarded damages based on the non-parties' negligence without a sufficient factual basis. *Reiss*, 470 Md. at 589, 236 A.3d at 537. Due to the prejudicial error, the court was unable to conclude that the jury would have come to a different decision had it not considered the non-parties' negligent acts. *Id.* at 590, 236 A.3d at 538. Accordingly, the court determined that the jury was "irreparably contaminated" by the Radiologists' unsupported statements, which "more likely than not" influenced the verdict. *Id.*

The decision provides clarification about the level of expert testimony a defendant is required to present when asserting non-party medical negligence as a defense. *Reiss*, 470 Md. at 590, 236 A.3d at 538. Regardless of how the defendant chooses to bring this testimony into court — by retaining its own expert or cross examining the plaintiff's expert — the testimony is subject to the same evidentiary threshold: a reasonable degree of medical probability that the non-party breached the standard of care and caused the plaintiff's injuries. As a result of this decision, legal practitioners asserting this particular defense will be required to devote additional time to trial preparation to ensure that the expert testimony being provided meets the requisite evidentiary standard.