

### **Haralampopoulos: Colorado Supreme Court - June 16, 2014**

The Colorado Supreme Court today issued an important case decision which will help physicians in the defense of malpractice cases. CMS submitted an Amicus, or friend of the court, brief on behalf of the defend physicians in the case and helped persuade the Colorado Supreme Court to rule in their favor and clarify Colorado hearsay rules in favor of physicians defending malpractice cases. In addition, CMS recognized the importance of the issue to all physicians and recruited additional organizations to join in the Brief on behalf of the defendant physicians, including the American Medical Association, the Colorado Chapter of the America College of Emergency Physicians, the Colorado Radiological Society and the Colorado Society of Anesthesiologists.

The middle-aged male patient presented with abdominal pain and a CT scan showed a large cystic liver mass. Interventional radiology was asked to perform an ultrasound-guided needle biopsy which diagnosed a hydatid cyst. During the procedure, the patient had a vasovagal response and went into cardiopulmonary arrest. Resuscitation efforts started immediately but took approximately 30 minutes to stabilize the patient. He suffered a severe anoxic brain injury which left him in a permanent vegetative state. At a family meeting one week after the event, the patient's ex-girlfriend discussed with family members outside the presence of the doctors the patient's past cocaine use, but it was not mentioned to the physicians. One week later, the ex-girlfriend told a physician who had been caring for the patient about the patient's cocaine use and asked whether it may have contributed to the cardiac arrest. The physician did not put the information in the medical chart.

The patient filed suit against seven physicians claiming negligence in the recommendation and performance of the biopsy. Five of the seven defendant physicians were dismissed from the case before trial. The radiologist who performed the biopsy procedure and the internal medicine specialist who recommended it were the only defendants at trial. During pre-trial discovery, the ex-girlfriend elaborated that when she dated the patient two years prior to the event he had admitted to cocaine use but claimed he had stopped. She then saw him buying drugs on a street corner. In addition, the patient stayed with her shortly before his hospitalization and told her he saw a friend floating as a white cloud in the hallway. The patient's brother testified that he knew the patient used cocaine and the family tried to get him to stop. In addition, the patient had chronic financial problems.

The defense attorneys retained experts who opined that the patient's arrest and prolonged resuscitation were likely caused by cardiac damage secondary to his cocaine use. Before trial, the patient's lawyer asked the trial judge to order that the defendants not put on evidence of the patient's past cocaine use or opine that it caused his arrest. The defendants relied on an exception to the hearsay rule which permits the admission of statements made "for purposes of diagnosis or treatment." They argued the statements made to the treating physician after the patient's event were for purposes of diagnosis. The trial Judge admitted the evidence and the experts' opinions. The jury returned a verdict in favor of the defendant physicians.

On appeal, the Colorado Court of Appeals reversed the verdict, holding that the ex-girlfriend's statements about cocaine use could not have been made for diagnosis or treatment purposes because the patient was already in a vegetative state. CMS joined in supporting a Petition for review by the Colorado Supreme Court and the Court agreed to review the case. The case was fully briefed and oral argument occurred on June 12, 2013.

The Colorado Supreme Court held that the ex-girlfriend's statements were made for purposes of diagnosis even though it was after the event. The Court properly recognized, as advocated by CMS and others, that diagnosis of a patient's condition does not end at some defined point, but frequently continues and is refined as more information is received. The example cited by the Court in the decision is pathology results, which by definition are obtained after the patient has had some treatment for a medical condition, but are often used to make a diagnosis. The Court also properly decided that the defense physician experts relied on the information in forming their opinions that the cause of the patient's arrest and prolonged resuscitation was not negligence by the physicians, but the patient's then-unknown cocaine use. So even if the treating physicians did not use the information at the time it was reported, the information was made for purposes of diagnosis.

This decision will assist physicians in defending malpractice claims by permitting the introduction of hearsay evidence in support of alternative causes to negligence for the plaintiff's injuries. In malpractice cases, Plaintiff's must prove that the alleged negligence caused the injury and many times a primary defense of the physicians is that there was a different cause. Sometimes, as in this case, the evidence of that alternative cause may only be obtained from family members or others who know the patient's habits and activities.