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EVIDENTIARY ISSUES IN MALPRACTICE

by Ted Babbitt

A relatively recent Fourth District opinion, Liberatore v Kaufman, 27 F.L.W. D1549 (Fla. 4<sup>th</sup> DCA, July 3, 2002), points out some of the issues that come up regularly in malpractice cases. These issues are also relevant to other cases which do not involve malpractice.

Mrs. Kaufman sued her obstetrician when she almost bled to death as a result of a vacuum extraction. The defendants' experts were allowed to discuss with the jury the ACOG Bulletins which are produced by the American College of Obstetricians and Gynecologists. These Bulletins are issued to obstetricians and gynecologists suggesting methods of treatment and are often the subject of discussion in obstetrical malpractice cases. The trial court allowed the defense experts to not only explain to the jury what these Bulletins were and what they said but to opine that the doctor, by following the Bulletins, had met the standard of care. The Evidence Code §90.706 provides in part, the following:

Authoritativeness of literature for use in cross-examination. – Statements of facts or opinions on a subject of science, art or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness . . . .

Learned treatises may not be used to bolster an expert witness' testimony. They can only be used in cross examination in specific circumstances notably

when written by the expert himself or when accepted by the expert as authoritative. The case law is clear that they cannot be used in direct examination to support the expert's opinion. See eg. Chorzelewski v Drucker, 546 So.2d 1118 (Fla. 4<sup>th</sup> DCA 1989); Quarrel v Minervini, 510 So.2d 977 (Fla. 3<sup>rd</sup> DCA 1987); Tallahassee Mem'l Reg'l Med Ctr. v Mitchell, 407 So.2d 601 (Fla. 1<sup>st</sup> DCA 1981); see also Green v Goldberg, 630 So.2d 606 (Fla. 4<sup>th</sup> DCA 1993).

In any professional negligence case there is always an attempt to influence the jury by the "good works" of the defendant. Realistically, however, a defendant physician having started a fund for orphaned children is hardly relevant to his professional competence. Likewise, whether the doctor has been recognized by any compilation as a well-qualified physician is pure hearsay as it relates to his actions in a particular case. Just as in an automobile case the fact that a defendant driver has been a good or bad driver in the past has no relevance to the issue of whether he ran the stop sign in the case under consideration so too, whether a doctor has been listed by a peer organization as a good doctor is neither relevant or admissible. In the Liberatore case, the trial court allowed the defendant doctor to testify that he had been listed for three years in a list of "top doctors published by the Center for Study of Services." The Appellate Court found that permitting that testimony to go into evidence was reversible error and required the granting of a new trial. The Court relied in part

on Tomlian ex rel. Tomlian v Grenitz, 782 So.2d 905 (Fla. 4<sup>th</sup> DCA 2001) in which reversible error was found when a defendant physician was allowed to testify that he had been listed as a top doctor in a local magazine. The opinion of anyone as to whether a doctor is a good or bad doctor is not relevant to the issue to be tried by the jury in a malpractice case which is whether that doctor, good or bad, made an error which fell below the standard of care in the case in question. To allow that testimony in simply risks reversal.

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