

Grace Under Fire



By William "Mike" J. Johnson, JD

“You’re a LIAR!” The plaintiff’s attorney passed close to the defendant physician as he leveled the accusation in front of the jury. The physician handled this charge as he did the entire trial: with grace and composure. The trial showcased two very different trial practice styles. The plaintiff team: aggressive, histrionic, emotional, “over the top” and overreaching. The defense team: well-reasoned, calm, thorough, well prepared and thoughtful. Who would the jury believe?

Years before, the family practice physician had ordered an echocardiogram (ECHO) to assess a heart murmur that he heard during an exam. The report indicated moderate mitral valve regurgitation. The plaintiff was asymptomatic. Several months after the echocardiogram, the plaintiff suffered a ruptured chordae and flail leaflet which resulted in acute congestive heart failure and left the plaintiff in very critical condition and at risk of death. Mitral valve replacement via open heart surgery was required. The surgery appeared to have been a success, however, the plaintiff claimed a multitude of injuries some of which included, brain injury, and a long list of associated cognitive impairments, respiratory failure, renal failure, and atrial fibrillation.

There were several issues presented in this case: Was the plaintiff properly advised by the

physician of the electrocardiogram findings and their implications, such that the plaintiff could have chosen to undergo preemptive treatment for mitral valve regurgitation? Should the plaintiff have been referred to a cardiologist, which possibly would have resulted in a less invasive repair that may have avoided the trauma and cognitive impairments that he claimed? Did the plaintiff actually suffer the damages he claimed?

The plaintiff alleged that he was told the ECHO findings were normal. The defendant physician maintained that the patient was not told that the test results were “normal.” Instead, the physician contended that he discussed the report with the plaintiff and explained that the report showed moderate mitral regurgitation, but that absent symptoms, no intervention was needed and that he should return in one-year unless symptoms developed earlier.

The plaintiff’s out-of-state family practice expert witness opined that moderate regurgitation was abnormal and required referral to a cardiologist. However, his credibility was substantially damaged by defense counsel’s rigorous cross- examination. Moreover, the defense had a very strong local family physician expert to support the insured physician’s judgment that, based on no symptoms and an ECHO showing moderate mitral regurgitation, the advice to return in one year for an annual physical and repeat ECHO was appropriate.

The plaintiff’s out- of- state expert cardiologist witness was polished and made a good witness for the plaintiff. However, his testimony was based on multiple hypotheticals stacked on top of each other. His position was that **if only** the insured physician had referred the plaintiff to a cardiologist, the cardiologist **would have** interpreted the ECHO as showing severe regurgitation which **would have** made the plaintiff a surgical candidate and **therefore avoided** the life-threatening situation that developed later. During cross examination, defense counsel got the expert to admit that the report itself showed Stage B -moderate regurgitation—and further admitted that under the guidelines, a patient with this level of regurgitation could participate in competitive sports. By contrast, support for the insured physician’s care came from an impressive in-state cardiologist. Furthermore, the treating cardiac surgeon’s video deposition was played for the jury, and he stated multiple times that the plaintiff was not a surgical candidate based upon the ECHO report.

The plaintiff’s experienced and polished out-of-state expert psychiatrist also made a good presentation, but his testimony was largely neutralized by defense counsel’s cross examination that challenged the lack of specific evidence to support the claim that there was an extended period of hypoxia sufficient to cause brain injury. Defense counsel observed that the deposition of the plaintiff’s out of state neuropsychologist was read to the jury without really capturing the jury’s interest. The defense, on the other hand, offered live testimony from a local neuropsychologist and in-state neurologist to challenge the lack of objective proof of plaintiff’s cognitive impairment claim.

Plaintiff’s claims of brain damage were particularly concerning for the defense. However, given that the plaintiff was employed in a very intellectually demanding career before and after the event at issue, his claim of brain damage and cognitive difficulties was a “hard

sell.” He did not further his position when he testified extensively and performed so well on the stand that it was difficult to believe that he had any type of brain injury. For example, he testified extensively about his thorough medical research regarding his condition and damages, including reading medical journal articles and white papers. In his testimony, the plaintiff discussed the research as if he was a physician. Showing how quick he was on his feet and his grasp on the details, he even corrected defense counsel for leaving something out of the discussion of his record. Ironically, his testimony compellingly demonstrated not that he had cognitive defects, but that he did not have them.

The jury returned a verdict for the defense in approximately 30 minutes.

Takeaways

- **Keeping Cool**

Despite the plaintiff attorney’s harsh and aggressive tactics, the defendant physician never gave up the high ground. While medical malpractice trials are heavy with medical information and analysis, they are as personal as the people in them. Trials are adversarial, emotionally charged, and often bruising events. If the plaintiff’s attorney controls your emotions, he controls you. There will be an opportunity to respond to personal attacks in a measured, careful, and thoughtful way. Such a response allows you to keep your grace under fire and shows the jury that you are a calm and composed, professional—traits the jury appreciates in a physician.

- **Credibility, Reputation, and Relationships**

A trial takes place in front of members of your community. The reputation that you develop in that community cannot be totally separated from you for purposes of trial. Thus, being a well-liked, respected and credible member of your community can be a substantial asset. In this case, the defendant physician is sincere and likeable. Moreover, he grew up in his community and was active in it.

- **Instincts, Strategy and Strong Bonds**

The defense counsel who tried this case has exceptional instincts in reading people and strategy. For example, he knows how far to go in “playing his hand,” but, not “overplay it.” He can sense when a jury has heard enough, and he has the confidence to remain quiet when the plaintiff’s proof is actually helping the defense’s case. In this case, the attorney relied on his instincts and sense of strategy in choosing not to call one of the defense experts. He reasoned that the point had already been made very well with the first expert, the jury was eager to begin deliberations, and putting on another expert could risk a change in the jury’s composition due to scheduling constraints of some members of the jury. These strategy decisions must be made amid the trial,

but it turned out to be the right call in this case.

The lengthy challenge of litigation often forges a strong bond between the defendant physician and their defense attorney which, over time, is welded into a strong and zealous defense. The defense attorney and the physician take the process and its outcome very personally. Comments after the trial from the defense attorney about his client underscore this bond:

“He is a really good man and I think the jury sensed that.”

“Thank you again for allowing me to represent Dr. _____. He is truly a good man and we have become brothers in arms during a trial”.

“They are such great people [the physician and his wife]. I could not ask for better and more loving clients. This is really what it is all about in my mind.”

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