

You MUST Be Present to WIN



By William "Mike" J. Johnson, JD

The recently licensed resident physician was “moonlighting” at a rural emergency department when the patient, a young male in his twenties with several small children, presented in the early morning hours with complaints of cough, congestion, nausea, vomiting, weakness, headache, and abdominal pain. The patient indicated he had been experiencing these symptoms for three weeks. The patient had no fever, a normal oxygen saturation, somewhat low blood pressure, a pulse of 120, and respirations in the 20’s. He generally appeared weak and exhibited general tenderness in a non-distended abdomen. The physician assessed the lungs as normal. She did not order a chest x-ray because, based on her physical exam of the patient, she did not suspect pneumonia. She diagnosed the patient with an upper respiratory infection and ordered antibiotics plus medication for the patient’s cough. The patient was discharged. Two days later the patient presented to a different emergency department. His symptoms had worsened, and his condition deteriorated rapidly such that he died that day. An autopsy listed the cause of death as congestive heart failure due to dilated cardiomyopathy.

The patient’s spouse filed a lawsuit contending that the first physician failed to fully

evaluate the patient's vital signs, failed to order a chest x-ray, and failed to refer the patient to a cardiologist. According to the plaintiff, if a chest X-ray had been performed, the congestive heart failure would have been evident, which should have prompted a referral to a cardiologist for treatment. The plaintiff contended that such referral and treatment would have increased the patient's chances of survival. Stacked against the physician and the defense team were several risks and challenges. Commonly, defending a medical malpractice case means defending against "hindsight bias" which results when the plaintiff has the benefit of knowing the outcome and can "second guess" the physician's care. In this case, the physician did not order a chest X-ray which a plaintiff could argue, and a jury could likely perceive in hindsight, as a cheap, simple, and easy-to-obtain test. Another challenge was that the patient's condition worsened significantly after discharge. Defense counsel considered that a central difficulty in the case would be convincing a jury that a person ill enough to die from congestive heart failure would not have shown signs of that condition just two days prior. The potential for jury sympathy was also a big concern since the patient was very young, died a sudden and unexpected death, and was the father of young children. Finally, the physician was young and appeared even more youthful than her actual age. Would a jury think the physician was simply too young and inexperienced?

At trial, the defendant physician made a very good witness on her own behalf. She did an excellent job of explaining the thoroughness of her exam and used the medical record to back up her testimony such that everything she was telling the jury could be verified through the medical record. She explained that through her exam she was able to rule out more serious causes of the patient's condition, symptoms, and vital signs. She did not order additional tests, including an x-ray, because they would not have added to her treatment and diagnosis. The physician's tone with the jury was conversational, and she guided and instructed the jury on how an examination in the emergency department is conducted. The physician acknowledged that she was in fact recently licensed at the time she treated the patient. Nevertheless, her confident and empathetic testimony demonstrated to the jury that her examination of the patient was thorough and complete.

The defense's standard of care expert was a likeable "country doctor" who sparred with the plaintiff attorney and held his ground, but not to the extent that it was irritating. His support of the insured physician was backed up with 30 years of experience that complimented the insured physician's relative youth. He testified that the insured physician met the standard of care in all respects, and properly diagnosed the patient based on the presenting symptoms and her examination of the patient. Critically, he testified that no additional tests were required, and that the patient did not exhibit signs of congestive heart failure at the emergency department visit. The defense's causation witnesses, a cardiologist and pathologist, also testified well at trial. After seven days in trial, the jury rendered a unanimous defense verdict in approximately 2 and 1/2 hours.

What were the keys to the successful defense of this case? Foremost, the physician was very confident about the medical care she provided and had the will to go to trial and defend herself in a tragic and sympathetic case. She understood that going to trial meant accepting the risk of losing and that the risk of a plaintiff verdict could not be eliminated.

However, she also realized the power and benefit of thorough preparation and participating in her own defense. The defense team, who was very skilled and experienced, obtained good expert support from local physicians. Both the physician and the attorneys devoted a great deal of work to preparing for the trial; even so, they knew that trials are dynamic in nature and there are surprises, both good and bad. Thus, they were poised as best they could to defend against any unexpected challenges while also being ready to take full advantage of any opportunities that could benefit the defense. In one instance the plaintiff tried to introduce a “last minute witness,” but because of the way the defense handled the issue, the plaintiff decided not to present the witness. In another instance, the defense received a favorable evidentiary ruling that allowed them to present certain evidence that would have been excluded from the trial, but for the fact that the plaintiff “opened the door” to its admission. From a strategy standpoint good luck also came the defense’s way when the plaintiff chose to argue an alternate theory for the patient’s demise which weakened the plaintiff’s theory of liability. Above all, this story would not be told today, and the physician would not have been vindicated, had she not made the “gutsy” commitment to go to trial on a dangerous case ----“You must be present to win.”

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