

The Long Road of Litigation

By Alisa Wamble, JD

This Tennessee case involved the alleged wrongful death of a 42-year-old male who presented to the ER in early 2008 complaining of lower abdominal pain, fever, nausea, diarrhea, anxiety and severe distress. The patient had a four- to five-year history of diverticulitis, which was managed by diet. Dr. Long^[1] was the ER physician who examined the patient and ordered an x-ray and labs. A CT was also ordered and initially read as showing no free air in the abdomen. Dr. Long treated the patient with IV antibiotics and fluids. He diagnosed acute diverticulitis with localized peritonitis and decided to have the patient admitted. The on-call hospitalist was not available so Dr. Long contacted Dr. Ellis - who was out of town and not on call that night. Dr. Ellis agreed to have the patient admitted in the late night/early morning hours and planned to consult a surgeon the next morning. Early the following morning, the patient was found unresponsive in asystole and could not be revived. The autopsy noted disease of the rectosigmoid colon with perforation, abscess formation, obstruction, peritonitis, remote subendocardial infarction with probable superimposed acute ischemic changes suggestive of possible arrhythmia. The CT from the prior evening was overread after the patient's demise, and it noted a finding of free air. The patient was married and had three children who were 16, 12, and 5 at the time of his death. His life expectancy was likely another 35 years, and his annual income exceeded \$150,000. It was a tragic, unexpected death less than 12 hours after presenting to the emergency room.

In late 2008, a suit was filed by the patient's wife against Dr. Long and the hospital. The plaintiff alleged that Dr. Long failed to order an emergency surgical consult, failed to keep the patient in the ER or transfer him to the ICU, delayed ordering the CT and failed to follow ER policies and procedures. The plaintiff's theory was that the patient had a perforation in his rectosigmoid colon that could have been repaired by emergency surgery.

We had multiple supportive experts who felt that Dr. Long's care was entirely defensible. They believed there was no indication of a medical emergency or the need for an immediate surgical consult. Even if the surgeon had been called, he likely would have administered an antibiotic to calm the infection before considering surgery the following day. Our experts thought the patient died from an unexpected and acute cardiac event that was aggravated by diverticulitis. They also agreed with the radiology interpretation that there was no free air in the retroperitoneal cavity and there were clear indications of diverticulitis.

The depositions of the treating physicians were helpful in the defense of the case. They confirmed there was no fluid, free air or inflammatory process in the peritoneal cavity.

There was no evidence of a bowel perforation at the time the patient was treated in the ER or when the CT was performed. Even if an emergent surgical consult had been ordered, they did not think the outcome would have changed.

Dr. Long and our defense counsel believed the case was defensible and should be tried. After multiple continuances by the Court due to scheduling conflicts, the case was tried in 2011. The plaintiff's attorney voluntarily dismissed the case on the second day of trial because his proof was not going as well as he had expected. Some states allow a case to be dismissed by the plaintiff any time before it is submitted to the jury, and the plaintiff has the option to re-file the case once more within a year. This plaintiff did just that and re-filed the case in 2012.

The plaintiff's settlement demand exceeded \$5,000,000 (primarily based on the loss of the patient's income and the loss of consortium claims for the wife and three children). Dr. Long, defense counsel and SVMIC desired to continue to defend the case. While the case was pending the second time, we developed additional expert support (and ultimately had two ER doctors, a general surgeon, and a radiologist) along with supportive testimony from the patient's gastroenterologist and the pathologist who performed the autopsy. The plaintiff also further developed expert testimony that the cause of death was septic shock and hemodynamic compromise.

The hospital grew weary and settled with the plaintiff before the case was tried for the second time in 2014. Dr. Long went to trial and received a unanimous defense verdict. Afterwards the plaintiff filed a motion for a new trial, and it was granted by the Court. The trial judge set the defense verdict aside because she thought the jury might have been confused as to whether the defense was claiming that the patient contributed to his demise. (The patient's primary care physician had testified in his deposition that he had referred the patient to a surgeon to address his chronic diverticulitis, but the patient did not go.) The judge's ruling was extremely disappointing because the defense did not allege that the patient contributed to his death during the trial.

The case was set for trial again (before a different judge) and was ultimately tried for a third time early last year. Fortunately, Dr. Long received another unanimous defense verdict. The plaintiff did not file any post trial motions challenging the verdict or an appeal, and the case was finally dismissed in mid-2017. This was a stressful situation for all involved, and the case weighed heavily on both parties for nine years. Dr. Long maintained, and SVMIC supported, his steadfast desire to defend his care. Even though the litigation process is painfully slow and fraught with worry and expense, good medicine deserves to be defended. The tortuous course of this litigation tested Dr. Long's commitment to standing up for his care, but his patience and perseverance ultimately prevailed.

When our doctors are sued, we find they often feel isolated and discouraged – especially when the litigation process seems unfair. It is an uncomfortable feeling not being in control and in unfamiliar territory. Just remember that you are not alone on this journey. SVMIC and your defense counsel will provide you with the best possible resources and support throughout the course of your lawsuit. We will be with you to its conclusion even when the

road is long and difficult to travel.

[1] All names have been changed

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