Learned Treatises and Apparent Agency

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Illinois had long resisted the movement among other states to codify their state rules of evidence and to conform the codified rules to the Federal Rules of Evidence (FRE). In 2010, the Illinois Supreme Court adopted the Illinois Rules of Evidence, effective January 1, 2011. While the current Illinois Code is more consistent with the Federal Rules, there are still several significant differences between the two codified sets of rules. One such difference is with respect to Learned Treatises. Under FRE 803(18), statements in learned treatises, periodicals and pamphlets may be admissible in evidence if certain foundational requirements are met. Illinois has not adopted 803(18) and has long held that a learned treatise is not admissible for the truth of the matter asserted or as substantive evidence. Nonetheless, Illinois courts have generally allowed learned treatises to be used on cross-examination of an opponent's expert. As expert testimony is necessary in almost every type of case imaginable these days, the effective cross-examination of one's opponent's expert is as important as the qualifications of your own expert witness.

The First District Appellate Court addressed how a learned treatise may be used on cross examination in *Fragogiannis v. Sisters of St. Francis Health Services, Inc*., et al, 2015 IL App (1st) 141788. *Fragogiannis* involved the trial of a wrongful death case based on medical negligence. When plaintiff's mother had an asthma attack while driving with her son, the plaintiff called 911, and his mother was transported to the nearest hospital. When the decedent could not be intubated after several unsuccessful attempts were made, a crycothyrotomy was performed, approximately 25 minutes after plaintiff and his mother arrived at the hospital. By this point, the decedent had suffered an anoxic injury to the brain. She was taken off life support and died 3 days later.

Plaintiff's expert testified that the doctors, the emergency room nurse and the hospital were negligent in delaying the intubation, and failing to timely establish an airway. He testified that the negligence of the physicians and hospital was a proximate cause of the decedent's death. He testified on direct that in formulating his opinions, he considered a learned treatise, the *Manual of Emergency Airway Management*, which included a "failed airway algorithm." Plaintiff's expert testified that the authors were recognized authorities in the field of emergency medicine and that the manual was "highly regarded" and the "most comprehensive source" dealing with emergency airway management. The Manual was also used as a textbook. Plaintiff's counsel then proceeded to cross

examine the defendant doctor and his expert and the hospital's expert with the Manual by reading statements from the Manual on cross-examination. Neither the hospital nor the physician objected to this as improper impeachment, but after the jury returned a $4.7 million verdict in favor of the plaintiff, the defendants argued that plaintiff effectively used the Manual as substantive evidence.

The appellate court disagreed. The court noted that while medical literature cannot be used as substantive evidence in Illinois, it can be used as impeachment under three circumstances:

1. When the trial court takes judicial notice of the author's competence
2. When the witness concedes the author's competence
3. When the cross-examiner proves the author's competence by a witness with expertise in the subject matter

Defendants argued that while their witnesses conceded that the Manual was a competent source, it was not "authoritative." The appellate court noted that here plaintiff proved the "authoritativeness" of the Manual under the third method with testimony from his own expert. The court reminded the defendants that there is no requirement that the adverse witness concede that the text is authoritative, and that there is no magic to the word "authoritative." Any recognition that the author and/or text is reliable, will meet the authoritativeness standard. In this case, it was clear that the defendants were aware of plaintiff's intent to use the Manual, as it was the subject of motions in limine. Reading from a text on cross-examination, when the author of the text has already been established as an authority, is permissible in Illinois.

Fragogiannis is also significant for its discussion of the apparent agency claim against the hospital. The appellate court held as a matter of law that the evidence established an apparent agency relationship between the emergency room physician and the hospital. Here, the patient did not choose to be treated by the doctor, and was in fact a stranger to the area. She was taken to the hospital because of its proximity to her respiratory emergency. The hospital could not rely on a consent form which disclosed that the emergency room physicians were not employees of the hospital, because she never signed the form, and she was already brain dead by the time her son signed the consent. An "after-the-fact" consent is, as a matter of law, insufficient to abrogate a vicarious link between the hospital and the attending physician.

The use of learned treatises is not confined to medical issues. The use of a learned treatise can be a powerful weapon at trial for the reasons discussed in this case. Trial counsel should be aware of the foundational requirements in Illinois before using a learned treatise to support his or her theory of the case. When the learned treatise is being used against a party, its counsel needs to be ready to distinguish the treatise and demonstrate the shortcomings of the treatise. While Illinois law does not allow the learned treatise to be used as

substantive evidence, that nuance may be lost on the jury when the treatise seemingly fits the facts of the case.

Fragogiannis is another example of the difficulty hospitals have in defeating an apparent agency claim. Clearly, a consent form signed after treatment has begun will not help defeat a claim of apparent agency, even with a clear disclaimer.