

# Treating Physicians Testifying As Fact Witnesses



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A recurring theme of SVMIC's Closed Case Articles is the importance of documentation. A medical malpractice lawsuit can be rendered virtually indefensible by poor documentation in some cases. While a defendant doctor will have the opportunity to tell their side of the story at trial and clarify suboptimal medical record documentation, often a jury will view the defendant doctor's testimony as self-serving and attribute the testimony little weight if it appears to conflict with the medical chart. However, there are also some cases where other evidence, such as the testimony of a non-party treating physician, can be used to corroborate the defendant doctor's testimony and successfully defend against allegations of medical malpractice, as demonstrated by the following closed claim.

The 75-year-old female patient was diagnosed with pancreatic cancer and referred to surgical oncologist Dr. Mario. At the consult appointment, Dr. Mario appropriately discussed the risks and benefits of a Whipple procedure with the patient, and prior to surgery, the patient signed an informed consent form which listed injury to surrounding structures of the pancreas, bleeding, and death as potential risks of the procedure. Accordingly, the patient underwent the Whipple procedure performed by Dr. Mario due to

pancreatic cancer, and Dr. Lopez assisted with the surgery. Unfortunately, during the Whipple procedure, the patient suffered an injury to a vein located near the pancreas, the right gonadal vein, and expired. The plaintiff filed a wrongful death action naming Dr. Mario as the defendant, alleging he committed medical malpractice causing death.

Generally, to prove a medical malpractice lawsuit, the plaintiff must establish, through expert testimony, that the defendant doctor breached the standard of care and that such breach caused damages. An expert witness is defined as “a witness qualified by knowledge, skill, experience, training, or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact issue.” Expert Witness, Black’s Law Dictionary (12th ed. 2024). In contrast, a fact witness is defined as “a witness who has firsthand knowledge of something based on the witness’s perceptions through one or more of the five senses.” Fact Witness, Black’s Law Dictionary (12th ed. 2024).

At trial, the plaintiff’s medical doctor expert witness opined that Dr. Mario should have stopped the Whipple procedure when he encountered excessive bleeding. The plaintiff’s medical expert testified that the patient’s coagulopathy and excessive oozing of blood obstructed visualization of the surgical field, and Dr. Mario could not adequately visualize the surgical field and anatomical structures. The plaintiff’s medical expert opined that poor visibility due to excessive oozing/bleeding in the operative field resulted in the injury to the gonadal vein causing death. The plaintiff’s qualified medical expert based these opinions on (1) the documented amount of blood loss and (2) Dr. Mario’s operative report, which stated the persistent oozing of blood created very difficult visualization throughout the procedure.

At trial, Dr. Mario testified he could visualize the surgical field adequately despite the oozing/bleeding. The injury to the gonadal vein was not due to insufficient visualization, but rather it was a known risk and complication of the Whipple procedure that the patient consented to and that occurred in the absence of negligence.

Based upon the plaintiff’s expert witness testimony and the documentation in the operative note, the plaintiff’s attorney countered that Dr. Mario’s testimony (i.e., that he could adequately visualize the surgical field despite the oozing blood) was self-serving and at odds with the contemporaneously documented operative note.

To rebut plaintiff’s theory of the case, defense counsel called Dr. Lopez, the physician who assisted during the Whipple procedure, as a fact witness at trial. As a fact witness, Dr. Lopez did not give expert medical opinion testimony. Rather, Dr. Lopez testified as a witness who had firsthand knowledge based upon his perceptions through one or more of his five senses. At trial, Dr. Lopez testified that the surgical field and the anatomical structures could be visualized despite the oozing blood. After deliberation, the jury returned a defense verdict in favor of Dr. Mario finding he did not breach the standard of care, because the operative field could be adequately visualized.

The importance of an accurate and well-documented medical chart to the defense of medical malpractice lawsuit cannot be overstated. However, as demonstrated by the above closed claim, there are still avenues to defend a medical malpractice lawsuit even

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when the documentation is suboptimal by using other evidence to corroborate the defendant doctor's side of the story.

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