

Is a Trial Loss Ever a Win?



By William "Mike" J. Johnson, JD

The patient's family had been pleading with him to go to the emergency department. He refused and later collapsed in his home. Resuscitation was unsuccessful. In his fifties, he suffered from shortness of breath, which was getting worse, along with leg swelling and pain in the right ankle and foot. His primary care needs were provided by a nurse practitioner who diagnosed him with allergies and gout and prescribed steroids and pain medication. The nurse practitioner had also advised him to go to the emergency department if his symptoms worsened. Approximately one month prior to his death, the nurse practitioner sent the patient for a chest x-ray which was read as showing no acute radiographic abnormality. Four days before his death, the patient had another chest x-ray in which the defendant radiologist identified a mass that he felt could represent an infectious process such as pneumonia but was more concerning for cancer. He recommended a CT of the chest with contrast and transmitted the report to the nurse practitioner on the same day. The patient's death was caused by a pulmonary embolism (PE). A lawsuit alleging negligent care by his healthcare providers was filed by his family.

The nurse practitioner settled before trial which left the radiologist and his group as the remaining defendants. The plaintiffs sought a settlement from the radiologist and the group, but the radiologist was adamant that he had done nothing wrong and did not want a

settlement that would trigger a National Practitioner Databank Report or have to deal with the ramifications of a settlement with respect to credentialing and a loss payment on his insurance record. Efforts were made to resolve the case with an offer to reimburse the plaintiff's litigation expenses. Resolution through this option was unsuccessful as the plaintiffs did not want to provide the required documentation and sought an amount that was simply higher than they could document through verified expenses. The plaintiffs proceeded to trial.

The main issues pertaining to the radiologist were whether he had compared the most recent x-ray with an earlier x-ray and whether he was obligated to recommend a STAT CT and call the nurse practitioner with the results of the last study. The radiologist testified very well on his own behalf. He admitted that he did not document reviewing the earlier study but testified that he did compare the studies. Failing to document the comparison was simply an oversight. He offered that pulmonary embolism cannot be diagnosed on a chest x-ray, but that if he had the clinical information on the patient, a PE would have been higher on his differential diagnosis. However, he maintained that cancer was a more likely interpretation than a PE. He also offered that it is not the standard of care for a radiologist to call the provider about every abnormal finding, and he did not see a definite emergency condition on the film that warranted a phone call to the nurse practitioner.

The plaintiffs' expert agreed that you cannot make a definitive finding of PE on a chest x-ray, but that there was a wedge shape on the film that he called Hampton's hump. He felt this could reflect signs of a PE and further opined that he would have been less concerned the x-ray was suspicious for cancer. The expert pointed out that his report did not contain reference to a comparison of the earlier x-ray, but conceded on cross examination that while he was taught the maxim that "if it was not documented, it was not done," that not everything that is done is written down and that not everything that is significant is written down. The expert did not feel that the radiologist's reading of the film was below the standard of care but testified that he would have just read it differently. Nonetheless, he opined that the radiologist should have called the nurse practitioner.

The radiology expert for the defense testified that he would like to chart everything, but that is hard to do with the new PACS systems. He opined that he too would have recommended the patient get a CT, but he would not have ordered a STAT CT. He said he would not have called the nurse practitioner unless he felt immediate attention was needed. He testified that the radiologist met the standard of care.

The jury returned a verdict for the plaintiff allocating 95% fault to the nurse practitioner and only 5% fault to the radiologist and his group. The radiologist and his group received an offset for what had been paid in settlement by the nurse practitioner and ultimately paid an amount that was likely lower than the plaintiff's expenses.

Was this result a loss for the radiologist and his group?

Technically "Yes." However, the verdict was far less than the settlement amount sought. From a practical perspective, the cost of trying the case against the radiologist and his

group only to receive such a meager verdict was hardly a financial win for the plaintiffs.

Observations:

- Cases are affected by the location where they are tried. This case took place in a small community where “everybody knows one another.” The patient and his family were well known and respected in this community. While we do not know the jury’s rationale, they did not allocate any fault to the patient who refused to go to the ER despite worsening symptoms, his family’s urging and the nurse practitioner instructing him to do so. Had he gone to the ER, his chances of survival would have greatly increased.
- Lawsuits are fluid. Fortunately, the defendants did not become complacent after the nurse practitioner settled, and it appeared that an expense payment could resolve the matter. They remained engaged with the prospect that they may have to go to trial, so when that unlikely event did occur, they were ready for it. The defendants were ready for the expected and the unexpected. Through their excellent preparation, the defense team and radiologist were not taken by surprise, and the radiologist had the will, mindset, and fortitude to go to trial and defend his care.
- Trials can be lengthy. Since attendance is required at every day of trial, there are practical concerns of how trial attendance will affect the physician’s practice? Such a time commitment is simply a fact of going to trial; however, defense counsel will do their best to streamline the process and make defense preparation as effective and efficient as possible. As part of your policy, SVMIC pays a daily stipend for each day a physician is required to attend his or her trial. This benefit does not replace the time away from your practice but provides some mitigation to the income loss faced by a physician who goes to trial.
- The prospect of going to trial is daunting. Juries are unpredictable, and different juries can reach different results on the same facts and evidence. Predicting what a jury will do with certainty is not possible. Instead, the defense team and the defendant must develop the case and the defenses to the allegations to the best of their ability but gauge whether to go to trial based on what a jury will likely do—not certainly do. So why go to trial? Because the right to defend yourself before a jury of your peers is a foundational and cherished right of the American legal system. This case illustrates that sometimes even if you lose at trial, you can end up in a better position by asserting your rights than settling the case. From a practical standpoint, when all things are considered, you may have actually won.

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