

OAJ Medical Malpractice Section Article April 2014

Parrish v. Jones: Another Pitfall for Plaintiff Medical Malpractice Cases?

By: Justin Madden

On December 4, 2013, the Ohio Supreme Court announced its opinion in *Parrish v. Jones*, wherein it affirmed an appellate decision to overturn a directed verdict in favor of a co-defendant in a medical malpractice trial, but on other grounds. The question arises whether *Parrish* helps ensure that meritworthy medical malpractice cases are resolved by juries, or whether *Parrish* creates another pitfall to upend a Plaintiff's case on a technicality?

Background of the Parrish Case:

Karen Parrish was diagnosed by Dr. Jones for an acute peripheral-nerve disorder, and following her hospitalization, was transferred to a rehabilitation facility to be followed by Dr. Skocik. There was an alleged breakdown in communication between the doctors resulting in a failure to prescribe anticoagulation therapy. Consequently Karen developed a pulmonary embolism that caused her death.

Originally, Plaintiff named both doctors as defendants. The complaint alleged all of the basic elements necessary for a wrongful death medical malpractice claim. Later, Dr. Skocik was voluntarily dismissed, but was brought back in when an expert for Dr. Jones opined that Dr. Skocik was at fault for failing to provide anticoagulation therapy. The trial commenced in Ross County before a visiting judge with both doctors as defendants.

During opening statement, Plaintiff outlined his case against Dr. Jones, reciting every element of the cause of action against Dr. Jones. Then, moving on to Dr. Skocik's role, Plaintiff stated as follows:

Dr. Jones, through his attorneys, have [sic] hired a medical expert, Dr. Writ[e]sel, who I had mentioned, who will tell you that it was Dr. Skocik's fault. That it was Doctor Skocik's fault for not ordering the proper D.V.T. prophylaxis in time. I'll let Dr. Skocik's attorneys argue for Dr. Skocik about that. But, there is a reason for continuity of care forms. That's the communication bridge between one doctor to the next so that the patient doesn't get lost.

Plaintiff focused his opening statement on Dr. Jones, but never stated he had no case against Dr. Skocik. It can be inferred from opening statement that Plaintiff alleged Karen's death resulted from a breakdown in communication between both doctors. At the conclusion of Plaintiff's opening, Dr. Skocik moved for a directed verdict. Plaintiff moved to amend his statement but the court refused. Plaintiff moved the court to review the pleadings. The court declined. Dr. Skocik was dismissed and the trial proceeded against Dr. Jones alone who repeatedly blamed the empty chair defendant - Dr. Skocik. The jury found in favor of Dr. Jones.

The *Parrish* Holding with respect to Civil Rule 50

Stating that its goal was to clarify the standard for ruling on motions for directed verdict following a party's opening statement, the *Parrish* decision issued a two-part holding:

We hold that although the trial court is not *required* to consider the pleadings when ruling on a Civ. R. 50(A)(1) motion, in liberally construing the motion in favor of the opposing party, it *may* do so. . . . We hold further that a trial court may grant a motion for directed verdict made at the end of party's opening statement only when that statement indicates that the party will be unable to sustain its cause of action or defense at trial.

This holding would seem to add confusion for the trial courts: does the word "indicates" mean the determination is based upon whether a party expressly admits it cannot meet its cause of action or defense, or does trial court retain discretion to infer this conclusion from its interpretation of the opening statement? As *Parrish* continues, it seems more to empower the trial court to discern for itself. But if that is the case, why should a trial court have discretion to make such a ruling without reviewing the pleadings? Does this support *Parrish*'s frank admonishment that trial courts are to liberally construe a directed verdict motion in favor of the opposing party? It remains a murky question of law, and it would seem that this holding will not help to clarify the standard for the trial courts to follow.

Additionally, opening statements, as *Parrish* acknowledges, are not evidence. They serve only to briefly outline a party's case so that the jury is better able to follow the evidence at trial. It seems curious, then, that a trial court would be able to direct a verdict after opening statement if nothing in the opening statement is evidence. If a directed verdict is a just outcome because an opening statement fails to mention one or more elements in support of a claim, (and *Parrish* expressly states this is not required), then it would seem only proper that the pleadings must be reviewed by the trial court, in order to ensure a just adjudication of the party's case.

What to take from the *Parrish* Opinion.

Motions for directed verdict following an opening statement are rare, and successful motions still more rare. On its face, *Parrish* discourages granting a directed verdict after opening statement unless the court liberally construes the issue in favor of the party opposing such a motion. However, two Justices dissented - Kennedy and O'Donnell - stating the party's failure to outline a prima facie case during opening statement was proper grounds to direct a verdict, even without reviewing the pleadings.

When trying medical malpractice cases today, one cannot be too cautious. We strive in opening statement to establish credibility, tell a story, speak in plain language, and so on. However, *Parrish* counsels that we should absolutely state the essential elements of the claim to avoid any chance of a directed verdict. The safest practice is to explicitly say the "magic words" during opening statement and presentation of evidence, so that the case is impervious to a

motion for directed verdict. Further, because *Parrish* still permits the trial court to review the pleadings, be certain the essential elements for the cause of action appear in all pleadings.

Medical malpractice cases are tough, lengthy, and expensive. To lose a claim or case to directed verdict after opening statement is devastating. In *Parrish*, while Plaintiff did receive a new trial against Dr. Skocik, it will be fraught with difficult issues. Dr. Jones was exonerated by the jury. Should Plaintiff be able to bring the case against Dr. Jones again, or is Plaintiff's trial against Dr. Skocik only? How does Plaintiff respond should Dr. Skocik blame the possible empty chair defendant Dr. Jones? How much procedural background in the case will Plaintiff be allowed to share with the jury? As can be seen, the erroneous decision to grant a directed verdict for Dr. Skocik has potentially barred the Estate of Karen Parrish from a fair trial.