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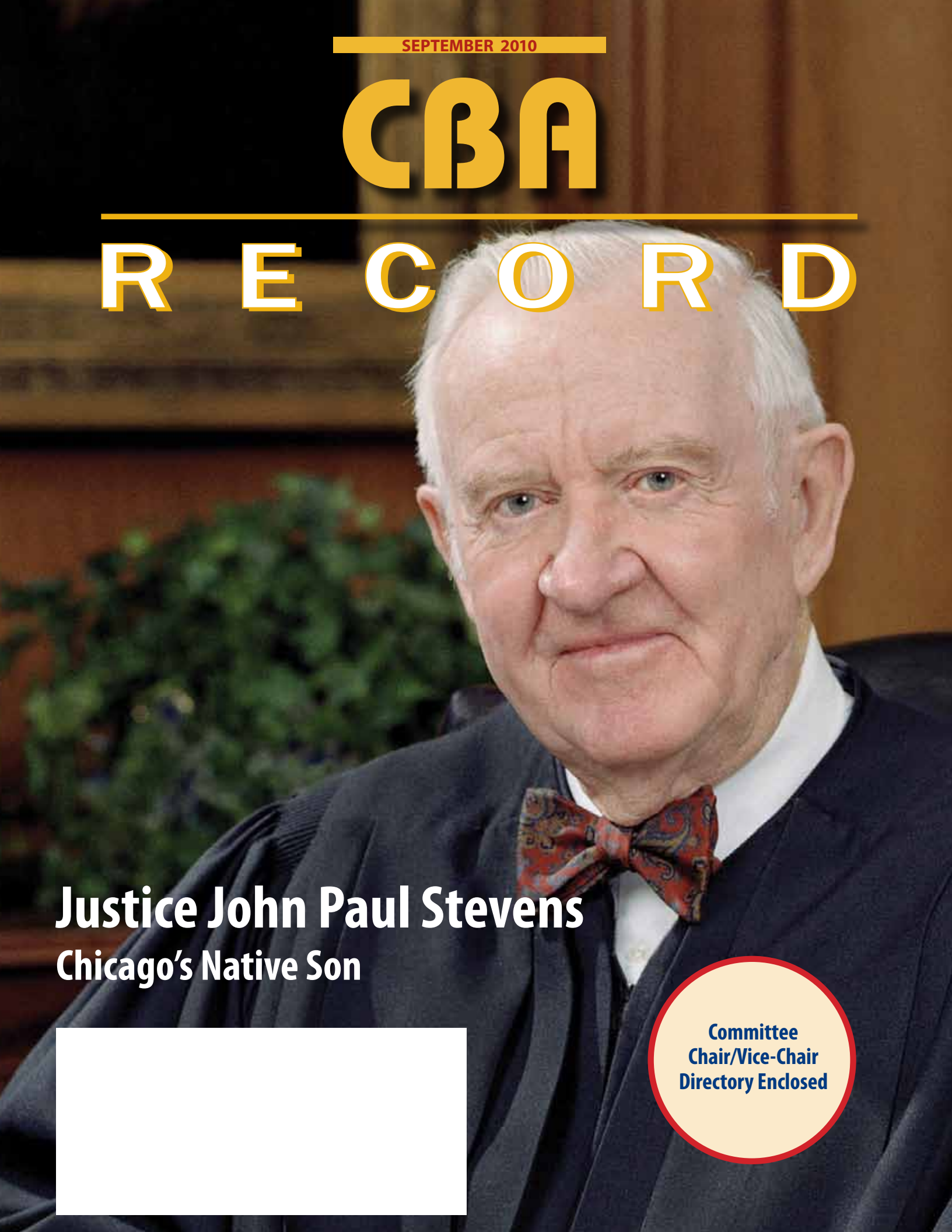

Justice John Paul Stevens
Chicago's Native Son

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Tort Immunity for Public Hospitals and Medical Professionals in Illinois

By Matthew A. Passen

Medical professionals are held to an objective "standard of care" within the medical community. Most people understand that when a doctor or hospital deviates from the standard of care and, as a result, a patient is seriously injured or dies, the patient or his or her family may seek legal recourse against the negligent hospital or medical professional by filing a medical malpractice lawsuit.

What many Illinois citizens do not realize, however, is that their right to access the civil justice system may depend on whether the negligent doctor (or hospital) is a *public* or *private* employee (or entity). As discussed below, public hospitals, clinics, and medical professionals are afforded immunity from tort liability in many instances.

Tort Immunity Act's Applicability to Public Medical Professionals and Entities

The Illinois legislature enacted the Local Governmental and Governmental Employees Tort Immunity Act ("the Act") as a measure of "tort reform" to protect local governmental agencies and public employees from liability for ordinary negligence committed during the exercise of their duties. *See* 745 ILCS 10/1-101 *et seq*. The Act extends immunity to public hospitals and medical professionals in many actions arising out of alleged medical malpractice. *Michigan Ave. Nat'l Bank v. County of Cook*, 191 Ill. 2d 493, 519 (Ill. 2000)

Specifically, Section 6-105 of the Act provides governmental medical personnel and entities with immunity for "failing to make a physical or mental examination, or to make an adequate physical or mental examination of any person…" 745 ILCS 10/6-105. Further, Section 6-106(a) provides local governmental agencies and public employees with immunity for "[incorrectly] diagnosing or failing to diagnose [a condition]…or from failing to prescribe [treatment for a patient]…" 745 ILCS 10/6-106(a); *see, e.g., Wilkerson v. County of Cook*, 379 Ill. App. 3d 838, 847 (1st Dist. 2008) (holding Cook County Hospital and doctors immune from medical malpractice claim alleging that they negligently failed to properly examine patient and diagnose cervical cancer).

On the other hand, public medical personnel and entities are not immune from negligently or wrongfully prescribing treatment (745 ILCS 10/6-106(c)) or for any negligence, wrongful act, or omission in administering the prescribed treatment (745 ILCS 10/6-106(d)).

In other words, public hospitals and employees (including doctors) are immune from medical malpractice liability if they fail to diagnose a condition or treat a patient, but they are not immune if, after correctly diagnosing a condition, they provide negligent treatment to the patient. *See Marbry v. County of Cook*, 315 Ill. App. 3d 42, 55 (1st Dist. 2000) ("Negligent prescription of treatment is different from failure to prescribe treatment as a result of a failure to diagnose," and immunity is only afforded to the latter).

This distinction seems almost illogical, as acknowledged by the Illinois appellate court: "We are dealing with a statute that rewards medical indolence and miscalculation resulting in harm to a patient." *Antonacci v. City of Chicago*, 335 Ill. App. 3d 22, 27 (1st Dist. 2002).

Hemminger v. Nehring Decision

In *Hemminger v. Nehring*, 2010 WL 1509345, No. 3-08-0751 (Ill. App. 3d Dist. Apr. 8, 2010), the plaintiff brought a wrongful death and survival action on behalf of his deceased wife alleging medical malpractice in the interpretation or supervision of defendant's Pap smear slides. The defendants, CGH Medical Center, a municipal public entity, as well as a doctor and cytotechnician employed by CGH, filed motions for summary judgment claiming they were immune from liability under Sections 6-105 and 6-106 of the Tort Immunity Act.

Plaintiff alleged that after a Pap smear was performed on his wife, the defendant cytotechnician found the slide to be within normal limits. The defendant doctor also reviewed the slide and concurred that it was within normal limits. Some six months later, plaintiff's wife was diagnosed with stage IIIb cervical cancer and later died.

Plaintiff argued that the defendants were not immune under sections 6-105 and 6-106 of the Act because: (1) the complaint did not allege the defendants failed to make an adequate examination; and (2) the complaint did not allege failure to diagnose cancer. Rather, the complaint alleged that defendants "misinterpreted" or "failed to supervise the interpretations of the Pap smear, and that Pap smears are screening devices and are not intended to diagnose cancer." *Hemminger*, 2010 WL 1509345 at *2. The appellate court disagreed.

The court began by noting that where a plaintiff essentially alleges that a public entity "failed to diagnose" or "misdiagnosed" an illness, it is immune under section 6-106(a) of the Tort Immunity Act. *See Id* at *4, citing *Michigan Avenue,* 191 Ill. 2d at 514.

Key to the appellate court's ruling in *Wilkerson* was its characterization of the plaintiff's malpractice allegations as not based on the treatment the patient *received*, but on the treatment *she should have received* had the defendants correctly examined and diagnosed her medical condition.

"[O]nce diagnosis of a medical condition is made and treatment of the condition is prescribed and undertaken [pursuant to that diagnosis], any subsequent prescription or examination required to be made pursuant to that condition is part of the patient's treatment." *Wilkerson*, 379 Ill. App. 3d at 846 (citing *American National Bank & Trust v. County of Cook*, 327 Ill. App. 3d 212, 220 (1st Dist. 2001).

The court in *Hemminger* found that the defendants conducted a Pap smear to help diagnose the patient's condition – "a screening test that is clearly part of the diagnostic process and precisely the conduct that both sections 6-105 and 6-106 immunize." 2010 WL 1509345 at *6. In other words, the court held that "the essence of plaintiff's action is that defendants failed to adequately examine and/or diagnose cervical cancer," and therefore it affirmed the trial court's granting of summary judgment to the defendants.

Plaintiffs Must Tailor Complaint and Evidence in Terms of "Negligent Treatment," not "Diagnosis"

According to the Tort Immunity Act, as interpreted by our courts, the distinction between whether a publicly employed medical professional was negligent in a "diagnosis," as opposed to "treatment," dictates whether an injured or killed patient may pursue a malpractice action against that medical professional or not. Illinois courts have defined "diagnosis" as the "art or act of identifying a disease from its signs and symptoms," and as an "investigation or analysis of the cause or nature of a condition" or disease; whereas "treatment" has been defined as "the action or manner of treating a patient medically or surgically." *See Antonacci*, 335 Ill. App. 3d at 29. Still, the distinction is not always obvious.

For instance, in *Mills v. County of Cook*, 338 Ill. App. 3d 219, 223-24 (1st Dist. 2003), the court held that a doctor employed by a public entity was not immune where the plaintiff alleged that the doctor, after making a correct "differential diagnosis" of pneumonia, was negligent in the treatment by omitting the necessary antibiotics and respiratory monitors that would have saved the patient's life. The court found the defendant doctor had "correctly examined and diagnosed her [patient's] condition" and that "[t]reatment was rendered pursuant to the differential diagnosis." 338 Ill. App. 3d at 223.

Conversely, in *Willis v. Khatkhate*, 373 Ill. App. 3d 495 (1st Dist. 2007), the same appellate court held a publicly employed doctor immune where the plaintiff alleged that the doctor, after making a correct differential diagnosis of Hodgkin's lymphoma, failed to render any treatment pursuant to that differential diagnosis. Instead, the court found that the "gravamen of plaintiff's suit is a failure to properly diagnose the decedent with Hodgkin's lymphoma." 373 Ill. App. 3d at 506. In other words, the court found that a "differential diagnosis that is not chosen and/or treated as the ultimate diagnosis is a misdiagnosis by definition." *Id.* at 504-05.

More times than not in medical malpractice actions, the theory of liability is that the doctors failed to diagnose the correct medical condition of the patient, and therefore failed to provide appropriate medical care to the patient, resulting in catastrophic consequences. In such cases involving public doctors or hospitals in Illinois, lawyers are often forced to tell their clients the unfortunate reality: the legislature has determined that no such cause of action exists.

Other times, lawyers can get creative, and frame their client's complaint and supporting evidence, including expert testimony, to show the doctors made a correct diagnosis, but negligently treated the condition, which caused the client's demise. In any event, lawyers must pay close attention to the Tort Immunity Act, and the way it is interpreted by our courts, before filing a complaint in a medical malpractice action involving a public entity or medical professional. ■

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