Testimony by Dennis Mulvihill

In Opposition to Senate Bill 129

Before the Ohio Senate Judiciary – Civil Justice Committee

May 4, 2011

Good afternoon,

Mr. Chairman, members of the committee, my name is Dennis Mulvihill, and I am here to offer testimony in opposition to proposed SB 129—a bill that would, in practical effect, grant immunity to all health care providers who work in the emergency setting.

By way of background, I am an attorney in Cleveland with a small law firm, where my practice primarily consists of product liability and medical malpractice cases. I am currently President of the Ohio Association for Justice, which strongly opposes this bill.

The OAJ will have several witnesses testify today, and in an effort to not be repetitive, we will try to cover this bill from different perspectives. My objective is to 1) describe what a malpractice case in reality looks like; 2) remind members of the committee that doctors have enjoyed a great deal of legislative protection over the last several years; 3) show that the numbers of claims against doctors has fallen dramatically as a result of those legislative protections, and 4) briefly show that the proposed standard will close the court house doors to the victims of preventable medical errors.

First, today, the law holds ER doctors accountable for their medical errors only if they breach the standard of care of that of an emergency room doctor. There is no comparing emergency room care with the care from another medical specialty when evaluating an emergency situation. The Jury instructions are explicit about this: OJI 417

> A specialist [ER doctor] is a physician who holds himself/herself out as specially trained, skilled, and qualified in a particular branch of medicine. The standard of care for a physician in the practice of a specialty is that of a reasonable specialist practicing medicine exercising reasonable skill, care, and diligence under like and similar circumstances, regardless of where he/she practices. A specialist in any branch has the same standard of care as all other specialists in that branch.

Thus, under the current law, ER doctors are only held accountable in terms of evaluating their conduct in the context of other ER doctors. Whether an ER doctor has committed

malpractice does NOT depend on how another specialty may have treated the patient in another setting. So, the current law already takes into account a busy emergency room situation when evaluating the ER physician conduct. By the way, the same instruction holds true for any specialist that might consult in the ER—that person is evaluated only in the context of that particular specialty under the same or similar circumstances.

Second, both the General Assembly and the Supreme Court have instituted numerous protections over the last eight years that have given doctors significant advantages in the event of a lawsuit.

SB 281 (eff. April 2003)

--put caps on damages for non-economic loss of 250K up to 500K, depending on the amount of economic loss;

--established a four year statute of repose for all medical claims;

--allowed defendants to file motions to ascertain that the claim was brought in good faith, permitting attorneys' fees from the plaintiff in the event of a positive ruling;

--allowed the defendant against whom a verdict is taken to pay the portion of the verdict that represents future damages over a period of time.

--allowed the doctors to require patients to take their cases to binding arbitration. (2711.22)

Further

--Civil Rule 10(D) requires an affidavit from a competent physician who practices in the same specialty to be executed and attached to the complaint before a lawsuit can be filed. So, in a very real sense, doctors themselves are in control of whether a physician can be sued in the state of Ohio. A patient and her lawyer certainly are not. If a doctor does not sign the affidavit, the lawsuit cannot be filed. So, the medical profession currently is the gatekeeper to the court house when a patient wants to file a claim.

--Ohio has the shortest statute of limitations of any state in the country—one year, for these claims.

--Joint and several liability was legislatively abolished for tort claims, so doctors and hospitals cannot be responsible in any way for joint breaches in the standard of care by a colleague that may be underinsured.

What is the effect of all of this legal protection? Medical malpractice claims are way down, and are at historic lows. According to the Ohio Supreme Court, since SB 281 passed in 2003,

the number of professional tort cases has been cut in half from 3448 in 2002, to 1705 in 2009, where most, but not all, are medical claims.

This dramatic reduction in the number of medical malpractice cases comes on the heels of a very recent study showing a startling figure: that one-third of all hospital admissions results in medical care that actually causes injury to the patients. (Health Affairs, April 7, 2011). So, if medical care is injuring one-third of all hospital patients, and the number of medical malpractice cases is at an all-time low, there simply is no need for one segment of the medical community to be given extra-special treatment by this body with a grant of effective immunity.

The point here is simple: physicians have been singled out by the General Assembly, and given more legislative protections than any other group of Ohioans whose negligence causes injuries to others, and the number of suits has dropped sharply as a result. There is no demonstrable need to take the next step and give a subset of that group even greater protection, with a grant of effective immunity.

In 2010, the Ohio State Medical Association, in its own publication, (Ohio Medicine, 2010, Issue 4) bragged that it had passed over 20 tort reform measures, causing a 40 percent reduction in closed claims, and a 22 percent reduction in malpractice premiums. That should be enough.

Proponents have said they need this law to attract more doctors to the state. But, during this period of legislative enactments--protecting doctors from the consequences of their own preventable medical errors--Ohio's population was stagnant, rising only 1.7% from 2000 to 2009 (Census statistics), but Ohio saw an increase in the number of doctors by 6.5% (2001—38,168 to 2008--40,660; State Medical Bd. Of Ohio License Activity Statistics). So, Ohio obviously has not had a difficult time attracting doctors to come practice in the state, without granting them immunity.

Also, the proponents have mentioned that ER doctors need further protection because they do not choose their patients. Although true, this is no justification. First, ER doctors chose their profession—knowing that they would be treating or transferring all patients who walk in or who are wheeled through their doors. Second, many other medical professionals do not choose their patients: Radiologists, for example, do not. Hospitalists do not. Pathologists do not. Anesthesiologists do not. Laboratory technicians do not. Nearly all nurses do not choose their patients. SO, if the proffered rationale was accepted as a legitimate reason to give immunity, much of the profession would ask for the same immunity.

Finally, although others will be talking about the language of SB 129 itself, I do want to mention that proving reckless disregard will be a substantial impediment to patients in pursuing their claims. Most doctors do not practice recklessly, and if they do, there should be criminal penalties attached to that type of care. But raising the civil standard to that level will all but eliminate malpractice claims.

As the committee knows, only five states have given ER doctors such effective immunity. And there is not much case law from those states yet, but there are a few, and it shows that rarely will a plaintiff be able to overcome this heightened standard of care. In Georgia, for example, which passed a "gross negligence" standard, the single appellate decision on point involved an ER doctor who failed to diagnose a serious leg fracture in a patient that had been in a motorcycle accident. Despite there being expert testimony that the ER doctor was grossly negligent, the Appellate Court overturned the trial court's denial of summary judgment and dismissed the case against him. (Pottinger v Smith 667 S. E. 2d 659).

In Florida, which passed a reckless disregard standard, there are a few cases. In one case, *Jackson County Hospital v Aldrich*, 835 So. 2d. 318, a patient was severely burned in a work related accident. The patient had trouble breathing, and the ER doctor and a nurse anesthetist tried to intubate the patient. The Nurse thought the patient was not intubated properly, and the ER doc thought he was. The nurse wanted to put in an NG tube, but the ER doctor said no. The patient died of respiratory collapse and the autopsy revealed the tube was misplaced. The jury found against both defendants, but the court of appeals held that the ER doctor, although perhaps negligent, was not grossly negligent, and dismissed the case against him. Since the nurse anesthetist did not have the protection of the statute, the entire verdict was entered against her.

On the other hand, in *Garcia v. Randle-Eastern Ambulance*, 710 So. 2d. 74, a patient arrived at the ER with brain injuries. The CT machine at that hospital was not working, so the hospital attempted to arrange for transport to another facility. It took *2:21* to get an ambulance, and the patient died. The court found this met the reckless disregard standard. (It would also violate EMTALA).

In Texas, the standard is "wanton and willful negligence," which the Courts have determined to be the same thing as "gross negligence." And under Texas law, objective and subjective tests must be met. To meet the subjective element, the doctor must have actual subjective awareness of the risk involved and choose to proceed with a conscious indifference to the safety of the patient. (*Turner v Franklin,* 325 S.W. 3d. 771) I was not able to find any cases that met this standard.

In summary, ER doctors are already receiving substantial protection under Ohio law. There has been no showing that Ohio needs to give effective immunity to ER doctors because they

do not choose their patients. This is part of the job, and ER doctors chose the field knowing that. While recent reports indicate that the incidence of malpractice in hospitals seems to be higher than expected, the rate of lawsuits has slowed to a trickle. Thus, there is empirical evidence there is no need for this legislation.

I would like to close with a comment from Victor Schwartz, who is President of the American Tort Reform Association, and well-known to several of you on this committee from his time at the University of Cincinnati Law School, who was quoted on January *30, 2011.*

> "It is rare or unusual for a plaintiff lawyer to bring a frivolous malpractice suit because they are too expensive to bring," said Mr. Schwarz. (the January 30, 2011 issue of *Business Insurance)*

Simply put, the data show that there is not any kind of crisis with regard to medical malpractice litigation in Ohio, and even the strongest advocates for tort reform recognize that there is no room for abuse in medical malpractice litigation because of the expense of the litigation. As a result, there is no problem in Ohio that needs this kind of dramatic remedy.