

Bad EME Cases Make IME Law

The recent case of *Smith V. Welch* (Kansas 1998) decided by the Kansas Supreme Court has expanded the potential liability of EMS physicians. The court held that! ME physicians have a duty not to cause harm to the person examined, and to use reasonable and ordinary care and diligence in the examination undertaken.

Why did the court reach these conclusions? The facts reported in the case are instructive:

Peggy Smith alleged she suffered head and neck injuries in an automobile accident on January 11, 1994, and filed an action against Edward Williams. Rather than requiring Williams' attorney to obtain a court-ordered medical examination pursuant to K.S.A. 60-235, Smith's attorney agreed his client would undergo an independent medical evaluation by Dr. Lauren Welch, a board-certified neurologist. The purpose of the independent medical examination was to determine the extent, if any, of Smith's head and neck injuries.

During the examination at Dr. Welch's office, while Smith and Dr. Welch were alone, Welch asked Smith a series of questions about her medical history. While taking Smith's history Dr. Welch would snap fingers and tell her she was not answering fast enough. Numerous times Dr. Welch told Smith she was stupid or lying and she had better start cooperating or she would not receive her settlement.

Some of Welch's questions had obvious medical relevance to a head and neck injury and other questions required a detailed statement of Smith's sexual past. Although not a complete list, Dr Welch asked Smith whether her parents and her sister were sexually active, whether Smith was having sex with someone else while dating her present boyfriend, what qualities about her boyfriend made her want to have sex with him, whether Smith had ever had sex with more than one person at a time, and whether she had ever had sex with her sister.

While asking Smith questions of a sexual nature, Dr. Welch told Smith numerous times that she had better answer his questions because he worked for the other side and a failure to answer would result in Smith not receiving a settlement in her personal injury action. Dr. Welch asked Smith if she knew what it meant to not "count your chickens before they hatch." He stated it meant she had better not count on her settlement because she was not doing what he required.

After Dr. Welch obtained Smith's medical history, he led her to an examination room where he threw a gown at Smith and told her to undress and put on the gown. Smith did. When Dr. Welch and his nurse entered the examination room, he untied the gown and ex-posed Smith's breasts. Welch grabbed Smith's arms and moved them away from her breasts. Dr. Welch began to examine Smith's breasts. Smith states it was unlike any other breast examination she had undergone previously. Smith asserted that Dr. Welch fondled her nipples and placed a cold stethoscope on them.

During the course of the examination, Smith repeatedly placed her hands over her breasts. Dr. Welch continually removed her hands from her breast. Welch told Smith not to be a "baby" about the examination.

After examining Smith's breasts, Dr. Welch moved his hands towards Smith's abdomen. Smith covered her pubic region with her hands. As Welch's hands reached Smith's pubic area, he attempted to move Smith's hands. At that point, Smith sat up and ended that portion of the examination.

Dr. Welch then placed his hands on the back of Smith's head and started lifting. Smith complained that this was hurting her. Dr. Welch told her to "just take it, she would be fine."

Smith settled her claim for the injuries to her head and neck. She then filed this action against Dr. Welch, claiming the examining physician had acted negligently, violated her right to informed consent; misrepresented the need for various aspects of the examination: and committed an assault, a battery, an outrageous act, and an invasion of her privacy.

The court, Kansas Association of Defense Counsel, and the Kansas Trial Lawyer's Association were outraged by the above actions,

Here is what the court stated:

Dr. Welch was retained by the defendant to perform an examination and determine the extent of a head and neck injury. Although the examination was not court-ordered, it was agreed to by the parties' counsel. This agreement was in lieu of a court-ordered independent medical examination. Under either circumstance, Smith had every reason to believe she would be treated with dignity. She certainly had a right not to be criminally assaulted, battered, or sexually battered. If the allegations of such conduct are proven at trial, would an average person find a medical examination under those circumstances to be outrageous? Yes....

Does a physician performing an independent medical examination have a duty not to negligently injure the person examined? Yes. A physician performing an independent medical examination has a duty to use reasonable and ordinary care and diligence in the examination the physician undertakes, to use his or her best judgment, and to exercise that reasonable degree of learning, skill and experience which is ordinarily possessed by other physicians. See *Durflinger v. Artiles*, 234 Kan. 484, Syl. Para 3, 673 P.2d 86. The examining physician has a duty not to negligently cause harm or injury to the person examined.

Is the duty of a physician not to injure the person being examined affected by the fact that physician was employed by a third party? No. The duty of a physician conducting an independent medical examination not to injure the person being examined is not affected by the fact that the physician was employed to conduct the examination by a third party and no contractual relationship existed between the physician and the person being examined. *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 375, 552 P.2d 885 (1976)....

A physician performing an independent medical examination is obliged to the person being examined to make a reasonable disclosure of pertinent facts and hazards within the physician's knowledge relating to the proposed examination so that the person being examined may make an intelligent decision to consent or refuse the examination.

Is the physician-patient relationship necessary for an intentional tort claims asserted by the person being examined? No. As to the intentional tort claims of invasion of privacy, assault, battery, and sexual battery, it makes no difference whether a physician-patient relationship exists.

Did the district court err in granting summary judgment on Smith's invasion of privacy, assault, battery', and sexual battery claims? Yes. Drawing inferences in favor of Smith, as required in reviewing a summary judgment, the facts alleged by Smith indicate that during the independent medical examination, Dr. Welch repeatedly grabbed Smith's breasts so he could grope and fondle her breasts, placed a cold stethoscope on her nipples and attempted to touch her genitalia. The acts alleged that there was an intentional touching of the person of another who is not the spouse of the offender and who did not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another. The facts alleged, if proven at trial establish invasion of privacy, assault, battery, and sexual battery and those claims in the context of a medical examination are outrageous. The district court erred in granting summary judgment.