

## Poisoned pen

Plaintiffs in suit against Boca Raton radiologists say defendant tried to scare away witness with story calling for boycott

By: Steve Ellman



Fort Lauderdale lawyer Michael Freedland represents Marsha Gilarmo, who says radiologists in Boca Raton misread her mammograms.

**A** physician whose practice faces a medical malpractice lawsuit has been accused of trying to intimidate a key plaintiff expert in the case by mailing him an article advocating the blacklisting of radiologists who testify against other radiologists.

The plaintiffs in the Miami-Dade Circuit

Court suit have moved for civil sanctions against Boca Raton-based Boca Radiology Group and other defendants in the case, on the grounds of witness tampering. The plaintiffs' attorney also has threatened to seek criminal charges against Dr. Kathy Schilling, director of mammography at the radiology group, which has imaging centers at nine South Florida locations.

Schilling has denied that she copied and mailed the article, titled "Say no to peers who weaken mammography," to the plaintiff expert, Dr. G.W. Eklund. Eklund is a Wisconsin-based authority in the field of mammography, for whom a standard mammographic technique is named.

Physicians who testify against other physicians have become a target of medical professional societies. Physician groups, including the Florida Medical Association, claim that some doctors provide irresponsible expert testimony for pay, and that these doctors are to blame for the increase in malpractice insurance costs.

The FMA and other doctor groups have launched efforts to sanction doctors whom they claim are providing improper expert testimony. They contend that such efforts are needed to correct judges' failure to weed out bogus testimony.

Leaders of the plaintiff bar have described the doctors' efforts as witness tampering, but formal complaints to that effect are rare. The alleged tampering in Miami-Dade arose in

a malpractice suit filed in August 2002 by Marsha Gilarmo, a 45-year-old Palm Beach County mother of three. She is suing Boca Radiology Group, several of its individual physician partners, and Boca Raton Community Hospital, where the group is the sole provider of outpatient radiological diagnostic services. Gilarmo alleges that the defendants misread her mammograms and failed to diagnose a life-threatening breast cancer. Her husband and children also are claiming damages for loss of consortium.

In his Sept. 11 motion for sanctions against the defendants, Gilarmo's attorney, Michael Freedland, a partner at Freedland Glassman Farmer & Sheller in Fort Lauderdale, described the sending of the article to Eklund as "a barefaced attempt by the defendant radiologists to intimidate the doctor to convert him from testifying on behalf of the plaintiffs."

In an interview, Eklund said his "natural inference" on receipt of the article was that "someone was trying to discourage me from testifying."

As minimum sanctions, Freedland's motion asks that the defendants' expert witness on radiology be struck and that Schilling be held in contempt. Other suggested sanctions include striking the defendants' pleadings, entering a finding of liability without a trial and trying the case for damages only.

Freedland told the Daily Business Review that Eklund would be difficult and costly to replace as an expert. "The gist of the article is 'You testify against us and we're going to rise up against you,'" Freedland

said. "The intent is clear. What really gets [the defendants'] goat is that he's one of the most respected mammographers in the world. It scares them."

Freedland said that Eklund will testify despite the alleged threat.

### 'This madness'

In a deposition last month, Dr. Schilling said that she had read the article advocating blacklisting, which appeared in the August 2003 issue of the medical journal *Diagnostic Imaging*.

Written by Washington, D.C., radiologist Mark Klein, the article said, "It is the willingness of radiologists to testify against their colleagues that perpetuates this madness. It's past time to let them know it's not OK. ... Shun them at professional meetings. Let them and their colleagues know that you know what they do. ... Vote with your dollars; refuse to attend meetings in which they participate and raise your voice against this small but deadly group who threaten our ability to do our jobs."

Asked during the deposition whether she agreed with the article's call to boycott plaintiff witness doctors, Schilling said, "It's an interesting concept. Something to think about."

Schilling testified that she has been sued five times for misreading mammograms, settling all five cases for monetary damages before trial. But she insisted she was indifferent to Eklund's role in the Gilarmo case "It doesn't matter to me," she said. "This is not my case. I'm not emotionally involved in this case."

Schilling denied that she had sent the article to Eklund. She agreed to the plaintiffs' request that she submit fingerprints to compare with those found on the envelope containing the article. Freedland told the Review that he would also ask Schilling to submit to DNA tests and handwriting analysis.

Eugene Ciotolli, a partner at Bobo Ciotolli Fulford Bocchino & Newman in West Palm Beach who is representing the radiology group, declined comment on the allegations. Counsel for the hospital, Thomas Heath, a partner at Billing Cochran Heath Lyles & Mauro in Fort Lauderdale, said the alleged intimidating conduct "had nothing to do with the hospital," which "has no legal relationship with the radiology group."

The witness tampering charge comes in a case in which Gilarmo alleges that in June 2000, Boca Radiology Group physicians Carol Adami and Vincent Mazzeo failed to

note abnormalities on her mammograms or to recommend further studies to properly diagnose them.

As a result, Gilarmo alleges, she has endured needless physical and mental pain and suffering, unnecessary hospitalizations and medical procedures and costs, including a double mastectomy, and a reduced life expectancy. She claims that early detection would have led to a high likelihood of successful treatment.

Freedland said that because the cancer went undetected, it spread to Gilarmo's lymph nodes and other areas. "Her rate of survival would have been 90 percent if it had been caught in time," he said. "Now it's about 7 percent."

Boca Radiology Group and Boca Raton Community Hospital are charged with both direct and vicarious liability for the alleged negligence. Dr. Leonard Roudner and his professional association also are named as defendants for his alleged failure to diagnose Gilarmo during his evaluation of Gilarmo for breast augmentation surgery.

Freedland described Eklund as his "key witness" on standard of care in mammography. He said that the article arrived at Eklund's offices at the Medical College of Wisconsin, in Bellevue, Wis., in an envelope postmarked Aug. 16 in Fort Lauderdale. The hand-written return address on the envelope bore Schilling's name and a return address at Boca Raton Community Hospital.

"There are two kinds of radiologists: those who make mistakes and those who don't read any films," the article reads. Its author, Klein, argues that because a 67 percent breast cancer detection rate is the standard of care in mammography, the field has become "lawyer candy."

"All a plaintiff's attorney has to do is camp out at the entrance to a breast cancer clinic ... [and] have [a patient] sign on the bottom line," Klein wrote. "All that remains is to find a radiologist to say, 'Oh sure, any decent radiologist would have seen that one.'"

Eklund said he has subsequently been threatened by members of a Washington, D.C., radiology group who called for a boycott of his appearance at an upcoming conference in Great Britain.

Eklund, who works as a consultant and as a clinical professor at the Wisconsin school and at the University of Illinois in Peoria, es-

timated that 20 percent of his income derives from expert witness testimony. He said he testifies "about four or five" times annually, about 60 percent of the time as a plaintiff witness.



Eklund

Eklund said that he "much prefers defense work" but that "one can't exclusively, in good conscience, testify for the defense." He said that in the past few weeks alone, his pretrial testimony had "successfully deterred" the filing of three medical malpractice claims.

Florida case law allows evidence of witness tampering to be admitted at trial as evidence of the weakness of the tampering party's case.

No criminal investigation is under way. But Freedland said that "it would be appropriate" to refer the evidence of Schilling's alleged actions to state prosecutors. Witness tampering is a third-degree felony under Florida law, punishable by up to five years in jail and fines of as much as \$5,000.

But any potential criminal charges against Schilling have limited chances of success, said Miami criminal defense attorney Neal Sonnett. "An aggressive prosecutor could make a case," he said. "But it's not the greatest. There's no direct threat."

And Sonnett questioned the utility of criminal sanctions since there's "more immediate relief" available in the civil suit.

The Review made copies of Klein's *Diagnostic Imaging* article available to the Florida Radiological Society and the Florida Medical Association. Both groups subscribe to guidelines that provide for peer review and sanctions for improper expert witness testimony. The FMA's Web site links to an online database that records the activity of medical expert witnesses in Florida. Plaintiff lawyers say that it is a tool for intimidation.

FMA associate general counsel Jeff Scott asked for time to consult with his group's council on ethics and judicial affairs before discussing the article. The director of the Florida Radiological Society said his group's officers were unavailable for comment.

Dr. Eklund said the data on detection rates on which the article's argument relied was "seriously flawed." And he argued that the acceptable standard of care put forth in the article was "really quite low."

"You can't solve the medical malpractice crisis by intimidating expert witnesses," he said. "Rather we should be improving the quality of care."