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DECISIONS

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CALIFORNIA SUPREME COURT LIMITS STATUTORY ELDER ABUSE CLAIMS TO THOSE WITH CARETAKING OR CUSTODIAL RELATIONSHIPS

On May 19, the California Supreme Court issued a ruling in *Winn v. Pioneer Medical Group, Inc.,* 63 Cal. 4th 148, 370 P.3d 1011 (2016) addressing the issue of whether "neglect" within the meaning of California's Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code § 15657) includes a health care provider's failure to refer an elder patient to a specialist if the care took place on an outpatient basis. In the case, the patient, Ms. Cox, suffered from onychomycosis, a condition that limits mobility and impairs peripheral circulation. Ms. Cox visited her doctor who treated the symptoms but never referred her to a specialist. After two years of treatment and no referrals, Ms. Cox was admitted to a hospital with symptoms of ischemia and gangrene. She suffered from sepsis, which caused her foot to appear black and required doctors to perform an above-the-knee amputation. Six months after the amputation, Ms. Cox was again hospitalized for blood poisoning and died. The deceased patient's children filed suit against the physicians alleging medical malpractice and then later amended the complaint to include a complaint for elder abuse under the Elder Abuse Act alleging that the defendants consciously failed to make a vascular referral. The defendants filed a demurrer and the court sustained the demurrer on the grounds that plaintiffs failed to allege malice, oppression and fraud. The Appellate Court, however, reversed the trial court's decision and held that the Elder Abuse Act does not require the existence of a custodial relationship in order to establish a cause of action for neglect. The California Supreme Court, however, disagreed. In analyzing the issue, the Court examined the statutory language and noted that the only portion of the two-part definition of "neglect" that could apply in the case is the one that defined neglect as "the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like circumstance would exercise." The Court noted that the statute does not flatly preclude the statute's applicability to outpatient medical treatment. The Court ultimately determined that "the Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant – not the defendant's professional standing – that makes the defendant potentially liable for neglect." The court explained that "[the statutory scheme further persuades us that the concept of neglect – though broad enough to encompass settings beyond residential care facilities – is not intended to apply to any conceivable negligent conduct that might adversely impact an elder or dependent adult. Instead, neglect requires a caretaking or custodial relationship that arises where an elder or dependent adult depends on another for the provision of some or all of his or her fundamental needs." Accordingly, the Court reversed the decision of the Court of Appeal and remanded the case back to the trial court for further proceedings consistent with the opinion.

Wisconsin Appellate Court Certifies A Challenge To the Constitutionality of Wisconsin's Cap on Non-Economic Damages

"Because Ferdon found the cap in place at the time unconstitutional, and because a due process challenge to an injured patient's noneconomic loss limitation has not been decided in Wisconsin, we believe that certification is appropriate."

In an unpublished decision issued on July 19, 2016, the Wisconsin Court of Appeals in *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, 2016 WL 3884089 (Wis. Ct. App. Jul 19, 2016) certified a question to the Wisconsin Supreme Court as to whether the $750,000 statutory cap on non-economic damages recoverable in medical malpractice claims, as amended by 2005 Wis. Act. 183 and codified in Wis. Stat. § 893.55, violates the plaintiffs' constitutional rights. The case at issue involved alleged negligence by several emergency room physicians who treated plaintiff for abdominal pain and a high fever. The physicians failed to treat her for an infection, which eventually caused all of her organs to fail and resulted in the amputation of all four of her extremities. The jury awarded the plaintiff and her husband a total of $25.5 million in damages, including $16.5 million in noneconomic damages. The trial court found that Wisconsin's cap of $750,000 on noneconomic damages was not unconstitutional on its face, but refused to apply the cap under the circumstances, believing it would too unfairly reduce the plaintiffs' recovery. The defendants appealed the court's refusal to apply the cap and the plaintiffs appealed the court's refusal to find the cap unconstitutional on its face. Instead of issuing a decision, the Court of Appeals requested that the Supreme Court take the case on a certified question. The Court of Appeals contends that there is a tension between the Supreme Court's decision in *Ferdon v. IPFCF*, which struck down a previous cap, and the legislature's enactment of a new cap. It reasons

that the Supreme Court is a better venue to decide the issues in this case, including the plaintiffs' novel "as-applied" challenge. The Court of Appeals framed the specific issue as whether enforcing the cap violates the plaintiff's equal protection and due process rights. "Because *Ferdon* found the cap in place at the time unconstitutional, and because a due process challenge to an injured patient's noneconomic loss limitation has not been decided in Wisconsin, we believe that certification is appropriate." The Wisconsin Supreme Court has not yet decided whether to hear the issue.

Michigan Appellate Court Clarifies Damages Recoverable in Wrongful-Conception Case

In an unreported decision issued on June 21, 2016, the Court of Appeals of Michigan in *Cichewicz v. Salesin*, 2016 WL 3421359 (Mich. Ct. App. June 21, 2016) addressed the issue of whether a claimant can recover emotional distress damages in a wrongful-conception case arising from her knowledge that her child would be born with Down Syndrome. The case stemmed from claims against a physician after he told the plaintiff that her fallopian tubes were blocked so it was no longer necessary to use contraceptives. The plaintiff subsequently gave birth to a daughter with Down Syndrome. The defendant filed a motion in *limine* precluding testimony or evidence regarding her emotional distress claim. The trial court granted the motion and the plaintiff appealed. On appeal, the Court noted that although Michigan has permitted wrongful-conception cases, issues have arisen as to the types of damages recoverable. The Court confirmed that a plaintiff in a wrongful-conception action is entitled to recover "traditional damages." The Court further held that such damages "generally include the damages that naturally flow from the injury, which may include noneconomic damages, such as pain and suffering and mental and emotional distress damages." In reversing the trial court's ruling, the appellate panel concluded that "while this Court did not delineate every possible element acceptable for plaintiff's claim of emotional distress … it did indicate that 'traditional medical malpractice damages' were compensable."

Illinois Appellate Court Expands Apparent Agency Doctrine In Case Involving Acts of An Unrelated, Independent Clinic

On August 19, 2016, an Illinois appellate court expanded the doctrine of apparent agency by holding a hospital vicariously liable under the doctrine of apparent agency for the acts of employees of an unrelated, independent clinic. In *Yarbrough v. Northwestern Memorial Hospital,* 2016 WL 4430080 (Il. App. 1st Dist. Aug. 19, 2016), the plaintiff received prenatal care from Erie Family Health Center, Inc. (Erie). She believed that if she received prenatal care from Erie, she would be receiving treatment from Northwestern Memorial Hospital (NMH) care workers. Despite receiving prenatal care, the health care workers at both facilities failed to identify certain medical issues with the plaintiff's pregnancy resulting in a premature delivery and numerous medical complications to the newborn. Plaintiffs asserted a claim of medical negligence against NMH based on the doctrine of apparent authority, claiming that the health care providers at Erie were the apparent agents of NMH. The plaintiffs set forth numerous allegations regarding the close ties between NMH and Erie. NMH argued that it did not hold out Erie as its agent and Erie and its employees did not hold themselves out as agents of NMH. NMH had its own management structure, budget, board of directors, employees and facility. In addition, although NMH provided some charitable funding to Erie, it had a small presence on its board and no control over Erie. The court disagreed with NMH reasoning that there was an affiliation between the hospital and the clinic that was advertised and promoted by the hospital, which created an issue of fact for the jury to decide. According to the court, the doctrine of apparent agency can be applied outside the "four walls" of the hospital, and a plaintiff is not required to include the individual physician or his/her employer as a defendant to hold the hospital vicariously liable. The court framed the issue as whether NMH and/or Erie held themselves out as having such close ties that a reasonable person would conclude that an agency relationship existed even though the two entities were completely independent of one another. Based on this ruling, a plaintiff can pursue a hospital for the conduct of employees that work at independent clinics if there is some affiliation or perceived affiliation between the hospital and that clinic.

"The [apparent authority] doctrine can be applied outside the 'four walls" of the hospital and a plaintiff is not required to include the individual physician or his/her employer as a defendant to hold the hospital vicariously liable"

The Ninth Circuit Court of Appeals certifies Question to California Supreme Court on Claims for Negligent Hiring, Retention And Supervision

On August 22, 2016, the United States Court of Appeals for the Ninth Circuit in *Liberty Surplus Ins. Corp. v. Ledesma &* Meyer, 2016 WL 4434589 (9th Cir. Aug. 22, 2016) certified the following question of law to the Supreme Court of California: "Whether there is an "occurrence" under an employer's commercial general liability policy when an injured third party brings claims against the employer for negligent hiring, retention and supervision of the employee who intentionally injured the third party." The underlying claim arose out of alleged sexual abuse of a 13-year old student at the school where the employee was performing construction work on behalf of his employer. The operative complaint alleged that his employee was liable for negligent hiring, retention, and supervision because the employee was a registered sex offender who was previously convicted on two different occasions of sexually abusing young girls. In the coverage action commenced by Liberty, it argued that it had no coverage obligations under the CGL policy it issued to the employer on the grounds that the claims did not constitute an "occurrence." The district court found that the claim was too attenuated from the injury-causing conduct to constitute an "occurrence." On appeal, the Ninth Circuit sought review of the coverage issue on the grounds that it was a question of exceptional importance and that the Supreme Court has yet to address "this issue of exceptional importance." The Ninth Circuit Court further noted that a case previously decided by the Supreme Court in 2010 suggested that the claim might be covered under the policy.

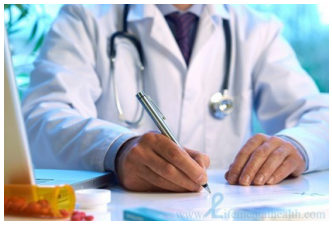
Ninth Circuit certifies question of coverage for negligent hiring, retention, and supervision claims under "occurrence" based CGL policy

Maryland's Highest Court Allows Wrongful Death Claim Despite Prior Jury Award In Favor of Decedent

"The Maryland wrongful death statute provides a new and independent cause of action, which does not preclude a subsequent action brought by the decedent's beneficiaries, although the decedent obtained a personal injury judgment based on essentially the same underlying facts."

On July 12, 2016, the Maryland Court of Appeals issued a decision in *Spangler v. McQuitty*, 141 A.3d 156 (Md. 2016) affirming the reversal and remand of a wrongful death action involving the death of boy who suffered injuries at birth and, eventually, cerebral palsy and death. The parents of the boy filed suit against the obstetrician, primary care physician, and his practice group alleging that the defendants failed to secure Ms. McQuitty's informed consent for treatment. Ms. McQuitty suffered a placement abruption, causing severe injuries to her son during birth. After several defendants settled with the plaintiffs, the case proceeded to trial and the jury awarded $13 million damages to the plaintiffs - including $8 million in future medical expenses. Prior to the appellate court deciding a remittitur motion, the boy died. Defendants subsequently filed a motion for a new trial or reduction of the award for future medical expense arguing that the death of the boy was a "significant event" that affected the equities of the case. The verdict was ultimately reduced to $5 million and the judgment was satisfied in March, 2012. In May, 2012, Plaintiffs filed a wrongful death action against the defendants under the Maryland wrongful death statute to recover damages based upon the same underlying facts in the personal injury action and the failure to obtain the mother's informed consent. Defendants filed a motion to dismiss arguing that the wrongful death action was precluded by the prior judgment in the son's favor. The trial court granted the motion but the Court of Special Appeals reversed the ruling in an unreported opinion issued in August, 2015. The Court of Appeals affirmed the appellate court's decision and held that "the Maryland wrongful death statute provides a new and independent cause of action, which does not preclude a subsequent action brought by the decedent's beneficiaries, although the decedent obtained a personal injury judgment based essentially on the same underlying facts during his or her lifetime." In examining the wrongful death statute closely, the Court further noted that the legislature did not intend to define "wrongful act" so as to make it so a wrongful death claim was contingent on decedent's ability to file a claim in a timely manner before his or her death. Accordingly, the statute of limitations for tort claims against health care providers in cases of alleged medical malpractice does not apply to a claim of wrongful death—which is a new and independently created claim.

Texas Appellate Court Dismisses Malpractice Case Due To Plaintiff's Failure to Serve Expert Reports in Compliance With Texas Procedural Rules



In a decision issued on July 25, 2016, the Court of Appeals of Texas (Dallas) reversed a trial court's order denying appellants' motion to dismiss appellees' healthcare liability claims for failing to serve expert reports that comply with section 74.351 of the Texas Civil Practice and Remedies Code. *Nexion Health at Lancaster, Inc.. v. Wells*, 2016 WL 4010834 (Ct. App. Texas Jul. 25, 2016). Plaintiff, the estate of a deceased resident filed a medical malpractice lawsuit against the defendant healthcare and rehabilitation center for failing to diagnose a bowel obstruction after he underwent bowel surgery. Plaintiff filed an expert report prior to the expert report deadline and the defendants objected to the report on the grounds that it did not sufficiently link the alleged breaches of the standards of care to decedent's injuries. Plaintiff amended the report two additional times and defendants subsequently moved to dismiss the plaintiff's claims with prejudice on the grounds that the amended reports failed to sufficiently set forth a causal link between the defendants' conduct and the injuries. The trial court denied the motion. The appellate court reversed, finding that the reports identified the manner of the injury but they did not explain how it relates to an unidentified breach in the standard of care or state why, but for the claimed breach, the injury or death would not have resulted. Relying upon prior appellate cases, the appellate court noted that the court may not "fill the gap and infer how evaluation and some potential treatment … would have remedied the situation." The appellate court concluded that the trial court abused its discretion in denying the motion to dismiss and, thus, reversed and rendered judgment dismissing the plaintiff's claims.

The Eighth Circuit Holds That The Nondisclosure of a Lawsuit Is a Material Misrepresentation Warranting Recscission

The Eighth Circuit Court of Appeals has determined that a physician's failure to disclose a lawsuit filed against him prior to the inception of coverage was equivalent to a false material representation entitling the hospital's insurer to equitable rescission under Iowa law. *Capson Physicians Ins. Co v. MMIC Ins., Inc.,* 2016 WL 3902654 (8th Cir. Mar. 15, 2016). In the case, a physician accepted a position at Crawford County Memorial Hospital (the hospital). The physician had purchased his own professional liability insurance policy from Capson. The hospital also sought to add the physician to the hospital's professional liability policy issued by MMIC Insurance. MMIC agreed to provide prior acts coverage to the physician based on the understanding that only two prior malpractice claims existed against the physician – one filed in 1983 and the other filed in 1997. However, a lawsuit was filed in November 2012 against the physician for a June 2011 medical incident involving the birth of a stillborn baby (Wilson lawsuit). Capson agreed to defend the physician under a reservation of rights. Neither the physician nor the hospital reported the lawsuit to MMIC at that time. In December 2012, MMIC ultimately agreed to provide the physician with prior acts coverage and issued an endorsement to that effect. Capson filed a declaratory judgment seeking a declaration that MMIC, the hospital's insurer, was primary and should defend the physician against the Wilson lawsuit. MMIC filed a counterclaim seeking to rescind its coverage for the physician. The court concluded that the physician's and hospital's failure to disclose the Wilson lawsuit was the equivalent of a false assertion. The claim made against the physician constituted a significant change that affected the risk that MMIC was offering to underwrite. According to the court, MMIC believed that it was offering prior acts coverage to a doctor who had been sued for medical malpractice twice during his decades-long career and that the physician did not have any claims pending against him. Unbeknownst to MMIC, a claim was pending against the physician when the hospital finally decided to purchase prior acts coverage for him. The court held that it is undisputed that MMIC would not have issued prior acts coverage to the physician had it known about the Wilson lawsuit.

"We hold that [the physician's] and the hospital's nondisclosure of the Wilson lawsuit was the equivalent of a false assertion."

Georgia Federal Court Concludes That "Innocent Insured" provision Does Not Prevent Policy Rescission In Misrep Case

In an unreported decision issued on August 9, 2016, a federal district court in Georgia concluded that material misrepresentations in an application for professional liability insurance entitled the insurer to rescind the insurance policy, notwithstanding an innocent insured provision. *Proassurance Casualty Co. v. Smith*, 2016 WL 4223666 (S.D. Ga. Aug. 9, 2016). The action stems from one attorney's theft of over one million dollars of his client's money. The attorney who committed the theft practiced law in a partnership with another attorney (Mr. Jenkins). The Defendant Mr. Smith renewed the professional liability policy for the firm in June, 2014. In the application, Mr. Smith stated that he was not aware of any circumstances, acts, errors or omissions that have been or could result in a professional liability claim. Mr. Smith's statement was false as he forged the signatures of his clients, settled two lawsuits and kept the money in his personal account while telling his clients that the suits remained pending. Mr. Smith and Mr. Jenkins were sued by the clients and sought coverage under the professional liability policy issued by Proassurance. Proassurance filed suit seeking rescission of the policy based upon the false statements of Mr. Smith. Mr. Jenkins challenged the rescission on the grounds that the policy cannot be rescinded because the false statements were not made on his individual behalf and based upon the policy's innocent insured provision, which provides coverage for individuals who did not participate in the dishonest or criminal acts. The Court disagreed and noted that the defendants' argument ignores the fact that the materially false statement was provided on the application for insurance. As a result, under Georgia statute (and based upon the false statements), "the innocent insured provision is inapplicable because there is and never was a contract for insurance." The Court further noted that the provision at issue does not reference any falsity in the application but, rather, relates to claims of dishonesty, criminal acts, etc. brought against the innocent insured under the policy. Thus, the insurer was free to rescind the policy based upon Mr. Smith's misrepresentations.

Policy Rescission under Georgia law

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Recent Notable Verdicts and Settlements

Notable Verdicts/Settlements

New London, CT—April 2016. A New London County jury awarded a 28-year old female patient $1.8 million in damages (which included $1.3 million in non-economic damages) in a medical malpractice lawsuit filed against a physician who rendered the female patient infertile after cutting the wrong fallopian tube during a medical procedure.

Warren County, KY—May 2016. A Warren County jury awarded $2.8 million in damages to a 67-year old male plaintiff who alleged that the defendant cardiologists were negligent in performing an angiogram when the procedure was not necessary. The surgery resulted in the plaintiff having to undergo a below-the-knee amputation.

Suffolk County, MA—June 2016. The family of a 13-year old decedent reached a $3 million settlement in a wrongful death, medical malpractice case involving the hospital's failure to timely diagnose and treat the child for sepsis. The case stemmed from the child's hospitalization after sustaining injuries during a motor vehicle accident. The family alleged the hospital was negligent in failing to diagnose necrosis of the child's small bowel, which subsequently developed into sepsis.

Lake County, IN—June 2016. A Lake County jury awarded a 49-year old male decedent's estate $9.5 million in damaged in a medical malpractice case in which the plaintiff alleged that the defendant rehabilitation facility was negligent for failing to follow a physician's order to transfer the patient for testing for the patient's abdominal pain and for failing to advise the physician of the test results. The patient ultimately died as a result of cardiac respiratory distress.

Jefferson County, AL—August, 2016. After a two week trial, a Jefferson County jury awarded a woman $16 million in damages for a nerve injury she allegedly suffered from being manhandled by nurses while she was giving birth at a medical center in 2012. The jury awarded her $10 million in compensatory damages and $5 million in punitive damages and her husband $1 million in consortium damages.

Notable Defense Verdicts

Kings County, NY—April 2016. A Kings County jury unanimously found that defendant physicians did not depart from the accepted standards of practice by prescribing antibiotics in conjunction with a blood thinner for a patient with metallic mitral valve replacement. The patient plaintiff alleged that she presented with signs of a viral illness and that antibiotics prescribed to treat the suspected bacterial sinusitis were contraindicated.

Alexandria, Virginia—May 2016. An Alexandria City jury entered a defense verdict in favor of a long term care facility and a physician in a case in which an 87-year old woman contended that the facility and physician provided improper wound care after a below-the-knee amputation of her right leg. Gangrene ultimately set in, which then required an above-the-knee amputation. Plaintiff alleged the defendants failed to properly monitor her wound and timely recognize an infection in the wound.

Philadelphia, PA—June 2016. The decedent's estate brought a medical negligence claim against a hospital and rehabilitation center where a 73-year old was brought following a fall at her home which resulted in her fracturing her hip. During her stay at the center, she developed pressure sores causing sepsis and her eventual death. Plaintiff alleged that the defendants were negligent in failing to prevent her pressure sores. A Philadelphia jury found in favor of the defendants concluding that the plaintiff failed to prove that the care provided by the defendants fell below the standard of care.