Jackson &Campbell
Attorneys and Counselors at Law

DECISIONS

July, 2016

Volume 2, Issue 4

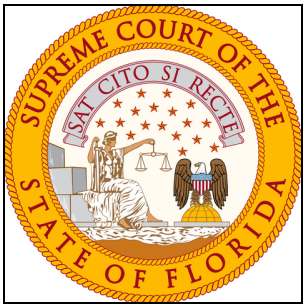
INSIDE THIS ISSUE:

Special points of interest:

- Challenges to Florida's Medical Malpractice Caps
- Michigan Appellate Court Finds Doctor Liability for Disclosure of Diagnosis to Patient's Wife
- Kentucky Federal Court Rejects Notice-Prejudice Rule in Claims-Made and Reported Policies
- Florida Supreme Court Adopts New Jury Instructions on Missing Evidence
- Insurer Having Difficulty Fighting Consent Judgment in Missouri

CHALLENGES TO FLORIDA'S MEDICAL MALPRACTICE CAPS

On June 9, the Florida Supreme Court heard arguments regarding the constitutionality of medical-malpractice damage caps that the Legislature approved in 2003. Specifically, the arguments revolved around two high-profile cases debating the constitutionality of statutes that allow such legislation to limit an attorneys' fee award and cap noneconomic damages in medical malpractice cases. In the fee award case, a jury awarded the family of Aaron Edwards, who has cerebral palsy after a birth accident in 1997, $31 million in damages. Because the hospital was public, it was liable for just $200,000 under the sovereign immunity damage limitations applicable under state law. A public campaign ensued resulting in the state Legislature passing a claims bill directing the hospital to pay $15 million into a trust for Edwards and that limited the attorneys' fee award to $100,000. The plaintiff's firm said it was owed $3.75 million in attorneys' fees for work representing the family. Florida's Fourth District Court of Appeal ruled that the claims bill was constitutional but asked the Florida Supreme Court to weigh in on the issue. Plaintiff's attorneys fear that, if upheld, the Fourth District's ruling could cause them hesitation in accepting malpractice cases against public facilities that could be considered arms of the state. They also argued that the average citizen could



then find it difficult to find an attorney willing to take on difficult malpractice cases if the odds in getting paid are almost none. The State, however, claims that private parties cannot contractually bind the Legislature in the exercise of its power over claims bills. The Florida Legislature, in its own amicus curiae brief, said that neither the family nor their attorneys have legal entitlement to funds over $200,000 noting that when the Legislature authorizes payment to compensate a claimant, it must be mindful of the funds of the state and the available resources necessary to meet its obligation.

The second case regarding statutory noneconomic damages caps stems from a case where Susan Kalitan had outpatient surgery to treat carpel tunnel syndrome. The surgery required general anesthesia, and during intubation, her esophagus was perforated. A jury awarded $4.7 million, including $2 million in noneconomic damages for pain and suffering and $2 million for future pain and suffering. The trial judge reduced the noneconomic damages by close to $2 million because of the statutory cap and cut the damages by another $1.3 million, as the hospital's share of liability was capped at $100,000 because of its status as a sovereign entity. The Fourth District declared the statute unconstitutional, applying the test utilized by the Florida Supreme Court in *McCall,* where the court concluded that the cap on noneconomic damages for medical malpractice cases does not pass the rational basis test because it arbitrarily reduces medical malpractice claimants' right to full compensation when there are multiple claimants. The State and reform groups claim that the appeals court misinterpreted the *McCall* decision and expanded it to such an extent that other caps could be struck down. The plaintiff is arguing: (1) that the cap should only apply to multiple claimants; and (2) that the caps are unconstitutional because they limit access to the courts and the right to trial by jury, as caps applied to a verdict deprives the plaintiff of the damages awarded by the jury.

"The undisputed disclosure of sensitive medical information, in the face of ethical and statutory duties of confidentiality, is conduct within the realm of common knowledge and experience."

Michigan Appellate Court Holds That Disclosure of Diagnosis to Spouse May Expose Doctor to Negligence Liability

In an unpublished decision issued on February 23, 2016, a Michigan Appellate Court held in *Brandon v. Handelsman*, 2016 WL 716304 (Mich App. Feb. 23, 2016) that doctors who disclose diagnoses to third parties without authorization cannot rely on rules applicable to medical malpractice actions to relieve them of liability. The underlying claim arose after the defendant recommended to the patient's now ex-wife that she read a book about borderline personality disorder in order to understand her husband's condition. The ex-wife was also a patient of the doctor. The patient filed suit against the doctor as a result of the unauthorized disclosure. Plaintiff had alleged causes of action for negligence, invasion of privacy, disclosure of embarrassing facts, and intentional infliction of emotional distress. The defendant sought summary judgment on the grounds that the plaintiff's claims sounded in medical malpractice and were, therefore, time-barred under the applicable statute of limitations. The trial court granted the defendant's motion and held that the claims could not proceed because he had alleged medical malpractice and the complaint was not filed within the statute of limitations. The appellate court, however, noted that the plaintiff had alleged that the doctor violated a Michigan law stating that a licensed doctor shall not disclose any information learned while in the course of treating a patient. The appellate court held that the claim may or may not have grown out of the doctor's alleged medical malpractice. Moreover, the appellate court noted that the claim was not one for medical malpractice because the

plaintiff had not taken issue with the diagnosis or how the doctor treated him. Thus, the court concluded, the plaintiff's claim was either for violation of statute, for negligence or for intentional disclosure. The appellate court also opined that, unlike a medical malpractice claim, expert testimony was not needed to help a jury decide whether the doctor should be held liable for unauthorized disclosure of confidential medical information. In a dissenting opinion, Judge Peter O'Connell noted that the case raises questions of medical judgment beyond the realm of common knowledge.

New Mexico Legislation Limits Where Patients Can File Suit

New legislation enacted in New Mexico allows doctors in other states to request patients to sign a form stating that the patient would file any lawsuits in the state where the treatment was provided. The recently enacted legislation stems from a medical malpractice lawsuit filed in New Mexico by a New Mexico patient against a Texas doctor. In 2004, the New Mexico resident traveled to Lubbock, Texas to have bariatric surgery at Texas Tech University. She later sued the doctor who performed the surgery for malpractice. The doctor, who practiced in Texas, would have had immunity under Texas law because he is employed by the State. The patient, however, filed suit in state court in New Mexico arguing that, although the surgery and follow-up treatment were performed in Texas, her subsequent injuries manifested themselves in New Mexico. The New Mexico Appeals Court allowed the case to continue, which caused doctors throughout Texas to threaten to stop seeing New Mexico patients. In an effort to find a compromise on the harsh impact of the appellate decision, the New Mexico legislature introduced legislation regarding the patient consent form. The Senate Judiciary committee approved of the legislation but was unwilling to make the legislation permanent. As a result, the act will sunset in three years. Opponents of the bill believed that New Mexicans will be unhappy if they are required to accept the jurisdiction of Texas in medical malpractice claims where there are extremely low caps on non-medical awards and much stricter time frames in which problems can be discovered and remedied. The New Mexico Supreme Court is scheduled to hear the patient's suit against the Texas doctor in August.

Federal Kentucky Court predicts That Notice-Prejudice Rule Would Not Apply to a Claims Made Policy

In a decision issued on June 21, 2016, the United States District Court for the District of Kentucky in *C.A. Jones Management Group, LLC v. Scottsdale Indem. Co.*, 2016 WL 3460445 (D. Ky. Jun. 21, 2016) predicted that the Kentucky Supreme Court "would not extend the notice-prejudice rule to claims made and reported policies that clearly and unambiguously" required timely notice "as a condition precedent to coverage." The case involved a coverage dispute under two consecutive claims-made and reported business indemnity policies issued to the plaintiff insured from 2011 to 2013. As a condition precedent to any right to payment, the insuring agreement required the insured to provide notice of any claim as soon as practicable but in no event later than sixty days after the end of the policy period. The insured was sued in three separate lawsuits and sought coverage for each. The insured subsequently filed a coverage action against Scottsdale and Scottsdale moved for summary judgment on the grounds that the insured failed to provide timely notice of the three underlying lawsuits. The Court noted that although certain of the lawsuits were made against the insured during the first policy, the claims were not reported to Scottsdale during that policy period. The insured did not disagree but, instead, argued that the insurer must show prejudice before rejecting a claim due to late notice under claims-made and reported policies. The court rejected the insured's argument. The court first noted that adopting such an approach is inconsistent with the approach taken by Kentucky courts to enforce unambiguous policy terms as written. Second, the Court held that such a rule would diminish the availability and advantages of claims-made-and-reported

policies not only for insurers, but also for insureds. Third, the Court held that such a finding is inconsistent with the majority rule and that the United States District Courts for the Western and Eastern Districts of Kentucky, as well as the Sixth Circuit Court of Appeals, have predicted that Kentucky would join the majority of its sister states and conclude that the notice-prejudice rule would not apply to claims-made and reported policies. The Court, thus, granted summary judgment in favor of Scottsdale.

"The Kentucky Supreme Court would not extend the notice-prejudice rule to claims-made-and-reported policies that clearly and unambiguously requires timely notice as a condition precedent to coverage."

Florida Adopts New Jury Instructions for Maintenance of Records and Evidence in Medical Malpractice Cases

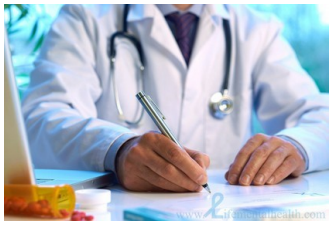
The Florida Supreme Court has authorized an amendment to Jury Instruction 402.4(d) regarding medical malpractice and the failure to maintain evidence. The amended jury instructions will impact jury trial cases involving lost or destroyed records or evidence. The prior version of the jury instruction was one sentence and required the jury to presume that missing records contained evidence of negligence unless the defendant proved otherwise. The new instruction is broken into two sentences. The first sentence instructs the jury that if it finds that the defendant has lost evidence that would be material to decide a disputed issue, the jury may, but is not required to, infer that the evidence would have been unfavorable to the defendant. The second sentence provides that the court has determined that the defendant has a duty to maintain records, the defendant did not maintain those records, and that as a result the jury should find that the plaintiff has established his or her claim unless the defendant can prove otherwise. The notes to the second sentence provide that this portion of the instruction applies in cases in which the court has determined that there is a duty to maintain records, and in which the plaintiff can establish "to the satisfaction of the court: that the absence of those records hinders the plaintiff's ability to establish the claim." The Supreme Court also authorized a new instruction, number 301.11 entitled "Failure to Maintain Evidence," that parallels the medical malpractice jury instruction found in 402.4 (d) set forth above. Thus, the same standard also now applies in general liability cases.

Florida Supreme Court Adopts New Jury Instructions on Missing Evidence

"It is unlikely that a patient who signs a form [indicating that the physician is not an employee or agent] can reasonably believe that his physician is an employee of a hospital when the form contains specific language to the contrary."

Illinois Appellate Court Affirms Summary Judgment For Hospital In Apparent Agency Case

In a decision issued by the First District Appellate Court on May 9, 2016, the Illinois Appellate Court affirmed summary judgment dismissing the Plaintiff's medical malpractice complaint against a hospital sued on a theory of apparent agency. The patient plaintiff in *Mizyed v. Palos Community* Hospital, 2016 WL 2654382 (Ill. 1st Dist. App. May 9, 2016), was a native Arabic speaker who spoke limited English. He filed a medical malpractice action against a hospital and physicians alleging negligence in failing to prevent, recognize, and treat an infection which the patient contracted in the hospital from the insertion of a peripherally inserted cardiac catheter (PICC) line following coronary artery bypass surgery. Prior to receiving treatment, the plaintiff signed a number of forms, including one that specifically indicated that the physicians and consultants were independent medical staff and were not employees of the hospital. The plaintiff acknowledged that he signed the forms but argued that he did not understand the forms he signed. In the lawsuit against the hospital, the plaintiff alleged that the physicians were actual or apparent agents of the hospital and, as such, the hospital was liable for the actions of the physicians. The hospital filed a summary judgment motion and argued that the plaintiff could not establish that the physicians were actual or apparent agents of the hospital. The hospital also argued that it was immaterial that the plaintiff could not read English. Plaintiff opposed the motion by arguing that, under Illinois common law, issues of disputed facts existed as to whether the physicians were apparent agents of the hospital. The trial court granted summary judgment in favor of the hospital and the plaintiff appealed. On appeal, the Court held that the plaintiff's inability to read or speak English did not undermine the effect of the consent forms that he signed. The explicit language in those forms put him on notice that his treating physicians were not agents or employees of the hospital, thereby defeating plaintiff's apparent agency claim. Moreover, the court noted that "whether a patient signs a hospital consent to treatment form that contains clear and unambiguous independent contractor disclaimer language is an important factor to consider … because it is unlikely that a patient who signs such a form can reasonably believe that [his] treating physician is an employee or agent of a hospital when the form contains specific language to the contrary." The court noted that the holding would be different if the form was ambiguous or confusing.



New Jersey Appellate Court Holds That Required Reports Prepared Under Patient Safety Act Are "Absolutely" Privileged From Production in Malpractice Case

In a decision issued on May 4, 2016 by the Superior Court of New Jersey, Appellate Division in *Conn v. Babylin Rebustillo*, 2016 WL 2337890 (N.J. Super. May 4, 2016), the Court held that a hospital report documenting the cause of a patient's fatal fall from a bed cannot be compelled in his widow's medical malpractice lawsuit because the information is privileged under the state's patient safety law. In a published opinion, a three-judge panel reversed a trial court's refusal to seal Newton Medical Center's root-cause analysis ("RCA") of David W. Conn's fall. In doing so, the court rejected plaintiff's argument that the doctors did not prove the report complied with state law. The trial court found that the RCA was generated for the specific purpose of complying with the mandatory reporting requirement and was filed with the New Jersey Department of Health. The trial court, however, ordered disclosure of the "underlying facts" of the RCA as well as documents previously withheld on the grounds that they were protected as part of the RCA. On appeal, the defendant argued that the trial court erred because the RCA was prepared as part of the defendant's self-critical analysis and for the purposes of reporting the event to regulators. The appellate court agreed and held that the information, as well as the documents that were the product of an investigative process, are privileged and sheltered from discovery. In so ruling, the Court concluded that the privilege afforded by the Patient Safety Act is "absolute, covering 'all documents, materials, or information received by the department'" pursuant to the act. As a result, the appellate court reversed and remanded the case for further proceedings consistent with its opinion.

Insurer Fighting $24.9 Million Consent Judgment Finds Difficulty in Challenging The Judgment In Missouri Courts

Beazley Underwriting, a Lloyd's of London affiliate, is involved in litigation stemming from an underlying lawsuit seeking compensation for brain damage sustained by a plaintiff who was dropped from a gurney by the insured ambulance company. Beazley defended the lawsuit, captioned *Nast v. Gateway Ambulance Services, LLC* pending in the Circuit Court of the City of St. Louis, Missouri, without a reservation of rights. When Beazley refused to settle the lawsuit for $25 million (the limits of all applicable policies), the insured fired its appointed defense lawyer and entered into a consent judgment with the plaintiff known as a 537.065 agreement. Per the agreement, which is sanctioned under the Missouri statute from which it is named, the insured paid plaintiff $100,000 and agreed not to contest or appeal the matter. The insured also assigned to plaintiff any bad faith claim it had against Beazley. In exchange, the plaintiff promised to limit recovery to Beazley's assets through a subsequent garnishment action. Upon learning of defense counsel's firing, Beazley hired counsel to appear on its behalf and attempt to intervene in the trial. The request was denied but because the ruling was never put in writing, the appellate court dismissed a subsequent appeal because there was no order denominated as a "judgment" to appeal. While the case was on appeal, the plaintiff continued to pursue a garnishment claim against Beazley for the $24.9 million judgment as well as the bad faith claim he was previously assigned. Beazley is now forced to defend the garnishment and bad faith action on the grounds that the insured breached its duty to cooperate by firing defense counsel and entering into a 537.065 agreement (an agreement that is typically entered into after rejecting a defense under a reservation of rights or after coverage has been disclaimed). Thus, the case is unique in that the insurer finds itself facing a $24.9 million judgment in a case in which it provided an unqualified defense. Beazley has argued that the plaintiff "seeks to transform section 537.065 from a device intended to protect an undefended insured into a tool to strip an insurer of its contractual right to control the defense of a case." The case against Beazley is ongoing.

"The plaintiff seeks to transform section 537.065 from a device intended to protect an undefended insured into a tool to strip an insurer of its contractual right to control the defense of a case."

Hospital Can Seek Damages Against The U.S. For Medical Malpractice

In a decision issued on June 20, 2016, the United States District Court for the Eastern District of Pennsylvania has allowed a hospital to continue its common law contribution and indemnification claim against the federal government in *Temple University Hospital Inc. v. United States,* 2016 WL 3457650 (E.D. Pa. June 20, 2016). The underlying malpractice claim was filed in February 2012 against Temple University Hospital by the parents of a child born there in August 2009. The parents claimed that the attending obstetrician, Dr. Clinton Turner, delayed a Caesarian section that was necessary because of an abnormal fetal heartbeat. As a result, the child was born with severe brain damage. Dr. Turner was an employee of Delaware Valley Community Health, a federally funded operator of clinics in the Philadelphia area and was working at the hospital under an agreement between the hospital and DVCH to share physicians. The hospital settled the case for $8 million and submitted a claim to the federal government under the Federal Tort Claims Act for reimbursement. According to the hospital, the federal government was liable for the settlement because the doctor was a federal employee pursuant to the Public Health Service Act. The government moved to dismiss the case arguing that it was not a party to the agreement between the hospital and the clinic and the clinic did not have the authority to commit the government to indemnify against malpractice claims. The judge agreed that the physician-sharing agreement could not bind the government and, as a result, dismissed the contractual indemnity claim against the federal government. However, the judge refused to dismiss the common law claims. The Court recognized that in Pennsylvania, an independent contractor doctor can be an ostensible agent of a hospital if (1) the patient looks to the hospital for care, not the individual doctor, and (2) the hospital holds the doctor out as its employee. In denying the motion on the common law claims, the court held that the hospital's complaint adequately asserted that the settlement had extinguished the doctor's liability and that the hospital held Dr. Turner out as its employee, creating the necessary legal relationship to hold it liable for the physician's conduct.

Jackson & Campbell
Attorneys and Counselors at Law

Jackson & Campbell, P.C.
1120 20th Street, NW
Washington, DC 20036
www.jackscamp.com

Timothy Dingilian
(202) 457-1664
tdingilian@jackscamp.com

Christopher Ferragamo
(202) 457-5458
cferragamo@jackscamp.com

Marie VanDam
(202) 457-1622
mvandam@jackscamp.com

Alexis Joachim
(202) 457-1613
ajoachim@jackscamp.com

Recent Notable Verdicts and Settlements

NOTABLE VERDICTS/SETTLEMENTS

Philadelphia, PA—May, 2016. A Philadelphia jury returned a $44.1 million medical malpractice verdict against the Hospital of the University of Pennsylvania in a case involving the hospital's failure to recognize a reaction a patient had to a medication administered after surgery. After a thirteen day trial, the jury found in favor of the 57 year-old patient, who suffered severe brain damage because of a brain hemorrhage caused by the medication. The jury found the hospital 65% responsible and the attending physician 35% responsible.

Summit County, OH—June, 2016. An Akron family was awarded $4.5 million by a Summit County court after a jury ruled that physicians severely misdiagnosed the 33 year patient who was suffering from severe head pain. Physicians at the Emergency Department of Cleveland Clinic Akron General Medical Center diagnosed the mother of three children with a migraine headaches. She was later correctly diagnosed with brain swells by the same health provider. The jury concluded that the misdiagnosed lead to her death.

Houston County, AL—March, 2016. A Houston County jury awarded $4 million in damages to a woman whose father died from a fall while in the care of a long –term care facility that is part of Noland Hospital. The lawsuit involved the death of a 77 year-old man who was found on the floor of his room after a fall. The patient was supposed to have been in restraints at the time due to being at a high-risk for falls. The jury concluded that the facility breached the standard of care.

Cook County, IL —May, 2016. A Cook County jury awarded $10.05 million to a 60 year-old patient in a medical malpractice case involving the patient's progression of cancer in his right thigh. The plaintiff contended that the radiologist defendant failed to diagnose the cancer and negligently provided medical care which delayed the diagnosis and treatment of plaintiff's cancer. The defendant denied he was negligent and denied proximately causing the plaintiff's claimed injuries. A portion of the verdict included a $2.5 million award to the plaintiff's wife for loss of consortium.

Prince George's County, MD—February, 2016. A Prince George's County jury awarded a 51 year old technology company CEO and his wife $6.7 million in damages in a medical malpractice case involving permanent injuries he sustained after suffering the effects of a stroke. Plaintiff alleged that the emergency room physician failed to establish an accurate last known time that he was without symptoms and, as a result, failed to timely administer a stroke treatment that would have prevented the long term effects of the stroke. The verdict was later reduced to $1 million pursuant to a high/low agreement.

DeKalb County, GA—May, 2016. A DeKalb County jury awarded $15 million to a man and his wife for injuries he suffered when he passed out and fell off an exam table after having blood drawn by a provider at Emory Healthcare. The 52 year-old man was left a quadriplegic after falling face first to the floor.

San Diego, CA —April, 2016. The parties to a medical malpractice case involving a newborn baby left brain damaged by the actions of a California hospital reached a confidential settlement for $20 million. On the date in question, the child of the plaintiffs was under the care of nurses at the hospital. The nurses allegedly failed to properly monitor a feeding tube, resulting in brain damage to the child. The family of the child filed suit in California against the hospital and sought recovery of damages for their child, including a long-term care plan.

Westchester, NY —March, 2016. A Westchester County jury awarded $9.1 million to the estate of a man who died after he underwent a coronary artery bypass grafting procedure performed by the defendant physicians. The estate contended that the physician was negligent in performing the procedure and for failing to properly manage the decedent's blood pressure. The estate also alleged the physician failed to obtain the decedent's informed consent. The defendants denied liability. The estate was awarded $7 million in pain and suffering damages, $2 million for past medical costs, and $100,000 for loss of services.