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DECISIONS

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SUPREME COURT OF LOUISIANA CLEARS PATH FOR CIRCUMVENTING CAP ON MEDICAL MALPRACTICE DAMAGES

In a decision issued on October 19, 2016, the Supreme Court of Louisiana affirmed a decision by the Louisiana Appellate Court for the Third Circuit holding that a negligent credentialing claim sounded in general negligence and fell outside the purview of the Louisiana Medical Malpractice Act ("LMMA") and its limitations on liability. *Billeaudeau v. Opelousas General Hospital Authority,* 2016 WL 6123862 (La. Oct. 19, 2016). In the case, the patient's mother and father filed a negligence action against a hospital (Opelousas General Hospital) asserting that the hospital negligently credentialed an emergency room physician (Dr. Kondilo Skirlis-Zavala), who allegedly failed to provide a treatment for stroke victims to the patient, who was subsequently diagnosed as having suffered a stroke. Specifically, plaintiffs alleged that they rushed their daughter to the ER Department at the hospital and asked the physician to administer stroke medication. Instead, the physician administered anti-seizure medication. Frustrated, the parents transferred their daughter to another hospital, which administered the stroke medication over four hours after she had experienced what was ultimately determined to be a stroke. The patient, a 34 year old woman with Down Syndrome, sustained severe, irreversible brain damage. After filing their lawsuit, the plaintiffs filed a motion for summary judgment requesting a declaration that their claim for "negligent credentialing" of the physician was not subject to Louisiana's $500,000 cap on damages under La. Rev. Stat. § 40: 1231.2(B)(1). In their motion, the plaintiffs argued that the hospital was negligent because the physician should not have been credentialed and given full active privileges and, thus, they argued that the matter was one of "corporate malfeasance in the hiring process." In opposition, the hospital argued that the case was based upon a simple act of medical judgment. The trial court granted plaintiffs' motion and focused on the legislature's failure to include "negligent hiring" within the definition of malpractice. The appellate court found no error in the ruling and affirmed the trial court's decision. The Supreme Court of Louisiana affirmed both decisions. The court began its analysis by noting that the LMMA and its limitations apply strictly to claims "arising from medical malpractice." Although the definition of the term "malpractice" covers negligent training and supervision of health care providers, the court noted that the definition does not directly address negligence in credentialing or hiring of said providers. The court then analyzed the claim under a six-factor test it laid down in a 2002 decision to determine whether certain conduct by a health care provider constitutes "malpractice" under the LMMA. The court ultimately concluded that the negligent credentialing claim is weighted in favor of a finding that the claim sounds in general negligence and falls outside the purview of the LMMA and its limitations on liability. In her dissent, Chief Justice Johnson argued that the definition of "malpractice" was broadly written and was intended to cover any act of negligence by a healthcare provider.

Fourth Circuit Court of Appeals Holds That Insurer Need Not Cover Birth Injury Claim Not Disclosed on Policy Application

"The letter from Risk Management, which notified Dr. Sutton of an attorney's involvement and used the words 'potential claim,' created a reasonable inference that a potential claim might be brought."

In a decision issued on December 22, 2016, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the United States District Court for the District of South Carolina that an exclusion contained in an insurance policy concerning whether a doctor made adequate disclosures on her application for insurance relieved the insurer of the duties to defend and indemnify the doctor in a medical malpractice case arising out of injuries a boy allegedly suffered during delivery. *First Professionals Ins. Co. v. Sutton*, 2016 WL 7413529 (4th Cir. Dec. 22, 2016). The defendant Dr. Sutton, a board-certified OB-GYN, was insured by Medical Protective Company ("MedPro") from 2003 until May 2009 and by First Professionals Insurance Company ("FirstPro") from May 2009 until April 2012. In 2008, while Dr. Sutton was still insured by MedPro, she received a letter from her hospital's Risk Management Department notifying her that an attorney representing a former patient had requested the complete medical record for a 2004 visit. The Risk Management Department indicated Dr. Sutton was being notified as part of the Department's ongoing activities to identify potential claims. Dr. Sutton did not recall the patient but called MedPro to notify them of the unusual letter. Approximately 10 months later, Dr. Sutton applied for insurance with FirstPro. In her application, she answered "no" to two questions asking whether she knew or could reasonably foresee that (1) a request for records from an attorney might lead to a claim and (2) there are outstanding claims that have not been reported to her current carrier. FirstPro issued an insurance policy to Dr. Sutton in May 2009. In May 2011, Dr. Sutton received a notice of intent to sue alleging a boy suffered hypoxia and brain injury as a result of Dr. Sutton's negligence in the course of delivery in 2004. MedPro and FirstPro disclaimed coverage. In subsequent litigation, the District Court determined that Dr. Sutton provided adequate notice to MedPro, her prior insurer, so MedPro had a duty to defend and indemnify Dr. Sutton. With respect to FirstPro, however, the District Court ultimately determined that Dr. Sutton's responses to two questions on her FirstPro insurance application were not adequate disclosures. The Fourth Circuit affirmed on both issues and adopted the ruling of the District Court that the letter from Risk Management, which notified Dr. Sutton of an attorney's involvement and used the words "potential claim," created a reasonable inference that a potential claim might be brought against Dr. Sutton.

Michigan Closes Medical Malpractice Damages Loophole

On December 13, 2016, the Michigan State Senate passed a bill that would close a loophole allowing medical malpractice plaintiffs to sue for compensation for the charged amount of medical expenses rather than the amounts that are actually paid out by health insurance companies. The legislation, sponsored by Republican State Senator Mike Shirkey, was drafted in response to a request by the Michigan Supreme Court in July, 2016 asking the legislature to address the issue of recoverable damages in medical malpractice cases. In a July 8, 2016 decision issued by the Michigan Supreme Court in *Greer v. Advantage Health*, 499 Mich. 975 (2016), the Court upheld the state's current law stating that a medical malpractice plaintiff can recover damages for the amount billed by a healthcare provider without lowering that amount to what was actually paid by a patient or an insurance company. Three justices of the court, however, implored the state legislature to address the issue saying that a legal loophole allowing for inflated damages was likely not state lawmakers' intent when they drafted a tort reform law in 1986. The legislation sought to ensure that only evidence of actual damages is admissible in medical malpractice cases, as opposed to the listed price for past medical expenses or rehabilitation services. State Senator Shirkey explained that "Insurers and medical providers often reach agreements on payment amounts that differ greatly from expenses that were initially charged" and "this legislation will help ensure accurate compensation." The bill, which had already been approved by Michigan's House of Representatives, now heads to Governor Rick Snyder's desk for his signature and formal enactment.

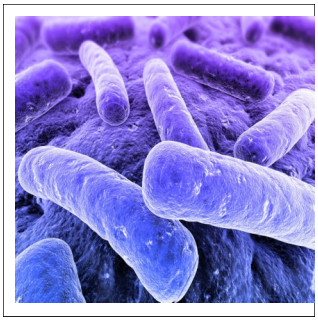
Third Circuit Court of Appeals Upholds Dismissal of Civil Rights Claim Against Prison Physician

In an unreported decision issued on December 8, 2016, the United States Court of Appeals for the Third Circuit affirmed the decision of the United States District Court for the District of New Jersey to grant summary judgment on behalf of a defendant prison medical doctor on the grounds that mere medical negligence is not an Eighth Amendment violation. *Soto-Muniz v. Martin*, 2016 WL 7157996 (3d Cir. Dec. 8, 2016). The underlying claim arose out of the medical treatment the plaintiff received for chronic ulcerative colitis while he was a prisoner at South Woods State Prison. One day after arriving at the prison, the plaintiff was seen by the defendant, Dr. Martin, for a gastrointestinal examination. Over the next two weeks, plaintiff complained that his condition worsened. Dr. Martin prescribed medicine because his veins could not handle hydration through an IV due to prior heroin use. After several delays, he had surgery to remove his colon. The plaintiff subsequently brought a § 1983 claim against Dr. Martin, the prison, and other individual defendants for cruel and unusual punishment in violation of the Eighth Amendment. Defendants filed a motion for summary judgment. In response, the plaintiff voluntarily withdrew all claims except the § 1983 claim against Dr. Martin. The District Court granted summary judgment in favor of the defendants. The plaintiff only appealed the grant of summary judgment as to Dr. Martin. The plaintiff's case relied on medical expert evidence arguing Dr. Martin should have given the plaintiff IV hydration and steroids. On appeal, the Third Circuit held that summary judgment in favor of Dr. Martin was appropriate because, although "hindsight called for different treatment than what [the plaintiff] received," the proper consideration is what Dr. Martin knew at the time he treated the plaintiff. *Id*. at *3. The evidence merely raised an issue as to whether Dr. Martin was negligent, not that Dr. Martin consciously disregarded a serious risk. The Third Circuit reiterated the well-established rule that "disagreements over medical judgment do not amount to an Eighth Amendment claim." *Id*. at *2.The Third Circuit also rejected plaintiff's argument that the court could infer Dr. Martin's deliberate indifference from the three week delay in the plaintiff receiving his requested GI consultation. The Court noted that the evidence showed Dr. Martin requested the GI consult shortly after the plaintiff's request and any delay in scheduling was due to prison administrative officials, which was not evidence that Dr. Martin was deliberately indifferent to the plaintiff's medical needs.

"Disagreements over medical judgment do not amount to an Eighth Amendment claim."

CDC Finds That Healthcare Facilities Are At An Increased Risk for Legionnaires' Disease

A June, 2016 Vital Signs report released by the Centers for Disease Control and Prevention ("CDC") found a nearly 300 percent increase in reported cases of Legionnaires' Disease since the year 2000 in the United States and Canada. The Legionella bacterium, which grows best in warm water, can cause a lung infection that is fatal for about one in ten persons infected. It is believed that Legionnaires' disease occurs when a person breathes in small water droplets contaminated with the Legionella bacterium. The CDC has noted that those most susceptible to contract Legionnaires' disease include: (1) adults 50 years or older; (2) current or former smokers; (3) people with chronic lung disease; and (4) people with weakened immune systems. Healthcare facilities are at an increased risk of an outbreak of Legionnaires' disease due to the combination of susceptible people on site and the numerous water sources present. In this regard, the CDC has concluded that the most likely sources of Legionella in building-associated outbreaks include showers and faucets, cooling towers (such as large air-conditioning systems), hot tubs, and decorative fountains and water features. Of the twenty-three outbreaks studied by the CDC, eleven of the cases were outbreaks within healthcare facilities. According to the CDC, an effective water management system is the key to preventing Legionnaires' outbreak. The CDC has made a number of recommendations on steps healthcare providers can take to prevent the spread of the disease—including educating patients about risks and the need to seek care quickly if they develop symptoms, testing patients for Legionnaires' disease if they develop symptoms, and promptly reporting cases to public health authorities.



Healthcare facilities at an increased risk for Legionnaires' Disease

Massachusetts Federal Court Holds That Sexual Misconduct Exclusion Does Not Preclude Coverage for Defamation Claims

"While no doubt related to and setting the stage for the defamation claims, the alleged sexual misconduct is multiple steps removed from the defamatory injury causing statements."

In a November 8, 2016 decision issued by the United States District Court for the District of Massachusetts, the court concluded that sexual misconduct exclusions contained in two insurance policies did not preclude coverage for defamation lawsuits filed against Bill Cosby. *AIG Property Cas. Co. v. Green*, 2016 WL 6637694 (D. Mass. Nov. 8, 2016). In the coverage action, AIG Property Casualty Company ("AIG") sought a declaration that it had no duty to defend or indemnify Bill Cosby in three pending defamation cases on the grounds that the sexual misconduct exclusions contained in a homeowners policy and an excess policy precluded coverage for the lawsuits. In the three underlying lawsuits, the plaintiffs alleged that they were sexually assaulted by Mr. Cosby years earlier but when they disclosed the assaults to the public Mr. Cosby falsely and publicly denied the accusations, thereby defaming them. Mr. Cosby filed a motion to dismiss the coverage action arguing that the exclusions do not unambiguously apply to the defamation cases and AIG filed a motion for summary judgment arguing that it was entitled to relief as a matter of law based on the sexual misconduct exclusions. The policies at issue both provided coverage for "personal injury," which was defined to include bodily injury as well as "defamation, libel or slander." Both policies also contained sexual misconduct exclusions that precluded coverage for liability, defense costs or any other cost or expense for personal injury arising out of any actual, alleged, or threatened sexual molestation, misconduct or harassment or sexual, physical or mental abuse. The court concluded that under either California or Massachusetts law, AIG owed Mr. Cosby a duty to defend under the policies. In so ruling, the court noted that the sexual misconduct exclusions were at least ambiguous as applied to the underlying claims. "Critically, the sources of the underlying plaintiffs' injuries are the allegedly defamatory statements issued by Cosby or his agents, not the sexual misconduct itself," wrote Judge Mastroianni. "While no doubt related to and setting the stage for the defamation claims, the alleged sexual misconduct is multiple steps removed from the defamatory injury causing statement." The court also noted that "[t]he defamation is sufficiently independent of the sexual misconduct such that the exclusions do not apply." Although the court ruled on the duty to defend issue, it held that coverage for any possible judgment must wait until the underlying defamation lawsuits have concluded.

Illinois Supreme Court Agrees To Review Appellate Court's Expansion of Apparent Agency Doctrine

On November 23, 2016, the Illinois Supreme Court agreed to review an August 19, 2016 decision from the First District Appellate Court in *Yarbrough v. Northwestern Memorial Hospital,* 2016 WL 4430080 (Ill. App. 1st Dist. Aug. 19, 2016), that expanded the doctrine of apparent agency in an unprecedented way. In the *Yarbrough* case, 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. 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. 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.

California Appellate Court Reverses $12 million Verdict in Cold Therapy Case

In a decision issued on October 28, 2016, a California appeals court overturned a $12.6 million verdict against a physician, his practice and a medical device manufacturer in a medical malpractice and products liability case involving postsurgical injuries caused by a cold-therapy device. *Bigler-Engler v. Breg Inc.*, 2016 WL 6311108 (Cal. Ct. App. 4th Dist. Oct. 28, 2016). The plaintiff, a fifteen year old high school athlete, underwent arthroscopic surgery to her left knee in 2003. The surgery was performed by the physician defendant, who recommended that the patient use a cold-therapy device after surgery. The device, which he recommended be continuously used, reduced swelling. The patient developed an injury from the constant use of the machine and had to undergo nine additional surgical procedures to address her injuries. A San Diego county jury found against the defendants and awarded plaintiff $68,000 in economic damages, $5.1 million in non-economic damages, and $7.5 million in punitive damages. On appeal, the appellate court concluded that the noneconomic and punitive damages awarded were excessive. The appellate panel found that the noneconomic damages resulted from the jury's passion and prejudice, in part due to the attorney's conduct. The panel held that $1.3 million was the maximum she could receive on the record. The court also overturned the $7 million punitive damage award against the manufacturer and reduced the punitive damage award against the physician to $150,000.

Federal Court Holds That Insurer Must Cover Nurse's Malpractice Settlement

In a December 6, 2016 decision, the United States Court of Appeals for the Fourth Circuit held that a Maryland hospital's insurer must cover $500,000 in defense costs and a $2.5 million settlement that a nurse hired from a staffing agency incurred in a medical malpractice lawsuit. *Interstate Fire and Cas. Co. v. Dimensions Assurance Ltd.*, 843 F.3d 133 (4th Cir. Dec. 6, 2016). In a unanimous published opinion, an appellate court panel concluded that the insurer for Laurel Regional Hospital was obligated to pay defense costs and indemnity expenses incurred in the underlying case finding that the nurse was a covered employee under the hospital's policy even though she was hired through a staffing agency. The appellate court reversed the 2015 ruling of the district court, which held that the nurse was not an employee of the hospital for purposes of coverage because the staffing agreement stated that agency-provided workers were not considered hospital employees. The appellate court held that the agreement was irrelevant and, instead, focused on the so-called "right to control" test. Under this test, the court concluded that the nurse qualified as an employee of the hospital. Because the term "protected person" under the hospital's policy included employees, the policy provided coverage for the nurse.

Fourth Circuit Court of Appeals holds that staffing agency nurse qualified as an employee under hospital's Professional Liability Policy

NJ Federal Court Dismisses Prisoner's Civil Rights Claims Against Healthcare Providers

On December 23, 2016, the United States District Court for the District of New Jersey dismissed, without prejudice, all but one claim brought by a prisoner against prison healthcare providers. *Owens v. Rutgers University Behavioral Health Care*, 2016 WL 7424482 (D. N.J. Dec. 23, 2016). The plaintiff, a prisoner confined at a prison in New Jersey, filed a civil rights complaint against Rutgers University Behavioral Health Care ("Rutgers") and others in federal court alleging violations of the Eighth Amendment, the ADA, and § 504 of the Rehabilitation Act ("RA") for the failure of Rutgers and others to provide him with reasonable accommodations for his sciatic condition, conspiring to deny him medical care, and intentionally discriminating against him. Rutgers contracted to run the prison's medical facilities. Rutgers and the individual provider defendants moved to dismiss the Complaint. The court dismissed the ADA and RA claims against the individual defendants because neither statute creates a private cause of action. The court also dismissed the civil rights claims against a physician and a nurse defendant due to deficiencies in the factual allegations. With respect to Rutgers, the court likewise concluded that the plaintiff failed to sufficiently allege Rutgers itself engaged in retaliation, denied him adequate medical care, or conspired with others and, thus, dismissed the claims without prejudice. The court, however, denied Rutgers' motion to dismiss with respect to plaintiff's ADA retaliation claim.

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Recent Notable Verdicts and Settlements

Notable Verdicts/Settlements

Lackawanna County, PA — November 2016. Plaintiffs, who filed suit on behalf of their daughter born with severe brain damage, reached a $19.3 million settlement with Moses Taylor Hospital and Dr. Raymond DeCesare II in a medical malpractice case. Plaintiffs alleged that the defendants were negligent in delivering their daughter in December, 2012. Plaintiffs alleged that defendants failed to immediately perform an emergency C-section despite clear signs that the mother suffered a placenta abruption. The delivery left the daughter unable to walk, talk or feed herself.

Baltimore County, MD—October, 2016. A Baltimore County jury awarded a mother $3 million in a medical malpractice case in which the mother sued a hospital alleging that her child was left with a permanently paralyzed left arm as a result of negligence during delivery. After a two week trial, the jury concluded that the hospital and two physicians were negligent in their care of the mother and child during delivery resulting in the child's permanent neurological injury.

Warren County, KY—May, 2016. After a five day trial, a Warren County jury awarded the plaintiff $2.2 million in damages in a medical malpractice case brought by a 67 year-old man who required a below-the-knee amputation. Plaintiff alleged that the defendant cardiologists were negligent in performing an angiogram when it was not necessary and that they were negligent during the procedure – resulting in the plaintiff's leg amputation.

Gwinnett County, GA—November, 2016. On November 9, 2016, a Gwinnett County jury awarded a mother and her brain-damaged child $30.5 million in damages in a case in which the plaintiff alleged a medical center and a physician were negligent in failing to promptly address a problem with blood flow through the unborn baby's umbilical cord. The child, now 4 years old, was left severely brain-damaged and will require 24 hour care for the rest of her life. The jury allocated 75% of the liability to the medial center and 25% of the liability to the physician and his practice. The trial took place over two and a half weeks and the jury reached its decision after about a day and a half of deliberations.

Notable Defense Verdicts

Dallas, Texas — December, 2016. A Dallas area jury concluded that a mentally ill woman's death was not caused by a nursing home accused of neglecting her nor by a hospital accused of wrongfully honoring a do-not-resuscitate order that her children said she signed while in throes of delusion.

Tulsa County, OK—September, 2016. A Tulsa County jury found in favor of a hospital in a medical malpractice case brought by a female patient and her husband alleging that the hospital provided substandard care in ordering and performing a transvaginal ultrasound which caused a vaginal cuff tear, life threatening bleeding and the need for several repair surgeries. The hospital denied all allegations of negligence and denied being the cause of the plaintiff's alleged injuries. The jury found no negligence on the part of the defendant hospital.

Richmond County, NY— July, 2016. A Richmond County jury found in favor of a hospital in a case brought by a 56 year-old man who claimed that he sustained spinal compression and paralysis in his legs as a result of surgery he underwent for an osteophyte. Plaintiff asserted that the hospital's failure to ensure blood pressure caused his leg paralysis. The defense argued that the paralysis was unavoidable.

Washington, DC—August, 2016. After an eight day trial, a Washington, DC jury found in favor of a hospital in a medical malpractice case brought on behalf of an 8 year-old boy who claimed that his liver transplant was unnecessary. The defendant denied liability and argued that his liver was damaged and a transplant was necessary.

Hillsborough County, NH—June, 2016. After an eight day trial, a Hillsborough County jury returned a verdict in favor of a defendant nursing home facility in a case in which the family of an 84 year-old decedent alleged that the defendant failed to timely diagnose and treat pressure ulcers which resulted in her death. The facility denied there was any deviation from the standard of care.