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Special points of interest:

- Wisconsin Appellate Court holds that statutory cap on noneconomic damages is unconstitutional
- Nebraska Supreme Court Rejects Loss-of-Chance Theory of Liability
- Kentucky Federal Court permits on-site review of patient’s Electronic Medical Records
- Tennessee Federal Court holds that insured failed to properly provide its insurers with a “notice of circumstance” so as to trigger coverage under claims-made policies

WISCONSIN APPELLATE COURT HOLDS THAT STATE LAW CAPPING DAMAGES IN MEDICAL MALPRACTICE CASES IS UNCONSTITUTIONAL

In a decision issued on July 5, 2017, the Court of Appeals of Wisconsin held that a state law capping noneconomic damages in medical malpractice actions is unconstitutional. *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, 2017 WL 2874614 (Wis. App. July 5, 2017). The case involved a matter in which the Plaintiff sought treatment in May, 2011 for abdominal pain and a high fever. She was told by medical personnel to follow up with her personal gynecologist about her history of uterine fibroids. Her condition worsened, and the next day she visited a different emergency room where she was diagnosed with a septic infection caused by the untreated infection. She went into a coma and ultimately the septic infection caused nearly all of her other organs to fail and led to gangrene in her arms and legs, which necessitated their amputation. The Patient and her husband filed suit against defendants including medical personnel and the Madison-based Wisconsin Injured Patients and Families Compensation Fund, charging medical malpractice and failure to provide proper informed consent. A Milwaukee circuit court jury awarded Ms. Mayo \$15 million in noneconomic damages and her husband \$1.5 million. The fund appealed, seeking to reduce the jury award to the

\$750,000 cap on noneconomic damages under Wis. Stat. § 893.55. The circuit court ruled the cap was not facially unconstitutional but that it was unconstitutional as applied to the Plaintiffs’ claims because it violated their rights to equal protection and due process. The trial court noted that the cap would reduce the jury award



by 95.46%, that there was no rational basis to deprive them of the money the jury found necessary to compensate them for their injuries, that reducing the award would not further the cap’s goal of promoting affordable healthcare and policing high or unpredictable economic damage awards, and that the fund was financially capable of paying the award. A three-judge state appeals court panel unanimously upheld the lower court’s ruling, although the majority opinion did so on different grounds. The appellate court held that the statutory cap on noneconomic damages is unconstitutional because “it always

reduces noneconomic damages only for the class of the most severely injured victims who have been awarded damages exceeding the cap, yet always allows full damages to the less injured malpractice victims.” “This cap denies equal protection to that class of malpractice victims whose adequate noneconomic damages a fact finder has determined are in excess of the cap,” the majority concluded. The cap on noneconomic damages, the Court held, “has the practical effect of imposing devastating costs only on the few who sustain the greatest damages and creates a class of catastrophically injured victims who are denied the adequate compensation awarded by a jury, while the less severely injured malpractice victims are awarded their full compensation.” The Court also noted that the record before the court does not support a finding that the legislative objectives articulated in the statute are promoted in any way because the amount of the noneconomic damages cap is \$750,000. Because the majority concluded that the statutory cap was facially unconstitutional, the court did not reach the question of whether the cap is unconstitutional as it applies to the Plaintiffs’ claims and, thus, left the trial court’s findings on that issue in place. The decision will likely be appealed to the Wisconsin Supreme Court.

NEBRASKA SUPREME COURT REFUSES TO RECOGNIZE “LOSS OF CHANCE” THEORY

“Although no profession should avoid the consequences of negligent conduct, we choose not to lower the well-established standard of causation.”

In a decision issued on July 7, 2017, the Nebraska Supreme Court ruled that “loss of chance” theories cannot be asserted in medical malpractice cases but nevertheless reinstated a lawsuit accusing medical staff of depriving a woman’s chance of a longer life as a result of a breast cancer misdiagnosis, concluding that sufficient evidence had been presented to withstand a directed verdict. *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, — N.W.2d — (2017) modified 297 Neb. 568. The medical malpractice action involved claims against a medical imaging facility, several physicians and physician assistants relating to negligent treatment provided to the plaintiff that caused her breast cancer to progress undiagnosed for one year and that delayed her treatment causing physical pain and suffering, shortened

life expectancy and increased risk of recurrence. In the lawsuit, Plaintiff alleged that Plaintiff was prevented from being afforded a better outcome because of the yearlong delay in diagnosing the cancer. At the close of Plaintiff’s case, the trial court granted a directed verdict finding that there was no sufficient proof of damages or causation other than the loss of a chance of a lower rate of non-recurrence and that, under Nebraska law, that does not constitute a proper measure of damage. On appeal, the Supreme Court rejected Plaintiff’s argument that Nebraska should recognize that loss of the chance of a better medical outcome is a cognizable injury, saying Plaintiff, who was cancer-free at the time of trial, had only a 30 percent chance of the cancer recurring so juries would be left to speculate about an outcome

that may never happen. The Court held that “[a]lthough we are sympathetic to the [Plaintiff’s] situation, adoption of the loss-of-chance doctrine in this case would create unwarranted liability in other cases and other medical contexts.” In this regard, the justices said if they adopted the loss-of-chance doctrine, medical malpractice plaintiffs would only have to prove a “mere possibility” of a better outcome rather than the current “preponderance of the evidence” standard of causation, or that a doctor’s negligence caused a patient’s injury. “Although no profession should avoid the consequences of negligent conduct, we choose not to lower the well-established standard of causation,” they said. The court, however, reversed the directed verdict and ordered a new trial because the jury could have sustained a finding on other elements of damages.

KENTUCKY FEDERAL COURT ALLOWS ON-SITE REVIEW OF PATIENT’S ELECTRONIC MEDICAL RECORDS

In a matter decided on July 14, 2017, the United States District Court for the Western District of Kentucky permitted a medical malpractice plaintiff’s attorney to inspect electronic medical records (“EMR”) at a hospital whose negligence allegedly contributed to a patient’s death. *Borum v. Smith*, 2017 WL 3014487 (W.D. Ky. Jul 14, 2017). The deceased patient came under the care of the defendant after she tried to hurt herself after a romantic relationship ended. She was prescribed an antidepressant on her second visit and the dosage was doubled on her third visit. She committed suicide three weeks later. Plaintiff’s counsel made a request to inspect the pa-

tient’s EMR on site where the patient was prescribed the antidepressants. The plaintiff argued that an on-site inspection was needed to help her thoroughly depose the treating physician defendant in the case. The defendant filed a motion for a protective order seeking an order prohibiting plaintiff from reviewing an exact copy of the EMRs in native-format and from being allowed access to the hospital’s EMR system during the course of the deposition. Defendant argued that allowing counsel to inspect the records would violate its EMR software licensing agreement, the Copyright Act, and the Health Insurance Portability and Accountability Act (“HIPPA”). Defendant also

argued that it already provided counsel with a complete copy of the medical records and plaintiff had not raised any issues with the completeness or accuracy of the records. The Magistrate Judge, however, rejected these arguments and allowed counsel to inspect the EMR on-site. The Judge further ordered the defendant to produce an audit trail of the patient’s EMR. The Judge, however, denied plaintiff’s request to depose the defendant physician while accessing the EMR system for the purposes of questioning her about her use of the software at the time of plaintiff’s treatment. The Judge concluded that doing so would be unduly burdensome and harassing.



TENNESSEE FEDERAL COURT CONCLUDES THAT INSURED FAILED TO PROVIDE SUFFICIENT “NOTICE OF CIRCUMSTANCE” TO TRIGGER COVERAGE UNDER CLAIMS-MADE POLICY

On June 23, 2017, a Tennessee federal judge ruled that primary and excess insurers had properly denied coverage for a \$212.5 million settlement reached by an insured bank in a False Claims Act settlement in 2015. *First Horizon National Corp. v. Houston Cas. Co.*, 2017 WL 2954716 (W.D. Tenn. June 23, 2017). The decision involved the timing that notice of a claim was provided to insurers under claims-made policies. The underlying investigation dated back to 2012 when the DOJ began investigating whether the bank's loan originating services violated the False Claims Act. In April, 2014, a DOJ representative made an offer via email for the bank to settle the accusations in exchange for a \$610 million payment. The following month the insured placed its insurers on notice by sending a “notice of circumstance” saying it was continuing to cooperate in an

investigation into its underwriting practices but the notice did not mention the settlement offer. The insured settled the matter in 2015 and, prior to the settlement, sued its insurers for coverage in a federal lawsuit. All of the insurers denied coverage on the grounds that they received either untimely or inadequate notice. The insured argued that it had properly placed the insurers on notice of the claim. The claims-made policies required the insured to provide notice “as soon as practicable” but in no event later than 90 days after the end of the policy period. The policies permitted a “notice of circumstance” to be tied to future claims so long as the notice provided the circumstances and reasons for anticipating a claim, full particulars as the dates, entities involved, potential claimants, and the consequences which have resulted or may result therefrom. The Court agreed with the insurers and

held that the April, 2014 email constituted a claim for which the insured was required to provide notice. The Court further concluded that the insured's “notice of circumstance” (“NOC”) did not include sufficient information to apprise the insurers of the significance of the claim, noting that the message did not mention the \$610 million offer. “To permit plaintiffs to rely on the NOC submitted in May 2014 as notice of the April 2014 claim defeats the policy behind a claims-made policy, wherein the purpose of the notice requirement is to inform the insurer of its exposure to coverage,” Judge Sheryl H. Lipman wrote. The Judge noted that the NOC that the bank submitted was insufficiently detailed to constitute adequate notice of a claim and the “general, boiler-plate type language ... was not sufficient notice of the claim.”

“General, boiler-plate type language ... was not sufficient notice of the claim.”

FLORIDA APPELLATE COURT STRIKES DOWN PROVISION LIMITING ATTORNEY'S FEES

In a decision issued on June 21, 2017, a Florida appeals court ruled that a trial court erred in upholding a provision of a claims bill limiting a law firm's contingency fee in a medical malpractice lawsuit, ruling that the claims bill provision was an unconstitutional impairment of the fee arrangement between the parties. *Grossman Roth, P.A. v. Mellen*, 2017 2665078 (Fla. 4th Dist. App. June 21, 2017). In the case, the plaintiff sued the North Broward Hospital District, a public entity, over the death of her husband who allegedly died after being misdiagnosed at the hospital when he presented with signs of a heart attack. While in the waiting room, he suffered a mas-

sive heart attack and died. The plaintiff and her attorney had a contingency fee contract in which she agreed to pay the firm an amount based on any damages she recovered, including the 25% contingency fee limitation of Florida law for claims against government entities. The hospital agreed to settle the suit for \$3 million and then paid its \$200,000 owed under state immunity statutes. The balance of the settlement was presented to the Florida Senate for payment through the claims bill process, which allocates money for individuals injured by public officers and institutions covered by sovereign immunity. The claims bill, however, limited

the attorney's fees to 15% of the first \$1 million, 10% of the second \$1 million, and 5% of the remainder for a total of \$290,000. The law firm filed a declaratory judgment action seeking a ruling that the limitation was unconstitutional and that it was entitled to the full 25% of the \$2.8 million awarded by the legislature. Relying on the *Searcy, Denney, Scarola, Barnhart & Shipley v. State* decision issued in January, 2017 by the Supreme Court of Florida that held that the fee limitation in the claims bill unconstitutionally impaired the preexisting contract between the parties, the appellate court held that the decision was controlling and likewise concluded that the limitation was unconstitutional.



The Florida Appellate Court followed a January, 2017 decision by the Supreme Court of Florida holding that the attorney fee limitation in Chapter 2012-250 was unconstitutional

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NOTABLE VERDICTS / SETTLEMENTS

Fairfax County, VA – July, 2017. A Fairfax County jury awarded the estate of a deceased 55 year-old woman \$7 million in damages in a lawsuit in which the plaintiff alleged that a neuroradiologist and an anesthesiologist were negligent in performing a neuroendovascular “coiling” procedure to treat a right middle cerebral artery bifurcation aneurysm using an inflated balloon catheter. Plaintiff’s expert testified that the death was caused by over-inflation of the balloon device. The award was eventually reduced to a little over \$2 million under Virginia’s damages cap.

Tulsa, Oklahoma—April, 2017. A federal jury in Oklahoma has awarded \$10.25 million to the family of a 37 year old mentally ill Tulsa County Jail inmate who was left to die of a broken neck, paralyzed on a

cell floor without medical treatment for several days. After a trial that lasted nearly three weeks, the jury returned a verdict assessing \$10 million against the county and \$250,000 against the sheriff of the jail.

Eastern District, Kentucky—August, 2017. A Kentucky federal judge held the US government liable for approximately \$2.1 million in damages after ruling that medical staff at a federally funded health clinic failed to diagnose a woman’s cancer for five years, which caused her to have a reduced life expectancy.

Hall County, GA—May, 2017. A Hall County jury awarded \$8.45 million to the family of a child who allegedly suffered from cerebral palsy, developmental issues, and seizures

as a result of a medical center’s negligence during his delivery. The family alleged that the medical center was negligent in allowing labor to continue despite fetal distress and for not having a resuscitation team present at the delivery. As a result, the newborn waited eight minutes for a breathing tube, resulting in atoxic brain damage.

San Francisco, CA, April, 2017. A 15 year old female plaintiff settled her claims against a surgical medical center that she alleged was negligent in performing spinal surgery. Plaintiff suffered a spinal cord infarct post-surgery that rendered her a T11 paraplegic. The claim was settled at mediation for \$2.85 million. An annuity was purchased for the plaintiff that will pay her over \$10 million over her lifetime.

NOTABLE DEFENSE VERDICTS

Montgomery County, MD – July, 2017. After a four day trial, a Montgomery County jury entered a defense verdict in favor of a dentist and his dental center in a case in which the plaintiff alleged she sustained nerve damage after she underwent a dental implant procedure in November, 2012. Plaintiff argued that the implant was not the proper size and penetrated the plaintiff’s gums too deeply. The defense argued that the procedure and post-surgical treatment complied with the standard of care.

Philadelphia County, PA—April, 2017. A Philadelphia County jury concluded that defendant gastroenterologist was not negligent in failing to properly prepare and perform the plaintiff for a colonoscopy.

Plaintiff alleged that he developed a MRSA infection following the colonoscopy and that the plaintiff will live with the infection the rest of his life. The defendant denied the allegations of negligence and maintained that the plaintiff was diagnosed with the MRSA infection over a full month after the colonoscopy.

Forsyth County, NC—August, 2017. A North Carolina appellate panel affirmed the dismissal of a lawsuit accusing a doctor’s group of being responsible for a woman’s death from pregnancy complications on the grounds that the patient’s estate’s expert medical witnesses did not qualify as experts under state law. The Court concluded that the experts lacked knowledge regarding the relevant community standard of care.

Dauphin County, PA - August, 2017. The Superior Court of Pennsylvania affirmed the dismissal of a lawsuit accusing Penn State University’s Hershey Medical Center of medical negligence, rejecting the patient’s argument that the hospital’s withholding of medical documents prevented him from timely submitting a certificate of merit as required under state law.

Shelby County, TN—August, 2017. The Court of Appeals of Tennessee upheld a directed verdict in favor of an emergency room nurse in a medical malpractice case concluding that there was no evidence presented at trial that the standard of care required the nurse to order a CT scan. The case involved eye injuries sustained by the plaintiff when using a weed eater.



Recent Notable Verdicts
and Settlements