Jackson &Campbell
Attorneys and Counselors at Law

DECISIONS

January, 2018

Volume 4, Issue 1

INSIDE THIS ISSUE:

Special points of interest:

- Illinois Supreme Court concludes that hospital is not vicariously liable for clinic's care
- New York's Highest Court addresses timing of wrongful birth claim
- Massachusetts Appellate Court addresses settlement without consent
- Florida Supreme Court addresses privacy rights of deceased patient
- North Dakota trial court concludes that medical malpractice cap is unconstitutional

ILLINOIS SUPREME COURT SAYS HOSPITAL NOT LIABLE FOR CLINIC'S CARE

On December 29, 2017, the Illinois Supreme Court ("the Court") declined to extend vicarious liability to Chicago-based Northwestern Memorial Hospital ("NMH") in a plaintiff's medical negligence lawsuit over care she received at a separate healthcare facility. *Yarbrough et al. v. Northwestern Memorial Hospital et al.*, No. 121367, 2017 WL 6625314 (Ill. Dec. 29, 2017). The Court held that the fact that some of the healthcare facility's physicians practiced at NMH is not sufficient to hold NMH responsible for the plaintiff's alleged damages. The split high court majority said that although the plaintiff received information and care from healthcare facility Erie Family Health Center ("Erie") that made her think it was an extension of NMH, Erie is an independent facility funded primarily through federal grants, whose workers are considered federal employees and whose cases are brought under different, federal statutes. In reversing the First District Appellate Court's ruling that extended liability to NMH under a precedent stemming from *Gilbert v. Sycamore Municipal Hospital*, 622 N.E.2d 788, 158 Ill.2d 511 (1993), the Court said that even the Erie physicians who have privileges to practice at NMH obtained them by applying just like any other doctor, and *Gilbert* "does not suggest that merely granting a physician employed by another entity hospital staff privileges alone could create an apparent agency relationship." The Court further stated, "[w]e refuse to read *Gilbert* and its progeny so broadly as to impose vicarious liability under the doctrine of apparent authority on a hospital for the care given by employees of an unrelated, independently owned and operated clinic like Erie." The plaintiff filed her lawsuit against NMH in 2009 over purportedly inadequate care she received from an Erie midwife and obstetrician gynecologist, which she claimed led to her daughter's premature birth and severe brain injuries. According to the plaintiff, she believed she was receiving care from NMH professionals once an Erie staff member provided her information about NMH's birthing classes and facilities, and told her that she would deliver her child at NMH after a pregnancy test administered at Erie came back positive. The trial court denied NMH's motion for partial summary judgment on the plaintiff's agency claims, but certified for the appellate court the legal question of whether a hospital can be held liable under the doctrine of apparent agency for acts of employees from an "unrelated, independent clinic" that is not a party to the case. The Court held that the reviewing court's answer should have been "no," remanding the appellate court's ruling and noting that Erie does not even use NMH's name or branding in any of its materials. However, the Court rejected NMH's contention that the apparent agency theory under *Gilbert* should pertain only to acts committed within hospital-owned facilities, as the Court already ruled in previous cases that such liability could be imposed on healthcare HMOs. The Court stated, "[t]he circumstances in this case are in marked contrast to the factual backdrop that led us to extend the doctrine of apparent authority in *Gilbert* and the cases thereafter. Here, [the plaintiff] sought treatment at Erie but looks to impose liability on NMH. Erie is neither owned nor operated by NMH." Notably, the three-justice dissent blasted the majority's ruling, stating that instead of focusing on the element NMH would need to win its partial summary judgment motion, the majority instead focused on "facts that have nothing whatsoever to do with NMH's actions or whether plaintiff[] can establish an apparent agency," like where its money comes from or how its employees are classified. According to the dissent, this effectively awards NMH summary judgment "on a question of fact without ever requiring NMH to meet the summary judgment standard."

New York High Court Says "Wrongful Birth" Claims Start at Birth

"We conclude that the cause of action accrues upon, and hence the statute of limitations period runs, from the birth of the child."

On December 14, 2017, the New York State Court of Appeals ("the Court") ruled in favor of two couples, who claimed they would not have had children through a fertility clinic had they known that the egg donor was a genetic defect carrier. The couples argued that the statute of limitations for this matter began to run at birth, rather than the date of the alleged medical malpractice. In a 5-1 ruling, the Court allowed lawsuits filed by the parents, the Dennehys and the Farbers, to move forward. The lawsuits asserted that Dr. Alan Copperman and Reproductive Medicine Associates of New York LLP failed to timely screen the egg donor for a genetic defect known as Fragile X, or otherwise notify the couples undergoing in-vitro fertilization that they did not screen for this trait. Notably, Fragile X is a chromosomal abnormality that can result in intellectual disability and other deficits. At issue is whether New York's two-and-one-half year statute of limitations for medical malpractice, in cases where parents seek recovery of the extraordinary expenses incurred in raising a disabled child due to a health-care provider's negligence, begins running at the time the doctor implanted the embryo in the mother or when the child is born. The Court stated, "[w]e conclude that the cause of action accrues upon, and hence the limitations period runs from, the birth of the child." The Court said from a legal standpoint, it is impossible to determine whether the parents will incur extraordinary expenses for a child prior to birth, so accrual on the date of birth is appropriate. The Court stated, "[t]his date appropriately balances the competing statute of limitations policy concerns – it gives parents a reasonable opportunity to bring suit, while at the same time limiting claims in a manner that provides certainty and predictability to medical professionals engaged in fertility treatment and prenatal care." The Court emphasized that most medical malpractice claims start running on the date of the alleged negligence, but certain exceptions are made for atypical cases, such as the instant suits. In a dissenting opinion, Judge Michael Garcia stated the majority's ruling runs counter to the two-and-one-half year statute of limitations that was mandated in 1975 through state legislation. The law allows for exceptions in two types of medical malpractice cases: when patients have foreign objects left in their bodies or when a patient receives continuous treatment for a single ailment. Judge Garcia asserted the Court's ruling improperly carves out a third exception.

Massachusetts Appeals Court Says Insurer Can Settle Without Doctor's Consent

On December 12, 2017, the Massachusetts Appeals Court ("the Court") declined to revive a doctor's claims against the insurance company accused of settling an underlying medical malpractice suit for $3.75 million without her consent. *Johnson v. Proselect Insurance Co.*, 92 Mass. App. Ct. 1118 (2017). The court ruled that Proselect Insurance Company ("Proselect") was acting within the terms of its contract when it settled claims that Dr. Ellen Johnson missed a stroke diagnosis after the jury in the underlying case, which took place in New Hampshire, returned a $5 million verdict against her, noting that the reduced amount was within Dr. Johnson's $4 million coverage cap. The Court stated, "[w]hile [Dr.] Johnson correctly asserts that New Hampshire recognizes an implied covenant of good faith and fair dealing in all contracts . . . it has not recognized a breach of the implied covenant where a party merely exercises a right expressly granted under an enforceable contract." Dr. Johnson initially sued Proselect in Massachusetts state court, where she lives and where Proselect is headquartered, after the settlement in the New Hampshire case went through, saying that even though she was not personally liable for the amount, her reputation had been harmed by settling. The Court ultimately ruled in favor of Proselect, holding that the settlement did not expose Dr. Johnson to any personal liability. In fact, the Court noted, the settlement shielded Dr. Johnson from the personal liability she would have faced if the $5 million verdict had stood. The Court further stated, "[b]ecause the settlement extinguished [Dr.] Johnson's personal liability for the amount of damages in excess of the policy limits, the motion judge concluded that the defendant fulfilled its duty of reasonable care." The Court agreed with this reasoning. The Court also agreed that Proselect could not have breached its contract with Dr. Johnson because the contract specifically authorized it to make post-verdict deals without her consent.

11th Circuit: No Duty to Make Pre-Suit Settlement Offer Absent Clear Liability

On November 29, 2017, the 11th Circuit held that the "Powell" rule, wherein Florida courts have ruled that insurers have a duty to make settlement offers even in the absence of a demand from the plaintiff, should only arise in situations where the insured's liability is clear. *Welford v. Liberty Mutual Insurance Company*, No. 16-14054, 2017 WL 5899784 (11th Cir. Nov. 29, 2017). In *Welford*, Liberty Insurance Corporation ("Liberty") insured a vehicle driven by John Middleton during a fatal car accident. At the time of the accident, Matthew Zisa attempted to pass Mr. Middleton from the left hand lane, but Mr. Middleton sped up to prevent the pass. While attempting to pass Mr. Middleton, Mr. Zisa's vehicle struck three pedestrians. Notably, it was unclear to an investigating officer whether Mr. Middleton was liable for the accident. One of the pedestrians, Rachel Welford, died from her injuries. Subsequently, her uncle filed a wrongful death claim against the owner of the vehicle insured by Liberty on August 21, 2009. While Mr. Welford would have settled for the policy limits before August 21, 2009, he never attempted to contact Liberty before August 21, 2009 or make any settlement demands or offers to Liberty for an amount at or below the policy's bodily injury liability limit. The owner of the vehicle insured by Liberty was served with the Complaint on October 3, 2009. On October 9, 2009, Liberty sent a letter to Mr. Welford, offering to settle for the per-accident policy limit of $20,000, to be split among the victims. On November 2, 2010, Liberty sent checks that divided up the policy limits to each of the victims, but Mr. Welford refused to accept the check. On July 21, 2011, Liberty offered to settle Mr. Welford's claim for the per-victim policy limit of $10,000, but he declined the offer. After the case went to trial and reached a verdict, Mr. Welford filed a complaint against Liberty, alleging it acted in bad faith by failing to investigate and timely offer to settle his wrongful death claim. The Court ruled in favor of Liberty, stating, "[w]hile Liberty did not make a pre-suit settlement offer, there was no affirmative duty under applicable Florida law to do so, and even if there was, such a duty would have been inapplicable because Middleton was not clearly liable for the accident . . . . Given Liberty's otherwise diligent efforts and the circumstances surrounding the accident, Liberty's initial failure to investigate the case and make a pre-suit settlement offer are insufficient to establish bad faith."

"[W]hile Liberty did not make a pre-suit settlement offer, there was no affirmative duty under applicable Florida law to do so."

Doctor Cannot Shake Patient's Handshake Suit: Tennessee Court

In *Lacy v. Meharry General Hospital et al.*, No. M2016-01477-COA-R3-CV (Tenn. Ct. App. Dec. 19, 2017), the Tennessee Court of Appeals ("the Court") revived a woman's claim that her doctor crushed her fingers during a handshake, holding that the trial court wrongfully concluded that the handshake was part of the patient's health care. The plaintiff filed suit against the doctor in April 2016, alleging that: (1) he assaulted her by shaking her hand too hard, causing injuries; and (2) he failed to properly document her medical files after analyzing her sonogram. When filing these claims, the plaintiff failed to comply with the pre-suit notice and certificate of good faith requirements under the state's Health Care Liability Act ("the Act"). *See* Tenn. Code. Ann. § 29-26-121(a)(1) (requiring any person with a potential health care liability claim to provide pre-suit notice of the claim to all health care providers who could be named as defendants); *id.* § 29-26-122 (a) (requiring the plaintiff to file a certificate of good faith with the complaint when expert testimony is required). The Court determined that the plaintiff's assertion that the handshake was either a greeting or an assault and was not health care related held validity. The Court said, "[The plaintiff] appears to be arguing that the offending handshake operated either as a non-verbal greeting unconnected to any health care service or an 'assault' . . . . [W]e cannot conclude that [the doctor's] handshake related to the provision of . . . health care services. Rather, one reasonable inference is that [the plaintiff] extended her hand merely as a greeting . . . and [the doctor] shook [the plaintiff's] hand either with the same intent or to cause harm." Accordingly, the Court held that the plaintiff's handshake claim should not have been dismissed, as it could not conclude that the Act applied to the claim. Notably, the Court upheld the dismissal of the plaintiff's claim that the doctor failed to properly document her medical files after analyzing her sonogram, as that claim clearly fell under the Act.

Tennessee Court of Appeals concludes that injuries sustained by a patient after shaking hands with her doctor was not part of the patient's health care

North Dakota Judge Rules That State Med Mal Damages Cap is Unconstitutional

"No explanation is offered as to why the [malpractice] cap was set at the $500,000 or how that level was the right level."

On January 5, 2018, North Dakota South Central Judicial District Judge Cynthia Feland declared unconstitutional North Dakota Century Code Section 32-42-02 ("NDCC § 32-42-02"), which caps non-economic damages in medical malpractice cases at $500,000. *Condon v. St. Alexius Medical* Center, No. 08-2014-CV-1904 (Burleigh County District Court, N.D., Jan. 5, 2018). According to Judge Feland, the statute deprives the most catastrophically injured patients of full compensation and thus denies them equal protection of the law. In *Condon*, Judge Feland rejected a post-trial bid made by Dr. Allen Michael Booth and his employer, St. Alexius Medical Center, to reduce a portion of a $3.5 million jury verdict pursuant to NDCC § 32-42-02. The jury found in April 2017 that Dr. Booth was negligent when he severed one of patient Chenille Condon's arteries during an exploratory procedure, causing a stroke, paralysis and blurred vision. Enacted in 1995, NDCC § 32-42-02 states that the total amount of compensation that may be awarded to a claimant for non-economic damage resulting from an injury alleged under a health care malpractice action may not exceed $500,000, regardless of the number of health care providers and other defendants against whom the action is brought, or the number of claims brought with respect to the injury. The court shall reduce the damages awarded by a jury to comply with the limitation in NDCC § 32-42-02. The statute was enacted with three goals in mind: to increase access to health care, control medical expenses, and maintain or increase the quality of health care. However, according to Judge Feland, "[l]ooking at the available legislative history for Section 32-42-02, no explanation is offered as to why the cap was set at that $500,000, or how that level was the right level to affect the 1995 legislature's purposes in accomplishing any one of their three health care reform goals." Judge Feland said there is no evidence to support lawmakers' assertions that a medical malpractice crisis in North Dakota drives up medical expenses and lowers the quality of health care. Notably, the North Dakota Supreme Court previously ruled that NDCC § 26-40.1-11, which limited the liability of a health care provider qualified under the Medical Malpractice Act to $300,000 for all claims arising from any one occurrence, violated the equal protection provision of the North Dakota Constitution and the similar provision of the Fourteenth Amendment to the United States Constitution. *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978). Other jurisdictions, like Alabama, Wisconsin, Georgia, Illinois, New Hampshire, Washington, and Florida have recently declared that their respective state medical malpractice damages caps were unconstitutional. It is expected that Judge Feland's decision will be appealed to the North Dakota Supreme Court.

Privacy Rights Exist After Death, Florida High Court Says

On November 9, 2017, the Supreme Court of Florida ("the Court") struck down a law requiring medical malpractice plaintiffs to allow prospective defendants to conduct meetings with treating doctors while the plaintiffs' lawyers were not present, holding that the provision threatened citizens' privacy and could easily upset litigation. *Weaver v. Myers, et al.*, 229 So.3d 1118 (Fla. 2017). The Court stated that such protections also applied in cases where the patient had died. In *Weaver*, the lawsuit, filed by Emma Gayle Weaver, accused Dr. Stephen Myers of providing substandard care that ultimately lead to the death of Mrs. Weaver's husband. As part of the suit, Mrs. Weaver challenged 2013 amendments to sections 766.106 and 766.1065 of the Florida Statutes for filing malpractice claims. The updated sections allowed potential defendants, once they received the required notice that a patient or family member was planning to file suit, to interview the patient's treating health care providers. Health care providers were allowed to decline an interview, but the plaintiff's counsel was required to try to set up any requested interview. If an interview was not scheduled within fifteen days by the plaintiff's counsel, the prospective defendant could set up a meeting without the plaintiff's attorneys. The Court held that there were far less invasive ways for the legislature to encourage parties to settle medical malpractice claims. The Court stated, "[t]he ex parte secret interview provisions of Sections 766.106 and 766.1065 fail to protect Florida citizens from even accidental disclosures of confidential medical information that falls outside the scope of the claim because there would be no one present on the claimant's behalf[.]" The Court said this possibility was a violation of the state constitution's right to privacy for citizens. The potential privacy invasion could discourage people from filing claims. The Court also stressed that the privacy protections extended after a plaintiff's death.

Tennessee Hospital Responsible for Contractor's Malpractice

On November 8, 2017, the Tennessee Court of Appeals ("the Court") ruled that a hospital can be held responsible for the negligent actions of a radiologist who contracted with it. *Beard v. Branson et al.*, No. M2014-01770-COA-R3-CV (Tenn. Ct. App. Nov. 8, 2017). In *Beard*, representatives for the decedent Ruth Hartley ("Mrs. Hartley") convinced the Court that Mrs. Hartley would have had a good-faith belief that her radiologist, Dr. Stanley Anderson ("Dr. Anderson"), was an employee at Trinity Hospital and that the information that he was a contractor was not clearly presented. The suit alleged that Mrs. Hartley's surgeon, Dr. James Branson, ignored post-surgery complications and did not act on a scan showing that Mrs. Hartley's bowel was obstructed after surgery. This failure led to septic shock and ultimately death. Mrs. Hartley's representatives were unable to identify Dr. Anderson, who read Mrs. Hartley's scans, as a defendant until after the statute of limitations for adding him had passed, but argued that Trinity Hospital should be held liable for his conduct because he was a representative for the hospital. In considering whether Trinity Hospital was responsible for Dr. Anderson's share of the damages awarded to Mrs. Hartley's representatives at the trial court level, the Court ruled that Mrs. Hartley's representatives had met all three of the requirements for the agency test established in *Boren v. Weeks*, 251 S.W.3d 426, 436 (Tenn. 2008). The test requires proof that: "(1) the hospital held itself out to the public as providing medical services; (2) the plaintiff looked to the hospital rather than to the individual physician to perform those services; and (3) the patient accepted those services in the reasonable belief that the services were provided by the hospital or a hospital employee." Trinity Hospital admitted to the first prong, that it presented itself as providing medical services, and the Court ruled that Mrs. Hartley's representatives had established the other two requirements as well. The Court determined that for the second requirement, it was clearly reasonable for a patient to believe that Trinity Hospital provided its radiology services, considering the scans were performed by hospital employees on hospital grounds who used hospital equipment, making it reasonable for patients to assume the scans were also read by hospital employees. In considering the third prong, the Court ruled that Trinity Hospital did not give reasonable notice that some of Mrs. Hartley's services were provided by contractors rather than employees, because such information was buried in the fine print of her intake forms. Accordingly, the Court determined that because all three prongs of the test presented in *Boren* were satisfied in this matter, Trinity Hospital was responsible for Dr. Anderson's negligence.

Tennessee Court of Appeals holds that a hospital is responsible for a contractor physician's malpractice

Insurer Must Cover Sexual Abuse Suit Against Psychiatrist

On November 8, 2017, the United States District Court for the Northern District of Illinois, Eastern Division ("the Court") held that an insurer, Professional Solution Insurance Company ("PSIC") will have to provide professional liability coverage to a psychiatrist accused of sexual misconduct in an underlying suit brought by his patient. *Professional Solution Insurance Company v. Giolas*, No. 16 C 9868, 2017 WL 5196652 (N.D. Ill. Nov. 8, 2017). In this matter, Staci Ferguson ("Ms. Ferguson"), Dr. Dale Giolas' ("Dr. Giolas'") patient from 2011 to 2016, claimed that Dr. Giolas had multiple improper sexual encounters with her while treating her. She sought $750,000 in damages, alleging that Dr. Giolas committed common law battery. Dr. Giolas denied these allegations, and also claimed that PSIC, his professional liability carrier, must cover his legal expenses in the case under his insurance policy. PSIC contended that the insurance policy does not cover his alleged actions because they do not relate to negligence in the performance of his professional services or physical injury. The Court found that it is widely considered to be medical negligence within psychiatry to fail to respond appropriately to a patient and avoid emotional involvement with him or her, which can be extrapolated to include sexual relations. The Court therefore found that sexual misconduct may be covered under the policy, unless the insurer clearly draws an exception for sexual misconduct. Moreover, the Court disagreed with PSIC's notion that the sexual misconduct allegations do not constitute a claim of "bodily harm" as required by the policy, stating that "[t]he very nature of a sexual violation requires bodily contact that is injurious, even if it is not as apparent as a wound or laceration." The Court ultimately held that "[Dr.] Giolas' failure to handle [his patient relationship] properly may constitute an error of professional skill in the treatment of [Ms. Ferguson's] psychiatric conditions. Accordingly, based on the facts here, the sexual misconduct alleged in the [u]nderlying [c]omplaint potentially falls within the [p]olicy's coverage."

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

Elderidge A. Nichols, Jr.
(202) 457-1696
enichols@jackscamp.com

Alyssa Lechmanik
(202) 457-1629
alechmanik@jackscamp.com

Recent Notable Verdicts and Settlements

Notable Verdicts/Settlements

District of Columbia — September, 2017. A jury in the Superior Court for the District of Columbia awarded $8 million in damages to a sixty-nine year old man who had his rectum lacerated during surgery to remove all or part of his prostate gland. After a three week trial, the jury deliberated for six hours before concluding that the physician and the urology center were negligent in providing treatment. The jury further concluded that the physician failed to obtain informed consent for the operation but the failure was not a proximate cause of his injuries.

Muscogee County, GA—December, 2017. A Muscogee County jury awarded $26 million to a woman in a suit accusing a hospital of providing negligent treatment causing permanent brain damage and subsequent blindness and physical disabilities. The fifty-three year old patient suffered respiratory failure hours after she arrived at the defendant hospital complaining of severe neck swelling, throat pain, and an inability to swallow.

Cook County, IL—December, 2017. An Illinois jury awarded $4.8 million in damages to the husband of a woman who died after being treated by a gastroenterologist who a jury concluded breached the standard of care in providing treatment to the woman. The woman died after being treated by a physician at Digestive Disease Consultants.

Wayne County, MI —August, 2017. A Wayne County jury found the Detroit Medical Center at fault in the death of a college student and awarded her family $40 million in damages. The medical malpractice lawsuit stemmed from the 2013 treatment of the woman by the medical center when she presented with signs of a pulmonary embolism. The ER said she had a virus and sent her home. She returned the next day with blood clots and died the following day.

Hennepin County, MN—August, 2017. A Hennepin County jury awarded $20 million to the husband of a thirty-year old woman who died of sepsis six days after giving birth to a son. She received care from a nurse practitioner who failed to diagnosis her symptoms. The jury found the nurse practitioner negligent, based upon the testimony of plaintiff's expert, who testified that a proper diagnosis could have saved her life.

Notable Defense Verdicts

Missouri —January, 2018. A Missouri Court of Appeals affirmed a jury's finding that a clinic did not cause wrongful death in connection with three miscarriages experience by a woman who had an IUD left inside her abdomen for years. In affirming the jury's finding, the Court of Appeals concluded that the trial court did not abuse its discretion in admitting results of certain chromosomal tests into evidence that plaintiffs contend were obtained illegally.

Michigan—January, 2018. A Michigan appellate court affirmed a verdict clearing a dentist of malpractice in a case brought by a woman claiming a procedure removing her upper teeth had changed her appearance and caused bone loss, holding that the patient had not shown the pertinence of evidence excluded from trial. The evidence included a booklet she received from a subsequent treating physician and the Michigan administrative code relating to the licensing of dentists.

Baltimore County, MD—October, 2017. After deliberating for one hour, a Baltimore County Circuit Court jury concluded that the perforation of the sigmoid colon of a seventy-eight year old patient was not caused by the medical negligence of several physicians who provided treatment to the woman after she developed constipation secondary to narcotic mediation she was given after surgery on her knee. The defense argued the perforation was due to other causes.

Prince George's County, MD—June, 2017. A Prince George's County jury concluded that a physician's assistant and a medical center were not negligent in causing the death of a forty-one year old woman who died from an alleged overdose of labetalol given to her to treat respiratory difficulties. After a three week trial, the jury concluded that the defendants did not breach the standard of care and that there was no evidence the drug could cause cardiac arrest.

Rhode Island—December, 2017. The Rhode Island Supreme Court upheld a jury verdict clearing a doctor in a medical malpractice case in connection with injuries a woman suffered as a result of a C-section holding that conflicting expert testimony was not enough for a new trial.