Jackson &Campbell
Attorneys and Counselors at Law

DECISIONS

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NEW YORK COURT OF APPEALS SAYS PRIVATE FACEBOOK PHOTOS CAN BE DISCLOSED

INSIDE THIS ISSUE:

Special points of interest:

- Court of Appeals of New York concludes that plaintiff's private Facebook photos are subject to disclosure.
- Connecticut Supreme Court allows patient to sue doctors for disclosure of medical records in response to a subpoena.
- New Kentucky law bars the use of physician peer review records in medical malpractice cases.
- Court of Appeals of New York permits plaintiff's medical malpractice suit to move forward under the continuous treatment doctrine.
- Sixth Circuit rules attorney's malpractice claim was not reasonably foreseeable, thereby entitling the attorney to professional liability coverage.

In *Forman v. Henkin*, 30 N.Y.3d 656 (2018), the Court of Appeals of New York ("the Court") was asked to resolve a dispute concerning disclosure of materials from the plaintiff's Facebook account in a personal injury action. The plaintiff alleged that she was injured when she fell from a horse owned by the defendant and suffered spinal and traumatic brain injuries resulting in cognitive deficits and difficulties with written and oral communication. At her deposition, the plaintiff stated that she previously had a Facebook account on which she posted "a lot" of photographs showing her pre-accident active lifestyle but that she deactivated the account about six months after the accident and could not recall whether any post-accident photographs were posted. She maintained that she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages. Accordingly, the plaintiff produced a document she wrote that had misspelled words and faulty grammar in which she represented that she could no longer express herself the way that she could before the accident. She contended that a simple email could take hours to write because she had to go over written material several times to ensure that it made sense. The defendant ultimately moved to compel discovery and sought an unlimited authorization to obtain the plaintiff's entire "private" Facebook account. The defendant asserted that photographs and messages the plaintiff posted on Facebook would likely be material to her allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer. The trial court granted the defendant's motion to compel to the limited extent of directing the plaintiff to produce: (1) all photographs of herself privately posted on Facebook prior to the accident that she intended to introduce at trial; (2) all photographs of herself privately posted on Facebook after the accident that did not depict nudity or romantic encounters; and (3) an authorization for Facebook records showing each time the plaintiff posted a private message after the accident and the number of characters or words in the messages. The Supreme Court did not order disclosure of the content of any of the plaintiff's written Facebook posts, whether authored before or after the accident. On appeal, the Appellate Division modified the ruling by limiting disclosure to photographs posted on Facebook that the plaintiff intended to introduce at trial (whether pre or post-accident) and eliminating the authorization permitting the defendant to obtain data relating to post-accident messages. The Court ultimately reversed the Appellate Division's order and reinstated the Supreme Court order. The Court noted that under New York discovery rules, a request for information "need only be appropriately tailored and reasonably calculated to yield relevant information." The Court held, "even private materials may be subject to discovery if they are relevant. For example, medical records enjoy protection in many contexts under the physician-patient privilege. But when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records—including the physician-patient privilege—are waived … For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information." The Court further stated that, "[a]pplying these principles here, the Appellate Division erred in modifying [the] Supreme Court's order to further restrict disclosure of [the] plaintiff's Facebook account, limiting discovery to only those photographs [the] plaintiff intended to introduce at trial. With respect to the items [the] Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), the defendant more than met his threshold burden of showing that [the] plaintiff's Facebook account was reasonably likely to yield relevant evidence . . . . [G]iven [the] plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities[.]"

Connecticut High Court Allows Patients to Sue Doctors for Releasing Records

On January 16, 2018, the Connecticut Supreme Court ("the Court") recognized a common law cause of action for a health care provider's breach of its duty to keep medical records confidential. *Byrne v. Avery Center for Obstetrics & Gynecology, P.C.*, 327 Conn. 540. In this case, the plaintiff sued the defendant for negligence and negligent infliction of emotional distress, alleging that she had instructed the defendant not to release her medical records to an individual who had filed a paternity lawsuit against her in 2004. The defendant had released her medical records to the individual in response to a subpoena served in 2005 without informing the plaintiff. The trial court initially granted summary judgment to the defendant on the grounds that HIPAA preempted the lawsuit. After the Court concluded that HIPAA would not bar a suit for breach of confidentiality, the case was remanded back to the trial court. The trial court subsequently granted summary judgment in favor of the defendant on the grounds that Connecticut did not recognize such a cause of action. The plaintiff once again appealed to the Court. The question on appeal was whether the unauthorized disclosure of confidential information obtained in the course of the physician-patient relationship gave rise to a cause of action sounding in tort. This was a question of first impression for the Court and the trial court. The Court began its analysis by acknowledging that a majority of jurisdictions that have considered the question have recognized a cause of action against a physician for the unauthorized disclosure of confidential medical information. The Court ultimately agreed with the majority of the jurisdictions and concluded "that the nature of the physician-patient relationship warrants recognition of a common-law cause of action for breach of the duty of confidentiality in the context of that relationship." The Court further noted that the cause of action sounds in tort against the health care provider, unless the disclosure is otherwise allowed by law. In addressing the present case, the Court acknowledged that the records at issue were provided pursuant to a subpoena. The Court, however, could not conclude on the record that the mere existence of a subpoena precludes a common law action for breach of confidentiality. Accordingly, the Court remanded the case to the trial court to determine whether the defendant violated the duty of confidentiality by disclosing the records in response to a subpoena.

New Kentucky Law Bars Physician Peer Reviews in Medical Malpractice Cases

"HB 4 increases access to and the quality of care for patients by providing doctors a setting where they can freely critique practices and colleagues without the risk of unnecessary and unfair litigation."

On March 9, 2018, Kentucky Governor Matt Bevin signed into law HB 4, which precludes health care institutions from disclosing records or findings related to physician conduct reviews or evaluations of a doctor's credentials, effectively barring their use in civil actions. HB 4 revises KRS § 311.377 to read, in pertinent part, "[a]t all times in performing a designated professional review function, the proceedings . . . shall be confidential and privileged and shall not be subject to discovery, subpoena, or introduction into evidence, in any civil action in any court, including but not limited to medical malpractice actions, actions arising out of review credentials or retrospective review and evaluation as referred to in subsection (1) of this section, and actions by an applicant for or grantee of staff privileges . . . or in any administrative proceeding before any board, body, or committee[.]" The new law makes all peer reviews or internal investigations conducted by a hospital or professional standards review organization not subject to discovery, subpoenas, or otherwise allowed as evidence. According to the bill, matters governed exclusively by federal law are excluded. The newly enacted legislation allows Kentucky to join forty-eight other states with similar laws already in place. Senator Ralph Alvarado, who presented HB 4 on the Senate floor, said candid peer review could be a source of information for physicians to learn from unexpected events and prevent future errors. He stated that confidentiality of these discussions has traditionally been viewed as necessary to their effectiveness. He further surmised that without HB 4, health care professionals are muzzled, medical innovation is stifled and patient safety is reduced across Kentucky. According to Senator Alvarado, "HB 4 increases access to and the quality of care for patients by providing doctors a setting where they can freely critique practices and colleagues without the risk of unnecessary and unfair litigation."

New York High Court Backs 'Continuous Treatment' Medical Malpractice Rule

On February 15, 2018, the Court of Appeals of New York ("the Court") allowed a suit accusing a doctor of botching a plaintiff's 1999 shoulder surgery to move forward, holding a factual dispute existed as to whether the statute of limitations can be tolled under the "continuous treatment" doctrine. *Lohnas v. Luzi,* No. 7, 2018 WL 889531 (N.Y. Feb. 15, 2018). The Court ruled summary judgment was properly denied to Dr. Frank Luzi ("the defendant") in a suit accusing him of negligently performing shoulder surgery on Darlene Lohnas ("the plaintiff") in 1999, which allegedly caused the destruction of her rotator cuff and glenoid. The Court said that because the last date the defendant treated the plaintiff was in April 2006 and the plaintiff filed suit in September 2008, a jury should decide whether she is entitled to a tolling of New York's two-and–a-half year statute of limitations under the continuous treatment doctrine. The continuous treatment doctrine allows for the time limit on claims to start running on the last date of treatment for a single ailment. CPLR § 214-a provides that a medical malpractice action must be commenced within two years and six months of the relevant act or the "last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the [challenged] act, omission or failure." According to the Court, "[t]he operative accrual date for the purposes of determining a claim's statute of limitations is at the end of treatment 'when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint[.]'" The Court stated, "Plaintiff's injury was a chronic, long-term condition which both plaintiff and defendant understood to require continued care. Each of plaintiff's visits to defendant over the course of seven years were 'for the same or related illnesses or injuries, continuing after the alleged acts of malpractice.'" The Court noted that even though one of the gaps in the plaintiff's treatment lasted longer than the 30-month statute of limitations itself, it does not necessarily mean that the medical malpractice claim is untimely, citing its 1991 ruling in a case called *Massie v. Crawford*. The dissenting opinion stated that the majority is confusing continuous treatment with a chronic condition in a ruling that runs counter to what state lawmakers intended in 1975 when it codified the continuous treatment doctrine originally put in place by a 1962 case, *Borgia v. City of New York*.

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The Supreme Court of Oregon Recognizes "Wrongful Birth" Claims

On February 8, 2018, the Supreme Court of Oregon ("the Court") allowed a medical malpractice suit to go forward, which alleged that a couple would not have given birth to a second son had their first born son been properly diagnosed with a genetic disorder. *Tomlinson v. Metropolitan Pediatrics, LLC,* 362 Or. 431 (2018). This decision affirmed a 2015 lower appeals court ruling that recognized "wrongful birth" claims. In *Tomlinson*, Dr. Mary K. Wagner, Metropolitan Pediatrics, LLC, and Legacy Emanuel Hospital & Health Center ("the defendants") were accused of failing to timely diagnose Duchenne muscular dystrophy ("DMD") in Kerry and Scott Tomlinson's first born child, referred to in court papers as M. The plaintiffs in this case included Kerry Tomlinson, Scott Tomlinson, and their second born child, referred to as T ("the plaintiffs"). Their suit claimed that, had the parents been properly informed of M's genetic disorder, they would not have conceived child T, who was also born with DMD. At issue was whether the defendants could be held liable for claims brought by both the parents and T, even though the plaintiffs were never patients of the defendants. The Court stated that it has been willing to recognize a professional's obligation to protect third parties in appropriate circumstances, which is determined on a case-by-case basis. The Court ruled that because M was a patient of the defendants and M's parents were his primary caregivers, a relationship existed between the parties, requiring the defendants to reasonably perform specific tasks such as diagnosing M's DMD and informing the parents of it. The Court held, "under the facts alleged in this case, such a relationship gives rise to legal protection. By failing to reasonably diagnose M's genetic disorder and communicate that diagnosis to the parents, [the] defendants failed to reasonably protect M's interests in receiving medical care and failed to reasonably protect the parents' separate interests in avoiding the reproductive risks associated with their own genetic composition."

The Supreme Court of Oregon holds that a medical malpractice lawsuit involving a "wrongful birth" claim may go forward.

Sixth Circuit Holds Legal Malpractice Claim Not Reasonably Foreseeable

In *Gonakis v. Medmarc Casualty Insurance Company*, No. 17-3463, 2018 WL 721673 (6th Cir. Feb. 6, 2018), the insured attorney, Spiros E. Gonakis, Sr. ("Mr. Gonakis") represented a lender ("the plaintiff") in a real estate transaction that involved financing the sale of an apartment building. After the transaction was complete, the buyer defaulted and the plaintiff started a foreclosure action. Several years after Mr. Gonakis's work was finished, he received a letter from the plaintiff's new counsel addressed to him and a number of parties, informing them that the plaintiff intended to bring claims against the defendants, and advising them to forward the letter to their liability carriers. Mr. Gonakis did not immediately send the letter to his insurer, Medmarc Casualty Insurance Company ("Medmarc") because he checked the court docket after receiving the letter and was not named as a defendant in the plaintiff's suit at the time. He also concluded that because the one-year statute of limitations for legal malpractice had run, no suit could be brought against him. However, the plaintiff did later sue Mr. Gonakis, and he tendered the suit to Medmarc. Medmarc denied coverage on the basis that the "notice of claim" letter put Mr. Gonakis on notice of a claim prior to the inception of his current claims made policy. Hence, the claim was not first made during the current policy period. The policy at issue excluded coverage for any claim "that occurred prior to the continuous coverage effective date" if, "on that date, the Insured knew or believed, or had reason to know or believe, that the . . . act, error, or omission might reasonably be expected to result in a claim . . . against the insured." On appeal, the Sixth Circuit ("the Court") held that it must adopt a meaning of "reasonably be expected to result in a claim" that is favorable to the insured, as that term was not defined in Mr. Gonakis's policy. The Court held that a general letter informing Mr. Gonakis and others of the plaintiff's intention to assert a claim and instructing Mr. Gonakis to put his carrier on notice failed to include facts that would cause Mr. Gonakis to reasonably expect that these events would result in a claim. The Court noted that the letter was general in the allegations of wrongdoing, and did not make allegations specific to Mr. Gonakis. The Court also determined that Mr. Gonakis had reviewed the demand and reasonably concluded that no claim could result because the statute of limitations had expired. The outcome of this case turns on the Court's very broad interpretation of the phrase "reasonably be expected to result in a claim." This case will likely be cited by policyholders for the proposition that mere prior notice of a claim does not constitute a reasonable basis to expect a claim would be made where the underlying claim that may be asserted is arguably without merit. Carriers must always proceed with caution when denying coverage on a claims made basis.

Pennsylvania Court Extends Time for Inherited Malpractice Claims

"It is within the legislature's power to enact a more specific statute of limitations for medical professional liability negligence that results in death, and where the plain language of the statute indicates that it did so, we must give effect to that language."

On November 22, 2017, the Supreme Court of Pennsylvania ("the Court") ruled that a medical malpractice survival action should be treated the same as a wrongful death claim. Accordingly, the statute of limitations on the survival action should not begin to run until the day the patient dies. *Dubose v. Quinlan*, 173 A.3d 634 (2017). In *Dubose*, Elise Dubose ("the decedent") developed several pressure ulcers while being treated at Albert Einstein Medical Center ("Einstein") in July 2005 for severe head injuries. She was later admitted to Willowcrest Nursing Home ("Willowcrest") in August 2005, where staff failed to treat the previously developed pressure ulcers. One of the ulcers, located at the decedent's sacral region, eventually became infected and led to sepsis, causing her death on October 18, 2007. On August 13, 2009, Robert Dubose, as administrator for the Estate of Elise Dubose ("the administrator"), filed a complaint against Willowcrest and Einstein ("the defendants"), asserting counts for negligence on behalf of the decedent ("the survival action"), and a wrongful death action. The defendants argued that the administrator's survival claims were barred by the two-year statute of limitations for personal injury actions, which began to run at the time of the decedent's injuries in 2005. The Court held that the statute of limitations began to run at the time of death under Section 513(d) of the Medical Care Availability and Reduction of Error Act. The Act states, in part, that if a medical professional liability claim "is brought under 42 Pa.C.S. § 8301 (relating to death action) or 8302 (relating to survival action), the action must be commenced within two years after the death[.]" The Court stated, "Section 513(d) establishes a specific statute of limitations for survival and wrongful death actions in medical professional liability cases that prevails over the general statute of limitations contained in 42 P.a.C.S. § 5524(2) . . . . It is within the legislature's power to enact a more specific statute of limitations for medical professional liability negligence that results in death, and where the plain language of the statute indicates that it did so, we must give effect to that language."

Insurer Avoids Coverage in Professiona Liability Malpractice Suit

On February 23, 2018, a Pennsylvania federal judge held that Lamb McErlane, P.C. ("the firm" or "Lamb McErlane") was not entitled to over $500,000 worth of professional liability coverage for allegedly mishandling an estate matter, considering the initial complaint about the firm's work predated the effective date of the firm's policy with Allied World Insurance Co. ("Allied"). *Allied World Insurance Company v. Lamb McErlane, P.C.*, No. 17-2878, 2018 WL 1035781 (E.D. Pa. Feb. 23, 2018). United States Magistrate Judge Timothy R. Rice said Allied did not have to cover the $557,001 judgment the firm was ordered to pay in March, 2017 because it stemmed from a claim dating back to before the policy went into effect in June 2016. "Lamb McErlane had written notice of the claim against it before it was insured by Allied World in June 2016," Judge Rice said, "[t]he claim against Lamb McErlane was granted, not initiated, in the March 2017 Adjudication." According to the opinion, in May 2015, beneficiaries of an estate that the firm represented filed a letter in the Chester County Court of Common Pleas seeking monetary relief on claims that the firm had "grossly mismanaged" a federal tax filing resulting in penalties in excess of $500,000. The beneficiaries had taken objection to the firm's work in the past, as they complained in April 2013 about allegedly excessive fees charged to the estate's executor. The beneficiaries followed up on their letter in November 2015, seeking sanctions to compensate the estate for losses suffered from the tax penalty. In March 2017, the Chester County court agreed that Lamb McErlane and the executor had breached their fiduciary duties by mishandling the tax process and held them liable for the losses. While Lamb McErlane sought coverage from Allied under a policy designed to cover claims made over the one-year period beginning June 20, 2016, the insurer filed suit in June, arguing that the claim really dated back to the filing of the letter in May 2015. However, Lamb McErlane argued that the May 2015 letter constituted only an offer of proof of alleged wrongdoing by the firm, adding that the beneficiaries lacked legal standing to pursue their own malpractice claim. Judge Rice held that the beneficiaries' standing was of no consequence. Judge Rice stated, "[a]lthough the beneficiaries were precluded from bringing a malpractice claim directly against Lamb McErlane in the estate proceedings, they were permitted to object to excessive legal fees already paid by the estate. They not only did so, they notified Lamb McErlane of their objections to Lamb McErlane's legal work." Moreover, "Lamb McErlane had written notice of the claim against it before it was insured by Allied World in June 2016. Similarly, the November 2015 motion for sanctions reaffirmed the claim[.]"

Pennsylvania federal judge holds firm is not entitled to professional liability coverage in legal malpractice claim, as the firm had notice of the claim before the policy at issue went into effect.

Massachusetts Courts Adopt New Rule to Speed Up Medical Malpractice Cases

The Massachusetts Superior Court adopted a new rule designed to move medical malpractice cases through the medical tribunal process more quickly by establishing strict deadlines for both attorneys and the Massachusetts Medical Society, which supplies lists of doctors for the tribunal. Under Massachusetts law, all medical malpractice cases must first be heard by a three-person tribunal. The tribunal is composed of a judge, an attorney, and a physician with a relevant specialty or another representative of a relevant field of medicine. If the panel votes against the plaintiff, he or she has the right to bring the case in court. The new Rule 73, which went into effect on January 1, 2018, enforces new penalties for missing deadlines in a medical malpractice case, though the deadlines themselves are unchanged. Plaintiffs will still be required to file an offer of proof within 15 days after defendants have filed an answer in the case, but plaintiffs who do not meet the deadline waive their right to the tribunal under the new rule. Defendants will also waive their right to a tribunal hearing if they fail to file a demand for a tribunal within the allotted 30 days of filing an answer. The proposal for Rule 73 noted, "[s]ince [this system] became effective in 1976, experience has shown the practical impossibility of complying with both the 15-day mandate and the required composition of the tribunal in almost all cases." Rule 73, which supersedes the Section 60B provisions that have governed medical malpractice cases in Massachusetts since 1976, also imposes time limits on the Massachusetts Medical Society, which supplies lists of physicians who are qualified to serve on the panel. If a list is not provided within 90 days after an answer is filed in the case, the case will proceed with only a judge. If the list comes in late, however, either party is allowed to request a rehearing before the full three-person panel. The proposal stated, "[t]his rule prescribes procedures that conform as closely as practicable to the statute and enable the session judge, in each case, to determine how best to maximize statutory compliance, where full compliance proves impossible."

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Recent Notable Verdicts and Settlements

Notable Verdicts/Settlements

Chatham County, GA —March, 2018. A jury in Chatham County State Court awarded $18 million to a 58 year old Savannah woman who became paralyzed after being hospitalized for an infection. The jury apportioned 90% of the fault to a medical group and an infectious disease specialist and 10% of the fault to a hospital and healthcare system. The plaintiff went to the ER in July, 2014 for acute back pain. Ten days after she was treated and released, she was diagnosed with an infection. Plaintiff alleged the providers failed to diagnose the abscess in her spine.

New York —January, 2018. A New York appellate court affirmed a jury verdict assessing punitive damages against a physician for her malicious destruction of notes she had written for a girl who later died as a result of the physician's alleged failure to diagnose her with diabetes. On appeal, the court reduced the original $7.5 million award to $1.2 million. The jury had determined that the physician had deliberately destroyed the notes in order to avoid potential malpractice liability.

Harris County, TX —February, 2018. A Harris County jury awarded $6.6 million in a medical malpractice lawsuit finding that two doctors were liable for failing to diagnose and treat a blood clot (portal vein thrombosis) that left the 29 year-old patient with permanent medical issues.

Tampa, FL — January, 2018. After a two week trial, a Tampa jury awarded a 52 year old woman $109 million in a case in which she suffers from constant abdominal pain due to a surgical error and the near severance of her small intestine. Complications from surgery led to gangrene in her hands and feet, requiring four amputations below her elbows and knees. The surgery which resulted in her injuries involved the removal of an ovarian cyst.

Kent County, MN—February, 2018. A Kent County jury awarded $4.5 million to the family of a baby who suffered nerve damage and permanent paralysis in a lawsuit in which the family accused the OBGYN of using excessive force to deliver the baby, who was stuck on the mother's pelvis. The delivery resulted in disfiguring injuries to the baby's arms, including nerve damage in his shoulder and permanent paralysis of his arm. In February, the trial court refused to grant a new trial.

Notable Defense Verdicts

Eighth Circuit (Missouri) — February, 2018. The US Court of Appeals for the Eighth Circuit affirmed entry of summary judgment for a hospital in a case alleging the hospital was vicariously liable for a doctor's alleged negligence. The Court held that the medical malpractice plaintiff could not recover against the hospital unless the physician was an employee. Because he was not, the plaintiff could not recover against the hospital.

Richmond, Virginia —February, 2018. The Virginia Supreme Court overturned a $652,000 jury verdict which found a physician liable for injuries suffered by a woman due to an alleged botched hysterectomy. Plaintiff alleged the physician perforated her bowel during surgery. The Court concluded that the plaintiff failed to present any evidence at trial that the physician proximately caused her injury.

Los Angeles County, CA, — October, 2017. After a two and a half week trial, a Los Angeles County jury found in favor of a high-risk maternal fetal medicine specialist in a case involving injuries suffered by a newborn during delivery where the plaintiffs alleged the specialist failed to adhere to the standard of care in failing to treat bleeding in the newborn after delivery. The defendant argued that its actions were both timely and appropriate and did not fall short of any acceptable standard of care.

Baltimore County, MD— December, 2017. A Baltimore County Jury, after a 7 day trial, found in favor of a hospital center and several physicians in a case in which the estate of a 92 year old alleged that the defendants failed to properly assess and treat the decedent's nose bleed that led to blood loss and his death. Defendants allege that his death was caused by his advanced age and prior cardiac condition.

Kentucky —February, 2018. A Kentucky Appeals Court upheld a defense verdict in a case accusing a radiologist of failing to diagnose a woman's breast cancer before it spread. The Court held that the trial court properly allowed the radiologist to testify and that his testimony did not stray into expert testimony.