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CONSTITUTIONAL LAW

Random Drug Testing Program for Select State Civil Service Employees Upheld as Constitutional

The Court of Appeals for the Sixth Circuit affirmed the District Court's judgment that a random drug testing program for select civil service employees did not violate the Fourth Amendment.[1] The court held testing urine for drugs was a reasonable search.[2] In making that determination, it balanced individual privacy interests against governmental interests.[3] It confirmed that the state's "special needs," based on public safety concerns, outweighed individual privacy rights.[4]

In determining that the state established a sufficient special need, the court reviewed jurisprudence on governmental interests.[5] It considered the context in which the employees were subject to testing.[6] There was no need for a particularized or pervasive drug abuse problem among employees.[7] The positions of the employees were such that, if they used drugs or were under the influence of drugs while on duty, they could cause harm to themselves or others.[8] Therefore, the court determined the State had a "special need" based on substantial public safety concerns.[9]

Next, the court established that the employees affected by this program worked in highly regulated fields.[10] Jurisprudence established that individuals working in a heavily regulated industry or activity, such as health care or inside a prison, have a diminished expectation of

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[1] Int'l Union v. Winters, 385 F.3d 1003 (6th Cir. 2004). The select employees included those: (1) having law enforcement duties; (2) who directed and had unsupervised contact with prisoners or; (3) with a responsibility to deliver health care or psychological services to those in state custody. *Id.* at 1012.

[2] *Id.*

[3] *Id.* at 1007-1012.

[4] *Id.* at 1013.

[5] *Int'l Union*, 385 F.3d at 1007-1012.

[6] *Id.* at 1009-1011.

[7] *Id.* at 1012.

[8] *Id.*

[9] *Id.*

[10] *Int'l Union*, 385 F.3d at 1012.

privacy.[11] Additionally, the degree of intrusion on this diminished expectation of privacy was minimal.[12] The procedure in collecting the urine allowed the employee complete privacy unless a reason existed to suspect tampering.[13] The specimen collector stood at a distance and only listened for normal urination sounds.[14] The test was random and continuous, but this had no effect on the intrusiveness of the program.[15] Therefore, since the violation of individual privacy is minimal, the special needs of the state outweighed those concerns, thereby making the drug testing program constitutional.[16] *Int'l Union v. Winters, 385 F.3d 1003 (6th Cir. 2004).*

Florida Statute Unconstitutionally Interferes With the Government's Separation of Powers When It Attempts to Reverse a Properly Rendered Final Judgment Regarding Cessation of a Patient's Life-Prolonging Treatment

The Supreme Court of Florida affirmed the circuit court's decision declaring a Florida statute unconstitutional when it attempted to give the Governor authority to prevent the withholding of nutrition and hydration for a patient.[17] This case required the court to decide a narrow issue regarding a law that violated the fundamental constitutional concept of separation of powers as it applied to Theresa Schiavo, a patient who had been in a persistent vegetative state for fourteen years.[18]

After suffering a cardiac arrest in 1990, Theresa Schiavo was rushed to the hospital and has been in a vegetative state since, fed and hydrated through tubes.[19] Eight years later, Michael, her husband, petitioned the guardianship court to authorize the termination of these procedures, despite disagreement by Theresa's parents.[20] Due to the permanency of her condition, the absence of any cure, and the belief that Theresa would not want to live this way, the Second District Appellate Court affirmed the trial court's decision that authorized the

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[11] *Id.* at 1012.
[12] *Id.* at 1013.
[13] *Id.*
[14] *Id.*
[15] *Int'l Union*, 385 F.3d at 1013.
[16] *Id.*
[17] Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004).
[18] *Id.*
[19] *Id.* at 324-25.
[20] *Id.*

cessation of artificial life support.[21] Theresa's parents filed a separate complaint in the civil division alleging the judgment was no longer equitable due to evidence of a new treatment that could improve Theresa's condition.[22] The court, however, agreed with the guardianship court, concluding that continuing the life-prolonging treatment was not what Theresa would want.[23] On October 15, 2003, Theresa's nutrition and hydration tubes were removed.[24]

Six days later, the Florida legislature enacted the statute at issue in this case, which stayed the continued withholding of nutrition and hydration.[25] Theresa's tubes were reinserted pursuant to this executive order.[26] The circuit court granted Michael's action for declaratory judgment and found the statute unconstitutional on its face and as applied to Theresa.[27] The law violated the constitutional separation of powers, which become the basis of the analysis for this case.[28]

The first issue addressed by the court was whether the Florida statute encroached on the power and authority of the judicial branch.[29] The judiciary has the power to rule on cases, which is subject to review only by superior courts.[30] A court's decision is final regarding a certain case or controversy, unless one party wants to appeal to a higher court.[31] The Governor's executive order created a statute that reversed a final judgment by the court; therefore, it was an unconstitutional encroachment and interference with the power allocated to the judicial branch.[32] Even though Theresa's parents were permitted to recall the prior judgment under a procedural rule, the finality of the court's decision still stood.[33]

The second issue addressed by the court was whether the statute was unconstitutional on its face because it delegated legislative power to the Governor.[34] A statute violates the nondelegation doctrine if it fails to provide the executive branch with adequate guidelines or

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[21] *Id.* at 325.
[22] *Bush,* 885 So. 2d at 327.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Bush,* 885 So. 2d at 328.
[28] *Id.* at 329.
[29] *Id.*
[30] *Id.* at 330, *citing* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221-22 (1995).
[31] *Id.* at 331.
[32] *Bush,* 885 So. 2d at 331.
[33] *Id.* at 331-32.
[34] *Id.* at 332.

criteria, thereby preventing discretion or favoritism.[35] The Florida legislature failed to include any standards for the Governor to use when deciding when and for how long a stay should be issued, thereby making his independent decision unreviewable.[36] The court held there was not appropriate limits to the Governor's power resulting from this statute and there was also no guarantee that the patient's wishes would be honored.[37] The court explained the importance of respecting the integrity and procedural requirements of the United States constitution and stated very clearly that it refused to improperly delegate powers of one branch of government to another.[38] The circuit court's final summary judgment deeming the statute unconstitutional was affirmed.[39] *Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004).*

DISABILITY

Additional Testimony From Vocational Experts May Be Necessary to Determine If Plaintiff Qualifies As a Disabled Individual Deserving Social Security Benefits

The United States District Court for the Northern District of Iowa, Central Division, granted defendant commission's motion for remand pursuant to the Social Security Act ("Act"), where plaintiff sought a decision from an administrative law judge ("ALJ") for a claim for supplemental security income and disability insurance.[40]

Plaintiff Havill alleged he was disabled due to back, neck, and arm problems, as well as depression and alcoholism.[41] After his first applications for disability insurance and social security insurance benefits were denied in 2001, he requested a hearing.[42] The ALJ denied him benefits because there were jobs in the national economy he could perform although Havill was unable to perform past work.[43] After being denied review by the Social Security Administration, plaintiff filed a timely complaint to the district court seeking judicial review in 2003.[44] Plaintiff agreed to allow review of the ALJ's decision if the

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[35] *Id.* at 333.
[36] *Id.* at 334.
[37] *Bush*, 885 So. 2d at 336.
[38] *Id.* at 337.
[39] *Id.*
[40] Havill v. Barnhart, 2004 U.S. Dist. LEXIS 18721at *1 (D. Iowa 2004).
[41] *Id.* at *2.
[42] *Id.*
[43] *Id.* at *3.
[44] *Id.*

court agreed that the there was not substantial evidence to support a refusal of benefits.[45]

Before analyzing the ALJ's decision, the court deemed it important to summarize Havill's daily activities and medical history.[46] Havill was last employed before the hearing doing maintenance on vehicles, a job he quit due to pains in his chest, back and hips.[47] He claimed to have a crushed vertebra in his neck and kidney pain, which made it difficult for him to sit or stand for long periods and to walk long distances.[48] Plaintiff said he had alcohol and depression problems as a result of a stress disorder caused by his experiences with Vietnam.[49] In 2000, Havill was diagnosed with noncardiac chest pain, most likely a result of heavy smoking and drinking, and he was hospitalized at a veteran's hospital in 2001 for detoxification and treatment.[50] Once diagnosed with a mood disorder, plaintiff still did not take medication given by a psychiatrist.[51] Another psychiatrist stated that Havill's impairments were only supported by medical evidence to some extent and that his functional limitations were no enough to qualify him as disabled.[52] After several assessments analyzing Havill's residual functional capacity, physicians recommended only small restrictions in physical activity and stated his general strength to be adequate.[53]

The first issue for the court to determine was whether the vocational testimony offered to the ALJ accurately demonstrated Havill's residual functional capacity.[54] The vocational expert testified that Havill could not perform any of his previous work and that he did not have "readily transferable skills," he would be in the sedentary classification.[55] The ALJ determined, however, that the expert testimony showed that plaintiff could perform several unskilled jobs at a light level and that he was not disabled under the definitions of the Act.[56] In order to determine if an individual has a disability within the meaning of the Act, there is a five-step evaluation.[57] Considered first is

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[45] *Havill*, 2004 U.S. Dist. LEXIS 18721at *4.
[46] *Id.*
[47] *Id.* at *5.
[48] *Id.*
[49] *Id.* at *6-7.
[50] *Havill*, 2004 U.S. Dist. LEXIS 18721at *9.
[51] *Id.* at *10.
[52] *Id.* at *15-16.
[53] *Id.* at *17, 22.
[54] *Id.* at *26.
[55] *Havill*, 2004 U.S. Dist. LEXIS 18721at *24, 26.
[56] *Id.* at *28.
[57] *Id.* at *29.

the claimant's work activity, and second, is whether there is a severe impairment limiting the claimant's physical or mental ability to perform work.[58] The third step looks at the medical severity of the impairment while the fourth step assesses the claimant's residual functional capacity ("RFC)") to meet the requirements of past relevant work.[59] Finally, if the RFC in step four does not allow claimant to perform past work, the burden shifts to the defendant Commissioner to prove that there is other work the claimant can do.[60]

The other significant issue addressed by the court was whether the ALJ used the appropriate legal standard, in other words, whether the factual findings were supported by substantial evidence on the record as a whole.[61] The court reviewed the standard deferentially and applied a balancing test to analyze any contradictory evidence.[62] The ALJ for this court could only discredit Havill's subjective complaints of pain if they were inconsistent with the record as a whole.[63] After carefully reviewing the record, the court found that the ALJ's assessment of credibility and determination of plaintiff's RFC was supported by substantial evidence in the record.[64] However, the court held it necessary to reverse and remand the case to the Commissioner due to the ALJ's reliance on the vocational expert testimony because additional testimony was necessary to determine if Havill could perform jobs consistent with his capabilities assessed by the RFC determination.[65] *Havill v. Barnhart, 2004 U.S. Dist. LEXIS 18721 (D. Iowa 2004).*

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[58] *Id.* at *29-30.

[59] *Id.* at *31.

[60] *Havill*, 2004 U.S. Dist. LEXIS 18721at *32.

[61] *Id.* at *34.

[62] *Id.* at *36. *citing* Sobania v. Sec. of Health & Human Serv., 879 F.2d 441, 444 (8th Cir. 1989).

[63] *Id.* at *38.

[64] *Id.* at *39, 40.

[65] *Havill*, 2004 U.S. Dist. LEXIS 18721at *40.

DISCOVERY

Designation of Treating Physician as an Expert Witness Not Necessary When Content of Testimony Was Not Learned or Acquired In Anticipation of Litigation

The Supreme Court of Iowa reversed and remanded the district court's exclusion of expert testimony of a treating physician and denial of a motion for new trial in a medical negligence action.[66]

The plaintiff sued a hospital for injuries she allegedly sustained in a fall while she was a patient in the hospital.[67] The district court disallowed testimony from the patient's treating physician because he was not designated as an expert as required by state code.[68] After a jury denied damages, the district court denied the patient's motion for a new trial.[69] The court of appeals affirmed.[70]

The issues before the court were (1) whether the district court abused its discretion in excluding the testimony of a treating physician on the question of causation; and (2) if so, whether such denial deprived the patient of a fair trial thereby entitling her to a new trial.[71] The court held that the exclusion of testimony was an abuse of its discretion which deprived the patient of a fair trial.[72]

The court noted that disclosure of an expert witness is required to enable the adverse party to discover his or her mental impressions, opinions and factual knowledge.[73] However, this information is only discoverable when it is acquired or developed in anticipation of litigation.[74] The court reasoned that a treating physician's factual knowledge, mental impressions, and opinions regarding causation of a patient's injury are not developed or acquired in anticipation of litigation but rather are learned and before he or she is retained as an expert witness and before the parties themselves anticipate litigation.[75] However, the court mentioned that in some cases the opinions as to causation of a negligence injury may not be formed during treatment but in this particular case the patient had sought the physician's

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[66] Hansen v. Central Iowa Hosp. Corp., 686 N.W.2d 476 (Iowa 2004).
[67] *Id.* at 477.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Hansen*, 686 N.W.2d at 479.
[72] *Id.* at 485.
[73] *Id.* at 481.
[74] *Id.*
[75] *Id.* at 481.

medical services on multiple occasions for her fall and thus the physicians had formed an opinion on causation as a "treater."[76] Thus, it was not necessary for the patient to designate the physician as an expert witness since his mental impressions and opinions were not within the reach of discovery for the adverse party anyway.[77]

The court also reasoned that since the exclusion of this testimony materially affected the patient's rights since this was the only medical testimony on the issue and the jury found that the hospital's negligence was not the proximate cause of the injuries, the district court abused its discretion in denying a motion for new trial.[78] *Hansen v. Central Iowa Hosp. Corp., 686 N.W.2d 476 (Iowa 2004).*

Lower Court Engaged In an Abuse of Discretion When It Compelled Production of Complete Mental Records File Without Protecting Documents Covered By the Psychotherapy Privilege Or Balancing Privacy Interests

The United States Court of Appeals for the District of Columbia Circuit vacated and remanded the district court's order that the mental retardation records of a mentally retarded adult male, who was a ward of the District of Columbia Mental Retardation and Developmental Disabilities Administration (MRDDA), be made available for review to the counsel of two other mentally retarded men he allegedly sexually assaulted.[79]

Appellant and the two appellees, also wards of MRDDA, resided in the same group home starting in 1997.[80] Appellant allegedly sexually assaulted the appellees in the group home.[81] Appellees further allege that the resident director did nothing to protect them from the appellant until it moved appellant to another home in 1998.[82] Appellees sued the District of Columbia for violating their civil rights and for negligence.[83] During pre-trial proceedings, the district court granted appellee's motion to compel production of the District of Columbia's complete files on the appellant.[84]

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[76] *Hansen*, 686 N.W.2d at 484.
[77] *Id.*
[78] *Id.* at 485.
[79] *In Re:* Sealed Case (Medical Records), 381 F.3d 1205 (2004).
[80] *Id.* at 1207.
[81] *Id.*
[82] *Id.*
[83] *Id.*.
[84] *In Re: Sealed Case*, 381 F.3d at 1208.

The issue before the court was whether the district court abused its discretion in granting the discovery order.[85] The court held that in light of the psychotherapy privilege and other privacy concerns, the district court abused its discretion in granting the motion.[86]

The Court based its decision on a ruling by the United States Supreme Court, which states that confidences between a psychotherapist and her patient in the course of diagnosis or treatment are protected from compelled disclosure, regardless of the interest in justice.[87] Further the court reasoned that even then the psychotherapy privilege is not available the court should allow as much relevant information to be discoverable as possible while at the same time preventing unnecessary intrusions into privacy interests.[88] Because the district court required the District of Columbia to produce all of the appellant's "mental retardation records" to counsel for the appellees without protecting any records that were subject to the psychotherapy privilege and without weighing appellant's privacy interests against the appellees evidentiary need for the records, the court held that an abuse of discretion was committed.[89] *In Re: Sealed Case (Medical Records), 381 F.3d 1205 (2004).*

HEALTH MAINTENANCE ORGANIZATIONS

Physicians' Class Action Claim Against Health Maintenance Organizations for Federal Claims Certified

The Court of Appeals for the Eleventh Circuit affirmed the Southern District of Florida's granting of class certification for all Racketeer Influenced and Corrupt Organizations Act (RICO) related claims and California Subclass for a physician class action suit against Health Maintenance Organizations ("HMOs") for systematic underpayment of reimbursements for procedures.[90] While the court affirmed the granting of class certification for all federal RICO conspiracy claims, the court urged the district court to reconsider the scope of the class on remand.[91] The court reversed the grant of certification for all state law claims.[92]

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[85] *Id.* at 1211.
[86] *Id.* at 1218.
[87] *Id.* at 1213.
[88] *Id.*
[89] *In Re: Sealed Case,* 381 F.3d at 1218.
[90] Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004).
[91] *Id.*
[92] *Id.*

Numerous physicians brought suit against HMOs, in which they serviced either on a fee-for-service plan or a capitation plan[93]. The physicians claimed the HMOs were conspiring together to underpay physicians by denying reimbursement for procedures they thought were too expensive, paying less than the procedures were worth by downcoding, grouping procedures together to reimburse a lesser fee, ignoring items that drove up reimbursement, holding the claims for reimbursement for longer than necessary, and failing to pay HMO physicians for registered patients they had not yet seen.[94] The Judicial Panel on Multidistrict Litigation on the Southern District of Florida consolidated the cases because the suits involved similar questions of facts.[95] After consolidation, the physicians filed an amended complaint asking the court to certify three classes.[96] The first class was a Global class, which included physicians providing services to persons insured by any HMO from August 14, 1990 to the date of certification to pursue a claim that the HMOs conspired together to violate RICO.[97] The second class was a National Subclass, which included all physicians providing services to any patient insured by an HMO to pursue the state law claims of breach of contract, unjust enrichment, and violation of prompt-pay statutes.[98] The third class was a California Subclass, which included any physician who provided services to any person insured by the HMOs in California.[99]

The first issue the court addressed was whether the Global class action could be certified.[100] In order for a class to be certifiable, under the Federal Rule of Civil Procedure 24(b)(3), the court must find the questions of law and fact were common to the members overall.[101] The court held the Global class was certifiable because of the existence of common questions of fact and law predominating due to the HMOs conspiring with joint efforts as a Managed Care Entity to restrain trade through medical necessity requirements, use of actuarial guidelines, and use of automated claims systems and software to adjust procedure codes and reimbursement rates.[102] Because all of the HMOs were national and allegedly conspired to underpay doctors throughout the

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[93] *Id.* at 1247.
[94] *Id.* at 1247-49.
[95] *Klay*, 382 F.3d at 1249.
[96] *Id.* at 1250.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Klay*, 382 F.3d at 1252.
[101] *Id.* at 1251.
[102] *Id.* at 1255.

nation, the conspiracy issues for a RICO claim were common to all the physicians.[103] The court followed *Kirkpatrick v. Bradford*[104] because the common issues of fact applicable to the Managed Care Entity, the group of HMOs in which a conspiracy ensued, was substantial, and the circumstantial evidence used to show reliance was common to all the physicians.[105] Although the court affirmed this class, it noted the physicians could be split into two categories of classes – one based on the fee-for-service physicians and the other based on the capitation contract physicians.[106]

The second issue the court addressed was whether the National subclass was certifiable.[107] The court held all three state claims the physicians were arguing under this class, the breach of contract claim, the unjust enrichment claim, and the prompt-pay statute claim, were inappropriate because the claims were too individualized.[108] As such, this class could not be certified, and the court reversed the district court's certification of the National subclass.[109] The court did not address the issue of certification of the California subclass because the HMOs did not challenge it on appeal.[110]

The third issue the court addressed was whether the certification of a class action of the Global class would be superior to other methods of litigation.[111] The court held the district court was correct in choosing to handle this claim as a class action because of the commonalities between the physicians' claims, no physicians pursuing the same RICO claims separately, the time, effort, and expense was more desirable, and it was manageable and would unclog the federal courts with numerous individual claims.[112] T he court further found the trial at issue was not about the managed care industry, but was about several large HMOs deviating from their agreements by conspiring to underpay physicians.[113] Thus, certification of a class action was correct regardless of whether one party would be disadvantaged by it because this is inevitable.[114] *Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004).*

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[103] *Id.* at 1256.
[104] 827 F. 2d 718 (11th Cir. 1987).
[105] *Klay*, 382 F.3d at 1258.
[106] *Id.* at 1260-61.
[107] *Id.* at 1260-68.
[108] *Id.*
[109] *Id.*
[110] *Klay*, 382 F.3d at 1268.
[111] *Id.* at 1269-72.
[112] *Id.*
[113] *Id.* at 1274.
[114] *Id.* at 1276.

IMMUNITY

Immunity Doctrine Not Applicable to Public Employee When the Public Employer "Directs and Controls the Physician's Treatment of the Patient"

The Supreme Court of Massachusetts at Worcester held that there is a genuine question of fact as to whether University of Massachusetts Medical Center, a public employer, directed and controlled the defendant physician Dr. Bonnie Weiner's ("Weiner") treatment of the patient ("Nicholopoulos").[115] The Court vacated its previous order granting summary judgment and then denied defendant's motion for summary judgment.[116]

Nicholopoulos filed a negligence claim against Weiner, alleging that Weiner negligently prescribed medication ("Zocor") to lower his cholesterol levels at a time when he had hepatitis C, Nicholopoulos developed cirrhosis of the liver and required a liver transplant as a result of Weiner failing to order blood tests first to check for hepatitis.[117]

Weiner filed a motion for summary judgment on grounds that she has immunity from liability as a public employee under the Massachusetts Tort Claims Act.[118] Weiner's motion for summary judgment was granted and Nicholopoulos filed a notice of appeal.[119]

The central issue that the court faced in deciding whether the immunity doctrine was to apply was "whether the public employer directs and controls the physician's treatment of the patient."[120]

Dr. Gore, Weiner's Department Chief, affidavit states in part that Weiner was required to act in accordance with the rules and regulations promulgated by the Trustees of the University of Massachusetts and that while she "generally exercised independent judgment in her treatment of patients, that judgment was always subject to the right of ultimate control by the University of Massachusetts Medical Center.[121] The court, viewing the facts in the light most favorable to the Nicholopoulos, found that there is a genuine question

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[115] Nicholopoulos v. Weiner, 2004 Mass. Super. LEXIS 311 at *1 (Mass. Super. Ct. 2004).

[116] *Id.* at *4.

[117] *Id.* at *1.

[118] *Id.* at *1.

[119] *Id.*

[120] Nicholopoulos, 2004 Mass. Super. LEXIS 311 at *3 *quoting* Johnson v. Cooke, 17 Mass. L. Rptr. 517 (Mass. Super. Ct. 2004).

[121] Nicholopoulos, 2004 Mass. Super. LEXIS 311 at *2-3.

of fact about whether Weiner was under the direction or supervision of his public employer in prescribing Zocor to Nicholopoulos which is at the core of Nicholopoulos's negligence claim.[122] The Court vacated its earlier order granting Weiner's motion for summary judgment and subsequently denied Weiner's motion for summary judgment. *Nicholopoulos v. Weiner, 18 Mass. L. Rep. 225 (Mass. Super. Ct.,2004).*

LICENSE TO PRACTICE

Allegations of Sexual Misconduct Based Exclusively On Hearsay Not Found to Meet the "Substantial Evidence" Requirement Needed to Revoke a Licensed Professional Counselor

The District of Columbia Court of Appeals reversed an order revoking Petitioner Dr. John W. Compton's ("Compton") license to practice psychology and subsequently remanded to the District Columbia Board of Psychology (Board) for further proceedings.[123] The court held deposition evidence based exclusively on hearsay did not constitute "substantial evidence" required to revoke a Board of Psychology license.[124]

Dr. Compton, who had been practicing psychology since 1969, formed a joint practice with Dr. Doree Waldbaum Lynn ("Lynn") in 1981.[125] In 1986, Dr. Compton began treating a licensed professional counselor Fatemeh Mina Klein ("Klein").[126] Klein, who was pleased with the individual mental health services, commenced couple group therapy with her husband, which was co-led by Drs. Compton and Lynn.[127] Klein's husband began a course of individual treatment with Dr. Lynn.[128] Klein was also mentored by the Drs. Compton and Lynn in the management of Klein's own professional practice.[129] Klein's individual therapy with Dr. Compton concluded in 1993 and the couple group therapy and professional mentoring continued until 1995, when the professional relationship between the Drs. Compton and Lynn

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[122] *Id.* at *4.

[123] Compton v. Dist. of Columbia Bd. of Psychology, 858 A.2d 470, 471 (D.C. 2004).

[124] *Id.* at 476.

[125] *Id.* at 471.

[126] *Id.*

[127] *Id.*

[128] *Compton*, 858 A.2d at 471.

[129] *Id.*

dissolved.[130] Thereafter, Klein had disclosed the sexual relationship with at least three other psychologists, one of them Dr. Lynn, while being treated.[131]

In 1997, Klein filed a civil suit complaint against Dr. Compton, alleging sexual misconduct constituting medical malpractice.[132] Two psychologists who treated Klein then filed a joint complaint with the Board alleging Dr. Compton with sexual harassment of a patient.[133] The Board held a preliminary hearing holding portions of Klein's deposition testimony from the 1997 civil suit should be allowed into evidence and held that Dr. Compton violated the standards of acceptable conduct; the Board adopted the ALJ's recommendation to revoke Dr. Compton's license to practice psychology.[134]

The issue before the court was whether the Board made its decision to revoke Dr. Compton's license from "substantial evidence" flowing rationally from record facts.[135] The court concluded that "the disputed hearsay evidence . . . was so central to the allegations of professional misconduct that, without more corroboration than was present here, the Board could not substantially rely on the deposition to support its decision to revoke Dr. Compton's license."[136]

The District of Columbia Appellate Court held that under the facts that Klein's unavailability to testify and Dr. Compton's denial of Klein's allegations, "the hearsay deposition in this case did not constitute evidence sufficiently substantial to support the revocation of Dr. Compton's license to practice psychology."[137] The court reversed the revocation order and remanded the case for further proceedings not inconsistent with this opinion." *Compton v. D.C. Bd. of Psychology, 858 A.2d 470 (D.C. 2004).*

Dentist's Use of "M.D." Designation After Attending Eight-Week Program At Foreign University Properly Regulated By the State

The Court of Appeals of Kansas ruled that the Johnson District Court (trial court) erred in denying the injunction sought by the State Board of Healing Arts (Board) against Steven Thomas, a licensed dentist, from attaching to this name the designation "M.D." and accordingly

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[130] *Id.*
[131] *Id.* at 471-72.
[132] *Id.* at 472.
[133] *Compton*, 858 A.2d at 472.
[134] *Id.* at 472, 475.
[135] *Id.* at 475.
[136] *Compton*, 858 A.2d at 471.
[137] *Id.* at 482.

reversed and remanded to the trial court for an injunction.[138] However, the Court of Appeals also found that the statutory scheme regulating the use of the "M.D." designation was nonetheless overbroad and ruled that the Board may constitutionally ban only the uses of the "M.D." designation that may potentially mislead the public, patients, hospitals, or other health care practitioners regarding the user's licensed or unlicensed status.[139] Finally, the statutory scheme did not violate his equal protection rights.[140]

Steven Thomas, licensed through the Kansas Dental Board (Dental Board) to practice dentistry, was authorized to treat and diagnose diseases of the mouth, prescribe medications for the same and possessed admitting and treating privileges at a hospital to perform various surgeries.[141] Mr. Thomas participated in an eight-week course and received a Doctor of Medicine degree from a University in the West Indies but did not seek formal medical licensing.[142] Nonetheless, Mr. Thomas utilized the designation "M.D." on hospital documents, on documents and orders in the care of his patients, his business cards, on his practice groups' website, as well as sought, and received, approval from both the Dental Board and the Secretary of State to include the designation on his respective corporate charters.[143] The Board sought an injunction, and when the trial court granted summary judgment in favor of Mr. Thomas, the State appealed.[144]

The Court of Appeals ruled that the Board had jurisdiction over Mr. Thomas's activities despite him not being a licensee because the Board had been delegated the authority to protect the public against the unqualified practice of medicine including those persons who hold themselves out to the public as a licensee.[145] Based on the statutory scheme regulating the use of the designation "M.D." and the stipulated facts on appeal, the Court of Appeals found that Mr. Thomas was in violation of a number of statutes for practicing medicine without a license, holding oneself out to the public as a licensed physician, and practicing medicine without a license.[146]

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[138] State *ex rel.* State Bd. of Healing Arts v. Thomas, 33 Kan. App. 2d 73 (Kan. Ct. App. 2004).

[139] *Id.* at 88-89.

[140] *Id.*

[141] *Id.* at 75-76.

[142] *Id.* at 75-77.

[143] *State*, 33 Kan. App. 2d at 76-81.

[144] *Id.* at 77.

[145] *Id.* at 77-79.

[146] *Id.* at 80 - 81.

Although the statutory scheme provided for injunctive relief, the trial court, in denying the injunction, determined that there was no public harm in using the designation "M.D."[147] Although noting Kansas precedent has previously required the showing of irreparable harm by the movant in seeking an injunction, the Court of Appeals distinguished the facts underlying the precedent and ruled the Board was excused from such a requirement.[148] Instead, the Court of Appeals adopted a Tenth Circuit substitute standard for irreparable harm which requires the showing that the defendants are engaged in actions prohibited by a statute which provides for injunctive relief and ruled that the Board so demonstrated.[149] Moreover, the Court of Appeals reasoned, irreparable harm by Mr. Thomas's actions occurred through his misleading the public, hospital staff, and by damaging the general esteem and reputation of the title.[150] Finally, the Court of Appeals concluded that the other requirements for an injunction were satisfied: (1) an action in law will not provide an adequate remedy due to what would be continued misleading of the hospital staff and the public, (2) the harm due to the misleading outweighed the harm to Mr. Thomas, and (3) the public interest would be served and not harmed.[151]

Mr. Thomas argued the proposed injunction would violate his constitutional rights to freedom of speech and equal protection under the law.[152] The Court noted that commercial speech is one area where the U.S. Constitution affords fewer protections such that the State may limit commercial speech that is fraudulent or deceptive.[153] However, Mr. Thomas argued that his use was not misleading because he, in fact, earned the degree and does not claim to be a physician.[154] The Court of Appeals rejected Mr. Thomas's argument, explaining that the public has come to associate the "M.D." designation with 4 years of graduate school, clinical training, and a residency program and thus Mr. Thomas's use of it after an eight-week course was misleading and can be appropriately restricted.[155] As for Mr. Thomas's non-commercial uses of the "M.D." designation on hospital and patient medical records, the Court of Appeals ruled that the Board met its burden of showing a compelling government interest in regulation due to possible

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[147] *Id.* at 81.
[148] *State*, 33 Kan. App. 2d at 81.
[149] *Id.* at 82.
[150] *Id.* at 83.
[151] *Id.*
[152] *Id.* at 84-85.
[153] *State*, 33 Kan. App. 2d at 85.
[154] *Id.*
[155] *Id.* at 86.

harm to the patient's health due to unjustifiable reliance in the designation.[156] The Court of Appeals similarly rejected Mr. Thomas argument that the least restrictive regulation, such as the use of a disclaimer, would suffice because such regulation would be administratively impossible to enforce to achieve the same public protections.[157] However, finding the statutory scheme overbroad because it prohibited every unlicensed individual's use of the "M.D." designation, the Court of Appeals judicially limited its application to those uses that may potentially mislead the public, patients, hospitals, or other health care practitioners of the user's licensed or unlicensed status.[158] Finally, the Court of Appeals rejected Mr. Thomas's equal protection claims due to the statute's rational relationship to the government's legitimate purpose of preventing the misleading use of the "M.D." designation.[159] *State ex rel. State Bd. of Healing Arts v. Thomas, 33 Kan. App. 2d 73 (Kan. Ct. App. 2004).*

MALPRACTICE

Malpractice Claim Preempted by Employee Retirement Income Security Act of 1974

The Court of Appeals for the Second Circuit affirmed the District Court for the Eastern District of New York's holding that malpractice claims brought by a widow of the deceased were preempted by the Employee Retirement Income Security Act of 1974 (ERISA).[160] The court based its holding on the rationale that neither the physician nor the health care company provided medical care to the deceased.[161] The court vacated its previous decision based on the United States Supreme Court's decision in *Aetna Health, Inc. v. Davila* and affirmed the entirety of the district court's decision of dismissal of the complaint.[162]

The insured widow originally sued her Health Maintenance Organization (HMO) in state court alleging breach of contract, bad faith, misrepresentation and negligence for failing to pay for the deceased's tandem double stem cell procedure for multiple myeloma.[163] The district court dismissed the widow's complaint, and this court

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[156] *Id.* at 85 - 88.
[157] *Id.* at 87.
[158] *State*, 33 Kan. App. 2d at 85.
[159] *Id.* at 88-89.
[160] Cicio v. Does, 385 F.3d 156 (2d Cir. 2004).
[161] *Id.* at 158.
[162] *Id.*
[163] *Id.*

reversed part of the judgment of the medical malpractice claims and remanded it back to the district court.[164] After the opinion was published, the Supreme Court decided *Aetna Health, Inc. v. Davila*, and the court directed the parties to submit supplemental briefs in light of *Aetna*.[165]

The court based its decision upon *Aetna*, and the holding from it that stated "any state-law cause of action that duplicates, supplements, or supplants [ERISA] ... conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."[166] Thus, the court determined that *Aetna* "fatally undermine[d]" the prior reasoning in this case.[167] As such, the court found that the district court did not err in dismissing the complaint.[168] Therefore, the court held that when neither the physician nor the health care company actually provides medical care to the patient, a malpractice claim will be completely preempted by ERISA.[169] *Cicio v. Does, 385 F.3d 156 (2d Cir. 2004).*

Physician, Medical Malpractice Insurance Company, and Patient's Health Maintenance Organization Not Liable For Failing to Order Procedure When Patient Had No Symptoms

The Court of Appeals of the Fourth Circuit affirmed the trial court's dismissal of the patient's physician and the physician's insurer from an alleged medical malpractice claim for the physician not ordering a mammogram.[170] The court reversed the trial court's refusal to dismiss the patient's health maintenance organization (HMO) for malpractice.[171] The court reversed in part and affirmed in part because the physician did not breach his standard of care in choosing not to order the mammogram and because no employment relationship existed between the patient's HMO, Travelers, and the physician.[172]

The patient saw her gynecologist, who recommended a mammogram but could not order under the patient's HMO because her breast exam was normal.[173] The patient then went to her primary care

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[164] *Cicio*, 385 F.3d at 156.
[165] *Id.*
[166] *Id.* at 158. (citing *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004).).
[167] *Id.*
[168] *Id.*
[169] *Cicio*, 385 F.3d at 158.
[170] Berthelot v. Stallworth, 884 So. 2d 648 (La. Ct. App. 2004).
[171] *Id.*
[172] *Id.* at 650 – 654.
[173] *Id.* at 650.

physician so that he could order the mammogram, but he would not order it because she had no objective symptoms and was under forty.[174] Three months later, the patient found a lump, which was cancerous.[175] The patient then sued the physician and his medical malpractice insurance for allegedly committing medical malpractice by refusing to order a mammogram, breaching the standard of care so that her cancer grew and spread.[176] The patient then filed an amended complaint to add her HMO as a party to the suit because the physician was its agent.[177]

The first issue the court addressed was whether the trial court was correct in finding Travelers liable for the physician's failure to order a mammogram.[178] Travelers appealed the judgment of $636,506.00 for the plaintiff because the physician was not its agent.[179] Travelers also asserted the trial court erred on the jury instruction about Louisiana HMO law requiring a baseline mammogram for any woman between thirty-five and thirty-nine.[180] The court held that the statute only requires an HMO to pay for a mammogram for a thirty-five year old woman if ordered by a physician.[181] Since the physician did not order a mammogram, Travelers did not violate the statute.[182] The court further held that the physician was not an agent of Travelers because it did not control the medical practice of the physician and did not proscribe how or when mammograms were ordered or administered.[183] Additionally, the court found the patient had used the physician before she was covered under Travelers, and she had the choice to change primary care physicians.[184] As such, the court held because no employment relationship existed between the physician and Travelers, Travelers could not be liable for the lack of a mammogram.[185]

The second issue the court addressed was whether the trial court erred in dismissing the physician and his medical malpractice insurer.[186] The patient appealed the directed verdict because she felt that the physician breached the standard of care by not ordering a baseline

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[174] *Id.*
[175] *Berthelot*, 884 So. 2d at 650.
[176] *Id.*
[177] *Id.* at 651.
[178] *Id.*
[179] *Id.*
[180] *Berthelot*, 884 So. 2d at 652.
[181] *Id.* at 652 -53.
[182] *Id.*
[183] *Id.* at 654.
[184] *Id.*
[185] *Berthelot*, 884 So. 2d at 648.
[186] *Id.*

mammogram for her when her gynecologist recommended it.[187] The court held the directed verdict in favor of the physician and the insurer was appropriate because the patient failed to carry her burden of proof regarding the standard of care in ordering a baseline mammogram.[188] *Berthelot v. Stallworth, 884 So. 2d 648 (La. Ct. App. 2004).*

NEGLIGENCE

Physician Found Negligent For Not Properly Diagnosing Her Patient, Although Proximate Causation and Damages Unclear Due to Evidence Erroneously Not Admitted

The Supreme Court of Virginia affirmed the Circuit Court of the City of Fredericksburg's holding that the physician and her employer were negligent for not examining Allen after he complained of aches and numbness from his anti-anxiety medication prescribed by the physician.[189] The court upheld the trial court's decision because the trial court's refusal to allow the physician to cross-examine Allen about specifics acts of alleged untruthfulness and to limit the cross examination of his expert witnesses by the physician was appropriate.[190] The court did remand the case for a new trial on the issues of proximate cause and damages because of the trial court's failure to allow the physician to cross-examine Allen about his wife to show evidence of other reasons for his suicide attempt.[191]

Allen met with the physician and informed her that he had experiences mild anxiety.[192] The physician switched him to a different anti-anxiety medicine than the one he was on.[193] A few days later, Allen telephoned the physician to let her know that he was experiencing numbness and muscle aches.[194] He spoke with a receptionist who told him he was possibly experiencing side-effects from the medication and he should decrease the dosage, which he did.[195] He still experienced problems, and again called the physician's office, once again speaking to the receptionist.[196] Allen then met with the

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[187] *Id.* at 651.
[188] *Id.* at 654.
[189] Gamache v. Allen, 601 S.E.2d 598 (Va. 2004).
[190] *Id.* at 602-3
[191] *Id.* at 603.
[192] *Id.* at 599.
[193] *Id.*
[194] *Gamache*, 601 S.E.2d at 599.
[195] *Id.*
[196] *Id.*

physician and related his symptoms to her, but the physician did not believe that it constituted an emergency.[197] The problems continued, and he eventually went to the emergency room where he was diagnosed as having transverse myelitis, an inflammation of the spinal cord.[198]

Allen alleged that he had depression from the spinal dysfunction, along with the physical problems, resulting from the physician's negligence.[199] Allen further alleged the loss of function caused him to attempt to commit suicide.[200] The jury returned a verdict in favor of Allen against the physician and her employer in the amount of $6.5 million, which the trial court reduced to $1.55 million.[201] The physician and her employer appealed, arguing that Allen's wife allegedly used narcotics and performed acts of self-mutilation on herself, and his suicide was caused by these acts rather than the physician's negligence.[202]

The court mainly addressed whether the trial court erred in disallowing the evidence about Allen's wife as a possible reason for his suicide.[203] The court found that the jury was entitled to consider evidence, such as this, because it was relevant and may have had some impact on Allen's attempted suicide.[204] Thus, the trial court "abused its discretion" in failing to permit the evidence about Allen's wife into the trial, and the issues of proximate cause and damages were remanded for a new trial.[205]

The next issues the court addressed was whether evidence of Allen's alleged untruthfulness was incorrectly inadmissible at the trial and whether the trial court erroneously limited the scope of the physician's cross examination of Allen's witness.[206] The court found that the evidence was based on specific acts, and held that the trial court correctly refused to allow evidence of Allen's veracity because evidence about specific acts to attack a plaintiff's veracity does not follow precedent.[207] The further found that the cross examination of Allen's witness by the physician was correctly limited due to the accuracy of the witness's observations on Allen's pain.[208] Thus, the

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[197] *Id.*
[198] *Id.* at 600.
[199] *Gamache*, 601 S.E.2d at 600.
[200] *Id.*
[201] *Id.* at 600-1.
[202] *Id.* at 601.
[203] *Id.* at 601-2.
[204] *Gamache*, 601 S.E.2d at 601.
[205] *Id.*
[206] *Id.* at 602.
[207] *Id.*
[208] *Id.* at 602-3.

court ultimately held the physician and her employer breached the standard of care owed to Allen and the above alleged errors were not errors challenging the trial court's finding of negligence.[209] *Gamache v. Allen, 601 S.E.2d 598 (Va. 2004).*

Doctor Did Not Deviate From the Standard of Care When Plaintiff's Child Was Born With Defects and Doctor Ordered Several Tests to Rule Out Possible Medical Problems

Plaintiff, individually and on behalf of her minor son, Arkel, appeals the jury verdict in favor of her defendant physician, which found he did not commit medical malpractice.[210] Plaintiff's child suffers from severe birth defects from exposure to testing administered by defendant physician.[211] Plaintiff's motion for a judgment notwithstanding the verdict was denied and the Court of Appeals of Louisiana affirmed that decision.[212]

Plaintiff was defendant physician's patient for six years and defendant had already delivered plaintiff's first child in 1991.[213] Due to plaintiff's complaints of severe abdominal pains, defendant ordered a pregnancy test, which was negative.[214] Defendant also ordered ultrasounds, one discovered a cyst on her left ovary, and another was administered to monitor it.[215] No evidence of pregnancy was found until the end of April in 1995.[216] Plaintiff never discussed her sexual activity with defendant and at each of her appointments in April of 1995 she signed an acknowledgement stating she was not pregnant and had no reason to think she was pregnant.[217] Defendant physician warned plaintiff about the dangers of x-rays to her unborn child once he discovered she had been exposed to radiation during pregnancy.[218] Several other physicians testified as to whether defendant physician's care for plaintiff patient used the reasonable standard of care.[219]

The only issue presented to the jury was whether defendant physician should have given plaintiff patient a pregnancy test before

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[209] *Gamache*, 601 S.E.2d at 603.
[210] Brown v. Stickley, 886 So. 2d 515, 515 (La. Ct. App. 2004).
[211] *Id.* at 517.
[212] *Id.*
[213] *Id.* at 518.
[214] *Id.*
[215] *Brown*, 886 So. 2d at 518.
[216] *Id.*
[217] *Id.* at 519, 20.
[218] *Id.* at 520.
[219] *Id.* at *15.

ordering tests that exposed the fetus to radiation. [220] The court looked at how defendant physician kept documentation and why he ordered certain testing for plaintiff to determine if the denial of plaintiff's motion for a judgment notwithstanding the verdict was in error.[221]

The court held reasonable people and professionals could find defendant's choice of testing and care did not deviate from the accepted standard of care.[222] Defendant doctor administered tests he felt appropriate to discover the medical problems from which plaintiff suffered.[223] The court believed defendant only realized in hindsight that certain tests were medically unnecessary and as a result, the judgment in favor of defendant physician was affirmed with costs of the appeal assessed to plaintiff.[224] *Brown v. Stickley, 886 So. 2d 515, 515 (La. Ct. App., 2004).*

PATENTS

Patent was Valid and Enforceable Without Clear and Convincing Evidence of Anticipation, Obviousness and Inequitable Conduct

The District Court for the District of Delaware held Aventis' patent for riluzole, a chemical compound used in the treatment of amyotrophic lateral sclerosis (ALS), valid and enforceable and that parts of the patent were infringed upon by Impax's proposed manufacture and sale of riluzole.[225] In the opinion, the Court promptly resolved the evidentiary disputes raised by both parties before focusing on the validity and enforceability of the patent.[226] Additionally, both parties asked the court to award the prevailing party attorney's fees; the Court denied this request, finding that there was no evidence of bad faith on either side in litigating this case.[227]

First, the Court examined the validity of the patent.[228] When a patent is issued, it is presumed to be valid.[229] Impax, to prove the patent invalid, had to show either it was anticipated or obvious by clear and

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[220] *Brown*, 886 So. 2d at 523.
[221] *Id.* at 522.
[222] *Id.* at 523.
[223] *Id.*
[224] *Id.*
[225] Impax Lab., Inc. v. Aventis Pharm., Inc., 333 F. Supp. 2d 265, 268 (D. Del. 2004). ALS is a fatal disease of the central nervous system more commonly known as Lou Gehrig's disease. *Id.*
[226] *Id.* at 269-283.
[227] *Id.* at 284.
[228] *Id.* at 270.
[229] *Id.* at 271.

convincing evidence.[230] A patent is anticipated when the subject matter previously existed, and can be found in prior references, and when it is recognized "by persons of ordinary skill in the field of the invention."[231] Impax presented three other patents to prove anticipation, but the Court felt none of them addressed riluzole's effectiveness in treating ALS and, therefore, they did not anticipate the patent at issue.[232] The Court moved onto the question of obviousness.[233] Multiple factors determine whether a patent is invalid as obvious, including scope, content, and skill level of prior art, the differences between the patent and prior art, and industry acceptance of patent as valid.[234] Impax introduced the patents mentioned above, articles and testimony, to prove the patent was obvious, all of which the Court dismissed for failure to prove obviousness by clear and convincing evidence.[235] The Court also dismissed Impax's final argument for the patent's invalidity, that the patent named incorrect inventors, as speculative and without evidence.[236] Therefore, the patent was found to be valid.[237]

The Court moved onto the second issue, that of enforceability.[238] A patent is unenforceable when a party establishes, by clear and convincing evidence, that inequitable conduct, including bad faith and dishonesty, occurred when filing a claim for a patent.[239] The parties here disputed the material standard the Court should have used to examine the patent, arguing for either an equitable principle standard or using Patent and Trademark Office (PTO) rules. Federal Circuit Courts have not ruled as to which standard should be applied but this Court held Impax's claim of inequitable conduct would fail under either standard.[240] Impax presented two articles, test data, a letter from the FDA, an editorial critical of the Aventis's Test results for riluzole, and information concerning the acceptance of a theory on which the patent was based.[241] Impax claimed Aventis' deliberately withheld this information with the intent of misleading the PTO.[242] However, the

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[230] *Impax*, 333 F. Supp. 2d at 271.
[231] *Id.*
[232] *Id.* at 271-73.
[233] *Id.* at 274.
[234] *Id.*
[235] *Impax*, 333 F. Supp. 2d at 276.
[236] *Id.*
[237] *Id.* at 284.
[238] *Id.* at 277.
[239] *Id.*
[240] Impax, 333 F. Supp. 2d at 277.
[241] *Id.* at 277-283.
[242] *Id.* at 282.

Court felt none of this evidence proved, by clear and convincing evidence, Aventis's intent to deceive the PTO, thus there was no inequitable conduct and the patent is enforceable.[243]

Impax had filed an Abbreviated New Drug Application with the U.S. Food and Drug Administration, seeking approval to manufacture and distribute riluzole for the treatment of ALS.[244] Aventis's patent was found to be valid and enforceable.[245] Therefore, Impax's intent to manufacture and sell riluzole infringed upon their patent and was not allowed.[246] *Impax Lab., Inc. v. Aventis Pharm., Inc., 333 F. Supp 2d. 265 (D. Del. 2004).*

REFUSAL OF TREATMENT

14th Amendment Protects Inmate's Right to Refuse Treatment

The United States District Court for the Southern District of New York, hearing cross-motions for summary judgment, granted defendant, state-contracted physician's (hereinafter physician) motion for summary judgment and denied plaintiff, inmate's motion for summary judgment on the inmate's Section 1983 claim that the physician's deliberate indifference to the inmate's serious medical needs caused an unnecessary and wanton infliction of pain in violation of his Eighth Amendment right to be free from cruel and unusual punishment.[247] The court also denied both the physician's and the inmate's motions for summary judgment on the inmate's Section 1983 claim that the physician violated his Fourteenth Amendment substantive due process rights by violating his liberty interest in freedom from unwanted medical treatment and the inmate's claim of battery against the physician.[248] Finally, the court ruled that the physician could not be granted summary judgment on the basis of qualified immunity.[249]

The inmate, with a history of urological problems, initially saw the physician for continued treatment of his kidney stones and for removal of a ureteral stent (stent 1) because it had become infected.[250]

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[243] *Id.* at 282, 284.
[244] *Id.* at 268-69.
[245] *Impax*, 333 F. Supp. 2d at 284.
[246] *Id.* at 284.
[247] Brown v. Ionescu, 2004 U.S. Dist. LEXIS 18873 at *14 (S.D.N.Y. 2004).
[248] *Id.* at *17-*20.
[249] *Id.* at *19-*22.
[250] *Id.* at *3-*4. "The Oxford English Dictionary defines "ureter" as "either of the fibro-muscular tubes or vessels which convey the urine from the pelvis of the

The physician removed stent 1 and implanted a new stent (stent 2).[251] Later, the inmate, complaining of more pain and obstruction, was diagnosed with another kidney stone and was informed that surgery was necessary to remove the stone, remove stent 2 because it had become infected, and implant another ureteral stent (stent 3).[252] The inmate alleged that he informed the physician that he would not undergo surgery if a new stent was implanted and that he received assurances from the physician that no stent would be implanted during the surgery.[253] However, after discovering stent 3 was implanted during the surgery, the inmate filed Section 1983 actions against the state-contracted physician for violation of his Constitutional rights, and before the court were both the inmate's and physician's motions for summary judgment.[254]

In order for the inmate to sustain a claim for deliberate indifference to serious medical needs, the court explained, the inmate must allege facts sufficient to satisfy an objective component, a serious medical condition, and a subjective component, deliberate indifference.[255] The physician did not dispute the inmate's condition would likely satisfy the objective requirement, however, the court explained, the inmate failed to assert that the physician disregarded his condition in order to satisfy the subjective requirement.[256] However, since the inmate alleged the physician implanted stent 3 despite the inmate's refusal, the court concluded that the inmate's claim constituted a Fourteenth Amendment claim for violation of his right to refuse unwanted medical treatment.[257] Thus, the court denied the inmate's motion for summary judgment and granted the physician's motion for summary judgment as to the inmate's Eighth Amendment deliberate indifference claim.[258]

The court explained that although the inmate's right to be free from unwanted treatment is protected by the Fourteenth Amendment, there are instances where the state's interest in providing a safe and secure environment outweighed the inmate's liberty interests, not to mention the state also has a constitutional duty to provide adequate

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kidney to the bladder, a urinary duct"). *Id.* at *2. A ureteral stent eases the removal of kidney stones. *Id.* at *5-*6.

[251] *Id.* at *4-*5.

[252] *Ionescu*, 2004 U.S. Dist. LEXIS 18873 at *4-*5.

[253] *Id.* at *5.

[254] *Id.* at *5-*6.

[255] *Id.* at *11-*12.

[256] *Id.* at *12-*13.

[257] *Ionescu*, 2004 U.S. Dist. LEXIS 18873 at *13.

[258] *Id.* at *14.

medical treatment.[259] Since neither party produced evidence as to whether the inmate refused stent 3 or whether or not stent 3 was urgent or necessary in favor of the state's interests, the court concluded material facts were in dispute and denied both parties motion for summary judgment.[260] In addition, the court concluded that the inmate's complaint outlined a cause of action for battery because a battery can occur when a physician operates in spite of not being authorized by the patient to do so.[261] Thus, the inmate's claim depended on of whether or not the inmate refused to consent to the implantation of stent 3, which would have made the physician's undisputed implantation of stent 3 unauthorized.[262] Because the inmate's consent was a disputed material fact, the court denied both party's motions for summary judgment as to the inmate's state claim.[263]

The court also denied the physician's motion for summary judgment on the grounds that he had qualified immunity.[264] Qualified immunity does not apply if the state actor's actions are clear violations of statutory or constitutional rights that a reasonable person would have known were being violated.[265] The court reasoned that the right to refuse unwanted medical treatment had been long established, a reflection of medical ethics, and, assuming the inmate's allegations were true, simply not reasonable for the physician to believe he was not violating the inmate's rights.[266] *Brown v. Ionescu*, 2004 U.S. Dist. LEXIS 18873 (S.D.N.Y. 2004).

REPRODUCTIVE RIGHTS

Right of Privacy Recognized In Indiana's Constitution: Constitutionality of Mandated Disclosure and Waiting Period In Statute Regulating Abortion In Question

The Court of Appeals of Indiana ruled that the Indiana State Constitution supports and protects a right of privacy for all Indiana citizens, including women seeking to obtain an abortion, and thus reversed and reinstated the Marion Superior Court's (hereinafter trial court) dismissal of a complaint filed by the Clinic for Women

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[259] *Id.* at *14-*16.
[260] *Id.* at *16-*17.
[261] *Id.* at *18.
[262] *Ionescu*, 2004 U.S. Dist. LEXIS 18873 at *18-*19.
[263] *Id.* at *19.
[264] *Id.* at *22.
[265] *Id.* at *19-*21.
[266] *Id.* at *20-*22.

(hereinafter Clinic) alleging Indiana's statutory informed consent requirements for women seeking to obtain abortions (hereinafter informed consent statute) violated Indiana's State Constitution.[267] Furthermore, the Court of Appeals ruled that the free speech protections of the Indiana State Constitution extends to the right to refrain from speaking but that informed consent statute at issue did not unconstitutionally infringe on these rights.[268]

The informed consent statute required both mandatory in-person counseling, where the abortion provider is required to orally convey information specified in the statute, as well as an eighteen-hour waiting period before obtaining an abortion.[269] The Clinic, an abortion provider, sought an injunction against enforcement of the statute on the grounds that it violated the Indiana Constitution.[270] The trial court granted the State's motion to dismiss for failure to state a claim and the Clinic appealed.[271]

The Clinic argued that the informed consent statute's dual requirements, which essentially force a woman to make two trips to the abortion provider, effectively prevented women who live in rural areas of Indiana from obtaining abortions because of the distance they must travel to gain access.[272] Although not specifically mentioned in the text of Article 1, Section 1 of Indiana's State Constitution, the Court of Appeals found the right of privacy therein based on its importance to other rights guaranteed by the Indiana State Constitution and the implicit assumption that it existed therein through judicial interpretation and by legislative action.[273] In addition, the Court of Appeals ruled that such right of privacy extended to the right of Indiana citizens to make decisions about the health and integrity of their minds and bodies, including the decision to terminate pregnancy, and that, based on the history of the Indiana State Constitution, such a right is a core value of the Indiana State Constitution such that a legislature mustn't "materially burden" it.[274]

The Court of Appeals ruled that the trial court erred in its ruling that, as a matter of law, the informed consent statute did not "materially burden" a women's access to an abortion which is equivalent to "materially burdening" the core constitutional value of

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[267] Clinic for Women, Inc. v. Brizzi, 814 N.E.2d 1042, 1044 (Ind. Ct. App. 2004).
[268] *Id.*
[269] *Id.* at 1045.
[270] *Id.* at 1046.
[271] *Id.*
[272] *Clinic for Women,* 814 N.E.2d at 1046.
[273] *Id.* at 1047-1049.
[274] *Id.* at 1048-1051.

privacy underlying their right to obtain an abortion.[275] Thus, the Court of Appeals concluded, the Clinic should be allowed to present evidence on the nature and severity of the burden imposed by the statute's dual requirements.[276]

The Clinic also alleged that the informed consent statute violated the Indiana's Constitution's freedom of speech provision by compelling speech because the Indiana legislature lacked authority to force it to do so without showing that the compelled speech is necessary to avoid abuse and that such compulsion "materially burdens" the core constitutional value of political/ideological speech.[277] The Court of Appeals ruled, on an issue of first impression, that Indiana's Constitution not only protects the prevention of speech but its compulsion as well, following both the extension of the U.S. Constitution to protect the same but also the more expansive interpretations given to Indiana's free speech protections.[278] Addressing the Clinic's arguments, the Court of Appeals ruled that the State had no affirmative burden of proving an enacted statute was necessary to prevent an abuse, instead, it is presumed constitutional unless proven otherwise by a challenger.[279] The Court of Appeals also ruled that the content of the mandatory disclosure was not political speech and declined to expand the definition to ideological speech.[280] Instead, the Court of Appeals upheld the mandated disclosure as a valid exercise of the State's Police Power.[281] *Clinic for Women, Inc. v. Brizzi, 814 N.E.2d 1042, 1044 (Ind. Ct. App. 2004).*

STATUTE OF LIMITATIONS

Complaint Dismissed For Lack of Diligence of Service When Defendants Were Served Five Months After Complaint Was Filed

The Appellate Court of Illinois, First District, Fifth Division affirmed the Illinois Circuit Court's decision to dismiss a medical malpractice complaint with prejudice because of failure to exercise reasonable diligence to obtain service.[282] The requirement to file an Illinois Code of Civil Procedure Section 2-622 report affidavit does not affect

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[275] *Id.* at 1051-1053.
[276] *Id.*
[277] *Clinic for Women,* 814 N.E.2d at 1054-1055.
[278] *Id.* at 1053-1054.
[279] *Id.* at 1054-1055.
[280] *Id.* at 1055-1057.
[281] *Id.* at 1056-1058.
[282] Lewis v. Dillon, 352 Ill. App. 3d 512, 520 (Ill. App. Ct. 2004).

plaintiff deceased estate's burden to exercise reasonable diligence in serving all Hospital and medical personnel defendants.[283] The court affirmed Defendants Motion for Dismissal for Lack of Diligence and Plaintiff's ("Lewis") failure to exercise reasonable diligence to obtain service during the five-month period between the filing of the complaint and the issuance of summons.[284]

Lewis brought a medical malpractice action against the University of Chicago Hospitals and medical personnel who treated his deceased wife, who died December 27, 1999.[285] The medical malpractice complaint was filed on December 21, 2001, shortly before the two-year' statute of limitations period had run.[286] Because Lewis was unable to file a mandatory health practitioner's report (Section 2-622) within the two year statute of limitations, he filed an affidavit to permit a 90-day extension to file the report.[287] On March 18, 2002, Lewis filed the practitioner's report.[288] On May 16, 2002, five months after the filing of the complaint and after the statute of limitations had run, Lewis issued his first summons on one of the defendants.[289] The earliest service was effected May 31, 2002.[290] Following service, defendants filed motions to dismiss based Lewis's failure to exercise reasonable diligence to obtain service.[291]

The issue before the court was when a medical malpractice complaint is a "viable" report.[292] The Appellate Court of Illinois quoted the trial court when it stated in part "once a complaint is signed by an attorney and filed with the court, the affixation of counsel's signature on the pleading constitutes a certification by that attorney. . . . This is sufficient to prosecute the lawsuit."[293]

The court held that the requirement to file a section 2-622 affidavit for medical malpractice cases does not affect plaintiff's burden to exercise reasonable diligence in serving all defendants.[294]

Lewis's proposed practice of "what they don't know won't hurt them" would deny defendants the right to know that they have been

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[283] *Id.*
[284] *Id.* at 716-7.
[285] *Id.* at 513.
[286] *Id.* at 514.
[287] *Lewis*, 352 Ill. App. 3d at 520.
[288] *Id.*
[289] *Id.* at 515.
[290] *Id.*
[291] *Id.* at 514.
[292] *Lewis*, 352 Ill. App. 3d at 514.
[293] *Id.* at 518-9.
[294] *Id.* at 520.

named in a lawsuit and the protection of Supreme Court Rule 103(b).[295] Specifically, the Appellate Court noted that, "under plaintiff's reasoning, a party would be permitted to file a lawsuit naming a defendant, not issue summons to that defendant advising him or her if the claim, and then, at some later date, dismiss the defendant due to the inability obtain a section 2-622 report.[296] The Court affirmed the trial court's judgment dismissing Lewis's complaint with prejudice, pursuant to Rule 103(b). *Lewis v. Dillon, 2004 Ill. App. LEXIS 1060at *19 (Ill App. 2004).*

Two Year Statute of Limitations For Intentional Infliction of Emotional Distress and Outrage

The Supreme Court of Kansas answered two certified questions of law regarding the state's statute of limitations on a claim for outrage and intentional infliction of emotional distress.[297] The court held the statute of limitations for a claim of outrage an intentional infliction of emotional distress was two years, and therefore did not address whether a one year limitation would apply retroactively or prospectively.[298]

Plaintiffs were three daughters of their deceased father.[299] Plaintiffs contended the defendant Mercy Health Center of Manhattan had employees who obtained consent from Kunz for organ and tissue donation for certain parts of their father's body.[300] The hospital harvested the deceased's eyes and bone marrow for monetary gain and in an effort to comply with quotas.[301] The hospital's employees obtained consent for the donation on the basis that Kunz was the common law wife of the deceased.[302] However, no such relationship existed and the employees never asked the plaintiffs about the marital status of their father.[303]

Plaintiffs sought damages under several claims including the intentional infliction of emotional distress and outrage.[304] The hospital claimed the state's statute of limitations barred the plaintiffs' claim for

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[295] *Id.*
[296] *Id.*
[297] Hallam v. Mercy Health Ctr. of Manhattan, Inc., 278 Kan. 339, 345 (Kan. 2004).
[298] *Id.*
[299] *Id.* at 339
[300] *Id.*
[301] *Id.* at 340.
[302] *Hallam,* 278 Kan. at 340.
[303] *Id.*
[304] *Id.*

intentional infliction of emotional distress and outrage.[305] The defendant referred to the state act which requires action for assault to be limited to one year.[306] The defendant argued the nature of the charge was similar to the intentional tort of common law assault and was therefore subject to a one year statute of limitation.[307]

The plaintiffs argued the applicable statute of limitation period was two years from the time the action accrues, and therefore their claim for intentional infliction of emotional distress was not barred.[308] The plaintiff referred to the state act which required actions for injury to the rights of another to be brought within two years.[309]

The court found the statute of limitations for outrage was two years.[310] The state courts have applied the limitation to a medical practitioner's mishandling of a corpse at least since decisions made in 1937.[311] The answer to the first certified question was that the statute of limitations on a claim of outrage and intentional infliction of emotional distress was two years.[312] Therefore, the court held the second question speculating on the application of a one year limitation was moot.[313] *Hallam v. Mercy Health Ctr. of Manhattan, Inc., 278 Kan. 339 (Kan. 2004).*

TAXATION

Non-Profit Hospital's Child Care Center Must Satisfy "Reasonably Necessary" Test In Order to Be Exempt From Property Tax

The Court of Appeals of Wisconsin, District Four, reversed the circuit court's grant of summary judgment against plaintiff, St. Joseph's Hospital of Marshfield (Hospital), and remanded the case giving the hospital the burden of showing the percentage of children in the center that were children of clinic employees who directly or indirectly provided diagnosis, treatment, or care to hospital patients.[314]

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[305] *Id.*
[306] *Id.* at 341.
[307] *Hallam,* 278 Kan. at 341.
[308] *Id.* at 340.
[309] *Id.*
[310] *Id.* at 345.
[311] *Id.* at 344-5.
[312] *Hallam,* 278 Kan. at 345-6.
[313] *Id.* at 346.
[314] St. Joseph's Hosp. of Marshfield, Inc. v. City of Marshfield, 2004 WI App 187 (Wis. Ct. App. 2004).

In 1999, Hospital constructed a stand-alone building near some Hospital and Marshfield Clinic ("Clinic") employee parking to house its child care center.[315] The child care center is available to both Hospital employees and Clinic employees.[316] The Hospital employs a private company, Bright Horizons, to operate the child care center.[317] Five percent of the spaces in the child care center are reserved for the children of Bright Horizon employees who work at the center.[318]

The issue before the court was whether a non-profit hospital's child care facility is exempt from property tax.[319] The Court used the "reasonably necessary" test to determine whether the property and its use is a 'reasonable necessity to the efficient functioning of the hospital as an organization' in order for a property tax exemption.[320]

The Court noted similarity in a sister case where the Supreme Court of Wisconsin held that a hospital-owned residence, located near the hospital and occupied by the hospital's chaplain, qualified for an property tax exemption.[321] The Court concluded that the benefit to the Hospital is sufficient under the "reasonably necessary" test.[322] The Court reversed and remanded to the lower court to determine what percentage of the children in the center are children of Clinic employees who directly or indirectly provide diagnosis, treatment, or care to Hospital patients. *St. Joseph's Hospital of Marshfield, Inc., v. City of Marshfield, 2004 WI App 187* (Wis. Ct. App. 2004).

WRONGFUL DEATH

Plaintiff Need Only Allege Contributing Cause, not Actual Cause, in Negligence Action

The United States District Court for the District of Kansas denied a physician's motion for partial summary judgment.[323] The court ruled that genuine issues of material fact remained as to whether the physician's actions contributed to the cause of the patient's death and

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[315] *Id.* at *2.
[316] *Id.* at *2-3.
[317] *Id.* at *3.
[318] *Id.*
[319] *Saint Joseph's,* 2004 WI App at *5.
[320] *Id.* at *8.
[321] *Id.* at *13-14.
[322] *Id.* at *23.
[323] Estate of Cox v. Davis, 2004 U.S. Dist. LEXIS 18554, at *1 (D. Kan. 2004).

that the standard for medical negligence was only a contributing cause, not the actual cause, as suggested by the physician.[324]

After sustaining injuries in a motor-vehicle accident, the patient arrived at an emergency room in Kansas, where the defendant-physician ordered X-rays of the patient's cervical, thoracic, and lumbar spine.[325] The X-rays allegedly revealed a fracture of the thoracic spine, which the physician allegedly failed to diagnose.[326] The physician discharged the patient, but the patient returned the next day and was diagnosed with a thoracic spine fracture, the complications of which resulted in the patient's death.[327]

The physician moved for partial summary judgment, relying on deposition testimony of the plaintiff's expert witness, who stated that the physician failed to diagnose the fracture but did not technically have a hand in the patient's death.[328] The court stated that a plaintiff must show a causal nexus between the breach of the physician's duty and the plaintiff's injury,[329] and the deposition testimony was sufficient to create a genuine issue of material fact for trial.[330] *Estate of Chester Cox v. Davis, No. 03-2507-GTV (Kan. Sept. 14, 2004).*

Wrongful Death Action Against Nursing Home Not Barred by Statute of Limitations When Alleged Negligence Was Revealed Upon Death Investigation

The Court of Appeals of Tennessee at Knoxville vacated the trial court's dismissal of the plaintiff's wrongful death action against the defendant nursing home.[331] It ruled that the plaintiff's causes of action were not barred under Tennessee's statute of limitations and remanded the case for further proceedings.[332]

The decedent was admitted into the defendant nursing home facility for rehabilitation after surgery, with a history of hypertension, diabetes, urinary tract infection.[333] The decedent died four days later, apparently as a result of "massive infection febrinopurlent pericarditis

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[324] *Id.* at *9.
[325] *Id.* at *2.
[326] *Id.*
[327] *Id.*
[328] *Cox*, 2004 U.S. Dist. LEXIS 18554, at *7.
[329] *Id.* at *5.
[330] *Id.* at *9.
[331] Puckett v. Life Care of America, No. E2004-00803-COA-R3-CV, 2004 Tenn. App. LEXIS 622, at *2 (Tenn. App. Sept. 24, 2004).
[332] *Id.*
[333] *Id.*

with cardiac constriction." Exactly one year after decedent's death, her husband filed suit against the nursing home. The nursing home moved to dismissed based on the tolling of the one-year statute of limitations;[334] the plaintiff responded that he believed the nursing home was taking proper care of his wife and did not become aware of the defendant's negligence until he reviewed her medical records.[335]

The court first considered whether the trial court erred in determining that the statute of limitations necessitated granting the Defendant's motion to dismiss."[336] The court noted that its jurisdiction observed a one-year statute of limitations from the discovery of the injury.[337] It ruled that neither the decedent nor the plaintiff could have reasonably discovered the injury until the decedent's death, if not later.[338] It further ruled that the defendant could not separate the wrongful death action into different parts, each with a different statute of limitations.[339] Having reversed the trial court's granting of the defendant's motion to dismiss, the court did not reach the issue of whether the trial court erred when it refused to grant Plaintiff's Rule 60 motion for relief.[340] *Puckett v. Life Care of America, No. E2004-00803-COA-R3-CV, 2004 Tenn. App. LEXIS 622, at *2 (Tenn. App. Sept. 24, 2004).*

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[334] *Id.* at *4.
[335] *Id.* at *5.
[336] *Puckett*, 2004 Tenn. App. LEXIS 622, at *6.
[337] *Id.* at *11.
[338] *Id.* at *13.
[339] *Id.*
[340] *Id.* at *15.