Case Briefs

DePaul College of Law

Follow this and additional works at: https://via.library.depaul.edu/jhcl

Recommended Citation
DePaul College of Law, Case Briefs, 3 DePaul J. Health Care L. 335 (2000)
Available at: https://via.library.depaul.edu/jhcl/vol3/iss2/7

This Case Briefs is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mccllre@depaul.edu.
Company Filing Bankruptcy Must Have Sufficient Time to Unwind Before Being Obligated to Return Stock Stipulated in a Prior Sales Agreement

The United States Bankruptcy Court of Pennsylvania, held that physicians who sold their shares in a professional corporation to a Chapter 7 debtor did not have superior rights to that stock.¹

Stock in plaintiff's professional corporation was sold to defendant corporation by way of a Stock Agreement.² Defendant subsequently discovered state law prohibited business corporations from purchasing stock in professional corporations.³ Defendant amended plaintiff's articles of incorporation to form a business corporation in order to make the stock purchase legal.⁴ The sale of the stock was contingent upon defendant achieving an investment benchmark of $30,000,000 to fund the consolidated practice group.⁵ Plaintiff further stipulated if the investment benchmark could not be met by specified date, the sale would be void, permitting the plaintiff to regain its stock.⁶ Defendant did not reach that benchmark and plaintiff requested the purchase agreement be cancelled and the stock returned.⁷ However, when defendant filed Chapter 11 bankruptcy thirty days later, stock had yet to be returned to plaintiff.⁸ At issue were the assets generated between the period of time when plaintiff demanded return of the stock and when the defendant filed bankruptcy, and which company was actually in control during that time frame.⁹

²See id. at 107.
³See id.
⁴See id.
⁵See id.
⁷See id. at 108.
⁸See id. at 105.
⁹See id. at 109.
The court cited a generally recognized principle of state law requiring recovery of stock before control of the corporation can occur. The court also stated, in order for plaintiff to recover stock, defendant must be given enough time to complete the corporate formality of unwinding, and one month, as was the case here, was not sufficient time for defendant to complete the process. The court thus held defendant had a greater interest in the proceeds generated in the time frame between plaintiff demanding return of the stock and defendant filing bankruptcy. In re U.S. Physicians, Inc., 238 B.R. 103 (1999).

CONTRACT

When the Medical History of an Adoptive Baby is Incomplete and Unknown, the Agency Will Not Be Held Liable for Medical Problems

The Court of Appeals of Minnesota held that the agency was not liable for breach of contract, violation of statute, negligent misrepresentation, or intentional infliction of emotional distress when a prospective adoptive baby died of sudden infant death syndrome (SIDS) and also was found to be HIV positive.

Plaintiffs, prospective parents, began an adoption process of a newborn baby girl through the defendant’s adoption agency. Shortly after birth, the baby died of SIDS and was found to be HIV positive. Plaintiffs filed for breach of adoptive contract against the adoption agency, based on the fact that defendant knew or should have known of

---

10 See id. at 111.
12 See id.
14 See id.
15 See id.
the child’s HIV status prior to her release from the hospital. Defendant filed a cross-motion for summary judgment that was granted by the trial court and plaintiffs appealed.

The court was faced with four issues. The first issue was whether the agency breached the contract by failing to disclose the medical history of the baby and her mother. Second, was whether the agency violated the statute by failing to complete the medical history form. Third, did the agency owe the prospective parents a legal duty. Fourth, was the agency liable for intentional infliction of emotional distress.

The court held that the agency was not liable for breach of contract, violation of statute, negligent misrepresentation, intentional infliction of emotional distress, and did not owe the parents a legal duty. The court concluded that there was no evidence that the agency was aware of any medical problems of the adoptive baby. The court articulated its belief that defendant agreed to provide the prospective parents with a child with unavailable medical records. Furthermore, there was no evidence that the birth mother was aware that she was HIV positive, nor was there evidence that the agency was untruthful in its representation of the baby to the prospective parents. Although the defendant informed plaintiffs that the newborn baby girl was “healthy,” there was nothing to indicate that defendant did not believe this to be true. Additionally, the court concluded that the hospital did not exhibit any tortious conduct; therefore was not liable for intentional

---

16 See id.
17 See id.
18 See Montavon, 1999 W.L. 639306 at *2.
19 See id.
20 See id.
21 See id. at *3.
22 See id.
23 See Montavon, 1999 W.L. 639306 at *3.
24 See id. at *1.
25 See id. at *2-3.
26 See id. at *2.

---

**CRIME**

Defendant's Act of Stealing Morphine from Her Patients with Reckless Disregard and Extreme Indifference Was Enough to Qualify as Tampering and Prescription Fraud Under the Statute

The United States Court of Appeals, Eighth Circuit, held that defendant's act of stealing morphine from her critically ill patients violated the tampering statute, and that defendant's knowledge of her patients' condition and suffering without the morphine was sufficient for the mens rea requirements of extreme indifference and reckless disregard.\textsuperscript{28}

Defendant stole morphine from the morphine delivery devices of patients under her care, and substituted it with saline solution.\textsuperscript{29} She was convicted of four counts of tampering with a consumer product and six counts of obtaining a controlled substance through fraud\textsuperscript{30}, and sentenced to forty-eight months for each fraud count and seventy months on each tampering count.\textsuperscript{31} She appealed arguing that the tampering statute is inapplicable to her actions and that the lower court erred in applying sentencing guidelines.

The court held that the government met all requirements of the tampering statute:

\begin{quote}
(1) the term "tampers" is not ambiguous and describes the activity of product adulteration;\textsuperscript{32}
\end{quote}

\textsuperscript{27}See id.
\textsuperscript{28}United States v. Moyer, 182 F.3d 1018 (8th Cir. 1999).
\textsuperscript{29}See id. at 1020.
\textsuperscript{30}See id.
\textsuperscript{31}See id. at 1023.
\textsuperscript{32}See id. at 1020-21.
(2) the morphine in question was used in commerce, since it was manufactured in and shipped from out of state;\textsuperscript{33}

(3) defendant acted with reckless disregard and extreme indifference by exposing her patients to serious health risks and great pain through her actions;\textsuperscript{34}

(4) defendant knew that her actions could be causing health problems for her patients;\textsuperscript{35}

Finally, the court held neither a downward or upward departure from applicable sentencing guidelines was appropriate. By exposing her patients to risk of death or serious bodily injury, defendant did not meet the criteria for downward departure, and, because her shorter sentences for fraud ran concurrent to those for tampering, any error the court would have made in not departing upward was harmless error.\textsuperscript{36} United States v. Moyer, 182 F.3d 1018 (8th Cir. 1999).

---

**DAMAGES**

Court's Discretion in Determining Periodic Payments of Damages is Bound by the Jury's Determination of the Gross Amount of Future Economic Damages, Legislative Intent, and Actual Empirical Evidence

The California Court of Appeals held that, while it was the jury who determined future economic damages or gross damages in a medical malpractice case, it was the judge's sole discretion to set forth a payment schedule upon the request of either party.\textsuperscript{37} Furthermore, the

\textsuperscript{33}See Moyer, 182 F. 3d at 1021.
\textsuperscript{34}See id.
\textsuperscript{35}See id.
\textsuperscript{36}See id. at 1022-23.
\textsuperscript{37}Holt v. Regents of the Univ. of Cal., 86 Cal. Rptr. 2d 752, 759 (1999).
judge must also look to the intent of the legislature and actual evidence of the plaintiff's future damages.\footnote{See id. at 759-61.}

The patient suffered permanent brain damage at defendant's hospital.\footnote{See id. at 755.} This event left her unable to live independently or finish college and in need of life-long medical care.\footnote{See id.} At the conclusion of the trial, the jury gave plaintiff accrued noneconomic damages, future medical expenses, future lost earnings, as well as determined the present cash value of the future medical expenses and lost earnings.\footnote{See id.}

Upon the defendant's request pursuant to Code Civ. Proc., § 667.7, the trial court set a schedule of periodic payments of twenty equal annual installments, with the total of future economic damages exceeding what the jury had previously determined.\footnote{See id.}

The issue on appeal concerned the scope of the court's discretion with respect to the jury's assessment of damages, limitations on payment of lost earnings, equal installments of payments, and calculating contingent attorney fees.\footnote{See id.}

First, the court held that, while the court had discretion to determine the duration, frequency and amount of the periodic payments, it must use the gross amount of future damages as set by the jury.\footnote{See Holt, 86 Cal. Rptr. 2d at 756.} Furthermore, if a defendant wished to purchase an annuity to fund the periodic payments it may do so, but it may not receive immediate satisfaction of judgment.\footnote{See id. at 752.}

Second, with respect to medical payments, the trial court abused its discretion as it disregarded evidence presented by the experts on both sides, that plaintiff's medical expenses would be constant throughout her life, and, instead, ordered payments to continue only for forty-two years.\footnote{See id. at 759.} On appeal, the court held that the lower court could not disregard expert testimony and vary the duration of medical

\footnote{See id. at 760.}
payments, since this would be detrimental to the plaintiff and leave her without support for her medical needs for the last twenty years of her life.  

Third, and upon a similar argument, the court determined that the lower court abused its discretion in setting a limit on plaintiff's working life. The court held that, any discretion concerning the structure of the periodic payment schedule must be exercised within the boundaries of the evidence presented. If the lower court were allowed to limit the duration for lost earnings, the plaintiff would, again, have been left without support later in life.

Finally, the court determined that a lower court may calculate attorney fees based upon the jury's finding of the present value of future damages. \(^\text{50}\) \textit{Holt v. Regents of the Univ. of Cal., 86 Cal.Rptr.2d 752 (1999).}

---

**DEFAMATION**

**Absolute Immunity in Trial Testimony Privilege Bars Suit for Slander**

The Court of Appeals of Texas held the absolute immunity privilege granted witnesses for their testimony in judicial proceedings prohibited a lawsuit for slander. \(^\text{51}\)

Plaintiff alleged that in a prior medical malpractice suit, defendant was called as an expert witness. \(^\text{52}\) Plaintiff contended defendant's expert testimony contained lies and libelous statements about plaintiff. \(^\text{53}\) These statements led to plaintiff's being ridiculed and

\(^{47}\) See Holt, 86 Cal. Rptr. 2d at 760.  
\(^{48}\) See id.  
\(^{49}\) See id.  
\(^{50}\) See id. at 762.  
\(^{51}\) See Lombardo v. Traughber, 990 S.W.2d 958, 958 (Tex. App. 1999, no writ).  
\(^{52}\) See id. at 959.  
\(^{53}\) See id.
subject to public hatred.\textsuperscript{54} The trial court granted summary judgment in favor of defendant, and plaintiff appealed that judgment.\textsuperscript{55} The court affirmed the trial court’s decision dismissing plaintiff’s action because defendant was protected by absolute immunity with regard to his trial testimony.\textsuperscript{56} Regardless of the truth of defendant’s statements, he still had immunity in order to ensure a full and free disclosure at trial.\textsuperscript{57} Lombardo v. Traughber, 990 S.W.2d 958 (Tex. App. 1999, no writ).

DISCOVERY

Hospitals Not Required to Produce Unknown Patient Information and Peer Review Materials to Third Parties in Litigation

The Supreme Court of Michigan in a consolidation of two cases held the Michigan physician-patient statute prohibited hospitals from providing identification information about other patients.\textsuperscript{58} Further, any after-incident reports and other investigatory documents were peer review materials and statutorily protected from discovery.\textsuperscript{59} Finally, plaintiff’s failure to provide a notice of intent to sue and an affidavit of merit warranted dismissal of plaintiff’s malpractice claim.\textsuperscript{60}

In Dorris v. Detroit Osteopathic Hosp. Corp., plaintiff visited the defendant hospital’s emergency room complaining of nausea, vomiting, and diarrhea and was administered a drug despite her warning medical personnel of her drug allergy.\textsuperscript{61} Plaintiff experienced an allergic

\textsuperscript{54}See id.
\textsuperscript{55}See id.
\textsuperscript{56}See Lombardo, 990 S.W.2d 958, 960.
\textsuperscript{57}See id.
\textsuperscript{59}See id. at 464.
\textsuperscript{60}See id. at 466.
\textsuperscript{61}See id.
reaction and subsequently filed suit for damages.\textsuperscript{62} Plaintiff sought to compel defendant to release the name of plaintiff's roommate who was witness to her protests regarding administration of the medication.\textsuperscript{63} The district court granted plaintiff's request, but this decision was reversed on appeal.\textsuperscript{64} Plaintiff appealed the decision of the appellate court.\textsuperscript{65}

In \textit{Gregory v. Heritage Hosp.}, plaintiff was the victim of an assault and battery by another patient in a hospital's psychiatric ward.\textsuperscript{65} Plaintiff requested production of all investigative reports relating to the incident, as well as the identity of the patient who assaulted her.\textsuperscript{67} The district court granted plaintiff's motion to compel production, and defendant's application for leave to appeal in the Court of Appeals was denied.\textsuperscript{68} The Michigan Supreme Court granted defendant's application for appeal and consolidated that case with \textit{Dorris}.\textsuperscript{69}

The first issue addressed by the court was whether defendant hospitals were required to provide identification information about other unknown patients.\textsuperscript{70} Michigan's physician-patient statute protected the names of unknown patients from discovery because that information was privileged.\textsuperscript{71} This privilege inheres in the patient, and a patient may voluntarily and intentionally, or impliedly waive it.\textsuperscript{72} Neither the patient in \textit{Dorris} or \textit{Gregory} voluntarily or impliedly waived their confidentiality privilege.\textsuperscript{73} While Michigan permitted a liberal discovery policy, the discovery of materials that were privileged

\textsuperscript{62}See id.
\textsuperscript{63}See \textit{Dorris}, 594 N.W. 2d at 455.
\textsuperscript{64}See id. at 455.
\textsuperscript{65}See id.
\textsuperscript{66}See id.
\textsuperscript{67}See id.
\textsuperscript{68}See \textit{Dorris}, 594 N.W. 2d at 459.
\textsuperscript{69}See id.
\textsuperscript{70}See id.
\textsuperscript{71}See id.
\textsuperscript{72}See id. at 462.
\textsuperscript{73}See \textit{Dorris}, 594 N.W. 2d at 462.
was prohibited.\textsuperscript{74} Since both patients' information was privileged, it was not discoverable.\textsuperscript{75}

The second issue considered was whether the investigative materials regarding plaintiff's assault and battery in \textit{Gregory} was discoverable.\textsuperscript{76} Under Michigan law, records and other information gathered for the purpose of peer review is confidential information.\textsuperscript{77} Hospitals were required to create and maintain peer review committees for the purpose of reducing morbidity and mortality, and to ensure a high level of patient care.\textsuperscript{78} Protecting the confidentiality of such information was important to ensuring open and honest discussions among hospital staff.\textsuperscript{79} The reports requested in \textit{Gregory} were used for maintaining quality health care standards and reducing morbidity and mortality in the hospital.\textsuperscript{80} The district court's order to compel production was reversed and remanded to determine if the materials requested in \textit{Gregory} were protected from disclosure under Michigan law.\textsuperscript{81}

The third issue addressed by the court was whether plaintiff's claim in \textit{Gregory} was a malpractice claim, and therefore subject to a requirement of notice of intent to sue as well as an affidavit of merit.\textsuperscript{82} Plaintiff argued that her claim was for ordinary negligence and not for medical malpractice, and should not be subject to the notice requirement.\textsuperscript{83} The test for determining whether a claim was for medical malpractice rested on whether the issues raised were within the common knowledge and experience of the jury, or, alternatively, whether questions of medical judgment were raised.\textsuperscript{84} The court held that the average juror would not be familiar with the supervisory and

\textsuperscript{74}See id. at 461.
\textsuperscript{75}See id. at 462.
\textsuperscript{76}See id.
\textsuperscript{77}See id.
\textsuperscript{78}See \textit{Dorris}, 594 N.W. 2d at 463.
\textsuperscript{79}See id. at 463.
\textsuperscript{80}See id.
\textsuperscript{81}See id. at 464.
\textsuperscript{82}See id.
\textsuperscript{83}See \textit{Dorris}, 594 N.W. 2d at 464.
\textsuperscript{84}See id. at 465.
staffing needs of a psychiatric ward. As such, plaintiff's claim was for medical malpractice and therefore subject to the notice requirement. Under Michigan law, the appropriate sanction for failure to provide notice of intent to sue was dismissal of the complaint. The court dismissed plaintiff's claim without prejudice. Dorris v. Detroit Osteopathic Hosp. Corp., 594 N.W.2d 455 (Mich. 1999).

Co-Defendants Entitled to Evidence of Prior Acts and Omissions, but Not Materials Prepared in Anticipation of Litigation

The Alabama Supreme Court held interviews and records prepared in anticipation of litigation could be withheld from production to co-defendants. However, evidence of prior acts and omissions on the part of a co-defendant could not be withheld from other co-defendants.

In 1991, plaintiff underwent circumcision. During surgery, defendant used a medical device known as an “electrosurgical unit” to cauterize blood vessels that bled during surgery. Following surgery, plaintiff developed an infection that led to gangrene. Ultimately, three-fourths of plaintiff's penis had to be removed because of the serious nature of the infection. Plaintiff filed suit against his physician as well as the manufacturers of the electrosurgical unit, alleging medical malpractice as well as claims of product liability.

Co-defendant manufacturers sought discovery of physician's insurer's investigative file on the incident, as well as discovery of

---

85 See id. at 466.
86 See id.
87 See id.
88 See Dorris, 594 N.W. 2d at 466.
90 See id.
91 See id.
92 See id.
93 See id.
94 See Pfizer, 1999 WL 357415, at *1.
95 See id.
physician’s prior medical records for circumcisions. The trial court initially ordered production of these records, but later vacated its order. Defendants sought a writ of mandamus directing the circuit court to vacate its latest rulings.

The court held there was no abuse of discretion in denying defendants’ requests for the insurer’s investigative file because that file was prepared in anticipation of litigation. Defendants had sufficient time to conduct similar discovery on their own without undue hardship.

Further, the court held defendants were entitled to the physician’s medical records for circumcisions because defendants and the physician were all co-defendants in this action. State law prohibits plaintiffs from seeking discovery of prior acts or omissions, but since defendants were making the production request, that law did not apply. Ex parte Pfizer, Inc., 1999 WL 357415, at *1 (Ala. June 4, 1999).

---

**EMPLOYMENT CONTRACT**

Employee Did Not Meet Requirement of Justifiable Reliance in a Fraudulent Contract Action

The Supreme Court of Alabama held that an employee could not have justifiably relied on alleged oral representations because the employee’s employment contract’s language was plain and unambiguous.

Plaintiff testified that a physician approached him about joining his medical practice after plaintiff completed his residency. Plaintiff

---

96See id. at *2.
97See id. at *1.
98See id. at *3.
99See Pfizer, 1999 WL 357415, at *3.
100See id. at *4.
101See id.
103See id. at *1.
agreed to the terms of an employment contract and commenced work as an associate physician with the defendant employer. Plaintiff became dissatisfied and decided to quit after the first year of his contract expired. Plaintiff alleged the defendant employer had fraudulently misrepresented that plaintiff would receive a bonus regardless of contract renewal. Plaintiff never received a bonus from defendant employer. Plaintiff also alleged that defendant employer fraudulently induced plaintiff into signing employment contract by telling him that revenue over $150,000 would be used for his bonus. Plaintiff subsequently filed suit against defendant for fraud and breach of contract.

Defendant employers filed a motion for a judgment as a matter of law on the fraud and contract claims. The trial court granted judgment in favor of defendant on the breach-of-contract claims and submitted the fraud claims to the jury. The jury awarded plaintiff damages on the fraud claims.

On appeal, the court considered whether plaintiff justifiably relied on defendant's alleged misrepresentations. In order to succeed on a fraud or misrepresentation claim, a plaintiff must establish:

1. a false misrepresentation by the defendant concerning an existing material fact,
2. a representation that
   a. the defendant knew was false when it was made,
   b. was made recklessly and without regard to its truth or falsity,

---

100 See id.
101 See id. at *2.
102 See id.
103 See Bailey, 1999 WL 722694, at *2.
104 See id.
105 See id.
106 See id.
107 See id.
108 See id.
109 See id.
110 See id.
111 See id.
112 See Bailey, 1999 WL 722694, at *2.
113 See id. at *3.
was made by telling the plaintiff that the
defendant had knowledge that the
representation was true, when the
defendant did not have such knowledge;

(3) reliance by the plaintiff on the representation,
(4) that the plaintiff's reliance was reasonable under the
circumstances, and
(5) damage proximately resulting from the plaintiff's
reliance.\textsuperscript{114}

The court held the defendants' motion should be granted because
the plaintiff employee failed to establish justifiable reliance on the
representations.\textsuperscript{115} The court held the language of the contract was
plain and unambiguous.\textsuperscript{116} The contract provided that plaintiff had to
renew the employment contract for a second year in order to receive a
bonus and any modifications to the contract had to be in
writing.\textsuperscript{117}

The court concluded plaintiff, who had the benefit of extensive
education, could only have failed to realize the contract terms by
closing his eyes to the truth.\textsuperscript{118} Hence, the court reversed the decision
and remanded the case.\textsuperscript{119} \textit{Bailey v. Rowan v. Bailey, Nos. 1971811 &
1971812, 1999 WL 722694, ( Ala. Sept. 17, 1999).}

\textsuperscript{114}See id.
\textsuperscript{115}See id.
\textsuperscript{116}See id.
\textsuperscript{117}See \textit{Bailey}, 1999 WL 722694, at *2.
\textsuperscript{118}See \textit{id.} at *3. (citing \textit{Hurst v. Nichols Research Corp.}, 621 So. 2d 946, 969
(Ala.1993)).
\textsuperscript{119}See id.
ERISA

Individual May Show Up to Work Everyday in Declining Health Prior to Termination and Still Meet the Prerequisites of Total Disability Under ERISA

The United States Court of Appeals for the Eleventh Circuit held it was reasonable to conclude a former employee was totally disabled for the purposes of Employment Retirement Income Security Act (ERISA) before termination.120

Plaintiff was an employee of one of the defendants for over twenty-two years.121 During the plaintiff’s employment, he received medical treatment for several serious illnesses, but maintained his employment with the defendant.122 However, plaintiff was subsequently terminated as a result of his performance.123 After termination, plaintiff filed a claim with employer’s insurance for long term disability benefits.124 The claim was denied on the basis plaintiff was not completely disabled prior to termination, and failed to meet the definition of disabled while still employed.125 The defendants argued plaintiff continued to show up for work and perform his duties on a day to day basis, thus he could not satisfy the definition of disabled while still employed.126

The court held there was evidence from medical records, physician testimony, and Social Security records, that established the plaintiff’s disability while still employed, and therefore, it could be concluded the plaintiff was disabled while still employed and should therefore, be

---

120 Whatley v. CNA Ins. Co., 189 F.3d 1310, 1313, 1315 (11th Cir. 1999).
121 See id. at 1312.
122 See id.
123 See id.
124 See id.
125 See Whatley, 189 F.3d at 1313-1314.
126 See id.
eligible for benefits under ERISA.127 Whatley v. CNA Ins. Co., 189 F.3d 1310 (11th Cir. 1999).

HEALTH MAINTENANCE ORGANIZATION

Health Maintenance Organization Held Liable for the Adverse Results of Its Actions

The Court of Appeals of California held a health plan negligently liable for failing to refer plaintiff to a specialist.128 The plaintiff patient suffered from a progressive lung disease.129 His health maintenance organization (HMO) refused to refer him to a specialist for treatment that rendered plaintiff unable to walk or stand without assistance and in need of oxygen to breathe.130 Plaintiff brought the action in state court against his HMO and its physician for negligence, intentional and negligent infliction of emotional distress, unfair business practices, and fraud.131 The trial court determined that all causes arose under the Medicare Act and should have been filed in Federal court and dismissed the complaint.132

The issue presented to the court was whether the patient’s claim arose under the Medicare Act and if not, whether the HMO was vicariously liable for the negligence of one of its members.133 The court held that the claim did not arise under the Medicare Act.134 The court concluded that claims, which did not seek reimbursement benefits, did not arise under the Medicare Act and were actionable in state court.135 Although plaintiff’s claim included damages of past and future medical

127 See id. at 1314-1315.
128 See McCall v. Pacificare of Cal., 97 Cal. Rptr. 2d 784, 788 (1999).
129 See id. at 785.
130 See id.
131 See id.
132 See id.
133 See McCall, 97 Cal. Rptr. 2d at 785.
134 See id. at 788.
135 See id.
expenses, which were not recoverable in a state action, their presence in the complaint did transform the action into a reimbursement case.\textsuperscript{135} Furthermore, plaintiff’s negligence, fraud, and emotional suffering allegations do not arise under the Medicare Act.\textsuperscript{137} The court further held the HMO vicariously liable of the negligence of one of its physicians.\textsuperscript{138} The court concluded that the HMO was a corporation that provided medical care to patients and the physicians were employees of that corporation.\textsuperscript{139} Because of the structure of the physician’s association with the HMO, the HMO was a provider and liable for the negligence of its employees.\textsuperscript{140} *McCall v. Pacificare of Cal.*, 97 Cal. Rptr. 2d 784 (1999).

**Commissioner Exceeded His Authority in Denying a Hospital’s Petition for a Certificate of Public Need by Claiming that the State Medical Facilities Plan was Outdated and by Reliance on Extra-record Evidence, When Hospital Met All Criteria of the COPN Form**

The Court of Appeals of Virginia held that the State Health Commissioner (Commissioner) exceeded his authority in denying plaintiff Hospital’s application for a certificate of public need (COPN) based on his contention that the State Medical Facilities Plan (SMFP) was outdated.\textsuperscript{141} Furthermore, the court held that it was reversible error for the Commissioner to rely on extra-record evidence, which he himself admitted was a mistake of fact.\textsuperscript{142}

The plaintiff applied for a COPN to be able to conduct liver transplants.\textsuperscript{143} The application satisfied all necessary criteria and the

\textsuperscript{135}See id.

\textsuperscript{137}See id.

\textsuperscript{138}See *McCall*, 97 Cal. Rptr. 2d at 789.

\textsuperscript{139}See id.

\textsuperscript{140}See id.


\textsuperscript{142}See id. at 694.

\textsuperscript{143}See id. at 692.
East Virginia Health Systems Agency Board recommended its approval. The Department of Health's Division of Certificate of Public Need (DCOPN), however, denied the application. Next followed another informal hearing, during the course of which the presiding officer recommended approval once again. The application was then presented to the Commissioner, who rejected it on grounds that empirical evidence showed the SMFP minimum transplant requirement was already too low and outdated, and if plaintiff would commence transplants, the transplants at surrounding facilities would decline.

The issues before the court were (1) whether the Commissioner acted within the scope of his authority and (2) whether his reliance on evidence was proper. As to the first issue, the court found that the outdated or inaccurate SMFP is not a basis for rejecting a COPN application. Secondly, the evidence used by the Commissioner did not meet the necessary substantial evidence standard and was insufficient to support his ruling. With respect to evidence, the court rejected the Commissioner's contention that he had institutional knowledge, and that his erroneous conclusion substantially prejudiced the plaintiff.


---

144 See id.
145 See id.
146 See Sentara, 516 S.E.2d at 692.
147 See id. at 693.
148 See id. at 694.
149 See id. at 695.
150 See id. at 696.
151 See Sentara, 516 S.E.2d at 696.
152 See id. at 697.
153 See id. at 698.
Immunity Granted Under HCQIA, Does Not Guarantee Attorney Fees, Unreasonable Conduct is Still Necessary to Satisfy the Test

The United States Court of Appeals for the Eighth Circuit held although defendant was granted immunity under the Health Care Quality Improvement Act of 1986 (HCQIA), plaintiff's claims and litigation conduct were not so unreasonable as to meet the purposes of section 11113 of HCQIA for attorney's fees.154

Plaintiff was employed by the defendant hospital that restricted and ultimately terminated the plaintiff's staff privileges.155 Plaintiff then filed suit against defendant for violation of antitrust laws, breach of contract and bad faith.156 Defendant filed motion for summary judgment on the basis of immunity under HCQIA, which was granted and followed by a motion for attorney's fees.157

The court first looked to the timeliness of defendant's motion for fees.158 A motion for fees must be filed within fourteen days after entry of judgment.159 The defendant here filed its motion one day late.160 There are certain factors that may be taken into consideration when determining whether or not an untimely motion may be addressed.161 The court decided the most important factors to be considered here were (1) the possible prejudice to plaintiff, (2) length of delay and its possible impact upon judicial proceedings, (3) reason for delay, and (4) did defendant act in good faith.162 The court determined plaintiff was

154 See Sugarbaker, M.D. v. SSM Health Care, 187 F.3d 853, 857 (8th Cir. 1999).
155 See id. at 855.
156 See id.
157 See id.
158 See id.
159 See Sugarbaker, 187 F.3d at 855.
160 See id.
161 See id. at 856.
162 See id.
not prejudiced, the one-day delay did not adversely effect the judicial process, and finally there was no reason to believe the defendant was not acting in good faith.\textsuperscript{163}

The court next determined HCQIA allowed for fee shifting, only (1) when immunity standard was met and (2) where plaintiff’s conduct during litigation was unreasonable.\textsuperscript{164} The court held although defendant was entitled to immunity under HCQIA, fee shifting should not be implemented since plaintiff’s litigation conduct was not unreasonable or frivolous.\textsuperscript{165} \textit{Sugarbaker, M.D. v. SSM Health Care, 187 F.3d 853 (1999)}.

\section*{INSURANCE}

\textbf{Patients Need Not Exhaust Insurance Company’s Administrative Claims Process if Doing so Would be Frivolous}

The United States District Court of New York held plaintiffs were not required to exhaust the administrative claims process of the defendant insurance company before filing suit since exhaustion would be frivolous.\textsuperscript{166}

Plaintiffs in this case were all men who had insurance policies through the defendant insurance companies and had been prescribed Viagra pills by their doctors for their medical conditions.\textsuperscript{167} Defendants stopped paying for Viagra and announced it would pay for only six pills per month regardless of the prescription quantity.\textsuperscript{168} Plaintiffs all made numerous calls to the defendants with no success.\textsuperscript{169} On every occasion plaintiffs were told there were no exceptions to the policy of six Viagra pills.

\begin{flushright}
\textsuperscript{163}See id.  \\
\textsuperscript{164}See \textit{Sugarbaker}, 187 F.3d at 856.  \\
\textsuperscript{165}See id. at 857.  \\
\textsuperscript{167}See id. at 981, 983.  \\
\textsuperscript{168}See id. at 981.  \\
\textsuperscript{169}See id. at 981, 983.
\end{flushright}
pills per month. The plaintiffs then filed suit against defendants. The defendants argued plaintiffs did not exhaust the administrative claims process and therefore, should not be allowed to file suit.

There was no statutory requirement of exhaustion before being able to file suit, however courts have relied upon the idea claimants should follow the internal procedures and exhaust internal plan remedies before looking for judicial relief. The court stated exhaustion was not always required. Exhaustion was not required in cases were it would be futile. In order for exhaustion to be futile, the plaintiff must show it was certain their claim would be denied. In this case, the court determined, plaintiffs numerous phone calls, letters, and even physician letters, did little good, and never invoked the fact plaintiffs could appeal. For these reasons, the court held the plaintiffs' exhaustion of the defendant's administrative process would be futile and unnecessary. Sibley-Schreiber v. Oxford Health Plans (N.Y.), Inc., 62 F. Supp.2d 979 (E.D.N.Y. 1999).

---

**MALPRACTICE**

**Physician Does Not Have an Obligation to Inform a Patient of Possible Lethal Results of a Drug When Administered Negligently, Unless Necessary to Rule Out Illness that Could Be Caused By Negligent Administering of Drug**

The Superior Court of New Jersey Appellate Division held while defendant physician may not have had the duty to disclose the lethality

170 See id.
172 See id.
173 See id. at 985.
174 See id. at 985, 986.
175 See id.
177 See id. at 987.
178 See id. at 988.
of the drug that killed plaintiff’s husband from the start of the treatment, he should have disclosed this when he learned the deceased was ill after his treatment in order to rule out possible sources of his illness.\textsuperscript{179}

Defendant physician prescribed colchicine therapy for the plaintiff’s husband, in order to treat his multiple sclerosis.\textsuperscript{180} The plaintiff and the deceased lived some miles from the defendant’s office, and therefore had the injections done by a physician close to their home.\textsuperscript{181} The drug itself was deadly in a greater than recommended doses, however the amount prescribed by the defendant was enough to help symptoms of the deceased’s illness.\textsuperscript{182} In April of 1993 the plaintiff and deceased informed defendant of difficulties in obtaining the drug.\textsuperscript{183} Defendant then instructed a different pharmacy to prepare a batch of the drug; however, this batch was four times greater than the old concentration.\textsuperscript{184} Included with the new batch of the drug was a letter from the pharmacist stating the batch was four times greater and indicating the new dosage for the deceased.\textsuperscript{185} On April 10, 1993, the deceased went to his regular doctor’s office to receive his weekly injection, but without his knowledge, he was given the old dosage amount.\textsuperscript{186} Hours later, the deceased began to feel ill.\textsuperscript{187} The next day, the deceased stopped breathing and was pronounced dead, with the cause of death being multi-organ failure from an overdose of colchicine.\textsuperscript{188}

Plaintiff argued defendant had a duty to inform her and her husband of the lethal nature of colchicine if negligently administered.\textsuperscript{189} In order to prove negligence based on lack of informed consent,

\textsuperscript{180}See id. at 622.
\textsuperscript{181}See id.
\textsuperscript{182}See id.
\textsuperscript{183}See id.
\textsuperscript{184}See Gilmartin, 735 A.2d at 622.
\textsuperscript{185}See id.
\textsuperscript{186}See id.
\textsuperscript{187}See id.
\textsuperscript{188}See id.
\textsuperscript{189}See Gilmartin, 735 A.2d at 632.
plaintiff must establish (1) the risk of injury would have influenced the deceased’s decision to undergo treatment, and (2) causation. The court rejected this theory because a physician does not have a duty to inform of risks not inherent in the procedure. However, the court determined defendant may have had a duty to inform plaintiff of the lethal nature of the drug once he learned deceased became ill after his treatment, this issue, however, was remanded for determination by the court in a new trial.

In addition, plaintiff contended the jury should not have been instructed on the defendant’s exercise of judgment. The court held this contention was without merit due to the fact plaintiff accused defendant of misdiagnosis of the deceased and diagnosis is a matter of judgment.

The court reversed the trial courts finding for the defendant and remanded the case for a new trial based on its decision that physician had a duty to disclose the lethal nature of a drug when it is necessary to rule out possible causes of an illness. Gilmartin v. Weinreb, M.D., 735 A.2d 620 (N.J. Super. 1999).

Medical Group Training Physicians Has a Duty to Supervise

The Court of Appeals of Tennessee held defendant hospital was responsible for the supervision of the operating physicians working out of the hospital.

Plaintiff claimed physician group was liable for negligently performing a tubal ligation. Plaintiff filed suit not only against physicians who performed the procedure but also the medical group the

\[153\] See id.
\[154\] See id. at 625.
\[155\] See id. at 632.
\[156\] See id. at 627.
\[157\] See Gilmartin, 735 A.2d at 632.
\[158\] See id. at 633.
\[160\] See id. at *1.
physicians belonged to. Plaintiff alleged the defendant medical group was guilty of negligently supervising the physicians. The medical group while not the physicians’ employer did have the physicians working for training purposes. Because physicians were working out of the defendant’s hospital and the fact that the medical group sent a bill to the plaintiff, plaintiff alleged physicians were servants of the defendant and therefore, defendant had an obligation to supervise.

The court stated unless there was a reason to believe the treating physician was an independent contractor, a patient would believe the medical group was liable for a physician’s actions. A master/servant relationship depends upon the amount of control by the master over the work done by the servant. Since the defendant functioned as “the clinical arm that carried out the delivery of patient care,” and billed patients for the services, it had a duty to supervise the actions of physicians, even those in training in its facility.

The court reversed the trial court's decision and held there was a duty on the part of the defendant to supervise training physicians in its facility. Davis v. University Phys. Found., Inc., No. 02A01-9812-CV-00346, 1999 WL 643388, at *1 (Tenn. Ct. App. Aug. 24 1999).

NEGLIGENCE

Evidence of Medical Personnel’s Routine Habits Not Admissible

The Supreme Court of Virginia held the habit evidence of medical personnel was not admissible to prove that a patient did not complain

---

198 See id.
199 See id. at *3.
200 See id. at *1.
201 See Davis, 1999 WL 643388 at *2-*3.
202 See id. at *3.
203 See id. at *4.
204 See id. at *5.
205 See id. at *6.
of pain on a specific occasion and defendant physician's treatment of patient conformed to routine standard of care.\textsuperscript{205}

Patient experienced tightness and pain in her chest during a cardiac stress test.\textsuperscript{207} Patient complained to her daughter about difficulty breathing and pains in her chest and arm following the test.\textsuperscript{209} Defendant physician told patient's daughter that the reaction was normal and would resolve with rest.\textsuperscript{209} That night, patient subsequently died in her sleep as a result of heart failure.\textsuperscript{210} The patient's estate filed a wrongful death action, alleging the physician was negligent in failing to diagnose and treat the patient's heart condition.\textsuperscript{211}

Defendant physician testified that he did not recall patient's condition following the procedure.\textsuperscript{212} Therefore, the physician admitted evidence of his routine or habit in responding to other patients who had similar complaints following a stress test to establish his conduct with regard to the plaintiff patient.\textsuperscript{213} The habit evidence revealed that the physician routinely re-evaluated a patient who complained of chest pain following a stress test.\textsuperscript{214} The evidence was used to show that a particular event, patient's complaint of chest pain, did not occur.\textsuperscript{215} The lower court allowed the admission of defendant's habit evidence and entered judgment in favor of defendant in accordance with jury's verdict.\textsuperscript{216}

On appeal, the issue was whether evidence of medical personnel's habitual conduct should have been admitted for the purpose of proving the defendants' conduct on a specific occasion conformed to their

\textsuperscript{207} See id.
\textsuperscript{209} See id. at *2.
\textsuperscript{210} See id. at *1.
\textsuperscript{211} See Ligon, 1999 WL 731427, at *1.
\textsuperscript{212} See id. at *2.
\textsuperscript{213} See id.
\textsuperscript{214} See id.
\textsuperscript{215} See id. at *2-3.
\textsuperscript{216} See Ligon, 1999 WL 731427, at *2.
routine practice.\textsuperscript{217} Here, evidence was not of general habit, rather evidence related to specific responses to a specific situation.\textsuperscript{218}

The court held evidence of habitual conduct that consisted only of collateral facts did not allow any fair inferences to be drawn.\textsuperscript{219} Evidence of habitual conduct was inadmissible to prove conduct at the time of the incident complained of because such evidence was collateral to the issues at trial.\textsuperscript{220} The court also held that this evidence tended to mislead the jury and to divert its attention from important issues.\textsuperscript{221}

The court held that the relevant inquiry in a negligence action was not whether a defendant had a habit of compliance with the type of duty at issue, but whether the defendant breached a specific duty owed to the plaintiff at a particular time.\textsuperscript{222} Hence, the court reversed the earlier decision and remanded the case.\textsuperscript{223} \textit{Ligon v. Southside Cardiology Assoc., P.C., No. 982467, 1999 WL 731427, at *1 (Va. Sept. 17, 1999).}

---

**Physician and Two Attending Nurses Liable for Death of Patient During Hysteroscopy Under the Doctrine of Alternative Liability, Even Though it was Not Certain Who Caused the Injury**

The Supreme Court of New Jersey held that under the negligence doctrine of alternative liability, physician and nurses present during a hysteroscopy could all be liable for the patient's death when it was clear one or more of them were at fault, but it was uncertain who.\textsuperscript{224}

The patient died from an air embolism as a result of an incorrectly connected hysteroscope during a common procedure.\textsuperscript{225} The exhaust

\textsuperscript{217}See id. at *4.
\textsuperscript{218}See id.
\textsuperscript{219}See id. at *3.
\textsuperscript{220}See id.
\textsuperscript{221}See Ligon, 1999 WL 731427 at *3.
\textsuperscript{222}See id. at *4.
\textsuperscript{223}See id. at *5.
\textsuperscript{225}See id. at 459.
tube of the apparatus used during the procedure was hooked-up incorrectly with the result that nitrogen gas was pumped into the patient’s uterus causing the fatal embolism.\textsuperscript{226} The pump arrived from the manufacturer undamaged but was negligently assembled during the procedure by three nurses and an attending physician present.\textsuperscript{227} Immediately following the fatal accident, the apparatus was disconnected, making it impossible to determine precisely which tubes were incorrectly connected.\textsuperscript{228}

The first issue before the court was whether the burden of proof shifted to the defendants.\textsuperscript{229} The court determined that the three prong rule set out in \textit{Anderson v. Somberg}\textsuperscript{230} was controlling in this case:

(1) the plaintiff must be entirely blameless;
(2) the injury must imply negligence on the part of one or more defendants;
(3) all potential defendants must be parties to the suit.\textsuperscript{231}

The court found that plaintiff met all three requirements and that the burden of proof was on the defendants to show that they were not negligent.\textsuperscript{232}

Next, the court considered whether the jury may use the doctrine of common knowledge or a professional standard of care to determine negligence.\textsuperscript{233} The court held that while medical malpractice cases use a medical standard of care, it is appropriate to use the common knowledge standard in unusual cases.\textsuperscript{234} The court held that, because the circumstances of the present case are clear and do not require expert evidence, the common knowledge standard is appropriate.\textsuperscript{235}

\textsuperscript{226} See id. at 461.
\textsuperscript{227} See id. at 467.
\textsuperscript{228} See id. at 468.
\textsuperscript{229} See Chin, 734 A.2d at 460.
\textsuperscript{231} See Chin, 734 A.2d at 465.
\textsuperscript{232} See id. at 465-66.
\textsuperscript{233} See id. at 460.
\textsuperscript{234} See id. at 469.
\textsuperscript{235} See id. at 470-71.
As a result, the court found that the defendants did not meet their burden to show they were not negligent, and remanded the case to enter the original jury verdict for the plaintiff.\textsuperscript{236} \textit{Estate of Chin by Chin v. St. Barnabas Med. Ctr.}, 734 A.2d 778 (N.J. 1999).

\section*{Visitor Had Comparative Fault in Injury}

The Court of Appeal of Louisiana reversed plaintiff's partial summary judgment on liability because of questions as to whether plaintiff visitor had any comparative fault in accident.\textsuperscript{237}

Plaintiff testified that she was aware of the employee’s normal routine for delivery of food trays.\textsuperscript{238} Plaintiff visited the nursing home daily to assist in the care and feeding of her husband, a patient at the nursing home.\textsuperscript{239} Plaintiff would meet the employee with the food cart before it reached her husband’s room in order to retrieve a tray early and have more time to feed her husband.\textsuperscript{240} Plaintiff brought a negligence action against the defendant nursing home and its insurer after being injured by a food cart pushed by defendant’s employee.\textsuperscript{241} Plaintiff sought partial summary judgment on finding that defendants were solely liable for the accident.\textsuperscript{242} The lower court granted plaintiff’s partial summary judgment on liability.\textsuperscript{243}

The issue before the court was whether a genuine issue of material fact was present, thereby precluding the summary judgment.\textsuperscript{244} The court held the partial summary judgment should be reversed because evidence showed that plaintiff placed herself directly in the food cart’s

\begin{footnotes}
\footnotetext[236]{See Chin, 734 A.2d at 472.}
\footnotetext[238]{See id.}
\footnotetext[239]{See id.}
\footnotetext[240]{See id.}
\footnotetext[241]{See id.}
\footnotetext[242]{See Allen, 1999 WL 735852, at *1.}
\footnotetext[243]{See id.}
\footnotetext[244]{See id. at *2.}
\end{footnotes}
Plaintiff admitted that it was not the employee who strayed from the normal routine on the day of the accident, rather it was the plaintiff herself who failed to follow her normal routine of meeting employee at particular place in hallway. The court held that reasonable minds would differ in apportionment of fault under these circumstances. Hence, the court reversed the summary judgment and remanded the case. Allen v. Integrated Health Serv., Inc., No. 32, 196-CA, 1999 WL 735852, at *1 (La. Ct. App. 2 Cir. Sept. 22, 1999).

PROCEDURE

When a Triable Issue of Fact Exists as to Whether or Not an Addiction Problem Prevents an Addict from Resuming His Former Occupation, Summary Judgment Will Be Denied

The United States District Court for the Southern District of New York held that a triable issue of fact was present and therefore denied the granting of summary judgment.

The plaintiff anesthesiologist, who had a history of addition to Demerol, diverted narcotics originally issued by the hospital pharmacy for his patients, for his own use. He frequently self-administered narcotics on days that he also administered anesthesia to hospitalized patients. After the hospital began to suspect plaintiff of taking the medication, he voluntarily surrendered his license and entered into a rehabilitation facility. Believing that he was incapable of returning to

\[\text{\textsuperscript{245}}\text{See id.}\]
\[\text{\textsuperscript{246}}\text{See id.}\]
\[\text{\textsuperscript{247}}\text{See Allen, 1999 WL 735852, at *3.}\]
\[\text{\textsuperscript{248}}\text{See id.}\]
\[\text{\textsuperscript{250}}\text{See id. at *1.}\]
\[\text{\textsuperscript{251}}\text{See id. at *3.}\]
\[\text{\textsuperscript{252}}\text{See id.}\]
work because he would be forced to administer to patients the same
drugs that he formerly abused, plaintiff sought disability benefits.  

The insurance company refused to acknowledge that the addiction fell
within the meaning of their disability terms. To be deemed
"disabled," an individual must be unable to engage in his former
occupation because of sickness or injury.

The issue addressed by the court was whether the plaintiff's
chemical dependency prevented him from returning to his former
occupation. The court found that a triable issue of fact was present
and denied summary judgment. The court held while there was no
inherent reason why addicts could not resume their occupation, the fact
that plaintiff was advised not to return to work until he was reevaluated
by the clinic presented an issue of fact, therefore, summary judgment

Any Motion for Summary Judgment Must be in Accordance
with Rules of Civil Procedure

The Court of Appeals of Tennessee vacated the lower court's ruling and
remanded the case to the trial court for further proceedings. The
plaintiff employee was covered by a health insurance plan under her
employers' parent company. The parent company failed to make the
insurance payment, thereby causing the policy to lapse. The
employee, unaware that she was not covered, incurred thousands of

253 See id.
255 See id. at *3.
256 See id.
257 See id. at *6.
258 See id.
Aug. 16, 1999).
260 See id. at * 1.
261 See id.
dollars in medical bills. Because of the lapse, the employer promised to pay for all the employee's medical bills. Before the medical bills were paid off, however, the employee was sued by her medical providers. After the complaint was filed, the employer paid the balance of the employee's outstanding medical bills and reinstated her health plan. The employee sought damages for negligent misrepresentation, fraudulent misrepresentation, and breach of contract, seeking both compensatory and punitive damages. The employer filed a motion for summary judgment, which was granted by the trial court.

The issue facing the court of appeals was whether the case should be remanded for further proceedings based on the trial court's ruling that plaintiff did not suffer any damages. State Rules of Civil Procedure stated any motion for summary judgement must be accompanied by a separate and concise statement of the material facts as to which the moving party contends no genuine issue of material fact exist. The opposing party must then respond to each fact set forth by the movant. The court vacated the trial court's order for summary judgment and remanded the case for further proceedings.

The court reasoned that although defendant filed its motion for summary judgment and gave a prayer for dismissal of the claims, it failed to argue each claim. The court further concluded that complaint alleged more than one claim and the trial court failed to rule on each claim and, therefore, a final judgment had not been issued. Seals v. Tri-State Defender, Inc., No. 02A01-9806-CH0172, 1999 WL 620874, at *1 (Tenn. Ct. App. Aug. 16, 1999).

262 See id.
263 See id.
265 See id.
266 See id.
267 See id. at *2.
268 See id.
270 See id.
271 See id.
REFUSAL OF TREATMENT

To Obtain Order to Forcibly Medicate a Patient, the Applicant Need Only Show that Medication is in the Patient's Best Interest and the Patient Lacks Consent

The Court of Appeals of Ohio held that an applicant was only required to show that an individual as an involuntarily committed patient, lacked capacity and that refused medication was in the person's best interest.272

The plaintiff patient was involuntarily committed into a psychiatric hospital.273 When the plaintiff refused to take his psychotropic medications, the County Mental Health Board (Board) petitioned the court to authorize the forced medication of the drugs.274 The trial court denied the Board's application holding that the Board failed to show that plaintiff was a danger to himself within the institution.275

The issue presented to the court was whether an applicant was required to show dangerousness, in addition to lack of capacity and a benefit of the medication.276 The court held that an applicant need not prove dangerousness in their request to have a patient forcibly medicated.277 The court first concluded that commitment related to a patient's dangerousness, not his competence to make decisions, and in the absence of a showing of incompetence, a patient could be forced to undergo treatment.278 The court defined incompetence as "any person who was so mentally ill as a result of a mental or physical illness or disability...that the person is incapable of taking proper care of the

---

273See id.
274See id.
275See id.
276See id. at *2.
278See id.
person’s self.”  In holding that dangerousness was not a condition for application, the court held that if a guardian (even if one has not yet been appointed) believed that the medication was in the best interest, no other showing was necessary. The court concluded, however, that even if dangerousness was a requirement, the fact that a patient was involuntarily committed was evidence of his or her dangerousness. Hamilton County Community Mental Health Bd. v. Steel, No. C-980965, 1999 WL 632925, at *1 (1st Cir. Aug. 25, 1999).

REIMBURSEMENT

Pharmacists Have a Private Right of Enforcement for Ensuring Minimum Payments from Managed Care Providers

The Commonwealth Court of Pennsylvania held that pharmacists are entitled to certain minimum reimbursement rates sufficient to ensure a federally mandated standard of care is maintained. However, since the court lacked original jurisdiction, the case was dismissed pending further administrative proceedings.

Plaintiffs consisted of the state pharmacists’ association and several individual pharmacies who challenged the validity of outpatient pharmacy rates under a managed-care program. Plaintiffs sought a declaration that the Pennsylvania Department of Public Works (DPW) be enjoined from providing further reimbursement to providers under the managed-care program and to direct DPW to reimburse providers at an earlier-established rate. The reimbursement rate contended by plaintiffs fell below the cost that pharmacies had to pay for

279 See id.
280 See id.
281 See id.
283 See id. at 668.
284 See id.
As a result of this reimbursement rate, hundreds of private pharmacies had closed, and thirty-five percent of pharmacies originally in the program had dropped out. Plaintiffs further contend this had resulted in a situation that impacted the efficiency and quality of care provided to the plan’s beneficiaries in violation of federal law.

The court held payments made under a state medical assistance program had to meet federal guidelines for efficiency and quality of care. DPW’s objection that plaintiffs were not statutorily entitled to a minimum reimbursement rate failed because it was contrary to federal law.

The court further held that plaintiffs had the right to challenge DPW’s administration of the managed-care waiver. Statutorily, plaintiffs were entitled to a private cause of action in enforcement.

Finally, the court ruled that it did not have original jurisdiction over this matter because plaintiffs had not exhausted all their administrative remedies. In answer to petitioners’ concerns that delay in the administrative process could cause irreparable harm, the court ordered that administrative review be conducted in an expedited manner.


---

285 See id. at 669.
286 See id.
287 See Pennsylvania Pharm. Ass’n, 733 A.2d at 669.
288 See id. at 670.
289 See id.
290 See id. at 671.
291 See id.
292 See Pennsylvania Pharm. Ass’n, 733 A.2d at 673.
293 See id.
RIGHT TO DIE

Physician Incurred no Liability for Refusing to Withdraw Life-Sustaining Treatment

The California Court of Appeals held a physician who refused to withdraw life-sustaining treatment against the patient’s family’s wishes, and in absence of the patient’s advanced directives, had no civil liability for his actions.\(^{294}\)

In 1991, patient was in an automobile accident.\(^{295}\) When admitted to the hospital she was comatose and was immediately placed on a respirator.\(^{296}\) After conducting tests, patient’s neurologist informed the family that patient would never recover her ability to think and function like a human being.\(^{297}\) Within the first few days of her hospitalization, patient’s family sought to have the respirator removed, believing that this was what patient would have wanted.\(^{298}\)

Family members approached patient’s physician and asked that the respirator be removed, but physician refused to do so unless the patient was brain dead or the family obtained a court order.\(^{299}\) The family retained counsel who negotiated an agreement with the hospital in which the family would release the health care providers from any liability if the respirator was removed.\(^{300}\) Patient’s physician refused to sign the agreement.\(^{301}\) Within two weeks, patient was declared brain dead.\(^{302}\)

Patient’s family filed suit against the health care providers for professional negligence and negligent and intentional infliction of

\(^{295}\)See id. at 851.
\(^{296}\)See id.
\(^{297}\)See id.
\(^{298}\)See id.
\(^{299}\)See Duarte, 72 Cal. App. 4th at 853.
\(^{300}\)See id. at 852.
\(^{301}\)See id.
\(^{302}\)See id.
emotional distress. At trial, the jury found that none of the defendants had been negligent, and the physician’s conduct was not sufficiently outrageous to warrant liability for intentional infliction of emotional distress. Patient’s family appealed, claiming the trial court erred by not instructing the jury about a physician’s duty of care when faced with the withdrawal of life support systems.

The court held that the trial court did not err in refusing to give this instruction. Plaintiffs only sought damages. Under California law, a physician has no civil liability for refusing to withdraw life-sustaining services. Since the physician was immune from liability for damages, the trial court was not in error for refusing to give the jury instruction.

The court further held that a physician’s immunity from prosecution was not limited to treatment that a patient expressly consented to. The fact that neither the patient nor her family consented to placing the patient on a ventilator had no effect on the physician’s immunity.

Finally, the court held that the physician’s statutory immunity was not contrary to California’s Natural Death Act. The patient had executed no advanced directives to cover a situation such as this. The Natural Death Act does not hold a physician liable unless the patient had executed advanced directives. As a result, the physician’s actions were not in violation of the Natural Death Act. Duarte v. Chino Community Hosp., 72 Cal. App. 4th 849 (1999).

---

303 See id. at 849, 853.
304 See Duarte, 72 Cal. App. 4th at 853.
305 See id.
306 See id.
307 See id.
308 See id. at 854.
309 See Duarte, 72 Cal. App. 4th at 856.
310 See id.
311 See id.
312 See id. at 858.
313 See id.
314 See Duarte, 72 Cal. App. 4th at 859.
315 See id.
When New Legislation Does Not Provide a Reasonable Time Frame to Preserve Rights, it Will Not be Applied Retroactively

The Circuit Court of Louisiana held that the statute, in the interest of justice, could not be applied retroactively, and was therefore not barred by the statute of limitations.\textsuperscript{316}

The plaintiff was involved in an accident and underwent surgery for a ruptured spleen.\textsuperscript{317} In the course of the surgery, he was given several units of blood infected with the hepatitis virus.\textsuperscript{318} Almost a year after plaintiff became aware of his illness, he contacted an attorney, who immediately mailed a petition to the Fund Oversight Board (PCF) requesting a medical review panel.\textsuperscript{319} State statute (La. R.S. 40:12999.47 (A)(2)) was amended in July 1997, whereby all medical malpractice claims were to be filed with the Division of Administration, instead of the PCF.\textsuperscript{320}

The amended statute caused plaintiff's claim to be barred by the statute of limitations. The initial petition was returned to plaintiff's attorney and he was then informed that the petition should be directed to the Division of Administration.\textsuperscript{321} Plaintiff's attorney re-submitted the petition on October 8, 1997; however, the one-year statute of limitations ended on September 30, 1997.\textsuperscript{322} The lower court held that Plaintiff's claim was barred by the statute of limitations.\textsuperscript{323}

\textsuperscript{316}See Davis v. Willis-Knighton Med. Ctr., 738 So. 2d 1191, 1194 (2d Cir. 1999).
\textsuperscript{317}See id at 1191.
\textsuperscript{318}See id. at 1192.
\textsuperscript{319}See id.
\textsuperscript{320}See id.
\textsuperscript{321}See Davis, 738 So. 2d at 1192.
\textsuperscript{322}See id.
\textsuperscript{323}See id.
The first issue the court was faced with was determining the effective date of the amended statute. The second issue faced by the court was whether the statute should be applied prospectively or retroactively. The court first determined that the statute took effect on August 15, 1997. The court further held that the statute could not, in the interest of justice be applied retroactively. In deciding the issue, the court concluded that the new provision lacked a reasonable period of time for plaintiff to secure his rights under the law that existed when his cause of action arose. The court further reasoned that Due Process guaranteed plaintiff a reasonable time frame during which he should have been able to preserve his vested rights by filing his claim with the Division of Administration rather than the PCF.

The court, in a dissenting opinion, articulated its belief that plaintiff was not stripped of any vested right. The dissenting judge argued that the legislature merely instituted a procedural change and ignorance should not prevent the running of prescriptions. Davis v. Willis-Knighton Med. Ctr., 738 So. 2d 1191 (2d Cir. 1999.)

324 See id. at 1193.
325 See id.
326 See Davis, 738 So. 2d at 1194.
327 See id. at 1194.
328 See id. at 1193
329 See id. at 1194.
330 See id.
331 See Davis, 738 So. 2d at 1191.
STRICT LIABILITY

Patient May Bring a Cause of Action in Strict Tort Liability for Illness Received Through Tainted Blood Received During a Blood Transfusion

Court of Appeal of Louisiana, Fifth Circuit, held that the plaintiff could bring a cause of action in tort when the defendant hospital gave him blood contaminated with Hepatitis C during a transfusion.332

Plaintiff was diagnosed with Hepatitis C in September of 1995.333 He was told that the illness was probably a result of a contaminated blood he received during two transfusions, one in 1981 and another in 1982.334 Plaintiff brought an action against the hospital in tort, since his three-year statute of limitations for medical malpractice had already expired.335

Prior to 1981, Louisiana held tainted blood to be a strict liability in tort under Civil Code article 2315.336 After 1981, Civil Code article 2322.1 and LSA-R.S. 9:2797 extended immunity from strict tort liability with respect to blood transfusions.337 This law, however, was found unconstitutional and invalid until the time of its amendment in July of 1982.338 Because plaintiff's claim fell within the time period, during which the law was unconstitutional, the court held that defendants do not have exception of prescription (i.e., immunity), and, therefore, plaintiff may bring a case in strict tort liability with the applicable statute of limitation of one year from the time plaintiff knows or should have known of the injury.339 *Boutte v. Jefferson Parish Hosp. Serv. Dist. No. 1, 738 So. 2d 1188 (La. App. 1999).*

333See id. at 1189.
334See id.
335See id.
336See id.
337See id.
338See id.
339See id. at 1191.
Licensee’s Refusal of Chemical Testing was Reasonable

The Commonwealth Court of Pennsylvania held licensee’s refusal to leave child with police while licensee had blood testing at hospital was reasonable; therefore, an appeal regarding suspension of licensing privilege should not have been denied.340

Licensee testified that she failed two field sobriety tests and was arrested for driving under the influence.341 A police officer told licensee about the informed consent law and asked licensee to submit to a blood test at a hospital.342 Licensee agreed to go to a hospital until she was informed that her four-year old daughter could not go with her.343 Licensee and her daughter were transported to a police station where an officer recorded licensee’s refusal to submit to a test.344 Defendant state Department of Transportation suspended licensee’s driving privileges for one year for refusal to submit to chemical testing.345 Licensee subsequently filed an appeal.346 The trial court denied licensee’s statutory appeal of the suspension of her operating privilege imposed by the defendant.347

The issue presented for review was whether the trial court erred in finding that licensee had refused testing simply because she did not want to leave her child with police while she had a blood test.348 The court held the suspension of licensee’s driving privilege should be reversed because defendant failed to meet its burden of proving

341See id.
342See id.
343See id.
344See id.
345See Brown, 1999 WL 722966, at *1.
346See id.
347See id.
348See id. at *2.
licensee refused to submit to a blood test.\textsuperscript{349} To sustain a license suspension for refusal to submit to a blood test, the defendant has the burden of establishing that the driver:

1. was arrested for drunken driving by a police officer who had reasonable grounds to believe that the motorist was operating, or actually controlling or operating the movement of a motor vehicle, while under the influence of alcohol,
2. was requested to submit to a chemical test,
3. refused to do so, and
4. was warned that refusal would result in a license suspension.\textsuperscript{350}

The court held the licensee assented to the test on two occasions and only refused to leave child with strangers at the police station.\textsuperscript{351} The court found no support for not allowing the reasonable request that the child be allowed to accompany licensee to hospital.\textsuperscript{352} Therefore, the court reversed the decision to suspend licensee's driving privilege for one year.\textsuperscript{353}

The concurrence noted that it would reverse the trial court on the additional grounds that a mother has a right to determine whether it is in the best interests of her child to be separated from her under these circumstances.\textsuperscript{354} The licensee has a statutory duty to keep her child in her care rather than leave the child in the care of strangers.\textsuperscript{355} Common sense and the United States Constitution demonstrate the state may not interfere with the parent/child relationship unless compelling circumstances are present.\textsuperscript{356} In this case, defendant provided no

\textsuperscript{349}See id.
\textsuperscript{350}See Brown, 1999 WL 722966, at *2 (citing Department of Transp. v. O'Connell, 555 A.2d 873 (Pa. 1989)).
\textsuperscript{351}See id. at *3.
\textsuperscript{352}See id.
\textsuperscript{353}See id.
\textsuperscript{354}See id.
\textsuperscript{355}See Brown, 1999 WL 722966, at *3.
\textsuperscript{356}See id. at *4.
compelling reason why licensee had to be separated from her child in order to undergo testing at the hospital.\textsuperscript{357}

The dissent stated that being separated from a child is the normal and unavoidable consequence of being arrested.\textsuperscript{358} The focus should not be on leaving the child with strangers, but on the danger that licensee was jeopardizing her child's safety by driving while intoxicated.\textsuperscript{359} Brown v. Commonwealth Dep't of Transp., 1999 WL 722966, at *1 (Pa. Commw. Ct. Sept. 17, 1999).

---

**TORTS**

**Smoker's Injury Did Not Meet Requirement for RICO and Fraud Action Against Tobacco Company**

The United States District Court for the Northern District of Georgia held a cigarette smoker could not proceed with cause of action without establishing reliance and a causal connection between injury and tobacco company.\textsuperscript{360}

Plaintiff alleged that his wife's death from metastatic oat cell carcinoma was caused by years of smoking defendant's cigarettes.\textsuperscript{361} Plaintiff brought a civil Racketeer Influenced and Corrupt Organizations Act (RICO) and fraud action against defendant.\textsuperscript{362} The court noted that a RICO plaintiff must establish that her injuries were proximately caused by the defendant's unlawful predicate acts.\textsuperscript{363} In order to state a prima facie case of fraud under Georgia law, plaintiff was required to allege:

\begin{itemize}
  \item \textsuperscript{357}See id. at *5.
  \item \textsuperscript{358}See id. at *6.
  \item \textsuperscript{359}See id.
  \item \textsuperscript{361}See id.
  \item \textsuperscript{362}See id.
  \item \textsuperscript{363}See id. at *4.
\end{itemize}
CASE BRIEFS

(1) a false representation by defendant,
(2) scienter,
(3) an intention to induce the plaintiff to act or refrain from action,
(4) justifiable reliance by the plaintiff and
(5) damages.\(^{364}\)

The plaintiff alleged the defendants deliberately exposed his spouse to a hazardous substance by concealing the dangerous health impact of cigarettes in advertising and marketing campaigns.\(^{365}\) Defendant cigarette manufacturer responded by filing a motion for summary judgment.\(^{366}\)

The court held the defendant’s motion for summary judgment should be granted because plaintiff failed to meet the requirements for a civil RICO and fraud action.\(^{367}\) The court concluded the plaintiff did not establish that his wife’s injury flowed from one or more predicate acts of the defendant.\(^{368}\) Specifically, the plaintiff provided no evidence of a causal connection between his wife’s lung cancer and the defendant’s cigarettes.\(^{369}\) The court held plaintiff failed to establish reliance on the defendant’s representations, a necessary element of a fraud action.\(^{370}\)

The court noted the Federal Cigarette Labeling & Advertising Act (the Labeling Act) pre-empted plaintiff’s RICO and fraud claims because the Eleventh Circuit held the Labeling Act was intended to include common law claims.\(^{371}\) Plaintiff also would not be able to succeed on his claim that defendants intentionally exposed his wife to a hazardous substance because the claim is not a recognized tort in this

\(^{364}\)See id. at *5.
\(^{365}\)See Huddleston, 1999 WL 739457, at *1.
\(^{366}\)See id.
\(^{367}\)See id.
\(^{368}\)See id.
\(^{369}\)See id.
\(^{370}\)See Huddleston, 1999 WL 739457, at *5.
\(^{371}\)See id. at *6-7.
Patient May Sue for Personal Injury Resulting from Sexual Abuse During Medical Examinations

The Court of Appeals of Minnesota denied defendant’s motion for summary judgment because lower court erred in finding plaintiff did not have a cause of action for personal injury resulting from sexual abuse during medical treatments. The court did grant defendant’s motion to strike portions of plaintiff’s brief since the briefs contained information filed after the verdict and were not a part of the appellate record.

Patient testified that defendant physician used inappropriate sexual conduct during physical examinations. Expert testimony indicated no medical reason for defendant to perform the examinations. Plaintiff presented evidence regarding prior disciplinary actions against defendant physician for similar misconduct. Patient alleged that her inability to trust as a result of the violations had impaired her relationships.

Defendant physician alleged no recognized cause of action for personal injury caused by sexual abuse. Defendant asserted that if such a cause existed, plaintiff would fail because she does not meet the severe mental anguish standard for emotional damages as reported in the criminal sexual conduct statute. Finally, defendant filed a motion to strike portions of patient’s brief and appendix and for attorney’s fees.

---

372 See id. at *10.
374 See id.
375 See id.
376 See id.
377 See id.
378 See Brett, 1999 WL 732249, at *2.
379 See id.
380 See id.
associated with the motion. The district court denied defendant's motion for judgment on the pleadings, but entered summary judgment against plaintiff's claims for sexual abuse. On appeal, the court denied defendant's summary judgment motion. The court held the plaintiff had a cause of action because personal injury is implicit in the act of sexual abuse. The court concluded plaintiff did not have to show an elevated level of emotion to proceed to trial. The criminal statute's definition of sexual misconduct required a plaintiff to demonstrate more significant emotional damage than a civil plaintiff would have to allege. The court noted that defendant misconstrued the criminal sexual assault statute and applied it incorrectly to this civil action.

---

Public University Faculty Members Working in Private Hospitals are Public Employees for Purposes of Tort Claims Act

The Supreme Court of New Jersey held physicians who work as state university faculty members in private hospitals are private employees under the state Tort Claims Act. In 1994, plaintiff underwent a thyroidectomy and a mediastinoscopy. Following surgery, plaintiff was only able to speak in a whisper. Follow-up treatment after surgery determined that in

381 See id.
382 See id. at *1.
383 See Brett, 1999 WL 732249, at *4.
384 See id. at *5.
385 See id. at *2.
386 See id. at *4.
387 See id.
389 See id. at 29.
390 See id.
the course of the operation, plaintiff’s recurrent laryngeal nerves were severed, leading to bilateral vocal cord paralysis.  

The defendant physicians were both clinical professors employed by the University of Medicine and Dentistry of New Jersey (UMDNJ). Both practiced medicine in a UMDNJ affiliated private hospital. Defendants’ sole employment was with UMDNJ, and defendants received their salary only from UMDNJ. 

Under the New Jersey Tort Claims Act, public employees were entitled to notice of a claim. When plaintiff filed his malpractice suit, he was not aware defendants were public employees, and he did not provide notice. Defendants filed a motion to dismiss for failure to provide notice, and the trial court granted that motion. The court of appeals reversed that decision, finding the physicians were independent contractors. Defendants appealed that decision.

The court held defendants were public employees for purposes of the Tort Claims Act because they were totally economically dependent on UMDNJ and because their work constituted an integral part of UMDNJ’s business.

The court further held plaintiff was entitled to file a late notice of claim because he could not have known who defendants’ employer was, and he diligently pursued his claim by following procedures necessary to claim medical malpractice against a physician under ordinary circumstances. Eagan v. Boyarsky, 731 A.2d 28 (N.J. 1999).

---

391 See id. at 30.
392 See id.
393 See Eagan, 731 A.2d at 30.
394 See id.
395 See id. at 31.
396 See id.
397 See id.
398 See Eagan, 731 A.2d at 31.
399 See id.
400 See id. at 32.
401 See id. at 34.
WORKERS' COMPENSATION

An Employee Paralyzed Due to a Work Related Injury May Modify His Original Compensation Award to Include a Wheelchair Accessible Vehicle

The Missouri Court of Appeals, Western District, held that a wheelchair accessible van qualified as "medical treatment" and was medically necessary under the workers' compensation law, but that the employer did not have to provide for all costs involved with the vehicle.402

Plaintiff, who worked for the defendant as a window washer, suffered complete paralysis from a fall incurred while on the job.403 As a result, he was wheelchair bound for the duration of his life.404 Upon his return to work in a different capacity than his previous position, he found it increasingly difficult to maneuver himself and the wheelchair in and out of vehicles.405 Plaintiff's physician testified as an expert witness that continued maneuvering of this kind in and out of the car, which was not wheelchair accessible, was already causing plaintiff physical stress on his lower back and torso, and would continue to pose physical problems in the future.406 The plaintiff requested that he be given a vehicle with proper access for the disabled as an extension of his original workers' compensation award, to which his current employer would not agree.407

The court posed a question whether Missouri's Worker's Compensation law covers wheelchair accessible vehicles under the rubric of medical treatment.408 The court held that the purpose of such statutes is to benefit those who are injured and, therefore, should be

402See Mickey v. City Wide Maint., 996 S.W.2d 144, 144 (Mo. Ct. App. 1999).
403See id. at 146.
404See id.
405See id.
406See id. at 146-47.
407See Mickey, 996 S.W.2d at 146.
408See id. at 147.
given a broad reading in terms of possible remedies. The court further held that it would be reasonable to interpret the language of the statute to compensate plaintiff for any modifications to the van. However, the court did clarify that its decision was fact specific and that plaintiff would be responsible for expenses such as repair, gas, title, license, and insurance costs. Mickey v. City Wide Maint., 996 S.W.2d 144 (Mo. Ct. App. 1999).

409 See id. at 150.
410 See id. at 151.
411 See id. at 153.