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Administrative Agency Bears Laches Burden of Proof When Hospital Asserts Analogous Statute of Limitations In Administrative Hearings

The Court of Appeal of California, Second District, held in administrative hearings concerning financial reimbursements the burden of proof as to laches transfers to the Administrative Agency. The court held the hospital may “borrow” an analogous statute of limitations to assert doctrine of laches.

Medi-Cal is the state program responsible for distributing federal Medicaid monies to healthcare facilities throughout the state. The State Department of Health Services (Department) is the agency responsible for the administration of the Medi-Cal program. In 1994, plaintiff hospital received a revised final reimbursement settlement for the fiscal years 1981, 1982, and 1983 from the Department. The Department alleged calculating errors had been made and plaintiff had been overpaid $1,265,440. Plaintiff requested an administrative adjustment, and in October 1996 the parties agreed the Department would receive $470,571 unless an administrative hearing barred recovery through a statute of limitations or the doctrine of laches.

In February 1997, an administrative law judge (ALJ) held the plaintiff failed to produce evidence showing prejudice or unnecessary delay, the two requirements under the doctrine of laches. Plaintiff filed a petition for mandamus preventing the Department from recovering the mistaken Medi-Cal payments. The superior court denied the petition and plaintiff appealed.

1See Fountain Valley Hosp. and Regional Medical Ctr. v. Director of the State Dep’t of Health Serv., 89 Cal. App. 2d 139, 146 (1999).
2See id.
3See id. at 141.
4See id.
5See id. at 142.
6See Fountain Valley Hosp., 89 Cal. App. 2d at 142.
7See id. at 143.
8See id.
The court held a defense under the doctrine of laches barring an administrative agency’s recovery may be asserted in two ways: 1) the party arguing in favor of laches bears the burden of proof or 2) if there is a statute of limitations in an analogous case and that statute has been exceeded, the elements are presumed and the burden transfers to the other party to prove the delay was not unreasonable and the party asserting laches was not prejudiced. The court held the application of the rule for borrowing periods of limitations shifted the laches burden of proof to the agency. The case was reversed and remanded to the trial court with directions to remand to the ALJ to determine whether the Department had met the burden of proof. Fountain Valley Hosp. and Regional Medical Ctr. v. Director of the State Dep’t of Health Serv., 89 Cal. App. 2d 139 (1999).

BANKRUPTCY

Failure to Include Medical Malpractice Cause of Action On Schedule of Assets Bars Patient From Pursuing Action On Own Behalf

The Supreme Court of New York, Appellate Division, Third Department, reversed the state Supreme Court’s denial of physician’s motion that patient had lacked capacity to sue.

In July 1991, plaintiff was treated for a cancerous tumor near her pancreas. She developed pancreatitis that did not respond to treatment by defendant physician, and was transferred to another facility where she underwent further medical treatment, including surgery, and subsequently recovered. In July 1992, plaintiff consulted with two law firms regarding a possible medical malpractice
claim against defendant.\textsuperscript{17} In April 1993, when plaintiff was discharged in bankruptcy, the schedule of assets did not include any reference to the medical malpractice suit.\textsuperscript{18} In February 1994, plaintiff filed a malpractice claim seeking damages from defendant’s care in July 1991.\textsuperscript{19} In 1998, defendant, after becoming aware of patient’s prior bankruptcy claim, amended his answer, moving to dismiss due to patient’s lack of capacity to sue as an affirmative defense.\textsuperscript{20} Plaintiff reopened the bankruptcy case and filed an amended schedule of assets, including the medical malpractice claim, and moved to dismiss the defendant’s affirmative defense of lack of capacity.\textsuperscript{21}

The state supreme court granted plaintiff’s motion and denied defendant’s motion stating the plaintiff’s lack of capacity “had been cured.”\textsuperscript{22} The court reversed that decision finding plaintiff’s failure to include a malpractice claim barred pursuing this action.\textsuperscript{23} This was true even after the filing of the amended schedule because the claim would be the property of the bankruptcy trustee, not the plaintiff.\textsuperscript{24} The court also noted a substitution of the bankruptcy trustee as plaintiff would still have left the incapacity.\textsuperscript{25} \textit{Hansen v. M. Madani}, 693 N.Y.S.2d 332 (1999).

\textsuperscript{17}See id.
\textsuperscript{18}See id.
\textsuperscript{19}See \textit{Hansen}, 693 N.Y.S.2d at 333.
\textsuperscript{20}See id.
\textsuperscript{21}See id.
\textsuperscript{22}See id.
\textsuperscript{23}See id. at 334.
\textsuperscript{24}See \textit{Hansen}, 693 N.Y.S.2d at 334.
\textsuperscript{25}See id.
DAMAGES

Under Management Services Agreements Between Hospitals, Hospital Two Employees, Acting Under Management of Hospital One, Are Not Vicariously Liable For First Hospital One's Alleged EMTALA Violations

The United States District Court for the Northern District of Alabama granted summary judgment on behalf of one hospital (Hospital Two) holding another hospital’s (Hospital One) employees were not subagents of Hospital Two. Hospital One had not agreed to assume primary responsibility for them, therefore Hospital Two was not vicariously liable for Hospital One’s alleged Emergency Medical Treatment and Active Labor Act (EMTALA) violations. On March 6, 1998 plaintiff presented her twenty-month-old daughter to Hospital One’s emergency room because the child was crying, running a fever, and having difficulty breathing. Plaintiff was refused treatment and told she would need to make payment on past medical bills before her daughter could receive medical attention. Hospital One claimed these events never occurred and plaintiff was never present at its facility on the day in question. Plaintiff subsequently filed a claim against both hospitals for alleged EMTALA violations concerning the March 6, 1998 incident. Hospital Two was included in the claim because the two hospitals had a management services agreement that provided an employee from Hospital Two to act as a management agent at Hospital One. On March 6, 1998 a Hospital Two employee was the acting administrator at Hospital One.

27 See id.
28 See id. at 1335-36.
29 See id. at 1336.
30 See id.
31 See Zeigler, 56 F. Supp. 2d at 1335.
32 See id. at 1336.
33 See id.
Plaintiff had never been to Hospital Two and Hospital Two did not own or operate medical facilities in the same county as Hospital One. The court granted Hospital Two's motion for summary judgment since plaintiff had never requested medical treatment at its facility and it could not be found to have denied her any medical treatment. Zeigler v. Elmore County Health Care Auth., 56 F. Supp. 2d 1334 1338 (N.D. Ala. 1999).

### EMPLOYMENT PRACTICES

**Summary Judgment Reversed In Favor of Plaintiff Because Negligent Supervision of Hospital Employee Involved Policies Regarding Employee's Access to Hospital Property Used In Perpetration of Assault**

The Court of Appeals of Texas reversed a trial court's decision granting final summary judgment in favor of defendant hospital district. The Court reversed and remanded the questions of negligence to the jury because the plaintiff patient sufficiently alleged an injury arising from defendant's use of hospital's property. Furthermore, plaintiff sufficiently alleged her injuries arose because of the employment of the incompetent employee, and were job related.

The plaintiff brought a negligence action against defendant hospital after an employee of the defendant sexually assaulted her during a breast examination. The hospital argued the state Tort Claims Act barred recovery for the intentional tort of an employee. It also argued the employee was not acting within the scope of his employment when the assault occurred. Finally, defendant hospital

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34 See id.
35 See id.
37 See id. at *5.
38 See id. at *6.
39 See id. at *1.
40 See id.
41 See Hendrix, 2000 WL 36098, at *1.
contended the plaintiff did not establish that the use or misuse of tangible property was the proximate cause of the damages the plaintiff alleged, and the hospital was immune, according to state statute, from allegations regarding hospital policies that are discretionary according to state statute.\footnote{See id.}

The court stated under the state Tort Claims Act, the plaintiff must allege an injury arising under the use of property, and the use of such property must be the proximate cause of her injury.\footnote{See id. at *2.} The court held the plaintiff sufficiently alleged an injury causally related to the use of government property.\footnote{See id. at *4.} In this case, the plaintiff was lured to the hospital examining room by a hospital employee using the hospital public address system.\footnote{See Hendrix, 2000 WL 36098, at *4.} Furthermore, the employee was wearing a hospital lab coat.\footnote{See id. at *2.} Finally, the assault occurred on a hospital exam table, while the plaintiff was wearing a hospital gown.\footnote{See id. at *5.} The claims of negligent supervision were related to hospital policies regarding hospital property.\footnote{See id. at *4.} The court noted it was unlikely this assault could have occurred had the employee not had such access to hospital property.\footnote{See id.} The court also held there was some connection between the plaintiff's injury and the employment of the incompetent employee.\footnote{See id. at *6.} The court noted because the defendant serves patients it has a high duty in the hiring, training and supervising of its employees.\footnote{See id.} The duty to conduct criminal investigations of the hospital employees should be standard.\footnote{See Hendrix, 2000 WL 36098, at *6.} Accordingly, the court reversed and remanded the case to the lower court, finding the question of fact regarding proximate cause needed to be determined by a jury.\footnote{See id.} Hendrix v. Bexar County Hosp. Dist., No. 04-98-00833-CV, 2000 WL 36098 at *1 (Tex. Dec. 30, 1999).
Employer Policy Does Not Violate Pregnancy Discrimination Act Where No Prima Facie Case of Disparate Treatment or Disparate Impact

The Eleventh Circuit Court of Appeals affirmed the district court's granting of summary judgment for defendant employer on plaintiff's claim of discrimination under the Pregnancy Discrimination Act (PDA).\(^5\) Plaintiff employee claimed disparate treatment and disparate impact discrimination because of her pregnancy.\(^5\)

Appellant, a certified nurse's assistant was required to perform a substantial amount of lifting and repositioning of patients as a primary responsibility of her position.\(^5\) Once she discovered she was pregnant, she requested she become exempt from the lifting responsibilities of her job.\(^5\) However, defendant's policy specified only employees who suffered a job-related injury would be excused from meeting their responsibilities.\(^5\) As a result, plaintiff was terminated, yet rehired one year later.\(^5\)

Under the PDA, appellant claimed two types of discrimination as a result of her termination: disparate treatment and disparate impact.\(^6\) Unlike disparate treatment, a disparate impact claim does not require appellant to provide intentional discrimination evidence.\(^6\) To prove disparate treatment discrimination, direct evidence of the employer's intent to discriminate is necessary.\(^6\)

To establish a *prima facie* case of discrimination, four requirements must be met: employee is part of a protected group according to Title VII, employee is qualified for the position, employee suffered adversely, and employee experienced a differential application of work rules.\(^6\) Appellant failed to prove she was qualified and she

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\(^5\) See id. at 1311.
\(^5\) See id. at 1311.
\(^5\) See id.
\(^5\) See id.
\(^5\) See Spivey, 196 F.3d at 1311, 1312.
\(^6\) See id. at 1312.
\(^6\) See id.
\(^6\) See id.
\(^6\) See id.
experienced a differential application of work rules. Because appellant could not perform a primary responsibility of her job, she was no longer qualified for that position. Appellant argued had she been provided an accommodation, she would have been able to perform her job. However, the employer was not required to make any accommodations to pregnant employees, only to those who were injured on the job.

Furthermore, appellant did not prove she suffered from a differential application of work rules. The employer only offered modification to those injured on the job. The court decided to adhere to the Fifth Circuit’s precedent: it is not an infraction of PDA if employers only assign light duty to employees injured on the job, not to pregnant employees. Instead pregnant employees must be treated like every other employee not injured on the job.

Additionally, appellant failed to establish her disparate impact claim. To prove such a claim, the appellant must establish the particular employment practice alleged to have caused disparate impact. Second, appellant must provide statistical evidence to demonstrate causation that the alleged behavior resulted in disparate impact discrimination.

Appellant successfully fulfilled the first requirement by alleging pregnant employees were discriminated against by the modified duty policy. However, appellant did not provide any statistical evidence illustrating a disparate impact on pregnant employees. Thus, because appellant did not prove a prima facie case of either disparate impact or

64 See Spivey, 196 F.3d at 1313.
65 See id. at 1312.
66 See id.
67 See id.
68 See id. at 1313.
69 See Spivey, 196 F.3d at 1313.
70 See id.
71 See id.
72 See id. at 1313.
73 See id. at 1314.
74 See Spivey, 196 F.3d at 1313.
75 See id.
76 See id. at 1314.
treatment, the appellee’s summary judgment was granted.\textsuperscript{77} \textit{Spivey v. Beverly Enter. Inc.}, 196 F.3d 1309 (11th Cir. 1999).

**EXPERT WITNESS**

**Plaintiff Must Use Expert Witness to Establish Standard of Care For Treatment of Bedsore**

The Supreme Court of Iowa upheld summary judgment in favor of defendant, a skilled nursing facility, in a negligence action alleging improper treatment of a bedsore that became a severe coccyx ulcer.\textsuperscript{78} The court considered both the facility’s treatment of the bedsores and its attempts to prevent the sores.\textsuperscript{79} It held a jury could not determine the standard of care without an expert witness, which plaintiff had failed to provide.\textsuperscript{80}

Plaintiff, a fifty-year-old quadriplegic, had been a patient at the facility for six years when bedsores began.\textsuperscript{81} The facility treated the sores with prescription ointment, sixteen visits by an enterostomal therapy nurse and use of a special air flotation cushion.\textsuperscript{82} Doctors and nurses sought to change plaintiff’s position every two hours.\textsuperscript{83} Medical notes documented he refused, although his preferred position aggravated the ulcer.\textsuperscript{84} Surgery and skin grafts were required to close the ulcer, which then healed.\textsuperscript{85} Staff from the skilled nursing facility filed affidavits in support of defendant’s motion for summary judgment, indicating plaintiff’s refusal to cooperate with what they asserted was the correct standard of care.\textsuperscript{86}

\textsuperscript{77}See id.
\textsuperscript{78}See Thompson v. Embassy Rehabilitation and Care Ctr., 604 N.W.2d 643, 646 (Iowa 2000).
\textsuperscript{79}See id.
\textsuperscript{80}See id. at 645.
\textsuperscript{81}See id. at 646.
\textsuperscript{82}See id. at 644.
\textsuperscript{83}See Thompson, 604 N.W.2d at 644.
\textsuperscript{84}See id. at 644-45.
\textsuperscript{85}See id. at 645.
The court determined from interrogatories and a deposition that plaintiff did not have an expert witness who could testify as to the required standard of care for his bedsores.\textsuperscript{87} It applied the test:

If all the primary facts can be accurately and intelligibly described to the jury, and if they, as [persons] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation, [expert testimony is not required].\textsuperscript{88}

The court upheld the motion for summary judgment on the basis defendant had shown plaintiff lacked a material element in his case because he did not provide expert testimony to establish the correct standard of care.\textsuperscript{89} Although a jury could have determined whether the facility was negligent in not repositioning plaintiff to prevent bedsores, his refusal to cooperate put this issue beyond the jury’s understanding and therefore required expert testimony.\textsuperscript{90} \textit{Thompson v. Embassy Rehabilitation and Care Ctr.}, 604 N.W.2d 643 (Iowa 2000).

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\textbf{Expert Witness Not Required in Battery Claim}

\textbf{Because the Psychological Injury Was Clearly Caused by the Doctor’s Battery}

The Superior Court of Pennsylvania reversed a lower court’s directed verdict, which held a medical expert was necessary in order to prevail in an informed consent case grounded in battery.\textsuperscript{91} The plaintiff, though he could still have sexual intercourse, suffered from premature ejaculation and partial loss of erection, and thus visited the defendant physician.\textsuperscript{92} The defendant determined surgery to clean out blockage

\textsuperscript{87}See id. at 646.
\textsuperscript{88}See Thompson, 604 N.W.2d at 646.
\textsuperscript{89}See id.
\textsuperscript{90}See id.
\textsuperscript{91}See Montgomery v. Sehgal, 742 A.2d 1125, 1136 (Penn. Dec. 9, 1999).
\textsuperscript{92}See id. at * 2.
was necessary. However, the defendant inserted a prosthesis into the plaintiff without his approval.

The plaintiff brought claims for lack of informed consent grounded in battery and negligence. The appeal only concerned the battery claim. The plaintiff claimed he felt like a "machine," was embarrassed by the device, and the device had hindered the relationship between he and his wife. He argued he did not need to present expert medical testimony that the unwanted procedure performed by the defendant caused the physical and mental symptoms he alleged. The court agreed with the plaintiff, holding in a battery claim the need for expert testimony was not required. All that was needed to be proven by the plaintiff in order to submit the testimony to the jury, was the fact the defendant implanted the prosthesis into the plaintiff, and such contact was unpermitted and intentional. There was no dispute the defendant implanted the device without permission. Furthermore, the claims for mental anguish, which are compensatory, can be received for direct, obvious, and foreseeable results of the injury, even in the absence of expert medical testimony.

The court stated the unpermitted insertion of the device would obviously cause mental anguish, surprise, and embarrassment. Furthermore, such a result was direct, foreseeable, and not complex. Therefore, the lower court's decision was reversed because expert testimony was not required and the case should have been presented to a jury. Montgomery v. Sehgal, (Penn. Dec. 9, 1999) (1999 Pa. Super. 304).

93 See id. at *3.
94 See id. at *4.
95 See id.
96 See Montgomery, 742 A.2d at *6.
97 See id. at *4.
98 See id. at *5.
99 See id. at *9.
100 See id. at *10.
101 See Montgomery, 742 A.2d at *12.
102 See id. at *18.
103 See id. at *20.
104 See id.
105 See id. at *21.
No Broad Duty to Disclose Physician Incentive Plans to Participants Imposed on Health Maintenance Organizations

The United States Court of Appeals for the Fifth Circuit held the Employee Retirement Insurance Security Act (ERISA) did not impose upon a health maintenance organization (HMO) a duty to disclose physician incentive plans.106

Plaintiffs brought action in 1997 against defendant HMO, claiming the HMO breached its fiduciary duty to act solely in the interests of its members.107 Specifically, plaintiffs claimed the HMO had a duty to disclose it maintained financial incentive arrangements.108 These incentives, plaintiffs argued, were not within the best interests of patients since they encouraged physicians to minimize health care, testing, and referrals.109

The court found there did not exist a broad duty to disclose incentive plans since such a duty is not expressly stated in ERISA.110 Such an implied duty would be illogical because ERISA does provide for other express duties, such as the duty to summarize material provisions of the plan.111 The court found this absence to be intentional on the part of the drafters.112 The court further refused to accept plaintiffs’ argument that the duty to disclose incentive plans exists even in the absence of a specific inquiry or special circumstance.113 The court, however, did not address the question of what duty would exist had there been such a specific inquiry.114

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107 See id. at 554.
108 See id.
109 See id.
110 See id. at 555.
111 See Ehlmann, 198 F.3d at 555-56.
112 See id.
113 See id.
114 See id.
INFORMED CONSENT

An Objective Standard on the Causation Issue in Informed Consent Medical Malpractice is Correct

The Supreme Court of Tennessee affirmed a lower court’s ruling, which held the objective standard is appropriate in evaluating the causation issue in medical malpractice informed consent cases. The lower court had reversed the trial court’s decision granting a directed verdict in favor of defendant physician. During the trial there was conflicting testimony regarding what the patient would have done had she been fully informed of the dangers of her treatment. Thus, the trial court struck the testimony and directed verdict was granted on the informed consent claim.

The patient, who was paralyzed after receiving radiation treatment, argued a subjective standard should be employed when evaluating informed consent cases. A subjective standard would be established only by patient testimony. Under this standard the patient would need to prove she would not have consented to the radiation had she been told of the risk of paralysis. Thus, the credibility of the patient’s testimony would be what the jury would use to decide liability. The objective standard measures what a prudent person in the patient’s situation would have decided if the information had been disclosed. The court held the objective test was the correct standard to use in determining informed consent cases.

The court found the objective approach superior because it circumvented the need to make the jury decide whether a speculative, 

116 See id. at *1.
117 See id. at *4.
118 See id.
119 See id. at *7.
120 See Ashe, 1999 Tenn. LEXIS 685, at *8.
121 See id.
122 See id.
123 See id. at *10.
124 See id. at *13.
and possibly emotional answer to a hypothetical question should conclude the outcome of the case. 125 Furthermore, the court reasoned by comparing the conduct of the patient with a reasonable person in like circumstances, the jury could also give weight to the patient’s testimony and the characteristics of the patient.126

Finding the jury should have been allowed to decide whether a reasonable person in the patient’s situation would have chosen the treatment if the risk had been disclosed, the court affirmed the reversal of the trial court’s judgment, and remanded the case for a new trial consistent with the application of the objective test on the causation issue.127 Ashe v. Radiation Oncology Assoc., No. M1997-00036-SC-R11-CV, 1999 Tenn. LEXIS 685 (Tenn. Dec. 27, 1999).

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INSURANCE

A Health Benefit Claim Involving a Workers’ Compensation Claim Does Not Have to Adhere to the Same Laws as Health Claims Alone

The Court of Special Appeals of Maryland held health claims that are pending an investigation of a worker’s compensation claim are exempt from a state law mandating payment in thirty days.128

In February of 1996, Philip Lunz, who worked at Frederick Memorial Hospital, hurt his back while on the job.129 He then filed a claim with the Maryland Workers’ Compensation Commission.130 The insurance company for the hospital in turn filed an “issue” contesting Lunz’s claim.131 Lunz went to see an Orthopedic specialist, and surgery was authorized by Maryland Individual Practice Association (MIPA),

125 See Ashe, 1999 Tenn. LEXIS 685, at *13.
126 See id. at *14.
127 See id. at *15.
129 See id.
130 See id.
131 See id. at *2.
Lunz's health insurer. Following surgery, MIPA learned Lunz had a workers' compensation claim pending as well. MIPA then notified the orthopedic physicians' group that payment for Lunz would be delayed.

In May of 1996, the orthopedic group filed a complaint with Maryland Insurance Administration (MIA) regarding the delay. In March of 1998, the MIA issued an order demanding MIPA pay submitted health claims within thirty days regardless of their connection to workers' compensation claims. In July of 1998, MIPA filed a petition for judicial review with the circuit court in Baltimore. In February of 1999, the court overturned the MIA decision.

The appellate court first determined the proper standard of review for decisions coming from an administrative agency. The court held a review of an administrative decision to be the same as if from the circuit court. Therefore, the decision itself must be reviewed, and the findings of fact accepted.

The appellate court then turned to statutory interpretation to decide if Sections 19-710.1 and 19-712.1 of the Maryland Code applied in the instant matter. These two sections, in part, required health maintenance organizations (HMOs) to pay health care providers for covered services within thirty days of receipt of a claim. The court determined a workers' compensation claim was not a "covered service," and thus, the thirty day limit for payment did not apply in this situation. The court then examined the good faith exception to Section 19-712.1. This exception allows payment to be delayed.

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132 See id.
134 See id.
135 See id.
136 See id. at *3.
137 See id.
138 See id.
140 See id.
141 See id.
142 See id. at *9.
143 See id.
145 See id.
longer than thirty days if the claim is in dispute due to a question of whether the claim is proper. 146

Applying the good faith exception, because the claim was in dispute as to the identity of the proper payor, the court held that it did not have to be paid within thirty days. 147 However, an HMO in the future could only deny payment within the thirty days if they investigated the claim, and made a good faith determination the claim was not covered. 148 Maryland Ins. Admin. v. Maryland Individual Practice Assoc., Inc. 1999 Md. App. LEXIS 199, *1 (Md. Ct. Spec. App. Dec. 6, 1999).

Insurance Company Ordered to Cover Breast Reduction Surgery Where Plan was Improperly Interpreted

The United States District Court for the District of Nebraska ordered a health insurance company to cover breast reduction surgery after a finding the company had improperly interpreted the language of the plan. 149

After experiencing neck and back pain, plaintiff consulted with her physician and was diagnosed with bilateral hypertrophy of the breast or enlarged breasts. 150 The treating physician recommended bilateral breast reduction surgery and referred plaintiff to a plastic surgeon. 151 Plaintiff attempted to receive approval for breast reduction surgery and was denied pre-certification. 152 Defendant insurance company claimed the requested breast reduction surgery was not covered under the health care plan (Plan), and although previously payments had been made for such surgery for other patients, such payments were erroneous. 153 The language of the Plan provided

146 See id. at *13.
147 See id.
148 See id. at *14.
150 See id. at *4.
151 See id.
152 See id. at *1-2.
153 See id. at *4.
payment would not be made for breast reduction surgery not related to cancer.\textsuperscript{154}

In determining whether the insurance company’s interpretation of the Plan was reasonable the court applied five factors, including whether:

(1) the interpretation was consistent with the goals of the Plan;

(2) the interpretation conflicted with substantive or procedural requirements of the Employee Retirement Insurance Security Act (ERISA);

(3) the interpretation rendered any language of the Plan meaningless or internally inconsistent;

(4) the interpretation was contrary to the clear language of the Plan; and

(5) the company had interpreted the relevant terms consistently.\textsuperscript{155}

The first requirement was satisfied in that the insurance company interpreted the Plan in a manner consistent with the goals of the Plan.\textsuperscript{156} The court found the relevant goals of the Plan were providing benefits for those services covered and providing services for those that are medically necessary.\textsuperscript{157} The process of determining coverage employed by the company included making a decision first as to whether a service is excluded from the Plan and then as to whether the service was medically necessary.\textsuperscript{158} This method, according to the court was consistent with both the aforementioned goals and the goals set forth by ERISA.\textsuperscript{159}

\textsuperscript{154}See Milone 1999 U.S. Dist LEXIS 20064, at *4.
\textsuperscript{155}See id.
\textsuperscript{156}See id. at *10.
\textsuperscript{157}See id.
\textsuperscript{158}See id.
\textsuperscript{159}See Milone, 1999 U.S. Dist LEXIS 20064, at *11.
Next the court looked at the interpretation of the language in the Plan and determined the term "medically necessary" was ambiguous. The court also determined the language in the exclusion, which denied coverage for "breast augmentation or reduction which is not associated with cancer of the breast," confusing in light of physician testimony that breast augmentation to achieve symmetry after cancer related surgery was not technically a form of treating cancer. Thus the court determined the use of the term "medical necessity" rendered the term meaningless.

Next, the court determined the company's interpretation of the Plan to be inconsistent. In reaching this conclusion the court focused on the fact in the past patient requests for breast reduction absent a claim of cancer, were granted pre-certification. While the court recognized the policies relied on in these previous cases were distinct, it rested its conclusion on the fact the language contained therein was identical.

Finally, the court found the company's interpretation inconsistent with the clear language of the Plan. The court reiterated the primary reason was the fact the medical necessity standard was utilized during the decision making process of refusing plaintiff's request and also accepting previous identical requests.

Since the requisite factors for proper interpretation of a health care plan were not satisfied, the court found for the plaintiff and ordered defendant to provide coverage to her for breast reduction surgery. *Milone v. Exclusive Healthcare, Inc.*, No. 8:98CV274 1999, 1999 U.S. Dist. LEXIS 20064 (Neb. Dec. 30, 1999).

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160 See id. at *15-17.
161 See id. at *12-14.
162 See id. at *21.
163 See id. at *25, 26.
165 See id. at *23-25.
166 See id. at *25-26.
167 See id.
168 See id. at *28.
To Carry Out an Injunction, One Must Prevail on the Merits

The Sixth Circuit Court of Appeals reversed a district court’s decision granting plaintiff physician’s preliminary injunction to restore his staff privileges with defendant hospital. Because plaintiff was not likely to prevail on the merits, the court stayed the injunction to withhold physician’s staff privileges.

While practicing medicine at defendant hospital, one of plaintiff physician’s patients died. Thereafter, defendant required plaintiff to be monitored when he admitted patients, and later suspended his staff privileges. Upon further review, an outside agency recommended plaintiff participate in an intensive training program.

Plaintiff filed a complaint against the hospital, alleging racial discrimination, antitrust violations, tortious interference with contractual and business relationships, and conspiracy. He also moved for preliminary injunction to lift suspension of his staff privileges. The district court granted the injunction under the agreement plaintiff would still be monitored. Defendant appealed, asking for a stayed enforcement of the injunction.

In order to grant a preliminary injunction, the court must consider several factors. The factor at issue here was whether the plaintiff was likely to prevail on the merits of his claim. He offered no concrete evidence to support his racial discrimination claim. Additionally, the antitrust claim was based on an unsupported allegation the hospital wanted plaintiff out of the business in order to

170 See id. at *18.
171 See id. at *3.
172 See id.
173 See id. at *4.
175 See id.
176 See id.
177 See id. at *7.
178 See id. at *8.
180 See id. at *9.
collect more revenue.\textsuperscript{181} His tortious interference claim did not survive either since hospitals can appoint or remove its doctors without judicial intervention.\textsuperscript{182} Likewise, plaintiff’s conspiracy claim was insufficient because of lack of evidence.\textsuperscript{183}

The court found the district court had erred in its balancing harms analysis.\textsuperscript{184} Originally the district court stated the hospital’s revocation of plaintiff’s privileges would irreparably damage plaintiff’s reputation.\textsuperscript{185} However, the district court neglected to recognize the harm to the defendant if plaintiff was allowed to practice.\textsuperscript{186} Therefore, because of the unlikelihood of plaintiff prevailing on the merits, and the district court’s incorrect balance of harms, the court stayed the injunction and plaintiff’s privileges were not restored.\textsuperscript{187} \textit{Samuel v. Herrick Mem’l Hosp., 2000 U.S. App. Lexis 586 (6th Cir.2000)}.

\section*{MEDICAL MALPRACTICE}

\textbf{Medical Malpractice Testimony, Unconsented Surgery, and Inappropriate Standard of Care Essential for a Medical Malpractice Claim}

The Court of Appeals of Ohio affirmed a trial court’s decision resulting in a directed verdict in favor of defendant physician.\textsuperscript{188} Plaintiff patient failed to carry her burden of proof in a medical malpractice suit.\textsuperscript{189}

Plaintiff patient required emergency surgery on her colon and a temporary colostomy.\textsuperscript{190} Approximately six months later, defendant recommended reversing the colostomy.\textsuperscript{191} Complications arose after

\begin{itemize}
\item \textsuperscript{181} See id. at *9.
\item \textsuperscript{182} See id. at *11.
\item \textsuperscript{183} See id. at *16.
\item \textsuperscript{184} See Samuel, 200 U.S. App. LEXIS 586, at *16-17.
\item \textsuperscript{185} See id. at *17.
\item \textsuperscript{186} See id.
\item \textsuperscript{187} See id. at *17.
\item \textsuperscript{188} See Dean v. Akron Gen. Med. Ctr., 1999 Ohio App. LEXIS 6169, at *29 (Ohio 1999).
\item \textsuperscript{189} See id.
\item \textsuperscript{190} See id. at *3.
\item \textsuperscript{191} See id.
\end{itemize}
the second surgery, where plaintiff developed a leak in her colon, resulting in massive infection.\textsuperscript{192} As a result, plaintiff required additional surgeries to rectify the situation.\textsuperscript{193}

Plaintiff alleged medical malpractice, technical battery, and inappropriate standard of care against defendant physician.\textsuperscript{194} The trial court entered a directed verdict in favor of defendant.\textsuperscript{195} To overcome a directed verdict, a plaintiff must provide sufficient evidence to prove other reasonable minds would not have reached the same conclusions.\textsuperscript{196}

Because plaintiff did not provide expert testimony demonstrating the physician failed to act in a manner similar to that of other similarly situated physicians, the medical malpractice claim failed.\textsuperscript{197} Plaintiff's technical battery claim failed because she had signed two legitimate consent forms obtained in a legitimate manner.\textsuperscript{198} Furthermore, plaintiff never contested the consent forms.\textsuperscript{199} Plaintiff further argued the wrong standard of care was used.\textsuperscript{200} She claimed the subjective laparoscopic surgeon standard was used, instead of the general surgeon standard of care.\textsuperscript{201} However, her own expert witness testified both standards were the same.\textsuperscript{202} Therefore, plaintiff failed to prove this issue.\textsuperscript{203}

Because plaintiff failed to prove medical malpractice, technical battery, and application of the wrong standard of care, the court affirmed the directed verdict in favor of the defendant.\textsuperscript{204} \textit{Dean v. Akron Gen. Med. Ctr.}, 1999 Ohio App. LEXIS 6169 (Ohio 1999).

\textsuperscript{192}See \textit{id.} at *7.
\textsuperscript{193}See \textit{Dean}, 1999 Ohio App. LEXIS 6169, at *7.
\textsuperscript{194}See \textit{id.} at *9.
\textsuperscript{195}See \textit{id.} at *9.
\textsuperscript{196}See \textit{id.} at *10.
\textsuperscript{197}See \textit{id.} at *10.
\textsuperscript{198}See \textit{Dean}, 1999 Ohio App. LEXIS 6169, at *13.
\textsuperscript{199}See \textit{id.} at *8.
\textsuperscript{200}See \textit{id.} at *23.
\textsuperscript{201}See \textit{id.} at *23.
\textsuperscript{202}See \textit{id.} at *24.
\textsuperscript{203}See \textit{Dean}, 1999 Ohio App. LEXIS 6169, at *21.
\textsuperscript{204}See \textit{id.} at *29.
Physical Therapists Have a Duty to Administer Pre-Employment Physicals According to the Accepted Standard, Even in the Absence of a Physician-Patient Relationship

The Court of Appeals of Washington held a physical therapist had a duty of care to those persons on whom he or she conducted pre-employment physicals, even though no physician-patient relationship existed.205

As part of his job application, plaintiff was sent to defendant’s Medical Center to have a pre-employment physical performed by a physical therapist.206 Plaintiff signed a waiver releasing both the therapist and the medical center from any injury liability resulting from the physical.207 During the physical plaintiff was required to lift a weight bending at the waist with his knees locked; this caused him immediate back and leg pain.208

The court found a motion for summary judgment was improper because an issue of fact existed; the therapist contended the test was properly conducted, while plaintiff’s expert witnesses declared the therapist’s description of the test revealed it was not administered in the proper and accepted way.209 The court held a physician-patient relationship was not required to claim failure of the state accepted standard of care.210 The state’s Comprehensive Medical Malpractice Act required any health care provider, including physical therapists, to follow the accepted standard of care in providing medical care or treatment.211 Since this statute was applicable, the physical therapist had a duty to perform the pre-employment physical on the patient within the accepted standard of care.212

206 See id. at 437.
207 See id.
208 See id.
209 See id. at 438.
210 See Eelbode, 984 P.2d at 438.
211 See id. at 467 (citing RCW 7.70 (Laws of 1975-76, 2nd Ex.Sess., § 6-13)).
212 See id. at 439.
The second issue addressed by the court was an exculpatory agreement signed by the patient prior to the physical. The court held although the language in the waiver would have covered negligence with the therapist or the medical center, the contract was unenforceable and void because it was violative of public policy.  


MENTAL HEALTH

Claim of Negligence for Failure to Warn of Possible Harm not Viable in the Absence of a Foreseeable Threat to a Specified Victim

The Court of Special Appeals of Maryland held a claim of negligence for failure to warn of a psychiatric patient’s propensity for violence failed since the injured was outside the zone of danger, and therefore the requisite element of a foreseeable danger to a specific person did not exist.

Plaintiff, representative of the estate of his mother, brought a medical malpractice suit against defendant physician and hospital. The complaint arose when an involuntarily admitted patient, upon refusal of medication at a psychiatric hospital, struck a nurse who fell and subsequently knocked down decedent who was at the time a patient in the hospital. Upon falling, decedent suffered a broken hip and died as a result of complications arising from hip surgery. The trial court granted defendant’s motion for summary judgment on the theory plaintiff failed to make out a viable claim for negligence.

The court considered the issue of whether a state statute prohibiting liability against a mental health provider in the absence of  

213 See id. at 440.  
214 See id.  
216 See id. at *1.  
217 See id.  
218 See id.  
219 See id.
knowledge of a propensity for violence and a direct threat to a specified individual applied in this instance. 220 In assessing whether these two requisite factors were present, the court focused on the fact that the injuring behavior was not foreseeable. 221 The court invoked the Palsgraf 222 doctrine and applied it here, noting the decedent in this case was not a "readily identifiable victim" because her injury resulted indirectly from a direct injury to the nurse and was therefore outside the zone of danger. 223

The court recognized the injuring patient in this case had a record of violent behavior and had previously behaved aggressively toward both staff and other patients. 224 The court concluded this did not establish a claim against the physician or hospital since there was not enough evidence to show the injuring patient had informed the defendants of an intent to harm. 225 Falk v. Southern Md. Hosp., No. 1924, 1999 Md. App. LEXIS 203 (Md. Dec. 7, 1999).

NEGLIGENCE

Doctrine of Res Irsa Loquitur Applies Where Oxygen Mask Catches on Fire During Electrocautery Procedure

The Court of Appeals of Indiana, Fifth District, held the doctrine of res ipsa loquitur applied where an oxygen mask caught on fire during surgery involving use of an electrocautery unit, under defendant physician’s control, that emitted sparks. 226

In January of 1995 plaintiff, now deceased, underwent a right carotid endarterectomy, a procedure performed on a patient’s right face and neck. 227 Part of plaintiff’s anesthesia involved the administration

221See id. at *6-7.
224See id. at *10-11.
225See id. at *11.
227See id. at *2.
of oxygen through a mask which did not create an air tight seal since the mask only came in one size.\textsuperscript{228} To cauterize the blood vessels during surgery, the physician used an electrocautery unit that emitted sparks.\textsuperscript{229} The plaintiff's face was covered by drapes in such a way that only the anesthesiologist had a view of it.\textsuperscript{230} During the surgery the oxygen mask caught on fire and plaintiff suffered burns to his face and chest.\textsuperscript{231}

Plaintiff brought a medical malpractice claim and was denied summary judgment.\textsuperscript{232} Defendants were then granted a directed verdict on the grounds plaintiff had failed to present evidence of a breach of the standard of care.\textsuperscript{233} The court held the doctrine of \textit{res ipsa loquitur} and its common sense exception did not apply.\textsuperscript{234}

On appeal, the court decided the doctrine of \textit{res ipsa loquitur} did apply in this situation, because the facts or circumstances accompanying the injury were such as to raise a presumption of negligence on the part of the defendant.\textsuperscript{235} The court noted, under the doctrine of \textit{res ipsa loquitur}, an inference of negligence will arise where: "(1) the injuring instrumentality is shown to be under the management or exclusive control of the defendant or his servants and (2) the accident is such as in the ordinary course of things does not happen if those who have management of the injuring instrumentality use proper care."\textsuperscript{236}

The court determined the requisite element of control was present in this case, in that the electrocautery unit and oxygen mask were the injuring elements and were indeed under the exclusive control of defendant medical providers.\textsuperscript{237} The court noted the concept of exclusive control was a broad one.\textsuperscript{238} The plaintiff did not need to show the existence of other possibilities, but rather that the injury could

\begin{itemize}
  \item \textsuperscript{228}See id. at *3.
  \item \textsuperscript{229}See id.
  \item \textsuperscript{230}See id. at *5.
  \item \textsuperscript{231}See Gold, 1999 Ind. App. LEXIS 2180, at *5-6.
  \item \textsuperscript{232}See id. at *1.
  \item \textsuperscript{233}See id.
  \item \textsuperscript{234}See id. at *6.
  \item \textsuperscript{235}See id. at *7, *9.
  \item \textsuperscript{236}Gold, 1999 Ind. App. LEXIS 2180, at *10.
  \item \textsuperscript{237}See id. at *13.
  \item \textsuperscript{238}See id. at *11.
\end{itemize}
be traced to a specific element, and defendants were the cause of that element.\textsuperscript{239} Next, the court found the accident was not one which would have happened in the ordinary course of things if the physicians had used proper care.\textsuperscript{240} In coming to this conclusion the court pointed out the risk of fire here was great since the mask did not produce an airtight seal.\textsuperscript{241} Thus the court concluded the elements of \textit{res ipsa loquitur} were satisfied, and consequently an inference of negligence was present.\textsuperscript{242}

The court declined to accept defendants' argument the jury should not be permitted to make a decision based on common sense because the procedure was complicated and thus required expert testimony for proper explanation.\textsuperscript{243} The court stated such expert testimony is required only when the issue of care is beyond the understanding of a lay person.\textsuperscript{244} The court found, in this instance, a lay person could understand the fact a fire could occur during a procedure where an instrument, which emitted sparks was placed near an oxygen source.\textsuperscript{245} Accordingly, the court reversed the trial court's denial of summary judgment for the plaintiff.\textsuperscript{246} \textit{Gold v. Ishak M.D.}, * No. 64A05-9809-CV-479, 1999 Ind. App. LEXIS 2180 (Ind. Dec. 15, 1999).

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\textbf{Leaving Part of a Medical Instrument Inside a Patient's Body Falls Within \textit{Res Ipsa Loquitur} Negligence and Does Not Require Expert Testimony}

The Court of Appeals of Texas partially reversed a Texas District Court summary judgment holding no issue of fact resulted from the exclusion of expert testimony of a severed defendant, and remaining defendants were not negligent.\textsuperscript{247}

\begin{itemize}
    \item \textsuperscript{239}See id. at *11, *12.
    \item \textsuperscript{240}See id. at *13.
    \item \textsuperscript{241}See Gold, 1999 Ind. App. LEXIS 2180, at *15.
    \item \textsuperscript{242}See id.
    \item \textsuperscript{243}See id. at *18.
    \item \textsuperscript{244}See Gold, 1999 Ind. App. LEXIS 2180, at *18.
    \item \textsuperscript{245}See id. at *19.
    \item \textsuperscript{246}See id. at *24.
\end{itemize}
A nurse, employed by a home health agency, inserted a catheter into patient's arm as part of medical treatment and the catheter fragmented. The patient required surgery to have the fragmented catheter removed. Plaintiff subsequently filed a complaint that initially named the company that manufactured the catheter as a defendant.

The trial court granted a motion for summary judgment and severance on behalf of the defendant catheter manufacturer. Plaintiff subsequently relied on evidence obtained from defendant manufacturer's summary judgment motion in answering the summary judgment motion filed by the defendant nurse. However, the trial court struck the evidence on the basis the defendant manufacturer's claim had been severed and the evidence was a part of that action. On appeal, the court held the evidence was stricken in error and more than a scintilla of evidence regarding the fragmented catheter existed, therefore summary judgment was in error on those issues.

Regarding negligence, the court held the res ipsa loquitor exception applied and medical expert testimony was not needed to determine that leaving part of a medical instrument inside a patient was negligent. The court, however, found no merit in plaintiff's contention her thoracic syndrome condition was linked to the catheter fragmentation. Steinkamp v. Arreola, [___ S.W.3d ___] No. 08-98-00425-CV, 1999 WL 740785, 1, (Tex.App.-El Paso Sep. 23, 1999).

248 See id.
249 See id.
250 See id.
251 See id.
253 See id.
254 See id. at *2.
255 See id. at *4.
256 See id. at *6.
The One-Year Statute of Limitation for Medical Claims did not Apply Because the Plaintiff’s Injury was Ancillary, and not a Necessary Part of the Medical Treatment

The Ohio Court of Appeals affirmed a lower court ruling a plaintiff’s negligence claim was not medical, therefore the one-year statute limitations did not apply. Thus, the trial court did not err in disallowing the defendant doctor’s motion for leave to file an amended answer asserting the one-year statute of limitations as a defense.

The plaintiff brought a negligence action against the defendant because while she was attempting to leave the office without assistance after her physical therapy, the door hit her causing her to fall. The physician sought to amend his answer to the complaint in order to assert the one-year statute of limitations as a defense to the allegations. He argued the action was a medical action, thus the one-year statute of limitations applied. The trial court denied the motion.

The court held the plaintiff did not file a medical malpractice claim, just a negligence claim. The injuries were not incurred as a result of any medical treatment. The plaintiff was leaving the office after her physical therapy session was finished. The plaintiff’s injury resulted from negligent maintenance of the doctor’s property. She was not accompanied by any employee of the physician. Therefore, because the plaintiff’s claim was not medical and thus subject to the one-year statute of limitation, the trial court was correct in disallowing

258 See id. at *7.
259 See id. at *2.
260 See id. at *3.
261 See id.
262 See Tayerle, 1999 Ohio App. LEXIS 5931, at *3.
263 See id. at *4.
264 See id. at *5.
265 See id.
266 See id. at *6.

\section*{A Patient May Find Negligence On the Part of a Medical Facility For Actions By a Third Person In Specific Situations}

The Supreme Court of Virginia held a patient harmed while under the care of a medical facility may hold the facility liable for actions of a third person if sufficient negligence is pled.\textsuperscript{269}

Plaintiff filed a third amended motion for judgment against defendant for medical negligence because of a breach of duty to her when she was a psychiatric patient in one of defendant's facilities.\textsuperscript{270}

Plaintiff had a history of bipolar disorder, and other psychiatric problems stemming from sexual molestation as a child and sexual assault as a teenager.\textsuperscript{271} She was admitted to a hospital affiliated with defendant, and while a patient there she was visited by an unauthorized male whom she alleged sexually assaulted her.\textsuperscript{272} The medical staff at the hospital documented the coming and going of the visitor, but never took any action to protect the plaintiff.\textsuperscript{273} Investigation revealed the visitor was a fellow patient with a history of sexual misconduct, and was known to be HIV positive.\textsuperscript{274} Defendant medical facility neither informed police nor made any other record of the assault.\textsuperscript{275}

Plaintiff filed an action claiming negligence for failure to protect her from the intentional acts of a third person, for failure to control the actions of the third person, and for both negligent and intentional affliction of emotional distress.\textsuperscript{276} Upon plaintiff's filing of her third amended motion for judgment, defendant filed demurrers, and asserted

\begin{itemize}
  \item \textsuperscript{268}See id.
  \item \textsuperscript{270}See id.
  \item \textsuperscript{271}See id. at *2.
  \item \textsuperscript{272}See id.
  \item \textsuperscript{273}See id.
  \item \textsuperscript{274}See Delk, 2000 WL 26988, at *2.
  \item \textsuperscript{275}See id.
  \item \textsuperscript{276}See id. at *1.
\end{itemize}
plaintiff had named no viable cause of action. The circuit court upheld defendant’s motion. Plaintiff appealed.

In order for defendants to be liable, a special relationship towards the plaintiff needed to exist. The court believed this necessary relationship existed because defendants knew plaintiff was a danger to herself and others, and had a long history of psychiatric problems. Defendants even listed plaintiff as a high risk patient. Therefore, the court held the sexual assault incident was reasonably foreseeable. It found plaintiff’s pleadings asserted sufficient facts to support her contention a special relationship existed. The court asserted in order for the necessary special relationship to exist, all plaintiff had to do was allege facts which, if proven, “would show that the defendant had ‘taken charge’ of a third person....” The court found plaintiff’s pleadings sufficiently asserted defendants had not controlled the third person who allegedly assaulted her.

The court affirmed the lower court’s judgment against plaintiff on the complaint of emotional trauma because of a lack of a causal connection, and a failure on her part to describe the trauma, but overturned the lower court on the remainder of the judgment. Delk v. Columbia/HCA Healthcare Corp., 2000 WL 26988 *1 (Va. Jan. 14, 2000).

An On-Call Emergency Room Physician Does Not Need to Be Present to Establish a Patient–Physician Relationship

The Court of Appeals of Missouri held an on-call surgeon owed a duty to reasonably foresee patients might need emergency care and,
therefore, he should have taken measures to notify the hospital of his absence. 288

Defendant, Dr. Joseph Corrado, was the on-call general surgeon at the Audrain Medical Center (AMC) on November 4, 1994. 289 He also needed to attend a medical conference in another town. 290 Dr. Corrado made arrangements with another physician, who was not a general surgeon, to take his place if an emergency arose. 291 Plaintiff, Mrs. Millard, was severely injured in an automobile accident later in the morning of November 4, 1994. 292 She was taken by ambulance to AMC. 293 The hospital attempted to page Dr. Corrado, but was unsuccessful. 294 Over half an hour after the initial message, Dr. Corrado called AMC and spoke with the physicians attending to Mrs. Millard. 295 The situation was discussed, and the decision was made to transport plaintiff to the University of Missouri Medical Center in Columbia for surgery. 296 Mrs. Millard was subsequently transported to Columbia, where surgery was performed on her two and a half hours after she first arrived at AMC. 297

Plaintiff brought action against Dr. Corrado, claiming negligence. 298 Defendant physician filed a motion for summary judgment based on the argument plaintiff had failed to establish the necessary patient–physician relationship needed for a medical negligence claim. 299 The trial court granted the summary judgment motion and plaintiff appealed. 300

The appellate court divided its analysis into two parts—general negligence and medical negligence. 301 For the general negli

289 See id. at *2.
290 See id.
291 See id.
292 See id.
293 See Millard, 1999 Mo. App. LEXIS 2405, at *3.
294 See id. at *4.
295 See id.
296 See id. at *6.
298 See id. at *7.
299 See id. at *7.
300 See id.
301 See id. at *15.
claim analysis, the court evaluated the public policy considerations, and
the foreseeability of the harm. For the public policy considerations,
the court determined from prior decisions a standard of care existed for
emergency room personnel, including the rule that on-call surgeons
should arrive at the hospital within thirty minutes of being called.
The court felt this created little burden. The court then quickly dealt
with the foreseeability of harm discussion by stating an emergency
room general surgeon could easily foresee the possibility of someone
needing his or her services while on-call. As a result of this
foreseeability, a duty existed. The court applied these principles to
the instant case and held public policy and the foreseeability of harm
created a duty on the part of defendant physician towards plaintiff.

In addressing the medical negligence claim, the court discussed
primarily the issue of whether a patient/physician relationship could
exist between plaintiff patient and defendant physician. In general,
such a relationship is only created if the physician personally examines
the patient. The court looked to the Corbet test to determine if a
patient/physician relationship existed without a personal
examination. The Corbet test is as follows: “where the consultant
physician does not physically examine or bill the patient, a physician-
patient relationship can still arise where the physician is contractually
obligated to provide assistance in the patient’s diagnosis or treatment
and does so.” The court applied this test to determine if there was
enough material question of fact to take this issue to a jury. It
determined enough question of fact existed.
Accordingly, the appellate court determined plaintiff properly pleaded claims of both general negligence and medical negligence. The court reversed the lower court’s decision, and remanded the case for further proceedings. Millard v. Corrado, 1999 Mo. App. LEXIS 2405 at *1 (Mo. Ct. App. Dec. 14, 1999).

When Trying to Prove Corporate Negligence on Behalf of a Medical Facility, and not Medical Negligence, Expert Medical Testimony is not Always Needed

The Superior Court of Pennsylvania held no Medical expert is needed to testify in a negligence action involving a medical facility when the incident and the injury are close together in time, and easily apparent, that the circumstances themselves justify allowing the case to go to a jury.

Plaintiff, Sybil Matthews, following the birth of a healthy baby, underwent a tubal ligation. After surgery, plaintiff fell from the operating table, perhaps when she rose in an attempt to go to the bathroom unattended. She alleged injury from both the fall, and a nurse’s attempt to grab her arm to break the fall. She subsequently filed a complaint stating negligence on the part of the hospital.

During discovery there was a question of who would serve as plaintiff’s expert medical witness. After plaintiff failed to produce an expert witness to testify as to causation of the alleged injuries, the defendants filed a motion for summary judgment. The trial court dismissed the case, claiming a medical malpractice action required a medical expert to show causation. Plaintiff appealed.

314 See id. at*27.
315 See id. at *30.
317 See id. at *2.
318 See id.
319 See id.
320 See id.
322 See id. at *1.
323 See id.
The appellate court did not see this action as one of medical malpractice, but instead one of corporate negligence. Nevertheless, the court held if causation was not obvious the plaintiff had to produce expert testimony the hospital's acts deviated from the accepted standard of care. No expert testimony was required, however, when the cause was obvious.

The court looked at cases involving both corporate negligence and medical negligence in creating a rule for the instant case. It held no medical expert testimony was required in situations where "the manifestation of the injury began almost immediately after the alleged negligent act, and the injury complained of was the type one would reasonably expect to result from the accident in question." The court further held the instant case was in accordance with that rule. Accordingly, the judgment of the trial court was reversed and the case remanded for re-trial. Matthews v. Clarion Hosp., 1999 Pa. Super. LEXIS 4109 at **22 (Pa. Super. Ct. Dec. 8, 1999).

PROCEDURE

In Order to Comply With State Law, Plaintiff Affidavits Must Include Applicable Standard of Care and How Standard Was Breached

The Minnesota Court of Appeals affirmed a lower court's dismissal because plaintiff patient failed to state the applicable standard of care, and how the defendant nursing home departed from the standard when she was not restrained and injured herself. The state statute and

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324 See id.
325 See id.
327 See id.
328 Id. at *11.
329 Id. at *17, *18.
330 See id. at *21
331 See id.
precedent case law required plaintiff to file an affidavit, which among other things had to state the applicable standard of care, the acts defendant committed to breach this standard, and an outline of the chain of causation that led to the injury. The court also held the lower court did not abuse its discretion by denying an extension of time to allow her to add to the affidavit.

The patient brought a medical malpractice negligence claim against the nursing home alleging that due to the nursing home's failure to restrain her, she fell and was injured. The patient filed an affidavit in a timely fashion as required by statute, but the lower court found the affidavit was lacking and dismissed the claim. The patient argued the affidavit should have been considered by the lower court in conjunction with a Department of Health report of the incident. The court disagreed, holding the affidavit did not articulate the standard of care and the facts showing the violation of the standard were inadequate. The affidavit only contained broad, conclusory statements.

Furthermore, the court held the lower court did not err in disallowing an extension of time to the patient so she could add to the affidavit. The court noted the patient did not ask the lower court for an extension to cure the affidavit's deficiencies. Also, in order to allow an extension of time according to statute, the party requesting the extension needed a reasonable excuse for any defects. Tousignant v. St. Louis County, Minn., 602 N.W.2d 882 (Minn. Nov. 30, 1999).

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333 See id. at 885.
334 See id. at 886.
335 See id. at 884.
336 See id.
337 See Tousignant, 602 N.W.2d at 886.
338 See id.
339 See id.
340 See id. at 887.
341 See id. at 886.
342 See Tousignant, 602 N.W.2d at 887.
RIGHT TO PRIVACY

When the Health of a First Patient is Possibly Affected by the Health of a Second Patient, the Medical Records of the Second Patient may only be Reviewed In Camera

The Supreme Court of Mississippi held a patient has the right to keep their medical records confidential, even if the health of another patient is at issue. The medical records may, however, be viewed in camera to determine if another patient's health is at risk.

Plaintiff, Sammy Johnson, and his wife, Deena Johnson, had a daughter, Kayla Johnson on December 6, 1995. Shortly after the birth, one of the nurses at Baptist Memorial Hospital (BMH) accidentally took Kayla to the wrong mother (Mrs. X) for breast feeding. Several hours later the Johnson’s were notified of this mistake. The hospital, however, refused to disclose the identity of the woman who breast fed Kayla.

Plaintiff filed a negligence action against BMH for the nurse’s mistake, and the plaintiff’s attorney served interrogatories and requests for production on BMH, in part requesting the identity of Mrs. X, and full access to her medical records. BMH filed a Motion for Protective Order to prevent the disclosure. Plaintiffs then filed a Motion to Compel BMH to produce the identity. BMH filed a response claiming Mrs. X’s identity was medically privileged information.

Officials at BMH notified Mrs. X of this ongoing litigation, and she affirmatively asserted her medical privilege to confidentiality.

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344 See id.
345 See id. at *3.
346 See id.
347 See id.
348 See Baptist Mem’l Hosp., 2000 Miss. LEXIS, at *3.
349 See id.
350 See id.
351 See id.
352 See id. at *4.
353 See id. at *4.
Mrs. X did, however, allow a portion of her medical records to be turned over to the Johnsons. The trial court held a hearing to determine the Motion to Compel. The court ordered the identity of Mrs. X disclosed, and ordered the production of all medical records relating to Mrs. X. The trial court then entered an interlocutory appeal to the supreme court for a ruling on the scope of the patient-physician privilege, and the appropriateness of full disclosure of the records.

The supreme court first reviewed the law and public policy relating to compelling the identity of a fact witness, even if it might violate the witness’s rights. The court saw Mrs. X as a fact witness to the potential negligence of BMH, therefore her identity had to be revealed. The court then turned to the issue of what medical records should be disclosed to the Johnsons. The court considered this an issue of first impression in Mississippi; therefore, for guidance, the court reviewed the history of the laws concerning the patient-physician privilege in the state. The court, on review, determined that any revelation of records that would allow someone to know both the identity of the person, and their ailments would be a violation of the person’s rights. Furthermore, this disclosure was only acceptable if public policy demanded such.

The court held the most reasonable solution was an in camera review of Mrs. X’s records. The court remanded the case to the trial court and ordered the medical records of Mrs. X reviewed in camera by the trial judge to determine if the health of the baby was at risk. The court also held the identity of Mrs. X to be revealed to the Johnsons.

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See id.
See id.
See id.
See id. at *7.
See id. at *8.
See id. at *9.
See id.
See id. at *14.
See id. at *16.
See id.
because she was a fact witness in the litigation. Baptist Mem’l Hosp. v. Sammy Johnson, 2000 Miss. LEXIS 5*1 (Miss. Jan. 6, 2000).

STAFF PRIVILEGES

Physicians Need a Direct Contractual Relationship with an Eligible Health Center to Qualify for Medical Malpractice Coverage Under the Health Centers Assistance Act

The Eleventh Circuit Court of Appeals affirmed defendant was not considered an employee under the federally supported Health Centers Assistance Act (Act). Because defendant had no contractual relationship with an eligible health center, he was not eligible for their malpractice insurance.

Plaintiff patient claimed defendant physician negligently performed medical services during her pregnancy. The key issue was whether defendant was an employee under the Act at the time this alleged malpractice occurred.

Defendant entered into a contract with Capstone Health Services Foundation. Through this contract, defendant became a member of University of Alabama and Capstone agreed to provide liability insurance for defendant. Capstone contracted with West Alabama to do so. After suit was filed against defendant for malpractice, he removed the case to federal court, believing he was covered under the Act.

Defendant contended despite an explicit contract with West Alabama, he was still included under the Act. He claimed it was

366 See id.
368 See id. at *8.
369 See id. at *8.
370 See id. at *2.
371 See id. at *3.
373 See id.
374 See id. at *4.
375 See id.
sufficient he performed services for a public health organization pursuant to a contract. However, the court held the contractor was an individual directly contracted with a particular entity.

When interpreting a federal statute, the court must strictly construe the verbiage so as not to expand a waiver of sovereign immunity. Therefore, because defendant never specifically contracted with West Alabama, he was not considered an employee under the Act. As a result, the malpractice action was remanded to state court. Dedrick v. Youngblood, 2000 U.S. App. LEXIS 374 (11th Cir. 2000).

Physician Whose Staff Privileges were Suspended did not have Standing to Sue Under Title VII Because She was not an Employee

The United States Court of Appeals for the Third Circuit affirmed a United States District Court motion for summary judgment on behalf of a hospital, holding a physician suspended of staff privileges did not have standing under Title VII because she was not a hospital employee.

Over a three and a half year period the defendant hospital’s Quality Assurance Committee, Executive Committee, and Investigative Committee, among other boards held various inquiries and meetings regarding the lack of care provided hospital patients seen by plaintiff physician. Statements from nurses, physicians, and plaintiff herself, were considered during this evaluation which culminated in twenty-five hours of hearings before the hospital’s Judicial Review Committee.

The court found much of plaintiff’s evidence had been “anecdotal and inadmissible,” and concerned instances that had occurred several

376 See id. at *6.
378 See id. at *6.
379 See id. at *8.
380 See id.
382 See id. at 381.
383 See id. at 389.
years prior to this action.\textsuperscript{384} Accordingly, the court held no reasonable finder of fact could find discriminatory reasons for physician’s suspension of privileges.\textsuperscript{385}

The court affirmed the district court’s dismissal of plaintiff’s second claim of disparate treatment under the Health Care Quality Improvement Act (HCQIA), holding defendant hospital’s inquiry to be reasonable and motivated by the furtherance of quality health care.\textsuperscript{386} \textit{Pamintuan, M.D. v. Nanticoke Mem’l Hosp., 192 F.3d 378 (3d Cir. 1999)}.

\textbf{TORTS}

\textbf{Plaintiff did not meet her Burden of Proof Because she Could not Link the Vaccination to her Child’s Hearing Loss}

The Court of Federal Claims denied the plaintiff mother a favorable determination and compensation to her child under the National Childhood Vaccine Injury Act of 1986.\textsuperscript{387} The court denied compensation to the plaintiff’s child because the court was only faced with a small amount of reliable medical evidence and the plaintiff failed to show a nexus between the vaccination and the child’s hearing loss.\textsuperscript{388}

The plaintiff filed a claim for compensation under federal statute alleging her son’s hearing loss was caused by an allergic reaction to a vaccination.\textsuperscript{389} However, there was evidence family members had thought the child may have had hearing difficulties before the vaccination was administered.\textsuperscript{390} Additionally, defendant’s medical expert noted there was no research linking the vaccination with hearing

\textsuperscript{384}See \textit{id. at} 387.
\textsuperscript{385}See \textit{id. at} 388.
\textsuperscript{386}See \textit{Pamintuan, 192 F. 3d 378, 390.}
\textsuperscript{387}See \textit{Zimmer v. Secretary of the Dep’t of Health and Human Serv., No. 97-0861V, 1999 U.S. Claims LEXIS 289, at *42 (Dec. 2, 1999).}
\textsuperscript{388}See \textit{id. at} *16, *18.
\textsuperscript{389}See \textit{id. at} *4.
\textsuperscript{390}See \textit{id. at} *6.
loss, and no proof the vaccination played any role in the child’s hearing loss.\textsuperscript{391}

The court held because there was a paucity of medical research connecting the vaccination to hearing loss, and because the plaintiff could not prove the nexus between the vaccination and her child’s hearing loss, she could not be granted relief.\textsuperscript{392} The court stated a two-prong test had to be met in order for the plaintiff to prevail.\textsuperscript{393} First, the plaintiff needed to provide a reputable medical theory that linked the vaccine to the hearing loss.\textsuperscript{394} Second, the plaintiff had to prove the vaccine actually caused the hearing loss in her child.\textsuperscript{395} The court decided the plaintiff had failed to meet either burden.\textsuperscript{396} Specifically the inference the plaintiff’s child suffered from hearing loss due to the vaccine was speculative and there was evidence the child had a hearing impairment for some time before the vaccine was administered.\textsuperscript{397} Thus, since the plaintiff did not meet her burden of proof she was denied relief.\textsuperscript{398} \textit{Zimmer v. Secretary of the Dep’t of Health and Human Serv., No. 97-0861V, 1999 U.S. Claims LEXIS 289 (Dec. 2, 1999)}.

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\textbf{Damage for Emotional Distress not Recoverable for Fear of Contracting AIDS When Exposure not Demonstrated}
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In an issue of first impression, the Court of Appeal of Florida, Fifth District, held a plaintiff could not recover damages for the fear of contracting AIDS without establishing physical injury, showing the virus likely to be present, or demonstrating the channel for transmitting the disease.\textsuperscript{399}

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\textsuperscript{391}See id. at *9.\\
\textsuperscript{392}See Zimmer, 1999 U.S. Claims LEXIS 289, at *18.\\
\textsuperscript{393}See id. at *13.\\
\textsuperscript{394}See id.\\
\textsuperscript{395}See id.\\
\textsuperscript{396}See id. at *18.\\
\textsuperscript{397}See id.\\
\textsuperscript{398}See Zimmer, 1999 U.S. Claims LEXIS 289, at *18.\\
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Plaintiffs won a jury award for medical expenses and loss of consortium for defendant’s negligent infliction of emotional distress. Both parties appealed.

The two plaintiffs had shared a bottle of Coca-Cola, found it tasted bad and discovered what appeared to be a used condom floating in the bottle. Both testified they feared exposure to the AIDS virus. They presented no medical or scientific evidence that HIV was or could be present in the Coca-Cola. Although they had an HIV test at a hospital emergency room, they did not follow-up with their own physicians. Furthermore, they presented no evidence they sought or needed professional counseling because of their fears. Later, a chemist from Coca-Cola’s quality assurance department testified the object in the bottle appeared at first to be a condom, but was actually a mold that developed in beverages that lost their carbonation.

The court considered the effect of Florida’s “impact rule” in negligence suits, which allows compensation only for emotional distress arising from physical injuries. The rule applied to contaminated food cases, requiring proof of physical illness. Plaintiffs had not experienced physical reactions or physical illness, and their emotional distress arose from the fear of contracting AIDS, not from the object in the beverage bottle. Therefore, there could be no recovery under Florida law. The court also found no case law in other states granting damages for the fear of contracting AIDS in similar situations. Most states required the plaintiff to show the fear was reasonable—either through actual presence of the virus or the medical or scientific possibility that it could have been transmitted by

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400 See id. at *2.
401 See id.
402 See id. at *3.
403 See id. at *3.
405 See id. at *10.
406 See id. at *10-11.
407 See id. at *5-6.
408 See id. at *10-12.
410 See id. at *14-15.
411 See id. at *17.
412 See id. at *22.
the method in question. Here, plaintiffs failed to establish the item was contaminated or that ingesting the beverage was a way to contract the disease. Therefore, their fear of contracting AIDS was unreasonable. The court held there was no cause of action proved against defendants and reversed the verdicts. Coca-Cola Bottling Co. v. Hagan, 1999 Fla. App. LEXIS 16194 (Fla. Dist. Ct. App. Dec. 3, 1999).

Public Hospitals Lack Standing to Sue Tobacco Companies for Recovery of Health Care Expenses for Treatment of Smokers

The United States District Court for the Western District of Washington granted summary judgment to defendants in a suit brought by public hospital districts in Washington state, seeking recovery for costs of treating smoking-related diseases. Plaintiffs used several legal theories, including federal antitrust violations, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, fraudulent misrepresentation, fraudulent concealment, breach of special duty to disclose health hazards, unjust enrichment, conspiracy, violations of the state Consumer Protection Act, and public nuisance.

Plaintiffs alleged defendants conspired to promote smoking and forced them to bear the costs of related medical care. Plaintiffs sought recovery of the unreimbursed costs of the care and equitable and injunctive relief. At issue was whether their claims differed from similar unsuccessful claims made by third party health care payers. The court cited Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 957 (9th Cir. 1999) as fatal to the

413 See id. at *23.
415 See id.
416 See id. at *26.
418 See id. at 1221.
419 See id.
420 See id.
421 See id. at 1222.
hospital districts’ case.\textsuperscript{422} \textit{Oregon Laborers} held the third party payers failed to show a direct link between the tobacco companies’ alleged actions and plaintiffs’ alleged damages.\textsuperscript{423} The court assumed, for purposes of reviewing the motion to dismiss, that smoking was harmful, that defendants conspired to withhold this information from the public, and that this affected plaintiffs’ costs for treating smoking-related illnesses.\textsuperscript{424}

Both the Sherman Act and RICO claims require standing for plaintiff to recover.\textsuperscript{425} Here, the court held smokers may have experienced direct injury, but any injury to plaintiff was derivative and too remote to allow recovery.\textsuperscript{426} The Sherman Act also requires an antitrust injury, in the form of restrained competition.\textsuperscript{427} The court held this could not exist because plaintiffs and defendants did not operate in the same market.\textsuperscript{428} Similarly, RICO claims require a direct injury to plaintiffs, and the court determined defendants’ activities were not targeted at plaintiffs, therefore no injury existed.\textsuperscript{429} The court dismissed state law claims for fraudulent concealment and misrepresentation, breach of special duty, unjust enrichment, violation of the Washington Consumer Protection Act, nuisance, and conspiracy using similar reasoning.\textsuperscript{430} The court concluded the hospital districts’ claims were derivative of harm experienced by their patients, and defendants’ actions were not the proximate cause of the plaintiffs’ alleged injuries.\textsuperscript{431} The court upheld defendants’ motion to dismiss.\textsuperscript{432} \


\textsuperscript{422}See \textit{Assoc. of Wash. Pub. Hosp. Dists.}, 79 F. Supp. 2d at 1221. 
\textsuperscript{423}See id. 
\textsuperscript{424}See id. at 1222-23. 
\textsuperscript{425}See id. at 1223. 
\textsuperscript{426}See id. at 1224. 
\textsuperscript{428}See id. at 1226. 
\textsuperscript{429}See id. at 1227-28. 
\textsuperscript{430}See id. at 1227-29. 
\textsuperscript{431}See id. at 1230. 
Latex Allergy Upheld As Work-Related Injury

The Supreme Court of Iowa upheld a workers' compensation award to defendant, a registered nurse. It affirmed latex-allergy was properly defined as an on-the-job injury, not an industrial disease, which arose from exposure to latex while employed at plaintiff hospital.

Defendant had worked at the hospital for five years when symptoms of latex-allergy arose. She could not change her work environment to avoid further exposure to latex, and quit a year later to work for an insurance company. She then filed for and obtained workers' compensation benefits for her latex-allergy, which was determined to be an injury that caused permanent partial disability.

Her former employer appealed the award on three bases. First, it argued the condition was an industrial disease, not an injury, and was covered under a separate chapter of Iowa code. Second, it asserted substantial evidence did not support the determination defendant's employment had caused the injury. Finally, it said the evidence did not support a 35 percent disability rating because defendant's new job paid more than her old one. The court ruled plaintiff waived its right to raise its first issue by not presenting it until appeal. It went on, however, to analyze whether allergic reactions should, as a matter of law, be considered injuries or industrial diseases. It cited as precedent its own broad definition of injury, several authorities, and case law from other states recognizing allergies as work-related injuries.
The court held defendant's expert witnesses had provided substantial evidence to show a causal connection between her employment and her injury. Finally, the court found compensation for an unscheduled disability involves all factors that may bear on employability, not just lost earnings ability. Here, substantial evidence showed defendant was unable to engage in many positions similar to what she had at the hospital, and she therefore lost earning capacity. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Statutory Presumption of Compensability Rebutted Only With Evidence Injury Was Not the Result of On the Job Activity

The District of Columbia Court of Appeals held a hospital had not properly rebutted a presumption of compensability where there was evidence that injury was the result of on the job lifting.

In 1990 plaintiff, a nurse, suffered multiple hernias subsequent to lifting a patient with obesity, which was a part of her regular duties as nurse on a burn unit. Plaintiff was advised to undergo surgery to repair the hernias and to stop working. Plaintiff underwent successful surgery and resumed full time employment as soon as she was cleared to do so by her physicians.

At the compensation hearing, the question at issue was whether plaintiff's condition was causally related to the lifting incident at work. As plaintiff had a pre-existing hernia condition at the time of the incident, her contention was the condition was aggravated by


See id. at 651.

See id. at 652.

See id.


See id. at *1-2.

See id. at * 1

See id. at * 2

See id.
subsequent, repetitive, heavy lifting. The defendant hospital stipulated that the statutory presumption of compensability had been met by plaintiff, but further contended the presumption could be rebutted by physician testimony that "a single lifting episode...was not the cause of this patient's hernia," and the injury was more likely the result of gradual tissue stress over a long period of time.

The court first looked to the presumption of compensability under which a plaintiff need only show some evidence of "(1) a disability, and (2) a work-related event, activity, or requirement which has the potential in resulting in or contributing to the disability." The defendant argued the hearing examiner failed to adequately discuss findings of fact on all material issues involved in this presumption. The court disagreed with this argument stating such a strict standard of procedure did not exist for the hearing examiner and plaintiff had satisfied the presumption requirements by alleging her disability was at least in part the result of a work related injury.

The court looked next to the examiner's findings relevant to whether the presumption was effectively rebutted by physician testimony implying that the injury did not result solely from the incident in question. The court noted such a presumption must be rebutted by "substantial evidence that the disability did not arise out of and in the course of employment." The court concluded the sole evidence offered on this point, expert physician testimony, was inconsistent and insufficient to rebut the presumption. However, the court noted the plaintiff was not required to show the injury arose only out of a single incident. To rebut the presumption successfully the hospital would have had to present evidence that the injury was definitively not the result of the incident in question.

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453 Id.
454 Id. at *3.
455 See id. at *3.
456 See id. at *5.
458 Id.
459 See id. at *6.
460 See id.
461 See id.