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, 2 DePaul J. Health Care L. 183 (1997)
Available at: https://via.library.depaul.edu/jhcl/vol2/iss1/7

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 digitalservices@depaul.edu.
Staffing Service Nurse Acts as Hospital's Borrowed Servant

The Court of Appeals of Georgia held a nurse, who gave medication leading to the death of patient, was a borrowed servant of defendant hospital. Therefore, the staffing service that provided the nurse was granted summary judgment.

A patient went to defendant hospital complaining of a swollen tongue and difficulty swallowing. The patient was initially assessed and treated by emergency room personnel. A physician covering for patient's regular physician went to defendant hospital to assess his condition. The physician determined patient had experienced an allergic reaction to his blood pressure medication. Therefore, the patient was kept in the emergency room, and his wife was sent home to determine the names of his blood pressure medications. A few hours after the patient's wife returned to defendant hospital with her husband's medication, an emergency room nurse gave patient a dose of the blood pressure medication that the treating physician suspected was the cause of his allergic reaction. The nurse claimed he administered the medication pursuant to an order made by patient's treating physician.

Approximately six hours later, patient was examined by his regular physician who concluded patient's symptoms were consistent with an allergic reaction to his blood pressure medication. At that time, patient's wife informed his regular physician that her husband had received another dose of the blood pressure medication after being admitted to the emergency room. Patient's regular physician responded that patient would be fine; subsequently, patient was discharged with directions to see his regular physician the following morning.

\[2\] Id. at 1.
\[3\] Id. at 1.
\[4\] Id.
\[5\] Id.
\[6\] Brown, 490 S.E. 2d at 505.
\[7\] Id.
\[8\] Id.
\[9\] Id.
\[10\] Id. at 505-06.
\[11\] Brown, 490 S.E.2d at 506.*1.
\[12\] Id.
suffered another allergic reaction the next morning, and choked to death on his grossly swollen tongue.\(^\text{13}\)

Plaintiff, patient’s wife, brought a medical malpractice action against defendant hospital, physicians, and nursing staffing service.\(^\text{14}\) The trial court granted summary judgment in favor of the nurse’s staffing service, and plaintiff appealed.\(^\text{15}\) Plaintiff claimed the trial court erred because the test for establishing that the nurse was a “borrowed servant” was not met.\(^\text{16}\) The appellate court found defendant hospital had complete supervisory control of the nurse while he was caring for patient and held the nurse was a borrowed servant of defendant hospital.\(^\text{17}\) The court further recognized defendant hospital had the right to discharge the nurse if his performance fell below hospital standards.\(^\text{18}\) Accordingly, the court affirmed the nurse staffing service’s motion for summary judgment.\(^\text{19}\) Brown v. Starmed Staffing, L.P., 490 S.E.2d 503 (Ga. Ct. App. 1997).

---

**Hospital May Be Directly Liable for Patient’s Injuries Under Corporate Negligence Theory**

The Supreme Court of Pennsylvania reversed the lower court’s grant of summary judgment in favor of defendant hospital because plaintiff patient had established a *prima facie* case of negligence.\(^\text{20}\)

At the age of sixteen, plaintiff received prenatal care from defendant physician, an employees of defendant hospital.\(^\text{21}\) During that time, defendant physician had obstetrical privileges at defendant hospital, although surgery was not within the scope of those privileges.\(^\text{22}\) Plaintiff alleged defendant physician negligently monitored the condition of the fetus, resulting in injury to the child, and ultimately the child’s death.

---

\(^{13}\) Id.

\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) Brown, 490 S.E.2d 506.

\(^{17}\) Id. at 507.

\(^{18}\) Id. at 506.

\(^{19}\) Id. at 509.


\(^{21}\) Id. at 581.

\(^{22}\) Id.
eleven months later. Plaintiff also maintained defendant hospital was vicariously liable for the negligent acts of its staff in failing to adequately care for an infant exhibiting signs of fetal distress. Furthermore, plaintiff argued defendant hospital was directly liable because the hospital acted negligently in granting non-surgical obstetrical privileges to defendant physician without requiring a qualified surgeon to be available if surgery was necessary. Plaintiff further opined defendant hospital was directly liable for hospital’s staff’s failure to notify the hospital of the necessary surgical delivery.

The court explained that, under a corporate negligence theory, plaintiff must show defendant hospital had “actual or constructive knowledge of the defect or procedures that created the harm.” Furthermore, defendant hospital could have been found liable if it failed to adhere to the proper standard of care owed to patients. The court further stated corporate negligence theory is based upon the negligent acts of defendant hospital; therefore, plaintiff had to rely on the negligence of a third-party in order to establish a cause of action for direct liability. Additionally, plaintiff had to present expert testimony in order to prove defendant hospital deviated from the standard of care and to establish the deviation was a substantial factor in causing plaintiff’s harm.

In this case, plaintiff presented expert testimony showing that if the nurses had notified defendant hospital of the need for a cesarean section, the injury to the child would not have occurred. Furthermore, plaintiff presented testimony regarding defendant hospital’s failure to have an on-call surgeon in the event that emergency surgery was necessary and that such a failure constituted a breach of the standard of care. In light of that evidence, the court held plaintiff established a cause of action against defendant hospital. Therefore, the court reversed the grant of summary

---

23 Id.
24 Welsh, 698 A.2d at 584.
25 Id.
26 Id.
27 Id. at 584.
28 Id.
29 Welsh, 698 A.2d at 585.
30 Id.
31 Id. at 585.
32 Id.
judgment and remanded the case to the trial court.\textsuperscript{33} Welsh \textit{v. Bulger}, 698 A.2d 581 (Pa. 1997).

\section*{ANTITRUST}

\textbf{Health Care Hospital Replacement Plan Does Not Restrain Trade Under Sherman Act}

The United States Court of Appeals for the Fifth Circuit affirmed a lower court’s judgment that a health care plan’s replacement of a hospital with another hospital did not restrain trade under the Sherman Act.\textsuperscript{34} However, the court reversed the lower court’s denial of standing, reasoning that standing in an antitrust claim did not require a showing of competition in the marketplace.\textsuperscript{35}

Plaintiff hospital filed a claim against defendant health care plan and replacement hospital, alleging violations of federal and state antitrust laws.\textsuperscript{36} Specifically, plaintiff asserted defendants illegally restrained trade in violation of Section 1 of the Sherman Act by conspiring to restrict competition through exclusion of plaintiff from the health care network.\textsuperscript{37} Plaintiff also asserted defendants violated Section 2 of the Sherman Act by attempting and conspiring to monopolize the hospital services market.\textsuperscript{38} The lower court granted summary judgment for defendants and plaintiff appealed.\textsuperscript{39}

The court began its review of the lower court’s decision by concluding plaintiff had established standing for an antitrust claim.\textsuperscript{40} The court disagreed with the lower court’s analysis of the standing issue, stating standing in an antitrust claim did not require a showing of injury to competition in the marketplace.\textsuperscript{41} Relying upon prior case law, the court determined an antitrust injury must be established in order to have

\textsuperscript{33} Welsh, 698 A. 2d at 585.
\textsuperscript{34} Doctor’s Hosp. \textit{v.} Southeast Medical Alliance, 123 F.3d 301, 312 (5th Cir. 1997).
\textsuperscript{35} Id. at 306-07.
\textsuperscript{36} Id. at 304.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Doctor’s Hosp, 123 F.3d at 304.
\textsuperscript{40} Id. at 306-07.
\textsuperscript{41} Id.
standing under the Sherman Act. Furthermore, the injury should reflect the anticompetitive effect of the violation in respect to plaintiff's position in the marketplace. Therefore, plaintiff was not required to establish market-wide injury to competition.

After resolving the standing issue, the court looked specifically to the alleged Sherman Act violations. The court held defendants' activities did not constitute an injury to competition necessary to prove a violation of Section 1 of the Sherman Act. Plaintiff alleged its replacement resulted in increased prices of hospital services, reduction in consumer choice, and a decrease in its own competition power. The court determined, however, plaintiff failed to present sufficient evidence of all three contentions.

In regard to the Section 2 violation, the court concluded plaintiff could not establish a monopoly claim when the market was clearly established. By reasoning that health care purchasers and consumers could still turn to hospitals outside the defendant health care plan, the court concluded defendants did not demonstrate an attempt and conspiracy to monopolize; thus, Section 2 of the Sherman Act was not violated. 


DISABILITY

Social Security Benefits Denied Due to Lack of Credible Evidence

The United States Court of Appeals for the Eighth Circuit denied claimant's motion for social security benefits due to lack of credible evidence.

42Id. at 306 (citing Bell v. Dow Chem. Co., 847 F.2d 1179, 1182 (5th Cir. 1988)).
43Id.
44Doctor's Hosp., 123 F.3d at 306-07.
45Id. at 307.
46Id. at 310.
47Id. at 305.
48Id.
49Doctor's Hosp., 123 F.3d at 112.
50Id.
51Jones v. Callahan, 122 F.3d 1148 (8th Cir. 1997).
Claimant filed applications for social security disability insurance benefits and supplemental security income after injuring his back at work while attempting to lift a large rock with a co-worker.\textsuperscript{52} Claimant alleged the injury caused him tremendous pain and affected his ability to work, resulting in depression and mental impairment.\textsuperscript{53} The Social Security Administration (SSA) denied his application, and claimant’s case proceeded to a hearing before an administrative law judge (ALJ).\textsuperscript{54} The ALJ upheld the SSA’s decision, denying claimant’s application for benefits and the district court affirmed.\textsuperscript{55}

The issue before the court was whether the ALJ erred by discrediting claimant’s complaints of pain and failing to consider his psychological impairments.\textsuperscript{56} The court acknowledged the ALJ could not dismiss claimant’s subjective complaints of pain merely because the medical evidence was inconsistent with claimant’s complaints.\textsuperscript{57} Nevertheless, the court upheld the ALJ’s decision that claimant’s complaints were not credible due to inconsistencies apparent through evidence presented by claimant.\textsuperscript{58} The court also denied claimant’s assertion relating to psychological impairment, finding that the ALJ adequately reviewed and considered the available evidence.\textsuperscript{59} The court noted no evidence demonstrated a significant level of deficiencies regarding “concentration, persistence, or pace; or any actual episodes of deterioration or decompensation in work settings.”\textsuperscript{60} Finally, the court held the district court was correct in denying claimant’s request for remand, because claimant did not produce any material evidence specific to an incident occurring after the SSA’s decision.\textsuperscript{61} Therefore, the court affirmed the district court’s ruling and denied all social security benefits to claimant.\textsuperscript{62}

\textit{Jones v. Callahan, 122 F.3d 1148 (8th Cir. 1997).}

\textsuperscript{52}Id. at 1150.
\textsuperscript{53}Id.
\textsuperscript{54}Id.
\textsuperscript{55}Id.
\textsuperscript{56}Jones, 122 F.3d at 1151.
\textsuperscript{57}Id.
\textsuperscript{58}Id.
\textsuperscript{59}Id. at 1153.
\textsuperscript{60}Id.
\textsuperscript{61}Jones, 122 F.3d at 1154.
\textsuperscript{62}Id.
Plaintiff Must Show Termination Was Due To Disability To Maintain ADA Claim

The United States Court of Appeals for the Eighth Circuit held plaintiff employee failed to prove that he was terminated due to his disability; and, therefore, plaintiff could not maintain a cause of action under the Americans with Disabilities Act (ADA).63

Plaintiff was diagnosed with Graves' disease, his supervisor at work was informed of the diagnosis, and his co-workers observed his deteriorating physical condition.64 After several acts of insubordination, plaintiff was suspended and eventually fired from his position.65 Plaintiff filed suit against defendant employer under the ADA, alleging that he was terminated because of his actual and/or perceived disability.66 The jury returned a verdict in favor of plaintiff, and defendant employer appealed.67

On appeal, the issue was whether plaintiff had succeeded in showing that he was truly terminated due to his disability or a perceived disability.68 In order to establish a prima facie claim under the ADA, plaintiff had to show defendant regarded him as having an impairment that substantially limited a major life activity.69 This requirement would be satisfied if others treated him as having such an impairment.70

After reviewing the record, the court found plaintiff failed to submit sufficient evidence to support a finding that defendant's employees, who decided to terminate plaintiff, believed that he had a disability.71 The court further held that even if plaintiff had succeeded in showing defendant regarded him as disabled, plaintiff's claim would fail because he had not presented any evidence demonstrating that his termination was due to his disability.72 The court found the evidence, viewed in the light most favorable to plaintiff, established only that he was terminated,

63 Roberts v. Unidynamics Corp., 126 F.3d 1088, 1094 (8th Cir. 1997).
64 Id. at 1090.
65 Id. at 1090-91.
66 Id. at 1091.
67 Id. at 1092.
68 Roberts, 126 F.3d at 1092.
69 Id.
70 Id.
71 Id. at 1093.
72 Id. at 1094.
because he failed to follow his supervisor's orders. Therefore, the court ruled the lower court should have entered summary judgment in favor of the defendant employer. Roberts v. Unidynamics Corp., 126 F.3d 1088 (8th Cir. 1997).

ADA Addresses Injury to Person's Rights or Reputation

The United States District Court for the Northern District of Utah held plaintiff's claim under the American with Disabilities Act (ADA) did not survive his death, because the ADA does not address injury to the person, but rather only injury to a person's rights or reputation.

Plaintiff, who was diagnosed with acquired immune deficiency syndrome (AIDS), brought an action against his former employer under the ADA, the Utah Anti-Discriminatory Act, and a tort claim for intentional infliction of emotional distress. Plaintiff subsequently died. Defendant employer argued the discrimination claim should not survive plaintiff's death. Defendant further argued plaintiff's personal representative could not be compensated for plaintiff's claim of intentional infliction of emotional distress and, therefore, filed for partial summary judgment.

Because the ADA does not address the issue of surviving causes of action, the court examined the state survival statute in order to determine whether the ADA claims survived plaintiff's death. The court concluded the survival statute allowed survival of claims for "personal injury to the person," not an injury to a person's rights, reputation, or property. The court held discrimination under the ADA addressed injury to a person's rights or reputation, not injury to the person, and hence, the ADA claims

---

73 Roberts, 126 F.3d at 1094.
74 Id.
76 Id. at 1396.
77 Id.
78 Id.
79 Id.
80 Allred, 971 F. Supp. at 1396.
81 Id. at 1398.
82 Id.

Cancer Is Handicap Within the Illinois Human Rights Act

The Appellate Court of Illinois, First District, upheld an Illinois Human Rights Commission (Commission) finding, that cancer was a physical handicap and found defendant was liable for employment discrimination in violation of the Illinois Human Rights Act (Act).

Plaintiff was a health spa manager diagnosed with non-Hodgkin's lymphoma, a form of cancer. At trial, the parties stipulated that plaintiff was able to perform all of her duties of employment. Although plaintiff received a pay raise in September, 1987, she was terminated one month later without justification. The supervisor who ordered plaintiff's termination claimed to have no knowledge of her cancerous condition. Plaintiff subsequently filed suit against her former employer.

The first issue addressed by the court was whether cancer was considered a physical handicap within the meaning of the Act. The court set forth three reasons in support of characterizing cancer as a handicap. First, the court noted cancer was not transitory or insubstantial, but rather a serious disease that causes death. Second, the Act protected not only individuals with actual handicaps, but also those with a history of handicaps. Third, if employers perceived employees as handicapped, employers' actions against employees could violate the Act.

---

83 Id.
84 Id.
86 Id. at 950.
87 Id. at 951.
88 Id.
89 Id.
90 Lake Point Tower, Ltd., 684 N.E.2d at 951.
91 Id. at 955.
92 Id. at 952-54.
93 Id.
94 Id.
95 Lake Point Tower, Ltd., 684 N.E.2d at 952-54.
The second issue was whether the defendant violated the Act in firing the plaintiff. The court noted two significant events that occurred just prior to plaintiff's termination: (1) a new general manager was named, and (2) plaintiff informed defendant she would begin chemotherapy treatments. The timing of these events, the court reasoned, raised an inference of discrimination, which was not rebutted by defendant, and, therefore, the court held the Commission was correct in finding a violation of the Act. Lake Point Tower, Ltd. v. Illinois Human Rights Comm'n, 684 N.E.2d 948 (Ill. App. Ct. 1997).

Employee Must Show Prima Facie Case Under ADA

The United States Court of Appeals for the Fourth Circuit affirmed a lower court's grant of summary judgment in favor of defendant employer, because plaintiff employee failed to establish discrimination based upon disability. The court determined plaintiff failed to meet three of the four elements required to establish a prima facie case of discrimination under the Americans with Disabilities Act (ADA).

Plaintiff was diagnosed with asymptomatic HIV in 1988 and was hired in 1991 as a marketing coordinator for defendant employer. Subsequently, the plaintiff had difficulty satisfying his professional responsibilities, which was documented in written evaluations. In 1992, he told a senior managing officer that he was homosexual and was infected with HIV. After the employee was transferred to the sales department, he continued to have difficulty satisfying his professional responsibilities and was eventually terminated. The employee filed suit,

96Id. at 955.
97Id.
98Id.
100Id. at 174-175.
101Id. at 162.
102Id. at 161.
103Id.
104Runnenbaum, 123 F.3d at 162.
105Id. at 163.
claiming the termination was a result of his HIV-positive status, which according to the employee, rendered him disabled.\textsuperscript{105}

The issue before the court was whether plaintiff had satisfied the four elements required to make a \textit{prima facie} case of discrimination under the ADA.\textsuperscript{107} The court concluded that plaintiff failed to establish the first element requiring plaintiff to be a member of a protected class.\textsuperscript{103} Specifically, plaintiff failed to prove asymptomatic HIV infection was a “physical or mental impairment” because the infection did not exhibit any diminishing effects on plaintiff.\textsuperscript{109} Additionally, plaintiff failed to prove asymptomatic HIV substantially limited one or more of his major life activities, including procreation or intimate sexual relations.\textsuperscript{110} Plaintiff also failed to demonstrate the second element, that defendant employer perceived plaintiff as having an impairment that substantially limited one or more of his major life activities.\textsuperscript{111}

The court also found that plaintiff failed to establish the third element, requiring that he meet the legitimate expectations of his employer,\textsuperscript{112} because his personnel record noted several instances of substandard performance, as well as a pattern of unprofessional conduct.\textsuperscript{113} Finally, plaintiff failed to establish the fourth element, mandating that his termination involved circumstances that raised a reasonable inference of unlawful discrimination.\textsuperscript{114} Because plaintiff failed to establish his \textit{prima facie} case of discrimination, the lower court’s opinion was affirmed. \textit{Runnebaum v. Nations Bank of Maryland, 123 F.3d 156 (4th Cir. 1997)}.

---

**Termination Claim Under ADA Not Actionable Without Employer Knowledge of Plaintiff’s Mental Disability**

The Court of Appeals of California for the Second District, Division Five, affirmed summary judgment for defendant employer in an employment

\textsuperscript{106}Id.
\textsuperscript{107}Id. at 164.
\textsuperscript{108}Id. at 174.
\textsuperscript{109}Runnebaum, 123 F.3d at 168-169.
\textsuperscript{110}Id. at 172.
\textsuperscript{111}Id. at 172-174.
\textsuperscript{112}Id. at 175.
\textsuperscript{113}Id.
\textsuperscript{114}Runnebaum, 123 F.3d at 175.
termination case under the Americans with Disabilities Act (ADA). The court held defendant employer did not know of plaintiff’s mental disability and, therefore, was not required to reinstate her as a reasonable accommodation to her mental disability under the ADA.

Plaintiff failed to return to work following the Thanksgiving holiday, and her employer sent her a letter stating that she was deemed to have resigned her position. During her absence, she had traveled to Nevada as a result of a manic episode believed to have been triggered by a change in her Prozac prescription. Plaintiff was subsequently admitted to a mental hospital, and her supervisor was notified of her condition. Shortly thereafter, plaintiff was informed that she had been terminated, and her request for reinstatement was denied. Plaintiff then filed a discrimination action against her employer under the ADA and the California Fair Employment and Housing Act (FEHA).

The court first analyzed plaintiff’s termination under a three-step process:

1) whether plaintiff satisfied the burden of establishing a prima facie discrimination case,
2) whether defendant employer offered a nondiscriminatory explanation for the termination, and
3) whether plaintiff proved defendant employer’s explanation was "pretextual."

In order to establish a prima facie case, plaintiff was required to show that:

1) she suffered from a disability,
2) she was a qualified individual, and
3) she was terminated because of her disability.\(^{125}\)

The court held plaintiff failed to prove the third element, not proving defendant had knowledge of her disability when she was terminated, and thus, she could not have been terminated because of her disability.\(^ {126}\)

The court then considered the denial of plaintiff's reinstatement claim.\(^{127}\) First, the court determined this claim was not a separate act actionable under the ADA and instead should be pursued through an administrative mandate, which was not undertaken by plaintiff.\(^ {122}\) Second, reinstatement was not considered a "reasonable accommodation" under the ADA because defendant was not required to give plaintiff a "second chance."\(^ {129}\) Additionally, plaintiff failed to identify any reasonable accommodation that could have been provided by defendant to control her disability.\(^ {130}\) Accordingly, the court affirmed the grant of summary judgment in favor of defendant.\(^ {131}\) *Brundage v. County of Los Angeles Office of the Assessor*, 66 Cal. Rptr. 2d 830 (Ct. App. 1997).

**Physician May Refuse Treatment When A Direct Threat**

The United States District Court for the Northern District of Georgia granted the defendant physician's motion for summary judgment in a suit for breach of a legal duty brought by plaintiff, an HIV-positive patient, after defendant had refused to perform an operation.\(^ {132}\) The court found plaintiff had not stated a cause of action upon which relief could be granted under both the state statute and Title III of the Americans with Disabilities Act (ADA).\(^ {133}\)

\(^{125}\)Brundage, 66 Cal. Rptr. 2d at 835.
\(^{126}\)Id. at 836.
\(^{127}\)Id.
\(^{128}\)Id. at 837.
\(^{129}\)Id. at 837-38.
\(^{130}\)Brundage, 66 Cal. Rptr. at 837-38.
\(^{131}\)Id. at 838.
\(^{133}\)Id. at 1464-65 (citing O.C.G.A § 51-1-6).
Plaintiff contacted defendant’s office in order to have a Gore-Tex implant procedure performed. Upon learning of plaintiff’s HIV-positive status, defendant refused to perform the operation. Plaintiff then filed a complaint alleging defendant had violated Title III of the ADA, because medical services were denied due to his disability. Defendant argued he had a right to refuse services, because performing the procedure would have threatened his own health. Although plaintiff’s complaint was premised upon violations of the ADA, he sought damages under a state statute authorizing recovery of damages for breach of a legal duty. In response, defendant filed a motion for summary judgment requesting the court to dismiss plaintiff’s complaint, because the state statute was inapplicable. Further, defendant argued plaintiff did not have standing under the ADA because plaintiff would only be entitled to prospective injunctive relief, not damages. In the alternative, defendant argued if plaintiff had standing, plaintiff failed to state a violation of the ADA.

After examining the relevant case law and language of the Georgia statute, the court ruled the state statute only provided recovery for a breach of duty in a private action where plaintiff had no other remedy available. Thus, plaintiff was required to bring forth a cause of action under the ADA since that statute would provide a private cause of action and a remedy. Accordingly, the court held summary judgment in favor of the defendant was proper.

In dicta, the court concluded plaintiff did not have standing to sue under the ADA. In order to have standing, plaintiff have had to show three elements, including:

1) he suffered an injury in fact;
2) his injury was caused by defendant’s conduct, and

---

134 Id. at 1461.
135 Id.
136 Id.
138 Id.
139 Id.
140 Id.
141 Id.
142 Jairath, 932 F. Supp. at 1461.
143 Id.
144 Id.
145 Id.
3) his injury was capable of being redressed by a favorable ruling from the court.\textsuperscript{146}

The court found plaintiff had satisfied the first two elements, but he had not shown how his injury could have been redressed by a favorable ruling.\textsuperscript{147} The court emphasized that the only remedy available under the ADA was injunctive relief, which would not have benefited plaintiff in this case.\textsuperscript{148} Specifically, plaintiff had received treatment from another physician, and stated he would never again seek treatment from defendant again.\textsuperscript{149} Therefore, no chance of future harm existed and injunctive relief would not have compensated plaintiff.\textsuperscript{150}

The court also analyzed plaintiff's cause of action in the event that plaintiff had standing.\textsuperscript{151} In order to establish a violation of the ADA, plaintiff must demonstrate:

1) he had a disability,
2) defendant's office was a place of public accommodation,
3) he was denied full and equal treatment because of a disability, and
4) this denial gave rise to the inference that treatment was based solely on plaintiff's disability.\textsuperscript{152}

If plaintiff had met this burden, defendant would have to prove plaintiff was not denied medical treatment, or the denial of such treatment was not unlawful.\textsuperscript{153} After a sufficient showing by defendant, the burden would shift back to plaintiff to prove that the reasons for refusing treatment were merely a pretext for the discrimination.\textsuperscript{154}

While plaintiff in this case had established a \textit{prima facie} case of discrimination under the ADA statute, defendant successfully rebutted by showing the denial of the Gore-Tex procedure was not unlawful due to the "direct threat" posed to him based upon his reasonable medical

\textsuperscript{146}Id. at 1461 (citing Lujon v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).
\textsuperscript{147}\textit{Jairath}, 972 F. Supp. at 1465.
\textsuperscript{148}Id.
\textsuperscript{149}Id.
\textsuperscript{150}Id.
\textsuperscript{151}Id.
\textsuperscript{152}\textit{Jairath}, 972 F. Supp. at 1465.
\textsuperscript{153}Id.
\textsuperscript{154}Id.
judgment. The court held defendant should not be punished for using caution when making medical decisions concerning a direct threat to his health. The court concluded defendant’s belief that the Gore-Tex augmentation surgery would have posed a direct threat to his health was reasonable and not discriminatory.  


DISCOVERY

Medical Peer Review Documents Are Privileged from unless made in Regular Course of Business

The Court of Appeals of Texas held in favor of defendant hospital, concluding that medical peer review documents were privileged and thus, not subject to discovery.

Plaintiff patient sued defendant hospital for allowing a single-use item to be reused during his cataract surgery. In his requests for production, plaintiff asked for the following:

1) incident reports relating to his care;
2) logs of telephone calls between the defendant hospital, physicians, and the laboratory that tested the item; and
3) correspondence between the parties named in the telephone logs.

Defendant hospital objected, claiming the documents were privileged from discovery as medical peer review documents. After plaintiff filed a motion to compel, defendant hospital submitted the documents for an in camera review, along with an affidavit from the defendant’s vice president. The affidavit stated “the documents tendered to the Court by counsel for [defendant] constitute[d] confidential documents,

---

155 Id. at 1466.
156 Id.
157 Jairath, 972 F. Supp. at 1468.
159 Id. at 928.
160 Id.
161 Id.
communications, and clinical testing done at the behest of the peer review committees ...”

The issue presented on review was whether the documents were privileged and, therefore, not subject to discovery. The court recognized that medical peer review documents were privileged from discovery, unless the documents were made in the regular course of business. Except in circumstances in which disclosure was required by law, communications to a medical peer review committee would not be subject to subpoena or discovery without a written waiver of the privilege of confidentiality by the committee. Furthermore, the party claiming that the documents were not subject to subpoena or discovery had the burden of establishing that the information was privileged. Applying these rules, the court held that the affidavit, which alleged and proved the privilege, along with the in camera submission, shifted the burden to plaintiff. Plaintiff then had to do one of the following:

1) controvert the affidavit,
2) show that the privilege was waived, or
3) prove that the documents were made in the ordinary course of business.

For the reason that plaintiff did none of the above, the court held the trial court abused its discretion in ordering defendant to produce the documents. *Arlington Mem'l Hosp. Found. v. Barton, No. 2-97-194-CV, 1997 WL 531025 (Tex. Ct. App. Aug. 29, 1997).*

---

162 *Id.*
163 *Arlington Memorial Hosp. Found.*, 952 S.W.2d at 929.
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Arlington Memorial Hosp. Found.*, 952 S.W.2d at 929-30.
169 *Id.* at 930.
Patient Does Not Have Property Interest in Specimen Slides

The Superior Court of Connecticut held the doctrine of *res judicata* was inapplicable and, thus, did not bar plaintiff's claim. However, the court concluded plaintiff did not have a property interest in her pap smear specimen slides and, accordingly, the court granted defendant's motion for summary judgment.

Plaintiff filed a complaint for writ of replevin seeking to recover pap smear specimen slides containing her tissue and genetic material that were examined by defendant hospital's pathology lab. Plaintiff stated she had requested the slides and defendant failed to provide them. Defendant argued plaintiff had previously filed a complaint in an attempt to recover the slides, and because the court denied her relief, her subsequent claim was barred by *res judicata*.

In the first complaint, plaintiff did not have the opportunity to argue the issue of ownership of the slides, and the court held the claim was not barred by *res judicata*. In order to prevail on her subsequent complaint, the court had to find that the plaintiff had a right of immediate possession. The court held because plaintiff signed a consent form which stated: "do all things necessary preliminary to, during or after such procedure, including the right to dispose of all tissue," plaintiff did not have a right of immediate possession of her cells. Furthermore, the court held plaintiff did not have a possessory interest in the slides based upon public policy limitations regarding patient's use of pathological waste. Finally, the court found plaintiff did not possess an ownership interest in the slides because the slides were considered part of plaintiff's medical records and thus, belonged to defendant. Accordingly, the

---

171Id.
172Id. at *1.
173Id.
174Id.
175Cornelio, 1997 WL 430619, at *2
176Id. at *3.
177Id. at *7.
178Id.
179Id. at *8.
court held the doctrine of *res judicata* was inapplicable to this case, but still granted defendant’s motion for summary judgment, finding plaintiff did not have a possessory interest in the slides.\(^{165}\) *Cornelio v. Stamford Hosp.*, No. CV 960155779S, 1997 WL 430619 (Conn. Super. Ct. July 21, 1997).

### EMPLOYMENT PRACTICES

**Adequacy of Notice is Question for Jury**

The United States Court of Appeals for the Fifth Circuit reversed and remanded a lower court’s summary judgment ruling in favor of defendant employer, which terminated plaintiff employee for giving less than thirty days notice of a medical leave of absence.\(^{181}\)

Plaintiff was scheduled to have breast reduction surgery on May 16, 1995.\(^{182}\) She gave defendant three months notice of leave on February 18, 1995 for the period between May 17, and July 2, 1995.\(^{183}\) In April, plaintiff learned her insurance policy would not cover breast reduction surgery after May 1\(^{st}\) and, therefore, the date of her surgery was changed to April 26.\(^{184}\) On April 21, 1995, plaintiff requested that defendant move the date of her leave of absence forward.\(^{185}\) Defendant denied her request, stating her position of employment could not be covered on such short notice.\(^{186}\)

Plaintiff underwent bilateral reduction mammoplassty on April 26, and a few days later, she was fired for failing to report to work for two consecutive days without notice.\(^{187}\) Plaintiff alleged her termination violated the Family Medical Leave Act, which states that notice of leave can be given less than thirty days in advance, but as soon as practicable, due to lack of knowledge of when leave would be required to begin, change in circumstances, or medical emergency.\(^{188}\)

---

\(^{165}\) *Cornelio*, 1997 WL 430619, at *7.

\(^{181}\) *Hopson v. Quitman County Hosp. & Nursing Home*, 119 F.3d 363 (5th Cir. 1997).

\(^{182}\) *Id.* at 364.

\(^{183}\) *Id.*

\(^{184}\) *Id.*

\(^{185}\) *Id.* at 365.

\(^{186}\) *Hopson*, 119 F.3d at 365.

\(^{187}\) *Id.*

\(^{188}\) *Id.* at 367 (citing Family and Medical Leave Act of 1993, § 2612(a)(2)).
The issues presented on appeal were as follows:

1) whether change in plaintiff's surgery date due to financial considerations constituted a "change in circumstances," allowing plaintiff to give notice as soon as practicable;
2) whether plaintiff gave notice as soon as practicable; and
3) whether plaintiff made a reasonable effort to schedule her surgery as to not unduly disrupt defendant's operations. 

The court held all of these issues were material questions of fact to be decided by a jury. Therefore, the court held the lower court erred by granting summary judgment in favor of defendant; the court remanded the case for resolution of these factual issues. Hopson v. Quitman County Hosp. and Nursing Home, 119 F.3d 363 (5th Cir. 1997).

Neglect of Plaintiffs' Attorneys to Designate Expert Witnesses Not Imputed to Plaintiff

The Court of Appeals of North Carolina vacated and remanded a lower court's denial of plaintiffs' motion for relief from judgment based upon excusable neglect. The court held the lower court applied the wrong legal standard by imputing inexcusable neglect of plaintiffs' attorneys to plaintiffs without determining whether plaintiffs themselves exercised due care regarding the handling of their case.

Plaintiffs were required to designate their expert witnesses before November 30, 1995 for their medical malpractice claim. The lower court granted summary judgment for defendants after plaintiffs failed to designate their witnesses by that date, and plaintiffs' motion for relief from judgment was denied.
The issue before the court was whether the lower court erred by imputing plaintiffs' attorneys' neglect to plaintiffs without determining if plaintiffs themselves were guilty of inexcusable neglect. The court found plaintiffs' hiring of an out-of-state attorney to handle their claim was not inexcusable neglect because plaintiffs also hired local counsel to assist the out-of-state attorney. The court also found the lower court's findings of fact and conclusions of law regarding inexcusable neglect were inadequate because the court focused solely upon plaintiffs' attorneys' inability to properly designate their expert witnesses. The court explained plaintiffs' motion for relief from judgment could have also been denied if the plaintiffs had not presented a meritorious claim. Therefore, the court vacated and remanded the case to determine if plaintiffs had failed to present adequate and competent evidence of the claim at the summary judgment hearing.


Witness Must Be Formally Qualified as Expert Witnesses in Order to Receive “Reasonable Fee”

The Superior Court of Connecticut held that two of the three medical experts called by plaintiff were only fact witnesses, as opposed to expert witnesses; and, thus, plaintiff was not entitled to compensation from defendant for the expert’s “reasonable fees.”

A state statute permitted a “reasonable fee” to be paid to practitioners of the healing arts who gave expert testimony at legal proceedings. The court recognized the existence of this statute but stated that testimony given by a witness formally “qualified” as an expert had to be distinguished from testimony by a practitioner merely “disclosed” as an expert. The court concluded witnesses only disclosed as experts were

---

197 Briley 488 S.E.2d at 623.
198 Id. at 624.
199 Id. at 625.
200 Id.
201 Id.
202 Id.
204 Id. at *1, citing CONN. GEN. STAT. § 52-257(f)(1997).
considered fact witnesses and would not be entitled to compensation under the statute.\textsuperscript{205} Furthermore, the determination as to whether a witness constituted a fact witness or an expert witness was a factual to be decided based upon how the witness was qualified at the proceeding.\textsuperscript{206}

The court found defendant was required to reimburse plaintiff for one of the three witnesses who testified on behalf of plaintiff.\textsuperscript{207} The court determined defendant also had to reimburse plaintiff for preparation time of that expert witness.\textsuperscript{208} The court further held defendant was required to reimburse plaintiff for costs incurred while converting photographs into negatives,\textsuperscript{209} as well as investigative costs up to 200 dollars.\textsuperscript{210} However, the court rejected plaintiff’s claims for reimbursement of demonstrative charts used at trial and trial transcript expenses, holding these items did not constitute “copies of records used in evidence.” \textit{Rivera v. St. Francis Hosp.}, No. CV 920511982S, 1997 WL 435868 (Conn. Super. Ct. July 24, 1997).

\textbf{Indigent Defendant Entitled to Psychiatric Expert Only If Sanity Is a Significant Factor in Defense}

The Supreme Court of North Carolina upheld a lower court’s decision to deny an indigent defendant funds for retaining an independent psychiatrist.\textsuperscript{211} The court reasoned that the defendant had failed to make a threshold showing to the trial court that his sanity was likely to be a significant part of his defense.\textsuperscript{212}

Defendant was on trial for first-degree murder on the basis of torture and the felony murder rule, as well as felonious child abuse.\textsuperscript{213} Prior to trial, he requested commitment to a psychiatric hospital in order to determine his competency to proceed to trial.\textsuperscript{214} Defendant also filed a

\begin{footnotesize}
\footnotesize\textsuperscript{205}Id.
\footnotescript{206}Id.
\footnotescript{207}Id. at *2.
\footnotescript{208}Id. at *2, citing CONN. GEN. STAT. § 52-257(b)(5) (1997).
\footnotescript{209}Id. at *3, citing CONN. GEN. STAT. § 52-257(b)(11) (1997).
\footnotescript{210}State v. Pierce, 488 S.E.2d 576, 582 (N.C. 1997).
\footnotescript{211}Id.
\footnotescript{212}Id. at 580.
\footnotescript{213}Id. at 582.
\end{footnotesize}
notice to the court that he would be raising the insanity defense and requested a psychiatrist to assist him in preparation for trial.\(^{215}\) Upon his examination at a psychiatric hospital, defendant was diagnosed as suffering from a polysubstance dependence and an unspecified personality disorder.\(^{216}\) Based upon that diagnosis, the defendant asserted his entitlement to funds in order to hire an independent psychiatrist.\(^{217}\)

The court argued an assessment of all the facts and circumstances known to the court must be made in determining whether defendant had successfully made his threshold showing.\(^{218}\) The court found defendant failed to show that his sanity was likely to be a significant part of his defense based upon the psychiatrist’s testimony that defendant knew the difference between right and wrong and had logical thought processes.\(^{219}\) Therefore, the court held sanity was not proven to be such a factor in his defense at trial that fundamental fairness required the appropriation of funds for a private psychiatrist.\(^{220}\) Furthermore, the lower court’s refusal to hire a private pathologist to review the state pathologist’s report of the victim’s injuries was upheld on similar grounds.\(^{221}\) The court concluded defendant’s bare assertion that an independent expert would be beneficial to his defense was not sufficient to justify state funding and thus, upheld the lower court’s ruling.\(^{222}\) *State v. Pierce, 488 S.E.2d 576 (N.C. 1997).*

---

**Expert’s “More Probable than Not” Causation Testimony Created Submissible Wrongful Death Claim**

The Court of Appeals of Missouri affirmed a lower court’s judgment that expert testimony of treating physician either “more probably than not” caused, or “did” cause, patient’s death from bacterial infection was sufficient to create submissible case of wrongful death.\(^{223}\)

---

\(^{215}\) *Id.*

\(^{216}\) *Pierce, 488 S.E. 2d* at 582.

\(^{217}\) *Id.*

\(^{218}\) *Id.*

\(^{219}\) *Id.*

\(^{220}\) *Id.*

\(^{221}\) *Pierce, 488 S.E. 2d* at 583.

\(^{222}\) *Id.* at 584.

\(^{223}\) *Baker v. Guzon, M.D., 950 S.W.2d* 635, 648 (Mo. 1997).
Plaintiffs, husband and children of deceased patient, brought wrongful death action against defendant physician, alleging defendant negligently and carelessly failed to observe, examine, diagnose, and begin to treat patient for her symptoms until ten hours after admittance to hospital. Furthermore, plaintiffs alleged patient died as a direct result of that negligence. The lower court entered judgment on a jury verdict for plaintiffs and defendant physician appealed.

At trial, plaintiffs included evidence of three expert witnesses, medical physicians, who analyzed patient's medical records, the tests performed, and the results of the tests. One physician concluded the actions or inactions of defendant either "more probably than not" caused or "did" cause patient's death. The other two witnesses testified the actions or inactions "more probably than not" caused the patient's death. Defendant moved for summary judgment, contending plaintiffs failed to meet their burden of proof because the expert witnesses failed to establish "but for" defendant's alleged negligence, patient would not have died.

The court refused to recognize defendant's contention despite its recognition of the "but for" causation requirement. The court examined the three expert testimonies separately and concluded that one expert satisfied the "but for" test by stating that the actions or inactions of defendant "more probably than not" or "did" cause patient's death. The court reasoned the use of the words "more probably than not" and "did" within the same sentence established a causal link between patient's death and defendant's negligence. In addition, by acknowledging a scientific basis for his opinion, the expert proved that his testimony constituted substantive causal evidence. "Baker v. Guzon, M.D., 950 S.W.2d 635 (Mo. Ct. App. 1997)."
Expert Opinions Must Be Considered by Trial Court When Granting Summary Judgment

The Court of Appeals of Ohio for the Fourth District, Scioto County, reversed the trial court's decision, holding genuine issues of material fact regarding the defendant's negligence remained in dispute.  

Plaintiff patient, who was born prematurely, had trouble breathing after delivery; however, she was not intubated until after she had suffered oxygen deprivation to her brain, resulting in cerebral palsy. Plaintiff filed medical malpractice suit against defendant physician for negligence. In response, defendant physician filed a motion for summary judgment, denying his negligence.  

Plaintiff then filed an affidavit and a deposition of two experts, contradicting defendant's statement and opining defendant had provided substandard care. The trial court granted defendant's motion for summary judgment, holding plaintiff's experts' opinions lacked evidentiary value. Plaintiff appealed. 

The appellate court found the trial court abused its discretion by not considering the opinions of the two experts provided by plaintiff. The court stated a genuine issue of material fact remained as to whether defendant's negligence caused plaintiff's injury. Accordingly, the court reversed the trial court's decision of summary judgment in favor of defendant. 


---

236Id. at *1.
237Id.
238Id.
239Id.
240Lawson, 1997 WL 596293 at *1.
241Id.
242Id.
243Id at *4.
244Id.
DNA Evidence Admitted at Trial After Application of Daubert Test

The Court of Appeals of Louisiana upheld the trial court’s decision to admit evidence of prior misconduct by defendant physician, as well as DNA evidence comparing different strands of HIV-infected blood from the defendant physician’s patients. In affirming the trial court’s decision, the court applied the Daubert test in order to determine whether the expert scientific testimony was reliable.

Defendant physician and plaintiff were involved in an extra-marital affair for over a decade. During that time, defendant physician was responsible for administering vitamin B-12 injections to plaintiff. After ending the relationship with defendant, plaintiff alleged defendant intentionally injected her with HIV instead of vitamin B-12 during one of her regularly scheduled appointments.

First, the court addressed the issue as to whether evidence of defendant drawing HIV-infected blood from two of his other patients could be admitted. Under the burden of clear and convincing evidence, the trial court concluded the evidence was admissible, because the evidence demonstrated defendant’s pattern of “taking blood and not properly documenting it or taking blood under false pretenses.” The court affirmed the trial court’s decision, although the court concluded the trial court erred in applying the clear and convincing standard. The court noted the admissibility of the evidence was a preliminary finding, which could be overruled when the court later addressed the question of relevance versus prejudice under the Louisiana Rules of Evidence.

The second issue the court addressed was whether the laboratory tests regarding DNA analysis could be admitted as evidence to determine if

---

247 Id. at 453.
248 Id. at 449.
249 Id. at 450.
250 Id.
251 Schmidt, 699 So.2d at 450.
252 Id. at 451-52.
253 Id. at 452.
254 Id.
plaintiff’s HIV matched the HIV of the defendant’s other patients. The Daubert test was utilized by the trial court to determine whether the expert scientific evidence relating to the HIV analysis was reliable. Defendant argued the trial court should have determined whether each step in the methodology was properly performed. Furthermore, defendant maintained the trial court erred in ruling that the DNA evidence was scientifically reliable and the trial court impermissibly limited the scope of his pretrial hearing. The court held the methodology used in the laboratory experiments satisfied the Daubert test, and accepted protocols for each methodology were used in the laboratory process. Furthermore, the court explained that the trier of fact, not the court, must ultimately determine whether the protocols were properly applied and thus, the issue was not decided during the pretrial hearing. State v. Schmidt, 699 So. 2d 448. (La. Ct. App. 1997).

Evidence of Child Abuse Victim’s Repressed Memory Recovered During Sodium Amytal Interview Inadmissible

The Court of Appeals of California granted a lower court’s petition for extraordinary writ review holding testimony of an alleged victim of childhood sexual abuse was inadmissible because the evidence was recovered during a sodium amytal interview. The victim was also not allowed to testify to flashbacks before and after the sodium amytal interview because she had no personal knowledge of these events. During the alleged victim’s counseling for bulimia, she began to have flashbacks of situations with her father, which suggested possible sexual abuse when she was between the ages of five and eight. She underwent

255 Id.
255 Schmidt, 699 So. 2d at 453.2.
256 Id. at 456.
257 Id.
258 Id. at 457.
259 Id. at 457.
260 Id.
261 Ramona v. Superior Court, 66 Cal. Rptr. 2d 766, 778 (Ct. App. 1997).
262 Id.
263 Id. at 769.
a sodium amytal interview to determine whether her flashbacks were true memories of childhood sexual abuse. Two years after the interview, the victim had additional flashbacks of sexual abuse by her father between the ages of twelve and sixteen. The victim subsequently filed suit against her father at the age of twenty-one.

The first issue before the court was whether the victim’s testimony regarding the alleged abuse between the ages of five and eight was admissible under the Kelly test, which requires that evidence gathered by a new scientific technique have general acceptance in the relevant field. Under this test, sodium amytal interviews have been held to be unreliable in California. The court found that any information gathered during the sodium amytal interview should have been excluded because the reliability of the information was not supported by the majority of experts. The testimony regarding flashbacks that occurred before the interview was also excluded because the victim failed to show that she knew at that time that she had been sexually abused.

The second issue before the court was whether the evidence of flashbacks occurring two years after the sodium amytal was excludable. The court concluded that the scientific community had not generally accepted the reliability of flashbacks occurring after sodium amytal interviews. Therefore, under the Kelly test, the testimony regarding flashbacks of events occurring when the victim was between the ages of twelve and sixteen was also excludable. Accordingly, the court directed the trial court to issue an order granting the motion for summary judgment in favor of the victim’s father.


---

264 Id. at 769-70.
265 Id. at 770.
266 Ramona, 66 Cal. Rptr. 2d at 771.
267 Id. at 773 (citing People v. Kelly, 17 Cal. 3d 24, 30 (1976)).
268 Id.
269 Id. at 777.
270 Id.
271 Ramona, 66 Cal. Rptr. 2d at 778.
272 Id.
273 Id.
274 Id.
Serious Health Condition Required for Medical Leave

Plaintiff sued defendant for violating the Family and Medical Leave Act (FMLA), stating she had been suffering from a serious condition. Based upon the evidence presented, plaintiff could not justify her absences from work for which she did not have a physician’s note. The United States Court of Appeals for the Fifth Circuit held plaintiff’s condition was not serious enough to entitle her to medical leave under the FMLA. Hence, the court agreed with the lower court’s decision to grant summary judgment in favor of defendant.

Plaintiff had been working for defendant employer when she missed a day of work due to an upper respiratory tract infection. The next day, plaintiff went to the emergency room where she was given antibiotics. At the end of the week, she was examined by her physician who gave her a written medical excuse for the week during which she had been ill. Her physician instructed her to return to work the following week. Plaintiff gave the written excuse to her supervisor, but she failed to return to work the following week. After missing three consecutive days of work, she was fired by defendant. The court of appeals affirmed the trial court’s decision, holding plaintiff employee did not suffer from a serious health condition. Murray v. Red Kap Industries, 124 F.3d 695 (5th Cir. 1997).

---

275Murray v. Red Kap Industries, 124 F.3d 695, 697 (5th Cir. 1997).
276Id.
277Id.
278Murray, 124 F.3d at 699.
279Id.
280Id.
281Id.
282Id.
283Murray, 124 F.3d at 696.
284Id.
Supervisors and Employers Both Subject to Liability

The United States District Court for the Northern District of Illinois held provisions of the Family Medical Leave Act (FMLA) were applicable to supervisors as well as employers. The court found agency language in other federal legislation mandating that only employers can incur liability was absent from the plain language of the statute; and thus, supervisors could be found individually liable under the FMLA.

In June 1996, an employee had surgery and, as a result, was absent from work for nearly three weeks. When the employee returned to work, he discovered his absence had been documented as vacation time. In October 1996, employee again became ill, and his physician informed him his condition required surgery. Because the employee received a telephone call from defendant supervisor informing him he would be fired if he did not return to work, the employee returned to work five days just after the surgery. The employee subsequently became ill, and his physician ordered him to stay home from work. The employee explained the situation to the defendant supervisor, who told him not to return to work until his physician released him. When the employee’s physician later released him to work, defendant supervisor told the employee that he was terminated due to his failure to explain his whereabouts a few days earlier.

The employee then filed a complaint, alleging violation of the FMLA, and the defendant supervisor filed a motion to dismiss.

The issue before the court was whether supervisors could be held liable under the FMLA. Although supervisors could not be held individually liable under the Americans with Disabilities Act or Title VII,
the court held the same rationale was not necessarily applicable to the FMLA. The court reasoned agency language in the statute specifically precluded supervisor liability under those discrimination statutes. Additionally, the only available remedies under those other statutes were back pay and equitable relief, which were solely within the employer's control. The court noted the FMLA allowed for compensatory and punitive damages; remedies that could be given by individuals. Thus, the court held if employee could show the defendant supervisors had some control over employee's ability to take protective leave, the defendant supervisor could be liable under the FMLA. Accordingly, the court denied defendant supervisor's motion to dismiss. Beyer v. Elkay Mfg. Co., No. 97 C50067, 1997 WL 587487.

### FOOD AND DRUG

#### FDA Regulations Not Violated By Permissible Off-Label Use of Screw Devices During Surgery

The Court of Appeals of Minnesota affirmed a lower court's judgment that the implantation of screw devices during surgeries was a permissible off-label use in accordance with FDA regulations. Furthermore, the court held Minnesota's informed consent statute was inapplicable; consequently, the physician did not have a duty to inform plaintiff patient that the screw devices were investigational.

Plaintiff patient filed a claim against defendant hospital alleging negligence, negligence per se, corporate negligence, fraudulent concealment, and strict liability after undergoing spinal surgery in which a physician implanted screw devices without informing plaintiff the surgery was experimental, or the screws were investigational.

---

297 Id. at *3.
298 Id.
299 Id
300 Id. at *4.
302 Id. at 544.
303 Id. at 537.
lower court granted summary judgment for defendant hospital.\textsuperscript{304} Plaintiff's patient appealed.\textsuperscript{305} The court analyzed three separate issues:

1) whether the statute of limitations barred plaintiff's claim;
2) whether defendant should be granted summary judgment in regards to the negligence, negligence \textit{per se}, and fraudulent concealment claims; and
3) whether a \textit{prima facie} case of strict liability existed.\textsuperscript{306}

The court first had to determine whether the claim was barred by the proper statute of limitations.\textsuperscript{307} Because the claim concerned negligent administration rather than medical malpractice, the court concluded that a six-year statute of limitations applied. Thus, plaintiff's claim was not time barred.\textsuperscript{308}

In determining whether defendant's actions were negligent, the court looked at whether federal law limited implantation of the screw device in spinal surgeries to investigational usage, or permitted the device to be implanted as an "off-label" use.\textsuperscript{309} The court concluded plaintiff failed to prove the FDA approved the use of the screw devices for arms and legs, and prohibited use in spines.\textsuperscript{310} The court's conclusion was supported by FDA documents declaring the implantation of the screw devices as an "off-label" use and indicating spinal use as one of the permitted "off-label" uses.\textsuperscript{311} Furthermore, the court rejected plaintiff's claim of violation of Minnesota's bill of rights' provisions requiring hospitals to obtain informed consent of patients receiving investigational devices.\textsuperscript{312} The court premised its decision on the theory that the bill of rights applied only to those patients participating in experimental research.\textsuperscript{313}

The court agreed with the lower court that plaintiff failed to establish a \textit{prima facie} case of corporate negligence for defendant's failure to
perform non-delegable duties.\textsuperscript{314} This conclusion also relied upon the theory that the duty to obtain informed consent was limited to investigational studies.\textsuperscript{315} The court emphasized that even if plaintiff had established \textit{prima facie} case of strict liability, the Minnesota courts have never recognized strict liability in the context of administrative services. Thus, this claim could not have been recognized despite the evidence presented.\textsuperscript{316} \textit{Femrite v. Abbott Northwestern Hosp.}, 568 N.W.2d 535, 538 (Minn. Ct. App. 1997).

---

**IMMUNITY**

Birth Defects Claims of Children of Gulf War Veterans Dismissed Under Feres Doctrine

The United States District Court for the District of Maryland dismissed plaintiff's claims pursuant to the Federal Tort Claims Act (FTCA) for lack of subject matter jurisdiction based upon the Feres doctrine and the discretionary function exception.\textsuperscript{317}

The wives and minor children of servicemen involved in the Persian Gulf War brought three consolidated cases.\textsuperscript{318} Plaintiffs alleged the minor children were afflicted with severe birth defects due to their fathers' exposure to drugs, pesticides, and other toxic and dangerous materials used by the United States during the war.\textsuperscript{319} Plaintiffs sought damages under the FTCA\textsuperscript{320} and the Military Claims Act (MCA),\textsuperscript{321} claiming the United States negligently exposed the mothers and minor children to the hazardous substances without warning.\textsuperscript{322}

Based upon lack of subject matter jurisdiction, the United States filed a motion to dismiss.\textsuperscript{323} The United States also claimed plaintiff's FTCA

\textsuperscript{314}Id. at 543.
\textsuperscript{315}Id. (citing 21 C.F.R. § 812.100 (1996)).
\textsuperscript{316}Femite, 568 N.W.2d at 538.
\textsuperscript{318}Id. at 502.
\textsuperscript{319}Id.
\textsuperscript{323}Id.
claims were barred by the decision in Feres v. United States, and by exceptions to the FTCA for discretionary functions, activities in a foreign country, and combat activities. In respect to the MCA claims, the United States argued benefit award decisions under the MCA were not subject to judicial review.

The court explained three purposes underlying the immunity established by the Feres doctrine. First, a "distinctively federal" relationship must exist between superiors and soldiers. Second, the existence of statutory disability and death benefits available to service-members preclude the need for litigation or proof of fault of the military. Third, the courts should avoid second guessing the judiciary and should preserve military discipline. Finding the Feres doctrine precluded not only suits brought by servicemen themselves for injuries they suffered, but also injuries claimed by third parties, the court held the plaintiffs' claims were barred by the Feres doctrine.

Additionally, the MCA provided that the secretaries of the military departments "may" settle claims against the United States. These claims may involve death or personal injury caused by officers or employees of the Army, Navy, or Air Force, who were acting within the scope of their employment, or acting incident to the non-combat activities of their department. Settlements under the MCA are considered conclusive and final. Plaintiffs, however, claimed the court could review whether a civilian's injuries were in fact incident to service. Finding that absent a constitutional violation, the MCA claims were not subject to review, the court granted the United States motion to dismiss.


---

324 Id. (citing Feres v. United States, 340 U.S. 135, 146 (1940)).
325 Id.
326 Id.
328 Id.
329 Id.
330 Id.
331 Id. at 504.
332 Minns, 974 F. Supp. at 507.
333 Id.
334 Id.
335 Id.
336 Id. at 508.
Physician’s Criminal Conduct Was Properly Excluded from Coverage

The Supreme Court of New Jersey determined claims based upon injuries caused by a physician’s criminal conduct were properly denied coverage when an insurance policy specifically excluded injuries resulting from physician’s performance of criminal acts. Accordingly, the court concluded plaintiff insurer was not liable to defendant patient for damages patient suffered as a result of defendant physician’s sexual assault.

Defendant patient was sexually assaulted during a gynecological examination performed by defendant physician. In a civil action, defendant patient sought compensatory and punitive damages against defendant physician for medical malpractice, negligent and intentional infliction of emotional distress, sexual assault, assault, and battery. The court acknowledged defendant physician had departed from accepted standards, and defendant patient had established a case of medical malpractice. Consequently, the court awarded $50,000 in compensatory damages as well as $50,000 in punitive damages to the defendant patient. Defendant physician had a medical malpractice insurance policy through plaintiff insurer. Prior to the final disposition of the case, plaintiff insurer instituted this declaratory judgment action against both defendants, seeking a determination that plaintiff insurer had no duty to either defend the defendant physician in defendant patient’s civil action or to satisfy any portion of that judgment.

The specific issue presented to the appellate court was whether an exclusion from coverage in a medical malpractice insurance policy for an injury resulting from defendant physician’s performance of a criminal act insulated plaintiff insurer from liability. The court recognized that

---

338 Id.
339 Id. at 10.
340 Id.
341 Id. at 11.
342 Id. at 11.
343 Princeton, 698 A.2d at 11.
344 Id.
345 Id. at 11.
exclusions, such as those articulated in plaintiff insurer’s policy, were valid and did not offend public policy.\textsuperscript{346} The court also noted civil liability caused by a physician’s criminal conduct, such as sexual assault, was significantly distinguishable from the liability typically contemplated when a physician purchases medical insurance.\textsuperscript{347} Therefore, the court held exclusion for liability based upon criminal acts was not inconsistent with the basic purpose of malpractice insurance, or to the parties’ intentions and expectations of the insurance policy; and, thus, public policy was not violated.\textsuperscript{348} \textit{Princeton Ins. Co. v. Prasert Chunmuang, M.D.}, 698 A.2d 9 (N.J. 1997).

\section*{Medical Plan’s Subrogation Clause Granted Plan First Priority to Plaintiff's Settlement with Third Party Insurer}

The United States Court of Appeals for the Eighth Circuit affirmed a trial court’s decision that the subrogation clause of defendants’ medical plan granted the defendants first priority to settlement.\textsuperscript{349} However, the court remanded the case to determine reasonable attorneys’ fees.\textsuperscript{350}

Plaintiffs were injured in an automobile accident and received medical benefits from defendant’s medical plan, governed by the Employment Retirement Income Security Act (ERISA).\textsuperscript{351} The plan paid $157,000 for plaintiffs’ medical expenses incurred by the accident, and then sought to recover costs from plaintiffs’ settlement with a third-party insurer.\textsuperscript{352} The court held the subrogation clause under the medical plan granted the plan first priority to a claim from the settlement.\textsuperscript{353} Therefore, the medical plan was entitled to recover costs of medical expenses from the settlement, but a dispute arose as to whether legal fees were recoverable.\textsuperscript{354}

\begin{itemize}
\item \textsuperscript{346}\textit{Id.} at 19.
\item \textsuperscript{347}\textit{Princeton}, 698 A.2d at 11.
\item \textsuperscript{348}\textit{Id.}
\item \textsuperscript{349}\textit{Waller v. Hormel Foods Corp.}, 120 F.3d 138, 139 (8th Cir. 1997).
\item \textsuperscript{350}\textit{Id.} at 141.
\item \textsuperscript{351}\textit{Id.} at 139.
\item \textsuperscript{352}\textit{Id.}
\item \textsuperscript{353}\textit{Id.}
\item \textsuperscript{354}\textit{Waller}, 120 F.3d, at 139.
\end{itemize}
The district court reduced the medical plan's claim by $50,000 as reimbursement for plaintiffs' attorneys' fees. Although the appellate court agreed with the district court in awarding plaintiffs reasonable attorneys' fees, the appellate court disagreed with the amount awarded and, therefore, remanded the legal fee issue for further consideration. Waller v. Hormel Foods Corp., 120 F.3d 138 (8th Cir. 1997).

Full-Time Status Rather than Hours Worked Determines Minimum Work Status for Coverage

The Court of Appeals of Minnesota affirmed the district court's grant of summary judgment in favor of plaintiff employee, who claimed he was entitled to reimbursement for medical expenses along with reasonable attorneys' fees. The court interpreted a minimum work requirement as requiring an employee to have full-time employment status, rather than a particular number of hours "actively" worked.

Plaintiff employee was hired by defendant employer as a full-time maintenance employee and was enrolled in defendant's group health insurance plan regulated under the Employee Retirement Income Security Act. The plan required plaintiff to a minimum number of hours per week. Plaintiff's coverage was supposed to begin on May 1, 1994, and defendant accordingly began to deduct insurance premiums. During his employment, plaintiff worked less than ten hours per week and was subsequently terminated on May 31, 1994. Plaintiff's entire medical coverage had also been retroactively canceled, and he was reimbursed for the previous premium deductions. On May 5, 1994, plaintiff's wife gave birth to a premature infant and, thereafter, incurred medical

---

355 Id.
356 Id. at 140-41.
358 Id.
359 Id. at 85.
360 Id.
361 Id.
362 Reese, 567 N.W.2d, at 85.
363 Id.
expenses. Defendant refused to cover those expenses under its health insurance plan and plaintiff filed suit.

Three issues were presented for determination by the court:

1) whether the district court erred in applying de novo standard review,
2) whether the district court erred in equating the eligibility provision with the status of the employee, and
3) whether the district court erred in awarding attorneys' fees to plaintiff.

First, defendant argued the court should have reviewed plaintiff's claim under a deferential and capricious standard of review, rather than the de novo standard applied by the district court. In review of this issue, the court was guided by precedent stating the deferential and capricious standard of review was applicable "only when the entity denying coverage was given deferential authority by the express language of the plan." The court held, because defendant had not raised the standard of review issue at trial, defendant could not raise the issue on appeal. Furthermore, if defendant had raised the issue, the court would have affirmed the district court's analysis under de novo review; because defendant had not been granted any discretionary authority by the insurance plan.

Second, the court relied upon case law in affirming the district court's interpretation of the eligibility provision as referring to plaintiff's status, rather than the actual number of hours worked. The court reasoned that an alternate interpretation would forbid all forms of absenteeism, including time off for vacation or illness. Finally, because the plan was regulated by ERISA, the court was governed by federal law in which a presumption favored the beneficiary of insurance claims through an award of attorneys' fees if the beneficiary prevailed.
court concluded defendant did not present any special circumstances to overcome that presumption; thus, the district court was correct in granting plaintiff attorneys' fees. The court also awarded plaintiff attorneys' fees to cover the costs of the appeal. Reese v. Brookdale Motors, 567 N.W.2d 83 (Minn. Ct. App. 1997).

Policy's Exception Endorsement Limiting Coverage Not Subject to Statutory Pre-Existing Conditions

The United States Fifth Circuit Court of Appeals affirmed a lower court's ruling that an exception endorsement limiting coverage for plaintiff patient's spinal disorder was not subject to statutory pre-existing condition restrictions on limiting coverage.

Plaintiff patient filed an action against defendant insurance company seeking health care benefits for her back surgery. This claim arose after defendant hospital denied coverage pursuant to exclusion endorsement. Plaintiff contended coverage should be imposed because the back condition was not a pre-existing condition. In the alternative, plaintiff argued if court found a pre-existing condition, state law prohibited the denial of coverage on this basis. Cross-motions for summary judgment were filed. The lower court granted defendant insurance company's motion for summary judgment on the premise that endorsement and pre-existing condition limitations were separate, unrelated provisions, and plaintiff appealed.

The court held the pre-existing condition limitation operated separately and independently from the exception endorsement of plaintiff's policy. The court noted the state statute restricted an insurance company from denying coverage for a pre-existing condition

---

374 Id.
375 Id.
377 Id. at 268.
378 Id.
379 Id.
380 Id.
381 Id.
382 Id.
383 Id. at 269.
that incurred more than twelve months after coverage began. The court reasoned this provision was intended to be enforced when an insurance policy did not provide for pre-existing conditions. However, when an endorsement policy did exist, exclusion of coverage was justified because insurance companies were free to limit their liability. Thus, the court held the exception endorsement did not operate to deny coverage for a pre-existing condition, but rather excluded coverage for any injury, disease, or disorder of the spine. This exclusion was proper. Wynn v. Washington Nat'l Ins. Co., 122 F.3d 266 (Cir. 5 1997).

---

Payment of First Party Medical Expenses Not Subject to Subrogation

The Supreme Court of Kansas held an insured's Missouri insurance policy applied to an accident that occurred in Kansas, and his payment of first-party medical expenses was not subject to subrogation. The court reached this conclusion despite the fact that the insured had received money for medical expenses from the other accident victim. The insured was a Missouri resident involved in an automobile accident in Kansas. After his insurance company paid his medical expenses, the insured commenced a tort action against the other driver. A legal assistant of the firm representing the insured told the insurance company that the firm would protect its personal injury protection lien in the event the insured recovered from the other driver. The insured subsequently settled with the other driver, although the insurance company was not reimbursed for any medical expenses it had paid on behalf of the insured. The insurance company then filed suit against the

---

385 Id. at 269.
386 Wynn, 122 F.3d at 269.
387 Id.
388 Id.
390 Id.
391 Id. at 1366.
392 Id. at 1367.
393 Id.
394 Safeco, 941 P.2d at 1371.
insured, as well as the attorney and the legal assistant who represented the insured.  

The first issue addressed by the court on appeal was whether the insurance company had a right to recover the first $2,000 of medical expenses paid on behalf of the insured.  

The court followed the general rule providing the law of the state where the insurance contract was made governs, unless the law contravened Kansas’ public policy.  

Because the court concluded the medical payment provision of the Missouri insurance policy was not violative of Kansas’ public policy, Missouri law was controlling.  

The court further held the first $2,000 paid by the insurance company for the insured’s expenses was not subject to subrogation in accordance with the contract between the insured and the insurance company.  

The court reasoned the first $2,000 payment of medical expenses was paid under the first-party medical benefits, not under Kansas personal injury protection benefits. Thus, that amount was not subject to subrogation.  

The court also affirmed the district court’s ruling in dismissing the insurance company’s claims against the insured and the legal assistant for lack of personal jurisdiction, because neither of them had committed a tortious act in the state of Kansas.  

_Safeco Ins. Co. of Am. v. Allen, 941 P.2d 1365, 1373 (Kan. 1997)._  

---  

**MANAGED CARE**  

HMOs May Encourage Physicians to Minimize Costs and are not Obligated to Disclose Physician Compensation  

The United States District Court for the Southern District of New York granted in part and denied in part a health maintenance organization’s (HMO) motion for summary judgment in a class action suit brought under the Employee Retirement Income Security Act (ERISA).  

Plaintiff’s
complaint alleged express and implied breaches of contract, as well as various breaches of fiduciary duties.\(^{403}\)

Plaintiff was a participant in a health care plan provided by her employer.\(^ {404}\) Under the plan, employees were treated by physicians participating in an HMO.\(^ {405}\) Plaintiff first alleged the HMO breached its fiduciary obligation and implied covenant of good faith and fair dealing by preventing its physicians, via gag orders, from advising patients of treatment options that were not compensable by the HMO.\(^ {406}\) The court held the claim for breach of implied covenant of good faith was preempted by the terms of ERISA.\(^ {407}\) However, the court found plaintiff had stated a valid claim with regard to the "gag order."\(^ {408}\)

Second, plaintiff claimed by pressuring physicians to under-treat patients to maximize profits, the HMO breached its fiduciary duty toward the plan participants as well as its implied covenant of good faith.\(^ {409}\) The court dismissed this claim, holding such claims were preempted by ERISA.\(^ {410}\) Plaintiff also alleged defendant failed to comply with disclosure requirements set forth by ERISA by not disclosing the nature of its physicians' compensation contracts.\(^ {411}\) The court dismissed this claim, reasoning the obligation to disclose was placed upon the administrator of the plan, not the HMO.\(^ {412}\) Further, the court held the scope of the disclosure provisions did not reach information concerning physician compensation.\(^ {413}\) Weiss v. CIGNA Health Care, 972 F. Supp. 748 (S.D.N.Y. 1997).

\(^{403}\) Id.
\(^{404}\) Id.
\(^{405}\) Id.
\(^{406}\) Id. at 751.
\(^{407}\) Weiss, 972 F. Supp. at 750.
\(^{408}\) Id.
\(^{409}\) Id. at 750-753.
\(^{410}\) Id.
\(^{411}\) Id. at 753-754.
\(^{412}\) Weiss, 972 F. Supp. at 753-54.
\(^{413}\) Id.
ERISA Precludes State Law Against HMO

The United States District Court for the Eastern District of Pennsylvania determined plaintiff's HMO plan was governed under the Employee Retirement Income Security Act (ERISA); thus, his claim could not be brought under state law. The court held plaintiff's claim failed under ERISA, because he did not have an actual plan or an administrator. Plaintiff was required to obtain pre-authorization for medical treatment under his HMO. After plaintiff injured his leg in an automobile accident, he required surgery to correct injuries to his heel bone. Plaintiff, however, did not undergo the surgical procedure, because he could not obtain pre-authorization from defendant insurer. Consequently, plaintiff's condition was no longer correctable; and therefore, plaintiff and his wife filed a complaint alleging breach of contract, negligent performance of contract, and loss of consortium. Defendant moved to dismiss plaintiff's complaint, because a state law claim could not be asserted due to ERISA pre-emption.

The issue presented to the court was whether plaintiff's claims were governed by state law or ERISA. The court held plaintiff's claim relating to breach of contract could not stand, because the claim was related to the employee benefit plan that was pre-empted by ERISA. Because ERISA required plaintiff to identify a plan administrator, the court dismissed all claims against defendant because defendant was not named plan administrator in plaintiff's complaint. Furthermore, plaintiffs could not recover money damages from defendant; under ERISA, suits to recover damages could only be brought against the terms of a plan. Because defendant was not a plan, plaintiff could not recover.

---

415 Id. at *3.
416 Id. at *1.
417 Id.
418 Id.
419 Smith, 1997 WL 587340, at *1.
420 Id. at *2.
421 Id.
422 Id. at *3.
423 Id.
424 Smith, 1997 WL 587340, at *3.
money damages. The court refused to dismiss the entire complaint, however, because plaintiff sought equitable remedies in addition to monetary damages.425

Defendant further argued plaintiff’s claims must fail, because not all of the available administrative remedies had been exhausted, as required by ERISA.426 The court rejected this argument, holding plaintiff had invoked the denial of meaningful access exception to the exhaustion requirement.427 The court declined to dismiss plaintiff’s ERISA claims, because the defendant refused to provide plaintiff with a procedure to determine the validity of the medical service requests.428 Smith v. Prudential Health Care Plan, No. Civ. A. 97-891, 1997 WL 587340, at *4 (E.D. Pa. Sept. 19, 1997).

MARIJUANA REGULATION

Scheduling Marijuana as Schedule I Drug Not Unconstitutional

The Supreme Court of Washington overturned a lower court’s grant of plaintiff patient’s motion for summary judgment in his action against the state for categorizing marijuana as a Schedule I drug.429

During his battle with cancer, plaintiff received radiation therapy and chemotherapy.430 To relieve nausea and vomiting commonly associated with that treatment, plaintiff took a synthetic form of marijuana, tetrahydrocannabinol (THC).431 Plaintiff also smoked marijuana to relieve the side effects of chemotherapy and preferred that method.432 However, marijuana was federally and state regulated as a Schedule I drug and thus, illegal for all purposes except research.433

Plaintiff asked the court for a declaratory judgment ordering placement of marijuana as a Schedule I drugs as violative of the state
Plaintiff also asked the court to order the board of pharmacy to reclassify marijuana, which would permit physicians to prescribe the drug for therapeutic purposes. The lower court granted the motion for summary judgment, finding the placement of marijuana as a Schedule I drug violative of plaintiff’s rights and liberties under the state constitution.

The court overturned the lower court’s grant of summary judgment, first rejecting plaintiff’s argument that the case should be decided based upon the state constitution, which would afford greater rights and privileges than the federal constitution. The court noted substantial similarities between the federal controlled substances law and Washington State’s Uniform Controlled Substances Act, showing the legislature intended to be part of “a uniform policy to control illegal drugs.” Due to this intended uniformity, the court concluded an independent assessment of the rights afforded under the state constitution was not warranted. Instead, the “federal and state protections [were] coextensive in this context” and thus, federal protections would always be utilized to resolve issues regarding the scheduling of drugs.

Plaintiff next asserted the scheduling of marijuana as a Schedule I drug implicated a fundamental right, and therefore, any legislative decision should be subjected to strict scrutiny. Plaintiff argued the drug classification must further a compelling state interest in order to withstand that level of scrutiny. The court rejected plaintiff’s argument, holding individuals did not have a constitutionally protected interest in having physicians prescribe marijuana. Applying the rational basis standard, the court determined the legislature had a legitimate reason to classify marijuana as a Schedule I substance based upon its scientific data and the availability of THC as a substitute treatment. Accordingly, the court

---

434 Seeley, 940 P.2d at 608.
435 Id.
436 Id.
437 Id.
438 Id.
439 Seeley, 940 P.2d at 608
440 Id.
441 Id.
442 Id.
443 Id. at 613.
444 Seeley, 940 P.2d. at 619.

\textbf{NEGLIGENCE}

\textbf{Physicians Are Not Presumed to Possess Reasonable Skill in Treating Patients}

The Court of Appeal of Louisiana for the Fourth Circuit reversed a district court’s dismissal of a negligence claim against a physician charged with medical malpractice arising from the implantation of an intrauterine device (IUD).\textsuperscript{446}

Despite defendant physician’s insertion of an IUD in plaintiff patient, plaintiff became pregnant three months later.\textsuperscript{447} After several unsuccessful attempts by defendant to remove the IUD, plaintiff delivered a premature baby.\textsuperscript{448} The baby was born with serious medical problems, and plaintiff sued defendant for medical malpractice.\textsuperscript{449} Upon a jury determination that defendant had met acceptable standards of medical care, the trial judge dismissed the suit.\textsuperscript{450}

The issue presented for review was whether the trial court erred in instructing the jury that physicians were presumed to possess the requisite knowledge and skill when treating patients.\textsuperscript{451} Holding the trial court’s jury instruction was reversible error, the court reviewed the case \textit{de novo} and made several findings.\textsuperscript{452} First, reasoning that defendant had the responsibility of preserving plaintiff’s medical records, the court held defendant’s failure to produce plaintiff’s records warranted a presumption that the records were unfavorable to defendant.\textsuperscript{453} Second, the court found defendant did not adequately inform plaintiff of the risks involved with continuing a pregnancy with an implanted IUD.\textsuperscript{454} The court relied upon

\textsuperscript{445}\textit{id.} at 623.
\textsuperscript{447}\textit{id.}
\textsuperscript{448}\textit{id.}
\textsuperscript{449}\textit{id.}
\textsuperscript{450}\textit{id.}
\textsuperscript{451}Williams, 699 So. 2d at 106.
\textsuperscript{452}\textit{id.} at 106.
\textsuperscript{453}\textit{id.} at 106-7.
\textsuperscript{454}\textit{id.} at 112.
expert testimony that established that physicians must inform patients of the risks of IUDs, such as spontaneous abortion or premature delivery.\textsuperscript{455}

Third, the court found defendant committed medical malpractice.\textsuperscript{456} In reviewing the evidence, the court held defendant should have ordered additional tests and hospitalized plaintiff.\textsuperscript{457} Finally, the court held plaintiff's child was entitled to $500,000 in damages for pain and suffering, and plaintiff was entitled to $100,000 for general damages as well as $65,853.18 for past and future medical expenses.\textsuperscript{458} \textit{Williams v. Godlen, M.D., 699 So. 2d 102 (La. Ct. App. 1997)}.

\section*{VACCINE DEVELOPMENT}

\textbf{Compensation Granted Under National Childhood Vaccine Injury Act for Measles/Rubella Vaccine}

The United States Court of Federal Claims determined petitioners were entitled to compensation under the National Childhood Vaccine Injury Act of 1986 (Act).\textsuperscript{459} The court held petitioners had satisfied the elements for a \textit{prima facie} case by establishing the measles/rubella (M/R) vaccine significantly aggravated their daughters' underlying tuberous sclerosis disorder.\textsuperscript{460}

Petitioners alleged their daughter suffered significant aggravation of her tuberous sclerosis disorder due to a grand mal seizure which occurred ten days after she received an M/R vaccination.\textsuperscript{461} Petitioners claimed the seizure resulted from a high fever she developed as a reaction to the vaccine.\textsuperscript{462} Petitioners further claimed their daughter was prone to future seizures due to her underlying condition of tuberous sclerosis\textsuperscript{463} and their

\textsuperscript{455}\textit{id.}
\textsuperscript{456}\textit{id.} at 113.
\textsuperscript{457}\textit{Williams, 699 So. 2d at 113.}
\textsuperscript{458}\textit{id.} at 110.
\textsuperscript{460}\textit{id.} at *13.
\textsuperscript{461}\textit{id.} at *1.
\textsuperscript{462}\textit{id.}
\textsuperscript{463}\textit{id.} at *13.
daughter never had a seizure prior to receiving the M/R vaccination. Subsequent to the vaccination, however, petitioner’s daughter began suffering two to four seizures per week.

Respondent, the Secretary of the Department of Health and Human Services, claimed petitioner’s daughter had contracted an intercurrent viral infection, and had not suffered an adverse reaction to the M/R vaccine. Respondent’s expert in pediatrics and epidemiology of infectious diseases testified petitioner’s daughter’s high fever stemming from the viral infection was the cause of the seizure, not a reaction to the M/R vaccine.

After hearing from numerous experts on M/R vaccine and tuberous sclerosis, the court found petitioner’s daughter had indeed suffered a reaction to the M/R vaccine. The court specifically noted the daughter was not diagnosed with a viral infection while she was in the hospital. Furthermore, the court based its decision on the fact she was suffering from symptoms indicative of a measles reaction, including a rash and fever. Based on these findings, the court held petitioners were entitled to compensation under the Act, and encouraged the parties to settle the damages portion of the claim. Evans v. Secretary of the Dep’t of Health & Human Servs., No. 90-3142V, 1997 WL 429719 (Fed. Ct. July 15, 1997).

---

465 Id. at *3.
466 Id. at *13.
467 Id.
468 Id.
469 Evans, No. 90-3142V, 1997 WL 429719, at *11.
470 Id.
471 Id. at *13.