MEDICAL MALPRACTICE CASE LAW UPDATE

MEDICAL MALPRACTICE AWARD CANNOT BE REDUCED TO REFLECT BENEFITS THE CLAIMANT WOULD RECEIVE UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

A Minnesota federal district court held that a medical malpractice claimant's damages cannot be reduced simply because he will receive benefits under the federal Patient Protection and Affordable Care Act (the "ACA").

A child plaintiff brought a medical malpractice action against two corporations – one which offers support services for health care facilities and another that owns and operates an acute care hospital while also providing certain hospital management services. Plaintiff, through his guardian, alleged that he suffered permanent injuries due to the malpractice of an obstetrician. Defendants moved for partial summary judgment as to damages, arguing that all future medical expenses that could be awarded must be limited to the projected premiums and deductibles available under the ACA. Essentially, Defendants asserted that if the future damages were not limited, Plaintiff would receive an unfair windfall by collecting damages for medical expenses that he would not need to pay. Plaintiff opposed the motion by arguing that he was entitled to the full amount of future medical care costs pursuant to Minnesota's collateral source rule.

The court denied Defendants' motion without providing a detailed analysis of the parties' arguments. It held, quite simply, that Plaintiff would be permitted to collect the full value of future medical care stemming from any negligent treatment. After examining Minnesota's collateral source rule and the state's limited precedent discussing the ACA, the court explained that any changes in tort recovery stemming from the ACA

must be made by the state legislature and not by the court. This alone was enough to preclude summary judgment as to damages.

Halsne v. Avera Health, No. 12-CV-2409 SRN/JJG, 2014 WL 1153504 (D. Minn. Mar. 21, 2014).

HOSPITAL MANAGEMENT COMPANY AND PARENT CORPORATION MAY BE SUED UNDER NEGLIGENT SUPERVISION THEORY

In the same decision cited above, the federal district court ruled that a hospital management company and its parent corporation could be sued under a negligent supervision theory where the management company negligently provided the hospital with a physician who had a colored history of disciplinary actions. However, the court declined to hold that the parent corporation could be sued under agency or "alter ego" theories for the obstetrician's alleged malpractice.

Before treating Plaintiff, the obstetrician in this case ("Obstetrician") had his medical license restricted by the state's Board of Medical Practice, as it was found that Obstetrician had incorrectly prescribed medications on four different occasions. Defendants moved for summary judgment on Plaintiff's claims for negligent supervision and direct liability as to the management company, and on the vicarious liability claim brought against the parent corporation.

The court granted summary judgment in favor of both defendants as to the direct liability claim, explaining that the non-party hospital had the final decision-making authority regarding what policies to adopt regarding labor and delivery of children. Thus, the management company could not be held liable for any deficient policies formulated by the non-party hospital.

Summary judgment as to the negligent supervision claim was denied. The court found that there was a genuine issue of material fact regarding whether the management company improperly failed to prevent foreseeable misconduct that could have occurred at the hands of Obstetrician. Whether the management company knew or should have known about Obstetrician's disciplinary history was a question for the jury, not the court.

Further, the court found that there was no agency relationship between the parent company and the management company. The court explained that even if the parent company had "general" control over the management company's policies and procedures, there was no evidence that it exercised control over the management company's day-to-day activities. For example, the parent corporation had no say over the manner in which the management company's employees "[p]rovided obstetrical services to patients" at the hospital, as such decisions had to be originated from and finalized by the hospital itself. Finally, Plaintiff's alter-ego theory failed, as there was no evidence that the parent company operated the management company in an "unjust" or "fraudulent" manner that warranted the stripping away of corporate formalities.

PHYSICIAN'S FAILURE TO ARRANGE PROMPT TRANSFER OF PATIENT IN NEED OF EMERGENCY SURGERY MAY CONSTITUTE GROSS NEGLIGENCE DESPITE STATUTORY IMMUNITY REGARDING ER CARE

The Georgia Supreme Court recently analyzed a state statute that sets a "gross negligence burden of proof" regarding claims brought against health care providers who render emergency care in a hospital emergency room, holding that it applied to a claim against an ER physician who allegedly failed to arrange the prompt transfer of a patient requiring emergency hand surgery.

Plaintiff arrived at the Spalding Regional Medical Center ("SRMC") around midnight, seeking treatment for a hand injury. A physician's assistant examined Plaintiff and concluded that he needed an immediate referral to a hand surgeon for emergency surgery. SRMC did not have an on-call hand surgeon that evening, and the physician's assistant told plaintiff that the on-call orthopedic surgeon "did not like to be disturbed during the night." Accordingly, the physician's assistant told Plaintiff that the surgery would have to wait until the morning. In the meantime, Dr. Abdel-Samed, an SRMC doctor who had been informed of Plaintiff's situation, spoke to a hand surgeon at another local hospital who was willing to take and treat Plaintiff.

After concluding his conversation with the local hand surgeon, Dr. Abdel-Samed examined Plaintiff and agreed that immediate hand surgery was necessary. Plaintiff and his wife stated during deposition testimony that Dr. Abdel-Samed then told them that surgery would have to wait until the next morning when the on-call orthopedic surgeon arrived. There was conflicting testimony as to whether attempts were made to transfer Plaintiff to the other facility where a hand surgeon was available. Regardless, Plaintiff was kept at SRMC until 7:30 AM, when arrangements were made to transfer him to another hospital for surgery. The delay in surgery allegedly resulted in lasting injuries, including the partial amputation of a finger, increased hand sensitivity, and constant pain.

Plaintiff brought a medical malpractice action alleging that Dr. Adbel-Samed and his physician assistant's failure to promptly transfer the patient for immediate hand surgery proximately caused his injuries. Defendants moved for summary judgment, arguing that a state statute protects health care providers from liability when allegedly deficient emergency care is rendered in an emergency room unless the claimant can

demonstrate gross negligence. The statute defined "emergency medical care" as "bona fide emergency services provided after the onset of a medical or traumatic condition" which, if not provided, could place the patient's health in serious jeopardy. The statute does not apply to medical care or treatment that occurs "after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient" or care "that is unrelated to the original medical emergency." The trial court granted Defendants' motion. The state Court of Appeals reversed, holding that a question of fact existed as to whether the delay in treatment constituted "emergency medical care."

The Georgia Supreme Court affirmed the reversal of summary judgment. The court held that Plaintiff clearly received "emergency medical care" and that the gross negligence standard applied, despite Plaintiff's contention that the delayed transfer did not constitute such care because the hospital did not treat the condition as an emergency. Explaining that the statute focused on the patient's actual condition rather than on how that condition was treated, the court ruled that the statute was applicable as a matter of law. However, the court ruled that summary judgment was *improper* because the patient had asserted a viable claim for gross negligence that was capable of satisfying this heightened burden of proof. In particular, the court pointed to evidence that a hand surgeon was available at another hospital and that SRMC physicians were aware of this fact in determining that Plaintiff's claim could survive summary judgment.

Abdel-Samed v. Dailey, 294 Ga. 758, 755 S.E.2d 805 (2014).

REFUSAL OF LIFE-SAVING TREATMENT MAY BE RAISED AS DEFENSE IN WRONGFUL DEATH ACTION AGAINST NURSING HOME

In a wrongful death action stemming from the death of a nursing home resident, the Mississippi Court of Appeals held that the trial court committed reversible error by excluding evidence that the resident's family had entered into a "Do Not Resuscitate" ("DNR") order and declined potentially life-saving treatment.

In 2001, Resident's treating physician recommended that she enter the nursing home for six months in order to control her diabetes and to engage in post-surgery physical therapy. Resident was diagnosed with dementia at the time of admission. Resident's condition continued to worsen, and by July of 2006 she suffered from end-stage dementia. In July of 2007, she had an episode of hypoglycemia and dehydration related to her diabetes. She was admitted to a local hospital, received appropriate treatment, and was released two days later.

By 2008, Resident became a "total care" patient, incapable of communicating with others and feeding herself. She also was incontinent of bladder and bowels. One morning, a licensed practical nurse ("LPN") noted that Resident refused to eat breakfast and lunch and would not take her medications. The nursing staff attempted to notify Resident's treating physician to no avail; accordingly, the on-call physician was contacted. The on-call physician instructed the nursing staff to withhold Resident's diabetic medications until she could be evaluated the following Monday. The next day, Resident again refused her meals and medications. She did not appear to be in any distress and the family was notified of her situation. Resident's daughter visited the nursing home that day, testifying that she found her mother slumped over in a geri-chair with a "big gash" in her neck. The daughter became "hysterical" and the LPN paged a

registered nurse ("RN"). The RN found that Resident had a rash of unbroken skin that had developed in the crease of her neck. Although Resident did not appear to be in any distress at the time, 911 was called.

The EMT's determined that Resident's vital signs were within normal limits and therefore did not administer IV fluids as they transferred Resident to the hospital. Resident's blood pressure began to drop within an hour of arriving at the ER, and she was admitted to the hospital in critical condition. Medical records indicated that she was designated as a DNR patient; thus, no "invasive procedures or central lines" were to be administered. Resident's respiratory status continued to worsen, but her family refused a procedure capable of curtailing further complications. Two days later, Resident passed away and her family filed suit on Resident's behalf.

During a hearing on pre-trial motions, the trial court granted a motion which prevented the nursing home from entering evidence that would show that the Plaintiffs were contributorily negligent. In arguing against the motion, the nursing home explained that it merely sought to show how the family's decision to withhold medical treatment from Resident was an "intervening cause" that broke the causal chain of attributing harm by the nursing home. The trial court disagreed, ruling that any evidence referencing the family's decision to withhold treatment was inadmissible, including the Resident's status as a DNR patient.

During trial, the court also allowed Plaintiffs to testify that they were told by hospital doctors that the Resident would die within 24 hours of admission to the hospital. Further, it refused to permit the nursing home from cross-examining Plaintiffs' expert regarding medical records in which the Resident's treating physician diagnosed Resident

with end-stage, terminal dementia, citing the DNR note in her records. A jury verdict ultimately was entered against the nursing home.

The Mississippi Court of Appeals ordered that the trial court committed reversible error and ordered a new trial. It explained that the nursing home's attempt to introduce evidence regarding the family's refusal of treatment was grounded in elements of proximate cause – not contributory negligence. According to the Court of Appeals, such evidence was relevant and the nursing home should have been entitled to present the issue to the jury. Further, the Court of Appeals held that the trial court should have allowed Plaintiffs' expert to be cross-examined regarding the terminal dementia. Finally, it ruled that the physicians' statements speaking to Resident's "hopeless" condition was inadmissible hearsay, explaining that the hearsay exception related to statements made for purposes of medical treatment did not apply in this situation. Instead, it was obvious that the testimony was used to prove the truth of the matter asserted. Based upon the forgoing, the case was remanded for a new trial.

Manhattan Nursing and Rehabilitation Center, LLC, No. 2012-CA-00025-COA (Miss. Ct. App. March 25, 2014).

SURGEON HAD NO DUTY TO DISCLOSE THAT PROPOSED SURGICAL PROCEDURE INVOLVED "OFF-LABEL" USE OF A MEDICAL DEVICE

A New Jersey federal district court held that a surgeon could not be sued under an informed consent theory for failing to advise a patient that a surgical procedure involved a medical device that would be used in an "off-label" manner which had not been approved by the FDA. The court further ruled that the surgeon could not be sued under a strict products liability theory for using the medical device in an unapproved way.

Plaintiff experienced years of debilitating back pain before consulting a new spinal surgeon. An MRI showed a complete collapse at L5-S1 with listhesis, and the surgeon discussed three different surgical options with Plaintiff. One of these options called for a fusion at one level of the spine and dynamic stabilization at another level. Plaintiff signed an informed consent form, stating that he had been advised of the procedure's risks and benefits. Plaintiff admitted to signing the form, but disputed that he actually made an informed decision as to whether to undergo the procedure.

As part of the "dynamic stabilization" phase of the surgical procedure, a "spinal fixation device" was implanted in Plaintiff's lower spine. Such devices commonly are used to provide temporary stability to the bones being fused. Semi-rigid fixation devices like the one used in this procedure have been employed as both fusion and non-fusion devices since the early 2000's. However, the FDA had yet to approve the use of these devices during dynamic stabilization procedures at the time Plaintiff underwent surgery. Unfortunately, Plaintiff's pain continued after the surgery and it was found that a pedicle screw contained in the fixation device had fractured. Plaintiff had to endure a number of additional procedures to fix this complication and the device ultimately was removed.

Plaintiff brought suit, alleging that the surgeon failed to obtain informed consent and that he also was subject to the strictures of a strict products liability theory based upon the allegedly improper use of the device. The surgeon moved for summary judgment, arguing that the "off-label" use was proper and that Plaintiff's theory did not form a basis for either an informed consent or strict products liability suit.

The court granted the surgeon's summary judgment motion, ruling that he had no duty under the informed consent doctrine to disclose that a procedure entails the off-label

use of a properly-prescribed medical device. The court explained that the "FDA regulatory status" does not speak "directly to the medical issues surrounding a particular surgery"; therefore, doctors can use medical devices for off-label purposes that are not FDA approved so long as the FDA has approved the devices for some other purpose. Further, the court stated that there was no evidence that the surgeon had any involvement in the design, manufacture, packaging, or labeling of the fixation device. Coupled with the fact that Plaintiff did not demonstrate that the surgeon knew or should have known of any defect involving the device, the court held that the Plaintiff could not pursue his cause of action under a theory of strict products liability.

Seavey v. Globus Med., Inc., No. CIV. 11-2240 RBK/JS, 2014 WL 1876957, at *1 (D.N.J. Mar. 11, 2014).

CAP ON NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE ACTIONS CAN BE APPLIED IN WRONGFUL DEATH ACTIONS

The Missouri Supreme Court ruled that the state's cap on the amount of non-economic damages recoverable from a health care provider in a wrongful death action is constitutional. Further, the Court held that a state statute requiring that future damages be paid in whole or in part in periodic payments when damages exceed $100,000 does not violate the state's constitution.

Plaintiff filed a wrongful death medical malpractice action against his wife's neurologist and other healthcare providers after his wife died. Plaintiff's wife had a long history of seizure disorders, and a consulting neurologist ordered a change in her medications from Dilantin to Depakote. The wife suffered a focal seizure the next day and became unresponsive to even painful stimuli; she was dead three months later. Plaintiff proceeded to trial on the theory that his wife had a condition that prevented her

body from eliminating excess ammonia that was produced from the Depakote ordered by the neurologist, which in turn caused irreversible brain damage that eventually led to death. The jury awarded $920,745 in economic damages and $9.2 million in non-economic damages. The trial court reduced the non-economic damages award to $632,603.82 per defendant pursuant to a state statute that limits such damages in medical malpractice actions.

Plaintiff argued that the statutory cap on non-economic damages violated the Plaintiff's constitutional right to a trial by jury and the separation of powers doctrine. The Missouri Supreme Court ruled that the trial court properly reduced the judgment, explaining that the right to maintain an action for wrongful death is statutorily born and not a common-law cause of action. It also held that the damages limitation does not interfere with the judiciary's performance of its constitutionally assigned power to render judgments consistent with a jury's verdict. Asserting that the cap interferes neither with the jury's ability to render a verdict nor with the judge's task of entering judgment, the Court held that the cap did not violate separation of powers principles, as "to hold otherwise would be to tell the legislature it could not legislate."

The Court also was not persuaded by Plaintiff's argument that the periodic payments statute was an unconstitutional taking of private property and a violation of the right to a jury trial. Explaining that the statute simply is a limitation on a remedy, the Court held that the statute was constitutional and appropriately applied. In sum, the Court ruled that the jury must make a factual determination of damages, and the trial court merely must then apply the law to that determination.

A dissenting justice argued that the damage limitation violated the right to a jury trial because assessing damages is an integral fact-finding function of a jury. The dissent also asserted that the cap "encroaches on the judicial prerogative" by determining whether the jury's assessment of damages is appropriate on a case by case basis.

Sanders v. Ahmed, 364 S.W.3d 195 (Mo. 2012).

PSYCHIATRIST DID NOT HAVE DUTY TO PREVENT AUTO ACCIDENT CAUSED BY AN OUTPATIENT

A federal district court granted summary judgment on behalf of a defendant psychiatrist, holding that he was not liable for injuries that a third party suffered in an automobile accident caused by a person receiving outpatient treatment.

The patient in this case was a Vietnam veteran who had been receiving medical care for schizophrenia, depression, and insomnia from a Veterans Administration Medical Center ("VA Medical Center"). He was found to be 100 percent disabled and had been hospitalized due to mental illness four years prior to the accident. At the time of the car crash, he was an outpatient living at home with his 87 year old mother. The patient was seen by a VA Medical Center psychiatrist in March of 2007. The psychiatrist's notes indicate that the patient was "doing well," his medications were effective, he was not agitated, and he did not have a recent history of substance abuse. Four days later, the patient drove his car into Plaintiffs as they were riding mopeds. Plaintiffs brought a medical malpractice action under the Federal Tort Claims Act, alleging that the psychiatrist was negligent in his care of the patient, which allowed patient to be involved in the subject matter accident. Defendant psychiatrist moved for summary judgment, arguing that he owed no duty of care to the Plaintiffs.

The District Court agreed with the Defendant and granted summary judgment. The issue before the Court was whether the psychiatrist owed Plaintiffs a duty to control an outpatient. The determination of whether a duty to control exists "requires an analysis of both foreseeability and policy." Applying New Mexico law, the District Court explained that the general rule is that a physician owes a duty to his or her patient—not to a third party. An exception does exist if a doctor exerts control over a patient. The Court ruled that the likelihood of injury to a third party was not foreseeable in this case, as at the time of the accident the patient had been prescribed the same three medications, at the same doses, for nearly three years without incident. Further, the patient's appointment with the psychiatrist just four days prior to the accident indicated that the patient's condition was stable. Similarly, as an outpatient, the VA Medical Center and the psychiatrist had only a limited opportunity to supervise the patient, and imposing a duty of control in such a context would require the psychiatrist to "exercise a degree of care and oversight that would be practically unworkable."

The Court also held that New Mexico's public policy does not support a duty that ran from Defendant to the Plaintiffs, as the state legislature consistently had acted to limit tort liability for health care providers. Accordingly, the Court declined to recognize a tort duty that would dissuade doctors from acting in their patient's best interests and entered summary judgment for the Defendant.

Burge v. United States, CIV. 10-0069 MV/WDS, 2012 WL 1450062 (D.N.M. Mar. 27, 2012).

STATE STATUTE REQUIRING EXPERT WITNESS IN MEDICAL MALPRACTICE ACTION TO PRACTICE THE SAME SPECIALTY AS DEFENDANT IS UNCONSTITUTIONAL

The Arkansas Supreme Court abolished a state law requiring that expert witnesses in medical malpractice actions practice in the same specialty as the respective defendants, holding that the law violated the separation of powers doctrine.

A patient brought a medical malpractice action after a physician performed a parathyriodectomy. After the surgery, the patient developed what she believed to be a burn located near the surgical site and experienced intense swelling and pain. She went to the emergency room due to pain and was admitted for conditions related to renal failure. During this hospitalization, the patient obtained a consultation from a dermatologist who allegedly told her that the "burn area" and accompanying damaged skin would fall off and heal. A black eschar (dead and sloughing tissue) developed on her neck and chest, and patient ultimately underwent several skin grafts. She sued the hospital, surgeon, nephrologist, and all nurses and technicians associated with her care. The Defendants subsequently moved for summary judgment, arguing that Plaintiff's expert witnesses did not practice in the same specialty as Defendants and that their testimony therefore was improper. The trial court granted summary judgment in favor of Defendants and ruled that the statute requiring proof in medical malpractices cases to be made by "medical care providers of the same specialty as the defendant" was constitutional.

The Arkansas Supreme Court overruled the trial court, holding that the statute unconstitutionally violated the separation of powers doctrine. The Court explained that although the statute claimed to establish a substantive burden of proof, in reality it affected procedural matters that are reserved for the court. Specifically, the statute

improperly set qualifications that a witness must possess before testifying in medical malpractice cases, as Rule 702 of the Arkansas Rules of Evidence already addressed those qualifications. The unconstitutional statute attempted to add an additional requirement to Rule 702, and in the process "invade[d] the province of the judiciary's authority to set and control procedure." The statute therefore violated the separation of powers doctrine and was found to be unconstitutional.

Broussard v. St. Edward Mercy Health System, Inc., 386 S.W.3d 385 (Ark. 2012).

HOSPITAL NOT VICARIOUSLY LIABLE FOR MALPRACTICE UNDER APPARENT AGENCY THEORY WHERE PATIENT SIGNED CONSENT AND DISCLAIMER FORMS

Plaintiff brought medical malpractice and wrongful death actions against a hospital, alleging that it was vicariously liable for a patient's primary care physician's failure to diagnose the reoccurrence of patient's lung cancer. The patient in this case received treatment from her primary care physician at two different locations: the physician's practice, and at a local hospital where the physician served as chief of staff. Prior to obtaining treatment at the hospital, the patient was required to sign a one page "Consent For Medical Treatment Form." Importantly, the form provided that none of the physicians who treated the patient were employees of the hospital. This provision was written in bold, capitalized text, and the patient signed the form on seven separate occasions. The primary care physician knew the patient had lung cancer before she started treating her. The cancer went into remission, but the patient once again was diagnosed a few years later by another physician while still seeing her primary care physician. The patient ultimately died as a result of complications from her second bout of lung cancer.

The crux of Plaintiff's malpractice claim was the allegation that the primary care physician was negligent in failing to diagnose a recurrence of the patient's lung cancer, and the same claim of medical negligence was made against the hospital based on an apparent agency theory. The trial court granted the hospital's summary judgment motion. Plaintiff appealed, arguing that the primary care physician was "inextricably linked and connected" with the hospital and held herself out as the chief of staff. The Court of Appeals affirmed, holding that the patient knew or should have known that the primary care physician was an independent contractor based on the numerous disclaimer forms that she signed. Moreover, the Court held that the administrative title "Chief of Staff" was insufficient to override the clear, unequivocal language found in the disclaimers. Finally, the Court explained that the patient was relying on the primary care physician—not on the hospital where she had privileges—for her treatment. The hospital merely was the location where she received treatment. Accordingly, the Illinois Court of Appeals affirmed the trial court's grant of summary judgment.

Lamb Rosenfeldt v. Burke Medical Group, 967 N.E.2d 411 (Ill. App. 2012).

NURSING HOME DIRECTOR NOT INDIVIDUALLY LIABLE FOR SUBSTANDARD CARE

The Arkansas Supreme Court has held that a nursing home director (the "Director") did not owe a personal duty of care toward a resident who allegedly suffered injuries resulting from negligent care.

The personal representative of a deceased nursing home resident filed suit against the Defendant Director and the nursing home, asserting claims for ordinary negligence, medical malpractice, violation of the Residents' Rights Act, and felony neglect. The

resident in this case suffered a stroke before entering into the care of the nursing home. She was fully dependent on nursing care for her basic needs and entered the home with a feeding tube, pressure sores, and a urinary tract infection. The resident was discharged to a hospital after contracting pneumonia, and despite treatment from wound-care specialists, her pressure sores worsened. She was transferred back to the nursing home, where some of the sores became infected. This necessitated several amputations. She died seven months after first being discharged from the nursing home to the hospital.

The trial court denied the Director's motion for a directed verdict, and the jury rendered a $5.1 million verdict against the nursing home and a $5 million verdict against the Director. The trial court entered judgment on these verdicts, and the Defendants filed motions for new trial and judgment notwithstanding the verdict. The motions were denied and the Defendants appealed. The Plaintiff argued that the trial court properly ruled that the Residents' Rights Act, 42 C.F.R. § 483.75(d), created a duty in tort. The Arkansas Supreme Court disagreed, holding that the regulation simply is a rule that nursing homes must follow to qualify for participation in Medicare and Medicaid.

Plaintiff also argued that one of the nursing home's internal policies, which provided that a governing body be established with full legal authority and responsibility for operating the home, created a tort duty. The Court disagreed, explaining that allowing internal policies with broad, governing language to create a duty that establishes personal liability of a company's owner would "open the door" to many improper lawsuits filed in attempts to pierce the corporate veil.

The Court then addressed the Defendant nursing home's argument that the trial court erred by making several evidentiary errors; namely, that it improperly excluded the

patient's post-discharge medical records. The Court agreed, ruling that the evidence clearly was relevant to the case, and that the trial court "stripped an entire defense" from the Defendant nursing home by excluding it. Finally, the Court found that the trial court committed reversible error in ruling that a state statute granting health care providers a privilege not to testify against themselves in a medical malpractice action did not apply to nurses who were not named in a nursing home suit. With regard to the last issue, the Court ruled that the "testimonial privilege" applied to nursing home employees and did not violate the state constitution's separation of powers doctrine. A new trial therefore was granted.

Bedell v. Williams, 386 S.W.3d 493 (Ark. 2012).

PHYSICIAN AND MEDICAL SOCIETY HAVE NO GENERAL TORT DUTY TO REPORT PEDIATRICIAN'S ABUSE OF PATIENTS ABSENT SOME SPECIAL RELATIONSHIP

The Plaintiff in this case represented a class of former child patients of a pediatrician in pursuing compensatory and punitive damages against the pediatrician and various other medical defendants for harm caused by the pediatrician's sexual abuse of patients. The Defendant Medical Society of Delaware ("Medical Society") is a voluntary, non-profit association of physicians in Delaware, created for the primary purpose of aiding physicians in the practice of medicine and ensuring that patients receive quality medical care. The Medical Society does not have statutory or regulatory authority to sanction or discipline physicians. However, the Physicians' Health Committee (PHC), a committee within the Medical Society, is tasked with the role of monitoring the professional behavior of the Medical Society's members. Each of the physicians sued in their individual capacity were Medical Society members.

All Defendants moved for dismissal, arguing that they owed no actionable duty of care to the pediatrician's patients. The court granted the Medical Society's motion, but only to the extent that Plaintiff based her claim on a failure to act. The court explained that there exists a distinction between malfeasance (a negligent act) and nonfeasance (a negligent omission). In the case of misfeasance, the party who performs an affirmative act owes a general duty to others to exercise reasonable care. In contrast, in the case of nonfeasance, the party who merely omits to act owes no general duty to others unless there is a "special relationship" between the actor and the third party.

This "no duty to act rule" arises in cases where the special relationship is between the defendant and either the person who is the source of the danger or the person who foreseeably is placed at risk by the danger. The Court ruled that none of the facts alleged by the class Plaintiffs suggested that the Medical Society exercised any type of custodial control over the pediatrician or maintained a relationship with him that would have allowed them to do so. It further determined that the Medical Society's general, aspirational goal of enhancing health care quality and exposing unfit physicians did not create the kind of relationship that triggers liability. The Court continued by explaining that while physicians have a statutorily defined duty to report child abuse, that duty did not extend to the Medical Society itself. Consequently, the motion to dismiss was granted as to the Plaintiff's failure to act claim against the Medical Society. The court did, however, allow the Plaintiff to pursue a claim against the Medical Society to the extent that she alleged the it affirmatively undertook a duty to investigate complaints about the pediatrician that were brought to the Society's attention.

Plaintiff also alleged that each of the individual Defendants were negligent by failing to report the abuse. The court reiterated that a "special relationship" must exist before liability may be imposed. It ruled that no such relationship was created simply because physicians were professional colleagues and/or co-employees of the pediatrician, as that relationship does not indicate that they had any means of control over the pediatrician. More importantly, that relationship did not create a tort duty to protect the pediatrician's patients. However, the court did allow Plaintiff to pursue negligence claims against the physicians who shared patients with the pediatrician or referred patients to him despite having knowledge of the sexual abuse allegations.

Doe v. Bradley, 58 A.3d 429 (Del. Super. 2012).

DOCTORS WHO ALLEGEDLY MISREPRESENT SUCCESS RATE OF CANCER TREATMENT MAY BE SUED UNDER CONSUMER PROTECTION STATUTE

The Second Circuit recently restored an action alleging that physicians violated a state consumer protection law by representing that an unconventional, alternative form of cancer treatment had a high rate of success.

In *Gotlin*, the estate of a deceased cancer patient brought an action against her treating physicians, hospitals, and various directors, officers, and employees, alleging claims for medical malpractice, consumer fraud, false advertising, violation of the RICO act, and wrongful death. The Plaintiff asserted that the Defendants fraudulently misrepresented the efficacy of a form of cancer treatment called Fractionated Stereotactic Radiosurgery ("FSR"), which induced the patient to undergo an unnecessary, ineffective, harmful form of radiation therapy. The District Court dismissed all of Plaintiff's claims.

The Second Circuit reinstated the action based on the consumer protection statute, explaining that it creates a private right of action for deceptive acts committed during the course of trade or commerce. The Court explained that the statute applies to health care providers and "virtually all economic activity" occurring in New York. Coupled with the fact that Plaintiff provided expert opinions supporting its allegations that Defendants falsely stated survival rates, the Court found that a fact issue was created. Summary judgment therefore was overturned.

The Court did, however, affirm the dismissal of the remaining claims, holding that a patient may not bring an independent action for fraud based on injuries stemming from medical malpractice. The RICO claim also was inappropriate, as the Plaintiff did not suffer an injury to her business or property.

Gotlin v. Lederman, 483 F. App'x 583 (2d Cir. 2012).

HOSPITAL SUED FOR MALPRACTICE MAY CONDUCT *EX PARTE* INTERVIEWS WITH NON-PARTY, TREATING PHYSICIANS UNDER LIMITED CONDITIONS

Applying Illinois law, a federal District Court ruled that a hospital sued for malpractice can conduct *ex parte* interviews with non-party, treating physicians who treated the Plaintiff and acted as agents of the hospital, despite the fact that the treatment did not form the basis for the lawsuit.

This case involved a claim of medical malpractice centering on the care provided to and during the birth of the Plaintiff. The Defendant Hospital filed a motion, pursuant to Illinois's Hospital Licensing Act ("HLA"), to conduct *ex parte* interviews of three physicians for the purpose of "preparing them for 'any discovery deposition which they are asked to give.'" None of the physicians were named as defendants. Plaintiff opposed

the motion on the grounds that the HLA did not allow for such interviews, as the doctors the Hospital wished to interview were not agents or employees of the Hospital.

The Court ruled that the Hospital could conduct *ex parte* interviews with the two physicians who treated the Plaintiff in the past for the purpose of preparing for depositions. However, the Court held that the Hospital could not speak *ex parte* with the third physician, who was still treating the Plaintiff at the time of the suit. In reaching its holding, the Court looked to previous decisions interpreting the HLA to clearly allow such *ex parte* communications between a hospital's counsel and treating physicians who acted as agents. The Court continued by tracing the HLA's history, explaining that it was amended to prohibit communication between a hospital that is sued for malpractice and members of the hospital's medical staff who are not agents or alleged agents of the hospital, "concerning the claim [for malpractice]." Plaintiff argued that the amendment barred *ex parte* interviews of all three non-party treating physicians, as they were no longer affiliated with the Hospital at the time of the suit. The Hospital countered by asserting that the interviews were proper because the relevant inquiry was whether the non-party doctors were acting as agents when they provided the Plaintiff with treatment.

The Court explained that the "concerning the claim" language used in the HLA limited the scope of interviews—not their permissibility. It held that the amendment did not affect the Hospital's right to interview the non-party physicians regarding post-natal treatment they rendered that was unrelated to the misconduct the suit was based on. Put simply, the Court found that the Hospital was entitled to interview the two physicians who treated the Plaintiff in the past, but only as to the treatment they personally provided. In contrast, the Hospital could not interview the third physician who was still treating the

Plaintiff, as it would be nearly impossible for the physician to differentiate between information garnered before and after his relationship with the Hospital ended.

E.Y. v. United States, 10-CV-7346, 2012 WL 1441402 (N.D. Ill. Apr. 26, 2012).

HOSPITAL THAT RE-CREDENTIALED A STAFF SURGEON WHO HAD HISTORY OF MALPRACTICE SUITS COULD NOT BE SUED FOR CORPORATE NEGLIGENCE

The Michigan Court of Appeals held that a hospital could not be sued under a corporate negligence theory when it failed to fully investigate a surgeon's history when that surgeon later injured a patient. A neurologist diagnosed Plaintiff with carpal tunnel syndrome, and the neurologist referred him to the Defendant surgeon for treatment. The surgeon nicked a nerve while performing arthroscopic hand surgery, causing permanent injury. Plaintiff sued the Defendant Hospital under a theory of negligent credentialing. He alleged that because the surgeon was sued 17 times for medical malpractice in the past, the Hospital should not have re-credentialed him. Both sides presented expert testimony and evidence either in support of or critical of the board charged with issuing credentials. The Hospital moved for summary judgment, arguing that Plaintiff could not prove causation-in-fact. The trial court ultimately found for the Plaintiff and denied summary judgment after reconsideration.

The Hospital argued on appeal that the mere fact that malpractice lawsuits have been filed against a physician is not a sufficient basis upon which to establish physician incompetency *and* liability for negligent credentialing. In other words, the Hospital asserted that any failure to take corrective action against a doctor based solely on the filing of suits cannot be considered proximate cause of the injury suffered by the Plaintiff in this case. Further, the Hospital asserted that even if it breached its duty to adequately

evaluate the surgeon's credentials, the Plaintiff failed to present evidence that a more stringent evaluation would have led to restrictions of the surgeon's privileges.

The Court of Appeals agreed and reversed the grant of summary judgment. It first reiterated that hospitals have a duty under both common and statutory law to exercise reasonable care in renewing a physician's staff privileges. However, the Court held that the mere existence of prior malpractice suits, without any detailed evidence of the surgeon's culpability, failed to raise "red flags" that the surgeon's staff privileges should have been restricted or revoked.

Engelhardt v. St. John Health Sys., 292143, 2012 WL 1367543 (Mich. Ct. App. Apr. 19, 2012) *appeal denied*, 493 Mich. 958, 828 N.W.2d 382 (2013).

PRIMARY CARE PHYSICIAN HAS NO DUTY TO OVERSEE A COURSE OF TREATMENT COMMENCED BY A TREATING SPECIALIST

The Plaintiff received almost a decade's worth of care from an obstetrical practice group before visiting the Defendant, an internist and primary care physician, for the first time. In the past, the obstetrical group treated Plaintiff for a benign mass under her arm. Plaintiff was three months pregnant at the time of that first visit with Defendant, and was still a patient of the obstetrical practice as well. The Defendant performed a full physical exam, and Plaintiff returned to the obstetrical group for pre-natal care. Six weeks after her physical exam, the obstetrical group detected a mass in the patient's abdomen and ordered a sonogram. A radiologist examined the results and concluded that it was consistent with a benign condition. The Defendant noted the radiologist report, but she did not discuss it with the patient or the obstetrical group. A different doctor later discovered that the mass was malignant.

Plaintiff alleged that the Defendant failed to perform a proper physical examination, diagnose, and treat the mass, and that the delay in treatment resulted in a painful, invasive surgery. The allegations were premised on the notion that the primary care physician had a general duty to monitor patient's treatment. Plaintiff hired an expert who characterized the mass as a "medical issue" instead of a gynecological one, and asserted that the Defendant acted negligently by failing to order a biopsy that could have detected the malignancy. Defendant moved for summary judgment, arguing that he had no duty to intervene in treatment rendered by a specialist group. The trial court disagreed and denied the motion.

The appellate court reversed. It first noted that the question of whether a doctor owes a duty of care generally is a question reserved for the court and is not an appropriate subject for expert opinion. Next, the Court explained that the dispositive factor is not the Defendant's status as a primary care physician or internist. Instead, the operative question is whether the physician played any role in advising the Plaintiff on the diagnosis or treatment of the abdominal mass that the Plaintiff actually relied on. The Court emphasized that the radiologist sent the sonogram to the Plaintiff and the obstetrical group, and that the Defendant had absolutely no involvement in the setting or monitoring of the course of treatment prescribed for the mass. Because the radiologist report showed no cause for concern and the obstetrical group was providing all treatment relating to the mass, the Court ruled that the Defendant had no independent duty to assess the course of treatment set and monitored by another physician.

Burtman v. Brown, 97 A.D.3d 156, 945 N.Y.S.2d 673 (2012).

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