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FEATURED ARTICLE

Different Rules for Different Doctors? A General Practitioner's Improper Relationship With His Patient Is Not Medical Malpractice, Says Pennsylvania Supreme Court

The latin prefix "mal" means "bad" or "wrongful," which explains why "malpractice" connotates a professional rendering, quite literally, "bad" service. Many cases of doctors "practicing badly" in medical malpractice cases are self-evident: leaving a surgical sponge inside a patient after surgery; operating on the wrong limb; or missing a crucial diagnosis which costs a life. These are the classic medical malpractice scenarios which constitute most of the thousands of such cases filed in the United States each year.

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DIRECTORS AND OFFICERS

Andy Warhol Art Authentication Board Owed Coverage under Directors and Officers Policy

THE ANDY WARHOL FOUNDATION v. PHILADELPHIA INDEM. INS. CO. (Sup. Ct. N.Y. Cty., 2012)

The plaintiffs, Andy Warhol Foundation for the Visual Arts, Inc. and the Andy Warhol Art Authentication Board, Inc. (plaintiffs), beat a summary judgment motion brought by their insurer, Philadelphia Indemnity Ins. Co (PIIC), seeking a judgment that it owed no coverage for defense costs incurred in an underlying class action.

The plaintiffs' business awards grants to arts organizations, protects the legacy of Andy Warhol and reviews pieces of art to determine if they were created by Warhol. The plaintiffs were insured by PIIC under a directors and officers policy (D&O policy) as well as a professional liability policy (E&O policy).

In the underlying claim, a party brought a claim against the plaintiffs for conspiracy when the plaintiffs determined that a painting was not created by Warhol. The party filed a class action complaint against the plaintiffs in the Southern District of New York on behalf of all persons who submitted Warhol artwork to the plaintiffs for review, alleging fraud and conduct in violation of the Lanham and Sherman Acts. The underlying complaint was dismissed in part, and a second complaint was filed by a different party alleging the same allegations as the first complaint years later.

PIIC was timely notified of both underlying actions, and denied coverage for both actions. PIIC agreed to cover $225,000 of plaintiff's defense costs for the first underlying action under the E&O policy but denied coverage under the D&O policy. After a threat of arbitration, PIIC agreed to pay an additional $1,775,000 under the E&O policy and the parties agreed to stay proceedings under the D&O policy until after the underlying actions were settled.

Both underlying lawsuits were dropped for lack of evidence, yet the plaintiffs had expended $4.6 million in defense costs which they then sought from PIIC under the D&O policy. PIIC brought a summary judgment motion, arguing that the claims were excluded from coverage under a "Professional Services Exclusion" found in the policy. PIIC also argued that the plaintiffs failed to satisfy conditions of the stay agreement.

The court held that the authentication service did not constitute "professional services," which was undefined in the policy, and thus the claims were not excluded under the policy. The court noted that the exclusion lists specific occupations that involve specialized knowledge, training or skills, and art authentication was not listed. Moreover, the other listed professional services did not relate to art authentication services in any way.

The court also found that the plaintiffs satisfied the terms of the stay agreement as the underlying claims were completely adjudicated and the plaintiffs did attempt to obtain reimbursement from the underlying plaintiffs, but were unsuccessful as the plaintiffs had no assets.

Impact: This is a trial court decision. We will follow this matter as there will undoubtedly be an appeal. Regardless, the trial court applied a narrow interpretation of the professional services provisions. At a minimum, this case is a reminder of ways trial courts may try to find coverage for an insured, especially in the context of providing a defense or paying defense costs.

MEDICAL MALPRACTICE

Pennsylvania Supreme Court Extends Corporate Negligence Liability Doctrine to Nursing Home Facilities and Management

SCAMPONE v. HIGHLAND PARK CARE CTR. (Sup. Ct. Pa. November 21, 2012)

In a widely anticipated decision, the Pennsylvania Supreme Court announced on November 21, 2012 its ruling in the matter of *Scampone vs. Highland Park Care Center,* No. 16 WAP 2011. In an opinion by Chief Justice Castille, the state's highest court held that both nursing home facilities and their parent corporations were subject to potential direct liability in negligence claims, thus extending the court's seminal decision in *Thompson vs. Nason*, 591 A.2d 703 (Pa. 1991). Under the corporate negligence doctrine, hospitals – and now nursing home facilities – may be held liable on direct theories of liability, and not just vicariously responsible for the actions of their agents.

The facts of the *Scampone* case were significant, and Chief Justice Castille repeatedly emphasized the underlying record in support of his opinion for a unanimous court. Mrs. Scampone was admitted to the defendant nursing home in 1998 when she was 88 years of age. She was in need of skilled nursing care and had a number of challenging medical conditions (her diagnoses included senile dementia, hypertension, atrial fibrillation, chronic obstructive pulmonary disease, left hip replacement, and thoracic compression fracture, among others). Mrs. Scampone was also susceptible to developing urinary tract infections (UTI), for which she was repeatedly hospitalized on 4 or more occasions in 2002-03. In January 2004 she was re-admitted to the hospital with yet another UTI compounded by dehydration, malnutrition, bedsores, and an acute heart attack. Mrs. Scampone died on February

9, 2004; one year later suit was instituted on behalf of her estate against Highland Park, a corporation; Grane Healthcare, a corporation providing management services to Highland Park; and against three additional parties with ownership interests in Highland Park. The plaintiff estate proceeded on theories of direct liability under the corporate negligence doctrine, as well as vicarious liability for the negligent acts of nursing home employees. After trial in the Allegheny County Court of Common Pleas, a Pittsburgh jury returned its verdict in favor of the estate, awarding compensatory damages in the amount of $193,500 and finding Highland Park both directly and vicariously liable for negligence in the death of Mrs. Scampone. In a ruling prior to submission of the case to the jury, the trial court refused to allow the management company, Grane Healthcare, to be held liable and granted its motion for nonsuit. The plaintiff's claims for punitive damages were also stricken before the case went to the jury.

On direct appeal, the Superior Court of Pennsylvania affirmed in part, holding that the trial judge properly allowed the claim of corporate liability against Highland Park to go to the jury. The Superior Court panel otherwise reversed, however, concluding that claims of corporate negligence against Grane Healthcare should also have been sent to the jury, as well as claims for punitive damages against both defendants. Subsequent petitions for allowance of appeal by Grane and Highland Park were granted by the Pennsylvania Supreme Court, limited to the question of whether the corporate negligence theory, initially adopted in *Thompson vs. Nason Hospital*, should be applied to a nursing facility and the healthcare company responsible for its operations.

Chief Justice Castille's lengthy opinion for the court carefully weighed the competing arguments presented by the parties against traditional concepts of duty and tort liability under Pennsylvania law. Specifically, the *Scampone* court held that trial courts must weigh five factors in deciding whether corporate negligence should apply to a defendant nursing or healthcare facility;

1. the relationship between the parties;
2. the social utility of the actor's conduct;
3. the nature of the risk imposed and foreseeability of the harm incurred;
4. the consequences of imposing a duty upon the actor; and
5. the overall public interest in the proposed solution.

As the court articulated its reasoning, it returned again to the underlying factual record, emphasizing case precedent in which "The key to the court's analysis was the relationship between hospital and patient – the parties, as in every case where the question of duty arises".

Impact: The immediate impact of this ruling – in a case which may have been much better settled prior to or immediately after the trial verdict, in order to avoid the subsequent appellate decisions – is to place nursing homes, their owners, and managers on notice of potential direct liability exposure to negligence claims in addition to their previous concerns based upon potential vicarious liability. The court's reasoning could well be extended in other negligence cases based upon premises liability, or trucking cases, in addition to the medical malpractice context. Finally, the potential impact of the Patient Protection and Affordability Care Act must be considered, as it establishes more transparency in ownership and management disclosures, providing fertile ground for plaintiff counsel to seek evidence in support of their claims.

Court Distinguishes Recent *Wilkins* Decision

STRICKLAND v. BRISTOL
(Conn. Super. Ct. Nov. 7, 2012)

The plaintiff filed a three-count complaint against Bristol Hospital and one of its emergency physicians, Dr. Cliff Wagner, alleging medical malpractice in connection with the care and treatment of the plaintiff's decedent. The first count alleged negligence against Bristol Hospital under the theory of respondeat superior based on the actions of its agents, servants, and/or employees, triage nurse(s), emergency department nurse(s), and/or emergency department technician(s). The second count alleged negligence against Dr. Wagner directly. The third count alleged negligence against Bristol Hospital under the theory of respondeat superior for the alleged negligence of Dr. Wagner.

In an attempt to comply with Conn. Gen. Stat. § 52-190a, the plaintiff attached to his complaint a letter from a board certified emergency medicine physician stating that Dr. Wagner and the staff of Bristol Hospital violated the applicable standard of care in connection with the care and treatment of the decedent. Bristol Hospital filed a motion to dismiss, arguing that the plaintiff's opinion letter was insufficient as to the first count of the complaint to the extent that said count alleged negligence of hospital personnel other than emergency medicine physicians. The hospital conceded that the plaintiff's letter was sufficient for the second and third counts. The trial court denied Bristol Hospital's motion to dismiss, agreeing with the majority of superior court decisions that a written opinion is sufficient for a medical institution if it is sufficient for at least one agent or employee of the institution. Because the letter was sufficient as to Dr. Wagner, the court found that it was sufficient as to the hospital.

Thereafter, Bristol Hospital filed a renewed motion to dismiss (which the trial court treated as a motion to reargue) based on the Connecticut Appellate Court's decision in *Wilkins v. Connecticut Childbirth & Women's Center*, 135 Conn. App. 679 (2012), which was rendered after the hospital's first motion to dismiss was decided. In *Wilkins*, the issue was whether a board certified obstetrician could opine as to the standard of care for a certified nurse midwife or a registered nurse. The Connecticut Appellate Court ruled that an obstetrician was not a "similar health care provider" to a certified nurse midwife and dismissed the plaintiff's action.

In the present case, the *Strickland* court ruled that *Wilkins* was distinguishable and did not alter the court's prior decision denying Bristol Hospital's motion to dismiss. The court noted that unlike the plaintiff in the present case, the *Wilkins* plaintiff had no other written opinion other than the one by the board certified obstetrician. Once the Wilkins court determined that the obstetrician was not a "similar health care provider" as the certified nurse, midwife, or registered nurse, the plaintiff had no other means to comply with § 52-190a. In *Strickland*, the plaintiff already had a written opinion from a "similar health care provider" as Bristol Hospital, namely, the board certified emergency medicine physician attesting to the negligence of Dr. Wagner. Because the hospital was sued under the theory of respondeat superior for the negligence of Dr. Wagner in addition to the negligence of the other emergency room staff, the opinion of the board certified emergency medicine physician was sufficient as to Bristol Hospital.

Impact: This case demonstrates that a written opinion is sufficient for the medical institution if it is sufficient for at least one agent or employee of the medical institution. Had the plaintiff not claimed that the hospital was vicariously liable for the alleged negligence of Dr. Wagner, and only claimed that the hospital was liable for the alleged negligence of the emergency room nurses and/or technicians, the case likely would have gone the other way.

Court Addresses Constitutionality of Statute Barring Wrongful Birth Actions

SERNOVITZ v. DERSHAW
(Sup. Ct. Pa., November 14, 2012)

The plaintiff, Rebecca Sernovitz, sought pre-natal care from the defendants. Mrs. Sernovitz and her husband, who was also a plaintiff, are of Ashkenazi Jewish heritage, which placed their child at an increased risk of being afflicted with various genetic disorders. A blood test revealed she had the mutation that causes dysautonomia. However, Mrs. Sernovitz was informed the tests were negative. Subsequently, their child was born with a genetic disorder that could only be caused if both parents were the carrier.

The plaintiff filed a medical malpractice claim on their own behalf that sounded in wrongful birth, and a claim on behalf of their child that sounded in wrongful life. Specifically, it is alleged had Mrs. Sernovitz known she was a carrier of this disorder, her husband would also have been tested to determine if their child was at risk. If he was found positive, they would have ended the pregnancy.

42 Pa. C.S.A. § 8305 prohibits actions for wrongful birth and life. The plaintiffs asserted in their complaint that this act was unconstitutional. The defendants filed a motion to dismiss the complaint because it was based upon claims prohibited by the aforementioned statue, which were granted by the trial court and this appeal ensued.

On appeal, the plaintiffs argued this statute violated the single subject rule of the Pennsylvania Constitution. The court reviewed the legislative history of the bill and determined that its primary purpose was to address post-trial matters in criminal cases, which is distinguished from the prohibition of wrongful birth and life claims. Thus, these diverse areas of law were not part of the same legislative scheme and § 8305 was ruled unconstitutional. Consequently, the trial court's opinion was reversed and the case was remanded for further proceedings.

Impact: The plaintiffs may assert a claim for wrongful birth in Pennsylvania because the legislature failed to comply with the single subject rule of the state Constitution.

ACCOUNTANT MALPRACTICE

No Fiduciary Duty Exists Where Accountant Merely Prepared Tax Returns

IACURCI v. SAX
(Conn. App. Ct., Dec. 4, 2012)

For several years the defendant accountant prepared income tax returns for the plaintiff and his wife. The defendant accountant was employed by the defendant accounting firm whose primary business was to provide certified accounting services.

Throughout the first few years that the defendant accountant prepared income tax returns for the plaintiff, the defendant accountant delineated the plaintiff as a real estate investor on his tax returns. However, from the years of 2003 and 2005, the defendant accountant, as opposed to identifying the plaintiff as a real estate investor, instead identified him as individual engaged in the business of real estate on his tax returns for those years.

A few years later in 2007, the plaintiff obtained a new accounting firm to prepare his income tax returns. It was at that time, after being alerted by the new firm, that the plaintiff learned that the defendant

accountant had made a change in his status on his tax returns. According to the plaintiff, the defendant accountant's change in his status resulted in adverse tax consequences for the plaintiff and the plaintiff subsequently brought suit against the defendant accountant and his accounting firm alleging claims of professional negligence.

Thereafter, the defendants filed a motion for summary judgment arguing that the plaintiff's suit was untimely and was barred under the statute of limitations as the last act upon which the plaintiff's suit was premised, the filing of the tax return with an improper status was completed in 2006, more than three years prior to the plaintiff's suit. In response, the plaintiff did not dispute that the last act was performed in 2006 but, rather, the plaintiff argued that the statute of limitations was tolled under the doctrine of fraudulent concealment. In support of his argument, he alleged that the defendants and the plaintiff were in a fiduciary relationship and therefore, he need not prove that the defendants intentionally concealed their alleged error to prove the intentional concealment prong of the fraudulent concealment test. The mere nondisclosure on the part of the defendants was enough to prove that part of the fraudulent concealment test. The defendants argued, in turn, that no such fiduciary relationship existed.

The trial court granted the defendants' motion for summary judgment. In granting the motion for summary judgment, the trial court determined that the latest date in which professional services were rendered by the defendants to the plaintiff was in 2006 and therefore, the action was beyond the statute of limitations. The trial court then shifted the burden to the plaintiff and assessed whether a genuine issue of material fact existed as to whether there was fraudulent concealment. The trial court found that plaintiff failed to meet his burden. The trial court did find that a fiduciary relationship existed and by virtue of establishing the relationship the plaintiff met the intentional concealment prong of the fraudulent concealment test by showing only nondisclosure on the part of the defendants. However, the court found that the plaintiff could not meet his burden with respect to the other elements that were part of the fraudulent concealment test and therefore, summary judgment was appropriate.

The plaintiff promptly appealed. On appeal, the plaintiff argued that the trial court having found an existence of a fiduciary relationship was required to shift the burden to the defendants to prove that there was no fraudulent concealment on the part of the defendants. Plaintiff claimed that the trial court incorrectly placed the burden with the plaintiff to prove the existence of a material fact with respect to fraudulent concealment despite having proved the existence of a fiduciary duty.

After dismissing some record preservation issues argued by the defendants, the Appellate Court affirmed the trial court's ruling that the defendants were entitled to summary judgment. In so holding, the court noted that there was no dispute that the trial court correctly concluded that the action was commenced after the statute of limitations, and that the plaintiff did not present sufficient evidence to demonstrate fraudulent concealment. Rather, the plaintiff argued that because he submitted sufficient evidence to establish that a fiduciary relationship existed, the defendants bore the burden of demonstrating the absence of facts sufficient to satisfy the elements of fraudulent concealment.

The Appellate Court, instead of specifically reviewing the trial court's determination as to who bore the burden of demonstrating fraudulent concealment, first determined whether the trial court had correctly concluded that a fiduciary relationship existed between the plaintiff and the defendant accountant and the defendant accounting firm.

The Appellate Court found that no fiduciary relationship existed between the defendant accountant, the defendant accounting firm and the plaintiff. In making this determination, the court noted that not all business relationships give rise to a fiduciary duty and that a fiduciary duty requires an evidentiary showing of a unique degree of trust and confidence between the parties such that the defendant undertook to act primarily for the benefit of the plaintiff.

The court found that the evidence submitted on the motion for summary judgment demonstrated that the defendants were hired only to prepare yearly federal and state income tax returns for the plaintiff which were prepared based on information provided by the plaintiff and filed with the plaintiff's final approval. The court noted that there were no allegations or evidence that the defendants were hired to, or were expected to, undertake other more unique tasks such as managing the plaintiff's funds, advising the plaintiff with regard to investments or recommending financial transactions. Nor was there any evidence that the defendants were hired to manage the plaintiff's personal or business affairs. Rather, the defendants were only hired to prepare tax returns and provide advice concerning tax liability.

The court found that the because the evidence demonstrated that the relationship between the parties was nothing more than the usual interactions between an accountant hired to prepare annual tax returns and his or her client, the relationship was not one that encompassed a unique degree of trust and confidence giving rise to a fiduciary duty.

In support of this conclusion, the court pointed to both a trial court opinion from Connecticut finding that an accountant who only provides general tax return

preparation is not a fiduciary and cases from other jurisdictions holding that a general accountant-client relationship is not fiduciary in nature.

In reaching this conclusion, the court also dismissed the plaintiff's argument that the plaintiff's long term relationship with the defendants spanning over 17 years alone gave rise to a fiduciary duty. The court concluded that a long term relationship does not become a fiduciary relationship merely because it was long term. The court further stated that the length of the relationship did not change the nature of the services provided by the defendants which was the yearly preparation of tax returns.

The court finally concluded that because the plaintiff had not demonstrated a fiduciary relationship between himself and the defendant accountant and defendant accounting firm, it did not need to pass on the burden shifting issue and whether the court's application of the burden shifting issue was correct with respect to fraudulent concealment.

Impact: There is no fiduciary relationship between an accountant and a client when the accountant merely provides general services such as preparing tax returns. The plaintiff must show something more, such as the undertaking of managing the plaintiff's funds, the advising of the plaintiff with regard to investments or recommending of financial transactions.

In Pari Delicto Defense Fails to Carry The Day At The Motion to Dismiss Stage

IN RE INOFIN, INC.
(Bank. D. Mass. Nov. 8, 2012)

The issue before the court in *Inofin* was whether an accounting firm could successfully move to dismiss a malpractice claim utilizing the *in pari delicto* defense. The individuals who operated the bankrupt entity, Inofin Incorporated (Inofin), had previously been named in a complaint filed by the Securities and Exchange Commission (SEC). The complaint filed by the SEC claimed, in part, Inofin's principals not only "artfully manipulated" the accountant defendant, but also "masterminded a pervasive Ponzi scheme type fraud on investors." Originally, Inofin was primarily involved in "the business of purchasing and servicing sub-prime used car loans." Inofin obtained the capital necessary to operate its business, including the funding of the loans, from private investors who lent the entity money in exchange for "a fixed rate of interest ranging from nine percent to over fifteen percent per year." In addition to utilizing the investor funds for the company's sub-prime lending activities, Inofin's principals began using the money to fund other start-up business ventures. Ultimately, Inofin's investors forced the entity into bankruptcy.

The defendant accounting firm audited Inofin's financial statements for a number of years. The accountant, for example, after auditing Inofin's 2006 financial statements, concluded "he was not aware of any material modifications which needed to be made for them to be in conformity with GAAP … ." According to the complaint, the defendant accounting firm was negligent in finding Inofin's financial statements complied with GAAP. The trustee asserted the financial statement was materially false because it inflated Inofin's net worth by over $5 million. This alleged over-inflation was caused by Inofin's failure to properly account for the investments in the other start-up business ventures. Based upon the above, the trustee filed a malpractice claim against the defendant accounting firm.

The accounting firm moved to dismiss the complaint, in part, by arguing the in pari delicto defense precluded the trustee from recovering on the malpractice claim. The in pari delicto defense, which has been recognized in many jurisdictions, generally stands for the proposition that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." While recognizing the ongoing viability of the in pari delicto defense in the context of accounting malpractice claims, the court refused to dismiss the claim at the motion to dismiss stage. The court reasoned additional facts would need to be developed through discovery before it could definitely decide whether the in pari delicto defense precluded the trustee from recovering on the malpractice claim.

Impact: The court's decision in *Inofin* is noteworthy for two important reasons. First, the court continued the trend of providing judicial recognition to the *in pari delicto* defense in the context of accounting malpractice claims. Second, the court, similar to a number of opinions from other jurisdictions, reasoned the motion to dismiss could not be granted because the *in pari delicto* defense necessarily involves a fact specific inquiry which is not conducive to be ruled upon at the motion to dismiss stage. In short, the *in pari delicto* doctrine remains a viable defense to an accounting malpractice claim, but only in rare instances is a court likely to grant a motion to dismiss founded upon this defense. The summary judgment stage, after the completion of substantial discovery, will typically be a more appropriate time for moving to dismiss a malpractice claim based on the *in pari delicto* defense.

ARCHITECTURE MALPRACTICE

Oregon's Architectural Liens on Construction Property Relates-Back to Commencement of Construction, and Lender's Defense of Equitable Subrogation to Obtain Priority is without Merit if Architectural Firm Notifies Lender of their Design Role

SERA ARCHITECTS, INC. v. KLAHOWYA CONDO, LLC
(Ct. of App. Ore., November 7, 2012)

In October 2007, the plaintiff, Sera Architects, sued property owner and developer Klahowya for failure to pay a balance of $375,598 for the design work it provided on Klahowya's failed construction project. The plaintiff also filed suit against Shorebank to foreclose their trust deed on Klahowya's property, a construction lien it recorded on November 15, 2006. The plaintiff had recorded a claim of lien on Klahowya's property on June 29, 2007. Klahowya had been current on debts owed to plaintiff through early 2007, at which point Klahowya stopped making payments and incurred an outstanding balance. Shorebank had supplied two lines of credit to Klahowya secured by the trust deed. One line of credit was used to pay off an earlier mortgage from a prior lender dating from January 2006. In its complaint, plaintiff alleged that Shorebank's lien on the property was subordinate to its own.

The trial court ruled that Shorebank's trust deed had priority over the plaintiff's lien. The plaintiff appealed the judgment of the trial court. The plaintiff asserted its lien encumbered the development property before Shorebank's trust deed was recorded, while Shorebank argued that plaintiff's lien did not encumber the property until the claim of lien was recorded on June 29, 2007, which was more than seven months after Shorebank recorded its trust deed. Shorebank also raised the defense of equitable subrogation which permits a subsequent lender whose loan is used to pay off an earlier mortgage to take the priority position of that earlier lender. Equitable subrogation is applicable if the later lender is ignorant of an intervening lien and if their ignorance was excusable.

The general rule regarding lien priority is that an earlier lien is entitled to satisfaction before a subsequent lien. However, ORS 87.010(5) authorizes a lien on a parcel of land and upon the structures necessary for the use of the architectural plans, drawings, or specifications that an architect prepares. The lien must still be perfected, but the date of perfection relates back to the date of commencement of the improvement upon the land. The plaintiff asserted that the applicable relate-back date was when Klahowya's contractor began construction in July 2006. Commencement and improvement is defined under ORS 87.005(1) as the first actual preparation or construction upon the site of such substantial character as to notify interested persons that preparation or construction upon the site has begun or is about to begin. Preparation is further defined by statute as "excavating, surveying, landscaping, demolishing, or detaching existing structures or leveling, filing in or otherwise making land ready for construction."

The Oregon Court of Appeals held that plaintiff's lien was created when it began work on the project. Once the lien was perfected on June 29, 2007 it related back to July 2006 when Klahowya's contractor commenced their work.

Regarding the equitable subrogation defense, the plaintiff proved that Shorebank had actual knowledge of plaintiff's involvement in the development project by virtue of their participation in workshops hosted by plaintiff, Shorebank's loan negotiations with Klahowya wherein plaintiff's work was discussed, and that fact that actual site preparation was ongoing during Shorebank's involvement with the project.

Shorebank asserted that equitable subrogation was proper because they were ignorant of the fact that Klahowya was not paying its bills to the plaintiff and had no grounds to believe that plaintiff had a lien on the property for those unpaid bills. The court held that their ignorance of Klahowya's non-payment was not a result of misrepresentations or the negligence of others, and therefore the defense of equitable subrogation was not available to Shorebank.

Impact: Under Oregon State Law, an architectural firm will have a lien upon the property for which its designs are intended. The relate-back date of that lien will be the date upon which work commences on that property. In order to proactively prepare for a lender's defense of equitable subrogation, an architectural firm should include lenders in the discussions of timelines and project goals so that ignorance of an firm's involvement cannot be proven. Once a design firm's involvement in a construction project is known, lenders are put on notice of a potential inchoate lien held by that architectural firm.

FEATURED ARTICLE

Different Rules for Different Doctors? A General Practitioner's Improper Relationship With His Patient is Not Medical Malpractice, Says Pennsylvania Supreme Court

Introduction

The latin prefix "mal" means "bad" or "wrongful," which explains why "malpractice" connotates a professional rendering, quite literally, "bad" service. Many cases of doctors "practicing badly" in medical malpractice cases are self-evident: leaving a surgical sponge inside a patient after surgery; operating on the wrong limb; or missing a crucial diagnosis which costs a life. These are the classic medical malpractice scenarios which constitute most of the thousands of such cases filed in the United States each year.

These cases exemplify mistakes made in rendering physical care. But psychiatric malpractice is a significant part of the amalgam of such lawsuits filed every year. Indeed, errors in mental health treatment may be just as detrimental to patients and third parties as any misjudgment pertaining to physical well-being. On that note, the Pennsylvania Supreme Court recently issued an opinion in *Thierfelder v. Wolfert,* 2012 Pa. LEXIS 2263 (Pa. 2012) highlighting a crucial development on the medical malpractice front for non-specialists who may render incidental or secondary mental health treatment to patients. The *Theirfelder* case can be distilled to one narrow question: whether a mental health specialist's presumed duty to refrain from sexual activity with patients should be extended to general practitioners who may provide some degree of mental or emotional counseling to their patients? In answering that question in the negative, the Pennsylvania Supreme Court made an implicit commentary that a general practitioner's indisputably unethical and repulsive conduct, i.e., engaging in sexual conduct with a vulnerable patient is not a cause of action for medical malpractice because there are different duties for different doctors.

The *Theirfelder* Case

In 1996, David and Joanne Thierfelder became patients of Dr. Irwin Wolfert, a family physician. He treated them both for conditions which included, among other issues, libido problems. Ms. Theirfelder was also treated for depression and other emotional problems. In 2002, Ms. Thierfelder told Dr. Wolfert that he had cured her problems, that he was her "hero" and that she was in love with him. They began a sexual relationship that lasted for a year during which Ms. Theirfelder alleged she became increasingly anxious and depressed. Eventually, Ms. Theirfelder's emotional state worsened. She finally ended the relationship in January 2003. She told her husband about the affair two months later, and together they filed a lawsuit against Dr. Wolfert. The lawsuit included claims for medical malpractice on behalf of Ms. Theirfelder which cited the sexual affair she had with Dr. Wolfert. She claimed that Dr. Wolfert's conduct in this regard was a deviation from the standard of care for physicians.

The trial court eventually reconsidered an earlier ruling and granted Dr. Wolfert's motion to dismiss the medical malpractice claim on the grounds that it was not part of treatment rendered to Ms. Theirfelder. On appeal, Pennsylvania's Superior Court (after granting reargument en banc) reversed and remanded the trial court's decision. It held that patients must be protected from physician malfeasance and that the unequal "playing fields" of doctor-patient relationships compelled that a cause of action existed against Dr. Wolfert for his sexual conduct with a trusting patient like Ms. Theirfelder.

On appeal to the Pennsylvania Supreme Court, Dr. Wolfert reiterated that as a general practitioner, he should not be held to the same standard as mental health specialists for whom a clear duty not to have sexual involvement with patients has generally been recognized as an independent cause of action in a majority of other states. The court, in vacating and remanding, accepted this view on the basis that mental health providers are specially trained to recognize and deal with "transference" (the process whereby the patient displaces onto the therapist feelings which belong to a significant attachment figure of the past and responds to a therapist accordingly). The court concluded that general practitioners should not be held to the same duty of care as mental health professionals because they are not specially trained to render treatment based on transference and because they only provide incidental mental health treatment. Simply stated, Dr. Wolfert did not breach a duty of care when he began a sexual relationship with Ms. Theirfelder even though he provided her with "incidental" mental health treatment.

The court made clear that the fact that Dr. Wolfert's actions were seen as unethical within the medical profession did not translate to the violation of a legally enforceable duty. (The Pennsylvania Board of Medicine had, in fact, sanctioned Dr. Wolfert before this decision for his conduct). The court ultimately embraced that to hold general practitioners to the same duty as that found in mental health professionals with the Theirfelder fact pattern would have the effect of discouraging general practitioners from rendering mental and emotional counseling to their patients. "The question is not whether this court condones appellant's actions, nor even whether his actions amounted to a violation of medical ethics," Justice Ronald Castille said. "We hold here only that, as a general practitioner, appellant was under no specific or 'heightened' duty in tort to refrain from sexual relations with his patient under these circumstances."

Other Rulings and Commentary

The *Theirfelder* court followed a familiar footprint, one that adhered to the tradition that medical malpractice claims are increasingly the province of specialized regulations and that there are heightened rules ("a particularized standard of care" as the court distinguished) for specialized medical professionals. Indeed, it appears that nearly all jurisdictions in the United States have held medical specialists to some differentiated or heightened standard of care compared to that governing general practitioners. The majority noted in *Theirfelder* that 14 states had adopted a "national" standard of care for doctors who hold themselves out as specialists in a given area of medicine so that these specialists are held to the same standard of care as other specialists practicing in the same specialty across the country.

States which have addressed a heighten duty for specialists have generally allowed a cause of action in medical malpractice to proceed when the allegations involve that a mental health practitioner engaged in sexual relations with a patient. Courts generally view that the mental health practitioner in such cases has acted unethically and negligently when the interaction with his patient morphs into a sexual relationship. The majority of rulings throughout the United States generally view this type of mental health practitioner conduct as a transparent mishandling of an actual treatment, i.e. the "transference" phenomenon. This mistreatment is seen as making patients more vulnerable to exploitation including sexual manipulation. To the contrary, most courts have been reluctant to recognize a cause of action in medical malpractice when consensual sexual relations arise out of a doctor-patient relationship where the underlying medical care involves a non-specialist (like Dr. Wolfert) and lacks any direct psychological or emotional component.

But Thierfelder and its family tree have seemingly not considered that different duties for different doctors in this context is wholly inconsistent with the realities of modern medicine. Court are too commonly underestimating that a physician-any type of physician-is in a position of superiority over a patient. That relationship is based on trust and confidence much like the position Dr. Wolfert occupied over an unstable Ms. Theirfelder. Thus, any differences in the manner of treatment these general practitioners provide from mental health specialists should be immaterial. Even Pennsylvania's Medical Practice Act of 1985 does not support different duties for physicians who provide the same kind of care. The majority noted this fact but ultimately ignored its significance.

Additionally, most state medical boards prohibit sexual contact between a physician and his or her patient. In Pennsylvania, the profession's ethical code is tailored for doctors to avoid physical relationships with their patients because it "detracts" from the goals of treatment and obscures a physician's objective judgment. That the majority of states have held that non-specialists who render mental heath care and have a sexual relationship with a patient are not liable for medical malpractice ignores that such conduct is already documented within the medical community to contravene the goals of effective treatment and/or rehabilitation. This is the very essence of a duty of care and should provided the threshold for a viable medical malpractice lawsuit. This makes the *Theirfelder* case and its predecessors even more befuddling.

Moreover, modern medicine is not as compartmentalized as the majority viewpoint may indicate. Simply stated, a "duty for some but not all" approach ignores that the distinction between general practitioners and mental health professionals has changed. General practitioners are increasingly treating patients for mental health disorders with one study from the New England Journal of Medicine suggesting that general practitioners provide more than 75 percent of mental health therapy for depression. Shielding liability from such physicians who engage in unethical and unprofessional sexual conduct with their patients will only jeopardize the overall treatment of the patients, increase the risk that their symptoms will be exacerbated and minimize the chance of recovery. Physicians should be made aware of the necessary boundaries when dealing with patients and those parameters should be circumscribed an reinforced by the courts.

Even more deleterious are the courts' disregard of certain duties, responsibilities and ethics that all physicians swear to uphold. All physicians who provide treatment to patients have a duty to render that care in an appropriate manner. When they fail to uphold that oath and there is foreseeable and unreasonable risk to vulnerable patients, the courts must hold that this is nothing short of "bad practice" as a matter of law.

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