DECISIONS

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In Two Recent Decisions, Georgia Supreme Court Allows Cyber-Related Patient Data Hacking Negligence Claims Against Medical Facility and Affirms Assumption of Risk Jury Instruction

Cyber-Related Patient Data Hacking Claims

In a decision issued on December 23, 2019, the Supreme Court of Georgia held that patients alleged a legally cognizable injury for negligence arising from a data breach of the clinic's computer systems by a hacker and theft of the patients' personally identifiable information (PII). *Collins v. Athens Orthopedic Clinic, P.A.*, 837 S.E.2d 310 (Ga. 2019). The plaintiffs, current and former patients of the defendant medical clinic, brought a putative class action after the clinic informed them that a hacker had stolen their personal data from the clinic. The trial court dismissed plaintiffs' negligence claims, which a divided panel of the Court of Appeals affirmed, concluding that the plaintiffs' claim was properly dismissed because the plaintiffs sought only to recover for an increased risk of harm to them related to the exposure of their PII. The majority concluded that although the credit monitoring and other precautionary measures alleged by the plaintiffs were prudent, they were designed to ward off exposure to future, speculative harm and thus insufficient to state a cognizable claim under Georgia law. The Georgia Supreme Court noted that the case law relied on by the Court of Appeals was inapplicable because the decisions were not issued in the context of a motion to dismiss and that the cases involved a sort of exposure data fundamentally different than the actual data theft at issue. In those cases, there was no reason to believe that the data in question had fallen into a criminal's hands, whereas plaintiffs alleged their data was stolen by a criminal whose purpose was the sell the data to other criminals. To conclude that the claimants in the prior cases would likely suffer identity theft as a result of the opposing parties' actions would have required a long series of speculative inferences which were not present before the Court. Instead, the plaintiffs alleged that the hacker had offered at least some of the data for sale and all the class members were now facing imminent and substantial risk of identity theft given the criminals' ability to use the stolen data to assume their identities. The Court held that it must assume the truth of the allegations, and must presume that a criminal actor had maliciously accessed the plaintiffs' data and had at least attempted to sell it to other wrongdoers. The Court also noted that an important part of the value of the PII is in its utility for committing identity theft. While the Court noted that there existed an easier showing of injury, it also proffered that it may be offset by a more difficult showing of breach of duty. However, since the case was only at the motion to dismiss stage, the Court of Appeals' decision did not turn on the issue and the Supreme Court left it for another day. The Court further held that at this stage, they could not say that the plaintiffs would not be able to introduce sufficient evidence of injury within the framework of the complaint. The court further relied on recent federal district court rulings applying Georgia law, which it noted were not binding, but were persuasive given that those cases also came before district courts on motions to dismiss and they were subject to the more stringent pleading standards governing federal law.

Assumption of Risk Jury Instruction

In a decision issued on June 1, 2020, the Georgia Supreme Court held that there needed to be only slight evidence supporting a theory of a charge in order to authorize a requested jury instruction in a negligence action brought against a cardiologist and the facility alleging medical malpractice in the prescription of blood pressure medication issued post-heart surgery which plaintiff alleges caused him to faint and fall from a tree stand. The trial court instructed the jury on the assumption of risk defense and the jury returned a defense verdict. The Court of Appeals reversed and held that the instruction should not have been given because the evidence did not justify the instruction. The defendants appealed, and the Georgia Supreme Court, holding the jury instruction was permissible, held that there need only be slight evidence supporting the theory of the charge to authorize a requested jury instruction. Such evidence does not need to be direct evidence -- it is enough if there is something from which a jury could infer a conclusion regarding the subject. In analyzing the assumption of risk defense, the Court recognized that an action may bar a plaintiff from recovering on a negligence claim if it is established that he without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not. The defendant must prove that that plaintiff had actual knowledge of the danger, understood and appreciated the risks associated with the danger, and voluntarily exposed himself to those risks. Knowledge includes both actual and subjective knowledge of the specific, particular risk of harm associated. Considering an objective, common sense standard in assessing plaintiff's knowledge, the Court held that there was at least slight evidence that the plaintiff was instructed not to engage in strenuous activity and not to lift more than ten pounds, bend, or stoop over for at least seven days after his procedure. Even without specifics, a competent adult could not blind himself to the obvious risk of a dangerous cardiovascular event by disregarding his doctor's instructions immediately after major heart surgery.

SPECIAL POINTS OF INTEREST:

- *Georgia Supreme Court Allows Cyber-Related Hacking Claims*
- *Georgia Supreme Court Allows Slight Evidence as Grounds for Jury Instruction*
- *California Limits Private Action Statutory Damages to $500 Per Action*
- *North Carolina Appellate Court Bars Med Mal Claim Against Nurse, Citing Binding Precedent*

Bound By Precedent, North Carolina Court of Appeals Finds Nurse Anesthetist Not Subject to Medical Malpractice for Treatment Decisions

In a decision issued on June 16, 2020, the Court of Appeals of North Carolina held that parents were not entitled to the admission of evidence on a medical malpractice action that a nurse shared responsibility with a physician for administering anesthesia on the grounds that the physician was solely responsible for the diagnosis and treatment, based on precedent. *Connette v. Charlotte-Mecklenburg*, 845 S.E.2d 168 (N.C. App. Ct. 2020). Plaintiff-parents brought an action against a hospital and a nurse anesthetist for medical malpractice alleging permanent brain damage of their daughter after they allege she suffered cardiac arrest following mask induction anesthesia. The anesthesiologist and the certified registered nurse anesthetist administered anesthesia via a mask to avoid the stress of a needle and intravenous anesthesia. The doctor and nurse also chose to induce her with sevoflurane, an anesthetic that can cause blood pressure to drop and cardiac output to decrease. Soon after administration, the young patient went into cardiac arrest and after about thirteen minutes, she was revived, but had been deprived of oxygen, leaving her with permanent brain damage, cerebral palsy, and profound developmental delays. In a first trial, the jury failed to reach a verdict on the claims against the doctor and nurse. Before the second trial, the doctor and his practice settled. At the second trial involving defendants nurse and hospital, the plaintiffs asserted a number of negligence-based claims that the nurse breached the applicable standard of care by agreeing, during the anesthesia planning stage, to induce the patient with sevoflurane using mask induction. Plaintiffs argued that the nurse anesthetists are highly trained and have greater skills and treatment discretion than regular nurses, often using those skills to operate outside the supervision of an anesthesiologist. They further alleged that the nurse was even more specialized than other nurse anesthetists because he belonged to the hospital's "Baby Heart Team" that focused on the care of young children. The trial court refused to admit the plaintiffs' evidence of the claim, determining the theory of liability was precluded by a North Carolina appellate decision that analyzed and applied the North Carolina Supreme Court's decision in *Byrd v. Marion General Hospital*, 162 S.E. 738 (N.C. 1932). The *Byrd* court rejected the notion that nurses can be liable for medical malpractice based on their diagnosis and treatment of patients, reasoning that nurses are not supposed to be experts in the technique of diagnosis or the mechanics of treatment. The trial court held that while a nurse could be liable for improperly administering a drug, a nurse could not be liable for breaching a duty of care for planning the anesthesia procedure and selecting the technique and drug protocol. On appeal, the Court of Appeals noted that medicine is quite different today than in the early twentieth century and so, too, is the knowledge and skill of the nurses in their varying fields and specializations, but that like the trial court, it was bound by the precedent set forth in *Boyd.* The court declined to address individually, but reserved for further appeal, plaintiffs' many policy arguments for why the time had come to depart from *Byrd*, noting that it was an "error-correcting body, not a policy making or law-making one." It further noted that it had no authority to modify *Byrd*'s comprehensive holding simply because times had changed.

Federal Government and States Enact Legislation and Executive Orders in Wake of COVID-19 to Provide Medical Malpractice Immunity Safeguards

Federal and state governments, in the wake of the spread of COVID-19 to the United States, have continued taking preventative and proactive measures to slow the spread of the virus and to treat those affected, including relaxing licensing and credentialing requirements to increase essential medical workforces. But one of the largest issues still facing health care providers remains a lack of resources and overrun hospitals. As such, medical professionals, medical facilities, and volunteers on the frontlines of the national emergency, faced with resource and facility scarcity, as well as threats to their own health, also face an increased risk of medical malpractice liability in their treatment of patients. The federal government, as well as several state legislatures and governors have issued various executive orders and legislation to protect health care providers from malpractice liability. For example, the federal Coronavirus Aid, Relief and Economic Security Act (CARES Act), protects volunteer healthcare professionals from civil liability for injury or death if they provide care during the COVID-19 emergency. New York, on the other hand, pursuant to a newly enacted Article 30-D of its Public Health Law, and as amended on August 3, 2020, provides immunity from civil and criminal liability for health care professionals, health care facilities, and volunteer organizations, as defined, in the providing of health care services in response to a COVID-19 emergency order related to the diagnosis and treatment of COVID-19 and where the care is impacted by COVID-19. Article 30-D, as amended, removes protections previously provided for "arranging for" health care services. Almost all legislation or executive orders enacted to date carve out willful, criminal, gross, or reckless misconduct and require the person or facility to have acted in good faith. To date, more than 20 states have sought to provide these liability protections to providers, and many others have been urged by the health care industry representatives and the Secretary of the Department of Health and Human Services to do the same. *Attorneys at Jackson & Campbell have compiled, and will continue to update, a national survey summarizing the evolving legislation and executive actions, available here: https://bit.ly/2Hqe9pI.*

Louisiana Appellate Court Affirms Dismissal of Patient's Negligence Claims Under Medical Malpractice Act, Requiring Pre-Suit Medical Review Panel; Allows Intentional Tort and Vicarious Liability Claims to Go Forward

In a decision issued on May 27, 2020, the Louisiana Court of Appeals held that a patient's negligence claims fell under the Medical Malpractice Act, and were thus premature without review by a medical review panel. *Shaikh v. Southwest Louisiana Hospital Association*, 298 So.3d 273 (La. App. Ct. 2020). A patient filed a petition for damages alleging that the defendant-employee of the defendant-hospital raped him during the course of the employee's employment, and that the defendant was vicariously liable for all wrongful acts perpetrated by the defendant-employee. The petition further alleged that the defendant-employee's acts causing damage included failing to follow the proper standard of care and that the defendant-hospital failure to properly train and supervise its employees and failed to provide a safe environment for its patients. The defendants filed a joint Dilatory Exception of Prematurity, asserting that the plaintiff's allegations included those sounding in medical malpractice, as contemplated by the Louisiana Medical Malpractice Act, and therefore must first be presented to a medical review panel per the provisions of the Act. The exception claims that despite the plaintiff's petition categorizing the conduct as a potential intentional tort, a review of the petition revealed that the allegations sounded all or in part in medical malpractice, rendering the petition premature. The trial court granted defendants' motion in part, dismissing without prejudice any and all negligence allegations. The trial court denied defendants' motion in part with regard to the intentional tort claims and vicarious liability claims against the defendant-hospital, finding such claims were not subject to the Act. The appellate court, affirming the trial court's decision, evaluated the evidence de novo, finding it undisputed that the employee was employed by the hospital at the time of the incident as a hospital emergency room technician and that the hospital is a qualified health care provider pursuant to the Act. The court further held that an employee may be covered by the Act, and considered qualified, if included in the insurance coverage provided to a qualified health care provider, as was the case. To determine whether certain conduct constitutes "malpractice," the court looked to whether (i) the particular wrong is "treatment related" or caused by a dereliction of professional skill, (ii) the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached, (iii) the pertinent act or omission involved assessment of the patient's condition, (iv) the incident occurred in the context of the physician-patient relationship or was within the scope of activities which a hospital is licensed to perform, (v) the injury would have occurred if the patient had not sought treatment, and (vi) the tort alleged was intentional. The court held it was undisputed that plaintiff was brought to the hospital for the purpose of receiving medical attention and that the employee was employed by the hospital. At the time of the injury, the employee was following the instructions of nursing staff and providing care and treatment up until the alleged assault. It further held that the intentional acts, the rape and vicarious liability for the rape, were excluded from the requirements of the Act and could go forward.

California Supreme Court Rules Long-Term Care Act Private Cause of Action Provision Limits Statutory Damages to $500 Per Action, Not Violation

In a decision issued on August 17, 2020, the California Supreme Court held that the provision of California's Long-Term Care Act, Health and Safety Code section 1430(b), which provides available remedies for a private cause of action against a skilled nursing facility to include "up to five hundred dollars ($500)" in statutory damages, is applied per action, not per regulatory violation. *Jarman v. HCR Manorcare, Inc.*, 10 Cal. 5th 375 (2020). A patient and his daughter brought an action against a nursing home alleging violation of the patient's rights under the Health and Safety Code, elder abuse, and negligence. Plaintiffs were awarded $100,000 in damages and $95,500 in statutory damages, $250 for each of the 382 violations against the defendant. On appeal, the Court of Appeals rejected the defendant's claim that plaintiffs were limited to $500 in statutory damages under

Section 1430(b), instead reasoning that the $500 cap applied to each cause of action, and remanded the matter to determine the amount of punitive damages plaintiffs were entitled to for the 382 regulatory violations. The California Supreme Court, analyzing section 1430(b) of the Long-Term Care Act, agreed with the plaintiffs that the language is far from clear in establishing whether the $500 cap applied to each suit or each cause of action. Evaluating the legislative intent and statutory scheme of the Long-Term Care Act, the Court held that the Act is remedial in nature and its central focus is preventative. Section 1430(b), specifically, was enacted to create an enforcement mechanism for violations not directly related to patient health and safety. Because section 1430(b) supplemented administrative enforcement under statutes and regulations that do not themselves confer a private right of action, it provided no guidance on how to determine the monetary recovery of each violation, and provided no notice as to what evidentiary facts constitute a single continuing violation or separate violations of a patient's right. The Court held that it seemed fairly improbable that the Legislature intended the cap to be applied in a sliding-scale fashion. The Court also disagreed with plaintiffs that such a reading would render section 1430(b) toothless, noting that the provision permits injunctive relief, attorney fees, and costs which may serve as a strong deterrent.

Nevada Supreme Court Affirms in Part and Reverses in Part a District Court's Dismissal of Claims for Failure to File a Medical Expert Affidavit

In a decision issued on July 9, 2020, the Nevada Supreme Court held that allegations that a nurse administered morphine to a resident when it was prescribed for another resident was a claim for ordinary negligence, but allegations that nursing home staff failed to monitor the resident after administering the morphine was a claim for professional negligence that required a supporting medical expert affidavit, which the plaintiff-estate failed to file. *Estate of Curtis, et al. v. South Las Vegas Medical Investors, LLC, et al.*, 466 P.3d 1263 (Nev. 2020). A deceased resident's estate brought an action against a nursing home alleging abuse and neglect of an elderly person, wrongful death, and tortious breach of implied covenant of good faith and fair dealing after the resident died from morphine intoxication. The complaint alleged that the nurse's administration of the wrong medication and failure to properly monitor and treat the resident, as well as the negligent mismanagement, understaffing, and operations of the nursing home led to the erroneous administration, failure to treat and monitor, and the resident's death. The nursing home moved for summary judgment, which the district court granted on the grounds that even though the estate made direct claims against the nursing home and borrowed language from the state's elder abuse statute, the gravamen of the allegations sounded in professional negligence, which, subject only to a common knowledge exception, required a supporting medical expert affidavit be attached to the complaint. The estate appealed, arguing that it was excused from the affidavit requirement, in part, because it asserted claims directly against the nursing home, that the allegations sounded in ordinary negligence, and that the allegations fell within the common knowledge statute, thereby avoiding the affidavit requirement. The Nevada Supreme Court, looking to the provisions of the professional negligence statute, held that direct liability claims against a nursing home do not excuse compliance with the statutory requirements because the allegations did not escape the definition of professional negligence. Relying on sister courts, the Court held that where allegations underlying negligent hiring claims are inextricably linked to professional negligence, negligent hiring claims are better categorized as vicarious liability. To determine whether a claim involves "professional negligence," the Court evaluated whether the claims involved medical diagnosis, judgment or treatment, or is based on the performance of nonmedical services. If the reasonableness of a health care provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence. In holding the administration of morphine sounded in ordinary negligence, and reversing and remanding on those grounds, the Court noted that the mix-up of prescriptions did not raise questions of medical judgment beyond common knowledge. In holding that the failure to monitor the resident was a matter of professional negligence, and affirming the district court's dismissal, the Court noted that a juror would have to make a determination as to what constituted proper supervision, whether remedial measures were taken, and whether the resident should have been transferred for further intervention or monitoring, which required expert testimony.

Michigan Appellate Court Affirms Dismissal of Plaintiff's Battery and Negligent Supervision Claims for Failure to File an Affidavit of Merit

In an decision issued on July 23, 2020, the Michigan Court of Appeals affirmed a trial court's decision to dismiss a plaintiff-patient's claims for battery and negligent supervision for removal of her ovary because she failed to comply with the procedures required to commence a medical malpractice claim. *Price v. Marras, et al.*, No. 349162, 2020 WL 4249065 (Mich. App. Ct. Jul. 23, 2020). The plaintiff presented with adnexal pain and gave conditional consent for the removal of her ovaries if medically necessary, to which the defendant-gynecologist agreed. Plaintiff sued the gynecologist and the hospital, alleging battery and negligent supervision of the removal of one of her ovaries. The defendants' filed a motion for summary disposition on the plaintiff's six counts because plaintiff conceded that she failed to file an affidavit of merit and that the expiration of the statutory period of limitations had lapsed. The trial court dismissed four counts on the grounds they arose out of medical malpractice and plaintiff had not filed an affidavit of merit. The remaining two counts, for battery and negligent supervision, were also dismissed on the same grounds, relying on the two-prong test outlined by the Supreme Court in *v. Oakpoint Villa Nursing Ctr.*, 684 N.W.2d 864 (Mich. 2004). The trial court found that the claims satisfied the test because the parties admitted that the claims pertained to an action that occurred within the course of a professional relationship and because medical judgment would be required to determine whether removal of plaintiff's right ovary was medically necessary. As such, plaintiff was also required to file an affidavit of merit for those claims and the trial court granted summary disposition to the defendants for plaintiff's failure to do so. On appeal, plaintiff argued, as she did below, that the battery and negligent supervision claims sounded in ordinary negligence, not medical malpractice, and so the trial court erred in its dismissal. The Court of Appeals, reviewing the claim de novo, noted that although the trial court was obligated to accept the allegations in plaintiff's complaint as true, the nature of a claim does not depend on how it is characterized by a party, but rather, courts are obligated to analyze the substance of a pleading to determine the true nature of a claim. A court accepts well-pleaded *factual* allegations as true, but conclusions unsupported by factual allegations are not sufficient. In addition, if plaintiff had forbid the removal of her ovaries altogether, no medical judgment would have been necessary to find their removal contrary to plaintiff's consent, but plaintiff asserted that she agreed to the removal of her ovaries if medically necessary, which the court determined required a medical judgment. Further, the court found that the negligent supervision claim required specialized knowledge and expert testimony on proper methods of training, implicating medical judgment.

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Jury Verdicts/Settlements

New Mexico — July, 2020.

A New Mexico federal court ruled that the federal government owes nearly $16 million to the family of a young Navajo girl in a medical malpractice suit against the Indian Health Service because of incorrect intubation causing anoxic brain injury after the girl presented to the hospital with injuries sustained from a fall from the playground. The $16 million award consisted of $500,000 in past medical care, $637,000 in past care, a statutory cap of $600,000 in non-medical damages, including loss of consortium, and $14.2 million in future medical care and related benefits, through the age of 81.

Texas — July, 2020.

A Texas state appeals court upheld a $10.3 million jury verdict in a suit alleging that nurses failed to notify a doctor of fetal distress signs in a baby later born with cerebral palsy, rejecting the hospital's argument that other factors could have caused the condition.

7th Circuit — August, 2020.

The Seventh Circuit affirmed an $8.3 million birth injury verdict, including $2.6 million in lost earnings and $5.5 million in non-economic damages for a now-five-year-old child who suffered severe and permanent impairment of the function of his right arm as a result of a brachial plexus birth injury that tore the nerves away from his spinal cord, finding no reversible error in the district court's granting of future lost earnings, which included damages for deprivation of a normal life and future lost earnings, based on the district court's reliance on expert testimony.

Pennsylvania — August, 2020.

A Pennsylvania jury awarded $10.8 million, $6.4 million in future medical expenses and $2.9 million for past and future noneconomic damages, to a patient suffering a permanent and catastrophic brain injury requiring around-the-clock care and supervision in a suit accusing an MRI technician of failing to timely notify a doctor when the patient began suffering a life-threatening allergic reaction to contrast dye used in an MRI.

Miami-Dade County, FL— March, 2020. A Miami-Dade County jury awarded $30 million in a wrongful death action filed against two orthopedic doctors by the husband of a 70 year old woman who died from DVT after ankle surgery. Plaintiff alleged she should have been prescribed anticoagulants.

Notable Defense Verdicts

Appellate Court, Illinois — August, 2020.

An Illinois appellate court has affirmed a defense verdict in a patient's trial over a bladder injury and excess fluid discovered in the days after a surgical procedure, saying the defense verdict was solidly supported by expert witness testimony.

Tenth Circuit — July, 2020. The Third Circuit overturned a $6.3 million verdict over a foreign Olympic snowboarding coach's claims that a hospital left him with permanent leg injuries as a result of compartment syndrome after he was treated for an accident he sustained during Olympic training at a Colorado resort in where he fractured his leg, saying that a trial judge wrongly refused to tell the jury that other parties might also be at fault, namely parties with which the plaintiff had already settled, thus allowing the plaintiff double recovery for the same harm.

Tenth Circuit — July, 2020.

The Tenth Circuit partially vacated an Oklahoma federal judge's $15.9 million award to the family of a baby boy who sustained a catastrophic brain injury during a delivery at an Indian Health Services hospital on the grounds that the court-established trust structure of the settlement erred by miscalculating the present value of a portion of the award subject to statute, by failing to specify a discount rate, but affirming the district court's calculation of noneconomic damages.

Appellate Court, PA — July, 2020. A Pennsylvania appeals court vacated a $40 million verdict and ordered a new trial in a suit accusing an obstetrician of negligently performing a delivery that caused an infant's permanent spinal cord injury, saying certain medical literature was wrongly admitted as evidence.

Appellate Court, Illinois — August, 2020.

An Illinois appellate court reversed and remanded a $50.3 million brain damage birth injury verdict and ordered a new trial where the trial court committed reversible error in failing to do substantial justice among the parties when it denied the defendants the right to file supplemental expert disclosures and responses, after the statutory deadlines, to a report plaintiffs filed less than 60 days before trial which disclosed the injured child's autism diagnosis. The appellate court agreed with defendants' experts that an autism diagnosis provided one more piece of evidence in support of their theory that the child's brain damage was caused by a chronic condition and not by the circumstances of his birth and the exclusion of that evidence prejudiced the defendants, warranting a new trial..