STATE LAW UPDATE

Health Care Law Update
June 30, 2015

Ernie Auciello

Erica M. James

Tucker Ellis LLP

Tucker Ellis | LLP

RECENT CASE LAW

Medical Claims

- Haskins v. 7112 Columbia, etc., 7th District, 13 MA 100, 2014 Ohio 4154

- Claim that a nursing home resident suffered a fracture in the course her bed linens being changed found not to a medical claim under 2305.113.

Medical Claims

- Eichenberger v. Woodlands Assisted Living, 10th District, No 14 AP 272, 2014 Ohio 5354.
- Likewise, a transfer from a wheelchair not considered a medical claim.
- Both cases lead to 2 year statutes and a possible claim without expert testimony.

Substitute House Bill 290

- Broadens the definition of nursing care to encompass the scope of nursing care in Ohio nursing homes. Includes care from the plan of care and care defined by statute.

Substitute HB 290

Substitute House Bill 290 modifies the definition of "medical claim" as currently provided in Ohio Rev. Code § 2305.113(E)(3). As of March 23, 2015, a medical claim now includes a variety of claims that arise out of a "plan of care." See Ohio Rev. Code § 2305.113(E)(3)(a)-(c). This is an entirely new term that seems to have replaced the previous word "care" and is not independently defined. "Plan of care" now accompanies medical claims arising out of "medical diagnosis" and "treatment."

In addition, a new subset of claims is now expressly included in the definition of a medical claim: "Claims that arise out of skilled nursing care or personal care services provided in a home pursuant to the plan of care, medical diagnosis, or treatment." See Ohio Rev. Code § 2305.113(E)(3)(d). According to the General Assembly's Fiscal Analysis, this particular addition as to what qualifies as a medical claim is intended to "limit the liability of nursing homes in civil actions."

Other provisions

- Ohio Rev. Code § 5165.67 will now generally prohibit the use of results of an investigation, inspection, and Medicare or Medicaid survey of a nursing facility in an advertisement. This includes statements about any deficiencies or findings from a survey.

Cromer v. Children's Hosp. Med. Ctr. of Akron

- Holding
  - In the context of an established physician-patient relationship, consideration of foreseeability is unnecessary to the determination whether the patient is someone to whom the physician owes a duty of care.
  - Foreseeability of harm is relevant to a physician's standard of care, and a correct, general statement of the law regarding the standard of care or the breach of that standard includes the element of foreseeability.

Guiliani v. Shehata

- 1st Dist. Hamilton Nos. C-130837, C-140016, 2014-Ohio-4240
- Facts
  - Plaintiff opted to undergo brachytherapy as treatment for his prostate cancer.
  - Prior to having the radioactive seeds implanted, Plaintiff had rectal bleeding and was referred to a GI physician by a primary care physician for a colonoscopy.
  - Plaintiff testified at trial that he was unaware a colonoscopy had been scheduled for him.

Guiliani v. Shehata

- Facts
  - In September 2009, Plaintiff's radiation oncologist ordered a CT scan as part of the seed-implant procedure.
  - The CT scan was interpreted by the radiologist to show a mid-pelvic mass abutting the colon.
  - The radiation oncologist never presented the results to Plaintiff.
  - In April 2010, Plaintiff was diagnosed with cancer.

Guiliani v. Shehata

- Facts
  - Plaintiff ultimately had to undergo removal of his bladder, ureters, rectum, and a significant amount of his colon.
  - Plaintiff's experts alleged that the radiation oncologist was negligent in failing to read and follow-up on the September 2009 CT scan and that his negligence resulted in a substantial delay in diagnosis.
  - Defendants' experts opined that Plaintiff had a colonoscopy 2 ½ years earlier that would have mandated that Plaintiff have another colonoscopy 6 months later.

Guiliani v. Shehata

- Facts
  - Jury awarded Plaintiff $1,000,000 in noneconomic damages.
  - Jury apportioned 70 percent liability to physician and 30 percent liability to Plaintiff.
  - The trial court first reduced the jury's award to $700,000 and then capped Plaintiff's damages at $250,000 pursuant to R.C. 2323.43.

Guiliani v. Shehata

- Appeal
  - Plaintiff argued that the trial court erred by failing to apply the higher damage cap of $500,000 in R.C. 2323.43 and excluding his medical bills.
  - The radiation oncologist cross-appealed, arguing that the trial court erred by applying R.C. 2315.35, the comparative fault statute, before applying the $250,000 damage-cap provision, and by permitting testimony of one of Plaintiff's experts.

Guiliani v. Shehata

- Holding
  - R.C. 2323.43 supports an interpretation that the applicability of the higher cap is a factual issue that a jury must determine.
    - Also consistent with the case law interpreting the general tort cap statute, R.C. 2315.18.
  - Trial court did not abuse its discretion by denying admission of certain medical bills where the evidence showed that Plaintiff would have required a major operation regardless of whether the defendant was negligent.

Guiliani v. Shehata

- Holding
  - The trial court did not err in applying R.C. 2315.35, the comparative-negligence statute, to reduce the jury's verdict before applying the damage cap of $250,000 in R.C. 2323.43.
    - The jury award referenced in R.C. 2323.43 represents the uncapped amount of compensatory damages recoverable by the plaintiff.
  - The trial court did not abuse its discretion in allowing a medical oncologist to render an opinion as to the standard of care for a radiation oncologist.

Kelly v. Aultman Physician Ctr.

- 5th Dist. Stark No. 2014CA00104, 2015-Ohio-628.
- Facts
  - Plaintiff presented to have Mirena IUD placed for contraceptive purposes in June 2008.
  - At an annual exam in February 2009, the string of the IUD was not visible, and after an ultrasound, her physician recommended that the IUD be repositioned.
  - The repositioning took place in February 2009.

Kelly v. Aultman Physician Ctr.

- Facts
  - Plaintiff had LLQ abdominal pain and could not feel the IUD string in June 2009, but decided with her physician to keep it.
  - Also in June 2009, Plaintiff had an ultrasound that determined that the IUD was malpositioned so that it appeared to extend into the myometrium of Plaintiff's uterus.
  - Plaintiff was never informed of the ultrasound results.

Kelly v. Aultman Physician Ctr.

- Facts
  - Plaintiff complained of abdominal pain and requested that her IUD be removed in October 2009.
  - Her physician recommended that she return in November 2009 for removal if her pain did not improve.
  - Plaintiff opted to continue with the IUD because her pain had improved.
  - Plaintiff presented to the ER with abdominal twice in December 2009 and was diagnosed with UTI.

Kelly v. Aultman Physician Ctr.

- Facts
  - In April 2010, Plaintiff presented to the ER with abdominal pain, and the ER physician ordered a CT scan.
  - The CT showed that Plaintiff's IUD was partially outside of the uterine cavity.
  - Plaintiff subsequently underwent a total abdominal hysterectomy, removal of both ovaries and fallopian tubes, bilateral gutter abscess removal, appendectomy, and removal of multiple pelvic abscesses.

Kelly v. Aultman Physician Ctr.

- Facts
  - Post-operatively, Plaintiff developed septic shock, multi-organ system failures, and sepsis-induced coagulopathy.
  - She subsequently required treatment for early menopause.
  - In September 2012, Plaintiff sought legal advice after seeing a legal advertisement on television advising viewers of complications associated with Mirena.
  - In January 2013, she first learned of the June 2009 ultrasound results.

Kelly v. Aultman Physician Ctr.

- Facts
  - Plaintiff filed a complaint for medical malpractice in March 2013.
    - Product liability claims later brought against Bayer Healthcare Pharmaceuticals, Inc. were removed to federal court.
  - Plaintiff alleged claims of medical malpractice, respondeat superior, and fraudulent concealment against her physician and other health entities.
  - Defendants moved to dismiss Plaintiff's complaint on the grounds that her claims were barred by the statute of limitations.

Kelly v. Aultman Physician Ctr.

- Facts
  - The trial court ultimately dismissed Plaintiff's medical malpractice and respondeat superior claims as barred by the 1-year statute of limitations pursuant to R.C. 2305.113.
  - The trial court held that Plaintiff did not file her fraudulent concealment claim outside of the 4-year statute of limitations
  - The trial court then granted the defendants summary judgment as to Plaintiff's remaining claim of fraudulent concealment.

Kelly v. Aultman Physician Ctr.

- Appeal
  - On appeal, Plaintiff argued that the trial court committed reversible error in granting the motion to dismiss her medical malpractice claim and her claim for fraudulent concealment.

Kelly v. Aultman Physician Ctr.

- Holding
  - "[A] cause of action for medical malpractice accrues and the one year statute of limitation commences to run (a) when the patient discovers or, in the exercise of reasonable case and diligence should have discovered, the resulting injury, or (b) when the physician-patient relationship for that condition terminates, whichever occurs later." *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 41-42, 512 N.E.2d 93.
  - *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 134, 538 N.E.2d 93: A "cognizable event" is "some noteworthy event * * * which does or should alert a reasonable person-patient that an improper medical procedure, treatment or diagnosis has taken place."

Kelly v. Aultman Physician Ctr.

- Holding
  - *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549, 589 N.E.2d 1284: "*[C]onstructive* knowledge of facts, rather than the *actual* knowledge of their significance, is enough to start the statute of limitations running under the discovery rule."
  - Cognizable event was when Plaintiff was informed after the April 2010 surgery that the migration of the IUD through the uterine wall caused internal injuries requiring a hysterectomy.
  - Plaintiff's claims that the physicians failed to inform her of the June 2009 ultrasound sounded in negligence rather than fraudulent concealment.

Carter v. Reese

- 12th Dist. Butler No. CA2014-04-095, 2014-Ohio-5395.
- Facts
  - Plaintiff truck driver got his leg stuck between a loading dock and the trailer of his truck.
  - After calling for help, a stranger volunteered to move his truck but caused the truck to roll backwards, crushing Plaintiff's leg.

Carter v. Reese

- Facts
  - Plaintiff ultimately had to have his leg amputated above the knee.
  - When the stranger was identified, Plaintiff and his wife filed an action against him alleging that the defendant failed to exercise reasonable care while operating the semi-truck.
  - Defendant moved for summary judgment.

Carter v. Reese

- Facts
  - The trial court granted summary judgment, finding that Ohio's "Good Samaritan" statute codified in R.C. 2305.23 applied and protected defendant from any liability since defendant's actions did not constitute willful or wanton misconduct.

Carter v. Reese

- Appeal
  - Plaintiff argued that the trial court erred in granting summary judgment because:
    - Genuine issues of material fact existed, including who was at fault in the accident; and
    - Plaintiff's predicament of having his right leg trapped but unharmed between his stopped semi-truck and the loading dock did not satisfy the "emergent care" standard in R.C. 2305.23.

Carter v. Reese

- Holding
  - The Good Samaritan statutes in a substantial majority of jurisdictions (38) protect any layperson who can meet the statutory requirements.
  - The Ohio statute does not on its face exclude laypersons and does not specify that it only applies to "emergency *medical* care."
  - Case law cited by Plaintiffs to support a requirement of medical care was dicta.

Carter v. Reese

- Holding
  - While R.C. 2305.23 does not define "emergency," the common, ordinary, accepted meaning would encompass a man with his leg pinned between his semi-truck and a loading dock yelling loudly enough to be heard across the street.
  - Defendant's conduct did not rise to the level of willful or wanton conduct, even if it is true that he attempted to drive the semi-truck forward even though he did not know how to do so, resulting in his allowing the truck to roll backwards.

RECENT LEGISLATION

Civil Commitment

- 2014 Am.Sub.S.B. No. 43 (eff. Sep. 17, 2014).
  - R.C. 5122.11 previously provided that proceedings for hospitalization of a person could be commenced by the filing of an affidavit in the manner and form prescribed by the department of mental health and addiction services.
  - Amendment now provides for a specific affidavit.

Civil Commitment

- 2014 Am.Sub.S.B. No. 43 (eff. Sep. 17, 2014).
  - Affidavit must be filed in the probate court in the county where the mentally ill person resides.
  - If a temporary order of detention is issued and the person is transported to a hospital or other designated case, the issuing court retains jurisdiction.

Dental Professionals

- 2014 Sub.H.B. No. 463 (eff. Mar. 23, 2015).
  - Creates a dental hygienist loan repayment program for individuals who agree to provide dental hygiene services in dental resource shortage areas.
  - Authorizes issuance of a temporary volunteer's certificate for dental and dental hygiene practice.

Dental Professionals

- 2014 Sub.H.B. No. 463 (eff. Mar. 23, 2015).
  - Further defines scope of practice for dental assistants.
  - Further defines scope of practice for expanded function dental auxiliaries.

Insurance

- 2014 Am.S.B. No. 99 (eff. Sep. 17, 2014).
  - Requires private insurance plans and the Medicaid program to cover prescribed, orally administered cancer medications on at least the same basis that they cover intravenously administered or injected cancer medications.

Insurance

- 2014 Am.Sub.H.B. No. 123 (eff. May 20, 2014).
  - Requires the department of Medicaid to establish standards for coverage of telehealth services.

Peer Review

- 2014 Am.Sub.H.B. No. 123 (eff. May 20, 2014).
  - Adds “accountable care organization” to the definition of “health care entity” codified at R.C. 2305.25.
  - Incorporates the definition of “accountable care organization” as defined in C.F.R. 425.20.

Peer Review

- 2014 Am.Sub.H.B. No. 123 (eff. May 20, 2014).
  - Specifies that the release of certain peer review documents does not affect the confidentiality of any other peer review documents.
  - Clarifies that health care entities can share peer review documents if used for peer review purposes.

Tucker
Ellis | LLP