the Quarterly Dose

Your Health Care Litigation Prescription

MARSHALL DENNEHEY

Marshall Dennehey has been named a **finalist** in four categories as part of *The Legal Intelligencer* and *Law.com* 2025 Pennsylvania Legal Awards. Our Health Care Department is represented in two categories.

Our Health Care Department is recognized as a finalist for Litigation Department of the Year – Professional Liability. Nearly half of Marshall Dennehey's Pennsylvania attorneys focus in the areas of medical and non-medical professional liability litigation. These attorneys are housed within our Health Care Department and our Professional Liability Department. In 2024 alone, the combined departments handled 5,819 professional liability matters in Pennsylvania and closed 1,957 files—an average of 484 cases per month. The group is recognized throughout Pennsylvania for its trial success, strategic defense, and leadership in professional liability law.

Additionally, **Gary Samms** (King of Prussia/Philadelphia) is a finalist for Attorney of the Year. Known for handling high-exposure and catastrophic claims for some of the region's most prestigious hospital and health care systems, Gary has tried 210 medical malpractice cases over the course of his career and 20 in the past year alone.

The winners in the finalist categories will be announced at an awards dinner set for June 12, 2025. ◆

INSIDE THIS ISSUE

Navigating the Digital Shift: Defending Medical Malpractice Claims in the Era of Patient Portals

By: Melissa Dziak, Esq. and Robert Aldrich, Esq.

With the recent implementation of the 21st Century Cures Act and modifications to the HITECH Act, many patients may now quickly and easily access their electronic health information. Whether through a website, an app, cellphone, or smart watch, patients have real-time access to most areas of their patient record via their patient portal.

The implementation of the patient portal undoubtedly has impacted the patient-physician relationship, particularly the communications regarding diagnoses and treatment plans. On the one hand, communication via the patient portal provides an ease with managing appointments, specialty consults and follow-up testing. It also allows physicians to respond to patient queries between visits more efficiently and quickly. Conversely, patients may be receiving test results or seeing physician clinical notes before a provider has the opportunity to review test results and educate the patient on the meaning of the medical information. Patients may also rely too much on electronic, as opposed to verbal communications, and may misunderstand the information being provided to them through the portal. What is even more concerning is that patients may neglect to review their online portal despite health care providers believing the message or test result has been received.

Over-reliance on the patient portal could lead to drastic adverse events. For example, a laboratory result or concerning radiology finding may be uploaded to the patient portal along with a message from the provider to obtain follow-up or additional testing. But what happens if, for whatever reason, the patient does not see the message or the results, and is unaware of the need for follow-up medical care? A simple miscommunication like this could result in an extremely poor outcome, such as delayed cancer treatment, cardiac event or a stroke. Some patients may even inadvertently "sign up" for the use of patient portals agreeing to the terms and use, but then never actually access it! Additionally, as we become more reliant on text messaging and emails (as opposed to telephone and in-person conversations), patients tend to utilize patient portal communications as first lines of reporting new symptoms to providers who may not see such messages until it is too late.

Recent Case Law Involving Patient Portals

Recent case law affirms such adverse events. In *Langford v. Irgau*, No. N24C-09-184 DJB, 2025 WL 1013491, at *1 (Del. Super. Ct. Apr. 1, 2025), the Delaware Superior Court denied the defendants' motion to dismiss based on a statute of limitations argument. In this case, a doctor performing gallbladder surgery ordered an abdominal CT prior to surgery, which showed a visualized lung base demonstrating a mild focal opacity, and additional testing was recommended to exclude a carcinoma. A courtesy copy of the CT report was provided to the plaintiff's primary care provider, but it was never uploaded to the patient's portal. Eight years went by and, in 2023, the plaintiff underwent a CT scan for an unrelated reason, but the report indicated "a 23 mm lingular opacity. … Malignancy cannot be excluded. Follow up enhanced CT of the chest is recommended for more thorough evaluation of the thorax." Again, the report was not uploaded on the patient portal and the patient was not advised of the incidental findings. The plaintiff did not learn of the findings until June 2024, during a hospital visit. By this time, she was diagnosed with Stage IV lung cancer that had metastasized to her brain and lymph nodes.

In *Currie v. United States*, No. 23-CV-3519 (NSR), 2024 WL 2158596, at *1 (S.D.N.Y. May 14, 2024), the U.S. District Court for the Southern District of New York evaluated medical malpractice claims brought pursuant to the Federal Tort Claims Act. This case involved a pregnant patient who began experiencing heavy bleeding and raised concerns with her OB/GYN practice about a possible miscarriage. After repeated calls, she was advised to have an ultrasound, which was performed on Nov. 1. The results were uploaded to her patient portal on Nov. 5, at which point she was informed that her OB/GYN was on vacation. On Nov. 16, the patient fainted and was directed by the practice to seek emergency care. A large ruptured ectopic pregnancy was subsequently discovered and emergency surgery was necessary.

These are just two examples illustrating how patient-portal issues can become an integral part of medical malpractice litigation. As such, it is critical to incorporate any patient-portal issues into your initial investigation and preparation of the case, as well as throughout each phase of discovery, including paper discovery and depositions.

Defending Claims Involving Alleged Patient Portal Miscommunication

Litigation involving allegations of negligence based on patient-physician communication through a patient portal is becoming increasingly common as their use takes on a bigger role in medical treatment. In the medical malpractice litigation setting, the first critical step to defending a claim involving alleged miscommunication via the patient portal is to secure all relevant documentation associated with the patient portal.

Initially, it must be determined whether the patient "signed up" for the patient portal and consented to a user agreement including terms of use. It is essential to obtain any written institutional policies, procedures, or protocols that address how physicians and patients are expected to use the patient portal as these can be key documents for use in defending both your physician at his/her deposition and deposing the plaintiff as to their use of the portal during the treatment at issue. This documentation can also be a helpful litigation tool for demonstrating that the institution and physician have clear communication policies.

Additionally, an accepted User Agreement with explicit terms of use for the patient portal emphasizes the shared responsibility of the physician and the patient. Today, the patient has an active role in managing communications with the physician. An accepted User Agreement may be the key to defending against a claim that the patient did not see a message that was clearly communicated to them via the portal.

Follow the Metadata and Audit Trail

In cases where timing, content or interpretation of patient portal messages is at issue, the metadata and audit trail related to the patient's use of the patient portal can be critical to an effective defense. Each patient portal will have a specific audit trail that is separate from the audit trail associated with the patient's electronic health record. The detailed logs from the patient portal system will include timestamps as to when the patient portal was accessed by the patient (or an approved user) and will indicate whether messages were viewed, and which areas of the patient portal were accessed. This objective data can clarify the timing of communication such as when messages were sent by the physician and how quickly the physician responded to the patient, and can be key evidence in dispelling claims of missed or delayed communication.

Another key defense is ensuring that patient-portal communications are correlated to the hands-on care and treatment. For example, providers should be prepared to explain what type of in-person communications took place with the patient regarding the portal; what the provider anticipates the portal or test results may show; and the follow-up discussions between the patient and provider at the next visit.

Navigating the Digital Shift: Defending Medical Malpractice Claims in the Era of Patient Portals

A critical final step in defending claims of alleged failures or miscommunications involving the patient portal is to retain expert witnesses who are well-versed in current electronic health record systems and digital communication standards in health care. These experts can explain how information is documented, transmitted, and accessed within the portal, helping to establish whether the provider's actions aligned with accepted standards of care. They can also contextualize the timing and content of messages, clarify the technical capabilities and limitations of the system, and address common misunderstandings about digital communication in clinical practice. By providing an objective, informed analysis, such experts can help counter claims that a provider failed to communicate appropriately or that the portal itself was improperly used, ultimately strengthening the defense's position. The experts will also surely assist defense counsel in becoming intimately aware with the functionality of the patient portal so that counsel could effectively explain it to opposing counsel and the court, and appropriately question witnesses regarding the technology.

The rise in usage of patient portals has greatly influenced the physician-patient relationship and, in turn, presents new challenges in communication that have the potential to give rise to malpractice claims. Allegations of miscommunication through patient portals will hinge on whether the provider took reasonable steps in communicating with the patient and whether the patient was properly informed of their responsibility in using the portal. ◆

Congratulations to Wendy Bracaglia, the firm's first female shareholder, on her retirement!

Wendy spent her entire career with Marshall Dennehey, primarily focused on medical malpractice litigation. She was highly respected by her clients and colleagues and was a mentor to many attorneys. In addition to being the firm's first female shareholder, she served on the firm's Board of Directors and was Managing Attorney of our King of Prussia office for many years.

We thank Wendy for her dedication and her many contributions to the firm and our clients. Please join us in wishing her a very happy retirement!

ALL RISE

Recent Victories and Success Stories

Missy Minehan (Harrisburg), with assistance from paralegal Angela Lentz, obtained a defense award on behalf of a skilled nursing facility client in a hotly contested "wound" case after a two-day arbitration. The 93-year-old plaintiff had been a resident at a skilled nursing facility for over three years without having suffered any pressure injuries, despite a plethora of risk factors. She was transferred emergently to an acute care hospital and was diagnosed with a myocardial infarction and cardiogenic shock. The hospital administered vasopressor, a life-saving medication that can increase the risk of pressure injuries, and recommended that she consult with Palliative Medicine, which the family declined. Within several weeks of her return to the assisted living facility, she was found to have a Stage III left wound and a Stage II wound, which were treated and resolved within four and five months, respectively. The plaintiff did not suffer any additional pressure injuries until she was re-admitted to the acute care hospital in January 2025.

Robert Aldrich (Scranton) obtained a defense verdict on behalf of an anesthesiologist after a medical malpractice jury trial in Lehigh County. The plaintiff, who underwent an elective right-shoulder surgery, alleged that the anesthesiologist and the CRNA who performed his laryngoscopy intubated him too soon, and under suboptimal paralytic conditions, leading to permanent throat damage. After a five-day trial, the jury returned a defense verdict within 15 minutes.

Joseph Hoynoski (King of Prussia) received a defense verdict at the Montgomery County Arbitration Center where the three-attorney panel found in favor of our clients, a pediatric primary care office and a pediatric nurse. We represented the pediatric practice and the nurse against claims from the plaintiff who claimed her median nerve was injured by a venipuncture procedure performed by the nurse. The case was originally filed in the Court of Common Pleas; however, after discovery revealed a weak damages claim—we found many TikTok videos helpful to our defense—it was dropped to the arbitration level.

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Recent Victories and Success Stories (continued)

Leslie Jenny and **Gabriella Wittbrod** (Cleveland) were granted summary judgment on behalf of our corporate nursing home clients in a medical negligence case in the Richland County Court of Common Pleas. The judge granted our request, finding that the plaintiff failed to establish liability, causation, or viable claims against individual employees—rendering vicarious liability inapplicable under Ohio law. See page 13 for a detailed case summary.

Brett Shear (Pittsburgh) received a defense verdict for his client, a general surgeon, in a case where the plaintiff had been suffering from bilateral carpal tunnel and came to our client who performed carpal tunnel surgery on his left hand. Following surgery, the plaintiff continued to complain of tingling, numbness and weakness in his hand. He went on to have two additional surgeries, performed by two different surgeons. During the third surgery, the surgeon found a median nerve injury. The plaintiff claimed that this nerve injury was caused by the defendant cutting the median nerve during his initial operation and that the injury resulted in permanent dysfunction such that he would no longer be able to work or use his hand normally. At trial, the defendant demonstrated how he performs carpal tunnel surgery and protects the median nerve, making it nearly impossible to cut or injure the nerve. We contended that the median nerve injury must have happened later, likely during the second surgery. The jury rendered a defense verdict in favor of our client.

Adam Fulginiti (Philadelphia) received a defense verdict in a nursing home malpractice matter involving the development and progression of pressure injuries that the decedent experienced during her admission. As a result of these injuries, the plaintiff claimed damages, including but not limited to pain, suffering and death. Adam cited the resident's significant comorbidities, non-compliance with pressure reduction measures and nutritional support, and documentation of the wound consultant, and overcame potential liabilities including several wounds that developed in-house and documentation deficiencies.

Gary Samms (King of Prussia/Philadelphia) obtained a defense verdict in a complicated urosepsis case where the damages included neurological sequelae and cognitive deficits. The trial was marked by aggressive cross examination of experts and comprehensive neurological records and literature. Instrumental in the successful result were **Raymond Petruccelli** (King of Prussia), **Michael Mongiello** (Harrisburg) and paralegal **Angela Lentz** (Harrisburg).

Lynne Nahmani and **David Drake** (Mount Laurel) successfully defended an anesthesiologist after a two-week trial which included testimony of five medical experts and three treating doctors. The plaintiffs claimed the doctor's regional nerve block, executed in advance of an orthopedic Achilles rupture repair, was performed negligently causing permanent nerve damage. Damages were sought for pain impacting marital relations and all aspects of the plaintiff's life. Under Lynne's cross examination, the plaintiff's standard of care expert flipped his opinion. Despite excellent conditions for a directed verdict, the court declined to rule, ultimately resulting in a unanimous jury verdict for the defense.

Suzanne Utke and **Benjamin Matzke** (Philadelphia) received a defense verdict in a five-day jury trial in Philadelphia County involving multiple defendants. We defended the medical malpractice claim alleging a violation of HIPAA privacy and an intrusion upon plaintiff's seclusion resulting in his eviction and severe emotional distress. The plaintiff claimed an anonymous email he sent to our client, a social worker, purporting to seek mental health therapy was a "mental health record" and subject to HIPAA privacy laws. When it was discovered that the email was from the same individual stalking and harassing the client's sister who worked at the apartment complex where he lived, our client provided the email to her sister, who then gave it to her employer to support legal action against the plaintiff. The email was used in an eviction proceeding, and the plaintiff claimed that the disclosure of the email violated his privacy rights under HIPAA and that he suffered humiliation and severe emotional distress as a result. The claim involved counts for medical and legal professional negligence, negligence per se, intrusion upon seclusion, conspiracy to commit an intrusion upon seclusion, intentional and negligent infliction of emotional distress, and a plea for punitive damages. The initial demand of $5 million was reduced to $125,000 before trial. No offer was made and a unanimous defense verdict was rendered in less than three hours.

"*IYKYK*" – KEEPING UP TO DATE WITH SOCIAL MEDIA

By: Patricia Lafferty, Esq. and Nicole Tanana, Esq.

If you know, you know! Social media has become ubiquitous and continues to evolve into myriad platforms. As the chaos surrounding a threatened shutdown and brief outage of TikTok illustrated in January 2025, most people believe that they cannot and simply do not want to live without it. Since Facebook was founded in 1996, social media has reached over half the world's population. In 2010, there were 970 million active social media users globally. That number has ballooned to 5.24 billion users in January of 2025. In the United States, 70.1% of the total population actively use social media. Amazingly, Americans spend an average of 2 hours and 9 minutes on social media every day. With these staggering numbers in mind, it would be naïve to think that social media does not play a role in litigation and the discovery process.

Ethical and Technological Considerations

When it comes to social media users, research has shown that there are stark differences in not only the generational usage of the various types of social media, but gender differences as well. It should be no surprise that age has an effect on usage. According to DataReportal, a website that provides global digital insights and trends, recent usage numbers show that everyone is embracing social media and all that it has to offer, with 84% of 18- to 29-year olds and 45% of those aged 65 and older using social media.

Additional research demonstrates that in the United States, females are more prevalent and account for 78% of social media users, whereas 66% of men use social media. Women were noted to use platforms such as Snapchat and Pinterest, and men tend to favor sites like YouTube and X(Twitter). According to a recent article by *Exploding Topics*, YouTube is the world's most popular and widely used social media platform, followed by Facebook, Instagram, WeChat, Reddit, Messenger, TikTok, Telegram and Viber.

These statistics can be a useful guide in directing you to where your target audience is spending their "down" time, leading to more pointed additional discovery requests. Due to the vast amount of information and data being generated by each user, it is important to cater your discovery requests to get as much information without going down the rabbit hole of what could be mountains of documentation and paperwork. Keeping up to date on the research related to ever-changing social media trends and the various demographics can help to narrowly tailor your discovery requests and yield pertinent information to defend your case.

It is important to keep in mind that the Rules of Professional Conduct require attorneys to "keep abreast of changes in the law and its practice, including the *benefits* and *risks* associated with relevant technology." (Pa. R.P.C. 1.1.). The obligation also exists for lawyers to ensure that preservation of such discoverable materials is maintained at the risk of spoliation issues arising. In 2014, the Pennsylvania Bar Association adopted

the view of the Philadelphia Bar Association Professional Guidance Committee that a lawyer may advise a client to change the privacy settings on the client's Facebook page, however, a lawyer "may not instruct or permit the client to delete/ destroy a relevant photo, link, text, or other content, so that it no longer exists." (Pa. Bar Ass'n Formal Op. 2014-300 [Sept. 2014]). The same principles still apply today, and lawyers are required to take affirmative steps to preserve social networking evidence and advise client(s) of the same.

Since social media discovery has to be maintained by the party, considerations can and should be given for an individual to preserve their own account. Many social media sites are now on the second and third generation of these platforms, and technological advances have allowed access to more features that may not have been feasible at their inception. For example, many platforms now allow individual users to download their entire account in just a few steps. Social media powerhouses such as Facebook, Instagram and TikTok all offer this feature. This process can be accomplished, in some circumstances, in a few "clicks" and arguably alleviates the "overly burdensome" obstacle of Pennsylvania Rule of Civil Procedure 4011.

What the Courts Have to Say

Under the general discovery principals in Pennsylvania, information contained on a litigant's social media platforms is generally discoverable. In Pennsylvania, "…a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it related to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." (Pa.R.C.P. 4003.1.) Pennsylvania Rule of Civil Procedure 4009.1 explicitly permits the discovery of electronically stored information. This broad general principle of what is discoverable is limited by Pennsylvania Rule of Civil Procedure No. 4011, which states: "No discovery, including discovery of electronically stored information, shall be permitted which (a) is sought in bad faith; (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party; … or (e) would require the making of an unreasonable investigation by the deponent or any party or witness."

Despite the popularity and extensive use of social media platforms, Pennsylvania Appellate Courts have not yet addressed the parameters of what is discoverable, and appellate review is scant. The trial courts, however, have seen their fair share of attempts to widen and/or limit the net of discoverable data. The court's interpretations have been varied when it comes to how far litigants can go when delving into the world of social media discovery.

Most courts have treated social media information as they would any other information sought in discovery. In *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, the court stated:

> Consistent with that firmly established discovery maxim, a party may obtain discovery of private Facebook posts, photographs and communications only if the electronically stored information is relevant, and the party must satisfy that relevancy requirement by showing that publically accessible information posted on the user's Facebook page controverts or challenges the user's claims or defenses in the pending litigation. To that extent, the resolution of social media discovery disputes pursuant to existing Rules of Procedure is simply new wine in an old bottle.

(C.C.P. Lackawanna April 22, 2013) (Nealon, J.).

Moreover, in at least in one case, the court held that it was not necessary for a party to have a public profile before the opposing party is given access to the private portion of a party's social media profile. In *Arcq v. Fields*, No. 11-4637 (C.C.P. Franklin Dec. 7, 2011) (Herman, J.), the

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defendants' Motion to Compel information about the plaintiff's social networking sites was denied due to the defendants' failure to show any reasonable basis for believing access to the plaintiff's profiles would yield any relevant information. Despite the denial of the motion, the court took a broad view of what the defendants had to show prior to being given access to the plaintiff's private profile, stating: "[w]hile it is not an absolute necessity that a plaintiff have a public profile before a defendant can be given access to the private portion, it is necessary that defendant have some good faith belief that the private profile may contain information." *Arcq v. Fields*, No. 11-4637 (C.C.P. Franklin Dec. 7, 2011) (Herman, J.).

Privacy Settings

Privacy considerations are typically the main argument against disclosure of a litigant's "private" social media information as based on the individual's privacy rights. While the privacy argument has been rejected by Pennsylvania trial courts in some circumstances, most litigants will continue to push back when discovery seeks specific information that is contained on a litigant's "private" social media platforms.

When discovery seeks information contained within a litigant's private social media platforms, Pennsylvania trial level courts have implemented a balancing test that balances the need for relevant "private" social media information and the parties' privacy concerns. In *Hunter v. PRRC, Inc*., 2013 WL 9917150 (York C. C. P. Nov. 4, 2013) (Linebaugh, J.), the court determined that a party making the request for social media information must make:

> [A] threshold showing that otherwise available information leads to the reasonable probability that relevant information is contained with the private portions of the account. The hypothetical possibility that relevant information may exist in any account held privately is not sufficient to meet this showing. Actual facts must be shown…

A "threshold showing" is the standard for Pennsylvania Courts in deciding whether private social media information should be disclosed in discovery; however, the analysis does not end at this showing. In *Trail v. Lesko*, 2012 WL 2864004 (Allegheny C. C. P. July 3, 2012) (Wettick, J.), the court analyzed the approaches taken by nine earlier Pennsylvania trial courts and recognized that discovery of private social media information is inherently intrusive and, relying on Pa.R.C.P. No. 4011, noted a court should consider the "level of the intrusion and the potential value of the discovery to the party seeking discovery." Most recently in *Allen v. Sands Bethworks Gaming, LLC*, 2018 WL 4278941 (Northampton C. C. P. Aug 6, 2018) (Dally, J.), the court found that in order to obtain the private portions of a litigant's social media information, the requesting party must show discrepancies between the public portions of the litigant's social media platforms and what the litigant is claiming in the lawsuit. These considerations, as to whether your case will cross the threshold, should be considered in any motion to compel.

It is evident that social media discovery exploration is a necessary component to ensure that you are properly defending your clients. Preparing discovery that is geared toward the opposing party's use of various social media platforms helps to maintain the most effective use of your and your client's time. Understanding the court's parameters of what is permissible and whether your case will meet the privacy threshold will help you successfully navigate the inevitable discovery disputes. ◆

SIDEBAR

News and Happenings

Matthew Keris (Scranton) is speaking with Jill Huntley Taylor, a jury and trial consultant, at the Hospital Insurance Forum 2025 Conference in Charleston, South Carolina, in June. Their presentation will include discussion on "New Jury Considerations in the Age of Big Law, Verdicts, and Medicine." Learn more **here**.

Megan Nelson (Orlando) will join a panel presentation on "The Latest on Medical AI and Liability Claims" at the Florida Society for Health Care Risk Management and Patient Safety 45th Annual Conference in Orlando in August. The discussion will explore the rapid rise in the use of AI technology to assist with radiology, pathology and differential diagnoses, and how it translates into potential liability and increased claims. More conference information can be found **here**.

Jacqueline Reynolds (King of Prussia) joined a panel to present "Preparing Your Bar Association for the Silver Tsunami: What Are the Roles and Opportunities for Bar Associations Related to Aging Members and an Aging Community" at the Pennsylvania Bar Association's Annual Conference of County Bar Leaders.

Elizabeth Underwood (Philadelphia) presented as part of "Decoding the Doctor's Notes: A Legal Guide to Medical Evidence," a day-long webinar hosted by NBI. The webinar focused on providing insights and skills to effectively utilize and challenge medical records and experts in litigation. Beth presented two sessions, one on "Getting the Most Out of Medical Experts" and the other on "Best Practices for Presenting Medical Records and Expert Testimony."

Please join us in welcoming **Elizabeth Rice**. Elizabeth focuses on medical malpractice and nursing home litigation. She earned her Juris Doctor from Howard University School of Law and holds a Bachelor of Arts in Political Science and History from the University of Connecticut. ◆

Electronic Medical Record & Audit Trail Litigation

AI has transformed health care as we know it, and its use is growing exponentially in ways previously unimaginable. As a result, medical malpractice cases are becoming even more complex and expensive to litigate and often involve third-party technology vendors as parties. Marshall Dennehey is at the forefront of this emerging area of law, as one of the first defense firms to devote a practice group to assisting health care clients and other counsel with EMR and audit trail preservation, production, expert and discovery issues.

Our experienced attorneys assist health care systems and their counsel every step of the way, from discovery through trial. We involve third-party electronic medical record vendors in the litigation, when necessary, to assist in explaining a production issue or clarify an ongoing discovery dispute. We routinely monitor and report legal precedent for new discovery and trial issues associated with the EMR, audit trail and AI.

As the EMR evolves into a tool that augments medicine, rather than an information repository with the integration of AI, new legal thought and litigation strategies need to be considered. We assist with the strategic decision of whether and how to include EMR and AI vendors in your cases, and we outline the legal benefits and pitfalls in doing so.

Medical negligence cases are only going to become more complex, with novel factual and legal issues. Going into these cases with the right guidance and experience is necessary, and you can rely on our Electronic Medical Record and Audit Trail Litigation Practice Group to lead the way. ◆

Our cases are becoming more complex with the advent of AI, not less. We can help you anticipate and plan for the novel issues that are coming. Stay ahead of the curve and contact us with any health care technology issues you may have.

– **Matt Keris**, Practice Group Chair

Defense Victory: Summary Judgment Granted for Corporate Nursing Home Defendants in Medical Negligence Case

By: Leslie M. Jenny, Esq. and Gabriella M. Wittbrod, Esq.

Leslie M. Jenny and **Gabriella M. Wittbrod**, both of our Cleveland, OH office, were granted summary judgment on behalf of their corporate nursing home clients in this medical negligence case. Judge Phillip S. Naumoff of the Richland County Court of Common Pleas granted our request, finding that the plaintiff failed to establish liability, causation or viable claims against individual employees—rendering vicarious liability inapplicable under Ohio law.

Sarah Miller, as the Personal Representative of the Estate of Mary Holt v. Lexington Court Care Center, et al., Richland County Court of Common Pleas, 24-CV-288N, Judge Phillip S. Naumoff, was originally filed on August 4, 2021, naming corporate nursing home defendants and John Does. The John Does were later dismissed due to the expiration of the statute of limitations. The court granted summary judgment in favor of the defendants on May 17, 2023, because the remaining defendants were corporations, thus, incapable of acting on their own behalf.

The plaintiff voluntarily dismissed her case and refiled on June 6, 2024. The court again dismissed the John Doe defendants for the same reason. The defendants filed a motion for summary judgment for the remaining corporate defendants.

In his order, Judge Naumoff held that, pursuant to *Clawson v. Heights Chiropractic Physicians, L.L.C.*, 170 Ohio St.3d 451, 214 N.E.3d 540, 2022-Ohio-4154, an employer cannot be held vicariously liable for an employee's alleged negligence when all claims against the employee are non-viable or have been extinguished. Judge Naumoff noted: "While it is true, the Plaintiff can file a claim against either the principal of an agent, the Plaintiff cannot recover against a principal if she cannot legally recover against an agent."

In her brief in opposition to the defendants' motion for summary judgement, the plaintiff made several arguments that were rejected by the court. First, the plaintiff claimed this was a "medical claim," not a medical malpractice claim; thus, *Clawson* does not apply. The court held that Ohio law and Ohio courts make no distinction between medical claims and medical malpractice. The plaintiff also claimed that *Clawson* does not apply to nursing home claims, to which the court responded that it apples to any employer/employee relationship.

Judge Naumoff criticized the plaintiff's complaint for being vague, stating that it "contains ninety-five paragraphs of repetitive allegations that throw a few scant facts and a mass of legal standards and legal conclusions together in a hodge-podge." Further, he reviewed the plaintiff's expert report and found the physician who reviewed the case only mentioned the nursing home and its staff—there was no mention of any of the named corporate defendants. The court also found that the plaintiff's expert report did not address causation whatsoever.

Judge Naumoff dismissed all non-negligence claims for failure to state a claim, and he granted our request for summary judgment in favor of all the defendants on the remaining claim of medical negligence because the plaintiff failed to establish a duty of the defendants and/or causation. ◆

LEGAL ROUNDUP

Case Law Updates

Ohio

By: Gabriella M. Wittbrod, Esq.

Ohio Supreme Court Orders In Camera Review in Peer Review Privilege Dispute

Stull v. Summa Health System, 177 Ohio St.3d 543, --- N.E.3d ---, 2024-Ohio-5718

In a discovery dispute over the applicability of peer review privilege, the Ohio Supreme Court ruled that the trial court should conduct an in camera review of the contested residency file. The case involves allegations that health care providers improperly intubated the plaintiff, causing severe medical complications. The plaintiff requested access to the residency file of one defendant-physician, which the defendants sought to protect under peer review privilege. The Supreme Court reversed the Ninth District's decision, asserting that the trial court has the authority to conduct an in camera review to assess whether the privilege applies.

This case concerns several health care providers and related corporate entities that provided medical care and treatment to the plaintiff after he suffered injuries from an automobile crash. The plaintiff alleged that the defendants improperly intubated him, which led to deprivation of oxygen, cardiac arrest and brain damage.

The plaintiff requested the residency file of one of the defendant-physicians, to which the defendants objected, citing peer review privilege pursuant to R.C. 2305.252. The trial court held, citing *Bansal v. Mt. Carmel Health Sys., Inc.*, 2009-Ohio-6845 (10th Dist.), that for the defendants to prove peer review privilege, they could either submit: (1) the documents for an in camera inspection, or (2) an affidavit with the information necessary for the trial court to decide whether privilege applies. The defendants chose the latter and submitted an affidavit from the general surgery residency director.

The trial court held that the affidavit was not sufficient to meet their burden to establish privilege. On appeal, the Ninth District Court of Appeal affirmed the trial court's ruling.

The Ohio Supreme Court examined the relevant statute, R.C. 2305.252, in conjunction with Civil Rule 26 and held that neither Bansal nor the strict construction of R.C. 2305.252 supports the trial court's decision to order the defendants to disclose the residency file. Rather, "[a] trial court can take the step of in camera review, and any other step allowed by the Civil Rules, given its inherent power to control discovery in general." The court cited the trial courts' extensive jurisdiction over discovery and held that, here, the trial court erroneously limited its own power over the discovery process.

The Supreme Court reversed the Ninth District's judgment and remanded the case to the trial court to conduct an in camera review to determine whether the residency file is protected by peer review privilege. ◆

LEGAL ROUNDUP

Case Law Updates

New Jersey

By: Georgette L. Reid, Esq.

New Jersey Supreme Court Rules Out-of-State Alleged Tortfeasor Cannot Be Allocated Fault Under Comparative Negligence Act

Estate of Crystal Walcott Spill v. Jacob E. Markovitz, M.D., 2025 WL 758318

In this appeal before the New Jersey Supreme Court, the court held that an out-of-state alleged tortfeasor was not a party subject to allocation of fault by a jury in a wrongful-death action pursuant to the Comparative Negligence Act. In this action, the estate of Crystal Walcott Spill and her surviving family members individually sued various physicians and medical providers for negligently sedating and performing surgery on Spill without first sufficiently examining her recent medical history, thereby causing her death.

In civil actions, the Comparative Negligence Act (CNA) and the Joint Tortfeasors Contribution Law (JTCL) provide allocations of fault against, or contributions from, individuals and entities. However, the court recognized that the language of the CNA and the JTCL differ in important respects: the CNA allows allocation of fault during a trial only to a "party" or "parties," N.J.S.A. 2A:15-5.2(a), whereas the JTCL allows "joint tortfeasors" to seek contribution after a trial from other "persons" alleged to be "liable in tort for the same injury," N.J.S.A. 2A:53A-1, -3.

Therefore, upon dismissal of an individual or entity for lack of jurisdiction, that individual or entity has never been and may never be a party to that action within the definition of the CNA. Hence, the individual or entity as a non-party alleged tortfeasor who is outside the jurisdictional arm of New Jersey courts is not a "party" subject to allocation by the jury pursuant to the CNA. The same is not true, however, under the JTCL. Accordingly, if a judgment is rendered against defendant(s), they may then pursue any available contribution claims in a jurisdiction relevant to any additional alleged tortfeasors. ◆

LEGAL ROUNDUP

Case Law Updates

Pennsylvania

By: Tyler R. Price, Esq.

Pennsylvania Superior Court Vacates Summary Judgment Due to Procedural Error in Response Time

Jordan v. Lynde, 330 A.3d 817 (Pa. Super. Ct. 2024)

The Pennsylvania Superior Court ruled that the trial court abused its discretion by failing to grant the appellants the 30-day response period required under Pa. R.Civ.P. 1035.5(a) before granting summary judgment in favor of a defendant-podiatrist. The court vacated the order as to the podiatrist, reasoning that the appellants may have had distinct legal arguments or factual disputes separate from those against the hematology defendants. By prematurely granting the motion, the trial court denied the appellants their procedural right to fully contest the claims. The case was remanded to allow the appellants to respond within the mandated timeframe.

A motion for summary judgment was filed by the hematology defendants on October 26, 2023. The appellants did not file a response opposing their motion. On December 5, 2023, the defendant-podiatrist filed a joinder in the hematology defendants' motion for summary judgment. Eight days later, the trial court granted both motions for summary judgment.

Vacating the order as to the defendant-podiatrist, the Superior Court reasoned that there may be facts and legal arguments against the defendant-podiatrist that do not apply to the hematology defendants' motion. The only way to be certain that such facts and arguments do not exist is to give the appellants 30 days to assert them, as permitted by Rule 1035.5(a).

The trial court abused its discretion by prematurely granting the defendant-podiatrist's motion, effectively denying the appellants the full and fair opportunity to respond to the motion which the Rules of Civil Procedure clearly provide. The case was remanded for the appellants to file a response to the defendant-podiatrist's motion within 30 days of remand. ◆

Pennsylvania Superior Court Affirms Dismissal of Medical Negligence Claims Due to Insufficient Evidence

Vandever v. Stair, 2025 WL 523863 (Pa. Super. Ct. 2025)

The Pennsylvania Superior Court upheld the dismissal of a medical negligence claim against a physician, finding that the plaintiff failed to present sufficient evidence to establish a prima facie case. The plaintiff's expert's report mentioned the physician only in her supervisory role and lacked substantive allegations of direct negligence. With no evidence produced during discovery to support claims against the physician, the trial court granted summary judgment. As a result, the plaintiff's claims against the hospital defendants, which relied on a theory of ostensible agency, also failed, as they were contingent on the physician's alleged negligence. ▶

The plaintiff submitted an expert report which only identified the defendant physician by name once and referred to her solely in her capacity as a supervisor of other medical providers working for the hospital defendants.

However, the plaintiff's claim that the physician failed to properly oversee the other physicians under her responsibility as the director was dismissed via preliminary objection. Additionally, the plaintiff failed to identify any evidence produced during discovery that would support his allegations that would impute culpability to the defendant physician.

The Pennsylvania Superior Court granted no relief because the plaintiff provided insufficient evidence of facts to make out a prima facie case.

As to the hospital defendants, the Superior Court recognized that the claims resting upon a theory of ostensible agency could not succeed without a surviving claim of negligence against the defendant physician. Effectively, the plaintiff's claims against the hospital defendants failed at the time the trial court granted the defendant physician's motion for summary judgment. ◆

Pennsylvania Superior Court Reverses Expert Disqualification Based on Board Certification Alone

McAleer v. Geisenger Med. Ctr., 2025 WL

The Pennsylvania Superior Court reversed and remanded a trial court opinion, holding that the trial court committed an error by disqualifying an expert based solely on his board certification, where a gastroenterologist was offered to present standard of care opinions pertaining to a colorectal surgeon.

The Superior Court reiterated that Section 512 must be considered in its entirety, via taking evidence directly from the expert, rather than relying on his CV, before ruling on the issue of qualifications. ◆

The Quarterly Dose – **May 2025**, has been prepared for our readers by Marshall Dennehey. It is solely intended to provide information on recent legal developments and is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.

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