



## The Erosion of Medical Claims Protection

By Christopher F. Mars, Esq.

**P**atient falls in nursing homes and hospitals may no longer be afforded the legal protections of medical claims after a recent appellate court decision. In December, the Tenth District Court of Appeals issued an opinion which further eroded the medical claim protection by holding that a fall in a nursing home unrelated to medical care or treatment is an ordinary negligence claim. The decision could have serious legal consequences for hospitals and nursing homes including a longer statute of limitations, the possibility that an affidavit of merit is not required, and importantly, no limitations on damages for survivorship claims.

### Ohio Cases Eroding Medical Claim Protections

The most recent example of the erosion occurred in *Carte v. Manor at Whitehall* where the decedent fell at a nursing home, while being transferred to the restroom, causing head injuries. Initially, the trial court dismissed the case because the cause of action was a medical claim and was not filed with the required affidavit of merit. The appeals court reversed the trial court holding that the plaintiff asserted an ordinary negligence claim and that the affidavit of merit was sufficient to establish that the nursing home caused the injury. The appeals court found the nursing staff was not providing medical care when the resident fell, and therefore it was not a medical claim.

The *Carte* decision continues the rapid retreat by appellate courts from categorizing nursing home and hospital falls as medical claims. This departure gained momentum beginning with *Conkin v. CHS-Ohio Valley, Inc.*, which involved a wheelchair-bound resident of a nursing home who fell while being transferred to the shower by nursing staff, using a Hoyer lift. The appeals court held that the plaintiff's claims were not medical claims because the use of the Hoyer lift to transfer the resident was not a medical procedure or treatment and therefore, the one-year statute of limitations did not apply.

*McDill v. Sunbridge Care Ents., Inc.* followed *Conkin* finding that the one-year statute of limitations for medical claims did not apply to a resident who fell while washing her hands in the restroom after being transferred by nursing staff because it was an ordinary negligence claim. Subsequent courts have relied heavily on these cases and last year, three additional cases determined that falls in nursing homes constituted ordinary negligence culminating with the *Carte* decision.

Hospital falls have also been found to be ordinary negligence claims. See *Balascio v. St. Elizabeth Hosp. Med. Ctr.*, 110 Ohio App.3d 83, 673 N.E.2d 651 (7th Dist.1996); *Hill v. Wadsworth-Rittman Area Hosp.*,

185 Ohio App.3d 788, 2009-Ohio-5421, 925 N.E.2d 1012 (9th Dist.) A determination that falls in nursing homes and hospitals are ordinary negligence claims may cause severe legal and practical consequences for defendants in these cases.

### No Damage Caps

The biggest impact is that there are no damage caps for survivorship claims in ordinary negligence claims. Falls which are considered medical claims are subject to limits on damages even when the injuries are serious or lead to death. See O.R.C. § 2323.43. However, in ordinary negligence claims there is no damage cap for non-economic damages for certain significant bodily injuries or resulting death. See O.R.C. § 2315.18(B)(3). Therefore, in situations where a fall occurs in a nursing home or hospital resulting in the death of the patient, there is no limit on the amount of damages a plaintiff can recover. This could lead to greater verdicts and give plaintiffs leverage in negotiating settlements.

### Longer Statute of Limitations

Another consequence is that ordinary negligence claims for bodily injury are subject to the two-year statute of limitations as opposed to the one-year statute of limitations for medical claims. This is significant as most of the cases discussed above were initially dismissed by the trial court as being barred by the one-year statute of limitations for medical claims. A longer statute of limitations period not only prevents dismissal of claims on limitations grounds but also opens the door to cases that would otherwise be barred by a one-year limitations period.

### An Affidavit of Merit May Not Be Required

Finally, ordinary negligence claims may not require an affidavit of merit. Generally, when a medical claim is asserted against the nursing home or hospital, the plaintiff must contemporaneously file an affidavit of merit or risk dismissal of the case. However, recent cases have muddied the waters on the requirement for an affidavit of merit for falls amounting to ordinary negligence claims. One court determined that the affidavit of merit was not required. *Hill*, 185 Ohio App. 3d at 795-96. Conversely, the *Carte* decision found that an affidavit of merit signed by a nurse was sufficient for establishing a claim for a resident's fall in a nursing home. It remains unclear whether a fall amounting to an ordinary negligence claim will require an affidavit of merit.

The bottom line is that with the elimination of the medical claims protection for falls occurring in a hospital or nursing home we can expect an increase in litigation and an advantage for plaintiffs during settlement negotiations. With more opinions like *Carte*, the Ohio Supreme Court will hopefully weigh in on the issues to clarify this area of the law as it has become increasingly uncertain.

Christopher F. Mars, Esq. is an attorney with Bonezzi Switzer Polito & Hupp Co., L.P.A. He focuses his practice in the area of nursing home/long-term care defense and medical malpractice. He interned with judges in the Northern District of Ohio and the Lorain County Court of Common Pleas. He is a dedicated attorney who truly enjoys his work while still maintaining a healthy balance between his work and family. The firm is committed to providing innovative, forward-thinking advocacy and prides itself on their history of success in the courtroom. For more information, call (216) 875-6024, email [cmars@bsphlaw.com](mailto:cmars@bsphlaw.com) or visit [www.bsphlaw.com](http://www.bsphlaw.com).