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Bonezzi Switzer Polito & Hupp Co. L.P.A.

BSPH WINS FIVE DEFENSE JURY VERDICTS THIS SUMMER

Top row, left to right: John S. Polito, Bret C. Perry, Steven J. Hupp, Ronald A. Margolis; Second row, left to right: Jeffrey W. Van Wagner, Claire C. Curtis, Beth A. Sebaugh, Jason A. Paskan

Intramuscular Injection Case

On August 1, 2013, John S. Polito and Bret C. Perry obtained a unanimous defense verdict on behalf of a regional medical center in the Cuyahoga County Court of Common Pleas. Plaintiff claimed that, following a routine intramuscular injection, he developed overwhelming septicemia and abscess formations in his lumbar spine, shoulder joints, and elbow. These problems required multiple surgical debridements and long-term antibiotic therapy.

The defense team successfully argued that the standard of care was met in the administration of the intramuscular injection. More importantly, the defense team offered persuasive evidence that Plaintiff was likely infected, and suffering from early signs of infection, prior to the administration of the intramuscular injection. While the intramuscular injection and the resulting infection were temporally related, there was no causal relationship with respect to the intramuscular injections and resulting outcome. The jury returned a defense verdict in less than one hour.

Nursing Home Care

On July 25, 2013, Steven J. Hupp and Ronald A. Margolis obtained a Directed Verdict on behalf of Altercare of Cuyahoga Falls, a skilled and long-term care nursing facility, in the Summit County Court of Common Pleas. This was an alleged wrongful death case concerning a 72-year-old female resident, who was admitted following hip replacement surgery. The resident was a long-term pain management patient, who was on high-dose pain medications, including Morphine and a Fentanyl patch.

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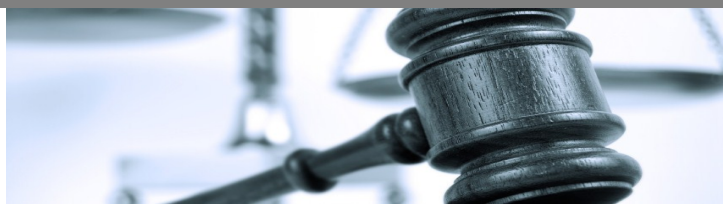

Ohio State Courts Agree that the Federal Nursing Home Regulations Do Not Create a Private Cause of Action for Nursing Home Residents

By Michelle B. Block, Esq.

Plaintiffs have recently alleged that a violation of the Federal Nursing Home Regulations constitutes a private cause of action of negligence *per se*. Plaintiffs have attempted to manufacture this claim despite the clear and concise language set forth in Ohio.

Specifically, any assertion that the Federal Nursing Home Regulations, as found in 42 C.F.R. §483, *et seq.,* pertain to more than compliance procedures for the administration of Medicare/Medicaid funding is unsupported by relevant case law and contrary to the doctrine of interpretation. *Harmon v. St. Augustine Manor,* Case No. 1:06CV2845, 4-5 (N.D. Ohio 2007). "It is a general doctrine of statutory construction adopted by the United States Supreme Court that the rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress expressed by the statute." *Id.* (Internal quotations omitted). The federal regulations do not have any probative value, because the federal regulations contained in 42 C.F.R. §483, *et seq.* contemplate administrative rather than judicial enforcement. *Harmon, supra.*

Even if Plaintiff's Complaint alleges a violation of the Medicaid/Medicare regulations, particularly 42 C.F.R. §483, *et seq.,* concerning patient's rights, no private remedy is implied on behalf of a recipient under the Medicaid/Medicare Acts and the regulations promulgated under it. *Harmon,* citing *Fuzie v. Manor Care, Inc.,* 461 F. Supp. 689 (N.D. Ohio 1977). "The Medicaid Act and the regulations contemplate administrative rather than judicial enforcement." *Harmon,* at 5. (Emphasis added).

"A private right of action, utilized to enforce specific, limited portions of federal regulations on an ad hoc basis would circumvent the responsibility of the state to administer its plan in an organized manner 'consistent with simplicity of administration and the best interests of the recipients,' *** transferring the primary obligation in such cases from the

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The resident was frequently found to be obtunded following her medication administration. She died suddenly three weeks into her admission. The family testified that she was having fevers and frequent diarrhea. The nursing home chart was incomplete. There were minimal nursing notes, and seven days of charting was lost and never located.

An autopsy showed forty centimeters of Pseudomembranous Colitis in the large bowel. However, a very large blood clot was found in the right ventricle of the heart, and clots were found in both pulmonary arteries.

Plaintiff's experts claimed that the nurses were negligent for failing to document the signs and symptoms of a C-Diff infection and further failed to contact a physician concerning these findings. Plaintiff's physician expert claimed that the resident died from an undiagnosed C-Diff infection. The defense team argued that the resident never suffered from a C-Diff infection and that her sudden death was the result of a very large blood clot in her right ventricle.

After the defense team aggressively cross-examined Plaintiff's experts and obtained several concessions, Plaintiff could no longer sustain their theory of the case. The trial court was forced to grant a directed verdict in favor of the facility.

Obstetrics

On August 14, 2013, Steven J. Hupp and Ronald A. Margolis received a unanimous defense verdict in the Stark County Court of Common Pleas. Plaintiff was a morbidly obese woman with a large pannis. Plaintiff had undergone a previous Caesarian section. She underwent an urgent Caesarian section due to her water breaking. At some point during the procedure, the patient's small bowel (near the cecum) was transected. On post-operative day three, the patient had stool exiting her surgical incision. She was taken for emergency surgery and had an ileostomy created. Her postoperative course was complicated and required additional surgeries for a large abdominal hernia.

Plaintiffs' experts claimed that the defendant OB/GYN breached the standard of care when he cut the small bowel with a scalpel during the C-Section due to insufficient operative exposure. The defense team successfully established that the portion of the bowel that was injured had an adhesion, which would have anchored this portion of bowel. The defense expert testified that the bowel was probably injured by retraction during the procedure.

Plaintiffs' counsel requested a $1.1 million dollar judgment during his closing argument. The jury deliberated for less than two hours before returning a verdict for the defense.

Plastic Surgery

On August 12, 2013, Attorneys Jeffrey W. Van Wagner and Claire C. Curtis received a unanimous defense verdict in the Cuyahoga County Court of Common Pleas. Plaintiff was a patient who elected to have an abdominoplasty and liposuction, despite a history of underlying liver disease. The defendant plastic surgeon sought and obtained clearance from the patient's treating hepatologist and performed the requested surgery. The patient appeared stable in the PACU and was discharged to home, but subsequently went into hemorrhagic shock and was hospitalized. She eventually made a full recovery.

Plaintiff's expert asserted that the plastic surgeon breached the standard of care in performing the surgery at all based on the patient's liver diease and in performing a surgery of more than six hours duration. He also opinioned that the plastic surgeon should have sent the patient to the emergency room sooner on the night she was discharged.

The defense team presented experts to testify that the patient's liver reserves were sufficient for surgery, that it was reasonable for a plastic surgeon to rely on a clearance from the patient's hepatologist, and that there would have been no difference in outcome had the patient been taken to the emergency room earlier in the evening.

Plaintiff's original demand was for $350,000. The jury deliberated only forty-five minutes before returning a unanimous defense verdict.

Premises Liability

On September 7, 2013, Beth A. Sebaugh and Jason A. Paskan received a unanimous defense verdict in the Cuyahoga County Court of Common Pleas in a premises liability case. Plaintiffs alleged negligence of a private school in permitting a hazard to exist, injuring a child during physical education. The claimed hazardous condition was an exposed storage door hinge and a return air grate located on a gymnasium wall. Injuries included knee and forearm lacerations requiring stitches to close, as well as permanent scarring.

The defense team successfully established that the conditions complained of were not foreseeable causes of injury. Defense counsel argued that the premises owner had the right to rely upon the architectural firm who designed the construction specifications, as well as the City Building Department who approved the design and construction of the gymnasium.

Plaintiffs' counsel requested damages in a range exceeding $250,000 during his closing argument. The jury deliberated for approximately one-half day before returning a unanimous verdict for the defense.

Keith Hansbrough published in *Ohio Assisted Living Association Update*

Shareholder Keith Hansbrough recently authored the article "Risk Agreements and Assisted Living," which was published in the Fall edition of *Ohio Assisted Living Association Update*. Attorney Hansbrough's article focuses on the tension between Ohio's requirement that assisted living facilities meet the standard of care and the state patient bills of rights, which requires assisted living facilities to respond to all reasonable resident requests and allow residents to give or withhold informed consent. The article analyzes how risk agreements between assisted living facilities and residents may help to avoid confusion, unmet expectations, and possible litigation.

Is Enforcing Arbitration Agreements in Nursing Home Negligence/ Wrongful Death Claims the New Trend in Ohio?

By Jason A. Paskan, Esq.

In light of the Supreme Court of the United States' holding in *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012), arbitration provisions may apply to, and be binding upon, all related claims to a nursing home resident's stay – including, but not limited to claims of medical/nursing negligence, wrongful death and punitive damages. Accordingly, Ohio's wholesale prohibition against pre-dispute agreements to arbitrate wrongful death claims is an invalid categorical rule. See *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258 (wife's wrongful death claim against the company was not subject to arbitration because, "[a] decedent cannot bind his or her beneficiaries to arbitrate their wrongful-death claims.").

One recent case that has addressed this issue is *Vogt v. Indianspring of Oakley,* 1st Dist. No. C-110864, 2012-Ohio-4124. In *Vogt*, the First District remanded the matter to the trial court with instructions to stay the case to enforce the arbitration agreement. The plaintiff alleged a wrongful death claim and a nursing home negligence cause of action on behalf of the former resident. Notably, the arbitration agreement in *Vogt* was executed by the resident's personal representative, a beneficiary of the wrongful death claim. The First District held:

> Due to the presumption in favor of arbitrability, [the plaintiff] had the burden to demonstrate unconscionability. Having reviewed the record, we conclude that she did not. During the hearing before the trial court, [the plaintiff] presented no evidence that the terms of the agreement were not commercially reasonable or that any circumstances in the bargaining made the process unconscionable. And our review of the agreement does not expose any indications of either substantive or procedural unconscionability. Rather than focus on the question of substantive and procedural unconscionability, [the plaintiff] instead challenged the validity of the arbitration agreement based on the fact that [the plaintiff], not [the resident], had signed the agreement. In signing the agreement (and initialing various clauses of the agreement), [the plaintiff] held herself out as the legal representative of [the resident]. [The plaintiff] points to a statement in the agreement that states: "If Resident is unable to sign this Agreement, then a legal representative of the resident may sign on his/her behalf. The person signing below certifies that he/she has the legal authority to enter into this Agreement on Resident's behalf with the Facility either through a valid Power of Attorney or a guardianship appointment." [The plaintiff] contends that this language put the burden on [the nursing home] to demonstrate that [the resident] was unable to sign the agreement. But [the plaintiff's] contention ignores the presumption in favor of arbitrability. As the burden was on [the plaintiff] to show that the agreement was unenforceable, she had to demonstrate that she had not validly exercised her authority as [the resident's] legal representative when she signed the agreement. She did not make such a demonstration.
>
> Because we conclude that [the plaintiff] did not demonstrate any grounds for revoking the arbitration agreement, we conclude that the trial court erred when it refused to grant [the nursing home's] motion for a stay of proceedings for a referral to arbitration. ***

Vogt , at ¶6-8.

On its face, the First District's ruling in *Vogt* is in line with the Supreme Court of the United States' holding in *Marmet,* and enforces Ohio's presumption of arbitrability. Interestingly, the decision in *Vogt* permits a beneficiary to bind other similarly situated beneficiaries to arbitrate wrongful death claims, contrary to the general presumption set forth in *Peters, supra.* Whether this is a new trend in Ohio law that is intended to mirror the holding in *Marmet* remains to be seen. Notwithstanding, Ohio nursing homes should be encouraged that the bargained-for arbitration agreements that they enter into with their residents and families now have state law precedent to rely upon when seeking to enforce arbitration. See also *Templeman v. Kindred Healthcare, Inc.,* 8th Dist. No. 99618, 2013-Ohio-3738, (Eighth District compared the case before it to *Vogt* and did not disturb the First District's holding).

If you are interested in learning more about arbitration agreements, contact Bonezzi Switzer Polito & Hupp Co. LPA.

The Ohio Supreme Court Upholds the Physician Apology Statute

By Bret C. Perry, Esq.

Recently, the Ohio Supreme Court issued its decision in the matter of *Johnson v. Randall Smith, Inc*., 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, holding that a physician's gestures, conduct, and expression of sympathy are not admissible at the time of trial pursuant to R.C. 2317.43. The Court held that a physician's statements to a patient that he took full responsibility for the situation were not admissible, because his gestures, conduct and statements were covered under R.C. 2317.43. Further, the Ohio Supreme Court also held that the statute applies to any cause of action filed after September 13, 2004.

By way of procedural history, in 2007, the plaintiff-patient refiled a medical malpractice action against a physician and his corporation after plaintiff had complications following gall bladder surgery in April 2001. The case proceeded to trial and defendants filed a motion to exclude the physician's

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administrative personnel intended to bear it to the federal courts." *Fuzie,* at 697. "A provision for a private right of action is absent from the Medicaid Act." *Harmon,* at 7.

Other jurisdictions have also determined that 42 C.F.R. §483, *et seq.* does not contemplate a private right of action or create a standard of care. *Brown v. Sun Healthcare Group,* 476 F. Supp. 2d 848 (E.D. Tenn. 2007) (Federal Nursing Home Bill of Rights, 42 C.F.R. 483.10 *et seq*., does not provide for an independent cause of action and an alleged violation of the federal regulations does not provide evidence of a breach of the standard of care required in a nursing/malpractice action. The federal regulations are too vague and general to constitute a standard of care by which a jury or court can judge the acts or omissions of a healthcare provider and do not form the basis for a negligence *per se* claim); *Brogdon v. National Healthcare,* 103 F. Supp. 2d 1322 (N.D. Ga. 2000) (Medicare and Medicaid Acts do not explicitly or impliedly create a private cause of action for nursing home patients to sue nursing homes); *Wheat v. Mass,* 994 F.2d 273 (5th Cir. 1993) (The Medicaid Act does not furnish substantive rights enforceable in civil suits between private parties, and the court's power to enforce the statute is limited to adjudication of whether a state properly administers federal Medicaid funds).

Recently, two Ohio state trial court judges confirmed the same. Specifically, in Summit County, Judge Teodosio held that 42 C.F.R. §483, *et seq.* may not be used to establish negligence *per se* or to create a separate cause of action.[1] Further, in Stark County, Judge Farmer held that 42 C.F.R. §483, *et seq.* and the Medicaid/Medicare acts do not create a private cause of action or standard of care for nursing home residents.[2] These Ohio state courts have recognized that the Federal Nursing Home Regulations merely contemplate administrative rather than judicial enforcement.

In addition, the probative value of allowing testimony at trial related to the Federal Nursing Home Regulations would be substantially outweighed by the danger of unfair prejudice, confusion of the issues and/or of misleading the jury, and therefore, must not be permitted pursuant to Evid. R. 403(A). As such, plaintiff's cannot bring a separate cause of action under the Federal Nursing Home Regulations, as found in 42 C.F.R. §483, *et seq.* and the Medicaid/Medicare acts, because the regulations do not create a private cause of action or standard of care for nursing home residents.

[1] *Kimberly Hull, Administratrix of the Estate of Barbara Hull, Deceased vs. Cuyahoga Falls Country Place, et al.*, Summit County Common Pleas Court Case No. CV-2011-09-5067 (April 2013).

[2] *Diana Turnbull, Administratrix of the Estate of Virginia Sawyer, Deceased vs. Altercare of Alliance Center for Rehab & Nursing Care, Inc., et al.*, Stark County Common Pleas Court Case No. 2013CV00548 (August 2013).

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statements of apology pursuant to R.C. 2317.43. The trial court conducted a hearing and the evidence showed that the physician made a statement of apology to the plaintiff, acted in a compassionate manner, and was sympathetic and comforting. The physician also stated that he took responsibility for the situation. Accordingly, the trial court determined that the statements were not admissible under R.C. 2317.43. A jury verdict was returned in the defendants' favor.

The Eleventh District Court of Appeals reversed the jury verdict and determined that the trial court had erred in applying R.C. 2317.43, because the statute was enacted and took effect after the malpractice claim arose and the statement was made. The appellate court also held that jurors could have determined that the words "take full responsibility" when taken in context meant that the physician was admitting fault.

On appeal to the Ohio Supreme Court, the decision of the Eleventh District Court of Appeals was reversed and the case remanded to the trial court to reinstate the jury's verdict and trial court's judgment in favor of the defendants. The Court held that R.C. 2317.43 applies to any cause of action filed after September 13, 2004. The Court also held that the physician's statements were properly excluded under R.C. 2317.43, explaining that "it was improper to reverse the trial court's decision to exclude [the physician's] statement. The trial court had determined that [the physician] was faced with a distressed patient who was upset and made a statement that was designed to comfort his patient." Accordingly, the Ohio Supreme Court held that this is precisely the type of evidence that R.C. 2317.43 was designed to exclude as evidence of liability in a medical malpractice action.

The matter of *Johnson* was argued before the Ohio Supreme Court by Bret C. Perry, Esq. on behalf of Dr. Randall Smith. In addition, Jennifer Becker, Esq. and Brian Lange, Esq. authored an *amicus* brief on behalf of the Academy of Medicine of Cleveland and Northeast Ohio urging that the Ohio Supreme Court uphold the Physician Apology Statute governed by R.C. 2317.43 and reverse the decision of the Eleventh District Court of Appeals.

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