

# Health Care Insights

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## Pharmacists are “Health Care Providers” Too

The executor of an estate claimed that his decedent’s death was caused by a pharmacist’s negligent filling of a prescription.

Asserting that the claim fell under the definition of a “medical negligence claim” and that, as a result, the plaintiff was required to obtain and file with his lawsuit a “probable cause” opinion from another pharmacist, the pharmacy sought to dismiss the action.

Its request was granted by Superior Court Judge Grant H. Miller. The court interpreted the medical malpractice statute to include pharmaceutical medical negligence within its scope. The executor’s failure to attach an expert’s opinion to his complaint was fatal to the lawsuit.

*Thomas vs. Walgreen Eastern Co.*, Docket CV-06-5001896 (Superior Court, Judicial District of Hartford, 2006)

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## Rudeness is Acceptable

The New Hampshire Board of Medicine dismissed a disciplinary case against Dr. Terry Bennett on August 3, 2006. Dr. Bennett had been charged with telling a patient that she was too obese and advising another to shoot herself after brain surgery.

Before the Board acted, a New Hampshire trial judge had ruled that physicians can insult or offend patients as part of their right to free speech.

According to an Associated Press article reporting this development, “the decision may not mean the end of the controversy. Dr. Bennett has said he hopes to sue everyone involved.”

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## It’s O.K. That Hospitals are Cold

Dr. Kent Sepkowitz, director of Infection Control at Memorial Sloane-Kittering Cancer Center in New York City, argues in the November 28, 2006, *New York Times* that “the cold, cold heart of hospitals...created something useful, even crucial to society. The hospital’s modern responsibility is to bluntly deliver to the dying the unhappy news that this is it, the jig is up. Nowhere else can such impossible information change hands so routinely.”

““ The machine-like mood at many hospitals...may assist in keeping patients and their families distracted. ””

The machine-like mood at many hospitals, especially, apparently, the one at which Dr. Sepkowitz practices, may assist in keeping patients and their families distracted. Indeed, this must be the case, he muses, because so few of us die at home.

“Death and corporate insensitivity,” two mutually attractive realities, “have found each other,” the good doctor offers, “and have merged their mutual awkwardness into an almost functional whole.”

## Surgeon's Employment Contract Evaluated

The fundamental issue in the lawsuit brought by Dr. Jonathan S. Schreiber against his former employer, Connecticut Surgical Group, P.C. was whether or not he was entitled to be paid a pro rata share of the bonus to which he otherwise would have been entitled had his employment not been terminated by the group.

Although the contract could have been clearer, the provision dealing with termination stated only that he would continue to receive his salary and benefits once a termination notice had been delivered; "it did not," as Judge Trial Referee Robert Berdon noted, "state that he would be receiving a bonus for his work during the ninety day period." Judge Berdon further noted, decisively for Dr. Schreiber's claim, that "the omission of a reference to a bonus was conspicuous."

Because the contract did not carry forward the bonus payment obligation of the professional corporation to the notice termination period, the appellate court massively concluded that Dr. Schreiber's former colleagues had not been "unjustly enriched" by denying him what otherwise would have been a handsome six figure payment.

*Schreiber vs. Connecticut Surgical Group, P.C. Connecticut. Appellate Court (August 1, 2006)*

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## The Role of the Placebo

A provocative article by Rachael Moeller Gorman in the Summer 2006 issue of *Proto* explores the powerful role of the placebo in clinical medical research. Recounting the experience of Theodore Kaptchuk, a professor of medicine at Harvard Medical School's Osher Institute,

Ms. Gorman discusses his study of pain relief. No one in the study received treatment; the two groups each received placebos; one received a sugar pill and the other received sham acupuncture.

Published in the February 2006 issue of the *British Medical Journal*, the study recounts that patients in both groups experienced less pain; the sham acupuncture patients did even better than the "pill takers." Even more surprising were the researchers' findings that members of the two groups experienced different side effects based on what they were told they could expect



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to "experience" during informed consent procedures at the outset of the "trial."

In addition to the ethical issues raised by a complete sham trial, the author argues that "physicians might also use the placebo effect to improve care – for example, by taking advantage of research showing that a doctor's compassion may produce measurable improvement in the patient."

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## No Damages for Fiance's HIV

While dating and after being affianced to their son, the young woman questioned his parents about her fiance's poor health. According to her court complaint, the parents allegedly lied to her about their son's health when she inquired, attributing his problems to heavy metal poisoning or Lyme Disease. She ultimately learned that he was HIV positive and that, sadly, she had contracted the infection from him. In her law suit against his parents, she asserted that had they been truthful with her, she would have been tested and would have sought treatment earlier. The delay in diagnosis and treatment, she claimed, would ultimately impact on her survival chances.

After a jury awarded her \$2 million in compensatory damages, the court reversed. It noted that she knew her fiance was in poor health and she was obviously concerned about it. Repeated questioning of his parents, the court observed, documented the likelihood that she did not think that her fiance, their son, was being truthful with her.

In a wonderful, commonsensical analysis of tort law principles, the court insisted that the young woman should have known that her fiance's parents were not going to be a reliable source of information and that if she was worried about HIV or any other serious problem, she certainly had the ability to seek medical help herself.

As the court trenchantly put it, "(one) cannot truly expect her fiance's parents to reveal a secret that their son would not..."

*Doe vs. Dilling, Appellate Court of Illinois, Docket Number 1-04-2372 (2006)*

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## May Doctors Refuse Infertility Treatments to Gay Patients?

This is the title of a provocative article by Jacob M. Appel in the July – August 2006 issue of *Hastings Center Report*.

Noting that except in the case of a medical emergency, physicians have the right to choose their patients, the author observes that doctors have employed this prerogative in recent years to refuse treatment to AIDS patients and to lawyers and/or their family members.

Do principles of physician autonomy extend to allowing clinicians "with bona fide religious objections" the right to refuse treatment because of a patient's sexual orientation?

In *Benitez vs. North Coast Women's Care Medical Group, Inc.*, the patient claimed illegal discrimination when her physicians asserted their right to exercise freedom of religion made it unnecessary for them to provide fertility care to her. The California Medical Association supported the physicians' position.

The patient's claim was rejected in the lower court and is now on appeal.

Should doctors be required to adhere to the same non-discrimination requirements applicable to other service providers? Mr. Appel notes that "(t)he nature of the doctor – patient relationship is fundamentally more intimate than the sorts of interactions that occur between landlords and tenants or innkeepers and guests."

*Health Care Insights* will report further on this very important litigation after the ruling of the California appellate court has been received.

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