PULLMAN &COMLEY

2015 Round-Up: Connecticut Court Decisions Affecting Health Care Providers

Connecticut Health Law

01.16.2016
By Stephen Cowherd

Before we get too far into the New Year, we thought we'd take a look back at some of the health care questions Connecticut state courts faced in 2015, as well as some health care cases decided by the Second Circuit Court of Appeals and the federal District Court of Connecticut. A number of significant issues were litigated last year, including the rights of patients placed in observation status, provider liability for emotional distress and the liability of hospitals under EMTALA. We've highlighted these and other noteworthy decisions below.

Observation Status

In *Barrows et al. v. Burwell*, the Second Circuit confronted the ongoing debate over observation status. A group of Medicare beneficiaries who were placed in observation status sued the Department of Health and Human Services in 2011, arguing that their failure to receive written notice of their placement in observation status, and the lack of any administrative right to challenge the placements, violated both the Medicare Act and federal due process. The court agreed with the District Court that the Medicare Act was not violated, but as for the due process claim, the court held that the plaintiffs were entitled to test whether they possess a property interest in being admitted to the hospital as inpatients. The case was remanded to the District Court for a limited period of discovery focused on this issue.

As we wait for the District Court's decision, keep in mind that the underlying causes of action occurred prior to the enactment of: (1) federal and state legislation requiring notice to patients when they are placed in observation status; and (2) the federal "two midnight" rule which provides that inpatient admissions will generally be payable under Medicare Part A if the admitting practitioner expects the patient to require a hospital stay that crosses two midnights or more.

Provider Liability for Emotional Distress

PULLMAN &COMLEY

2015 Round-Up: Connecticut Court Decisions Affecting Health Care Providers

Resolving an unanswered question in the state, the Connecticut Supreme Court has recognized a cause of action for bystander emotional distress arising out of medical malpractice. In *Squeo et al. v. Norwalk Hospital Association et al.*, the son of the plaintiffs took his own life 35 minutes after being released from a hospital for emergency treatment of depression and suicidal thoughts. While recognizing the cause of action, the court nevertheless granted summary judgment to the hospital because the plaintiffs failed to demonstrate that their distress was severe enough to warrant a psychiatric diagnosis or to substantially impair their ability to cope with daily life.

Citing *Squeo,* the Superior Court (J.D. New London) in *Wheelis et al. v. Backus Corporation et al.*, granted a hospital's motion to strike a claim for bystander emotional distress where the plaintiff observed her husband as he received medical treatment and later died. The court held that the hospital's conduct was not so grossly negligent as to be clear to a layperson that medical malpractice took place.

However, another Superior Court (J.D. Stamford-Norwalk) recently denied a hospital's motion to strike a mother's claim for emotional distress resulting from experiencing the consequences of malpractice that resulted in serious injuries to her infant during birth. The court in *Krayeski v Greenwich Hospital* found that the mother was herself a patient during the birth and not a bystander, and that her claim for emotional distress could potentially be a new principle of liability that has not yet been recognized in Connecticut.

Although Connecticut now recognizes a claim for bystander emotional distress in the medical malpractice context, these cases illustrate the rather high standard plaintiffs must meet in order to prevail. (See also DeVito v. Yale-New Haven Hospital, Inc., where the Superior Court (J.D. New Haven) granted a hospital's motion to strike the claim of the sister of a gravely ill family member where the sister claimed she suffered emotional distress because the hospital denied her visitation rights.) In addition, the Appellate Court of Connecticut held this year that Connecticut does not recognize a cause of action for infliction of emotional distress that arises out of a loss of property in a hospital (Costello et al. v. Yale New-Haven Health Services Corp.).

EMTALA Obligations

In *Brown v. St. Mary's Hospital et al.*, the federal District Court of Connecticut denied a hospital's motion to dismiss the plaintiff's claim that it violated the Emergency Medical Treatment and Labor Act (EMTALA). The hospital argued that it treated a patient suffering from diabetic ketoacidosis in the same way as any other patient with a similar condition, even though the patient was not stabilized on discharge and died the next day. The court found that the stabilization requirement is not met by simply dispensing uniform stabilizing treatment, but by providing the treatment necessary to assure, within reasonable medical probability, that no material deterioration of the patient's condition is likely to result.

2015 Round-Up: Connecticut Court Decisions Affecting Health Care Providers

In *Grenier v. The Stamford Hospital Stamford Health System, Inc. et al.*, the same court denied another Connecticut hospital's motion to dismiss and found that the plaintiff's complaint sufficiently alleged that the hospital did not comply with its EMTALA screening obligations because it was influenced in part by the fact that the patient arrived in the same condition for which she had been seen at the hospital multiple times in the past. The court also found that the hospital did not comply with its EMTALA stabilizing obligations, as the patient returned to the ER minutes after her initial discharge and did not receive appropriate testing for almost 24 hours thereafter, even though her condition had been deteriorating.

These cases underscore the dual obligations that EMTALA imposes on hospitals to screen and to stabilize. In particular, the screening obligation cannot be met by applying a uniform standard of care on all patients who arrive at the ER with the same condition.

ERISA

Two physicians who allegedly owed Cigna more than $800,000 in overpayments brought an action under the Employee Retirement Income Security Act (ERISA) to enjoin the insurer from removing them from its coverage network. In *Rojas et al. v. Cigna Health and Life Insurance Company et al.*, the physicians claimed they were ERISA beneficiaries because they were entitled to receive "benefits" under the Cigna plan, and, as "beneficiaries," they had a right to invoke ERISA's anti-retaliatory protections. The Second Circuit affirmed the District Court's holding that providers do not become ERISA beneficiaries solely by virtue of receiving reimbursement from a plan, and that the right to receive an assignment of payments from the plan's participants does not include the right to assert retaliation claims under ERISA.

Interestingly, the court mentioned that the providers sued under the "wrong agreement," suggesting that they might have argued for reinstatement under their provider agreement with Cigna. The plaintiffs did not raise this argument, however, and so the court did not consider it.

No Private Right of Action Found Under Two State Laws

The issue in *Bentivegna v. Lall-Trail et al.* was whether the author of an expert medical opinion that was written for submission in a medical malpractice action under Connecticut General Statutes §52-190a can be held personally liable to the subject of the letter. The Superior Court (J.D. Fairfield) granted the author's motion to strike, finding that no private cause of action exists.

In *Guiliano v. Jefferson Radiology, P.C. et al.*, the Superior Court (J.D. Hartford) held that no private right of action can be implied from Connecticut General Statutes §38a-503(c), which requires mammography reports to state a patient's breast density category and its implications to the patient. The plaintiff claimed that the defendants failed to include the correct breast density in the report she received and she was injured as a result. The court read her allegations as stating a statutory cause of action and granted the defendant's

motion to strike, noting that the remedy for violations under the statute is for the state to impose a fine against persons and corporations.

Note that the courts in both cases suggested that the plaintiffs might have been able to bring common law actions against the defendants.

Private Practice

The Superior Court (J.D. Waterbury) denied a motion to strike raised by a private medical practice against the plaintiff, a physician in the practice, who was terminated from the practice. In *Marjanovic v. Naugatuck Valley Women's Health Specialists, P.C. et al.,* the court found the plaintiff adequately alleged breach of an oral contract between the parties in which the practice had promised an ownership interest to the plaintiff once he satisfied his buy-in through payroll deductions.

While the court found that the physician adequately alleged breach of an oral contract, this case emphasizes the value of written employment agreements for physicians and practices alike.

Medical Malpractice Not Actionable under CUTPA

In *Santos v. Hillsman et al.*, the Superior Court (J.D. Waterbury) granted a provider's motion to strike a patient's claim that the provider's alleged malpractice violated the Connecticut Unfair Trade Practices Act (CUTPA). The court found that CUTPA requires that the actions at issue be chiefly concerned with the entrepreneurial aspects of the provider's practice, as opposed to claims directed at the competence of and strategy employed by the provider, and that even though the provider may have profited by directing additional business to herself, these actions do not make the acts chiefly entrepreneurial.

This decision offers further reassurance to providers that malpractice claims are generally not actionable under CUTPA.

Liability under the National Childhood Vaccine Injury Act

The Superior Court (J.D. New London) denied a pharmacy's motion to dismiss a claim that injuries arising from the pharmacy's improper placement of a vaccine in the plaintiff's arm should have been brought under the National Childhood Vaccine Injury Act. In *Neddeau v. Rite Aid of Connecticut, Inc. et al.*, the court found that the Act, which limits the liability of vaccine manufacturers and administrators, applies when the alleged negligence concerns the physical effects of the vaccine upon the body, and not to instances in which an injury is alleged to have been caused by negligence in the physical process of injecting the vaccine.

PULLMAN & COMLEY

2015 Round-Up: Connecticut Court Decisions Affecting Health Care Providers

This case is a reminder to providers of the limited protection offered by the National Childhood Vaccine Injury Act.

Hospital Liability for the Negligence of Non-Employee Physicians

The question of whether a hospital can be held vicariously liable for the medical malpractice of its non-employee physicians is still awaiting resolution by the state's highest court. In January 2015, the Connecticut Supreme Court granted review of Appellate Court's 2014 decision in *Cefaratti v. Aranow*, which held that no agency relationship existed between a hospital and a private attending surgeon.

In *Tiplady v. Maryles et al.,* the Appellate Court of Connecticut found no liability of a hospital for the acts of emergency room physicians employed by a nonhospital entity, but instead of relying on the absence of an agency relationship, the court affirmed the trial court's decision that the hospital did not have a non-delegable duty to patients treated in its emergency room. The Connecticut Supreme Court has declined to review the case on other grounds.

It is unclear if the holding in Tiplady would extend to private practice physicians outside of the ER.

Rights of Minors and Fetuses

In *In re Cassandra C.*, the Supreme Court of Connecticut was faced with the question of whether it should adopt the common law doctrine of the "mature minor," which would allow a sufficiently mature minor to consent to or refuse medical treatment despite being under the legal age to do so. The court ultimately did not answer this question, however, because it upheld the lower court's decision that the evidence did not support a finding that the patient, a 17-year old with Hodgkin's lymphoma, was a mature minor under any standard.

In *Foster v. de Cholnoky et al.*, the Superior Court (J.D. Fairfield) denied summary judgment against a physician and medical practice and found, in a matter of first impression, that a wrongful death claim may be maintained on behalf of a nonviable fetus who is injured in utero, but who had been born alive, regardless of whether the fetus reached viability at the time of birth.

Although involving very different fact patterns, these two cases illustrate the evolving nature of the law governing the rights of these vulnerable populations in Connecticut.

Hospitals Found to Have No Duty to Care for Non-Patients

The Appellate Court of Connecticut recently decided that a hospital that had no actual or constructive notice of an allegedly unsafe condition on its property has no duty to an invitee who is injured as a result of that condition. In *Diaz v. Manchester Memorial Hospital*, the plaintiff slipped on an icy sidewalk at the entrance to

the hospital's emergency room and was injured. The court deferred to the trial court's factual findings that the hospital took reasonable care to maintain the sidewalk and that it could not be determined that the hospital had constructive notice of the danger.

In *Multari v. Yale-New Haven Hospital,* the grandmother of a young child recovering from surgery claimed that, after the child's surgical procedure, hospital staff directed her to leave the hospital with the child in her arms, along with her own and the child's belongings. The plaintiff fell and was injured on the sidewalk outside the hospital, and she sued the hospital for negligence. In granting summary judgment to the hospital, the Superior Court (J.D. Waterbury) held that the hospital owed no duty of care to the plaintiff, who was not a patient of the hospital, and therefore, there was no breach of any duty. Importantly, the court found that the plaintiff in this case was not arguing premises liability (that is, the duty owed by a business owner to an invitee to keep its premises reasonably safe) and that if it were a case of premises liability, the case would have been assessed differently.

While the hospitals in both cases were not found liable for injuries suffered by non-patients, these cases should not read to imply that hospitals need not take appropriate steps to ensure the safety of their non-patient visitors.