Health Care Alert

PULLMAN & COMLEY

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Top 10 Connecticut Health Law Cases for 2021

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Befitting a year in which the lingering COVID-19 pandemic caused delays in almost every aspect of daily life, Pullman & Comley's annual survey of notable health law cases from Connecticut's trial and appellate courts makes its debut a little late this year. But that does not mean there weren't some very notable cases for providers and their vendors alike to learn from.

We start with a case of first impression decided by Connecticut's highest court concerning a hospital's liability as a product seller as well as an important judicial decision connected with Connecticut's certificate of need process. Beyond that there were several important decisions involving the supervision of mid-level providers, the disclosure of protected health information under HIPAA and other topics important to those who are part of the state's health care delivery system.

1. In a Case of First Impression, CT Supreme Court Finds Hospital Not Liable as a Product Seller

In Normandy v. American Medical Systems, Inc., a patient brought an action against Bristol Hospital under the Connecticut Product Liability Act (CPLA), the Connecticut Unfair Trade Practices Act (CUTPA) and common law alleging that she suffered injuries after a surgeon, who was not an employee of the hospital but had privileges to practice there, implanted a pelvic mesh sling to treat the patient's incontinence. The trial court granted summary judgment to the hospital.

The Connecticut Supreme Court affirmed. Acknowledging that the issue was a case of first impression in Connecticut, the court rejected the patient's claim that the hospital was a "product seller," which is an essential element of a claim under the CPLA. The court determined that, contrary to the patient's claim that the hospital marketed the sling on its website, the hospital provided only informational content about the options available to treat incontinence on its

website and made no mention of the sling, and the fact that the surgeon's medical practice advertised the sling on its website could not be imputed to the hospital. The patient also claimed that the essence of her relationship with the hospital was for the procurement of the sling since the hospital stocked the sling and billed the patient for the sling at a significant upcharge and, further, that the services provided by the hospital to the patient were dependent on the sale of the sling. The court found that these facts did not conclusively establish that the sale was the main purpose of the patient's relationship with the hospital. The court also noted that the majority of the hospital's bill to the patient's insurer was for services, not products.

The court affirmed the trial court's decision that the patient's CUTPA and common law claims against the hospital were time-barred.

Normandy v. American Medical Systems, Inc., 262 A.3d 698.

This case provides a measure of assurance to hospitals that they are not typically product sellers for purposes of the Connecticut product liability law. One reason why the court affirmed the trial court's ruling was because the hospital did not advertise the medical device on its website. For this reason, hospitals may want to review the content of their websites to ensure that particular medical devices are not mentioned.

2. Corporation Did Not Properly Seek Judicial Review of CON

Birch Hill Recovery Center, LLC filed an application with the Office of Health Care Access (OHCA, now the Office of Health Strategy) for a certificate of need (CON) to establish a substance abuse treatment facility in Kent in 2017. High Watch Recovery Center, Inc., a substance abuse treatment facility also in Kent, requested that OHCA designate it as an intervenor. Following a public hearing it was recommended that Birch Hill's application be denied. Birch Hill then filed a brief in opposition and requested oral argument, after which the Department of Public Health (DPH) entered into an agreement with Birch Hill which approved the CON application subject to certain conditions. High Watch appealed to the Superior Court (J.D. New Britain) and argued that DPH had abused its discretion in approving the application. The court granted Birch Hill's motion to dismiss on the grounds that there was no "final decision" in a "contested case," as required by the Uniform Administrative Procedure Act (UAPA) and that therefore the court lacked subject matter jurisdiction.

The Appellate Court of Connecticut affirmed. The court found that the UAPA provides that a contested case does not arise if an agency is not required by law to hold a hearing. In this case, the court found that even though the hearing officer stated that the hearing was a contested case at the beginning of the hearing and had used contested case procedures, the hearing was held pursuant to DPH's discretion under CGS §19a-639a(f)(2) and therefore was not a contested case. As there was no contested case, there was no final decision from which an appeal could be had. That the hearing was not a contested case was also evident from the hearing notice that OHCA sent to High Watch which stated that a hearing was not mandated but was within OHCA's discretion.

The court also disagreed with High Watch's argument that its request to intervene constituted a request for a mandatory public hearing under CGS §19a-639a(e). The court noted that High Watch's request failed in this regard for several reasons, including that High Watch requested to intervene and participate in a hearing that OHCA had already scheduled.

The court additionally found that High Watch was not aggrieved by the decision.

High Watch Recovery Center, Inc. V. Department of Public Health, 207 Conn.App. 397, *cert. granted,* 340 Conn. 913.

The Connecticut Supreme Court has granted certiorari on the questions of whether: (1) the Appellate Court properly concluded that a CON hearing conducted by DPH pursuant to CGS §19a-639a(f)(2) is not a contested case; and, if so (2) whether the Appellate Court correctly concluded that High Watch's letter requesting intervenor status in a CON hearing that had been scheduled pursuant to CGS §19a-639a(f) was not a legally sufficient request for a public hearing pursuant to CGS §19a-639a(e).

3. Superior Court Denies Motion to Strike Negligence Claim against Physician in Role as Supervising Physician to Physician Assistant

Connecticut law requires a physician assistant (PA) to enter into a delegation agreement with the supervising physician with whom he or she collaborates, and requires the supervising physician to maintain final responsibility for the care of patients and the performance of the PA. Last year, the Superior Court (J.D. Litchfield) denied a physician's motion to strike a negligence claim against him for failure to exercise oversight, control and direction over the PA for whom he was the supervising physician.

In Schnell v. New Milford Medical Group, LLC, the plaintiff was a diabetic who sought care for a worsening foot infection from a physician and a PA at a medical practice. The PA met with the patient on several occasions but did not consult with the supervising physician about her treatment of the patient. The supervising physician did not review the PA's diagnosis, treatment or care of the patient. Eventually, the PA referred the patient for emergency treatment, at which time the patient underwent amputation of a toe.

The physician and the medical practice moved to strike the patient's negligence claims. The court denied the physician's motion on the basis that the physician had a statutory duty to supervise the PA and failed to do so. The court disagreed with the physician that the patient had to plead that the physician was aware of the PA's propensity to provide substandard medical care as an element of the negligence claim. The court found that the physician's failure to carry out his supervisory duties amounted to allowing the PA to practice medicine and to render care she was not capable of rendering. The court also found that the physician knew or should have known that his failure to supervise the PA would result in harm to the patient and that this failure was a cause of the amputation of the patient's toe and related physical and emotional injuries.

The court did, however, grant the medical group's motion to strike, finding that an employer generally cannot be held liable for negligent supervision of its employees unless it had notice of an employee's propensity for the type of behavior causing the harm. In this case, the patient did not plead that the medical group knew or reasonably should have known of the PA's propensity to render negligent medical care.

Schnell v. New Milford Medical Group, LLC, 2021 WL 6101170.

This case serves as a strong reminder to physicians who act as supervising physicians to a PA to exercise their supervisory duties and to follow the statutes that require the supervising physician to maintain final responsibility for the patient. While the court did not mention the specifics of the delegation agreement required to be entered into between a supervising physician and a PA, supervising physicians should revisit these agreements on a regular basis and, as required by the statute, no less frequently than annually.

4. No Violation of HIPAA Found When Nurse Accessed Patient Files to Avert Harm

The Connecticut District Court (Arterton, J.) denied summary judgment to a hospital which sought to vacate an arbitrator's decision that the hospital's termination of an emergency department (ED) nurse violated the nurse's collective bargaining agreement.

In this case, the adult son of a hospital employee gained unauthorized access to the ED. The nurse informed her co-workers in the ED that she had safety concerns because the man was a drug addict. She also accessed the man's medical records. The man's mother complained to hospital management about the nurse's disclosure of her son's drug addiction and, following an investigation of the matter, the hospital terminated the nurse for violating the Health Insurance Portability and Accountability Act (HIPAA).

The union representing the nurse filed a grievance and the matter was brought before an arbitrator who found: (1) the nurse's knowledge of the man's drug addiction likely stemmed from conversations she had had with the man's mother, not from the man's medical records; (2) the nurse had legitimate reasons for informing other employees of the potential danger of the man's unauthorized entry into the ED; and (3) the nurse's access of the man's medical records was proper and did not violate HIPAA. The court found that the hospital failed to demonstrate that the arbitrator manifestly disregarded the law when it determined that the nurse considered the unauthorized entrance of the man to be a threat to her safety and that she reasonably informed those in her immediate vicinity of her concerns. According to the court, the disclosure, even if it revealed protected health information, would not have violated HIPAA, as HIPAA permits the disclosure of protected health information to avert a serious threat to health or safety to prevent or lessen a serious and imminent threat to the public and is to a person or persons reasonably able to prevent or lessen the threat.

Prospect Medical Holdings, Inc. d/b/a Waterbury Hospital v. Unit #10, CHCA NUHHCE AFSCME AFL-CIO, 2021 WL 949751.

This case serves as a reminder that health care facilities and other covered entities should examine the facts surrounding a possible HIPAA breach carefully prior to taking disciplinary action against a practitioner. Experienced counsel should be consulted in cases where the facts are not clear or when the law is not clear about how a situation should be handled.

5. Medical Practitioner Owes Duty to Mother Not to Cause In-Utero and Delivery Harm to Child

The Superior Court (Hartford, J.D.) denied a motion to strike a claim of negligent infliction of emotional distress by a mother whose newborn son suffered multiple severe injuries arising from an obstetrician's failure to recognize early signs of macrosomia (large birth weight) during prenatal care and negligence during delivery. The defendants (the obstetrician and the medical practice) argued that the mother's claim should be read as a claim for "bystander" emotional distress because her injury was derivative of the infant's injury and, because bystander emotional distress requires an allegation of gross negligence (which the mother did not plead), the claim must be struck. The mother argued that her injury was not derivative of her son's injury; rather, the defendants owed her a *direct* duty to exercise reasonable medical care so as not to cause injury *to the infant*.

The court determined that there was no appellate authority in Connecticut on the issue of whether a physician providing obstetrical care owes a duty to the mother to prevent harm to her child during gestation and delivery, and that the superior courts were split on this issue. In denying the defendants' motion to strike, the court cited the "modern trend" of finding the existence of a duty arising from the status of the plaintiff as an identifiable third party who might foreseeably suffer harm as a result of the defendant's negligence. The court also noted that the normal expectations of a mother-- that the physician will undertake the care and treatment of both mother and child-- supported a finding of liability based on a theory of negligent infliction of emotional distress.

Gambacorta v. Williams, 2021 WL 402053.

The court was mindful of the important policy goal of limiting the potential liability of health care providers and found that the potential for limitless third party liability was allayed in this case because of the nature of the obstetrical physician-patient relationship, which necessarily involves treatment to ensure the health of both the mother and the fetus.

6. No Willful Disclosure of Patient's HIV Status

Connecticut General Statutes (CGS) Section 19a-590 provides for a cause of action against a person who "willfully violates" the statutes governing AIDS testing and the limitations on the disclosure of HIV-related information. Prior courts have held that the term "willful" requires a plaintiff to demonstrate that the defendant was aware and/or cognizant that it was disclosing the plaintiff's confidential HIV-related information, but does not require an intent to cause injury.

In Hart v. NB Health Care, LLC, a patient of a home health agency claimed that her HIV status was unlawfully disclosed when her HIV medication was mistakenly delivered to her neighbor's house on several occasions. The patient sued the delivery company and the home health agency for breach of CGS §19a-590, as well as for negligent infliction of emotional distress and negligence in violation of HIPAA.

The Superior Court in New Britain granted the motions to strike of both defendants. With respect to the delivery company, the court found that the plaintiff failed to establish that the company was aware and/or cognizant that it delivered the medication to the wrong address or even that the company was aware of the contents of the packages. The court also struck the claim for emotional distress, in part because the plaintiff did not plead that the injuries which she alleged to have suffered were severe enough to cause illness or bodily harm, which is an essential element of the cause of action. On the HIPAA claim, the court agreed with the delivery company that: (i) HIPAA does not recognize a private right of action; and (ii) Connecticut has recognized a common law cause of action when a claim involves the relationship between a physician (and we assume other health care providers) and a patient (see our discussion of the case establishing this common law right here).

With respect to the home health agency, the plaintiff claimed that upon learning that her HIV medication was delivered to her neighbor's home, she contacted the agency and instructed it not to allow anyone else to sign for her medication and to deliver it only to her. The court found that these instructions were insufficient to establish that the agency was aware and/or cognizant that it was disclosing her confidential HIV-related information in violation of CGS §19a-590. In rejecting the plaintiff's emotional distress and HIPAA claims, the court noted that the plaintiff failed to allege the manner in which her information was actually disclosed and therefore her allegations were insufficient to demonstrate an actual disclosure of confidential medical information to a third party.

Hart v. NB Health Care, LLC, 2021 WL 3409338.

Health care providers should keep in mind that the outcome of this case might have been different if the plaintiff's allegations were more specific. For example, the court noted that the plaintiff did not allege that the packaging of the medication identified its contents or that her HIV status was discernible from the packaging. If the neighbor could have determined her HIV status from the packaging, it might have denied the defendants' motions to strike.

7. Court Strikes Claims that Hospital Was Vicariously Liable for Employee's Unauthorized Access of Confidential Patient Information

The plaintiff in this case was a patient of Danbury Hospital. A hospital employee, who was not involved in the care or treatment of the patient, gained unauthorized access to the patient's medical records (which included her HIV status) and disclosed the patient's HIV status to the patient's boyfriend and others. The patient claimed that the hospital was vicariously liable for the unauthorized access and disclosure of confidential

patient information by the employee. These claims included charges of invasion of privacy; breach of CGS §19a-583 (which sets forth limitations on the disclosure of HIV-related information); negligence; and negligent infliction of emotional distress. The Superior Court (J.D. Danbury) granted the hospital's motion to strike these claims on the basis that the complaint did not support any rationale to determine that the employee was accessing the plaintiff's records as part of her job or to serve her employer.

The court also granted the hospital's motion to strike charges that the hospital was liable for the employee's actions under the Connecticut Unfair Trade Practices Act (CUTPA), finding that a CUTPA claim against a health care provider must allege that an entrepreneurial or business aspect of the provision of services was implicated. The court found no such implication.

However, the court denied the hospital's motion to strike the plaintiff's other claims that were not based upon the actions of the employee, including breach of contract, negligent and intentional infliction of emotional distress and negligence. The court found that the plaintiff provided factual allegations for each of these causes of action. With respect to the negligence claim in particular, the plaintiff alleged 25 different instances of negligence including, without limitation, failure to establish internal policies and/or procedures to safeguard the confidentiality of patient information and failure to protect the dissemination of confidential patient information by employees.

Doe v. Danbury Hospital, 2021 WL 402055.

The plaintiff's 25 negligence claims on the part of the hospital also included various failures to train employees regarding the protection of confidential patient information. At this stage of the case the court assumes the failures alleged. It may yet turn out that the allegations are not supported by evidence. The HIPAA Privacy Rule requires a covered entity to have written policies and procedures to implement the privacy standards and to train its workforce on these policies and procedures, as necessary and appropriate for the workforce to perform their functions, as the hospital may have done. Cases of this sort are a reason for covered entities to ensure that they are up-to-date on these training obligations and that they document their compliance with these obligations.

8. Failure to Permit DPH Access to Patient Records Leads to Severe Consequences

The defendant in this case was a dentist who was requested to produce patient records in response to an audit conducted by an insurer with whom he contracted. When the dentist refused to produce the records, the matter was referred to the Department of Public Health (DPH), which over the next few years obtained first a subpoena and then a contempt order against the dentist in Superior Court. In 2019, the court imposed a fine of $1,000 for each day of noncompliance (which was later vacated). Because the dentist claimed that the subject records had been contaminated by toxic mold caused by flooding in his office storage area, the court ordered the dentist to make available to DPH all records relating to the subject patients and required the dentist to provide DPH with full access to his dental office for the purpose of inspecting and verifying the

manner of storage, existence and location of patient records and other documents. In addition, the court awarded DPH its attorney's fees.

Last year, the Appellate Court of Connecticut affirmed, finding in part that the order permitting DPH to search the dentist's office did not violate the dentist's Fourth Amendment right to be free from unreasonable searches and seizures. The court relied on General Statutes §19a-14(c), which gives DPH the authority to order the production of books, records and documents of its licensees and to enforce its orders, and found that the order was sufficiently limited in scope.

Following the Connecticut Supreme Court's denial of certiorari, DPH moved the Superior Court for another contempt order and, later, for an order of imprisonment due to the dentist's persistent failure to allow DPH investigators access to his patient records. The court denied imprisonment because of the defendant's health but imposed a daily fine that would increase each month up to $2,500/day. DPH also revoked his license.

State of Connecticut Commissioner v. Colandrea, 202 Conn.App. 815, *cert. denied*, 336 Conn. 930, 2021 WL 3127089, 2021 WL 5112980.

This case illustrates the necessity of proper storage of patient medical records and highlights the risks run when interfering with DPH's access to records it has an entitlement to examine. Health care professionals are well-advised to work with experienced counsel when responding to record requests of insurance carriers and governmental authorities to help avoid the occurrence of similar severe enforcement measures.

9. Court Finds Only Limited Immunity from Lawsuit related to COVID-19

In Mills v. Hartford Health Care Corp., a woman had a heart condition and exhibited symptoms that were consistent with a COVID-19 infection when she arrived at the hospital in March 2020. The hospital's policy at the time was not to admit patients suspected of having COVID-19 to its cardiac catheterization lab in order to preserve PPE. She was tested for COVID-19 and put in isolation. The decedent's negative test result was obtained several days later, at which time the hospital set up an appointment for the cardiac catheterization lab for late the following day. However, the patient died early that morning of a heart attack.

The decedent's administrator sued the hospital and several treating physicians for medical malpractice and the defendants filed a motion to dismiss based on: (i) Governor Lamont's Executive Order 7V (which has since expired), which provided immunity for medical providers while providing health care services in support of the State's COVID-19 response; and (ii) the federal Public Readiness and Emergency Preparedness (PREP) Act, which provides immunity when a health care provider administers any test to diagnose COVID-19, even if the plaintiff alleges gross negligence.

The Superior Court (J.D. Hartford) dismissed the plaintiff's claims that were based on the defendants' actions prior to receiving the negative COVID-19 test result because, in reliance of Executive Order 7V and the PREP Act, the defendants were acting out of a good faith belief that the decedent had COVID-19. However, the

court denied the motions to dismiss the claims for acts occurring after the negative test result was obtained since the defendants then had actual knowledge that the decedent did not have COVID-19 and they could no longer claim they were providing healthcare services in support of the State's COVID-19 response. The court noted that the defendants' own actions demonstrated that they knew they were no longer providing medical care related to COVID-19 because they discontinued the decedent's isolation protocols after they received her negative test result.

Mills v. Hartford Health Care Corp., 2021 WL 4895676.

This case illustrates the parameters of the immunity afforded by Governor Lamont's executive order and federal law for health care providers who treat patients suspected of having COVID-19.

10. CT Appellate Court Holds that Omission of Opinion Letter Cannot be Cured after Statute of Limitations Has Expired

The Appellate Court of Connecticut ruled that a plaintiff in a medical malpractice action cannot add the statutorily-required opinion letter after the statute of limitations in the action has expired.

In Kissel v. Center for Women's Health, P.C., the plaintiff allegedly suffered serious burns to her foot after prolonged contact with a heat lamp used during an acupuncture procedure. The plaintiff brought a medical malpractice action against the treating acupuncturist and the medical practice (as well as a products liability claim against the manufacturer of the heat lamp). The defendants moved to dismiss the complaint because it did not include an opinion letter from a similar health care provider as required by CGS §52-190a. According to the plaintiff, the opinion letter existed at the time the complaint was filed but was inadvertently omitted, and the trial court permitted her to amend the complaint to add the required opinion letter. The defendants argued that the omission deprived the court of personal jurisdiction and that the plaintiff could not cure this defect because the two-year statute of limitations had passed.

The trial court denied the defendants' second motion to dismiss, relying on an earlier Appellate Court case which gave courts discretionary power to permit an amendment to a complaint if the opinion letter existed prior to the commencement of the action. The trial court also found that the dismissal of the complaint would elevate form over substance and violate Connecticut's public policy of allowing a trial on the merits. A jury found in the plaintiff's favor and awarded her one million dollars on each of the malpractice and product liability claims.

The malpractice defendants filed a post-verdict motion in light of an Appellate Court case that was decided after verdict was reached which held that any attempt to cure a defect relating to a §52-190a opinion letter must have occurred prior to the expiration of the statutory limitation period. The trial court denied the motion citing, among other things, that the purpose underlying CGS §52-190a had been satisfied, given the jury verdict and the defendants appealed.

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The Appellate Court reversed and remanded the case. It determined that the malpractice action should have been dismissed based on lack of personal jurisdiction. In reaching its decision the court noted how, during the period between the trial court's denial of the defendants' first two motions to dismiss and the defendants' post-verdict motion (a span of approximately six years), the law shifted from consideration of whether the opinion letter had existed at the time the plaintiff commenced the malpractice action to a focus on whether the elected procedure to remedy a defective opinion letter had begun prior to the expiration of the statute of limitations. The court also rejected the plaintiff's argument that the statute of limitations in her case was actually three years, not two years. The court determined that the three-year period in the statute of limitations is a statute of repose, that is, the time period beyond which a malpractice action is absolutely barred.

The court affirmed judgment against the manufacturer on the products liability claim.

Kissel v. Center for Women's Health, P.C., 205 Conn.App. 394, *cert. granted*, 339 Conn. 916, 339 Conn. 917.

The Connecticut Supreme Court has granted certiorari on the question of whether the Appellate Court improperly reversed the trial court's judgment for the plaintiff and improperly directed the trial court to render judgment dismissing the plaintiff's medical malpractice claims against each of the malpractice defendants pursuant to CGS §52-190a.

Read on for important legal developments that may affect your organization or practice and for more information, please contact one of our Health Care Law attorneys.