Medical Litigation Newsletter

July 2011 Issue

Hinshaw Expands Medical Litigation Practice to Florida and California

Hinshaw is pleased to announce that the firm has expanded its Medical Litigation practice into Florida and California. This expansion now provides Hinshaw clients the ability to have medical malpractice cases defended coast-to-coast. The *Medical Litigation Newsletter* will be enhanced by featured legal developments in these new jurisdictions. Hinshaw's Medical Litigation Group continues to thrive and expand under the leadership of Group Leader, Daniel P. Slayden.

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The Death of Statutes of Limitations

A disturbing trend is developing among the plaintiffs' bar—namely, the use of "John Doe," "Jane Doe" and/or "John Doe Corporation" as named defendants. In an attempt to circumvent statutes of limitations, attorneys are adding unidentified fictitious entities in hopes of convincing trial courts to allow joinder of new defendants substantially after the particular statute of limitations has expired. In Missouri, this tactic presently is centered on medical negligence claims (both personal injury and wrongful death); however, the practice will likely be used in other areas of the law.

The Missouri Supreme Court presently has under advisement *State ex rel. B.C. Missouri Emergency Physicians LLP, David Poggemeier, MD, Scott Landry, MD, v. The Honorable Nancy Schneider*, Cause No. 091418 and *State ex rel. Dr. Neal Holzum v. The Honorable Nancy Schneider*, Cause No. 091434. The Court will decide whether the joinder by the plaintiff in a medical negligence case of four new defendants two years after the statute of limitations had run and more than five years after the medical care was provided should be allowed.

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Hinshaw Representative Matters

Each issue of the Medical Litigation Newsletter highlights a few recent cases handled by Hinshaw lawyers.

We are pleased to report the following:

Gregory T. Snyder and ***Jennifer L. Johnson***, partners in Hinshaw's Rockford, Illinois office, recently obtained a not guilty verdict for a defendant psychiatrist in Will County, Illinois. Plaintiff claimed the suicide death of a 34-year-old father of two minor boys was due the psychiatrist's conduct. Decedent had held a gun to his head in the early morning hours prior to his hospitalization for suicidal ideation. He was evaluated and admitted to the psychiatric floor of a Will County medical center where he was further evaluated and treated by the psychiatrist. Plaintiff attempted to criticize defendant for discharging decedent after approximately 48 hours. Defense counsel successfully argued the length of admission as well as the other care provided was tailored appropriately and reasonably to the patient's particular circumstances. Among those circumstances: the patient's wife provided assurances she would (a) monitor and supervise the patient, (b) take the decedent back into the family, and (c) participate in marital counseling. After his discharge, the patient's wife argued with him at length about a divorce, culminating in his suicide death. The jury endorsed the psychiatrist's care and returned a not guilty verdict.

In March of 2011 ***Rhonda J. Ferrero-Patten***, partner in Hinshaw's Peoria office, secured a not guilty verdict in a medical negligence case in Peoria County, Illinois for a large regional health care system and its insured resident. Allegations were surgical error during a lumbar microdiscectomy where the femoral artery was severed and the vein injured, resulting in post operative hemorrhage and continuing problems with leg claudication.

In the underlying case, plaintiff, a surviving son of the subject decedent, filed his wrongful death malpractice action within the three-year statute of limitations. He named as defendants the hospital where his mother was treated, a university, and Jane Doe and John Doe. The descriptions in the petition concerning defendants merely stated, "providers of medical services, who at all times relevant to this action was engaged in providing medical services to the consuming public, including the decedent for a fee." There was no further identifying information to describe the role of the Jane Doe or John Doe defendant in the care and treatment of the decedent that allegedly resulted in her death.

More than two years after the statute of limitations expired, the son added the four new defendants, arguing that he was merely substituting the properly named defendants for the Jane Doe and John Doe defendants originally named in the petition. The circuit court denied motions to dismiss that contended that the statute of limitation had expired. The court held that the newly added defendants related back to the original timely filed petition and that the actions of the son consisted primarily of a substitution of a party, as opposed to a joinder of a new party. The Missouri Supreme Court agreed to take the writs filed by the newly added defendants. Oral arguments were held on May 10, 2011.

Interestingly, in Missouri, there is virtually no law on this topic, and the Missouri Supreme Court has not addressed the issue. Under Missouri law, a party may utilize a fictitious name and substitute, at a later date, the proper name. Courts will allow such an amendment to the petition to relate back to the original filing. But there has to be a description as to the conduct of the individual involved and the potential identity of such person so as to allow him or her, as one who has not been named, sufficient information that a claim may be brought against him or her. *See e.g. Maddux v. Gardner,* 192 S.W. 2d 14 (Mo. App. 1945); *Schultz v. Romanace, M.D.,* 906 S.W.2d 393 (Mo. App. S.D. 1995).

In *Maddux*, plaintiff originally sued "John Doe," who was described as the engineer on the subject train and "Richard Doe," who was described as the fireman on the train. Plaintiff later filed an amendment by interlineation (after the statute of limitations had expired) seeking to name the actual engineer and fireman. The newly named parties sought to dismiss the petition on the grounds that the statute of limitations had run. The court held that plaintiff was merely substituting names. It found that the amendment related back to the original timely filed petition and that the statute of limitations had not run.

Plaintiff in *Schultz* also tried to extend the statute of limitations. He originally filed a medical malpractice case against various defendants including "John Does I, II, III and Jane Does I, II, III." Plaintiff described where the alleged treatment had occurred, but nothing further. Several years after the statute of limitations had run, he sought leave to amend his petition by adding new physician defendants. He did not dismiss any of the John Doe or Jane Doe defendants. The court held that the prior description of the unknown defendants did not "sufficiently describe" the conduct from which the newly named physicians could be identified as persons whose treatment produced plaintiff's injuries. The court further stated that the pleading did not state

facts that would have put either of the newly named/added physicians on notice that they were the persons against whom claims were made concerning their care and treatment of plaintiff.

In the present case, the son's original petition includes no identifying information such as where the care was provided or what type of care was supplied. "Providers of medical care"—the description that the son used—could apply to anyone in the healthcare industry who comes in contact with the public. There is no indication from the original petition that defendants are doctors. Nor is there any indication when the medical services were provided, nor the type of medical services provided. However, the son claims that because he dismissed the John Doe and Jane Doe defendants he is merely substituting the proper names for the misnomer or, alternatively, that his description was sufficiently adequate to allow the substitution.

The Missouri Court of Appeals for the Eastern District recently addressed this issue in *Johnson v. Delmar Gardens West, Inc. et. al,* No. ED95317 (Mar. 8, 2011). In that case, plaintiff filed a wrongful death action against the nursing home that was caring for her husband. She originally named the wrong nursing home entity, "Delmar Gardens West" as opposed to "Delmar Gardens of Chesterfield Inc. and Delmar Gardens of Chesterfield, LLC, d/b/a Delmar Gardens of Chesterfield." The newly named defendants added after the statute of limitations had expired moved to dismiss, contending that the cause of action was time-barred. The trial court sustained the motion and dismissed all claims as to those defendants with prejudice.

On appeal, the appellate court maintained that plaintiff was clearly adding new defendants and that it was not a case of misnomer. The court broadly interpreted the rule addressing amendments and relation back and found that the addition of the admittedly new defendants was an attempt to correct a mistake in identification of the defendant entity where her husband was residing. The court found that the claims arose out of the conduct that was the subject of the timely filed petition. Further, the court held that the newly added parties had sufficient notice to know that but for the mistake in identity of the proper parties, the lawsuit would have been brought against them. In that case, unlike the present, defendants all had the same registered agent, their annual registration report filed with the secretary of state was filed by the same controller, and they shared the same corporate headquarters and attorneys and had a majority of the same directors and officers. As a result, the court reversed and remanded the case for further handling. The court maintained that given the facts and the manner of the corporate set-up with both companies, it was appropriate to allow them to be added.

As noted, only appellate courts have grappled with this issue. However, there is no real consistency in the rulings or what courts are considering in rendering their opinions. As the Missouri Supreme Court has not addressed this issue in the past, it is hoped that the Court will carve out a clear procedure by which John Doe and or Jane Doe defendants can be used but the statute of limitations is not eliminated. Given the facts of the present case, the Court could solidify the practice of the earlier decisions and require specificity in the description of the individuals whose particular identity is not known. However, to allow mere generalizations such as "medical providers," "manufacturers," "sellers" or "distributors" would make a mockery of any statute of limitations. Plaintiffs, if the Court does not take strong action, could assert general allegations in all cases so as to allow for a never-ending addition of parties as discovery progresses. No one would be protected and plaintiffs would have no incentive to exercise any due diligence to ascertain if there are viable claims and who should be joined. It is not known when the Court will issue its opinion, but the purpose of statutes of limitations hangs in the balance.

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Employers Should Be Aware of State Laws Prohibiting Marital Status Discrimination

Although no federal law prohibits discrimination by private employers based on marital status, a number of state laws include such status as a protected class. The Minnesota Supreme Court recently considered a case where a husband and wife worked for the same employer. The husband, employed as the company's president, offered to resign his employment. The wife, employed as a sales and marketing coordinator, was terminated shortly thereafter. The company's CEO told the wife that he would like to terminate her because "she would be uncomfortable or awkward remaining employed" after her husband left the company. The CEO also told her that her position was going to be eliminated because

she would likely relocate with her husband. The wife then sued the employer, alleging marital status discrimination in violation of Minnesota law. The employer argued that a claim for marital discrimination must be supported by a finding that the termination was an act "directed at the institution of marriage" and claimed that the employee had been fired for legitimate business-related reasons. The Minnesota Supreme Court held that a claim for marital discrimination does not require that an employee prove a direct attack on the institution of marriage. The Court instead determined that "marital status" includes "protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse." Importantly, this means that an anti-nepotism policy prohibiting employment of married couples by a company is illegal in Minnesota. Many other states, including California, Florida, Illinois and Wisconsin, also prohibit marital status discrimination. This decision is a reminder that all employers, and especially national employers, should review and update their anti-nepotism and anti-discrimination policies to ensure compliance with state laws.

Taylor v. LSI Corporation of America, Case No. A09-1410 (Minn. Apr. 13, 2011)

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Illinois Supreme Court Rules Common Fund Doctrine Does Not Apply to Health Care Services Lien Act

The Illinois Supreme Court recently held that the common fund doctrine does not apply to a health care professional or provider holding a lien under the Health Care Services Lien Act. *Wendling v. Southern Illinois Hospital Services and Howell v. Southern Illinois Hospital Services*, Nos. 110199, 110200 cons. (Ill. Mar. 24, 2011). The common fund doctrine is an exception to the general American rule that, absent a statutory provision or an agreement between the parties, each party to litigation bears its own attorneys' fees and may not recover those fees from an adversary. It provides that a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from every person who receives money from the fund.

In reversing the Appellate Court of Illinois, Fifth Circuit, the Illinois Supreme Court ruled that the common fund doctrine does not apply to the relationship between a personal injury plaintiff and a lienholder hospital. The Court noted that the Health Care Services Lien Act (770 ILCS 23/45) expressly does not limit the right of a hospital to pursue collection, through all available means, of its unpaid reasonable charges that remain unpaid after satisfaction of its lien. The Court distinguished actions against a fund from a hospital's claim directed primarily against its patient. The hospital's claim is not contingent upon the outcome of a personal injury action or the creation of a fund; its right to payment arises from providing medical services.

The Supreme Court identified two additional reasons why the scope of the common fund doctrine is limited to cases such as insurance subrogation claims, class actions, and wrongful death cases involving an intervenor. First, hospitals have no standing to participate in a patient's personal injury lawsuit and cannot bring independent causes of action against the at-fault party. Secondly, in a typical common fund case, the fund is "created for the benefit of the entire class." In contrast, counsel for a personal injury plaintiff recovers funds for the benefit of his or her client, regardless of the interests of the hospital. As a result, the Court concluded that a personal injury plaintiff and a hospital-creditor are not similarly situated with respect to the fund and do not share the same interests in the fund.

The Supreme Court remanded the cases to the circuit court for further proceedings consistent with its holding that plaintiffs' attorneys are not entitled to keep one-third of the amount otherwise payable to providers and professionals to satisfy lien claims as additional legal fees for creating the settlement fund. The decision means that hospitals and providers may continue to recover 100 percent of the amount due on their lien claims.

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Hinshaw & Culbertson LLP prepares this newsletter to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects if you contact an editor of this publication or the firm.

The Medical Litigation Newsletter is published by Hinshaw & Culbertson LLP. Hinshaw is a national law firm with approximately 500 lawyers in 24 offices. We offer a full-service practice, with an emphasis in litigation, business law and corporate transactions, environmental, intellectual property, labor and employment law, professional liability defense, estate planning and taxation matters. Our attorneys provide services to a range of for-profit and not-for-profit clients in industries that include alarm and security services, construction, financial services, health care, hospitality, insurance, legal, manufacturing, real estate, retail and transportation. Our clients also include government agencies, municipalities and schools.

Hinshaw was founded in 1934 and is headquartered in Chicago. We have offices in 12 states: Arizona, California, Florida, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New York, Oregon, Rhode Island and Wisconsin.

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