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FLORIDA'S LONG TERM CARE REPORTER

MARCH 2013

School of Claims Seminar

Orlando Florida, April 25th and 26th, 2013

Legislative Update –Long Term Care Litigation

Recent Decisions Defining the Permissible Scope of Expert Testimony in Long-Term Care Cases

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MARK YOUR CALENDAR! Cole, Scott & Kissane is pleased to announce that on April 26, 2013, we will be once again hosting a complimentary Claims Management Seminar at the beautiful JW Marriott Orlando Grande Lakes Resort, 4040 Central Florida Parkway, Orlando, Florida 32837. This seminar is our firm's way of thanking you for all your hard work throughout the year and is our completely complimentary gift just for you. For those who will be staying over night, we kick off the Seminar with a cocktail reception and light dinner on April 25th, also at the JW Marriott from 5:30 p.m. to 9:30 p.m. Seminar materials will be available and registration begins at 7:00 a.m. on April 26th. A continental breakfast will be served from 7:00 a.m. to 9:00 a.m. at the registration location. We invite all guests to attend a complimentary luncheon at noon. We have some great raffle prizes and special gifts for each attendee. Please note that CE and CLE credits will differ contingent upon your selection from each of the four breakout sessions.

We ask that you register in advance on line at www.csklegal.com. We prefer online registration, as it is automatically entered into our system.

Please feel free to make additional copies of the registration form for anyone else who may be interested in attending or direct them to our website. You Must Pre-Register for This Event. If you have any questions, please do not hesitate to contact Samantha Webster at (321) 972-0006, samantha.webster@csklegal.com or Janeena Lluy at (305) 350-5319, janeena.lluy@csklegal.com.

We look forward to seeing you in Orlando!

"School of Claims" Seminar

Orlando, Florida

April 25th and 26th 2013

BREAK OUT SESSION No. 1

1. The Science of Sinkholes
2. Traumatic Brain Injury
3. Winning your Case at Trial
4. Biomechanics and Accident Reconstruction Analysis
5. Current Trends in Construction Industry Claims

BREAK OUT SESSION No. 2

6. Bad Faith in Florida
7. Medical Malpractice Arena For 2013
8. Problem Employee – Harassment, Terminations and Discrimination
9. Florida's Recent Legislative Changes
10. Nursing Home Claims

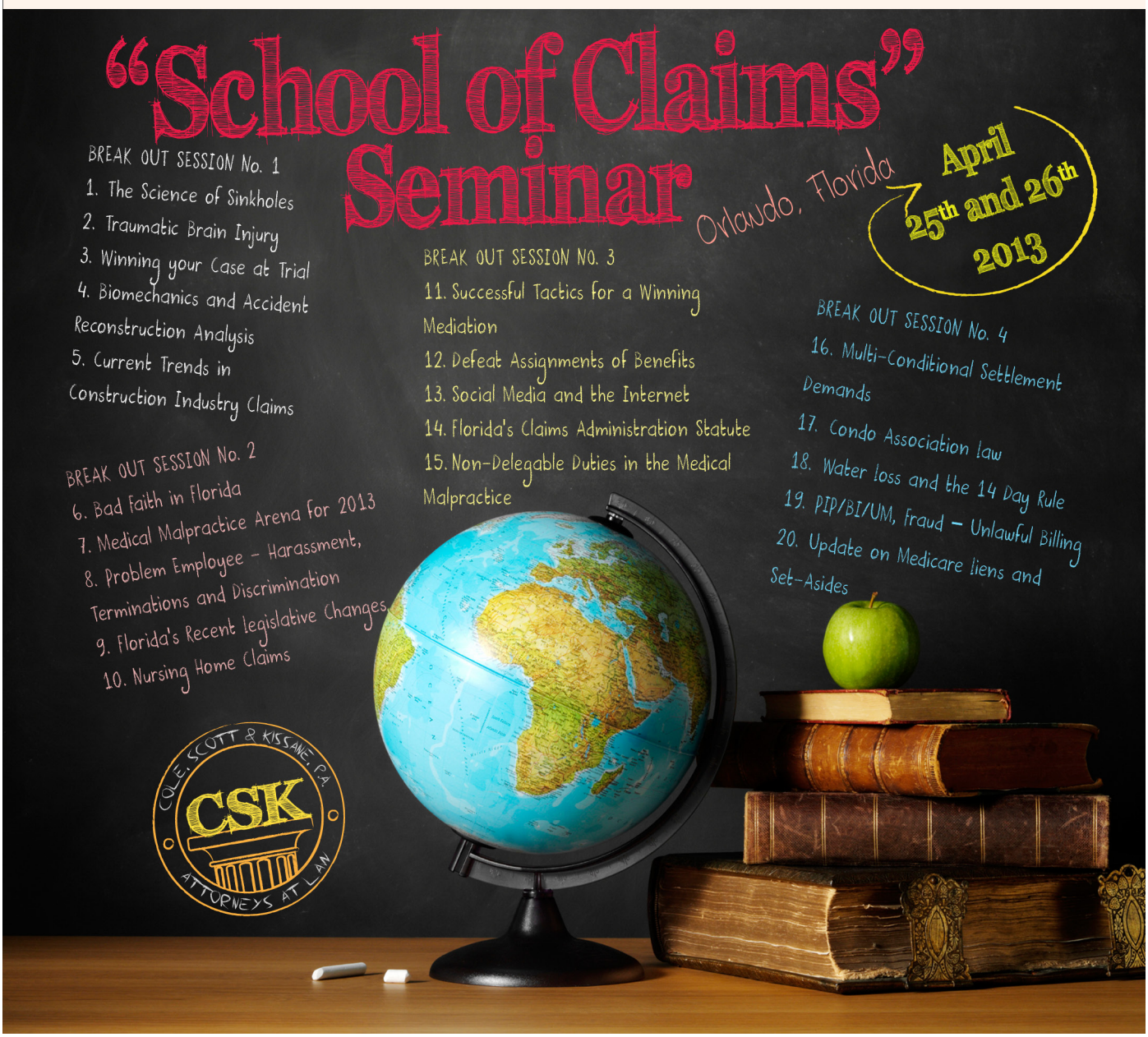
BREAK OUT SESSION No. 3

11. Successful Tactics for a Winning Mediation
12. Defeat Assignments of Benefits
13. Social Media and the Internet
14. Florida's Claims Administration Statute
15. Non-Delegable Duties in the Medical Malpractice

BREAK OUT SESSION No. 4

16. Multi-Conditional Settlement Demands
17. Condo Association law
18. Water loss and the 14 Day Rule
19. PIP/BI/UM, Fraud – Unlawful Billing
20. Update on Medicare liens and Set-Asides

COLE, SCOTT & KISSANE, P.A. CSK ATTORNEYS AT LAW



LEGISLATIVE UPDATE – LONG TERM CARE LITIGATION

By Gene Kissane and Colin Riley

Several changes have been proposed regarding nursing home litigation that will have a substantial effect on the long term care industry if enacted. The bills, entitled SB 1384 in the Senate and HB 869 in the House of Representatives, seek to limit the defendants that may be named in a nursing home negligence claim. Additionally, the proposed legislation will have a substantial effect on the evidence that a court may consider to allow the Plaintiff to plead punitive damages. The proposed laws will also require a stricter burden of proof to plead punitive damages. The proposed bills seek to modify the language of Florida Statutes §400.023 and §400.0237.

Florida Statute §400.023 is a statutory cause of action that legislates and regulates resident lawsuits brought against nursing home facilities. The proposed bills seek to limit who may be named defendants in these statutory causes of actions. Specifically, the legislation would restrict the defendants to patient caregivers, nursing home licensees, and management companies. The Plaintiff would not be able to name any other defendant, until an evidentiary hearing is held which establishes a reasonable basis for a finding that the additional person or entity owed a duty to the resident, breached the duty, and the breach of duty was the legal cause of injury. In other words, the bills would seek to limit residents from naming corporations, administrators, regional directors, investors, and any other person or corporation that did not provide any care to the nursing home resident, until an evidentiary hearing is held that proves a breach of duty. This proposed legislation would make it very difficult for a Plaintiff to name any person or entity that did not provide direct care to the resident. The new legislation would strike a balance to ensure those who need redress have access to the courts while ensuring that those not directly involved in providing care – investors, creditors and other individuals who have no role in the alleged act – are not included in nursing home claims.

Florida Statute §400.0237 regulates punitive damage procedures in nursing home negligence cases. The proposed changes make Plaintiff's evidentiary requirements stricter. The current version allows a court to consider evidence that is "reasonably calculated to lead to admissible evidence" to determine whether the Plaintiff may plead punitive damages. In other words, the Plaintiff may rely on evidence that would not necessarily be admitted as evidence at trial. The proposed version of the statute requires the court to hold a hearing to determine whether there is "sufficient admissible evidence" to allow the Plaintiff to plead punitive damages. Under the current version, Plaintiffs are free to make any number of allegations whether or not they are necessarily supported by admissible evidence. The proposed legislation would make it more difficult for the Plaintiff to establish that punitive damages are warranted.

In addition to the stricter evidentiary requirements, the proposed legislation would not allow the Court to rely upon state or federal surveys in considering punitive damages. Plaintiffs often rely on these surveys to not only establish that the individual nursing home facilities are guilty of punitive conduct, but also to establish that the corporate parents had knowledge of the surveys, did nothing to remedy the survey deficiencies, and thus, are also guilty of punitive conduct. The removal of the state and federal surveys from consideration in a punitive damage motion will be beneficial to defending nursing home litigation.

Finally, the new legislation would require that the trial court determine that there is a reasonable basis to believe that the Plaintiff, at the time of trial, will demonstrate by "clear and convincing evidence" that punitive damages are warranted. Under the current version of the statute, the Plaintiff need only establish that there is a "reasonable basis" to allow punitive damages to be pled. The "reasonable basis" standard, as often alleged by Plaintiffs, is a relatively low standard to meet. The new language would substantially affect the Plaintiff's burden of proof requirements at the punitive damage hearings. Predator law firms are using the current lax standards to seek punitive damages in every nursing home claim they bring forth. Punitive damages should only be applied in the most egregious of cases; yet, current law is often misapplied when determining whether a punitive damages claim should proceed in nursing home cases. These clarifications are needed to give guidance in due process in determining whether evidence exists that would warrant a claim for punitive damages.

The proposed legislation, SB 1384 and HB869, have the potential to have a substantial impact on defending nursing homes in civil litigation. The limitations as to who may be named in a nursing home civil action will make it less onerous for nursing home corporations to defend these matters. The restrictions on pleading punitive damages, including restrictions on evidence and a higher burden of proof, have the potential to make verdicts and settlement values decrease in Florida. In sum, these proposed changes will be favorable to the nursing home industry should they pass through the Florida Congress. At this time, both bills are in the committee phase. Cole, Scott, and Kissane, P.A. will be actively monitoring the bills throughout the legislative phases. As more information is known about the bills' likelihood of passing, future updates will follow.

RECENT DECISIONS DEFINING THE PERMISSIBLE SCOPE OF EXPERT TESTIMONY IN LONG-TERM CARE CASES

By Sherry M. Schwartz

The standard of care, causation, and issues giving rise to alleged healthcare provider negligence, generally require some aspect of expert testimony to prove the injury stemming therefrom. This article seeks to define the national trends of the courts applying this principle by assessing recent decisions on the admissibility of expert testimony in this arena.

The first case worthy of discussion is a recent decision rendered by the Massachusetts Court of Appeal, Suffolk County.[1] Contrary to the general rule that expert testimony is required to establish medical causation, the Court articulated a broad exception to the rule in holding that the patient *was not required* to present expert testimony on causation concerning a fall alleged to have resulted in a tibia fracture of the right leg fracture. The facts of this case are as follows:

A 53 year old resident was admitted to a nursing facility for rehabilitation. Pre-existing conditions included dementia, seizures, and profound osteoporosis. Upon admission, the facility noted that the Resident required two-person

assist for transfers. Shortly into the admission, the Resident suffered an alleged fall while be transferred by one CNA.

In this case, causation was heavily disputed. The nursing home retained an orthopedic surgeon to testify that the tibia fracture was of a pathological origin stemming from the osteoporosis, and not a result of the fall. Although the Court acknowledged that expert testimony is necessary "when proof of medical causation lies outside the ken of lay jurors, it is not necessary where such determination lies within general human knowledge and experience'…".[2] The trial court's directed verdict in favor of the nursing home, in large part was based on the Resident's failure to retain a causation expert. This ruling was overturned in light of the "exception" articulated by the Superior Court.

The next recent decision worthy of discussion pertains to a recent Pennsylvania Court holding relating to alleged staffing deficiencies.[3] By way of background, it is fairly well settled that generalized alleged deficient practices of a healthcare provider is not admissible absent testimony linking the practice with the actual injury sustained.[4] With regard to staffing, the same holds true. Notwithstanding, the level of proof required by a party to introduce this evidence during the liability phase of trial is often construed liberally in favor of the plaintiff.

To illustrate, in Hall v. Episcopal Long Term Care, the Resident presented evidence of former employees, specifically certified nursing assistants, attesting to the frequent staffing deficiencies at the facility during the relevant time frame. Plaintiffs also presented evidence that the facility would increase staffing levels in or around the time that state surveyors would visit, and then decrease the levels post surveys. Finally, Plaintiff's physician and nurse expert testified that short staffing directly led to the development of a UTI and improper hygiene.

Interestingly, the generalized testimony from ex-employees and plaintiffs' experts did not appear to articulate the specific staffing levels that were deficient. Arguably, even if the nursing home did increase staffing during surveys, the same would not necessarily establish that the former level was below the state requirement. Likewise, the generalized testimony of the former certified nursing assistants did not appear – at least from the written opinion – to state the basis for their opinion that the facility was always understaffed. Nevertheless, the Appellate Court held that the employee testimony coupled with the expert testimony, drawing a causal nexus to the staffing issue and the injury were sufficient to be presented to the jury in both the liability and punitive phases of the trial.[5]

The above opinion was rendered despite the fact that the nursing home presented evidence that they were never cited for short staffing. In fact, the facility records reflected that they were above the state minimum requirements for staffing prior to and during the subject admission. Corporate personnel also testified that short staffing was never a concern cited nor brought to their attentions, and the defense nursing expert testified that the facility was compliant with staffing requisites.[6]

Heading south, the Supreme Court in Arkansas recently rendered some favorable rulings limiting expert testimony in a case against Little Rock Health Care.[7] In this case, the Resident asserted that the president of the corporation that owned the facility, individually, owed a duty to Resident by virtue of certain federal regulations and internal policies of Little Rock Health Care. The Supreme Court of Arkansas disagreed in holding that no such duty existed simply by virtue of the ownership.

The policy relied upon by the estate provided as follows: "a governing body is established for this facility which has full legal authority and responsibility for the operation of this facility." The court further acknowledged that the federal regulation is relatively similar in this regard. Plaintiffs then presented expert testimony interpreting the policy and federal regulation to support her opinion that a duty was created in this case. Despite said language, the broad principles articulated did not in it of itself implicate personal liability of the president.

In reaching its conclusion, the Supreme Court in Arkansas held that "…the fact that an expert testifies that a duty existed does not make it so. A jury question is not created simply because an expert believes a duty exists." The court further held that experts may not be used as conduits to define general definitions to opine that the defendant's conduct fell below the standard of care. Specifically, the Court held that the "Trial court abused its discretion by admitting expert testimony on the meaning of the word 'dignity'[8] as used in the Residents' Rights Act; the average juror was competent to determine from the facts, when considered together, whether nursing home resident was treated with dignity."

In sum, the above recent decisions appear to uphold several general notions, perhaps best reaffirmed by a recent New Jersey decision defining the prohibition against "net opinions" of experts: "A net opinion is one that "present[s] solely a bald conclusion, without specifying the factual bases or the logical or scientific rationale that must undergird that opinion."[9] The Court explained that the "net opinion rule" derived from propensity of experts to often "explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom…", without explaining the causal nexus between the injury and damages.

The net opinion rule and the above discussion of some recent ruling paving the limitations and exceptions to limitations on expert testimony appears to offer sound advice from the perspective of defending healthcare claims. In sum, one must be weary of tenuous efforts to present expert testimony where the opinions are either unsupported by facts in the records, unrelated to issues in the case, and/or usurp the province of the jury in rendering opinions that fall within the realm of human knowledge and experience.

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We hope this report has been helpful and informative. As always, the attorneys of Cole, Scott & Kissane are ready to answer any questions you may have regarding the above. We will strive to keep you updated on any future developments regarding cases or legislation impacting Skilled Nursing Facilities.

References of each article are available upon request

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