APPELLATE CASE SUMMARIES

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Medical malpractice claim for a child's still birth does not accrue when autopsy fails to determine cause of death

Kernan v. Regents of the University of California (Aug. 29, 2022, A162750) __ Cal.App.5th __ [2022 WL 4363156], ordered published Sept. 20, 2022

Charlotte Kernan underwent an apparently successful prenatal procedure to rotate her fetus from the breach position. She returned to the hospital the next day because she could not detect fetal movement. Doctors determined she had suffered an intrauterine fetal demise (IUFD) and informed her that its cause is often unknown. At the time of her child's still birth, no medical literature linked the prenatal procedure with IUFD and the delivery doctor could identify no cause of death. Kernan later ordered an autopsy. For months, Kernan's delivery doctor failed to respond to her requests to review the autopsy report. She finally consulted a different doctor, who informed her that the hospital had initiated a morbidity and mortality conference regarding her case, but refused to tell her what was said at that conference. This triggered Kernan's suspicion that medical negligence caused her baby's death, and she filed suit against the hospital within one year. The hospital moved for summary judgment, arguing the action was time-barred under Code of Civil Procedure section 340.5(2) because it accrued when she was informed about the IUFD and ordered the autopsy. The trial court granted the motion and Kernan appealed.

The Court of Appeal reversed, holding there was a triable issue of fact whether Kernan subjectively and objectively suspected medical malpractice on the date she learned of the IUFD. Because doctors told Kernan that the cause of her IUFD was unknown, she continued seeking care and requested an autopsy. A reasonable trier of fact could conclude she did not, at that juncture, subjectively suspect medical negligence. Likewise, reasonable minds could differ regarding whether Kernan objectively should have suspected malpractice when her doctors said they did not know the cause of death, there was no known association between her prenatal procedure and IUF, and the autopsy report found no specific cause of death.

The litigation privilege entitled hospital to anti-SLAPP dismissal of physician's claims arising out of peer review proceedings

Bonni v. St. Joseph Health System (Aug. 23, 2022, G052367) __ Cal. App.5th __ [2022 WL 4232964]

Invoking Health and Safety Code section 1278.5, Dr. Aram Bonni filed a whistleblower lawsuit against two hospitals where he had admitting privileges alleging they retaliated for his complaints about patient safety by suspending his privileges and initiating peer review proceedings. The hospitals filed an anti-SLAPP motion, arguing that Dr. Bonni's claim arose from protected peer review proceedings and had no merit. The trial court granted the motion and Dr. Bonni appealed. The California Supreme Court ultimately granted review and held

that Dr. Bonni's retaliation action was composed 19 distinct claims, of which eight arose from protected activity. The Court remanded the case to the Court of Appeal to determine whether Dr. Bonni had established a probability of prevailing on the merits of those eight claims.

The Court of Appeal held that Dr. Bonni failed to show that any of the eight claims had merit since all of them were precluded by the litigation privilege. (See Civil Code, § 47.) The litigation privilege provide absolute protection for communications made in connection with official judicial or quasi-judicial proceedings, including medical peer review proceedings. The eight claims identified by the Supreme Court covered three categories of conduct: (1) the reporting of Dr. Bonni's suspension to the medical board, (2) the peer review proceedings, and (3) one hospital's settlement negotiations. Regarding the reports, the appellate court rejected Dr. Bonni's argument that his claim was based on noncommunicative acts because the hospital engaged in inherently communicative acts when making the statutorily required reports. Next, the court held that the hospitals' initiation of peer review proceedings, like the filing of a lawsuit, is a protected communication distinct from the act of suspending privileges. Similarly, Dr. Bonni's claims based on statements made during peer review were part of an official proceeding. Finally, the court held that Dr. Bonni's tort claims based on settlement negotiations were barred by the litigation privilege regardless whether he might bring a separate equitable action to rescind the settlement agreement.

Ambulance company owed a general duty of care to a patient who jumped out of a moving ambulance while being transported

T.L. v. City Ambulance of Eureka, Inc. (Sept. 29, 2022, A162508) __ Cal. App.5th __ [2022 WL 4544295]

T.L., a minor, was admitted to a crisis stabilization unit where a clinician placed her on a 72-hour mental health hold under the Welfare and Institutions Code. The following day, T.L.'s attending psychiatrist determined that she was stable and could be safely transferred to an in-patient facility where she could receive a higher level of care. The psychiatrist decided not to prescribe specific transfer protocols, such as a sedative or safety restraints. Discharge nurses advised the paramedics and the EMT staffing the transfer ambulance that T.L. was on a mental health hold, but that she was calm, cooperative, and stable for transfer. Ambulance personnel reviewed T.L.'s medical records and saw no behavioral problems warranting the use of restraints. They placed T.L. on a gurney and buckled her in to the ambulance with two safety belts. Fifteen minutes into the transport, and without warning, T.L. unbuckled both belts and stepped out of the back of the moving ambulance, suffering serious injuries. T.L. sued the ambulance company for negligence. It moved for summary judgment on the ground that, under *Hernandez v. KWPH Enterprises* (2004) 116 Cal.App.4th 170, it owed no duty to prevent T.L. from engaging in "impulsive, reckless, irrational and self-harming conduct." The trial court granted the motion, concluding *Hernandez* was dispositive, and T.L. appealed.

The Court of Appeal reversed. The court distinguished *Hernandez*, which involved a patient who had entered an ambulance voluntarily and then ran away after arriving at the hospital, and who was later struck by a car while crossing a road. By comparison, T.L. was being transferred involuntarily from one facility to another, and was injured during transport, rather than after arrival. The court rejected the defendants' argument that they had no duty to protect T.L. from unilaterally and unexpectedly unbuckling the belts and stepping out of the ambulance. To the contrary, the trained and licensed paraprofessionals providing a medical transportation services owed T.L. a general duty to act with due care based on their special relationship with her. The court further determined that the *Rowland* factors did not warrant a departure from a general duty to use reasonable care to protect T.L. during transport. The court did not hold that ambulance personnel acted negligently, or that they had a duty to restrain T.L. because she was on a mental health hold. The court only held that they had a duty to use reasonable care under the circumstances (such as equipping the gurney with a shoulder harness, and/or locking the rear door of the ambulance) to ensure safe transport.

Negligently performing an MRI scan does not substantiate an elder abuse claim

Kruthanooch v. Glendale Adventist

Medical Center (Oct. 4, 2022, B306423) __ Cal.App.5th __, 2022 WL 5126799

Daniel Kruthanooch, an elderly man, presented to Glendale Adventist Medical Center (GAMC) after experiencing weakness. A GAMC doctor ordered an electrocardiogram (EGC) and an MRI. A GAMC technologist failed to remove the EGC pads prior to the MRI, resulting in burns to Kruthanooch's abdomen following the scan. Kruthanooch sued GAMC for professional negligence, elder abuse, and elder abuse per se. When he died, his estate was substituted in his place and abandoned all claims other than elder abuse. A jury found GAMC liable for elder abuse, but awarded no damages. The trial court then granted GAMC's motion for JNOV, ruling there was no substantial evidence that GAMC had care or custody of Kruthanooch, or that it acted with neglect or recklessness. The estate appealed.

The Court of Appeal affirmed. First, the court held the estate fail to present substantial evidence that GAMC had a robust caretaking or custodial relationship with Kruthanooch required to establish a custodial relationship under the Elder Abuse Act, as construed by *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148. The court explained that the heightened remedies provided under the Act are available only when the defendant has "ongoing responsibility for one or more basic needs" of an elderly patient. Although GAMC admitted Kruthanooch for in-patient care and provided him with mobility and hydration assistance, that did not mean GAMC assumed a robust caretaking or custodial relationship where Kruthanooch was cognitively aware; capable of making his own medical decisions; and present at GAMC for only a few hours prior to his injury. Second, the court found no substantial evidence of neglect. The court explained that neglect refers not to the provision of substandard care, but instead to a caregiver's failure to provide for the basic needs and comfort of an elder or dependent adult. While GAMC's failure to screen Kruthanooch for EGC pads could support a finding of professional negligence based on the estate's expert standard of care evidence, it was not evidence of neglect under the Act (i.e., the failure to provide ***any*** medical care or attend to a patient's basic needs).

Breach of confidentiality claim under the CMIA requires proof that medical information was "actually viewed" by an unauthorized party

Vigil v. Muir Medical Group IPA, Inc. (Sept. 26, 2022, A160897) __ Cal. App.5th __ [2022 WL 10239738], ordered published Oct. 18, 2022

A former Muir Medical Group employee downloaded and retained the private medical information of over 5,000 patients. Muir patient Maria Vigil filed a class action complaint against Muir alleging violations of the Confidentiality of Medical Information Act (CMIA) (Civ. Code, §§ 56 et seq.) and seeking statutory damages for each class member. The trial court denied Vigil's motion for class certification, ruling that common issues would not predominate because, under *Sutter Health v. Superior Court* (2014) 227 Cal.App.4th 1546, each class member would need to show that his or her confidential information was "actually viewed" by an unauthorized party to obtain CMIA remedies. Vigil appealed.

The Court of Appeal affirmed. Agreeing with *Sutter Health*, the court explained that negligently losing possession of confidential medical information does not, by itself, establish a breach of confidentiality under the CMIA. More is required—proof that the information was *actually viewed* by an unauthorized party—because the CMIA's focus is medical information, not physical records. This construction of the CMIA advances its purpose to protect patient privacy while accommodating common law negligence principles, which require proof of causation and injury beyond the mere breach of a duty. Because the potential for an unauthorized party to access confidential information does not establish a CMIA claim, Vigil had to show that actual unauthorized viewing of patient medical information could be established on a class-wide basis. She failed to do so, therefore the trial court did not abuse its discretion when it ruled that individual issues would predominate over common issues. While the record showed that the former employee may have viewed some of the purloined medical information, each class member's right to recover under the CMIA depended on the facts of his or her individual circumstances.

Hospital immune from civil liability for reporting to National Practitioner Data Bank that doctor surrendered privileges while under investigation

Wisner v. Dignity Health (Oct. 18, 2022, C094051) __ Cal.App.5th __

[2022 WL 16706648], certified for partial publication Nov. 4, 2022.

Dr. Gary Wisner was criminally charged with making false insurance claims. The Medical Board of California also issued an accusation seeking to revoke or suspend his license for gross negligence and repeated negligent treatment of multiple patients. Six months later, Dr. Wisner asked Dignity Health St. Joseph's Medical Center (SJMC) to place him on its on-call panel. He held courtesy staff privileges at SJMC, but had not treated patients there for two decades. SJMC's chief of staff "began an investigation" and asked Dr. Wisner for all available information about the accusation and the indictment. The chief of staff explained that SJMC needed to independently review the evidence to assess the validity and peer review implications of the charges. Dr. Wisner told SJMC he had no additional information to provide, asserted that he was "clearly" not under investigation at SJMC, and "resign[ed] all privileges." SJMC filed a statutorily mandated report with the National Practitioner Data Bank (NPDB) that Dr. Wisner had surrendered his clinical privileges while under investigation. Dr. Wisner responded by asserting the NPDB report was false and asking the Secretary of the Department of Health and Human Services to review its accuracy. He also sued SJMC for fraud, defamation, and other claims. In the administrative proceeding, the Secretary rejected Dr. Wisner's challenge, finding no basis for Dr. Wisner's claim that the report should not have been filed or that it was inaccurate, incomplete, untimely, or irrelevant. In the civil action, the trial court granted SJMC's anti-SLAPP motion. Dr. Wisner appealed.

The Court of Appeal affirmed. Dr. Wisner conceded that filing an NPDB report is a protected activity, but argued that some of his claims arose from unprotected activity, such as SJMC's refusal to place him on its call panel, and SJMC's demand that he exercise his prehearing discovery rights in the Medical Board's administrative proceeding and provide that discovery to SJMC. The Court of Appeal held that Dr. Wisner forfeited this contention by failing to raise it in the trial court. The Court of Appeal agreed with the trial court that Dr. Wisner could not meet his burden under the anti-SLAPP statute to demonstrate a probability of prevailing on the merits. Under the Health Care Quality Improvement Act (42 U.S.C. § 11101 et seq.), SJMC was immune from liability for making a mandatory NPDB report when a physician surrendered privileges while under investigation. The court rejected Dr. Wisner's contentions that the meaning of the term "investigation" was a jury question, and that the term should be narrowly construed to mean a formal investigation pursuant to hospital bylaws. Rather, the statutory term had to be construed by the court as a matter of law. Relying on the NPDB Guidebook's broad definition, the court held that an "investigation" commences as soon as there is a focused "inquiry" into potential misconduct, and therefore the undisputed evidence established that Dr. Wisner was "under investigation" when he resigned. The court explained that allowing hospital bylaws to control the statutory definition of "investigation" would result in ad hoc and inconsistent reporting by health care entities across the nation, thwarting the purpose of the reporting requirement.

Plaintiffs may withdraw from arbitration if hospital doesn't timely pay arbitration fees

Williams v. West Coast Hospitals, Inc. (Dec. 22, 2022, H049177) __ Cal. App.5th __ [2022 WL 17881773]

Ann Williams was admitted to a West Coast Hospital center to recover from hip surgery. West Coast discharged her to an assisted living facility where she died five days later. Williams' son (and other family members) sued West Coast for elder abuse and wrongful death, alleging that its failure to nourish and hydrate Williams cause fatal renal failure. The trial court granted West Coast's motion to compel arbitration, which stayed the litigation, but West Coast then failed to pay its arbitration filing fee on time. Plaintiffs moved for an order vacating the litigation stay based on their election to withdraw from arbitration under Code of Civil Procedure sections 1281.97 and 1281.98 (because West Coast had not timely paid arbitration fees). Although West Coast belatedly paid its fees, the trial court granted the motion. West Coast appealed.

The Court of Appeal affirmed. First, the court rejected West Coast's argument that withdrawal was not permitted until the arbitrator found the drafting party was in default. The court held instead that the statutes empower consumers who are

parties to arbitration agreements to *unilaterally withdraw* from arbitration upon the drafting party's failure to pay required fees. The court also rejected West Coast's argument that the trial court lacked jurisdiction to vacate its own stay order, explaining that the trial court's vestigial jurisdiction over the action at law allowed it to vacate the litigation stay once plaintiffs withdrew from the arbitration. Finally, the court refused to draw a distinction between voluntary and mandatory arbitration agreements, holding the withdrawal statutes applied equally to both.

Preservation letter is not notice of intent to sue under CCP § 364; confidential mental health records are sometimes admissible

McGovern v. BHC Fremont Hospital, Inc. (Dec. 21, 2022, A161051) __ Cal. App.5th __ [2022 WL 17828959], ordered published Jan. 4, 2023

On November 7, 2015, Shannon McGovern was attacked and injured by a fellow patient at BHC Fremont Hospital, Inc. Her counsel sent Fremont a letter on March 9, 2016 stating McGovern had "serious" injuries "to her head, and back, including a broken clavicle," requesting the hospital preserve evidence, and stating that counsel was gathering information to present a prelitigation demand to the hospital's insurance carrier. On October 27, 2016, McGovern's counsel sent Fremont a "Notice of Intent to Commence Action for Medical Negligence Pursuant to Code of Civil Procedure [section] 364" detailing her specific injuries. McGovern sued Fremont on January 20, 2017, and demanded discovery of Fremont's mental health records for the patient who attacked her. Fremont moved to quash and for summary adjudication of McGovern's professional negligence claims under MICRA's 1-year statute of limitation (Code. Civ. Proc., § 340.5), arguing that the March 9 letter constituted a notice of intent to sue, so the October 27 letter failed to toll the limitations period. The trial court granted both motions, and later granted Fremont's motion for summary judgment. McGovern appealed.

The Court of Appeal reversed. First, the court held that McGovern's March 9 letter was not a notice of intent to sue under section 364, so her later October 27 notice tolled the limitations period. The court explained that the March 9 letter did "not state, nor even imply, that [plaintiff] was giving 'notice of her intention to commence [an] action.' " Instead, the bulk of plaintiff's letter regarded preserving evidence, and it only mentioned a future prelitigation demand in hopes of *avoiding* litigation. A threat of *potential* litigation is insufficient to give notice under section 364. The March 9 letter also failed to meet section 364's requirement to state "with specificity the nature of the injuries suffered;" it contained only generalized statements regarding McGovern's injuries, not "treatment, sequelae, or residual injury," or any amount of economic or noneconomic losses.

The trial court also erred by quashing discovery of the attacker's mental health records based on a mistaken belief such records are always inadmissible. Although the discovery implicated patient privacy concerns, a statute permits the use of confidential patient records in litigation " 'as necessary to the administration of justice.' " (Welf. & Inst. Code, § 5328, subd. (a)(6).) The psychotherapist-patient privilege (Evid. Code, § 1014) likewise does not always bar disclosure since it can be waived or subject an exception, such as when a patient presents a serious danger to others (Evid. Code, § 1024). Thus, the trial court was required to reconsider the motion on remand.

Medical malpractice plaintiffs lack standing to seek declaratory relief challenging MICRA's constitutionality

Dominguez v. Bonta (F082053 & F082208, Dec. 19, 2022) __ Cal. App.5th ___ [2022 WL 17752246], ordered published Jan. 6, 2023

Heirs of deceased patients sued healthcare professionals for medical malpractice and filed this declaratory relief action against the California Attorney General challenging the constitutionality of two pre-A.B. 35 MICRA statutes: (a) Civil Code section 3333.2, which caps noneconomic damages in professional negligence actions against health care providers; and (b) Business & Professions Code section 6146, which limits attorneys' contingent fees in such actions. The heirs alleged that it was infeasible for their law firm to represent them due to the damages cap and contingent-fee limitation, and that the insurance crisis that precipitated MICRA has been alleviated. They pleaded violations of their right to petition the government and the takings, equal protection, due process, and jury trial provisions in both the federal and statute constitutions. The

trial court sustained the Attorney General's demurrer without leave to amend, ruling the heirs lacked standing. The heirs appealed.

The Court of Appeal affirmed. After explaining how the MICRA statutes have been repeatedly upheld against constitutional challenges by both the Supreme Court and Courts of Appeal, the court held the heirs lacked standing to challenge the constitutionality of MICRA. The "potential that heirs may ultimately have to prosecute their medical malpractice case in propria persona in the event their current medical malpractice counsel withdraws does not rise to the level of a cognizable injury for standing purposes." Accordingly, the "heirs' alleged injuries are neither concrete nor actual. They are, at present, conjectural and hypothetical." For the same reason, there is no basis for concluding that the heirs will suffer hardship if declaratory relief is withheld. The litigants' mere "difference of opinion" as to the validity of MICRA statutes "is obviously not enough by itself to constitute an actual controversy" within the meaning of California's declaratory relief statute. (Code Civ. Proc., § 1060.)