PENNSYLVANIA LEGAL UPDATE

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PHYSICIANS RESPONSIBLE FOR ACCURATE DIAGNOSES

The heirs of a 23-year-old man who died unexpectedly sued the young man's physician in a case that clarified the law of contributory negligence in Pennsylvania.

The young man saw his physician for treatment and reported that he was vomiting and suffering from blurred vision, dry mouth, lightheadedness, and inability to work. The physician diagnosed him with influenza and allowed him to go home. She knew that the young man had a family history of diabetes and had lost 22 pounds since his previous visit, weighing only 144 pounds at 6'1" tall. She suggested that he obtain a fasting blood draw within the next month. Less than one month later, the young man returned, complaining of nausea and vomiting. The physician found no fever, but noted that the young man's heart rate was elevated. She diagnosed gastroenteritis and again sent him home, where he died the following day of diabetic ketoacidosis from Type 1 diabetes.

In the first trial, the judge instructed the jurors that they should consider the young man's contributory negligence because he had not followed up on the physician's suggestion that he have blood work.

But on appeal, the Pennsylvania Superior Court found that there was no basis for the jury to consider contributory negligence at all. The young man had reported all of his symptoms accurately and, on both visits, the physician had mistakenly given him an incorrect diagnosis. Patients are contributorily negligent when they do not report their symptoms accurately and completely. When a patient seeking a diagnosis accurately reports his or her symptoms, asks necessary questions, and listens to the physician's answers, his or her duty as a patient is satisfied. Patients are entitled to rely on their health-care providers' diagnoses and directions.

The court found that the young man had not been negligent in failing to obtain a fasting blood draw prior to his death because the physician did not order testing or communicate any urgency but, instead, told the young man to follow up with blood work within the month. On the date of the young man's death, just three weeks later, that month had not yet elapsed.

The court also noted that the physician's second mistaken diagnosis of gastroenteritis superseded the young man's delay in scheduling an earlier follow-up consultation or obtaining a fasting blood draw. Having enlisted the doctor's assistance on a second occasion and having apprised her again of his symptoms, the young man was entitled to accept her diagnosis of gastroenteritis and go home.

Patients' responsibilities are broad and should be based on common sense. Patients promptly must report all symptoms and personal history, truthfully and completely. Patients are responsible for asking questions to be sure that they understand their physicians' instructions. Patients are responsible for following those instructions. Finally, patients are responsible for requesting follow-up consultations if their symptoms change or worsen. However, patients are not responsible for second-guessing their health-care providers or for detecting inaccurate diagnoses or poor medical advice. In malpractice claims, judges can instruct jurors to consider contributory negligence only when there is evidence that the patient has failed in a patient responsibility.

SURVEILLANCE OF INJURED WORKERS

A Pennsylvania man who suffered a broken arm when he fell at work later sued a private detective agency for invasion of his privacy and lost. The injured man claimed that the agency had violated his privacy when it videotaped him praying inside a mosque.

The detective agency had been hired by the injured man's employer's insurance company. Insurance companies that handle work-injury claims frequently put injured claimants

under surveillance. Surveillance using videos or photographs can be a successful tool to document occasions when injured claimants engage in physical activities that are inconsistent with their claimed injuries. In the case of the injured worker who sued the detective agency, the detective used a zoom lens from across a highway, standing 80 yards from the mosque. He filmed the injured worker through a window while the worker stood and knelt for 45 minutes.

The injured man argued that he had an expectation of privacy even while praying in public. He claimed that constitutional freedom affords everyone complete privacy when engaged in prayer and worship, even in visible locations. Contending that acts of worship are always private, the injured worker argued that even though he participated in the worship service with others, he sought to keep the service "free from interference of the world," and, in particular, he sought to "keep his prayers to his god private to himself."

The court rejected his claims, noting first that established law acknowledges that all injured workers who raise compensation claims have a diminished expectation of privacy. Simply by raising compensation claims, injured workers give up privacy in their medical records and even in their physical presence in public places. The court observed that the mosque was open to the public, and that the injured man was praying directly in front of a plate-glass window. The court refused "to create a privacy expectation based on religion," and focused on the fact that the injured worker was in public at the time of the surveillance. The court noted that the worker's physical activities, and not his thoughts, prayers, or even expressions of prayer, were viewed and videotaped.

A critical fact in the court's decision was that the detective was standing at a lawful vantage point in a parking lot across the highway from the mosque. His use of a zoom lens, similar to using binoculars, was deemed reasonable. Also important was the fact that the injured worker could have been seen and watched by any member of the non-trespassing public standing outside the mosque. The court found that the worker could not have reasonably expected that he was unseen while praying.

While surveillance at times of prayer or worship may offend some people, the law links

privacy rights to reasonable expectations of privacy. When people pray in public, they have no right to assume that they are free from observation and video recording. All injured workers should expect surveillance. Any physical activity that is strenuous, against medical advice, or beyond the injured person's physical capacity should be avoided because surveillance can create the impression that the claimant is not injured. As to claimants who are in fact feigning or overstating their injuries, surveillance can produce evidence that leads to insurance fraud prosecution.

SKIING ACCIDENTS IN PENNSYLVANIA

In two cases that illustrate the complexity of Pennsylvania law on ski injuries, a skier who was injured when he was struck from behind by a snowboarder successfully sued a Pennsylvania ski resort, but a skier injured when a lift operator accidentally disregarded her request for help was barred from suing the resort.

Pennsylvania law strictly limits the rights of skiers to sue ski resorts. The Pennsylvania Skier's Responsibility Act, which protects ski resorts from lawsuits, notes that skiing is an "inherently dangerous" sport, and holds that all skiers assume all risks associated with skiing. This "assumption of the risk" makes it almost impossible for skiers to sue a resort for a ski-related injury. Whenever a skier is injured by an event that is an "inherent risk" of skiing, he or she has no claim against the resort.

Skier vs. Snowboarder

The skier injured by the snowboarder avoided the liability limits of the Act, however, by focusing on the snowboarder's alcohol consumption. The injured skier claimed that the snowboarder was part of a high school group whose drinking in the parking lot and on the slopes was obvious and should have been controlled or prevented by the resort. Moreover, the injured

skier claimed that the resort was generally aware of alcohol abuse by high school groups at the resort. The Pennsylvania Superior Court agreed that the injured skier was entitled to his day in court. The court found that intoxicated snowboarders are not an inherent risk of downhill skiing. At trial, the injured skier will have to prove that the resort had reason to know that patrons were consuming alcohol while using the resort's ski facilities and that the resort was careless in responding to the problem.

Fall from Chair Lift

The other injured skier did not fare as well with the courts. She was injured when she fell from a moving chair lift. Concerned that her six-year-old nephew would have difficulty boarding a high-speed chair lift, the woman asked the chair operator to slow the lift as she boarded with the child. The operator could not slow the chair because it ran at only one speed, but he suggested that he could stop the lift twice—once to permit the woman and child to approach the boarding area and, again, just before they boarded the chair.

The operator stopped the lift, and the woman and child moved into its path, but the operator failed to stop the chair a second time. The woman managed to board the moving chair, but the child struggled. As the chair left the boarding area, the child was not properly seated, and he began to slip off of the chair. The woman tried to help the child, but both of them fell from the moving chair outside the boarding area. The child was uninjured, but the woman suffered serious shoulder and hip injuries.

The Pennsylvania Supreme Court dismissed the woman's claims, relying on the Act's "no-duty" rule. The court noted that the sport of downhill skiing encompasses more than merely skiing down a hill. It includes all activities directly and necessarily incident to the act of downhill skiing. Such activities include boarding the ski lift, riding the lift up the mountain, alighting from the lift, skiing from the lift to the trail, and, after a run has been completed, skiing toward the ski lift to start another run or skiing toward the base lodge or other facility at the end of the day.

As to the operator's failure to stop the chair the second time, the court concluded that the

woman boarded the chair in the face of a well-known and obvious danger, and that she did so safely. Her efforts to help her nephew, while admirable, were the cause of her injuries. With the exception of injuries caused by other intoxicated skiers, Pennsylvania courts consistently dismiss skiers' lawsuits against ski resorts. Skiers simply must expect to assume all risks of any kind directly associated with skiing.

LAW FIRMS AND DEBT COLLECTION

Can a letter be legally misleading just because it comes from a lawyer? Surprisingly, the answer is yes. A federal magistrate judge in the Middle District of Pennsylvania has recently ruled that lawyers who act as debt collectors cannot use their law firm's letterhead for collection letters unless the lawyer has actually reviewed the file and the firm is truly poised to file a lawsuit.

The case involved a New York law firm that sent two letters to a Pennsylvania homeowner. The homeowner had fallen behind on his home equity loan payments. While the homeowner and the lender disputed the amount of the unpaid balance due, the account arrears mounted. The lender stopped negotiations and hired the law firm; the firm sent two collection letters on its letterhead.

The homeowner sued the law firm under the Fair Debt Collection Practices Act (FDCPA), claiming that when lawyers send demand letters they are responsible for investigating the underlying facts. The homeowner also argued that lawyers engage in illegal unfair practices if they write letters when they have not actually been hired to institute a lawsuit.

The federal magistrate judge agreed, holding that the two letters amounted to clear violations of the FDCPA because the use of the law firm's letterhead gave the false impression that a lawyer was working on the case and planning to sue. "The least sophisticated consumer would be likely to believe upon receiving a communication from an attorney for the lender that

the debt collection process has entered into a phase where the lender through its attorney will begin to use procedures established by law and known to attorneys to collect the debt," the judge wrote.

Even though the letters contained the statement, "At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account," the judge found that this disclaimer language did not protect the law firm. The judge stated that, "in our view, that language does not mitigate the impression of potential legal action" because a law firm's letter "does bear an implied threat of litigation, and does connote that it is a communication from an attorney." Had the law firm actually reviewed the facts of the case and assumed the responsibility for filing a lawsuit, the homeowner likely would not have prevailed.

Pennsylvania federal judges have generally held that a debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate. Fair debt collection practices law focuses on "the least sophisticated consumer," assessing debt collection practices according to what impression or understanding is held by the least sophisticated consumer. Pennsylvania's federal judges have determined that the least sophisticated consumer would assume that a law firm is comprised of attorneys and that it does legal work. Such a consumer "would be likely to believe that the law firm is acting as an attorney for the lender in communicating with the consumer concerning the loan."

Lawyers who engage in debt collection simply cannot avoid the fact that communications from lawyers have a strong impact. Law firms hired to write demand letters must reconsider the use of their law firm's letterhead. When lawyers send debt collection letters, they are obliged to reasonably investigate and understand the underlying debt, and may start collection proceedings only if they intend to move forward with the case.