The Unsettled Law of What Constitutes a Medical Claim Under R.C. 2305-113

Legal Analysis

In 2016, after many years of legislative amendment and common law interpretation, one would expect the definition of "medical claim" to be clear and determined. However, such is not the case and often requires a multi-prong test. "Medical claims" are defined by R.C. 2305.113(E)(3). This section broadly includes claims "against any employee or agent of a physician, podiatrist, hospital, home, or residential facility… that arises out of the medical diagnosis, care or treatment of any person." Medical diagnosis, care and treatment are not defined. Using this statute and interpreting it as written, one could assume that a hospital pharmacy whose employees negligently fill a prescription written by a physician could only be sued in Ohio for medical malpractice and not general negligence. However, such an assumption would be wrong in the Stark County courtroom of Judge Kristin G. Farmer.

On June 6, 2016, Judge Farmer applied R.C. 2305.113(E)(3) in this very scenario in the case of *Yerkey v. Spectrum Orthopaedics, Inc., et al.,* Stark County Court of Common Pleas Case No. 2016-CV-00794 when she denied a Motion to Dismiss. In *Yerkey,* the issue before the Court was whether the claim against the pharmacist was a medical claim pursuant to R.C. 2305.113(E)(3). Judge Farmer found that had the General Assembly intended to include claims against a pharmacist it would have done so. Current listed providers under R.C. 2305.113 are physicians, podiatrists, hospitals, homes, residential facilities, CPNs, RNs, APNs, PTs, EMTs, dentists, optometrists and chiropractors. Psychologists, occupational therapists, acupuncturists, medical assistants, general office staff and many other types of ancillary individuals not listed. The Court further found that the misfill claim did not arise out of medical diagnosis, care, or

treatment and denied the Motion to Dismiss letting the case proceed as one of general negligence.

In light of this ruling, and discussion of it in the medical negligence community, I conducted a review of the case law in this regard to see how other courts have been dealing with this issue. The review has revealed that other Ohio courts have made similar findings of common law negligence in assessing whether the claim before it is one of medical malpractice. In *Christian v. Kettering Med. Ctr.,* 2016-Ohio-1260, 2016 Ohio App. LEXIS 1178 (Ohio Ct. App. Montgomery County Mar. 25, 2016) the second Appellate District found that injury resulting from the movement of a patient by a registered nurse in front of a hospital, from a privately owned car to a hospital wheelchair, prior to any interaction with diagnostic staff, did not constitute a medical claim. Even though the *Christian* nurse testified the wheelchair transfer required specific medical skill, the Court found that since there was no discussion of the Plaintiff's medical condition while the transfer was happening, the act of transfer was too attenuated from the receipt of medical treatment, care, and diagnosis to constitute a medical claim. The Court also focused on the fact there was no medical treatment or diagnosis at the time and the need to transfer the patient from the private vehicle to the wheelchair was done without a doctor's order.

The Seventh District Court of Appeals in *Haskins v. 7112 Columbia, Inc.,* 2014-Ohio-4154, 20 N.E.3d 287, 2014 Ohio App. LEXIS 4068 (Ohio Ct. App., Mahoning County, 2014), while making a judgment on the pleadings, held that the changing of bed sheets in a nursing home that resulted in injury also did not constitute a medical claim. In *Haskins,* the injured party was bedridden and the staff was required to change the sheets while she was still in bed. The Court found the claim to be one of common negligence since two people changing sheets had no

particular skill or expertise outside of common knowledge. Further, the victim was not being prepared for any sort of medical procedure and the action was not ordered by a doctor.

The First District Court of Appeals in *Conkin v. CHS-Ohio Valley, Inc.,* 2012-Ohio-2816,2012 Ohio App. LEXIS 2467, 2012 WL 2367391 (Ohio Ct. App. Hamilton County June 22, 2012) was asked to determine whether the use of medical equipment involved a medical claim. The care in issue involved a transfer from a wheelchair to a Hoyer lift. In a two-prong test the Court assessed first whether the equipment was used to prevent or alleviate a physical or mental defect or illness. Essentially, whether the equipment was inherently a necessary part of a medical procedure or if it arose out of a physician ordered treatment. Second, the Court assessed whether the equipment required a certain amount of professional expertise or skill to use it. The Court found the claim to be one of common law negligence even if the Hoyer lift was used to alleviate problems associated with range of motion since there was no indication the use of the lift was an inherent part of a medical procedure or that it arose out of physician ordered treatment. The Court also noted the evidence was unclear whether the transfer from wheelchair to the Hoyer required medical expertise or skill.

The Fourth District Court of Appeals adopted some of the First District's *Conklin* assessment in *McDill v. Sunbridge Care Enters.,* 2013-Ohio-1618, 2013 Ohio App. LEXIS 1503, 2013 WL 1716748 (Ohio Ct. App., Pickaway County Apr. 11, 2013). In *McDill,* a rehabilitation patient was being assisted by two aides while washing her hands when she fell and was injured. The Court found the claim to be one of common law negligence since the injury did not arise out a medical diagnosis, care, or treatment. The victim also was not being transferred to or from a medical procedure. Likewise, escorting the victim to the sink to wash her hands did not involve the prevention or alleviation of a physical or mental defect or illness.

The Tenth District Court of Appeals in *Summers v. Midwest Allergy Associates, Inc.,* 10th Dist. No. 02AP-280,2002-Ohio-7357 found that a patient who is struck on the head by an improperly secured and falling cabinet during allergy treatment involved a claim for common negligence. The Court focused on the fact the falling cabinet did not arise directly from medical diagnosis, care, or treatment. Instead, it arose from negligent maintenance of the premises and involved a premises liability claim.

Although the above courts found some claims to be ones of common negligence based on the specific fact patterns, other courts have found actions to be solely ones of medical malpractice based on similar fact patterns. In *Cart v. Manor at Whitehall,* Franklin County Court of Common Pleas Case No. 13-CV-3567 Judge Richard Sheward was asked to determine, on a Motion to Dismiss, whether the claim that one aide was used for patient transfer instead of two as ordered by a doctor was a medical claim as opposed to a common negligence claim. Judge Sheward focused on *McDill* and *Summers* in large part in conducting his assessment. Even though the facts were similar to *McDill,* the *Cart* Court reached a different conclusion determining the claim to be one solely for medical negligence and granted the Motion to Dismiss without prejudice since the Complaint was filed without a required Affidavit of Merit. The Court hinged its decision on the fact there was an order for a two person transfer and the victim was a known risk for falls due to a medical condition that caused his legs to collapse unexpectedly. Likewise, the injury was not due to a force separate from the patient's medical care, diagnosis, or treatment under *Conkin.* Judge Sheward determined the care requirements dictated a two person assisted transfer and found this was ancillary to and a necessary part of his medical treatment or care.

Similarly, in *Sliger v. Stark county Visiting Nurses Serv. & Hospice,* 2006-Ohio-852, 2006 Ohio App. LEXIS 742 (Ohio Ct. App. Stark County Feb. 21, 2006), the Fifth District Court of Appeals found that the improper application of post-surgical dressings by a nurse at a patient's home was solely a medical negligence claim since it arose directly from the medical diagnosis, care, or treatment of the patient.

Further, in *Bush v. DuBos,* 1976 Ohio App. LEXIS 6181 (Ohio Ct. App. Mahoning County Feb. 12, 1976) the Seventh District Court of Appeals determined that a prescription misfill by a pharmacist was a medical claim since the pharmacist was practicing a profession at the time of the error. The Court focused on the fact that there was required to be used some special skill attained through training with the need of judgment.

Finally, in *Straquadine v. Crown Pointe Care Ctr.,* 2010 Ohio Misc. LEXIS 11331 (Franklin County Court of Common Pleas Case No. 09-CVC-10-15417) Judge John Bender determined that a Motion to Dismiss for failing to have an Affidavit of Merit was proper since the case involved a medical claim. In *Straquadine,* the victim was an Alzheimer patient in a home who was at fall risk according to his medical records. He was injured during transportation back to the home from lunch at Cracker Barrel. The Court looked to *Browning v. Burt,* 66 Ohio St.3d 544, 1993-Ohio-178 for the definition of medical diagnosis, care, or treatment. Judge Bender determined that since the Complaint solely alleged the Defendant had a duty to guard against falls because they knew he was at a fall risk due to Alzheimer's disease, this required the Defendant to take the steps necessary to alleviate the effects of a physical or mental defect or illness, which is providing medical care. This requires care outside of common knowledge and expert testimony per Judge Bender. And, as such, is a medical claim.

Discussion

In assessing whether a claim is one for common law negligence or is a medical claim subject to heightened requirements, one needs to assess the factual cause and origin of the injury under R.C. 2305.113 and the multi-prong tests that have evolved in each venue. Was the care provider listed under the statute? Was the care provider an agent or employee of a listed care provider? Did the injury arise out of the medical diagnosis, care, and treatment of the patient? Did the injury occur prior to diagnosis, care, and treatment occurring? Did the injury arise out of someone exercising specialized expertise, skill, or knowledge? Did the injury arise out of the following or failure to follow a physician order? Did the injury arise out of preparation for a medical procedure that was ordered? Did the care involve medical equipment ordered to be used by a physician, intended to prevent or alleviate a physical or mental defect or illness, or was otherwise a necessary part of a medical procedure? Unfortunately, each fact pattern is different and there is more grey than black and white in this assessment. One thing is clear; That is the law is still unsettled and will continue to evolve in this regard and protections need to be put in place accordingly.

Practice Pointers

The ultimate question is what should a practitioner do when presented with a factual scenario that could be construed under a broad and undetermined interpretation of R.C. 2305.113? To be on the safe side, the case should be filed within one year with Affidavits of Merit as a medical claim. In addition, the case should be pled in the alternative as one for common law negligence. Once the discovery is complete and evidence is in, one could then let the case proceed to jury trial or move for summary judgment to determine which claim applies for trial. In most instances, the claim must either be a medical claim or a common law negligence

claim and not both. However, there are some foreseeable circumstances with multiple issues and multiple care providers where both medical claims and common negligence claims could exist. A determination would then need to be made on dismissing of one or more of the claims or proceed to trial on all. The benefits of proceeding on a common law negligence claim involve a longer 2 year statute of limitation, no need for Affidavits of Merit, and most importantly, no cap on catastrophic non-economic damages, which in turn, increases a potential punitive damage-capped award. Nevertheless, it is very importation to protect and timely file both claims until a final determination can be made in this regard

Conclusion

Many practitioners are quick to determine that all matters involving any injury related to medical care are medical claims. There are others who believe that unless the specialty of the provider listed in R.C. 2305.113 are specifically involved, no medical malpractice case exists and the action is solely one for common negligence. The reality is that under R.C. 2305.113, and the mixed-message common law that has evolved, both schools of thought could be correct. More importantly, they could also be incorrect. However, they likely will not find out until a judge has ruled on motions and the final judgment on the fact specific issues in their case has been made by the Court of final appeal. If they did not file both claims, at that point it might be simply be too late for the practitioner and their client.