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TRENDS IN HEALTH CARE LIABILITY ACTIONS

This paper will explore several topics in health care litigation likely to see attention of the courts in the coming years.

A. Principal / Agent Issue in HCLA Actions

Issue: Whether a plaintiff in a health care liability action must sue the employee if it seeks to impose vicarious liability on the employer for the negligent acts and omissions of the employee?

This issue will be addressed in two cases pending before the Tennessee Supreme Court:

Ultsch v. HTI Memorial Hospital Corporation, No. M2020-00341-SC-R11-CV
https://www.tncourts.gov/sites/default/files/ultsch.dennis.opn_.pdf

Gardner v. Saint Thomas Midtown Hospital, No. M2019-02237-SC-R11-CV
https://www.tncourts.gov/sites/default/files/gardner.beverly.opn_.pdf

In both cases, the Court of Appeals ruled that the HCLA trumped the language in *Abshure v. Methodist Healthcare-Memphis Hospitals*, 325 S.W.3d 98 (Tenn. 2010) which stated, *inter alia*, that a principal could not be sued for vicarious liability of an agent when the claim against the agent had been extinguished. In each case, the plaintiff sued only the employer, not the employee, and relied upon the 120-day extension of the statute of limitations that arises if proper notice of a claim is given. Notice was given only to the employer, and thus the statute of limitations expired for any claim against the employee on the one-year anniversary of the injury.

The basis for the holding is that the HCLA provides that notice of an HCLA action need only to be given to "each health care provider that will be named a defendant." Tenn. Code Ann. § 29-26-121(a)(1). The term "health care liability action" includes claims against health care providers, regardless of the theory of liability on which the action is based." Tenn. Code Ann. § 29-26-101(a)(2)(B). The definition of "health care services" is very broad, including services provided by "agents, employees, and representatives of the provider,…" The Court of Appeals

construed the foregoing to mean that an employer is subject to a claim for health care liability for the care provided by its agents and employees and thus there was no need to give notice to or sue the employees.

Therefore, the Court of Appeals reasoned, the HCLA (which did not exist when *Abshure* was decided) created a claim against the employer for vicarious liability even if the agent was not sued within the statute of limitations.

The Court of Appeals also pointed out that to rule differently would be to ignore the mandate of Tenn. Code Ann. § 29-26-121, which prohibits the notice requirement from shortening or extending a statute of limitations or statute of repose. If the employee had to be sued to save a vicarious liability claim, (a) notice would have to have been given to the employer more than sixty days before the one-year deadline, then suit filed against the employer only before the expiration of the one-year deadline; or (b) notice given to both and then only the employer sued (but notice would need to be given only to those to be named defendants).

The Tennessee Supreme Court ruling is expected in the Fall of 2022.

Practical Issues for Plaintiffs:

- Hard to identify providers, especially nurses and techs.
    - Argue discovery rule protects plaintiff there, but lots of resources are utilized.
- If you give names of those potentially at fault, reporting issues.
- Sometimes those at fault aren't providers at all.

B. Expert Witness Issues – Discovery Issues

1. Full and Fair Expert Disclosures

It is not uncommon for scheduling orders in simple cases to require that the plaintiff serve expert witness disclosures before the defendant is required to do so. This is not unwise; normally, the plaintiff has the burden of proof on the most if not all the issues, and it makes sense to require the party with the burden of proof on an issue to disclose experts first. A full and fair expert witness disclosure gives the opposing party a clearer understanding of the plaintiff's theory of the case, and thus the opposing party's expert can better address the issues in his or her own disclosure.

This is what the rules of civil procedure require for expert witness disclosures.

26.02(4) TRIAL PREPARATION. EXPERTS. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows.

> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to s*tate the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion*. In addition, upon request in an interrogatory, for each person so identified, the party shall disclose the witness's qualifications (including a list of all publications authored in the previous ten years), a list of all other cases in which, during the previous four years (sic), the witness testified as an expert, and a statement of the compensation to be paid for the study and testimony in the case.
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> (ii) A party may also depose any other party's expert witness expected to testify at trial.
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> (Emphasis added).

Clearly, the intent of the rule is to give a full, fair disclosure in written form of the expert's proposed testimony and bases for it. Depositions of the expert are permitted, but not required. A party should not be required to incur the expense of taking an expert's deposition to obtain information that should be disclosed in an answer to an expert witness interrogatory.

There are several types of measures and sanctions available to judges who believe that a party has not given full and fair expert witness disclosures,[1] and a judge who consistently and uniformly uses them to punish those who violate the rule concerning expert disclosures will see an improvement in the quality of expert witness disclosures and a halt to motion practice on the subject. Unfortunately, there are some lawyers who will do as little as they can get away with concerning expert disclosures (and other matters), and these lawyers know which judges will enforce the rules of civil procedure and which judges will not. In addition, the lawyers (and their clients) harmed by such conduct also know which judges will enforce the rules and which will not, and thus will not ordinarily spend the time or money seeking enforcement of the rules from judges

[1] For example, a judge who finds on a motion to compel that an expert witness disclosure is inadequate can issue an order requiring a more complete disclosure. The judge can also exclude testimony from the expert on those issues that were not properly disclosed. (See *Mayo v. Shine*, 392 S.W.3d 70-71 (Tenn. Ct. App. 2012) and Tenn. R. Civ. P. 37.03 (failure to properly disclose or supplement gives rise to a default sanction that the witness or information is excluded from evidence unless the failure is harmless; other remedies also available). Alternatively, the judge can allow the adverse party two opportunities to depose the offending party's expert, the second deposition at the cost (including attorney's fees) of the offending party.

who have a history of not enforcing them. This in turn emboldens the rule-violators and increases rule violations because it causes those otherwise inclined to follow the rules to ignore them (or at least approach them more casually) because they perceive no downside risk to ignoring them.

Sometimes a scheduling order will require that a defendant's expert disclosures be delayed until after the plaintiff's experts have been deposed. It is difficult to understand why such a provision would ever be a part of a scheduling order – doing so only builds months of delay into the pretrial process.

The alleged rationale for delaying a defendant's expert disclosures is that the plaintiff's expert disclosure is presumptively presumed to be so poor that the defendant cannot gain a true understanding of the nature and extent of the proposed testimony without a deposition of the expert and thus, cannot know how to disclose its own experts without the benefit of a deposition of plaintiff's expert. However, there are other, sufficient remedies for poor expert disclosures that do not require delaying a case based on the assumption that a plaintiff's expert disclosure will be inadequate. Moreover, to the extent that expert depositions are taken (the law does not require depositions of experts), it makes sense for each deponent to have a clear understanding of the proposed testimony of the opposing party's expert so that he or she can comment on it at his or her deposition (if any).[2]

In the opinion of the author, the civil justice system works best when the rules of procedure are followed by lawyers and enforced by judges. Scheduling orders which assume lawyers will not follow the rules punish lawyers (and their clients) who do follow the rules by increasing expense and delay.

Sample language:

> Plaintiff shall provide expert witness disclosures no later than __________________. Defendant shall provide expert witness disclosures no later than ___________________________. No expert shall be deposed before these disclosures are made. The expert witness disclosures shall provide all information required by Rule 26.02(4) of the Tennessee Rules of Civil Procedure. The failure to provide information as required by the Rule shall result in such information being excluded at trial.

[2] In some jurisdictions there are actually two rounds of depositions of plaintiff's experts: one based on the original disclosure, and a second deposition after the plaintiff's expert has a chance to see (and wants to comment on) the defendant's expert disclosure or expert deposition. This practice is a tremendous waste of time and money and should be abandoned.

2. Expert witness deposition deadline

If depositions of experts are going to be taken, a deadline for doing so should be established. If the court or the parties are not certain whether depositions of experts will be taken, it is prudent to include a deadline for expert depositions if the decision is made to depose experts.

It is good practice for scheduling orders to require each party to provide, at the time of the disclosure of the expert, several dates that the party's expert can be deposed. Doing so increases the likelihood that the depositions can be put on the books of busy trial lawyers sooner rather than later, consequently speeding up the resolution of the case.

Sample language:

> Any party choosing to depose an opposing party's expert may do so after ____________________ but no later than ____________________. To facilitate the scheduling of depositions, a party disclosing an expert witness shall also provide, with the disclosure, no fewer than two dates within the period state above that the expert will be available for a deposition if the opposing party chooses to depose the witness.

3. Timing of disclosures in more complex cases

In more complex cases, however, it is not uncommon for the plaintiff to have the burden of proof on some issues, and one or more defendants to have the burden of proof on other issues. For example, assume that Plaintiff sues Hospital A in a health care liability action. Defendant alleges in its answer that Plaintiff's injuries were caused by the negligence of an earlier facility that treated Plaintiff, Hospital B. Under the law of comparative fault, Plaintiff can add Hospital B as a party defendant, but Hospital A will have the burden of proving the case against Hospital B. Thus, Hospital A will have the burden of calling expert witnesses to establish that Hospital B negligently caused or contributed to cause Plaintiff's injuries.

In this and other situations involving the pleading of an affirmative defense which must or may involve expert testimony, the party that has the burden of proof should be required to disclose expert testimony before the party that does not. Using the example set forth in the preceding paragraph, the scheduling order should provide that Plaintiff is required to disclose expert witnesses it has against Hospital A and Hospital B, and Hospital A should have to disclose experts against Hospital B on the same date. Why? Because each have the burden of proving liability and causation against those they have asserted caused harm.[3]

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[3] To be precise, Plaintiff may elect to have expert witness testimony against Hospital B or may rely on Hospital A to prove fault against Hospital B (because Hospital A asserted the fault of Hospital B as an affirmative defense). But, if

So, it is better practice to set expert disclosure deadlines based on who has the burden of proof on an issue, rather than simply looking to whether a party is a plaintiff or a defendant. Doing so gives all parties – plaintiffs, defendants, and co-defendants alleged to be at fault by another defendant – a level playing field on expert disclosures. Disclosures of experts by a party without the burden of proof on the issue can take place 30 to 45 days later.

Sample language:

> Each party with the burden of proof on an issue shall provide expert witness disclosures related to that issue no later than ____________________. Each party who does not have the burden of proof on an issue shall provide expert witness disclosures on those issues no later than ____________________________. No expert shall be deposed before these disclosures are made. The expert witness disclosures shall provide all information required by Rule 26.02(4) of the Tennessee Rules of Civil Procedure. The failure to provide information as required by the Rule shall result in such information being excluded at trial.
> Any party choosing to depose an opposing party's expert may do so after _____________________ but no later than _____________________. To facilitate the scheduling of depositions, a party disclosing an expert witness shall also provide, with the disclosure, no fewer than two dates within the period state above that the expert will be available for a deposition if the opposing party chooses to depose the witness.

C. Qualified Protective Orders

The *Willeford v. Klepper*, 597 S.W.3d 454 (Tenn. 2020) decision allows defendants in health care liability actions to petition trial courts for qualified protective orders permitting *ex parte* interviews with non-party treating health care providers, but it leaves the manner of disposition of such petitions to the sound discretion of trial courts. The protective orders must comply with HIPAA. *Id.* at 471. The burden is on the defendants to demonstrate that the patients' non-discoverable health information will remain confidential if permission is granted to engage in *ex parte* interviews. *Id.* at 472.

The Tennessee Supreme Court said the following about the substance of the protective orders:

Plaintiff elects to present expert testimony against Hospital B, it is fair to require Plaintiff to disclose it before Hospital B discloses experts.

Guidance for trial courts in entering these protective orders may be found in a Georgia Supreme Court decision encouraging "trial courts in authorizing such interviews, to fashion orders carefully and with specificity as to scope." *Baker v. Wellstar Health Sys., Inc.,* 288 Ga. 336, 703 S.E.2d 601, 605 (2010). Specifically, the court provided that the trial court should provide the following in its orders:

> (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary. In addition, when issuing or modifying such orders, trial courts should consider whether the circumstances—including any evidence indicating that *ex parte* interviews have or are expected to stray beyond their proper bounds—warrant requiring defense counsel to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request. *Id.* (internal citations omitted).

*Id.*at 472, fn. 12.

We can expect continued motion practice under these orders.

D. Remote Video Depositions and Testimony

We can expect that there will be motion practice concerning the taking of depositions by remote video. The issues include:

(a) Should they be permitted at all?

(b) If permitted;

- a. The issue of the oath (TRE 603).
- b. Quality transmission.
- c. Appropriate environment.
- d. What materials can be used by the witness?
- e. Who can be physically present in the room with the witness?
- f. Preventing coaching.
- g. Handling exhibits.

We can also expect requests that witnesses, especially experts, appear remotely at trial rather than in person. Remote video testimony at trial is permitted by Tenn. R. Civ. P. 43.01, which provides "for good cause shown in compelling circumstances and with appropriate safeguards, the court may permit presentation of testimony in open court by contemporaneous audio-visual transmission from a different location." Remote video testimony raises some of the same issues as above.

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