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MINNESOTA STATE & FEDERAL HEALTHCARE DECISIONS UPDATE

The Minnesota Court of Appeals refused to recognize direct corporate negligence as a cause of action against a healthcare provider in *Bothun v. Martin LM, LLC*, A12-1377 Minn. Unpub. LEXIS 408 (Minn. Ct. App. May 13, 2013).

The Minnesota Court of Appeals upheld the dismissal of all claims for failure to comply with the requirements of Minnesota's Expert Affidavit statute, Minn. Stat. Sec. 145.682 in *Bothun v. Martin LM, LLC*. Specifically, the court held that while a medical malpractice plaintiff is not required to rule out all other possible causes of injury in order to establish a prima facie case, unsupported conclusions by expert witnesses are speculative, and therefore, do not provide the requisite causal link between the alleged injury and the claimed breach of the standard of care. The court of appeals affirmed the long-standing principle that an expert must establish the "how" and the "why" linking the alleged breach of standard of care to the claimed injury. Failure to do so is grounds to dismiss the Complaint under Minn. Stat. Sec. 145.682.

The court also rejected plaintiff's claims of direct corporate negligence. The court clearly explained that Minnesota does not recognize direct corporate negligence as a cause of action. This is significant as it expressly rejects an expansion of the Minnesota Supreme Court's acknowledgement of negligent credentialing, finding the negligent credentialing is separate and distinct from direct corporate negligence.

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The Minnesota Supreme Court recognized loss of chance as a theory of recovery in medical malpractice actions in *Dickhoff v. Green*, A11-0402, 2013 Minn. LEXIS 309 (Minn. May 31, 2013).

In *Dickhoff v. Green*, the Minnesota Supreme Court recognized the loss of chance doctrine as a theory of recovery in medical malpractice actions in Minnesota. The Dickhoff's argued that the physician's failure to timely diagnosis their daughter's cancer reduced her life expectancy. Although the Dickhoff's did not allege loss of chance as a theory of recovery, the court reviewed their negligence claims under a loss of chance theory and remanded to the district court for further proceedings on whether Plaintiff can establish causation necessary to recovery for a loss of chance.

When discussing the Dickhoff's claims, the court noted that under the loss of chance doctrine, a patient may recover damages when a physician's negligence causes the patient to lose a chance of recovery or survival. The court clarified that the loss of chance is not a recovery for the disease itself, but that it provides a recovery for the harm resulting from the physician's delay that could have been prevented if treatment had been provided earlier. Further, the court explained that the loss of chance does not require an all or nothing analysis. Rather, a patient may recovery damages related to the reduction of the patient's chance of recovery or survival. Nonetheless, the court emphasized that expert testimony is required to establish causation on the reduction of the patient's chance, explaining that the court will require causation be proven to a degree of medical certainty. However, the court also indicated that, due to advances in medicine, it is now possible to prove causation in a loss of chance cause, thus, justifying its recognition of this new cause of action.

The court explained that the first step in establishing a loss of chance cause of action is to the measure the chance lost,

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i.e. the percentage probability by which the defendant's tortuous conduct diminished the likelihood of achieving some more favorable outcome. Second, the loss of chance must be valued. The Minnesota Supreme Court adopted a proportional-recovery approach to valuation in which damages for the patient's injury or death are discounted by the value of the chance that the physician's negligence destroyed. Thus, the total amount of damages recoverable is equal to the percentage chance of survival or cure lost, multiplied by the total amount of damages allowable for death or injury.

This case will likely have a profound impact on medical malpractice defense, as this is the recognition of a new cause of action. Although the court suggests that plaintiff's loss of chance claims will be subject to expert disclosure requirements, including Minn. Stat. Sec. 145.682, this case has the potential to create a new barrier to summary judgment, as establishing a probability of reduced life expectancy may be sufficient to state a cause of action. We will continue to monitor this case as rehearing is currently being sought by the health care provider.

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The Minnesota Court of Appeals determined that there is a right to a jury trial for retaliation actions brought under Minnesota's workers' compensation statute, Minn. Stat. Sec. 176.82, subd. 1, in *Schmitz v. United States Steel Corp.*, 2013 Minn. App. LEXIS 48 (Minn. Ct. App. May 13, 2013).

In *Schmitz v. United States Steel Corp.*, the Minnesota Court of Appeals analyzed Minnesota's workers' compensation retaliation provision and found that the claimant had a constitutional right to a jury trial if proceeding under Minn. Stat. Sec. 176.82, subd. 1. In contrast, the court rejected that a jury trial is required if plaintiff is proceeding under Minn. Stat. Sec. 176.82, subd. 2 and seeking equitable relief in the form of reinstatement.

This case arose of an alleged work place injury that the plaintiff did not immediately report to his employer. Plaintiff alleged that when he reported the injury days later, his supervisor advised him that U.S. Steel would take a "very dim view" of Plaintiff if he were to file a First Report of Injury or accident report. Accordingly, Plaintiff did not do so until after he sustained a subsequent back injury at home a few months later. Plaintiff then sought workers' compensation benefits and claimed he did not file for benefits earlier due to his employer's threat.

The court of appeals found that the threat was actionable under Minn. Stat. Sec. 176.82 as it had deterred Plaintiff from seeking benefits at the time of injury. It further found that a threat from a supervisor will be imputed upon the employer even if the employer did not have actual knowledge of or endorse the threat. Finally, the court rejected the argument that plaintiff's retaliatory discharge claim under Minn. Stat. Sec. 176.82 was subject to the *McDonnell Douglas* burden-shifting test as a threat, as defined by Minn. Stat. Sec. 176.82, is direct evidence of retaliatory intent.

Given the court's broad interpretation of Minn. Stat. Sec. 176.82, including the right to a jury trial, in conjunction with the expansive the definition of disability under the Americans with Disabilities Act Amendments of 2008, it is likely that employers will see a rise in the number of workers' compensation retaliation and/or disability claims. We will continue to monitor this case as an appeal is likely given the court's far-reaching conclusion that Minn. Stat. Sec. 176.82 provides a right to a jury trial.

A special thank you to JLO attorney Vicki Hruby for her work on these updates.