

RECENT CASES

tiff in that case. Amicus curiae counsel was Amy G. Langerman, Phoenix, Ariz.

A document in *Duncan* is available through the Court Documents section at p. 118, courtesy of Ms. Langerman.

Prison health care provider, sheriff liability: Improper care of pregnant inmate: Deliberate indifference: Wrongful death: Settlements.

Grey v. Prison Health Servs., Inc., U.S. Dist. Ct., M.D. Fla., No. 8:04-cv-02663, Apr. 18, 2007.

Grey, 34, was incarcerated at a county jail while pregnant. At 25 weeks gestation, Grey complained that she was leaking fluid. A nurse employed by the company that provided health care at the jail allegedly ordered a "pad count" to monitor the leakage.

A subsequent urinalysis revealed excess protein in Grey's urine consistent with amniotic fluid. Two days later, Grey lost her mucus plug and went into labor. She remained at the jail infirmary for the entire labor—which lasted about 12 hours—and delivered her baby in a toilet bowl with a nurse's assistance.

Both Grey and her baby were then transferred to a hospital; however, the baby died before reaching the facility.

Grey, individually and on behalf of the child's estate, sued the health care company and the county sheriff, alleging medical negligence and violation of 42 U.S.C. § 1983 for defendants' deliberate indifference to plaintiff and her unborn baby's welfare.

Defendants argued that the baby had died before birth and that they had not caused the death. The sheriff also claimed that its co-defendant was responsible for providing health care at the jail.

The sheriff settled with plaintiffs before trial for \$350,000. The health care company settled with plaintiffs during trial for \$1.25 million.

Plaintiffs' expert was Joseph Paris, internal medicine and correctional health care, Atlanta, Ga.

Plaintiffs' Counsel

Michael J. Trentalange, Tampa, Fla.

Nicholas M. Matassini, Tampa, Fla.

Comment: For a case alleging improper treatment of and deliberate indifference toward a prison inmate with mental illness, see *Sanville v. Scapardine*, 18 PNLR 100 (June 2003). **Robert Bennett**, Eric Hageman, and Joseph Margulies, all of Minneapolis, Minn., represented plaintiffs.

Documents in *Grey* and *Sanville* are available through the Court Documents section at p. 118, courtesy of Mr. Trentalange and Mr. Bennett.

Oncology: Misdiagnosis of gestational trophoblastic disease: Test manufacturer liability: Unnecessary chemotherapy: Settlement: Verdict.

Kachurak v. Cooper, Pa., Luzerne Co. Com. Pleas, No. 821-C-2002, Apr. 30, 2007.

Kachurak, 30, experienced heavy vaginal bleeding. She underwent testing, including a check of her human chorionic gonadotropin (hCG) level. Kachurak's hCG level indicated a possible pregnancy or gestational trophoblastic disease (GTD)—a group of diseases involving abnormal, sometimes cancerous, cells that develop inside the uterus after conception.

Kachurak then underwent three ultrasounds, which did not show a pregnancy. She also underwent a laparoscopy and a dilation and curettage. She was subsequently referred to a medical oncologist, who performed another hCG test.

The test was again positive, and the physician allegedly advised Kachurak to begin chemotherapy the following day for suspected GTD. She also referred Kachurak to a gynecological oncologist.

Kachurak underwent 12 cycles of chemotherapy and suffered various side effects, including pain, sores, and hair loss. She subsequently learned that she did not have GTD and never required chemotherapy.

Kachurak sued the medical oncologist, alleging she misdiagnosed GTD and subjected her to unnecessary, aggressive treatment. Plaintiff charged that defendant should have researched false-positive hCG test results and should not have diagnosed GTD because repeated testing showed no evidence of cancer or metastasis, and there was no evidence of pregnancy. The GTD diagnosis, plaintiff argued, was negligently based on the elevated hCG level alone.

Plaintiff also claimed she should have been referred to a gynecological oncologist with more experience regarding GTD. Suit against the gynecological oncologist alleged he negligently abdicated plaintiff's care to the medical oncologist and should have advised that a positive hCG result could indicate something other than cancer. Additionally, plaintiff charged that this defendant misreported the results of a negative urine test, which should have called the GTD into question.

Lastly, plaintiff sued the manufacturer of the hCG test, alleging that, although the company knew its test was being used as a cancer-screening device, leading to unnecessary chemotherapy in some women, it failed to adequately warn doctors not to use the test as a tumor marker.

Plaintiff did not claim lost income.

The manufacturer settled after jury selection for a

confidential amount. The jury awarded \$3 million, finding the two physicians equally liable.

Plaintiff's experts included Ronald H. Blum, medical oncology, and Kevin Holcomb, gynecological oncology, both of New York, N.Y.; Glenn Braunstein, hCG testing, Los Angeles, Cal.; Donald P. Goldstein, gynecological oncology, Boston, Mass.; and Richard Fischbein, psychiatry, Wilkes-Barre, Pa.

Defendants' experts, all of Philadelphia, Pa., were Thomas C. Randall, gynecological oncology; Charles Dunton, gynecological oncology; and Joseph DiGiacomo, psychiatry.

Plaintiff's Counsel

Matthew A. Cartwright, Wilkes-Barre, Pa.

Sam Sanguedolce, Wilkes-Barre, Pa.

Documents in this case are available through the Court Documents section at p. 118, courtesy of Mr. Cartwright.

Exclusivity provisions in Nebraska workers' compensation act bar tort suit by worker reinjured at hospital after surgery for work-related injury.

Bennett v. St. Elizabeth Health Sys., 729 N.W.2d 80 (Neb. 2007).

The Nebraska Supreme Court held that the exclusivity provisions of the state Workers' Compensation Act, Neb. Rev. Stat. §§ 48-101 *et seq.*, preclude an injured worker from suing for damages she sustained at a hospital while undergoing physical therapy for a work-related accident.

Here, Bennett, a hospital employee, injured her shoulder at work. She underwent surgery to treat her injury and subsequently required physical therapy at the hospital. Allegedly as a result of this therapy, the shoulder was reinjured, necessitating a second surgery. Bennett's medical expenses for both shoulder injuries were covered by the hospital's workers' compensation insurance.

Bennett sued the hospital, claiming compensatory damages for defendant's negligent performance of physical therapy. The trial court granted defendant summary judgment, holding that the state workers' compensation act's exclusivity provisions barred plaintiff's suit.

Affirming, the state high court noted that §§ 48-111, 48-112, and 48-148 of the act, as well as relevant case law, provide that the exclusive remedy by an employee against an employer for any injury arising out of and in the course of employment is workers' compensation. Thus, the court found, if plaintiff's injury occurred during the course of her employment, then her claims are

precluded under the terms of the act.

Citing case law, the court concluded that plaintiff's injury occurred in the "quasi-course of employment" because (1) the reinjury of her shoulder occurred while she was receiving treatment for a work-related injury, and (2) the physical therapy was a necessary or reasonable activity that she would not have undertaken but for her original work-related injury. Thus, the court found, the consequential injury to plaintiff's shoulder is related to her employment and is therefore covered under the workers' compensation act, including its exclusivity provisions. One of these provisions, the court added, requires plaintiff to relinquish rights to any other compensation from her employer, even if there is still a viable claim against a third-party arising out of the injury-causing incident.

Consequently, dismissal was proper.

NURSING HOME

Probate statute does not limit late-appointed personal representative from pursuing elder abuse claim on behalf of alleged victim's estate.

Winn v. Plaza Healthcare, Inc., 150 P.3d 236 (Ariz. 2007).

The Arizona Supreme Court held Ariz. Rev. Stat. § 14-3108(4)—a provision of the state's probate code that limits the right of late-appointed personal representatives from "possessing estate assets"—does not prevent a late-appointed representative from pursuing an elder abuse claim under the state's Adult Protective Services Act (APSA), Ariz. Rev. Stat. §§ 46-455 *et seq.* Among other things, the law creates a remedial cause of action against those who abuse the elderly and provides that the law itself may not be limited by any other civil remedy or legal provision.

Here, Winn died within a month of entering a nursing facility operated by Plaza Healthcare, Incorporated. Her husband brought an APSA claim against Plaza Healthcare, on behalf of himself, Winn's estate, and her survivors. More than five years after Winn's death, her husband was appointed personal representative of her estate. He then moved to substitute himself, as the estate's personal representative, as plaintiff in the case against Plaza Healthcare.

Defendant moved for summary judgment, arguing that Ariz. Rev. Stat. § 14-3108(4) precluded the husband's motion. The trial court granted defendant summary judgment, and an appellate court affirmed.

Reversing, the state high court noted that the policy