American Educational Institute, Inc.

CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS COMPENSATION, FRAUD INVESTIGATION AND AUTOMOBILE

Spring, 2020

AEI CLAIMS LAW QUIZ

WHEN A CLAIMANT MAKES AN ISSUE OF A TORTFEASOR'S MEDICAL CONDITION IS THE TORTFEASOR'S PHYSICIAN-PATIENT PRIVILEGE WAIVED?

[Ref. Law of Evidence, Para 3.10]

FACTS: Holocker was operating his vehicle when he struck a pedestrian, Palm, while she was crossing an intersection. Palm filed suit and claimed that Holocker negligently failed to maintain a proper lookout, failed to stop for a stop sign, and failed to yield the right of way. The defendant denied these allegations, and argued that the plaintiff was more than 50% responsible for her own injuries. Specifically, he claimed that she improperly crossed the street when it was unsafe to do so, failed to keep a proper lookout, and was under the influence of alcohol or some other substance at the time of the accident.

During discovery the plaintiff served the following interrogatories on the defendant:

> 20. Do you have any medical and/or physical condition which required a physician's report and/or letter of approval in order to drive? If so, state the nature of the medical and/or physical condition, the physician or health care professional who issued the letter and/or report, and the names and addresses of any physician or other health care professional who treated you for this condition prior to the occurrence.
>
> 21. State the name and address of any physician, ophthalmologist, optician or other health care professional who performed any eye examination of you within the last five (5) years, and the dates of each such examination.
>
> 22. State the name of any physician or other health care professional who examined and/or treated you within the last ten (10) years, and the dates of each examination.

The defendant answered the first question, indicating that he was treated for a diabetic condition by Dr. Nau. The defendant, however, objected to the other questions based on the physician-patient privilege.

The plaintiff filed a motion to compel answers, arguing that the defendant's vision was an issue based on a Facebook post the plaintiff had received. The plaintiff's lawyer explained:

> And Judge, here, just by way of background, a few weeks after this happened our client got a Facebook post from someone that said that the defendant in this case is legally blind, from someone who knows him, and that he has had other - a few other collisions that he's never reported to anyone because of the fear of revocation of his privileges based upon his difficulties with vision.

The plaintiff argued that the defendant's ability to see was relevant because the accident occurred in broad daylight and because subpoenaed driving records revealed that the defendant had previously been involved in as many as seven accidents. The plaintiff theorized that the defendant may have been using multiple optometrists to find one who would clear him to drive. The defendant, on the other hand, asserted that his physical condition was never an issue and that he was waving to a friend on the street corner when the accident occurred. He added that the reason he needed a doctor's note to drive was to prove that he was keeping his blood sugar under control.

The defendant's argument was that the privilege applied because only he, as the patient, could waive the privilege and in this case he had not made his medical condition an issue and, therefore, had not waived the privilege.

The trial court ruled in favor of the plaintiff and allowed discovery. The appellate court reversed. It held that the physician-patient privilege belonged to the patient, the defendant in this case, and could not be waived by another party. The plaintiff appealed to the Illinois Supreme Court.

QUESTION: In a bodily injury action, can a plaintiff make the defendant's health an issue and cause a waiver of the defendant's physician-patient privilege?

ANSWER: No. According to the Illinois Supreme Court in *Palm v. Holocker*, 131 NE3d 462 (Ill. 2019), the privilege belongs to the patient and only the patient can waive it. The court reached its conclusion by interpreting the Illinois physician-patient statute and by reviewing case law holding that the privilege belongs exclusively to the patient.

The court observed that most states that have addressed this issue have held that the physician-patient privilege applies and a defendant does not waive it by denying fault. The outcome, however, depends on the specific language of the state statute that defines the privilege.

The Illinois Supreme Court began its analysis by recognizing that the purpose of the physician-patient privilege is to "encourage disclosure between a doctor and a patient and to protect the patient from invasions of privacy." The court then looked at the Illinois statute, 735 ILCS 5/8-802, which codifies the physician-patient privilege. The pertinent part of the statute states:

> no physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient except ... (4) in all actions brought by or against the patient ... wherein the patient's physical or mental condition is an issue.

The court recognized that the key is to determine the meaning of "an issue" in the statute's exception (4) to the physician-patient privilege. The plaintiff rejected the argument that only the

patient could waive the privilege. She argued that the statute merely requires that a physical or mental condition be an issue and that the statute is silent on who can make a medical condition an issue. According to the plaintiff, to be an issue, something simply has to be relevant and in this case the defendant's medical condition was relevant.

The court ruled in favor of the defendant and held that the physician-patient privilege applied for three reasons. First, citing case law in other jurisdictions, the court noted that "there is near universal agreement among courts that the physician-patient privilege belongs to the patient and therefore only the patient may waive it by putting his physical or mental condition at issue." Most courts that have considered the issue have not found any support in law or public policy to rule that anyone other than the patient can waive the privilege in a civil lawsuit. In this case the defendant was the patient and the privilege belonged exclusively to him.

Second, the court recognized that if the plaintiff's interpretation was correct and exception (4) allowed disclosure when the plaintiff's medical condition was "relevant," then most of the remaining 13 exceptions in the statute would be unnecessary. According to the court, "the sheer number of codified exceptions to the privilege suggests that section 8-802(4) must have a narrower scope than plaintiff contends."

Finally, the court feared that the plaintiff's interpretation of the statute could render the privilege meaningless. The court said:

> Consider again what happened in this case. The plaintiff represented to the trial court that she had learned through a hearsay statement posted on Facebook that defendant is legally blind. Based on this representation, plaintiff was allowed to vitiate defendant's privilege, and she now seeks to file an amended complaint based on the information found in defendant's medical records. It is difficult to imagine that is how the legislature intended section 8-802(4) to work. We note further that at the time plaintiff was allowed to obtain defendant's medical records she had not even pleaded that defendant had a relevant medical condition. Although plaintiff construes "an issue" to mean relevant, the plain meaning of the term "issue" would at least require the condition to be pleaded. ... Nevertheless, even if plaintiff had pleaded a relevant medical condition, we do not believe that this is sufficient to waive the defendant's privilege. Allowing a plaintiff to put defendant's medical condition at issue simply by making an allegation in a pleading would leave in place all of the problems discussed above. Such an interpretation would allow one party to waive another party's privilege, and that interpretation would be problematic in light of other provisions of the statute.

The court did acknowledge that construing the statute this way would prevent a jury from considering all relevant information, but it also pointed out that this is a problem that is inherent in all privileges. The need for privacy that privilege protects outweighs the need for full disclosure. It's also important to note that in this case the plaintiff could prove her negligence case without access to the defendant's medical records.

OTHER JURISDICTIONS: The court, in *Palm,* relied on *Griego v. Douglas*, 2018 U.S. Dist. LEXIS 88562 (D.N.M. 2018), for the proposition that most courts hold that in a civil suit the physician-patient privilege can only be waived by the patient and not by another party.

In *Griego*, a motorcyclist died in a collision with an auto when the driver of the auto made a left turn in front of the motorcycle. The defendant denied liability and the estate sought medical records to determine whether any medical condition or cognitive deficiency affected the defendant's ability

to appreciate and properly respond to other drivers. The court, however, cited case law in Colorado, Florida, Indiana, Minnesota, and New York, and held that the physician-patient privilege applied:

> Most courts that have addressed the matter have found that a defendant's medical records are privileged, and that a defendant does not waive the privilege merely by driving, denying fault, or asserting comparative negligence.

The *Griego* court ultimately did allow the plaintiff access to the defendant's medical records because the defendant died after the accident. The privilege didn't survive the death, but would have applied otherwise.

It's also worth noting that North Carolina courts have held that a plaintiff in a civil suit can make a defendant's medical condition an issue based on North Carolina's physician-patient privilege statute that specifically gives courts discretion. N.C. Gen. Stat. § 8-53 provides, in part:

> Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

Unlike Illinois law, the statute in North Carolina does not list specific exceptions to the physician-patient privilege. Rather, it allows the court to act in the interests of justice based on the facts of the case.

CONCLUSION: The general rule in a bodily injury claim is that a tortfeasor's physician-patient privilege can only be waived by him. An injured claimant cannot get around the privilege by claiming that the tortfeasor suffered from some type of medical condition that caused the accident. To put this in context, consider if the roles were reversed and it was the claimant asserting the privilege and the tortfeasor seeking discovery. In that case, the claimant, by bringing the action, waives the physician-patient privilege for injuries or conditions that form the basis of his claim. By bringing the action the plaintiff has made his medical condition an issue. The tortfeasor needs access to the claimant's medical records to verify the claimed injuries and damages. In the *Palm* case, and others like it, the tortfeasor, by simply defending himself against the plaintiff's claim, is not making his medical condition an issue.