



Breach of Confidence is Malpractice

Bruce A. Vande Vusse

Foster Swift Medical Malpractice E-News

March 6, 2009

Claims for breach of confidence arising when a healthcare provider discloses confidential patient information without consent or other authority, are medical malpractice claims, not independent causes of action in Michigan. Notwithstanding what is believed to be an issue of first impression under Michigan law, the Michigan Court of Appeals in an *unpublished* opinion* on February 19, 2009 held that claims for breach of confidence arising from unauthorized release of protected health information are properly brought as medical malpractice claims.

Factually, the disclosures in the case arose from a counseling relationship with a therapist at a state university. Plaintiff argued these type claims were independent causes of action, not medical malpractice cases and therefore not subject to all the procedural and substantive requirements of medical malpractice litigation in Michigan (no small burden on plaintiffs). The Court noted that other states who had dealt with similar issues had come to varied conclusions but that in Michigan "a claim against a healthcare provider is properly characterized as one for medical malpractice if the claim (1) arises from conduct that occurred during the course of a professional relationship, and (2) involves questions of medical expertise or judgment outside the realm of common knowledge and experience." If both inquiries are answered affirmatively, it states a claim for medical malpractice, subject to all the procedural and substantive requirements governing medical malpractice claims.

The Court's rationale cited cases that have differentiated professional negligence (i.e. medical malpractice) cases from general negligence cases. In those cases often the "real" contest is whether the procedural and substantive requirements of medical malpractice actions apply, including pre-suit notification, expert witness affidavits of merit and cap limitations on economic damages. Those cases most often turn on the second test component, namely whether the claim presents questions of medical expertise or judgment outside the common knowledge and experience of the public. The Court concluded that a claim asserting that the disclosure had "violated the therapeutic relationship by breaking [the patient's] confidences" was dependent on

CONTACT

Bruce A. Vande Vusse

P: 248.538.6330

E: bvandevusse@fosterswift.com

AUTHORS/ CONTRIBUTORS

Bruce A. Vande Vusse

PRACTICE AREAS

Medical / Professional Malpractice
Defense



questions of medical expertise beyond the realm of common knowledge and experience. Consequently, the expertise necessary to pursue such a claim will have to be presented by qualified expert testimony.

This holding certainly makes it slower and more expensive for aggrieved patients (and their attorneys) to bring claims for unauthorized disclosure of confidential patient information. It's slower because the 182 day waiting period for notices of intent to file claim must expire before suit can be brought and more expensive because a plaintiff patient must have an expert witness who will sign an Affidavit of Meritorious Claim before a suit can be brought.