

IN THE SUPREME COURT OF OHIO

Todd Leopold, et al.,	:	Case No. 2012-0438
	:	
Appellees,	:	
	:	On Appeal From The
v.	:	Cuyahoga County Court of Appeals,
	:	Eighth Appellate District
Ace Doran Hauling & Rigging Co., et al.,	:	
	:	
Appellant (Danielle Laurence)	:	
and Appellees	:	

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STATEMENT OF FACTS

On March 6, 2008 at about 2:15 p.m., a series of violent collisions occurred involving a nearly fully-loaded semi-tractor/trailer rig, a delivery van, a concrete median barrier, an automobile and a straight truck on Interstate 90 Eastbound on a section of the freeway known as The Innerbelt that winds its way around downtown Cleveland. (Supp. 3, 9.) Todd Leopold's injuries were extensive, severe, permanent and deforming. (Supp. 3, 15, 20-21.) Leopold's economic loss alone exceeds \$1,500,000. (Supp. 14.) Thus, damages are substantial.

An independent witness, Marjorie Clark, the only person who saw the cause of the collisions, said traffic was moving steadily in the far right lane with Danielle Laurence's car not involved in any collision until Stillwagon's 77,000-pound semi rear ended Leopold forcing his employer's delivery van forward into the rear of Laurence's car resulting in Leopold being spun sideways across the freeway propelling the van's front end into the median barrier where it again spun forward this time toward oncoming traffic when Leopold was front ended by a straight truck. (Supp. 24, 25-27, 28, 30, 31, 32, 33, 34-35, 36.) Laurence remembers being rear ended once, *i.e.* from Leopold's van being forced into her, which pushed her forward into Gertrude Wilson's car. Laurence told the police the same thing later that day at the hospital after she had been treated. (Supp. 42, 50-51, 52-53.)

On October 30, 2009, Todd and Linda Leopold (collectively "Leopold") sued Ace Doran Hauling & Rigging Co., under whose PUCO and ICC authority the semi operated, and its driver, Stephen Stillwagon (collectively "Stillwagon").¹ (Supp. 57, 64-65.) As discovery proceeded, Stillwagon attempted to spread the risk of Leopold's substantial loss. First, he contended that

¹ Ace Doran Brokerage Co. was also initially sued, but was later voluntarily dismissed. (Supp. 86.)

Laurence and Ford Motor Company were potential tortfeasors. As to Laurence, the contention was she rear ended the car in front of her causing Leopold to slow/stop and Stillwagon to rear end Leopold. (Supp. 62-63, 66-67, 68.) As to Ford, the contention was that when Leopold's driver's seatback broke, his injuries were enhanced. (Supp. 40-41, 43, 45-46, 73-77, 79.) Second, Stillwagon contended that because Laurence had low liability insurance limits, two underinsured motorist carriers should also be involved. (Supp. 3-4, 8.)

Under Ohio's tort reform laws, tortfeasors not named as parties are assessed percentages of fault under *R.C. 2307.23* that could cause a plaintiff to go uncompensated under Ohio's joint and several liability rules in *R.C. 2307.22*. Thus, although Leopold did not consider Laurence or Ford tortfeasors, Leopold brought them into the case to avoid Stillwagon pointing to "empty chairs" at trial, to allow them to defend themselves, and to give the trial court the opportunity to order the claims against them dismissed via summary judgment, *i.e.* determine that they were not tortfeasors. Indeed, following discovery, Leopold still did not consider Laurence or Ford tortfeasors and expressed that sentiment by agreeing with their summary judgment positions. (Supp. 80, 83-84.)

Unknown to Leopold, on November 13, 2008, Laurence was the first one to sue Stillwagon claiming personal injury, but she did not make her medical records public in that case, and she voluntarily dismissed her case on April 1, 2009 and never refiled it. (Appx. 1-3.) Leopold added Laurence to his suit on February 18, 2010 - ten months after Laurence dismissed her case. (Appx. 3; Supp. 88-89.) Laurence did not make a personal injury claim in Leopold's case. (Supp. 92-93, 98) During the few months that Laurence's personal injury case was pending, her deposition was taken, and she was questioned about statements she made to her doctors at the hospital after the accident. (Supp. 103-109.)

Those physician-patient statements were not privileged in her case because Laurence filed suit and put her medical condition at issue, but she did not make her medical records public. In Leopold's case, however, any statements Laurence made to her physicians that her physicians placed in her hospital chart are privileged.

The importance of medical records cannot be overstated. ... Medical records serve many purposes, including ... [r]ecording information important to patient care The record must contain the following elements: ... documentation of pertinent history (Current Diagnosis & Treatment Emergency Medicine, Appx. 6)

Thus, Laurence's entire hospital chart contains information placed there by her doctors and staff that they considered important to her medical care, and it is privileged. Leopold did not sue Laurence due to her medical condition. She was sued for allegedly being a negligent driver. (Supp. 3.)

ARGUMENT

Proposition of Law No. I:

Under R.C. 2317(B)(1)(a)(iii), when a personal injury claim is asserted in a pleading, the patient-physician privilege is waived by the personal injury claimant because that person's medical condition is at issue. That waiver does not, however, apply in another case where the personal injury claimant is a party whose medical condition is not at issue and who did not make his/her medical records public.

Laurence was named as a defendant in this case because Stillwagon says she negligently drove her car contributing to cause Leopold's injuries. (Supp. 3.) Laurence is not a party here because she hurt herself in the accident. Accordingly, her patient-physician communications made in order to treat her are not at issue. Thus, Laurence's hospital emergency room records are privileged and inadmissible here. *Walus v. Hipp*, 6th Dist. No. L-11-1052, 2012-Ohio-623, ¶¶ 40-41; *Humble v. Dobson*, 2nd Dist. No. 95-CA-12, 1996 Ohio App. LEXIS 4774, **11-12 (November 1, 1996).

When Laurence did waive her privilege by filing a personal injury case, medical records apparently produced by her in that case were never filed by her with the trial court before she dismissed her case. Thus, Laurence did not voluntarily make her medical records public. When Laurence was named a defendant by Leopold due to her alleged negligent driving, Laurence's medical condition was not an issue so her privileged hospital records remained privileged. *Hageman v. Southwest General Health Center*, 119 Ohio St.3d 185, 189-190, 2008-Ohio-3343, 893 N.E.2d 153, ¶¶ 16-17.

Coincidentally, when Laurence dismissed her case, any records produced during discovery were no longer subject to the patient-physician-privilege waiver. After the voluntary dismissal, Laurence's personal injury action is treated as if it had never been filed. *Zimmie v. Zimmie*, 11 Ohio St.3d 94, 95, 464 N.E.2d 142 (1984); *Conley v. Jenkins*, 77 Ohio App.3d 511, 517, 602 N.E.2d 1187 (4th Dist. 1991); *Asbrock v. Brown*, 12th Dist. No. CA97-01-002, 1997 Ohio App. LEXIS 3655, **5-6 (August 18, 1997). Thus, because Laurence's first case is treated as never having been filed, R.C. 2317.02(B)(1)(a)(iii) categorizes Laurence's medical records as privileged. Consequently, there are two reasons the privilege is not waived in this case. *Hageman @ ¶ 17; In Re: Miller*, 63 Ohio St.3d 99, 109, 585 N.E.2d 396 (1992).

In *Hageman*, this Court in a plurality decision determined that a waiver of the physician-patient privilege in a divorce custody matter was not a waiver of the privilege in a related criminal proceeding pertaining to the husband's alleged pre-divorce assault upon his wife. Three members of the Court concluded that waiver of medical confidentiality in one case was limited to the specific case in which the records were sought, especially where the records are not introduced into evidence so as to become public records. *Id. @ ¶¶ 19-20*. Two members of the Court concluded that the physician-patient privilege was waived for the child-custody and civil-

protection-order issues in the divorce case, but that a patient-physician waiver under *R.C.* 2317.02(B)(1)(a)(iii) did not apply to the criminal case so the issue of limiting a waiver to a particular case was not ripe for decision. *Id.* @ ¶ 25. Two members of the Court dissented noting that Ohio's statute did not expressly limit the waiver to the litigation then at issue such that a waiver of the privilege was not limited to the divorce action alone. *Id.* @ ¶¶ 44-47.

The *Hageman* decision did not, however, address the impact of two civil cases where one was focused on a plaintiff's medical condition and where the other was not focused on that person's medical condition, but rather on that person's (a defendant) alleged negligent driving. In *Hageman*, the Court dealt with two cases where the same person's medical condition was at issue in each case. That is not the case here. Accordingly, there is all the more reason to uphold the privilege. Laurence's medical condition is just not at issue now. Additionally, when Laurence dismissed her personal injury action, the waiver there is treated as if it never occurred, but that rule of law is not determinative here because Laurence did not bring a personal injury claim in this case so her medical condition in this case is immaterial. As such, her medical records are privileged, and the lower courts erred in failing to protect Laurence's medical records from use or disclosure.

In an effort to side-step the privilege, Stillwagon says he only wants to use Laurence's medical records in this case, he is willing not to let them extend outside the scope of this case, and he will destroy them after the case is closed. (Supp. 113.) Yet just a singular misuse of Laurence's medical records violates her privilege because her medical condition was never an issue in this case. Moreover, she never voluntarily made her medical records public in her case. Again, the fact that Laurence voluntarily dismissed her case is not material to the fact that her physician-patient privilege is not waived in a case where her medical condition is not at issue.

Stillwagon, nonetheless, claims foul if the “whole truth” is not told even though it is privileged. The patient-physician privilege continues to apply, however, even if the information sought is highly relevant. As stated in *McCoy v. Maxwell*, 139 Ohio App.3d 356, 743 N.E.2d 974 (11th Dist. 2000):

We recognize that information contained in appellant’s psychological or psychiatric records may be extremely relevant to appellee’s defense ... [H]owever, relevancy alone does not waive the physician-patient or psychologist-client privilege. *Id.* @ 359.

Thus, merely because Stillwagon believes he has relevant evidence, it is not admissible because the physician-patient privilege protects it from disclosure. Further, in *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61, this Court agreed with the Eleventh District stating:

Thus, even assuming that the information the Roes seek is relevant and may lead to the discovery of admissible evidence, they must establish an exception to the privilege in order to discover this information; relevancy itself is not sufficient for purposes of discovery under *Civ. R. 26* when matters are privileged. *Id.* @ ¶ 28.

Relevance simply does not trump the privilege.

A few Ohio lower court decisions, reported and unreported, have considered a physician-patient-privilege waiver in related cases. Yet those cases are not like this one, and all of those cases, except one, were decided pre-*Hageman*.

In *Menda v. Springfield Radiologists, Inc.*, 136 Ohio App. 3d 656, 737 N.E. 2d 590 (2nd Dist. 2000), the Court dealt with concurrently pending cases involving a medical negligence claim against a physician and that same physician’s business dispute with former partners that centered around the physician’s mental health. When the plaintiff in the medical negligence case learned that his physician’s mental health may have impacted his medical care, he sought the physician’s personal mental health records, the confidentiality of which had already been waived in the business litigation. Thus, the *Menda* court was dealing with a physician who had already

placed his medical care at issue in the business litigation and a simultaneously pending medical negligence case where the patient made the physician's medical condition an issue pertinent to the patient's care. *Id.* @ 657-658. Here, however, Laurence's medical condition is not an issue, and she did not make her medical records in her personal injury case public. Thus, the *Menda* rationale does not apply to Laurence's situation. Moreover, the Second District believes *Hageman* has overruled *Menda*. See *State v. Branch*, 2nd Dist. No. 22030, 2009-Ohio-3946, ¶ 77.

In *Kodger v. Ducatman*, 8th Dist. No. 97842, 2012-Ohio-2517, the Court distinguished its facts from *Hageman* because the plaintiffs voluntarily filed their own expert witness reports in the trial court and served them on opposing counsel who then shared those reports with his law partners and his client. Plaintiffs sued the attorney for unauthorized disclosure of medical records under a *Hageman* tort-claim theory. Because the plaintiffs had already made their medical records public by filing them in the previous litigation, they were available for all to see, including opposing counsel's law partners and clients. Thus, no tort had been committed. *Id.* @ ¶ 20. Laurence never filed her medical records in her personal injury case so they never voluntarily became public record. Thus, the *Kodger* rationale does not apply here either.

In *Progressive Preferred Insurance Company v. Certain Underwriters at Lloyd's London*, 11th Dist. No. 2006-L-242, 2008-Ohio-2508, an insurer, having settled a personal injury action, brought an action for indemnity or, alternatively, contribution under R.C. 3937.21 against another insurer who may have also insured the same risk. The settling insurer contended the non-settling insurer should pay all or a portion of the settlement amount. When the injured person's doctors' depositions were scheduled for trial, the non-settling insurer moved to quash. The Court determined that the non-settling insurer did not have standing to assert the physician-

patient privilege of the plaintiff who had previously settled the personal injury action. *Id.* @ ¶¶ 12-13, 15. Standing to sue is not at issue here.

Although the Court determined that the non-settling insurer lacked standing to assert the privilege, it commented in *dicta* that once the personal-injury plaintiff waived the privilege it was also waived for the purposes of the settling insurer pursuing indemnity and/or contribution. No authority for its position was cited. *Id.* @ ¶ 14. This case was also decided pre-*Hageman*. Although the personal injury action had been settled, the insurer seeking indemnity/contribution had to try the same case in order to prevail. Thus, the same facts were at issue in both cases with respect to the settling plaintiff's medical condition. Laurence's medical condition is not at issue here. Incidentally, the settling plaintiff, unlike Laurence, did not voluntarily dismiss her case so as to make it a nullity. She settled it.

In *AK Steel Corporation v. Mitchell*, 12th Dist. No. CA99-04-039, 1999 Ohio App. LEXIS 5715 (December 6, 1999), a former employee filed seemingly inconsistent lawsuits: 1) an ADA claim against a former employer that was tried and decided in the former employee's favor, *i.e.* the employee had the ability to perform his job but for his termination. Thereafter, the former employer sued the former employee in a discovery action believing that the former employee had made a false claim for Social Security benefits shortly after winning his ADA case. The Social Security Administration determined that the former employee was disabled and could not perform his prior job duties. The former employee argued that the requested discovery was protected by physician-patient privilege, but the Court concluded that the former employee, having waived his privilege in the ADA litigation and in the SSA claim, had waived his privilege for this proceeding that questioned the viability of the ADA and SSA medical claims. *Id.* @ **3, 8. Again, that case is unlike Laurence's situation. In *AKA Steel*, the former employee had

placed his medical condition at issue and had released his confidential medical information to the public when he tried his ADA case and when he processed his SSA disability claim. Laurence, on the other hand, did not make her medical records public, and her medical condition is not at issue here.

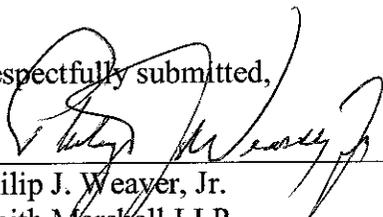
Consequently, there is no Ohio authority supporting the lower courts' denial of Laurence's protective-order motion under the facts here. The Eighth District's reliance upon *Menda* is misplaced. *Hageman* provides a balanced protection of privileged medical records. Every physician-patient-privilege waiver issue brings unique circumstances to bear on whether that waiver is a waiver in another lawsuit. The critical questions are: 1) is your medical condition an issue in both cases; 2) have you made your medical records public by filing them with a court or exhibiting them during a public trial; and 3) have you objected to the use of your medical records when you believe they are privileged.

Because Danielle Laurence: 1) filed a personal injury case; 2) did not voluntarily make her medical records public in that case; 3) was also made a party to Leopold's case alleging she negligently operated a motor vehicle, not that her medical condition was an issue; and 4) objected to and moved to protect her medical records in Leopold's case, she did not waive her physician-patient privilege here. The fact that Laurence also voluntarily dismissed her personal injury case should not deter this Court from establishing a broader rule that bars a waiver in one case from being applicable to another case as long as: 1) a medical condition is not at issue in one of the cases; 2) the records have not been voluntarily made public; and 3) timely objection is made to improper use of privileged medical records.

CONCLUSION

For the aforementioned reasons, the appellate court's decision should be reversed, and this Court should issue an order granting Danielle Laurence's Motion for Protective Order.

Respectfully submitted,



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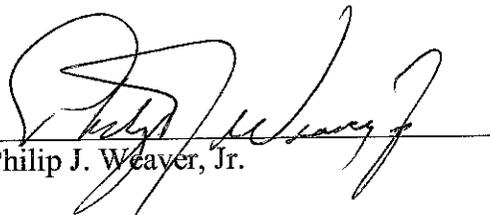
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APPENDIX

DATE: 8/01/2012
TIME: 2:46 PM

APPEARANCE DOCKET

Case No: CV-08-676218
Filing Date: 11/13/2008

DANIELLE LAURENCE
VS
STEPHEN H. STILLWAGON ETAL

Filing Cd: 1310 TORT-M.V. ACCIDENT
Judge: BRIDGET M MCCAFFERTY
Prior Judge:
Magistrate:
Panel Chair:

Status: I
Jury Req: Y
Class:
Prayer Amt:

- Arbitration
- Mediation
- Settlement
- Notes
- Appealed

Next Action:
Date/Time:

-----File Location-----
Name: DF-ROOM 45
Date: 04/03/2009

Disposition: NEWLY FILED DIS. W/O PREL

THE STATE OF OHIO }
Cuyahoga County } SS. THE COURT OF COMMON PLEAS WITHIN AND FOR CUYAHOGA COUNTY.

I, GERALD E. FURST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR CUYAHOGA COUNTY, HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL.

Appearance Docket

NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 13th DAY OF *Aug* A.D. 20*08*

GERALD E. FURST, CLERK
Deputy

P 1	LAURENCE, DANIELLE	0019148	SMITH/MICHAEL/LEBBY 23811 CHAGRING BOULEVARD SUITE 235 BEACHWOOD, OH 44122-0000	(216) 292-3430
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D 2	Service: 11/18/2008 ACE DORAN HAULING DBA MAGGIE TRANSPORT LLC PO BOX 10 AUSTINBURG, OH 44010-0000	SUMS COMPLAINT CERTIFIED MAIL 0059791	11/20/2008 COMP ON PERSON ABBARNO/KENNETH/P 1400 MIDLAND BUILDING 101 PROSPECT AVE. WEST CLEVELAND, OH 44115-0000	(216) 687-1311
	Service: 11/18/2008	SUMS COMPLAINT CERTIFIED MAIL	11/20/2008 COMP ON OTHER	

Type	- Docket - Code	Party	Date	Description	Cost Amount
SR	C001	P 1	11/13/2008	COMPLAINT WITH JURY DEMAND FILED. SERVICE REQUEST - SUMMONS BY CERTIFIED MAIL TO THE DEFENDANT(S).	
SF	RECT	P 1	11/13/2008	DEPOSIT AMOUNT PAID MICHAEL LEBBY SMITH	100.00
SF	LR	P 1	11/13/2008	LEGAL RESEARCH	3.00
SF	LA	P 1	11/13/2008	LEGAL AID	26.00
SF	INIT		11/13/2008	CASE FILED	
SF	CM	P 1	11/13/2008	COMPUTER FEE	10.00
SF	LN	P 1	11/13/2008	LEGAL NEWS	10.00
SF	245		11/13/2008	JUDGE BRIDGET M MCCAFFERTY ASSIGNED (RANDOM)	

DATE: 8/01/2012
TIME: 2:46 PM
CASE: CV-08-676218

APPEARANCE DOCKET

Case No.	Case Type	Date	Description	Amount
SF	CF P 1	11/13/2008	CLERK'S FEE	25.00
SC	H001	11/14/2008	CASE MGMNT CONFERENCE SET FOR 12/29/2008 AT 08:45 AM. (Notice Sent).	
CS	WRIS D 2	11/17/2008	WRIT FEE	2.00
CS	WRIS D 1	11/17/2008	WRIT FEE	2.00
SR	CRTM D 1	11/18/2008	SUMS COMPLAINT(12876536) SENT BY CERTIFIED MAIL. TO: STEPHEN H STILLWAGON 3087 LILLIE RD JEFFERSON, OH 44047-0000	6.00
SR	CRTM D 2	11/18/2008	SUMS COMPLAINT(12876537) SENT BY CERTIFIED MAIL. TO: ACE DORAN HAULING 1034 ROUTE 45 AUSTINBURG, OH 44010-0000	6.00
SR	GDCO D 2	11/25/2008	CERTIFIED MAIL RECEIPT NO. 12876537 RETURNED BY U.S. MAIL DEPARTMENT 11/24/2008 ACE DORAN HAULING MAIL RECEIVED AT ADDRESS 11/20/2008 SIGNED BY OTHER.	
SR	GDCP D 1	11/26/2008	CERTIFIED MAIL RECEIPT NO. 12876536 RETURNED BY U.S. MAIL DEPARTMENT 11/24/2008 STILLWAGON/STEPHEN/H MAIL RECEIVED BY ADDRESSEE 11/20/2008.	
JE	JE	12/04/2008	PLAINTIFF'S MOTION TO CONTINUE CASE MANAGEMENT CONFERENCE, FILED 12/1/08 IS GRANTED. CMC RESET 1/5/09 AT 8:45 AM IN COURTROOM 21-C. CLDLJ 12/04/2008 NOTICE ISSUED	8.00
AN	GEN D	12/10/2008	DEFENDANT(S) STEPHEN H STILLWAGON(D1) and ACE DORAN HAULING(D2) ANSWER KENNETH P ABBARNO 0059791	
JE	JE	1/06/2009	CASE MGMNT CONFERENCE HELD ON 01/05/2009. ALL DISCOVERY TO BE COMPLETED BY 04/06/2009. EXPERT WITNESS REPORTS SHALL BE EXCHANGED IN ACCORDANCE WITH LOCAL RULE 21.1 AS FOLLOWS: BY AGREEMENT OF THE PARTIES. . DISPOSITIVE MOTION TO BE FILED BY 04/13/2009. BRIEF IN OPPOSITION TO BE FILED BY 5/13/09 BY WALK THROUGH TO COURTROOM 21-C. PRETRIAL SET FOR 04/06/2009 AT 08:45 AM. FINAL PRETRIAL SET FOR 05/20/2009 AT 09:00 AM. ALL PARTIES TO BE PRESENT. JURY TRIAL SET FOR 05/27/2009 AT 10:00 AM. ALL PARTIES ARE TO SUBMIT TO THE COURT TRIAL BRIEF, WITNESS LISTS, JURY INSTRUCTIONS, MOTIONS IN LIMINE, AND STIPULATIONS 7 DAYS BEFORE THE TRIAL. COURTESY COPIES TO BE DELIVERED TO THE COURT UPON FILING. CLRDT 01/06/2009 NOTICE ISSUED	6.00
SR	SUBP D 1	2/12/2009	SUBPOENA FOR: CONSTANCE SPEED SERVED FEB. 11, 2009 AS FOLLOWS: POSTED .	2.00

DATE: 8/01/2012
TIME: 2:46 PM
CASE: CV-08-676218

APPEARANCE DOCKET

SR	SUBP	D 1	2/12/2009	SUBPOENA FOR: GERTRUDE WILSON SERVED FEB. 11, 2009 AS FOLLOWS: POSTED .	2.00
SR	SUBP	D 1	3/19/2009	SUBPOENA FOR: CONSTANCE SPEED, SERVED MAR. 16, 2009 AS FOLLOWS: POSTED SIDE UPSTAIR ENTRANCE, DOWNSTAIR FEMALE TOLD ME THIS WAS HER ENTRANCE .	2.00
SR	SUBP	D 1	3/19/2009	SUBPOENA FOR: GERTRUDE WILSON, SERVED MAR. 16, 2009 AS FOLLOWS: POSTED SIDE ENTRANCE OF RESIDENCE .	2.00
OT	GEN	P 1	4/01/2009	P1 DANIELLE LAURENCE NOTICE OF DISMISSAL. MICHAEL LEBBY SMITH 0019148	
JE	JE		4/06/2009	CASE IS DISMISSED WITHOUT PREJUDICE. OSJ. FINAL. COURT COST ASSESSED TO THE PLAINTIFF(S). CLRDT 04/06/2009 NOTICE ISSUED	8.00
CS	3151		7/29/2009	COURT COST ASSESSED DANIELLE LAURENCE BILL AMOUNT 120 PAID AMOUNT 100 AMOUNT DUE 20	
CS	3151		8/10/2009	COURT COST ASSESSED DANIELLE LAURENCE BILLED C/O ATTY BILL AMOUNT 120 PAID AMOUNT 100 AMOUNT DUE 20	
CS	3151		8/10/2009	COURT COST ASSESSED DANIELLE LAURENCE BILL AMOUNT 120 PAID AMOUNT 100 AMOUNT DUE 20	
\$\$	POA	P 1	10/14/2009	PAYMENT ON ACCOUNT MADE ON BEHALF OF LAURENCE/DANIELLE/ IN THE AMOUNT OF \$20.00	20.00
OT	GEN	D 1	8/19/2011	D1 STEPHEN H STILLWAGON DEPOSITION OF DANIELLE LAURENCE. KENNETH P ABBARNO 0059791	
OT	GEN	D 1	8/19/2011	D1 STEPHEN H STILLWAGON DEPOSITION OF GERTRUDE WILSON. KENNETH P ABBARNO 0059791	

a LANGE medical book

CURRENT DIAGNOSIS & TREATMENT

Emergency Medicine

sixth edition

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Current Diagnosis & Treatment: Emergency Medicine, Sixth Edition

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Notice

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tends to injure the plaintiff's reputation or to diminish the esteem or respect in which the plaintiff is held.

Animal Bites

Reporting laws in the United States usually require that the emergency physician and staff report an animal bite to the appropriate local health official within a specified number of hours after the bite has occurred. Such reporting is an obvious safeguard to protect the public from vicious animals and from the spread of animal-borne infections, especially rabies.

See Chapter 28 for management of bites.

Epilepsy

In many states, epilepsy and other neurologic impairments, especially those resulting in episodic loss of consciousness, are reportable to the agency responsible for motor vehicle licensing. The time period after a seizure during which a patient may not drive varies widely among the states. It is also important to provide appropriate discharge instructions to patients so that they will avoid potentially dangerous activities.

Dead on Arrival

All states in the United States require that receipt of a body DOA at the ED be reported to the coroner or medical examiner for possible investigation and for assessment of the need for postmortem examination. In such cases, the emergency physician and staff should do nothing to the corpse that would interfere with the gathering of evidence by the coroner or medical examiner. For example, the ED staff should not attempt to obtain blood and tissue for laboratory studies; all specimens in such cases should be obtained by the coroner or medical examiner. Similarly, the corpse should not be used to practice cardiopulmonary resuscitation, endotracheal intubation, or other procedures.

THE MEDICAL RECORD

The importance of medical records cannot be overstated. The medical record is both a legal document and a means of recording the cause of a patient's illness. It is subject to review by hospital administration, the medical staff including consulting or subsequent treating physicians, third-party payers, state and national accreditation agencies, patients, and occasionally attorneys.

Medical records serve many purposes, including the following:

- Recording information important to patient care now and in the future,
- delineating level of care for billing, and

- providing medicolegal documentation to support compliance with the standard of care.

When crucial facts such as vital signs or the results of specific examinations were not recorded in the patient's medical records, courts and juries may conclude that they were not done. Although the medical record is a summary of the patient's visit rather than a verbatim account of everything that transpired, it behooves the emergency physician and staff to document carefully with specific attention to pertinent negatives and positives for the particular presenting complaint. Invariably, should an unfavorable outcome or litigation occur, the physician would wish he or she had provided better documentation of care.

JCAHO requires that a medical record be established and maintained for every ED patient. The record must contain the following elements:

- patient identification
- time and means of arrival
- appropriate vital signs
- documentation of pertinent history and physical findings
- emergency care given prior to patient arrival
- diagnostic and therapeutic orders
- clinical observations, including the results of treatment
- reports of procedures, tests, and results
- conclusions reached on completion of examination and treatment
- diagnostic impression
- final disposition
- patient condition on discharge or transfer
- documentation of discharge instructions

Other important items include the following:

- list of allergies
- current medication
- possibility of pregnancy, if germane
- tetanus immunization history, if germane
- name of patient's private physician
- documentation of prescriptions given to the patient
- patient's signature acknowledging receipt and understanding of discharge instructions
- documentation of a medical screening examination
- documentation of leaving against medical advice

The information contained in the patient's medical record is confidential and should not be disclosed to the police, press, or other parties without the patient's written consent. Exceptions arise when the patient's medical

record is sought by a valid subpoena or court order. The emergency physician can be forced to release confidential information by a court order requiring such release.

Medical records of patients seen in the ED because of drug or alcohol abuse must be handled with particular attention to confidentiality to avoid litigation for defamation. All descriptions of the patient's clinical condition must be stated in an objective manner. Extraneous subjective remarks betraying the physician's or nurse's attitudes about the patient have no place in the medical record.

EMERGENCY PHYSICIAN & MEDICAL STAFF INTERACTION

The practice of hospital-based emergency medicine involves constant interaction with many members of the medical staff as well as the hospital administration and governing body. The emergency physicians practice in something of a fish bowl, where his or her clinical skills are under constant prospective and retrospective scrutiny by the entire medical staff. As a result, emergency physicians and other staff must work in a highly charged professional environment.

A potential problem for the ED is created when a patient is instructed by a medical staff physician to go to the ED for treatment and the physician then either fails to meet the patient and keep the appointment or fails to notify the ED staff of the patient's imminent arrival. The emergency physician must decide whether to exercise clinical control over the patient and institute diagnosis and treatment. If the patient is a nonemergency patient and wishes to be seen only by the private physician, there is no difficulty for the ED staff. However, when the patient's clinical problem requires immediate attention, the emergency physician may be sued for negligence if necessary emergency care is not given despite the wishes of the private physician. As a general rule, when in doubt, it is better to err on the side of treatment, assuming that the patient has consented to treatment in the first place. An effort should be made to contact the private physician under these circumstances, but administrative considerations should never interfere with appropriate patient care.

Another difficulty for the emergency physician is dealing with medical staff physicians' requests that the emergency physician write admission orders for patients admitted through the ED. The responsibility for writing admission orders should rest with the medical staff physician to whose service the patient has been admitted. Having the emergency physician write admission orders as a convenience for the medical staff still occurs at many hospitals, but it is a policy that should be discouraged. It blurs the transfer-of-care responsibility, exposes the emergency physician to unnecessary liability, and may delay prompt examination by the admitting physician.

Once a patient has been admitted through the ED, hospital bylaws usually specify how soon the patient must be seen by the admitting physician. If the patient's condition is serious, the patient should be seen as soon as possible after admission. All admitted patients should be seen within a reasonable time depending on their clinical condition. To ensure that this happens, the emergency physician should accurately convey the patient's clinical condition to the admitting physician. If uncertainty exists, the admitting physician should be asked to examine the patient.

Another area of potential conflict between the hospital staff and the emergency physician is the area of on-call specialty consultation. EMTALA requires hospitals to provide a list of on-call physicians who will respond to requests from emergency physicians for specialty consults and follow-up care. If emergency specialty consultation is requested and the on-call specialist fails to respond, the emergency physician may transfer the patient by certifying that the benefit of transfer outweighs the risks. Care must be taken to document requests for on-call consultation in a timely, accurate, and objective manner.

Problems such as these involving the ED and medical staff are of a delicate political nature. The ED and medical staff must keep lines of communication open so that these difficult areas can be discussed dispassionately. If this open communication does not exist, the inevitable result is strained personal and professional relations, which can cause a lowered standard of patient care and create a climate of confusion that engenders litigation.

EXPERT WITNESS

Emergency medicine physicians may be asked to provide expert witness testimony in medical malpractice cases. Regardless of how one feels about the current legal process for resolving malpractice suits, fair, accurate, and impartial opinions by emergency physicians familiar with the standard of care are essential. Serving as an expert witness can be an intimidating experience. If opposing counsel is unable to rebut the opposing expert's opinions, they often attempt to discredit the expert.

The American College of Emergency Physicians has issued expert witness guidelines for the specialty of emergency medicine (policy stated September 1995), as stated below:

Expert witnesses are called on to assess the standard of care for emergency physicians in matters of alleged medical malpractice and peer review. Expert witnesses in the specialty of emergency medicine should meet the following criteria:

- *Be certified by a recognized certifying body in emergency medicine;*
- *Be in the active clinical practice of emergency medicine for three years immediately before the date of the incident;*