

vital signs

DIAGNOSING THE CHANGING STATE OF MEDICAL MALPRACTICE & NURSING HOME LIABILITY

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Michigan Supreme Court Permits Introduction Of Evidence Of A Plaintiff's Own Pretreatment Negligence As An Element Of Comparative Fault In Medical Management Disputes

By Jeffrey H. Chilton

This month the Michigan Supreme Court issued an opinion which will be of great assistance to health care administrators and practitioners in the proportioning of fault between plaintiffs and defendants for injuries claimed in a medical management dispute.

In the Estate of *Shinholster et. al. v. Annapolis Hospital et. al.* ___Mich___ (Docket No 123720, rel'd 8/4/04), the Supreme Court reversed an adverse jury verdict against a defendant hospital and physician and remanded the case for a re-trial on damages based on the refusal of the Court to allow introduction of evidence at trial that the plaintiff herself was, in part, responsible for her own demise. The focus of plaintiff's complaint was that the defendant health care professionals caused the death of their patient when they allegedly failed to monitor and treat signs and symptoms of a stroke. Defendants had attempted to introduce evidence at trial to the effect that the decedent was comparatively at fault for her own death when she failed to follow a previous physician's order to take medication to lower her blood pressure before she had any contact with the medical defendants in this litigation.

It is well settled in Michigan that a patient's negligence in failing to follow a defendant's physician's advice once treatment commences may be considered in a comparative negligence analysis. See e.g. *Jalaba v. Borovoy*, 206 Mich App 244 (1994). The key importance of the Michigan

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The decision supports a reduction in the total amount of damages a plaintiff in a medical malpractice case may recover by the percentage attributable to plaintiff's own negligence prior to treatment by a defendant physician or hospital. Defendants should file an affirmative defense based on comparative negligence of a plaintiff-patient with the first responsive pleadings and should work on developing medical evidence to support such an affirmative defense during a claim's discovery period. Such evidence secured during discovery should be introduced by defendants at trial and defendants should request the standard jury instruction regarding comparative negligence (M Civ JI 11.01).

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Supreme Court's decision in *Shinholster* on the issue of comparative negligence is that this recognized concept has been extended to medical situations in which a plaintiff sought prior treatment from other health care professionals who are not parties to the lawsuit and failed to follow their medical direction.

This Michigan Supreme Court decision provides strong support for all health care professionals, medical institutions and their counsel and insurers to utilize in legitimately reducing a medical malpractice plaintiff's demand pre-trial or to reduce any potential adverse verdict at the time of trial. Health care professionals can legitimately advocate that the total amount of damages that a plaintiff would otherwise be entitled to recover should be reduced by the percentage that the plaintiff contributed to their own injury by failing to follow medical advice. In certain instances where a plaintiff is more than fifty percent responsible for their own injuries, the plaintiff, pursuant to Michigan statute, can be prevented from obtaining any monies for non-economic damages.

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