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EMERGENCY ROOM NEGLIGENCE: HOW NEW LEGAL BURDENS HARM PATIENTS

In recent years, a number of states have changed malpractice laws to make it more difficult for injured patients to bring cases against emergency room (ER) doctors.[1]

Some laws increase the standard of proof against an ER doctor, requiring a victim of malpractice to prove their case by "clear and convincing evidence" rather than by a "preponderance of the evidence," a lower standard where patients need only show that it was more likely than not that the doctor was negligent.[2] Proving a case by "clear and convincing evidence" means injured patients must demonstrate that negligence was substantially more likely than not.[3] This is a very high burden that makes it much more difficult for patients to win a medical malpractice case.

Other state laws have raised the standard of negligence in medical malpractice cases. Normally, a doctor can be held liable for his actions or failure to act if it violates what a reasonable doctor in a similar position would have done.[4] These new laws have heightened the standard to "gross negligence" or "willful and wanton" negligence so that a doctor will not be held liable unless the act or omission was voluntary and conscious or reckless.[5] It is not enough that the doctor did not comply with standards. To be liable, the physician must affirmatively want to not comply.

The following examples show the real life impact of these increased burdens on patients.

GEORGIA

[1] *See*, *e.g.*, NC Gen Stat § 90-21.12 (2012); A.R.S.§12-572 (2009); OCGA §51-1-29.5 (2005); Florida Statutes §768.13 (2003); Tex CP. Code Ann. § 74.151 (2003). As of publication, the Pennsylvania state legislature is considering raising the standard of evidence in ER medical malpractice cases to gross negligence that must be proven by "clear and convincing evidence." Kris B. Mamula, "Bill would change medical negligence definition," *Pittsburgh Business Times*, April 2, 2014, http://www.bizjournals.com/pittsburgh/news/2014/04/02/bill-would-change-medical-negligence-definition.html.

[2] Legal Information Institute, "Clear and Convincing Evidence" (viewed April 28, 2014), http://www.law.cornell.edu/wex/preponderance.

[3] Legal Information Institute, "Clear and Convincing Evidence" (viewed April 28, 2014), http://www.law.cornell.edu/wex/clear_and_convincing_evidence.

[4] BLACK'S LAW DICTIONARY 1133 (9th ed. 2009).

[5] *Ibid*.

Shaquille Johnson. Fifteen-year-old Shaquille Johnson underwent knee surgery for a football injury at the end of 2007. Eight days later he returned to the emergency room complaining of chest pain. The ER doctor diagnosed him with pleurisy (an inflammation of the lining surrounding the lungs) and sent him home. In early 2008, two weeks after his visit to the emergency room, Shaquille was taken by ambulance to the same hospital, where he later died from a pulmonary embolism. Such embolisms are common after surgery, and considering both Shaquille's history and the pain he complained of, the doctor should have run the proper tests. The trial court dismissed the case because Shaquille's parents could not prove the doctor was "grossly negligent" by "clear and convincing" evidence. An appeals court upheld the lower court's ruling.[6]

Carol Gliemmo. In 2007, Carol Gliemmo went to the ER complaining of a "snapping in her head" and serious pain behind her eyes. The ER doctor diagnosed her as having high blood pressure and discharged her with a prescription for valium. Two days later, Carol went to her family physician because nothing had improved. Her physician ordered a CT scan that revealed hemorrhaging in her brain, which left Carol paralyzed. She sued the hospital and the ER doctor who misdiagnosed her condition but the case was dismissed because Carol was unable to show "clear and convincing evidence" of "gross negligence."[7]

Kimberly Evans Scruggs. In 2000, fifteen-year-old Kimberly Evans Scruggs, then 20 weeks pregnant, went to the hospital because she suffered excessive vaginal bleeding. The on-duty doctor consulted an on-call doctor over the phone and ultimately determined that Kimberly was having a spontaneous or inevitable miscarriage. The on-duty doctor discharged her and sent her home to "let nature run its course." This doctor provided no information or instruction to Kimberly or her mother. After returning home, Kimberly began to feel contractions and returned to the ER. The on-call nurse refused to admit Kimberly because there was no obstetrics facility. She directed Kimberly to the hospital bathroom where she was forced to give birth with the help of her mother. Only after miscarrying in the bathroom was she admitted to the hospital and transferred to an obstetrics facility. The court found that the hospital was not liable.[8]

TEXAS

Aaliyah Gardner. In 2006, ten-month-old Aaliyah Gardner went to the ER in respiratory distress and was having a seizure. Even though the hospital was not equipped with the proper level of care, a doctor placed an endotracheal tube in the baby's airway and gave her medication to control the seizure. The ER then arranged for transport to a facility better equipped to handle her care. When the transport team arrived, Aaliyah was not getting enough oxygen because of

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[6] *Johnson v. Omondi*, 736 S.E.2d 129 (Ga. Ct. App. 2012).

[7] Tim Chitwood, "Georgia Supreme Court rejects Columbus appeal over emergency room liability law," *Ledger-Enquirer*, March 15, 2010, http://www.ledger-enquirer.com/2010/03/15/1052347/georgia-supreme-court-rejects.html; Bill Rankin, "Tort reform challenged over ER care,"*Atlanta Journal-Constitution*, October 6, 2009, http://www.ajc.com/news/news/local/tort-reform-challenged-over-er-care/nQX6P/; *Gliemmo v. Cousineau,* 694 S.E.2d 75 (Ga. 2010).

[8] *Scruggs v. Georgia Baptist Health Care System Inc.*, 2009 Jury Verdicts LEXIS 42661 (02-VS-030085-H, November 3, 2009).

the intubation tube either being blocked or improperly placed. The team removed the tube, attempted to re-intubate three times and Aaliyah went into cardiac arrest. They were able to successfully administer CPR and eventually reintubate. However, because of the deprivation of oxygen, Aaliyah has permanent brain damage, cerebral palsy and cortical blindness. A jury found there was no willful and wanton negligence.[9]

Stacy Meaux. In 2007, Stacy Meaux went to the ER with chest pain that could indicate cardiac arrest. At the hospital, nurses did not follow proper procedure. In Stacy's initial assessment, her temperature was low, she had a high level of pain, suffered high blood pressure and showed an increased heart rate. Stacy also had certain risk factors of a heart attack. The nurse disregarded this information and assessed her as having generalized pain, so Stacy was not given any specialized care for an impending heart attack. She received a breathing treatment and an EKG and was eventually discharged as being stable. No other tests were done. After being discharged, Stacy died from a heart attack. At trial, the nurses and doctors treating Stacy testified that the proper protocol was not followed; nevertheless the court determined that there was no willful and wanton negligence.[10]

[9] *Gardner v. Children's Med. Ctr. Of Dallas,* 402 S.W.3d 888 (Tex. App.-Dallas 2013).
[10] *Christus Health South East Texas v. Licatino*, 352 S.W.3d 556 (Texas App. 2011).