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Leveling the Playing Field: Applying Daubert in Rebuttal of Punitive Damages Claims in the Nursing Home

2014 Marked A Continued Rise In The Incidents Of Data Breaches – Healthcare Hit The Hardest

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LEVELING THE PLAYING FIELD:

By James E. Simmons, Esq.

APPLYING DAUBERT IN REBUTTAL OF PUNITIVE DAMAGES CLAIMS IN THE NURSING HOME

Recently, the Florida Legislature amended Florida Statute § 400.0237 (hereinafter "Florida Nursing Home Statute"), essentially heightening a claimant's burden of proof when attempting to seek punitive damages.[1] Notwithstanding the legislative efforts, predatory law firms continue to employ tactics to drive up costs, expose nursing home companies to highly intrusive corporate discovery, and otherwise prolong unnecessary litigation by seeking punitive damages claims. In efforts to accomplish these goals, most predatory law firms heavily rely on the testimony (or Affidavit) of a nursing consultant (or other standard of care expert) to support allegations that the claimant is entitled to punitive damages, (usually contained in their proffer).[2] Importantly, the Florida Legislature has also recently amended the Florida Evidence Code and adopted Federal case law heightening the admissibility requirements for expert testimony.[3] Thereby, in order to adequately defend a punitive damages claim, in the nursing home context, a savvy defense attorney will likely need to exhibit a mastery of both the recently amended Florida Evidence Code regarding the admissibility requirements for expert testimony *and* the amended Florida Nursing Home Statute as it pertains to punitive damages claims. This article will discuss the importance of applying Florida's recent adoption of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* in rebuttal to a claim for punitive damages in the nursing home context, which are inextricably intertwined.

In order to effectively attack a claimant's expert in a claim for punitive damages in the nursing home context, it is important to initially examine the expert's qualifications and, ultimately, raise arguments to question the admissibility of their opinion testimony. In 2013, the Florida Legislature amended the Florida Evidence Code to adopt the standards for expert testimony as provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).[4] Under the *Daubert* standard, Courts are required to make a "gatekeeping" determination as to the admissibility of expert testimony.[5] The Supreme Court has held that the *Daubert* standard applies to all expert testimony, not just scientific testimony.[6] Similarly, under the amended Florida Nursing Home Statute, "the Court shall conduct a hearing to determine whether there is sufficient admissible evidence submitted by the parties to ensure that there is a reasonable basis to believe that the claimant, at trial, will be able to demonstrate by clear and convincing evidence that the recovery of such damages is warranted under a claim for direct liability."[7] Therefore, to adequately rebut the opinions of a nursing consultant (or other standard of care expert) in a claim for punitive damages, a defense attorney is inherently charged with raising a *Daubert* challenge to discredit the expert's qualifications in attempts to have his or her opinions excluded. Failing to do so, and merely arguing against the merits of the opinions reached by the expert, would essentially concede the point that these opinions should be considered as "admissible evidence" pertaining to Claimant's "reasonable basis" burden.

Under the *Daubert* standard, as codified by Fla. Stat. § 90.702, expert testimony is only admissible if: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. The proponent of the evidence (claimant in this instance) bears the burden to show that evidence is relevant and reliable by a preponderance of the evidence (emphasis added).[8] As noted above, the language of Fla. Stat. § 90.702, adopting *Daubert*, is inextricably intertwined with the requirements for a showing of a "reasonable basis" for the imposition of punitive damages in the nursing home context. As referenced above, the statute governing the burden of proof for pleading punitive damages in the nursing home context, Florida Statutes, 400.0237 (hereinafter "Punitive Damages Statute"), was recently amended on June 13, 2014.[9] According to the amended Punitive Damages Statute, a claim for punitive damages may not be brought unless there is a showing by admissible evidence that has been submitted by the parties that provides a reasonable basis for recovery of such damages when the criteria of the statute are applied (emphasis added).[10] A plain reading of the two statutes, in conjunction with each other, requires that a nursing consultant's opinion must first satisfy the stringent requirements of *Daubert* in order to even be considered by the Court as "admissible evidence" establishing a "reasonable basis" for a punitive damages claim.

It is important to note that an expert may be *qualified* under *Daubert* by their education, training, and experience, which may include certifications, professional affiliations, and fellowships.[11] Nonetheless, he or she must *also* have "*special knowledge* about the *discrete subject* upon which he (or she) is called to testify (emphasis added)."[12] Furthermore, witnesses' qualifications and competency are determined by the trial judge.[13] Also, a party must demonstrate their expert's competence on a subject matter pending before the Court by a preponderance of the evidence.[14] Therefore, although many nursing consultants (or other standard of care experts) may be "qualified" as an expert under *Daubert* due to their education or years of experience in the nursing field; it will be imperative for defense counsel to question whether the expert actually has *special knowledge* about the specific allegations contained in the punitive damages claim to be considered by the Court. For example, a nursing consultant who is not a medical doctor and does not have the qualifications to render medical opinions (*e.g.,* prescribing medications) should be excluded from rendering any standard of care opinions in this regard.[15]

Further, in determining whether an expert has utilized a reliable methodology in arriving at their conclusions, the Supreme Court in *Daubert* laid out four non-exclusive factors.[16] First, Courts are directed to inquire whether the expert's methodology has been tested.[17] The Court noted that "scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other forms of human inquiry."[18] The second *Daubert* factor is that it must be determined whether the theory or technique used by the expert has been subjected to peer review and publication.[19] The third *Daubert* factor is that it must be determined whether there is a known or potential error rate in the methodology.[20] The fourth *Daubert* factor is that the Court must determine whether the technique used by the expert has been generally accepted in the relevant community.[21]

Therefore, a nursing consultant (or other standard of care expert) proffered to support a claim for punitive damages would need to exhibit a reliable methodology in arriving at their opinions that are also subject to peer review, publication and based on empirical data with a known rate of error. They *cannot* merely rely on their education and experience to render such opinions. Without satisfying these heightened requirements, a nursing consultant's testimony would amount to mere *ipse dixit* or pure opinion testimony, which has been specifi
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cally rejected in Florida.[22] Also of note, expert's Affidavits which are merely legal conclusions are also disregarded in Florida.[23]

In sum, the admissibility requirements for expert testimony under *Daubert* in Florida are inextricably intertwined with the requisite burden of proof that claimants must show for the imposition of punitive damages under Florida's amended Nursing Home Statute. A claimant's expert must satisfy the stringent requirements under *Daubert* before their opinions or testimony can even be considered by the Court as a "reasonable basis" for the imposition of punitive damages. Therefore, to adequately rebut a predatory law firm's tactics of seeking punitive damages in the nursing home context, it is imperative that a defense attorney raise

both *Daubert* considerations and argue against the merits of the claim as applied to the new heightened standards of Florida's Nursing Home Statute.

(Endnotes)

1 *See generally*, Florida Statutes, 400.0237 as amended on June 13, 2014; requiring the proffer of "admissible evidence" to provide the reasonable basis necessary to seek a claim for punitive damages.

2 Florida Rule of Civil Procedure 1.190 requires a claimant seeking punitive damages to file a motion for leave to amend a pleading to assert a claim for punitive damages and must make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant that provides a reasonable basis for recovery of such damages. The motion to amend can be filed separately and before the supporting evidence or proffer, but each must be served on all parties at least 20 days before the hearing.

3 In 2013, the Florida Legislature abandoned the *Frye* test derived from *Frye v. United States*, 293 F.2d 1013 (D.C. Cir 1923), which previously governed the admissibility of expert testimony in Florida and adopted the standard under *Daubert* v *Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). *See,* Fla. Stat. § 90.702. *See also, Conley v. State,* 129 So. 3d 1120, 1121 (Fla.1st DCA 2013).

4 *Id.* Further, the Florida Legislature adopted *Daubert* as reaffirmed and refined by both *General Electric Co. v. Joiner,* 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999). *See,* Ch. 2013-107, § l, Laws of Fla. (2013) (preamble to § 90.702).

5 *Id.*

6 *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999).

7 Florida Statutes, 400.0237(1)(b).

8 *United States* v. *Frazier,* 387 F.3d 1244, 1260(11th Cir. 2004).

9 *See generally*, Florida Statutes, 400.0237 "amendments" and "committee notes."

10 Florida Statutes, 400.0237(1).

11 *Vega v. State Farm Mut. Auto,* 45 So.3d 43, 44 (Fla. 5th DCA 2010).

12 *Id.*

13 Fla. Stat. §90.105 (2013).

14 *Daubert* at 592.

15 As distinguished in *Holmes Regional Medical Center, Inc. v. Wirth,* 49 So.3d 802 (Fla. App. 5 Dist. 2010)*; see also, Gold vs. Park Ave. Extended Care Ctr. Corp.,* 2010 WL 2324160 (N.Y.Sup. 2010).

16 *Daubert,* at 593.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *See Perez v. BellSouth Telecommunications, Inc.,* 2014 WL 1613654 (3rd DCA 2014).

23 *See, Briggs v. Jupiter Hills Lighthouse Marina,* 9 So.3d 29, 32 (Fla. 4th DCA 2009).

2014 MARKED A CONTINUED RISE IN THE INCIDENTS OF DATA BREACHES – HEALTHCARE HIT THE HARDEST

By Sherry Schwartz, Esq.

It is difficult to read the news these days without learning of the newest "data breach" of personal identifiable information (PII), including personal health information (PHI). Healthcare and other entities that maintain health records seem to be an attractive target for hackers given the nature of information contained in medical records. According to the Identity Theft Resource Center (ITRC), 2014 marked a record high year for instances of data breaches.[1] The Medical/Healthcare industry represented the highest percentage of reported breaches at 42.5 percent.[2]

It is important to note that healthcare is governed, in large part, by HIPAA and HITECH; both of which mandate more stringent data breach reporting guidelines than analogous state and federal laws.[3] Hence, one must certainly question if the "reported" statistics truly represent an accurate picture when quantifying instances per industry. Nevertheless, the financial costs of reported settlements certainly demonstrate the potential exposure. This article intends to take a look at some of the cases we have seen in 2014, a brief discussion of the data breach governance both in federal and state law, as well as two court decisions offering some available defense strategies when dealing with private causes of action.

According to the U.S. Department of Health and Services, 2014 marks the largest HIPAA settlement to date.[4] The 4.8 million dollar agreement was reached in May of 2014, following a near 4 year investigation lodged by the department after the New York and Presbyterian Hospital and Columbia University submitted a joint breach report regarding the compromise of electronic health records of 6,800 individuals. Per the investigation, the Department determined that the breach occurred when a physician/employee attempted to deactivate a personal computer server on the network shared by the hospital and university – each of which contained electronic personal health information (ePHI). The Department determined that the deactivation was performed absent sufficient technical safeguards, thereby enabling the accessibility of ePHI on internet search engines. The breach was found to be the result of inadequate security of the server utilized to maintain the records. Additionally, the Department found that the policies and procedures of the hospital were both inadequate and/or otherwise not followed.

The growing recognition of technology related exposures given the growing dependency on technology for information management has prompted continued changes in the law both at state and federal levels. For example, Florida enacted new legislation this year serving to broaden and otherwise repeal the prior version of Florida's Information Protection Act.[5] Looking forward, we can certainly expect this trend to continue in 2015.

There is no private cause of action under HIPAA with regard to data breaches. On the other hand, damages arising out of identity theft, stemming from a data breach, are actionable in many states per applicable state law. Given the widespread notification requirement for healthcare providers per HIPAA, class action suits have been an appealing endeavor for prospective claimants. Fortunately, the mere fact that a breach occurred, does not in it of itself give rise to a private cause of action. Two noteworthy 2014 decisions have continued to uphold this precedent. A brief discussion follows:

In Henry Ford Health Systems, et. al., a class of 159 patients alleged that the facility, by and through their transcription service, negligently exposed private health records over the internet.[6] The transcription service, Perry Johnson and Associates, Inc. was named in the suit. According to the court opinion, upon learning of the breach, Plaintiffs immediately removed all information, the affected patients were notified, and steps were taken to increase safeguards to patient records. Plaintiff alleged a claim for negligence, invasion of privacy, and breach of contract. In addition to non-economic damages, they also sought the recovery of identity theft protection. The trial court permitted class certification. Defendants thereafter moved for summary judgment on all claims given the alleged utter lack of evidence establishing damages beyond conjecture. On December 18, 2014, the Michigan Court of Appeals agreed. To that end, the court upheld the longstanding proposition that "fear" of identity theft is not actionable. Further, the court held that the decision of Plaintiffs to purchase identity theft protection was not the result of the alleged breach.

In California, a health care provider successfully opposed a class certification granted to patients alleging violations of California state law governing confidentiality of medical records.[7] The Confidentiality of Medical Information Act provides a cause of action for certain breaches, and also allows for nominal damages.[8] Similar to the case discussed above, the crux of the complaint alleged a breach and fear of identity theft. However, there was no allegation that any "unauthorized person" had actually utilized the protected health information to any of the patients' detriment. The appellate court held that nominal damages were not available for theft of medical information absent any allegation that anyone viewed the information. It should be noted that Plaintiffs sought potentially 4 billion dollars ($1,000 per patient).

In sum, the cost of dealing with a data breach can be significant – both in the form of hard costs and damage to reputation/good will. To compound the problem, even the highest level of safeguards cannot guarantee the prevention of a criminal hack and/or an innocent mistake. That being said, the best defense will always be proactive measures - ensuring the industry standards are met with regard to IT security, ensuring written policies and procedures are in place, reporting compliance, and continually monitoring and updating your systems. At a minimum, being able to show diligence in preventing a breach is critical to not only defending a potential case, but also increasing the likelihood that the risk will be mitigated early.

(Endnotes)

1 "Identity Theft Resource Center Breach Report Hits Record High in 2014." Jan. 12, 2015; URL:http://www.idtheftcenter.org/ITRC-Surveys-Studies/2014databreaches.html

2 Id.

3 See HIPAA Breach Notification Rule, 45 CFR §§ 164.400-414.

4 "Data Breach Results in 4.8 Million HIPAA Settlements." May 7, 2014;URL:http//hhs.gov/news/press/2014pres/05/20140507b.html

5 §501.171, Fla. Stat (2014); repeals §817.5681, Fla. Stat.

6 Jane Doe v. Henry Ford Health System, et. al. ---N.W. 2d---, 2014 WL 6202854 (Mich.App)

7 *See* Sutter Health et. al. v. Superior Court of Sacramento County, 227 Cal.App.4th 1546, 174 Cal.Rptr.3d 653 (2014)

8 Cal. Civ. Code § 56.101.

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We hope this report has been helpful and informative. As always, the attorneys of Cole, Scott & Kissane are ready to answer any questions you may have regarding the above. We will strive to keep you updated on any future developments regarding cases or legislation impacting Skilled Nursing Facilities.

References of each article are available upon request

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