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Remember, too, that your thoughts and ideas are highly valued by AAEM. You may want to start by sending some comments to us here at *Common Sense* as a letter to the editor or by submitting an original article for publication. Feel free to contact me directly at cseditor@aaem.org with your opinions about anything you read in *Common Sense*. In addition, direct communication with the leadership of AAEM is merely an email away (http://www.aaem.org/boardofdirectors/boardlisting.php). Serving on the board of directors, I can say that the entire board is completely dedicated to the promotion of AAEM's mission and willing to go far beyond what is necessary to respond to the needs of individual members.

You can also serve the Academy by remaining vigilant for issues arising at the state level. Individual states' recognition of emergency medicine boards that do not require EM residency training requires our particular attention. *Emergency Medicine News* quotes the director of governmental affairs for The American Association of Physician Specialists (AAPS) as saying, "We have a very aggressive and active governmental affairs program for 2010… Our strategic plan for 2010 includes Alaska, Montana, Idaho, Utah, and North and South Dakota. It will put us on the path of achieving the goal of being recognized in every state."[1] AAEM (i.e., each one of us) must continue to monitor the activity of our state medical boards and make sure that our concerns about non-residency trained individuals being designated as "board certified" are recognized.

Inaction is our adversary and will lead to the erosion of our rights as specialists in emergency medicine and lessen our ability to effectively care for our patients in the emergency department. If we do not take action, others will act on our behalf. These others often do not have the best interests of us or our patients in mind, sometimes intentionally and sometimes by simple lack of knowledge or understanding.

There is no doubt that AAEM is *the* specialty society for board certified emergency physicians. Keep the excitement and enthusiasm from Vegas with you throughout the year. Commit now to making your specialty society even better!

1. SoRelle, Ruth. "AAPS Ramping Up Campaign for Recognition." Emergency Medicine News. Lippincott Williams & Wilkins, Mar. 2010. Web. 12 Mar. 2010. <http://journals.lww.com/em-news/Fulltext/2010/03000/AAPS_Ramping_Up_Campaign_for_Recognition.1.aspx>.

Petition to U.S. Supreme Court Challenges Appeals Court Decision to Extend EMTALA Reach

Kathleen Ream, Director of Government Affairs

As reported in the July/August 2009 issue of *Common Sense*, on April 6, 2009, the U.S. Court of Appeals for the Sixth Circuit overruled a Centers for Medicare and Medicaid (CMS) interpretation of EMTALA. This appellate court instead found that admission to the hospital does not end the EMTALA requirements to stabilize and treat a patient (Moses v. Providence Hospital and Medical Centers Inc., 6th Cir., No. 07-2111, 4/6/09).

While the federal sixth circuit ruled that EMTALA only allows for suits against a hospital, not a practitioner, it also decided that third parties, such as an estate on behalf of a deceased patient harmed as a direct result of an EMTALA violation, possessed standing to sue pursuant to EMTALA's private enforcement provisions. Moreover, the appellate decision held that a mental health emergency could qualify as an "emergency medical condition" under the plain language of the EMTALA statute. (For case facts, see article titled "Estate of Murdered Woman Allowed to Pursue EMTALA Claims," at http://www.aaem.org/commonsense/commonsense0709.pdf.)

Unresolved EMTALA Interpretations

Since its enactment in 1986, the differing interpretations of EMTALA's requirements by various courts and CMS have resulted in conflicts. Several of these conflicts remain unresolved, such as the concept of "stabilization" compared to mere "admission to the hospital." As in this case, the court stated that CMS misinterpreted the intent of the statute, thus infringing on the responsibilities of Congress to rewrite those statutes that are unclear.

There is a possibility that resolution of some EMTALA issues may occur in the near future. On October 13, 2009, Providence Hospital and Medical Centers Inc. filed a petition with the U.S. Supreme Court, contending that the appellate court for the sixth circuit misconstrued EMTALA in Moses (Providence Hospital and Medical Centers Inc. v. Moses, U.S., No. 09-438, petition filed 10/13/09).

In the petition, the hospital argues that the appellate court erred when it held that federal law was not limited to ED screening and stabilization, but that the hospital's legal duty may continue to apply even after a patient has been admitted to the hospital for inpatient care. The hospital's petition maintains that the court should have stayed with the 2003 CMS regulations holding that EMTALA ends once the patient has been formally admitted to the hospital. Furthermore, the petition reasons that to the extent the appellate court found the 2003 CMS regulations should not be applied retroactively, such as to the issue at incident in Moses which occurred in December 2002, that appellate court determination should be reviewed by the high court.

At present, only hospitals in the sixth circuit (i.e., in Michigan, Ohio, Tennessee and Kentucky) must comply with the court's decision in Moses. However, should the Supreme Court affirm the appellate court's opinion, the concept of stabilization prior to discharge will have to be further defined for hospitals across the nation.

Claims of Flawed Screening and Improper Transfer Pursued in New Mexico

On November 17, 2009, the U.S. District Court for the District of New Mexico denied a hospital its motion for summary judgment. This decision gave the plaintiff the opportunity, under EMTALA, to

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pursue claims absent testimony of a medical expert that the hospital failed to adequately screen her father and discharged him without stabilizing his emergency medical condition (St. John v. Wilcox, D.N.M., No. 08-cv-229, 11/17/09).

The Facts

Steve St. John lost consciousness the evening of June 13, 2007. He was transported via ambulance to the Gila Regional Medical Center (GRMC) ED, where he was examined by Dr. Robert Wilcox. Although St. John was unresponsive upon arrival at the ED, shortly after placed in a bed, he regained consciousness, becoming "very aggressive and disoriented. He fought with hospital staff and his family and had to be restrained."

Allegedly, prior to establishing the cause of his behavior or making an attempt to stabilize his condition, and despite urging from St. John's family that St. John be kept overnight for further observation and testing, Wilcox ordered St. John's release from the hospital. St. John remained "violent and agitated upon his return to the family home," and in less than 24 hours after release from the hospital, St. John committed suicide.

On March 4, 2008, St. John's wife filed suit against Wilcox and GRMC, alleging that the physician's treatment "fell short of the standard of care required by state negligence statutes and that GRMC violated the Emergency Medical Treatment and Active Labor Act." On January 28, 2009, the plaintiff filed an amended complaint, containing the same allegations, but substituting St. John's daughter, Jennifer, as plaintiff in place of the initial plaintiff. The Court issued its scheduling order on January 5, 2009, listing May 15, 2009, as the deadline for the plaintiff's disclosure of expert witnesses.

The plaintiff failed to name an expert witness by the deadline. Attempting to circumvent this failure, the plaintiff moved to "either stay the litigation or to dismiss the claims against Dr. Wilcox without prejudice with leave to refile after acquisition of a medical expert." On September 10, 2009, the Court denied the plaintiff's motion, leaving the plaintiff to proceed without a medical expert. Both Wilcox and GRMC moved for "summary judgment on the ground that Plaintiff cannot succeed in her claims without the testimony of a medical expert." On June 2, 2009, the Court stayed discovery, pending resolution of the two motions for summary judgment.

The Ruling

In order to prevail on a state claim of medical malpractice in New Mexico, typically the plaintiff must produce expert medical testimony "to establish the relevant standard of care and any deviation from it." The Court decided it was "not able . . . without expert testimony, to determine what the standard of care is with respect to screening a patient brought into the emergency room unconscious or with respect to releasing that patient after he regains consciousness. Without expert testimony on this issue, Plaintiff cannot prove her negligence case against Dr. Wilcox." "With no response to Defendant's motion," wrote the court, "Plaintiff has essentially failed to contest the issue." With the malpractice claims against Wilcox failing, the district court ordered that defendant Wilcox's motion for summary judgment be granted.

The plaintiff claimed that GRMC violated both EMTALA's "appropriate medical screening" requirement and the failure to stabilize prior to discharge/transfer requirement. Defendant GRMC contended that, just as St. John cannot prevail on her medical malpractice claim without expert testimony, "Plaintiff cannot demonstrate a violation of EMTALA without presenting expert medical testimony." The court disagreed, writing that "EMTALA is not a negligence or malpractice statute . . . In fact, its requirements impose a 'strict liability' on a hospital . . . [I]t is this higher bar that actually enables a plaintiff to succeed without expert medical testimony, because the standards of proof require a demonstration of facts rather than opinion."

A hospital violates EMTALA's appropriate medical screening requirement "only when it does not follow its standard screening procedures with respect to a particular patient, regardless of the adequacy of those screening procedures . . . Thus, to demonstrate an EMTALA violation, a plaintiff need only present evidence establishing the hospital's standard screening procedures and evidence that those procedures were not followed in the particular patient's case." Questions of fact, not expert medical opinion, also are the basis for determining whether "a defendant hospital violated EMTALA's restriction against transferring an individual with a diagnosed emergency medical condition prior to stabilization." Likewise, EMTALA only covers "actions taken by hospitals that have actually diagnosed an emergency medical condition. Actual knowledge is subject to factual proof rather than opinion testimony, so a medical expert is not required to prevail on this portion of the claim."

The court, determining that plaintiff may proceed with her EMTALA claim in the absence of expert medical testimony, stated that "Plaintiff will have an opportunity to attempt to prove her claims through further discovery. Defendant GRMC may again seek summary judgment at the close of discovery if Plaintiff fails to uncover factual evidence that the hospital did not follow its standard screening procedures in this case or that it had actual knowledge that Mr. St. John was suffering from an emergency medical condition." The federal district court denied defendant Gila Regional Medical Center's second motion for summary judgment.

As to the matter of proving damages in the absence of expert medical testimony, "the statute requires a plaintiff to demonstrate that he or she suffered 'personal harm as a direct result' of the hospital's violation." The district court suggested that for medical cases, "proof of a causal link between the alleged violation and the alleged injury generally requires expert testimony," thus necessitating opinions based on direct treatment of the patient. "Opinion testimony not drawn from personal care and treatment of the patient, such as an opinion based on the reports of other physicians, is still subject to [rules of] disclosure." "Because the deadline for such expert disclosure has passed," noted the court, "any testimony from Mr. St. John's treating physicians will be strictly limited to conclusions drawn from their own treatment and personal observations of him. Whether Plaintiff can develop testimony sufficient to demonstrate causation, given these limitations, remains to be seen."

First Circuit Appeals Finds No Error in PR District Court's Dismissal of Failure to Stabilize Claim

On September 4, 2009, the U.S. Court of Appeals for the First Circuit affirmed the decision of the U.S. District Court for the District of Puerto Rico, dismissing a suit alleging violation of the Emergency Medical Treatment and Labor Act (EMTALA), brought by the surviving family of a man whose condition they claimed was not stabilized (Alvarez-Torres v. Ryder Memorial Hospital, 1st Cir., No. 08-2351, 9/4/09).

The Facts

On January 16, 2001, at 6:45p.m., Adalberto Martínez López (Martínez) arrived at the Ryder Memorial Hospital, Inc. (Ryder) ED complaining of chest pain and bleeding from a femoral dialysis catheter site. Martínez was fifty-seven years old at the time and an end-stage renal disease dialysis patient. His vital signs were

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taken, and at 6:50p.m. ED physician Dr. Griselle Pastrana examined Martínez. Documenting that Martínez was actively bleeding and that he was weak and dizzy, Pastrana described Martínez's condition as "alert, oriented [and] mildly pale." Pastrana ordered tests, including a chest X-ray, an EKG, and a "type and cross for four units of Packed Red Blood Cells."

At 7:30p.m., Pastrana discussed Martínez's case with Dr. Enrique Ortíz-Kidd, a nephrologist at Ryder, who ordered Martínez's admission to Ryder's "Medicine Floor" as well as completion of the tests. Martínez was admitted at 7:39p.m. with orders for bed rest, testing of vital signs every four hours, and hemodialysis and a blood transfusion the next morning. Martínez, arriving in his room on the Medicine Floor almost two hours later at 9:30p.m., was described as "alert, but pale, feverish, and complaining of chest pain . . . [and the] catheter site remained bloody." The on-duty nephrologist, Dr. Baquero, was contacted at 10:00p.m. and informed of Martínez's vital signs. Among other things, Baquero prescribed an antibiotic and Tylenol which were administered at 10:20p.m. Two hours later, Ortíz-Kidd gave a telephone order to "change the bandage on Martínez's catheter site, apply pressure, and prepare for a blood transfusion in the morning." However, Martínez continued to bleed throughout the night, requiring several changes of his bandages.

Finding the bleeding "profuse," a relative who accompanied Martínez complained to nursing staff at 4:55a.m. Staff contacted Ortíz-Kidd, who requested a consultation with Ryder surgeon Dr. Sotomayor. However, at 5:00a.m., when Martínez's blood pressure had dropped and his temperature had increased, nurses called on-duty physician Dr. Juan R. Gómez López, who examined Martínez and ordered a blood transfusion. Via telephone, Gómez López then discussed Martínez's condition with Ortíz-Kidd. At 5:30a.m., staff contacted Ortíz-Kidd again to inform him that Sotomayor was not available, at which point Ortíz-Kidd requested that another Ryder surgeon, Dr. Luis Canetti, conduct the evaluation.

Nurses noted that when Cannetti removed Martínez's bandages, "bleeding continue[d] profusely and abundantly." Canetti determined that Martínez required surgery, but that he could not perform it. Canetti recommended that Martínez immediately be transferred to Auxilio Mutuo Hospital for an "A-V fistula revision." Notified at 7:00a.m. of Canetti's recommendation, Ortíz-Kidd "order[ed] [the] patient to be transferred as soon as possible." The blood transfusion ordered by Gómez López began at 7:05a.m. Sometime between 7:00a.m. and 8:00a.m., nurses discovered that Martínez was not breathing. CPR was performed, but Martínez could not be revived.

Martínez's wife and children brought suit against Ryder alleging violation of EMTALA and bringing malpractice claims against the physicians. On November 19, 2007, the federal district court granted the defendants' motion for summary judgment on all of the plaintiffs' claims. The plaintiffs appealed, arguing that the district court "erred in dismissing the EMTALA claim for failure to stabilize, that no EMTALA claims were brought against individual physicians, and that the district court retained jurisdiction over state-law claims."

The Ruling

The plaintiffs argue that EMTALA "imposes an unqualified duty to stabilize once it is determined that the patient has an emergency medical condition, and this duty begins upon admission to the hospital and follows the patient to any hospital department." They argue in the alternative that "even if the duty to stabilize applies only when a patient is transferred, 'transfer' does not require a patient to physically leave the hospital, but only for a physician to enter an order of transfer." In the plaintiffs' view, Ortíz-Kidd triggered a stabilization duty by entering an order of transfer for Martínez. The First Circuit agreed with the district court that the duty to stabilize under EMTALA "does not impose a standard of care prescribing how physicians must treat a critical patient's condition while he remains in the hospital, but merely prescribes a precondition the hospital must satisfy before it may undertake to transfer the patient."

Explaining further, the appellate court found Ortíz-Kidd's order that Martínez was "to be transferred as soon as possible" did not effectuate a 'transfer' for purposes of EMTALA. The summary judgment record clearly establishes that Martínez never left Ryder's facilities, and indeed died in the room on the Medicine Floor where he was admitted the night of January 16. Because no transfer occurred, plaintiffs have not established a stabilization claim under EMTALA."

The First Circuit also agreed with the district court's ruling to dismiss EMTALA claims against individual physicians, recognizing that EMTALA applies only to hospitals, not individual providers of care. Likewise, the appellate court affirmed the trial court's decision regarding state law malpractice claims brought against all of the defendants, finding that the district court "did not abuse its broad discretion in dismissing the claims arising under Puerto Rico law without prejudice to refiling in state court."

Case synopses prepared by Terri L. Nally, Principal, KAR Associates, Inc.

AAEM Thanks the Following 100% ED Groups for Their 2010 Membership

Campbell County Memorial Hospital

Fort Atkinson Emergency Physicians (FAEP)

Jesse Brown VA Hospital

OSF Saint Anthony Medical Center

Rocky Mountain Emergency Physicians

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