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Welcome to Speaking of Health Law

Hi, I'm Norm Tabler, host of *The Lighter Side of Health Law* AHLA podcast sponsored by Coker Group. I hope you enjoy this month's edition.

Why It's Better to Punch an Accountant than a Nurse

Here's something I never knew until this month: You're better off punching an accountant than a nurse. I discovered this when I read that Tiana Solis was arrested in Providence, Rhode Island, for punching an ER nurse at Women & Children's Hospital. I wasn't surprised that Tiana was arrested. What surprised me was the specific charge: quote, "assault on a health care provider."

So I checked on Google, and sure enough, most states have a specific crime for assaulting a health care provider on the job. In my state, Indiana, for example, assaulting someone is generally a misdemeanor, but assaulting a health care provider on the job is a *felony*.

That's why if you have to punch someone, it's better to punch an accountant than a nurse.

When a Lawyer's Word Is Not Enough

Generally, courts take a lawyer's word at face value. But, as Jaylene Lambert and her lawyer recently learned from the Kansas Supreme Court, that's not always the case.

Jaylene was administrator of the estate of a man whose death allegedly resulted from medical malpractice. Her lawyer electronically filed a wrongful death case against eleven health care providers on June 22, the last day of the two-year statute of limitations.

The clerk rejected the filing because of a technical issue—the listing of the parties in the petition didn't match the parties in the court record. So her lawyer refiled the next day, June *23*, listing the parties correctly.

The lower court granted the motions to dismiss filed by defendants because the corrected filing was filed one day *after* the statute of limitations had run.

On appeal, Jaylene's lawyer argued that the court should treat the case as filed on June 22 because the June 23 filing was a duplicate of the first filing except for correcting the technical issue.

Did the court accept the lawyer's argument? No. The court *would not even consider the issue* she raised. Why not? Because the lawyer didn't offer any *evidence*—noting but her word—word given in arguing the case.

What's puzzling and unanswered is *why* no evidence was offered. The court makes clear that an affidavit would have sufficed: an affidavit confirming that the June 23 filing was the same as the June 22 filing.

What's more, Kansas requires lawyers to retain a copy of all court filings. So Jaylene's lawyer *should* have had copies of the June 22 filing to show that it matched the second filing.

Jaylene lost the appeal and any right to pursue the medical malpractice or wrongful death case.

The case is *Lambert v. Peterson*, Kan. Sup. Ct.

Strange Lawsuit, Strange Outcome

Here's a case that registers nine on the ten-point weirdness scale, both for the theory of the case and for the basis of the outcome.

James Weems was convicted of attempted murder after he shot Ernest Bradshaw twice in the head at point-blank range. Bradshaw was treated at Hillcrest Medical Center and survived.

This is where it gets weird. Weems sued the hospital for medical malpractice. You heard correctly: *Weems*, the man who fired the gun, alleged that the hospital was negligent in its treatment of the man he shot, Bradshaw.

Was Weems alleging that Bradshaw got poor treatment or was the victim of negligence? No, Weems, the assailant, alleged that *he himself* was the hospital's victim. How so? Because, Weems alleged, Bradshaw was *not* shot at all. The hospital *made that up* and put it in the medical record, resulting in Weems's arrest and conviction.

If you think that's strange, listen to the reasoning of the Texas Supreme Court in throwing the case out. Was it because the fraud that Weems was alleging was not medical malpractice by any stretch of imagination?

No, quite the opposite. The court accepted Weems's theory that he was alleging medical malpractice. But since he was, he was required by the Texas Med Mal statute to file an expert report, and he hadn't done so. So his case was dismissed.

I can't help wondering what the expert report would have looked like. Would the expert have recited that saying that a patient has been shot twice in the head falls below the community standard of care for patients who have *not* been shot twice in the head? Does it take an expert to know that?

You can't make this stuff up.

The case is *Baylor Scott and White v. Weems*, Tex. Sup. Ct.

Shakespeare on Medical Staff Credentialing

Who says a background in English literature has no practical value? Certainly not the attorneys defending Dimensions Health in a class action filed on behalf of OB/GYN patients. Their Motion to Dismiss invoked one of the Bard's most famous lines.

There's no denying that so-called "Dr. Akoda" was a fraud. For one thing, his name is Igberase, not Akoda. Time after time he got Social Security numbers by using fake names. Medicare denied his application for enrollment because he used a fake Social Security number. He used someone else's Social Security number to get his Maryland medical license. He used false information to gain Foreign Medical Graduate approval, enter a residency program, and practice medicine.

The complaint against Dimensions relied primarily on the theory of negligent credentialing: namely, Dimensions should have known he was a fraud.

Did Dimensions concede negligence? Not on your life. Dimensions noted that the man *did*, in fact, hold a medical license. What difference did it make whether his name was Akoda or Igberase?

This is where *Shakespeare on Medical Staff Credentialing* comes in. Dimensions argued, quote,

> As Shakespeare wrote over 400 years ago, "What's in a name? That which we call a rose by any other word would smell as sweet." Whether the patients knew him as "Akoda" or "Igberase," both names denote the exact same person, and that person was a licensed physician …., end quote.

You can't make this stuff up.

The case is *Russell v. Dimensions Health* (D. Md.).

Timing Is Everything

This case concerns trypanophobia. If you're like me, you had never heard of *trypanophobia.* I looked it up. It means fear of needles, as in hypodermic needles.

Bill Noel was a pharmacy manager at a Wal-Mart. He had trypanophobia. So Walmart got his attention when it announced that all pharmacy employees would have to get certified to administer shots. He asked for an exemption, and in July 2016 he got a letter from Wal-Mart granting the exemption but saying that it was subject to further review under certain conditions, like a change in job description.

Three months later, in October, Wal-Mart told Bill that he had to get certified for giving shots, after all. Bill quit and filed a suit claiming constructive discharge. The trial court dismissed Bill's case, noting that (a) the July letter said the exemption was subject to review in the case of a change in job description, and (b) the job description *had* been changed, making shots an essential function.

On appeal, the Second Circuit unanimously vacated the dismissal. Why? Because the job description had not been changed until November, the month *after* the constructive discharge. It was improper for the trial court to consider the November job description in addressing a constructive discharge that occurred a month earlier, when the July exemption was still in effect.

The case is *Noel v. Wal-Mart Stores, East*, 2nd Cir.

Well, that's it for this month's edition of *The Lighter Side of Health Law.* I hope you enjoyed it. Check your *AHLA Weekly* and *Connections* magazine for the next edition.