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## Fla. High Court Ruling May Ease Path For Med Mal Suits

By **Emma Cueto**

Law360, New York (November 22, 2017, 2:29 PM EST) -- The Florida Supreme Court's recent decision to sink certain requirements for medical malpractice plaintiffs before they sue will make it easier for patients to bring such cases and shut the door on coordination between accused doctors and other physicians who treated a patient, plaintiffs attorneys say.

On Nov. 9, the justices **struck down** a 2013 law allowing defense counsel to meet with a patient's other treating doctors without plaintiffs attorneys present and also found that Florida citizens have a right to privacy after death.

Some experts say that the ruling could have a significant impact beyond pre-filing requirements by making plaintiffs less reluctant to move forward with a suit and preventing behind-the-scenes collaboration between defendants and potential witnesses.

"It's a pretty big deal," said Matt Schwenke, a Palm Beach attorney with Searcy Denney who helped work on the case. "It [the previous system] was really a disadvantage to the plaintiff because the defense would meet with treating physicians and say God knows what to them and perhaps skew their version of the case in the defense's favor from the get-go."

However, defense attorneys argue the decision gives patients an unfair advantage. Counsel for doctors and health care facilities have been stripped of a valuable tool for learning about the potential strengths and weaknesses of a case, while plaintiffs attorneys can still meet with a patient's treating doctor, they say.

"For 25 years [prior to the 2013 amendments] we were on an uneven playing field, and the legislature fixed that," said Mark Delegal, a partner in Holland & Knight LLP's Tallahassee office.

The case, which was filed by Emma Gayle Weaver on behalf of her husband's estate, accused Dr. Stephen Myers of providing substandard care, leading to Weaver's husband's death. As part of the suit, Weaver challenged provisions in two 2013 amendments to existing Florida requirements for filing medical malpractice claims.

The updated sections allowed potential defendants, once they received the required notice that a patient or family member was planning to file a suit, to interview the patient's treating health care providers without the patient's attorneys.

In a 4-3 decision, the court sided with Weaver, ruling that the new requirements opened plaintiffs up to potential violations of privacy if they did not have a representative in such a meeting, and that this could block patients' access to the court by forcing them to choose between a lawsuit or their privacy.

The decision also emphatically stated that Floridians' right to privacy extended after death.

A major purpose of the 2013 amendments was to promote settlements by requiring both sides to assess a potential case before it was filed, though experts were split on the question of whether the informal conferences with treating doctors actually accomplished this goal — and whether banning

them would make settlements less likely.

Defense attorneys told Law360 that the provisions did have some benefit.

"Any time you can know more about your case when you're a defendant and figure out who's going to say what, it's helpful," said Delegal.

Treating doctors in an informal conference might tip defense attorneys that they should try to settle a case, but might be unwilling to say so in a formal session with both sides present, according to Bruce Lamb, the head of the health care practice at Gunster.

"Sometimes a physician might be more willing to open up about their colleague in an informal setting," Lamb said.

However, several plaintiffs attorneys told Law360 they felt strongly that the law did not promote settlements at all.

"Everyone in the plaintiffs bar would like a law that facilitates settlements, but I can tell you as someone who almost exclusively does medical malpractice that these cases did not start settling any faster after the 2013 amendments," Schwenke said.

Bob Peck, who also worked on the case, echoed that idea.

"This was not designed to effectuate [settlements]. It was to prepare for litigation and to see if there was some sort of litigation advantage that could be obtained. If it was designed for settlements, there's no reason to do it ex parte."

Scott Schlesinger, a personal injury attorney in Fort Lauderdale, said that in his experience, "Under no set of circumstances would a case ever be settled because they talked to the treating doctor."

Rather, the ex parte conversations were an opportunity for defense counsel to attempt to coordinate with witnesses, according to Schlesinger. He said that in his experience, doctors were often eager to help one another and work with defense attorneys if given the opportunity.

Striking the law wouldn't prevent defense counsel from trying to get treating doctors on their side, but it would go a long way to keeping things from getting out of hand, according to Schlesinger.

"It keeps it from just being naked," Schlesinger said. "To the extent that it goes on anyway and there's some blurry, gray areas, lawyers still know that there's a place where they fear to tread. We should continue to have in place zones where they fear to tread."

According to Schwenke, the ruling merely evens the playing field.

"They would have these secret meetings with the doctors, exclude us, and talk about our clients' sensitive and confidential information," Schwenke said.

Now, the Supreme Court ruling means medical malpractice plaintiffs will no longer have to contend with that disadvantage, he said.

However, defense attorneys bristled at the idea that informal conferences are opportunities to collude with witnesses.

"This is all a trumped-up, made-up idea that there's abuses," Delegal said. "If you want to say there are abuses, they're working both ways."

Patients' attorneys have the means to try to tip witnesses onto their side, he said, by threatening to also sue a treating doctor if he or she didn't go along. And now, by giving only patients' attorneys the opportunity to contact the treating doctors, the court is giving plaintiffs an unfair advantage.

"The whole notion of private conversations are either fraught with abuse — and if they are, why are the plaintiffs doing it? — or they're not," he said.

While plaintiffs attorneys say the playing field isn't now suddenly tilted in their favor, both sides say the ruling will make it easier to pursue a medical malpractice case, as it takes away a pre-filing tool used by defense lawyers and means patients will be less likely to be intimidated by potential privacy violations.

"I think it's important that there was a recognition in this case that you do not sign away all your privacy rights just because you happen to bring a medical malpractice lawsuit," Peck said. "It certainly will make it less threatening for them to [bring medical malpractice claims]. That was certainly Ms. Weaver's concern, that she was opening the door to not only her husband's medical records but potentially even hers."

Defense attorneys in medical malpractice cases still have other tools they can use before a suit is filed, including bringing both sides together to take unsworn statements from witnesses, according to Lamb. However, eliminating the more informal conferences would require attorneys to adjust their strategy, he said.

"You're going to have battles over whether people can be deposed and what the limits are," he said. "And the mechanism that's probably going to result is judges saying 'Give me the records; I'll look them over.'"

Doing so, Lamb noted, could prove problematic since such a review was often time consuming and judges themselves are not typically trained in evaluating medical records.

"It's going to be interesting to see how the mechanics play out," he said.

Lamb noted that the presuit conversations at issue in the case had been going on between defense counsel and treating doctors since long before the legislature specifically authorized them in 2013. However, he said, now that the court had taken a stand against them, lawyers are unlikely to attempt it.

The decision in *Weaver v. Myer* that patients have a right to privacy after death also had the potential to affect other medical malpractice issues, experts say, beyond just the pre-filing requirements — and potentially beyond medical malpractice cases entirely.

"I think there are going to be ramifications in other health care areas in regard to how sacred these records are," Lamb said. "It's such broad language and such strong language that any litigant who is trying to resist providing information will probably raise it."

Schwenke said he thought the court has sent an important message with the ruling.

"I would hope that everyone understands that people's health care rights and privacy rights are a big deal and they should be respected," he said. "And just because there is a lawsuit or litigation over an injury or a death doesn't mean the floodgates are open to uncover every rock of a person's medical history."

--Editing by Rebecca Flanagan and Aaron Pelc.