Oops

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Cindy: Hey Bobby, nice to meet you. I'm Cindy, Dr Goode's assistant. I'm going to take you back so Dr Goode can take a look at you, okay?

Bobby: Sure thing.
(Bobby and Cindy walk down the hallway, back to one of the examination rooms.)

Cindy: (*Pointing to the dental chair*) Okay Bobby, hop up and Dr Goode will be along in a minute.
(Bobby approaches the dental chair, turns slightly sideways to get on, places his right hand on the edge of the chair as he lifts his right leg to scoot sideways on to the chair. The locking mechanism was not engaged; the chair rotates to the right, Bobby loses his balance and falls, striking his head on the corner of the junction box, which was under the leg rest portion of the chair but is now exposed because of the rotation of the chair.)

Bobby: *(Screaming)* Ow!

Cindy: Bobby, are you okay? (*She helps him up onto the still movable chair, finally locking the rotating mechanism.*)

Now for the rest of the story. Bobby was still pretty shaken, so the screening appointment was cancelled and rescheduled. Later that evening, Bobby still had a bad headache, so they took him to the emergency room. Bobby had suffered a subdural hematoma. Bobby died a few days later.

The scenario above fairly reflects the facts of *Minnich vs MedExpress Urgent Care, Inc*; No. 13-C-1547 (Kanawha Cir. Ct.; W. Va.; December 1, 2014). In the Minnich case, the plaintiff had undergone hip surgery, was just off his walker, sought emergency care for an unspecified malady, and was told by the nurse to get into an examination gown and get up onto the examination table. While she was out of the room, he slipped trying to get onto the examination table, hit his head, and ultimately died.

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The case was about whether the negligence was simple negligence, premises liability, or professional negligence, medical malpractice. Why does this matter? It matters because the 2 different causes of action have different insurance policy limits regarding potential indemnification; there are differences in the statutes of limitations that apply; in a malpractice suit, one needs an expert witness to determine whether there was a breach in the standard of care, whereas in a simple negligence case, the jury alone can decide this issue; and so on. The ultimate question that needed to be decided by the court was whether or not the assistant, the nurse in the real case, was rendering medical treatment when she instructed the patient to climb up in the chair/get onto the table. What do you say? Is the act of instructing someone to get positioned to be examined considered to be providing medical care? You gotta love the law.

In its deliberation, the court first looked at the governing statutes and noted:

> The plaintiff initially filed a premises liability claim asserting simple negligence. The court, in its opinion, essentially stated that a duck is a duck by holding: The failure to plead a claim, as governed by the Medical Professional Liability Act [MPLA], W.Va. Code § 55-7B-1, et seq., does not preclude application of the Act. Where the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of "health care" as defined by W.Va. Code § 55-7B-2(e) (2006) (Supp. 2007), the Act applies regardless of how the claims have been pled. (Cit. Omit.)

In other words, what the court was saying was whether or not a particular cause of action has been asserted, and whether it does or does not fall under the MPLA is totally based on the specific facts of the case, regardless of the claim made. Another portion of the decision noted:

> Pursuant to W.Va. Code § 55-7B-2(e) (2006) (Supp. 2007), "health care" is defined as any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement.

The pertinent definition of "health care provider" (12 under the MPLA) is

> a person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, this State or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, emergency medical services authority or agency, *or an officer, employee, or agent thereof acting in the course and scope of such officer's, employee's or agent's employment* (W.Va. Code § 55-7B-2(g) (2008), emphasis supplied).

The court then went on to address the argument that the fall occurred before any treatment was rendered and therefore, it could not be medical negligence and had to be simple negligence, by stating that the examination and diagnostic component of medical treatment is almost always preceded by some type of "intake" process. Without the intake process, the examination actually rendered might not be as focused as it needs to be. Regarding the plaintiff, part of the intake process involved preparing the patient for the examination. Gowning, positioning on the examination table, and obtaining vital signs are required to conduct an appropriate exam. The court stated that

> …a physician's failure to assist a patient as she stepped off the examination table was rooted in professional rather than ordinary negligence because the degree of physical assistance needed by a patient to prevent a fall in light of the patient's medical condition required the exercise of expert medical judgment. Where the professional's alleged negligence requires the exercise of professional skill and judgment to comply with a standard of conduct within the professional's area of expertise, the action states professional negligence. (Cit. Omit.)

The court ruled that the claim sounded in medical negligence necessitating the plaintiff to produce all of the requisites attached to a claim of that nature.

COMMENTARY

The orthodontic analogy is clear. In order for us to diagnose a patient's orthodontic problem, we first need to obtain a medical, dental, and social history reasonable to the circumstances and then perform an appropriate clinical examination to know which diagnostic records to acquire. Part of that examination involves seating and positioning the patient in the dental chair. Ensuring that the chair is stable and at an appropriate height for accommodating the seating and positioning of a patient both initially and when dismissing a patient requires using a minimal degree of clinical judgment and, therefore, falls within the umbrella of professional practice.

You see a new patient for an initial screening, and the patient wants to proceed with records as soon as possible–great. Your assistant walks the patient down the hall to your dedicated records room. As the fates would have it, there is a small dollop of water on the floor just hanging out waiting to trip someone. It does. The patient goes down and blows out his knee. Medical malpractice or simple negligence? Change the venue, it's the same situation, but this time, it happens in the foyer between your office door and the outside entrance to the building while the patient was on his way out. Medical malpractice or simple negligence?

Back in my younger days, when I first started out, I set up my reception area to feel like a living room—think sofas, coffee tables, plush carpet—I even had a little table off in one corner with a couple of Mr. Coffee machines on it, so moms or my adult patients could help themselves to coffee. I thought it looked great. Well, one day I am escorting junior out of one of the treatment rooms to talk to mom in the waiting room, and there is junior's little sister, a toddler, pulling herself up to a standing position, holding onto the side of the little table on which hot coffee was brewing. Where was mom? Engrossed in one of the dozen or so not out-of-date magazines. All I could see was scalding coffee dripping all over this kid. I flew, and those of you who know me know that I'm a big guy. Flew I say. Scooped up little sis and thanked my lucky stars that this was not a McDonald's kind of day. From that day on, we made the coffee in the back and brought it out in carafes with screw on tops. That situation would have been an example of simple negligence.

The takeaway message is that if a patient is injured during any activity that can be viewed as part of delivering any component of orthodontic care, it will probably be construed as constituting professional negligence, as opposed to simple negligence. To be considered simple negligence, it cannot have anything, nothing, zip to do with rendering care.

Be careful out there. There is always an "oops" waiting right around the bend.