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Recent Developments in Delaware Medical Malpractice Law

Delaware Superior Court Clarifies “Wrong Body Part” Exception to Affidavit of Merit

The Delaware Superior Court recently dismissed a plaintiff’s claim against a physician and clarified the meaning of one of the exceptions to the affidavit of merit requirement. In *De Roche v. Grewal*, 2016 WL 5793721, (Del. Super. Ct. Oct. 4, 2016), a plaintiff filed a medical negligence claim against a cardiologist and alleged that a cardiac catheterization was performed negligently. In particular, the plaintiff claimed that a probe became “entangled” in an artery, perforated it, and damaged tissue outside of the artery, causing bleeding and other complications. Although the plaintiff failed to file an affidavit of merit as required, he claimed that no affidavit was required under the statutory exception, as he claimed that the physician performed a surgical procedure on the wrong body part. 18 Del. C. § 6853(e)(3).

The Superior Court rejected this position and held that, under the circumstances, an affidavit of merit was required. First, the Court accepted, without ruling, that a cardiac catheterization would constitute a “surgical procedure.” The Court then noted that the exception would apply only if the surgery started and continued to be performed on the wrong body part. *De Roche*, 2016 WL 5793721 at *3. Here, the probe was inserted into the plaintiff’s groin area to reach the plaintiff’s heart. The Court specifically noted that a complication of damaging tissue around the heart did not equate to performance of a surgical procedure on the wrong body organ, limb or body part. As a result, the plaintiff was required to file an affidavit of merit, and his failure to file one timely warranted dismissal of his case.

Payments Under Medicaid Conclusively Establish The Amount Plaintiff Can Recover For Past Medical Expenses

In *Smith v. Mahoney*, __ A.3d __, 2016 WL 6519000 (Del. Nov. 3, 2016), the Delaware Supreme Court held that the amount Medicaid pays for an injured party’s medical expenses determines conclusively the amount a plaintiff can recover for past medical expenses. Primarily at issue in *Smith* was whether the collateral source rule should apply when Medicaid pays for an injured party’s medical expenses. When the collateral source rule does apply, it precludes consideration of payments or compensation received by a plaintiff from a source independent of the tortfeasor. Thus, the rule allows a plaintiff to recover for medical expenses even if they were not paid out-of-pocket by the plaintiff.

By statute, the collateral source rule does not apply in medical negligence actions unless the payments were made by a private collateral source such as a plaintiff’s private health insurer. 18 Del. C. § 6862. Thus, in medical negligence cases, payments made by Medicaid and Medicare, which are almost always less than the amount billed by a medical provider, are admissible at trial for the purpose of establishing the reasonable value of services rendered, i.e. the value of medical expenses recoverable by a plaintiff. The statute, however, does not preclude a medical negligence plaintiff from arguing that he or she was entitled to recover the value the provider billed, so long as such a claim was supported by an expert’s opinion. That changed in part when the Delaware Supreme Court

issued its decision in *Stayton v. Delaware Health Corporation*, 117 A.3d 521 (Del. 2015). In *Stayton*, the Supreme Court held that the value paid by Medicare conclusively determines the reasonable value of an injured party's medical services.

In *Smith*, the Delaware Supreme Court extended its holding in *Stayton* to Medicaid, ruling that the amount paid by Medicaid is conclusive in determining the reasonable value for medical services rendered. Notably, the Delaware Supreme Court in *Smith* limited its holding expressly to past medical expenses paid by Medicaid. The Court held that, unlike Medicare, future eligibility for Medicaid (which is based on income) is speculative and, therefore, future medical expenses cannot be reduced by the amounts covered under Medicaid. Instead, a plaintiff can recover for the "reasonable" value of future medical expenses that he or she establishes through expert testimony.

Supreme Court Affirms Dismissal of Class Action Suit Against IME Doctor For Alleged Fraudulent IME Reports

The Delaware Superior Court recently rejected fraud claims by plaintiffs against a physician who performed medical examinations in the context of their underlying personal injury claims and held that the physician enjoyed absolute immunity. In *Adams v. Gelman*, 2016 WL 373738 (Del. Super. Ct. Jan. 28, 2016), three individuals who had made claims for personal injuries were either examined by a physician or had their records reviewed pre-litigation by the physician at the request of the respective defendants. After the three separate plaintiffs lost their claims, they filed suit against the physician who had performed their independent medical examinations (IMEs) or reviews and alleged that they were victimized by his unethical and fraudulent behavior.

The Delaware Superior Court held, however, that the physician was entitled to absolute immunity because his work (whether it was reviewing records, performing an examination, or testifying) was done in the context of a formal proceeding. The Court further held that there was no fiduciary duty owed to the plaintiffs by a physician performing an IME, that there was no basis to claim fraud, that any claims for battery could not be pursued, and that there was no basis to proceed with a claim for civil conspiracy. In sum, the Court held that a plaintiff who is unhappy as to the results of an IME cannot file a claim against the physician who performs an IME or otherwise assists a defendant during the context of litigation. The Delaware Supreme Court agreed with the Superior Court and affirmed its rulings, thereby finding conclusively that physicians who perform IMEs or medical case reviews in the context of litigation are protected. *Adams v. Gelman*, 2016 WL 6651419 (Del. Nov. 10, 2016).

Expert's Testimony that Brachial Plexus Injuries are Only Caused by Excessive Downward Lateral Traction Admissible

In *Lewis v. McCracken*, 2016 WL 6651417 (Del. Super. Ct. Nov. 7, 2016), the Delaware Superior Court permitted expert testimony that a baby's permanent brachial plexus injury could only result from excessive traction to the baby's head during delivery, despite evidence to the contrary. During discovery, the challenged expert opined that the defendants negligently delivered the plaintiff's baby causing permanent brachial plexus palsy. The expert opined that the baby's injuries could have only been caused by the delivery methods employed by the defendants. The defendants thereafter sought to exclude the expert's testimony under Delaware Rule of Evidence 702, arguing that the expert's opinions were not reliable because (1) they were based in part on lay witness testimony, and (2) medical literature confirms that there are multiple potential causes of brachial plexus.

The Superior Court, however, disagreed. The Court concluded that, in this case, the challenged expert's opinions were based upon "sufficient facts or data," specifically, medical records and the testimony of lay witnesses. The Court further noted that the expert's opinions were "the product of reliable principles and methods." In particular, the expert relied on a differential diagnosis that he used to eliminate all other potential causes of the injury at issue. Moreover, the expert was familiar with some medical literature and was able to distinguish it, even though he did not intend to cite any specific literature. Finally, the expert acknowledged that, in some cases, permanent brachial plexus palsy injuries could occur in the absence of excessive downward lateral traction, but he maintained that, in this particular case, the only way that the injury could have occurred was through defendants' alleged negligence. As a result, the Court permitted expert testimony that a permanent brachial plexus injury must have occurred through excessive downward lateral traction to the baby's head.

Parents and Siblings Cannot Recover Wrongful Death Damages Where Decedent's Children Are Alive

In a matter of first impression, the Superior Court held that a parent and sibling of the decedent were not eligible to recover for a decedent's death where the decedent's children were alive. In *Dunfee v. KGL Holdings Riverfront, LLC*, 2016 WL 6988791 (Del. Super. Ct. Nov. 23, 2016), the decedent died due to carbon monoxide poisoning in his apartment that occurred after a pipe burst. Although the decedent's children filed a wrongful death and survival action on their father's behalf, the decedent's parent and sibling filed a similar but separate wrongful death claim

against various defendants claiming that they failed to maintain the pipe appropriately, leading to the decedent's death. The defendants moved to dismiss on the grounds that the parent and sibling were not eligible under Delaware law to recover for the decedent's death.

The Court reviewed 10 *Del. C.* § 3724(d)(5), which permits recovery of mental anguish in a wrongful death suit by certain parties. In particular, the surviving spouse, children and persons to whom the deceased stood in loco parentis at the time of the injury may recover. Relevant to this case, parents and siblings may only recover "if there is no surviving spouse, children or persons to whom the deceased stood in loco parentis." 10 *Del. C.* § 3724(d)(5). The Court interpreted the statute to mean that a parent or sibling can only recover damages for the decedent's wrongful death if there is no surviving spouse, children or persons in loco parentis (i.e., individuals to whom the decedent acted as a parent). Because the decedent had children, they had the exclusive right to recover mental anguish damages. Therefore, the Court dismissed the claims by the parent and sibling and refused to hold a hearing to evaluate whether they stood in loco parentis to the decedent.

The Superior Court Finds That Certain Investigative Materials Maintained By the Division of Professional Regulation Are Not Privileged

In *Newborn v. Christiana Psychiatric Services, P.A.*, 2016 WL 7015715 (Del. Super. Ct. Nov. 30, 2016), a plaintiff claimed that the defendants provided negligent psychiatric treatment to the decedent, causing her to commit suicide in August 2014. During discovery, the plaintiff subpoenaed documents in the possession of the Department of Justice ("DOJ") and the Division of Professional Regulation ("DPR") relating to an investigation into the decedent's psychiatric treatment and death. The defendants, the DOJ and the DPR moved to quash, asserting that the information sought was protected by peer review privilege and governmental privilege.

The Court granted the motions in part, finding certain investigative materials were not privileged. Before considering whether either privilege applied, the Court first considered plaintiff's argument that the DPR had waived any privilege when it produced its investigative file to plaintiff in response to the subpoena. The letter accompanying DPR's production failed to indicate that the materials were privileged. Nevertheless, the Court held that waiver had not occurred and that the disclosure was inadvertent. In so concluding, the Court noted that: (1) it is expected that State agencies will inadvertently disclose privileged materials

given the volume of requests they receive, and (2) DPR quickly attempted to rectify the disclosure by quickly filing its motion to quash.

The Court then considered whether either of the asserted privileges applied. First, the Court rejected the argument that DPR's investigative materials were protected by peer review because the DPR is not a "peer review organization." The Court noted that DPR's investigation into the decedent's death was conducted without the involvement of a "peer review organization." In *dicta*, the Court noted that the DPR's files could be protected by peer review if, for example, it acts as a mandatory investigative arm of peer review organization.

Second, the Court held that some, but not all, of the sought materials were protected from disclosure pursuant to the governmental privilege. The Court found that the governmental privilege did not apply to statements provided to the DPR by the defendant because the defendant had since deceased. Therefore, the defendant's statements were not otherwise available, and the State no longer had an interest in keeping the statements confidential because it was no longer pursuing criminal or civil charges against the defendant. As a result, the Court permitted portions of the DOJ and DPR files to be produced.

New Trial is Justified Where Erroneous Instruction on Proximate Cause is Given to Jury

In *Lisowski v. Bayhealth Medical Center, Inc.*, 2016 WL 6995365 (Del. Super. Ct. Nov. 30, 2016), the Court reversed a jury verdict in favor of a hospital and awarded a new trial to the plaintiff due to an erroneous jury instruction. Before trial, the defendant asked the Court to add additional language to the normal "proximate cause" instruction. In particular, the defendant wanted the jury to be instructed that an action is not a proximate cause of "an event or condition if that event or condition would have resulted without the negligence." The Court, over the plaintiffs' objection, agreed to add that language. During trial, the jury expressed a lack of understanding with the proximate cause instruction, but the Court indicated that it could not provide further guidance. The jury then found that the hospital was negligent but that any negligence did not proximately cause the alleged harm.

The plaintiffs moved for a new trial thereafter. In reviewing the motion, the Court agreed with the plaintiffs that the instruction was misleading, and therefore an incorrect statement of law. In particular, the instruction should have focused on the alleged harm or injury, not an "event or condition," which was confusing to the jury in view of the

dispute of the cause of the plaintiff's injuries. This was further supported by the jury's note requesting clarification of the instruction. As a result, the Court granted the plaintiffs a new trial.

Evidence of a "Known Complication" is Admissible at Trial with Expert Testimony

In a helpful ruling for healthcare providers, the Superior Court recently permitted defendants in medical negligence cases to argue that an alleged error during a surgery was a "known complication" with supporting expert testimony. In *DeBussy v. Graybeal*, C.A. No. S14C-03-034 RFS (Del. Super. Ct. Dec. 2, 2016), a surgeon injured a patient's common bile duct during a laparoscopic cholecystectomy. The surgeon sought to argue that the injury was a "known complication" that can occur even when the surgeon complies with the standard of care. The Superior Court agreed and permitted this argument so long as it was supported by expert testimony. It further rejected the plaintiff's claim that this evidence was unduly prejudicial or irrelevant and held that the jury should be permitted to consider whether this injury was due to negligence or occurred through no fault of the surgeon as a known complication.

Non-Delaware Insurers Need to Advise Potential Claimants of Statute of Limitations for Injuries in Delaware

In a recent case, the Delaware Superior Court held that a hospital could not assert a statute of limitations defense against a personal injury claim because it failed to give notice of the statute during the pendency of the claim as required by 18 *Del. C.* § 3914. In *Berbick v. The Nemours Foundation*, 2016 WL 7176719 (Del. Super. Ct. Dec. 8, 2016), a minor slipped and fell at a hospital located in Delaware. The hospital was owned and operated by a Florida corporation. The plaintiff asserted a personal injury claim more than two years after the incident, and the hospital moved to dismiss the claim under the applicable two-year statute of limitation.

The Court refused to permit the hospital to rely on the two-year statute of limitations, as the hospital had failed to alert the plaintiff of the two-year statute of limitation as required by 18 *Del. C.* § 3914. In particular, the statute requires that an insurer give notice of the applicable statute of limitation to a claimant during the pendency of the claim. If the insurer fails to do that, the statute bars the insurer from asserting the statute of limitations as a defense. In this case, even though the insurer was not based in Delaware, the fact that it insured a Delaware

hospital that performed activities in Delaware meant that the corporation (i.e., the insurer in this case) needed to comply with the notice requirements of 18 *Del. C.* § 3914 if it wished to avail itself of the statute of limitations defense. Because the insurer failed to give notice of the statute of limitations during the pendency of the claim, the Court refused to dismiss the claim on statute of limitations grounds.

No Duty Imposed on Premises Owners to Monitor Invitees' Health Conditions

In an interesting case, the Superior Court recently held that business owners do not owe a duty to wait by a bathroom for a patron. The plaintiff in *Wesselman v. Christiana Care Health Services, Inc.*, 2016 WL 7340109 (Del. Super. Ct. Dec. 16, 2016) claimed that the staff at an outpatient radiology facility intentionally and negligently caused her emotional distress when they failed to take her complaints of weakness and sickness seriously when she was in a bathroom. The plaintiff further claimed that the staff acted inappropriately in failing to have a key to unlock the bathroom door in five minutes. Pointedly, the plaintiff did not claim any medical negligence or improper treatment. The Court made clear that this situation was akin to one where a business patron uses a bathroom. Under that framework, the Court held that a business owner does not owe any duty to stand by a bathroom and monitor a patient's well-being, nor does it owe a duty to a patron to be able to unlock a bathroom door in less than five minutes. The Court further noted that, absent a specific identifiable harm, a claim for intentional or negligent infliction of emotional distress was not viable.

RECENT DELAWARE MEDICAL MALPRACTICE JURY VERDICTS¹

Scott Pavey; Virginia Puspoki, individually and as the executors of the Estate of Tsuru Pavey v. Surgeon and Practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N05C-09-190 JAP: The jury returned a defense verdict. The plaintiff was represented by Melanie Sharp, Esq. of Young Conaway Stargatt & Taylor, LLP. The defendants were represented by John Balaguer, Esq. of White & Williams LLP.

Ariell Green v. Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-03-208 CEB: The jury returned a defense verdict. The plaintiff was represented by Richard Zappa, Esq. and Natalie Wolf, Esq. of Young Conaway Stargatt & Taylor, LLP. The defendants were represented by John Balaguer, Esq. and Lindsey Imbrogno, Esq. of White & Williams LLP.

Nicole Lisowski, et al. v. Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-04-228 ALR: The jury returned a defense verdict after finding that the hospital was negligent but did not cause the decedent's death. The plaintiff was represented by David G. Culley, Esq. of Tybout, Redfearn & Pell. The defendant was represented by James Drnec, Esq. of Balick & Balick LLC.

Tiffany R. Lewis, individually and as the parent and natural guardian of Tyra Curtis, a minor v. Obstetrician and Practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N13C-10-175 RRC: The jury returned a hung verdict. The plaintiff was represented by Bruce Hudson, Esq. of Hudson & Castle Law. The defendants were represented by Gregory S. McKee, Esq. of Wharton Levin Ehrmantraut & Klein, P.A.

Cheryl DeBussy v. Surgeon and Practice, Superior Court of the State of Delaware in and for Sussex County, C.A. No. S14C-03-045 RFS: The jury returned a plaintiff's verdict in the amount of \$180,000.00. The plaintiff was represented by Roger Landon, Esq. and Kelley E. Huff, Esq. of Murphy and Landon. The defendants were represented by Richard Galperin, Esq. and Joshua H. Meyeroff, Esq. of Morris James LLP.

RECENT DELAWARE MEDICAL MALPRACTICE CASE FILINGS²

Mary M. Schrock; E. Truman Schrock v. Hospital, Surgeon and Practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-09-262 JRJ (filed on 9/29/2016): The plaintiff alleges that a surgeon removed the wrong thyroid lobe on plaintiff. The case was filed by Francis Murphy of Murphy & Landon.

Raymond Flatt v. Rehabilitation Center and Physicians, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-10-138 RRC (filed on 10/17/2016): The plaintiff alleges that defendants failed to properly care for plaintiff's wound so that a hole formed containing purulent and necrotic tissue. The case was filed by Robert Leoni of Shelsby & Leoni, P.A.

Jocelyn Rice v. Hospital, Neurosurgery Practice and Neurosurgeon, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-10-158 AML (filed on 10/19/2016): The plaintiff alleges that defendants botched plaintiff's spinal surgery by causing blunt force trauma to her spinal cord and cutting her dura, among other mistakes. The case was filed by Lawrance Kimmel of Kimmel, Carter, Roman, Peltz & O'Neill, P.A.

Bonita Bleacher v. Hospital, Neurosurgery Practice and Neurosurgeon, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-10-178 CEB (filed on 10/21/2016): The plaintiff alleges that defendants injured plaintiff's spinal cord when removing a mass, causing her to become a paraplegic. The case was filed by Robert Leoni of Shelsby & Leoni, P.A.

Carol Kruser, individually and on behalf of the Estate of June Kruser v. Nursing Home and Related Facilities, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-10-200 ALR (filed on 10/25/2016): The plaintiff alleges that decedent died of septic shock because defendants failed to properly care for her urinary tract infection and complaints of nausea. The case was filed by Robert Leoni of Shelsby & Leoni, P.A.

Eugenia Negron v. Dentists and Practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-10-216 PRW (filed on 10/26/2016): The plaintiff alleges that defendants injected anesthetic medication venously into plaintiff, which caused her convulsions that sent her to the emergency room. The case was filed by Gary Aber of The Law Offices of Gary Aber.

Robert Miller; Susan Miller v. Vascular Surgeon, Practice and Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-10-220 DCS (filed on 10/26/2016): The plaintiff alleges that the vascular surgeon injured plaintiff's common iliac artery during surgery which led to loss of blood flow to his lower leg. After several procedures that failed to fix the blood flow problem, defendants amputated the necrotic lower left leg. The case was filed by Philip Edwards of Murphy & Landon.

Dawn W. Hastings; Steven Hastings v. Orthopaedic Surgeon and Practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-11-038 JAP (filed on 11/3/2016): The plaintiff alleges that defendants bungled a procedure to fuse discs in plaintiff's back which now causes severe physical and mental harm. The case was filed by Ben Castle of Hudson & Castle Law, LLC.

Deborah Miller, individually and as personal representative of the Estate of Mary Miller v. Nursing Home, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-11-141 RRC (filed on 11/15/2016): The plaintiff alleges that the defendant failed to properly care for decedent Miller by allowing her to contract pressure ulcers and to suffer dehydration. The case was filed by Kelley Huff of Murphy & Landon.

Nadine Stoneking v. Healthcare Facility, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-11-242 AML (filed on 11/28/2016): The plaintiff alleges that the defendant failed to get plaintiff's consent before administering her antipsychotic medications, and then failed to monitor side effects such as repetitive body movements. The case was filed by Stephen Hampton of Grady & Hampton.

David E. McNatt Jr., individually and on behalf of the Estate of David E. McNatt Sr. and Daniel Wilkerson v. Nursing Home, Related Facilities and Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-11-280 CEB (filed on 11/30/2016): The plaintiff alleges that defendants allowed plaintiff to develop a pressure ulcer and deep tissue deterioration. The case was filed by Robert Leoni of Shelsby & Leoni, P.A.

Kacie Jackson v. Anesthesiologist and Practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-11-281 ALR (filed on 11/30/2016): The plaintiff alleges that the defendant botched plaintiff's surgery on her thumb and now she has very little use of her arm, and it hangs limp. The case was filed by Stephen Hampton of Grady & Hampton.

Ann M. Shapiro v. Orthopaedic Surgeon and Practice, Superior Court of the State of Delaware in and for Sussex County, C.A. No. S16C-12-007 RFS (filed on 12/7/2016): The plaintiff alleges that the defendant botched plaintiff's hip replacement surgery. The case was filed by Brian Dolan of Stumpf Vickers & Sandy, P.A.

Debro S. Abdul-Akbar v. Hospital Systems, U.S. District Court for the District of Delaware, C.A. No. 1:16 cv 1175 (filed on 12/9/2016): The plaintiff has alleged that the defendants injured her through medical malpractice. The case was filed pro se.

Anne V. Storck; Paul Storck v. Obstetrician and Gynecologist and Medical Aid Units, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-12-089 DCS (filed on 12/12/2016): The plaintiff has alleged that the defendants failed to timely diagnose and treat plaintiff's bronchitis and also prescribed medication that ruptured plaintiff's tendon. The case was filed by Bartholomew Dalton of Dalton & Associates, P.A.

Jane Rooney, individually and as personal representative of the Estate of Dolores Rooney; Patrick Rooney; Susan Jefferson; John Rooney v. Rehabilitation Facility and Staff, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-12-216 JAP (filed on 12/15/2016): The plaintiff has alleged that the defendants were negligent in their care for decedent after she was diagnosed with sepsis from uncontrolled fecal impaction, urinary tract infection and pneumonia. The plaintiff further alleges that the decedent died after being transferred to a hospital. The case was filed by Sean Gambogi of Kimmel, Carter, Roman, Peltz, & O'Neill, P.A.

Leonard Brooks v. Nursing Home and Related Facilities, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-12-253 JRJ (filed on 12/20/2016): The plaintiff seeks punitive damages for alleged negligent care that caused falls and injuries requiring hospitalization. The case was filed by Robert Leoni of Shelsby & Leoni, P.A.

Gregory Petkiewicz v. Dialysis Practice and Center, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-12-309 RRC (filed on 12/23/2016): The plaintiff alleges that defendants' negligence caused the plaintiff to fall out of his wheelchair and break his leg. The case was filed by Timothy Lengkeek of Young Conaway Stargatt & Taylor, LLP.

¹ Defendants' names have been purposefully redacted.

² *Id.*

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