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Professional Liability Monthly provides a timely summary of decisions from across the country concerning professional liability matters. The publication is distributed monthly via email. Cases are organized by topic, and where available, [hyperlinks](#) are included providing recipients with direct access to the full decision. In addition, we provide the latest information regarding news in the professional liability industry. We appreciate your interest in our publication and welcome your feedback. We also encourage you to share the publication with your colleagues. If others in your organization are interested in receiving the publication, if you wish to receive it by regular mail or if you would like to be removed from the distribution list, please contact [Brian R. Biggie](#).



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FEATURED ARTICLE

Increased Risk of Malicious Prosecution Suits Against Attorneys: War by Health Care Providers and Their Medical Malpractice Defense Bar on Attorneys Who Fail to Follow Connecticut's Statutory Good Faith Requirements Governing Claims Against Health Care Providers

Imagine you are a medical malpractice attorney and a client enters your office seeking legal advice ... see page 10.



DIRECTORS AND OFFICERS

The Bankruptcy Court Rules That Chapter 7 Trustee Is Separate and Distinct From the Debtor

WILLSON v. VANDERLICK (IN RE CENT. LA. GRAIN COOP., INC.) (Bankr. W.D. La., Jan. 31, 2012)

The Bankruptcy Court for the Western District of Louisiana denied the defendant's, Admiral Insurance Company, motion for summary judgment, holding that the plaintiff, a duly appointed Chapter 7 trustee, was not an insured person within the definition of a nonprofit management liability insurance policy, and, thus, not subject to the insured versus insured exclusion.

The plaintiff trustee brought an action against former members of the debtor's board of directors alleging breach of their fiduciary duties to the debtor and failure to maintain adequate records. The plaintiff also asserted a direct claim against Admiral Insurance Company alleging that the D&O policy issued to the debtor covered the losses alleged in the complaint against the former members of the debtor.

The D&O policy at issue provided that it would pay on behalf of the insureds of any loss arising from a claim against the insureds during the policy period for any wrongful act. The policy further provided that an insured was any "past, present, or future duly elected or appointed directors, trustees, officers, employees, volunteers, or committee or staff members" of the debtor. The "insured versus insured" exclusion, however, provided that the insurer was not liable for loss in connection with a claim made

against any insured by the insured entity. The policy defined the insured entity as the debtor and its subsidiaries.

The rationale behind the insured versus insured exclusions, the court explained, was to avoid collusive claims by insured corporations that would otherwise recoup their losses by holding their directors liable, who, in turn, would not lose anything if insured. Although such rationale is readily applicable when claims are brought by the insured corporation, the court opines that it is not so straightforward when claims are brought by a debtor-in-possession, plan committee, or trustee. The court acknowledged the lack of consensus on the issue of whether the trustee's claims were brought by the insured company and thus were subject to the insured versus insured exclusion.

The court, citing a series of cases from various jurisdictions, held that a duly appointed bankruptcy trustee was not the insured debtor and, thus, not the insured entity for the purposes of the insured versus insured exclusion as the trustee was a separate and distinct entity from the debtor. In support, the court noted that the trustee was bound to administer the bankruptcy estate for the benefit of the debtor's creditors, not the debtor.

As the duties of the trustee were clearly distinguished from that of the debtor, the court found no violation of the rationale behind the insured versus insured exclusion in not applying the exclusion to the case at bar. Accordingly, Admiral Insurance Company's motion for summary judgment seeking dismissal on the grounds of the insured versus insured exclusion in the policy was denied.

Impact: This decision is important in that this issue continues to evolve nationwide. At least this court took the position that a trustee does not fall within the "insured versus insured" exclusion. It is unclear whether this will affect other pending litigation or the decision will be limited in practical effect to this case in this jurisdiction. Regardless, insurers must be cognizant of the possibility of a trustee maintaining an action against the policyholder for the very acts that may have led the policyholder to declare bankruptcy. Arguably, the court is crafting a way around the "insured versus insured" exclusion in order to reach the policy limits.

Court Deems "Services" Ambiguous in E&O Endorsement

CORKY McMILLIN CONSTR. V. US SPECIALTY INS. CO. (S.D. Cal. Jan. 11, 2012)

The U.S. District Court for the Southern District of California denied the defendant U.S. Specialty Insurance Company's motion to dismiss in a claim over an errors and omissions exclusion (E&O endorsement) in a directors, officers, and organization liability insurance policy.

Pursuant to the policy, the defendant agreed to pay for losses arising from claims premised upon "wrongful acts." The E&O endorsement in the policy provided that the defendant will not be liable for any claims against the plaintiffs "arising out of, based upon, or attributable to the rendering of or failure to render services for others, including without limitation services performed for or on behalf of customers or clients" of the plaintiff.

During the policy period, a class action complaint was filed against the plaintiffs

based on alleged misrepresentations and omissions that the plaintiffs made to home buyers regarding the nature, value, and desirability of certain residential communities. The plaintiffs tendered the case to the defendant for coverage under the policy, but the defendant denied the claim citing the E&O endorsement.

The plaintiffs argued that the E&O endorsement was ambiguous, in part, because the policy did not define “services.” Thus, the defendant asserted that it must be construed in its ordinary and popular sense as helping or doing work for someone.

The court agreed that the term was not defined and that it would apply the ordinary and popular meaning of the term. The court further stated that although the ordinary meaning of services encompasses a wide array of activities, broad meanings do not necessarily create ambiguity.

However, the court agreed with the plaintiffs that there was an ambiguity when viewed in the context of the policy as a whole. The court found that while the coverage provision provided that wrongful acts are defined to include “any other actual or alleged act, error, misstatement, misleading statement, omission or breach of duty,” it was unclear whether the term “services,” was meant to include the “wrongful acts” such as “misstatement, misleading statement, and omission.”

The court noted that this uncertainty is even more pronounced when one considers that exclusionary clauses are to be interpreted narrowly against the insurer.

Impact: While the court did agree that a

term such a “services” is not inherently ambiguous simply because it may encompass a wide variety of actions, in the end, the court held the exclusion at issue was ambiguous. It appears unclear whether the conduct was indeed a “service.” Regardless, the policyholder was successful in arguing the existence of an ambiguity.

New York Court of Appeals Rules That the Martin Act Does Not Preempt Common Law Causes of Action

ASSURED GUARANTY LTD. v. J.P. MORGAN INVESTMENT MANAGEMENT INC.
(N. Y. Court of Appeals, Dec. 20, 2011)

The New York Court of Appeals denied the defendant J.P. Morgan’s motion to dismiss, holding that the plaintiff’s common law causes of action were not preempted by the Martin Act.

The plaintiff, Assured Guaranty (Assured), brought an action against J.P. Morgan for gross negligence, breach of fiduciary duty, and breach of contract. Assured claimed that J.P. Morgan mismanaged the investment portfolio of an entity where Assured guaranteed the obligations of that entity. Assured alleged that J.P. Morgan put the investments in high risk options, and failed to diversify investments and sacrificed the well being of the entity’s investments by favoring another large client of J.P. Morgan’s.

The Supreme Court initially dismissed the complaint finding that the common law causes of action fell within the purview of the Martin Act and should be enforced by the attorney general, not through a private civil action. The Appellate Division reinstated the

common law causes of action finding that nothing in the plain language of the Martin Act or the legislative history supported preemption of common law rights of action.

The Court of Appeals affirmed the appellate court decision. The court noted that the Martin Act was set up to create a statutory mechanism for regulatory and remedial powers in the attorney general. The act granted investigatory and enforcement powers to the Attorney General, but it did not contemplate or eliminate common law causes of action. Moreover, the legislative history did not show any intent on the part of the legislature to override common law rights of action. For a statute to preempt common law rights of action, the court noted, the legislature must clearly and specifically intend for the statute to do so. Therefore the court found that the Martin Act did not preempt Assured’s common law causes of action.

The court also noted that prior cases dealt with whether a private cause of action was created under the Martin Act, not whether common law causes of action with an independent legal basis are preempted by the Martin Act. Thus, the gross negligence and breach of fiduciary duty claims survived.

Impact: This is an important decision and could potentially open companies up to a flood of litigation. This is a significant shift and, at least in New York, establishes a private right of action that previously was foreclosed by the Martin Act. This decision, and its consequences bears watching.

LEGAL MALPRACTICE

Prior Act Provision Bars Coverage for Malpractice Claim

DARWIN SELECT INS. CO. v. LAMINACK, PIRTLE & MARTINES
(S.D. Tex. Feb. 8, 2012)

The U.S. District Court for the Southern District of Texas granted the plaintiff Darwin Select Insurance Company (Darwin)'s motion for summary judgment as to the duty defend in an action arisen out of a lawyers' errors and omission insurance policy issued by the plaintiff for the defendants law firm and attorneys.

Under the Prior Acts Condition, the policy did not provide coverage for a wrongful act that occurs before the inception date of the policy if, prior to the inception date, "any insured had a basis to foresee that the wrongful act might reasonably be expected to be the basis of a claim against any insured." The inception date of the policy was June 17, 2010.

On October 11, 2010, RX.com, Inc. filed a malpractice claim against the defendants in Texas state court, alleging that the defendants delayed filing a lawsuit until after the statute of limitation had expired. Darwin filed this declaratory judgment action asserting that it did not owe a duty to defend or a duty to indemnify the defendant in connection with the underlying malpractice lawsuit because the alleged malpractice occurred prior to the inception date of the policy, and the defendants had reason to believe that missing the statute of limitations might reasonably be expected to be the subject of a malpractice claim against the defendants.

The court noted that as of March 2008, the defendants had known that summary judgment had been entered against RX.com, Inc., dismissing the action based on the statute of limitations, and therefore, had a basis to foresee that missing the statute of limitations in the underlying lawsuit might reasonably be expected to be the basis of a malpractice claim against the defendants.

The court noted that it is inconceivable that the defendants, including the two experienced attorneys, would not have a basis to foresee that missing the filing deadline might reasonably be expected to be the subject of a malpractice claim against them. Accordingly, the court concluded that Darwin did not owe a duty to defend the defendant in the underlying lawsuit.

As to the question of a duty to indemnify, the court noted that Texas law considers the duty-to-indemnify question to be justiciable only after the underlying suit is concluded. Since the underlying malpractice suit remained pending, the court found that the duty to indemnify issue was not yet justiciable and would be administratively stayed until the lawsuit is finally concluded. This portion of the decision was surprising given the court's rationale. Regardless, the matter is stayed until the end of the underlying action.

Impact: Failing to file a claim within the statute of limitations remains a clear example of misconduct. Moreover, knowledge of such a misstep is consistently seen as knowledge of a potential claim. Denying a claim based upon the prior knowledge exclusion remains a fact-driven issue. Here, the insurer was able to establish the error and the policyholder's knowledge.

Court Strikes Claim Premised Upon Unfair Trade Practices Statute

AFRIM FRANGU v. EUGENE AXELROD ET AL.
(Conn. Super. Ct. Jan. 3, 2012)

In *Frangu v. Axelrod*, the Connecticut Superior Court struck a plaintiff's claim against his attorney for violation of the Connecticut Unfair Trade Practices Act C.G.S. §42-110a et seq (CUTPA). CUTPA is designed to provide legal redress for injuries caused by unfair and deceptive commercial business practices. Since CUTPA was enacted, Connecticut law has evolved to hold that a legal malpractice claim does not give rise to an unfair trade practice under CUTPA, because it does not apply to injuries caused by the "actual competence" of legal professionals. However, deceptive or immoral conduct by an attorney that pertains to matters involving the entrepreneurial or commercial aspects of the legal profession may be an unfair trade practice.

In this case, the plaintiff hired the defendant law firm just over two years after he was fired from his job and his union refused to arbitrate his case after exhausting all grievances. The plaintiff claimed he chose the defendant law firm because of a *Yellow Pages* advertisement said it had expertise in employment and labor law and he wanted representation for potential claims against his former employer for wrongful termination, and against the union for discrimination on the basis of race, religion, or national origin.

Over two years after the termination occurred, the defendant law firm accepted the engagement and a legal fee of \$2,500 to file the claim with

the Equal Employment Opportunities Commission (EEOC). The EEOC dismissed the claim as being time barred because it was brought over 300 days after the termination. The defendant law firm failed to pursue any other potentially viable claims against the union or the employer in any other venue, such as the National Labor Relations Board, the Connecticut Commission on Human Rights and Opportunities, or the federal or state court systems.

The plaintiff sued the defendant law firm for professional negligence, breach of contract, violation of CUTPA, and conversion/statutory theft. In support of the CUTPA claim, the plaintiff alleged the following conduct was entrepreneurial: charging \$2,500 to file a claim with the EEOC it knew would be dismissed as time barred; and falsely advertising in the *Yellow Pages* and other publications that it had expertise in the field of employment and labor law, inducing the plaintiff to rely on the advertisement when choosing a law firm.

The defendant moved to strike the CUTPA claim as legally insufficient, arguing that the CUTPA allegations did not involve the entrepreneurial and/or commercial aspects of the practice of law.

The court struck the plaintiff's claims under CUTPA because the complaint did not have any facts to support the otherwise conclusory allegations that the defendant's advertisements were false. Additionally, the court was not persuaded by the plaintiff's argument that charging a \$2,500 fee to pursue an administrative complaint that was ultimately dismissed as being time barred was an unfair trade practice. The

court stated that it was "inconceivable" that the defendants would know whether the EEOC would have been presented with a statute of limitations defense prior to the claim's presentment. Moreover, while filing a claim after the statute of limitations expired may be professional negligence, there was nothing to show that the action was unfair, unethical, or unscrupulous to rise to the level of violating CUTPA.

Impact: This case may be useful in defending an attorney sued under CUTPA; however, its impact may be limited as it is in conflict with other authoritative cases addressing the factual adequacy of CUTPA allegations under similar fact patterns involving attorney fees and advertising.

Court's Statements in Underlying Opinion Do Not Supplant Plaintiff's Need for Legal Standard of Care Expert in Jury Trial

ROBERT GRIMM v. JOHN WAYNE FOX (Supreme Ct. Conn., January 10, 2012)

In *Grimm v. Fox*, 303 Conn. 322 (2012), the Connecticut Supreme Court considered whether on a legal malpractice claim, the plaintiff could use the negative statements of the court regarding certain errors made by his counsel in the underlying action in place of expert testimony to establish the breach of the standard of care in his new legal malpractice claim. In this Supreme Court case, the defendant attorneys previously represented the plaintiff in his 2003 divorce action. In that divorce action, the trial court rendered judgment dissolving the plaintiff's marriage to his

former wife and issued various financial orders. The trial court ordered, inter alia, that the plaintiff had diminished the marital estate by \$2.9 million and also ordered him to pay \$100,000 of the attorney's fees incurred by his former wife.

The plaintiff appealed the trial court's decision to the appellate court, which held that the trial court erred in determining that the plaintiff had diminished the marital estate, but that this incorrect finding was harmless error and did not require reversal. The appellate court also determined that the trial court had abused its discretion in ordering that the plaintiff pay his wife's attorney's fees. Following the appellate court's ruling, the Connecticut Supreme Court granted the plaintiff's petition for certiorari on the limited issue of determining whether the trial court's improper findings were harmless error. In that certified appeal, the Supreme Court determined that the award of attorney's fees was not an abuse of the trial court's discretion and reversed the appellate court judgment. The Supreme Court also affirmed the appellate court with regard to the financial orders, determining that the plaintiff had abandoned his claims because he failed to move for an articulation or rectification of the trial court's financial findings, and that the plaintiff had failed to raise this issue until oral argument before the appellate court and only addressed this issue in the statement of facts section rather than in the argument section of his brief.

The plaintiff then brought this subsequent legal malpractice action. In the action, the plaintiff relied solely on certain language in the Supreme Court's decision to establish that the defendants

had breached the standard of care rather than disclose a standard of care expert, as is generally required in legal malpractice actions.

The day before the start of the trial, the defendants filed four motions in limine, including one to preclude the plaintiff from making any mention, argument, or claim at trial that the defendants had breached the standard of care in their representation of the plaintiff as well as a motion for judgment. On the day of the trial, the court granted the defendants' motion in limine precluding the plaintiff from presenting evidence that the defendants had breached the standard of care in their representation of him because the plaintiff had failed to disclose expert testimony. The trial court also granted the defendants' motion for judgment because the plaintiff had failed to disclose an expert, which was required, and therefore, the plaintiff could not establish a prima facie case for legal malpractice.

On appeal to the Supreme Court, the plaintiff claimed that certain statements made by the Connecticut Supreme Court in his previous dissolution of marriage case, in which the court indicated its disapproval of the defendants' actions in failing to provide an adequate record for review, and for inadequately briefing the claims, were sufficient evidence upon which a jury could reasonably have found that the defendants had breached the standard of care. Therefore, the plaintiff argued that a standard of care expert was not required. To the contrary, the defendants contended that the language of the court's opinion was not sufficient, on its own, to establish that the defendants breached the standard of care.

The Supreme Court first considered whether the trial court improperly granted judgment in favor of the defendants because the language of the previous Supreme Court's opinion in his divorce action was insufficient evidence to support the plaintiff's claim of legal malpractice. The court determined that the language in the decision was not sufficient evidence.

The court rejected the plaintiff's argument, which relied on the holding in *Dubreuil v. Witt*, 80 Conn. App. 410 (2003), *aff'd*, 271 Conn. 782 (2004). The plaintiff argued that in *Dubreuil*, the court indicated that there may be no better expert who knows about the practice of the law before the Superior Court than a judge of that court and logically, then, in this case no expert knows more about the practice of law before the appellate court than the justices of the Supreme Court.

In rejecting this argument, the Supreme Court stated that *Dubreuil* was tried before the court. In *Dubreuil*, the appellate court stated, and the Supreme Court agreed, that when a legal malpractice case is tried before a judge, rather than a jury, the trial judge need not require the aid of expert testimony to understand the requisite standard of care or the reasonableness of the attorney's actions. The court stated that while it is possible to infer from *Dubreuil* that no expert knows more about the appellate practice than the Supreme Court, the present case was scheduled to start trial before a jury who would have required the aid of expert testimony to understand the standard of care, and the reasonableness of the defendants' actions in that context. The court continued to illuminate that its statements in the divorce action, although critical in

tone and content, were based on nothing more than the materials that it had before it on the record. The court stated that based on the record it did not, nor could it, opine as to the reasonableness of the defendants' strategic process or their ultimate decisions throughout the litigation of that divorce case.

Instead, the Supreme Court found *Dixon v. Bromson & Reiner*, 95 Conn. App. 294, 298-99 (2006) persuasive wherein the appellate court noted that "an observation by a trial judge ... that evidence was not produced to support a contention does not mean that the failure to produce that evidence was the result of professional negligence by trial counsel." The court held its observations that the record and briefing were inadequate, while technical violations of the rules do not, standing alone, indicate that those failures were necessarily the result of professional negligence by the defendants. The court scrutinized its observations by stating that it did not indicate that the defendant had breached the standard of care because it did not consider whether certain inactions were reasonable and because it was not privy to the interaction with the client, or the ultimate strategic decisions regarding issues to emphasize in the appeal.

The court also examined the case law of *Pagan v. Gonzalez*, 113 Conn. 135, 141 (2009) in which the court held that "[t]he exception to the need for expert testimony is limited to situations in which the defendant attorney essentially has done nothing whatsoever to represent his or her client's interests..." The court remarked that this is not a case in which the defendants did "nothing whatsoever" in their representation, but rather one in which the plaintiff claims that the defendants failed to undertake activities

to satisfy the requisite professional standard of care.

Impact: Frequently, the plaintiff's counsel will argue that the court's language in rulings from the underlying action proves that there was a breach of the standard of care. This case gives support for the defendant's argument that the court's observations in the underlying rulings are insufficient for the plaintiff to prove a legal malpractice case before a jury. More importantly, this case shows that the courts' observations can be scrutinized so that the observations amount to nothing of significance when defending a legal malpractice action, whether before a jury or not.

MEDICAL MALPRACTICE

Claim for Medical Expenses Deemed Barred by Statute of Limitations

LaBAR v. McDONALD
(E.D. Pa., Jan. 27, 2012)

In this medical malpractice action, the court granted the defendants' motion in limine and prohibited the plaintiffs from introducing evidence related to past medical expenses. The plaintiffs, a child and her parents, filed suit against the defendant, a physician, and others for breaching the standard of care by placing three surgical clips on the child's common bile duct during a laparoscopic cholecystectomy. The surgery occurred on June 28, 2007 and suit was filed on March 15, 2010.

Personal injury to a minor gives rise to two separate and distinct causes of action in Pennsylvania. One claim is the parents' for medical expenses

and loss of the minor's services during minority. The other claim is the minor's for pain and suffering and for losses after minority. In this case, the parents' claim for medical expenses was barred by the applicable two-year statute of limitations. The court further ruled that the plaintiffs' could not introduce the medical expenses to establish the severity of the injuries sustained, holding that the amount expended on medical bills is not relevant or, in any way, indicative of an individual's pain and suffering.

Impact: It is important to distinguish between the claims of the minor and the claims of the parents when there is personal injury involving a minor.

Connecticut Supreme Court Examines What Constituted a "Detailed Basis" in Physician Opinion Letter

WILCOX v. SCHWARTZ
(Supreme Ct. Conn., Feb. 7, 2012)

The issue in this case was the adequacy of the physician opinion letter attached to the plaintiff's medical malpractice complaint. Conn. Gen. Stat. § 52-190a requires a plaintiff to attach a written opinion from a similar health care provider setting forth that there appears to be evidence of medical negligence by the defendant and providing a "detailed basis" for the formation of such opinion. The opinion letter obtained by the plaintiff indicated that there were deviations from the standard of care because the defendant, Schwartz, failed to prevent injury to the plaintiff's biliary structures during laparoscopic gallbladder surgery.

The defendants filed a motion to dismiss, arguing that the opinion letter was not detailed enough to satisfy

the requirements of § 52-190a. The defendants argued that the opinion simply provided a conclusory statement of negligence without indicating how Schwartz was negligent and how he deviated from the standard of care. The trial court granted the defendants' motion to dismiss and ruled that the opinion letter failed to set forth the required "detailed basis" for the opinion under § 52-190a.

On appeal, the Connecticut Appellate Court reversed the trial court's decision, and the defendants appealed to the Supreme Court. In a 4-3 decision, the Connecticut Supreme Court upheld the appellate court's ruling. The court stated that whether the written opinion satisfied the "detailed basis" requirement of § 52-190a is a question of statutory construction. Because the statute did not define "detailed basis," it was appropriate to look to at extra-textual sources to determine the meaning of that phrase.

After reviewing legislative history and prior decisions, the Supreme Court determined that a written opinion satisfies the "detailed basis" requirement of § 52-190a if it sets forth the basis of the similar health care provider's opinion of negligence by expressing reference to what the defendant did, or failed to do, to breach the applicable standard of care. In other words, the opinion must state the applicable standard of care, the fact that the standard was breached, and the factual basis of the conclusion concerning the breach. The Supreme Court noted that the legislature did not intend to bar a potential meritorious claim simply because the expert, although able to determine that there was a breach of the standard of care, could not identify the specific act or omission involved.

In the present case, the plaintiff's letter was sufficient because it identified the applicable standard of care (which was to protect the biliary structures), and because it stated that Schwartz breached the standard of care by failing to prevent injury to the plaintiff's biliary structures.

Importantly, the Supreme Court dismissed the defendants' argument regarding the legislature's failed attempt to amend § 52-190a in 2010. The proposed amendment would have removed the "detailed basis" language and replaced it with a less stringent requirement that the opinion letter need only set forth "one or more specific breaches" of the standard of care. The defendant argued that this demonstrated that the "detailed basis" language required more detail than was set forth in the letter at issue in this case. The Connecticut Supreme Court noted that in the past, it has relied on the failure to amend a statute as an indication of legislative intent. However, it usually did so only where there was a prior judicial interpretation of the statute. The court would then interpret the failure to amend the statute to infer legislative approval of the judicial interpretation of that statute. Because, in this case, there was no prior judicial interpretation of the issue at hand, the court did not find the legislature's failure to amend to be persuasive in this case.

Impact: This ruling appears to relax the stringent requirements of § 52-190a by ruling that as long as a plaintiff obtains an opinion that identifies the applicable standard of care, indicates that the standard was breached, and provides a factual basis for that conclusion, a plaintiff can satisfy the "detailed basis" requirement of § 52-190a. A plaintiff need not set forth the specific act of the

defendant which caused the breach.

ARCHITECT/ENGINEER MALPRACTICE

Architect's Malpractice Does Not Create Obligation to Underwrite Costs of Project

ASSOULINE RITZL LLC v. EDWARD I. MILLS & ASSOC.
(N.Y. 1st Dept., Jan. 12, 2012)

The plaintiffs wanted to purchase a building in Manhattan and renovate it to add six new stories. Prior to the purchase, they retained the defendant architect to be their zoning consultant. The defendant architect advised the plaintiffs that the applicable zoning laws allowed the addition of six new stories. After the purchase of the property, the New York City Department of Buildings objected to their plan to add six additional floors on the basis that the zoning laws did not allow it. After trying several different ways to get around the zoning laws, the plaintiff ended up demolishing the old building and rebuilding it. The plaintiffs then sued the defendant architect for damages incurred as a result of his bad zoning advice.

The plaintiffs alleged that they would have never bought the building at issue if not for the advice of the defendant architect. The defendant moved for summary judgment to dismiss the action. The defendant did not deny his malpractice in giving bad zoning advice, but argued that his malpractice was not the proximate cause of the alleged damages in the case. Further, he argued that plaintiffs failed to mitigate the loss by not re-selling the property as soon as they learned about the zoning issues. The lower court denied the defendant's

motion and the Appellate Division affirmed.

The court held that the plaintiffs were entitled to recover any damages they can prove were actually incurred as a proximate result of their reliance on the defendant's bad advice. The plaintiffs' right of recovery is subject to reduction based on their failure to mitigate. In order to have mitigation apply, the court held that defendant would have to prove, 1) that plaintiffs failed to mitigate their damages in a reasonably diligent manner; and 2) the extent such mitigation would have diminished the loss.

The court further held that this loss would not provide a windfall for plaintiffs and that they were only entitled to recover all costs incurred as a result of pursuing their alternative development plan for the building after they learned that their original plan would not work. Indeed, the court noted that the defendant's malpractice did not render the defendant liable to underwrite the cost of plaintiffs' project and that in giving zoning advice defendant did not make himself an insurer of the project.

Impact: Even in cases where the malpractice is clear (and in this case freely admitted by the defendant) a plaintiff is still responsible for those losses that could have been avoided by their reaction to the situation after the initial damage.

Plaintiff Architect Entitled to Attorneys Fees in Dispute Over Unpaid Work

FARRELL v. WHITEMAN
(Sup. Ct. Idaho, Jan. 10, 2012)

The plaintiff, an architect, sued the defendant, a developer, for uncompensated architect services rendered related to a condominium project. The plaintiff had worked on the defendant's condominium project for more than a year; he was then terminated by the defendant. The defendant never hired any other architect and used the plaintiff's plans for construction of the condominium, but refused to pay the plaintiff for any of his work. There was no written contract between the parties, only an oral agreement.

Further, the project was located in Idaho, and the defendant was only licensed in Michigan. Because of the project, he obtained his license in Idaho during his work on the project. The defendant tried to use his late licensure and other "breaches" of their oral agreement as the basis for their refusal to pay plaintiff. On remand, the lower court awarded defendant \$208,690.05 in damages for unjust enrichment, quantum meruit and attorney's fees and costs. The lower court awarded plaintiff damages for the money spent out of pocket prior to his licensing under unjust enrichment and damages for the architectural services rendered under quantum meruit principles.

In affirming the damages awarded by the lower court, the court held that all of the damages awarded were proper, including the award for attorneys fees, because under Idaho Code § 12-120(3) architectural services represent a commercial transaction.

Impact: It is important to remember that in Idaho architectural services are considered a commercial transaction, which may open up any potential plaintiff and/or defendant to additional damages such as attorney's fees as was seen in this matter.

LEGISLATIVE UPDATE

House Bill 495: Proposed Pennsylvania Legislation That Could Potentially Alter the Landscape of Medical and Nursing Home Malpractice Cases

BACKGROUND

A piece of legislation was introduced in the Pennsylvania General Assembly that, if enacted, has the potential to alter the landscape of medical and nursing home malpractice cases filed in Pennsylvania. House Bill 495 would preclude "benevolent gesture[s] or admission[s] of fault" uttered by certain specified healthcare providers "prior to the commencement of a medical professional liability action" from being introduced at trial "as evidence of liability or as evidence of an admission against interest." The term benevolent gesture, under House Bill 495, is defined as "[a]ny and all action, conduct, statement or gesture that conveys a sense of apology, condolence, explanation, compassion, or commiseration from humane impulses."

The floor debate over House Bill 495 indicates that the overriding purpose of the legislation is to promote open and frank discussions between health care professionals and the patient's families concerning an unforeseen outcome with the patient's care. The state representative who introduced the legislation explained that "[c]urrently

when a patient or their family wants information on a bad outcome, health care providers are advised not to share expressions of empathy, compassion, or benevolence for fear that this could be used against them." Moreover, the court in a jurisdiction that has already enacted similar legislation reasoned that the law enables "a physician [to] speak with a patient and/or a patient's family members and express his [or her] heartfelt sympathy for their pain following a negative outcome without risk of that expression of sympathy being used against him [or her] in court," *Davis v. Wooster Orthopaedics & Sportsmedicine*, 952 N.E.2d 1216, 1221 (Ohio Ct. App. 2011). Consistent with the above, the evidence described in House Bill 495 is regularly relied upon by attorneys in Pennsylvania to support or otherwise prove their client's medical malpractice claim.

Impact: The impact of House Bill 495, if enacted into law, is largely twofold. First, the bill would provide health care professionals some measure of protection when speaking with a patient or a patient's family about a less than desirable result. A portion of the statements made by health care professionals during these conversations would be inadmissible in any subsequent civil litigation. Second, the bill would place off-limits a fertile ground of evidence that attorneys continually utilize to support medical malpractice claims in Pennsylvania.

House Bill 495 was passed by the Pennsylvania General Assembly by a vote of 171 to 27. The Pennsylvania State Senate has yet to approve the bill. As a result, House Bill 495 remains a proposed piece of legislation instead of Pennsylvania law.

Pennsylvania House Bill 1907

The Pennsylvania House of Representatives has passed legislation that would put a limit on the amount of punitive damages that could be awarded in civil liability cases against nursing homes. Under House Bill 1907, there would be a limit of 200 percent of compensatory damages for cases that include personal care homes, long-term care facilities, and assisted living communities. The bill states that this limit would not apply to cases where there are allegations of intentional misconduct or where the defendant knowingly acted negligently.

FEATURED ARTICLE

Increased Risk of Malicious Prosecution Suits Against Attorneys: War by Health Care Providers and their Medical Malpractice Defense Bar on Attorneys Who Fail to Follow Connecticut's Statutory Good Faith Requirements Governing Claims Against Health Care Providers

Charlotte Hungerford Hospital v. Kevin Creed, et. al. 2012 Conn. Super. LEXIS 139 (January 11, 2012)

Imagine you are a medical malpractice attorney and a client enters your office seeking legal advice. His wife has just taken her own life, and he wants to bring suit against a hospital for prematurely discharging his visibly delusional and depressed wife prior to her suicide.

After reviewing the medical records, death certificate, and other materials,

you learn that your client's wife was never even seen by the treating psychiatrist and that the hospital discharged her, despite her request to be admitted, merely because they did not have enough beds. You discover that your client's wife took her own life by ingesting the very pills that were prescribed to her by the hospital upon her forced discharge.

Based on this information, you think you have a good case against the hospital. You bring suit. But much to your chagrin, the case is dismissed, not because the case lacked merit but because you failed to adhere to one small detail. You did not obtain a sufficient letter of a similar health care provider pursuant to statutory requirements. You might expect a legal malpractice action by your client to follow because of this failure. You are in fact served with a summons shortly after the dismissal, but much to your surprise, it is not your client who has sued you; rather it is the hospital that has sued you in a retaliatory malicious prosecution action.

This is the exact scenario that recently unfolded in the Connecticut case of first impression, *Charlotte Hungerford Hospital v. Kevin Creed*. This recent landmark case marked the escalation of an aggressive war by health care providers on a simple failure of a plaintiff's attorney to follow the statutory good faith requirements governing claims of medical negligence.

Good Faith Certificate Requirements

The use of Connecticut's good faith certificate requirements by the defense bar as a sword against medical negligence actions is not new. For almost 30 years, Connecticut has

required that a certificate of good faith be filed in any medical negligence claim by counsel attesting that he or she had made a reasonable inquiry into the validity of the case and that this inquiry gave rise to a good faith belief that there were grounds for the suit, Connecticut General Statutes § 52-190a. In 2005, as part of a "comprehensive effort to control significant and continued increases in malpractice insurance premiums" Connecticut amended its good faith statute to include a new additional requirement. *Bennett v. New Milford Hospital*, 300 Conn. 1, 18 (2011). Since 2005, the statute now requires, in addition to the good faith certificate, that a "plaintiff in a medical malpractice action ... obtain the written opinion of a similar health care provider" attesting that there is evidence of medical negligence and attach it to the complaint prior to bringing suit. *Id.*

Since this 2005 amendment, a flurry of litigation has ensued surrounding this opinion letter requirement. The defense bar has capitalized on the statute's notable ambiguity, the plaintiff's bar's confusion, and the court's stringent application of the statute, and utilized the statute as a defense tool to secure a vast number of procedural dismissals of otherwise meritorious medical negligence claims brought by plaintiffs.

The Offensive Use of the Similar Health Care Provider Requirement

However, in the recent *Creed* case, the plaintiff hospital has taken this aggressive attack a step further. The hospital for the first time has used the procedural requirement offensively, directly attacking attorneys bringing medical malpractice suits that fail to

adhere to the stringent application of the statute by the courts. The plaintiff hospital, in a dangerous maneuver, combined another retaliatory tool available to defendants in Connecticut, the claim of vexatious litigation with the statutory opinion letter requirement, and filed its own suit against the attorney and firm for the attorney's prosecution of two medical malpractice actions against the hospital.

More specifically, in *Creed*, the attorney had commenced a total of two actions for medical negligence against the hospital for its failure to render appropriate psychiatric care to his client's wife. The first suit resulted in an immediate dismissal as the attorney neglected to attach the letter of a similar health care provider to his original complaint and then only later sought to amend the complaint to attach the letter of a nurse. Because the statute of limitations had since run out after the dismissal of the first suit, the attorney then commenced a second suit alleging similar claims under Connecticut's Accidental Failure of Suit Statute, a savings statute, in effort to cure the dismissal of the first action and save the claims therein. The court again dismissed the second suit and found that because the only letter that the attorney had at the commencement of the suit was that of nurse who the court did not consider a similar health care provider under the good faith statute, he could not avail himself under the savings statute and save his claims. According to the court, the attorney needed to have a sufficient letter of a similar health care provider prior to commencing the first action in order to avail himself under this remedial statute and bring the case anew.

Upon dismissal of the two actions, the hospital brought suit against the attorney

and its firm claiming that the attorney and firm had engaged in vexatious litigation in commencing the two suits.

The hospital essentially piggybacked off the pre-suit opinion letter requirement to argue that because the attorney had failed to obtain a letter of a similar health care provider prior to commencing suit, he lacked probable cause to bring the two actions, as he lacked a requisite ingredient of a cognizable claim for a medical negligence action. In other words, the hospital claimed that in order to have probable cause to bring his claims against the hospital, the attorney needed to have the letter of a similar healthcare provider prior to bringing suit.

Specifically, the hospital made two claims. In its first claim, the hospital alleged that the attorney and firm lacked probable cause to bring the first medical malpractice action because it was filed without the requisite opinion letter from a similar health care provider and any attorney familiar with Connecticut law would not have reasonably believed that the individual consulted prior to bringing suit, the nurse, qualified as a similar health care provider. As to the second claim, the hospital alleged that the attorney and firm lacked probable cause to commence and prosecute the second action because no reasonable attorney would believe that he or she could utilize the Accidental Failure of Suit Statute to save a suit that the attorney never had probable cause to bring in the first case.

Cross motions for summary judgment were filed by both parties. The hospital again continued to argue that the lack of a letter of a similar health care provider was the equivalent to a lack of probable cause on the part of the attorney and the firm. In contrast, the attorney and firm argued that the opinion letter was merely a procedural prerequisite and

was not the "be all to end all" indicator of a lack of probable cause on the part of the attorney to bring his claims. The attorney and firm asserted that the court needed to look to other factors to assess the attorney's belief in the viability of the action, including other aspects of his investigation.

In its decision on the cross motions, the trial court declined to allow this type of offensive action by the hospital against the attorney and firm. The court rejected the hospital's argument that the lack of an adequate opinion letter prior to the commencement of suit is tantamount to a lack of probable cause to bring the negligence action. Instead, the court agreed with the attorney and the firm and concluded that in terms of a claim for vexatious litigation, the opinion letter is just one factor in determining whether there is probable cause and that the court must look to other aspects of the attorney's investigation which demonstrate that probable cause existed to bring the first action.

In so holding, the court determined that the plaintiff's argument, that the lack of probable cause can be based solely on the insufficiency of a written opinion letter, defines the scope of the court's inquiry too narrowly. Looking to a recent Connecticut Supreme Court decision in which the court held that an opinion letter did not have to address causation, the court determined that here it must look beyond the sufficiency of the written opinion letter to determine whether probable cause existed to bring the first medical malpractice action. The court looked to the attorney's affidavit in which he attested to the investigation that he undertook prior to commencing the first action. The court next held that it could not say that the facts and evidence known to the attorney at the time that

the first action was commenced were such that no reasonable attorney would have found the claim worthy of litigation, finding that the attorney and firm had probable cause to institute the first action.

Similarly, the court also rejected the plaintiff's assertion that because the attorney did not have probable cause to bring the first action, he could not utilize the Accidental Failure of Suit Statute to bring the second suit. The court stated that this issue was a matter of first impression, and given that and the fact that the hospital had presented no evidence to show that no reasonable attorney would have instituted the second action, there was no issue of material fact as to whether the defendants had probable cause to commence the second action.

The court then granted the attorney and firm's motion for summary judgment, denied the hospital's motion for summary judgment, and concluded that the attorney and firm had not engaged in vexatious litigation.

A Trend Toward Increased Liability?

The impact of the *Creed* case is far reaching. It demonstrates the heightened aggressive approach that defendant health care providers have taken to stave off medical malpractice claims, and a new use of the good faith statutory requirements that could have a damaging impact on all attorneys.

Further, the *Creed* case is instructive not just for legal attorneys in Connecticut but nationally as many states have similar statutory requirements regarding similar health care opinion letters. It begs the

question: could attorneys prosecuting medical negligence cases be exposed to an increased risk of liability in the form of a claim for vexatious litigation, malicious prosecution, or the like? Could this procedural requirement breed a bevy of new claims against counsel for their role in medical negligence cases? The *Creed* case seemingly suggests that this is not the case and that this type of claim goes too far. However, an appeal is currently pending with respect to the trial court's decision in *Creed* and the Connecticut Appellate Courts have yet to weigh-in on this issue, leaving the liability question open for the time being.

Notably, while it does not appear that this issue has reached the courts of other states, some states, such as Illinois, have specific statutes which make it easier for a physician to bring a malicious prosecution suit after he prevails on a medical negligence suit brought against him. Illinois, for example, reduces the injury requirement needed for a claim of malicious prosecution in medical negligence cases, thereby lowering the burden of proof on physicians seeking retribution for allegedly "frivolous" medical negligence claims. The Illinois Supreme Court has upheld the constitutionality of this statute. In upholding the constitutionality, the Illinois Supreme Court emphasized that the state's legislature enacted the statute to specifically ease "the burden of bringing a malicious prosecution action for health care professionals with the specific intent of not only 'discouraging' the filing of frivolous medical malpractice suits, but also as a way of 'punishing' those plaintiffs who bring baseless medical malpractice claims." *Miller v. Rosenberg*, 196 Ill.2d 50, 64 (2001). It does not appear, however, that there have been

any attempts to utilize Illinois's malicious prosecution statute against attorneys for their role in prosecuting medical negligence actions.

On the other hand, there has been some notable backlash with respect to the opinion letter requirement in Connecticut and other states alike. Several states have declared similar laws imposing similar requirements unconstitutional. Additionally, the Connecticut legislature has since tried to make amendments to the statute, scaling back the court's stringent imposition of the statutory requirement in medical negligence actions. Although the attempt failed in 2011, it is believed that a new attempt to change the statute will be made in the 2012 legislative session. See Dave Collins, "Law Nixing Legitimate Malpractice Claims," *Connecticut Post*, January 8, 2012. It will remain to be seen how the Connecticut Appellate Courts will address this hospital's offensive use of the statute in light of this backdrop.

Accordingly, whether an increased risk of liability will arise in connection with these types of suits presents an open yet precarious question. If ultimately the Connecticut Appellate Courts allow this type of retaliatory action, a full out war against plaintiff's attorneys bringing medical negligence suits could ensue changing the entire landscape of how and when these suits are brought. Given the national trend toward the use of similar health care provider opinion requirements such a war could be far reaching and take place on a national level. With little information on the horizon, presently we are left to hold our breath to see how this all shakes out.

However, as this issue plays out in the appeals process, attorneys should be wary that these types of claims could be lurking and should proceed with the utmost caution in performing their pre-suit inquiry prior to bringing claims of medical negligence. In states imposing the opinion letter requirement, a detailed letter from a reputable physician in the exact same specialty as the defendant physician will be helpful in staving off these types of claims. Without such a letter, any attorney practicing in this field could find themselves facing down a summons by a hostile health care provider.

Upcoming Webinar

When Outsiders Invest in Lawsuits — An Ethical Debate on This Growing Trend in Litigation April 20, 2012 - 2 p.m. EST

Litigation financing provides a relatively new means for parties, usually plaintiffs, to fund litigation using otherwise disinterested sources who provide financing in exchange for a cut of the eventual return, if any. This practice has become accepted in some jurisdictions — and has raised a fascinating ethical debate.

Seth L. Laver of Goldberg Segalla's Professional Liability Practice Group is a program chair of this upcoming webinar, presented by the Defense Research Institute's Professional Liability Committee, which will bring together three of the nation's premier authorities on alternate litigation financing to discuss its ethical implications and its impact on the practice of law now and into the future.

For more information and to register, please click [here](#) to view the webinar brochure or visit dri.org/events/webcasts.

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