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DECISIONS

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PENNSYLVANIA SUPREME COURT RULES THAT MALICE IS NOT REQUIRED TO PROVE INSURER BAD FAITH

On September 28, 2017, the Supreme Court of Pennsylvania ("the Supreme Court") unanimously held that under Section 8371 of the Pennsylvania statutes ("42 Pa. Cons. Stat. § 8371"), proof of an insurer's malicious intent is not a prerequisite to prevail on a bad faith claim. Rather, insureds, as required in the past, must show that the insurer knowingly or recklessly refused coverage without a reasonable basis. *Rancosky v. Washington National Insurance* Company, No. 28 WAP 2016, 2017 WL 4296351 (Pa. Sept. 28, 2017). In *Rancosky*, Conseco Health Insurance Company ("Conseco") made benefit payments under a cancer insurance policy to LeAnn Rancosky from 2003 to 2005. However, Conseco allegedly began denying claims when Ms. Rancosky's cancer returned in 2006, after erroneously determining, without investigation, that Ms. Rancosky failed to make the required premium payments during a ninety day waiting period of her policy. Subsequently, Ms. Rancosky and her husband filed a bad faith claim against Conseco. At the trial court level, a bench trial decided in favor of Conseco with regard to the Rancoskys' bad faith claim. This decision was reversed by the Superior Court of Pennsylvania ("the Superior Court") in December, 2015 based on its interpretation of *Terletsky v. Prudential Property and Casualty Insurance Company*, 649 A.2d 680 (Pa. 1994). Under *Terletsky*, an insurer's bad faith is established when the insured demonstrates: (1) that the insurer did not have a reasonable basis for denying benefits under the policy; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim.

Taking this analysis into account, the Superior Court held that a dishonest purpose or motive of self-interest or ill will is not a third element required for a finding of bad faith. However, it may be considered in determining the second prong of the test established in *Terletsky*. In *Rancosky*, Conseco argued that evidence of a self-interested motive or ill intent is required to support a bad faith finding under 42 Pa. Cons. Stat. § 8371 because the statute authorizes punitive damages awards. Conseco cited *Anderson v. Continental Insurance Company*, 271 N.W.2d 368 (Wis. 1978), which required that an insured prove that an insurer had evil intent deserving of punishment in order to qualify for bad faith punitive damages. However, the Supreme Court disagreed with Conseco, noting that in enacting 42 Pa. Const. Stat. § 8371, "the General Assembly seemingly put punitive damages on the same footing as other categories of damages[.]" The Supreme Court held, "[g]iven our conclusion that there is no basis to distinguish between punitive damages and other categories of damages under [42 Pa. Const. Stat. § 8371], an ill-will level of culpability would limit recovery in any bad faith claim to the most egregious instances only where the plaintiff uncovers some sort of 'smoking gun' evidence indicating personal animus towards the insured." The Supreme Court's ruling is problematic because the bad faith concept has historically required ill will or actual malice. The test adopted by the Supreme Court could lead to bad faith decisions against insurers based only on negligent conduct. Additionally, the ruling does not consider the due process and constitutional issues associated with punitive damages awards. For example, the *Terletsky* two-prong test, as adopted in *Rancosky*, may not satisfy the reprehensibility requirements needed to sustain a punitive damages award.

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Illinois Appellate Court Orders Hospital To Produce Notes In Infant Death Case

On September 5, 2017, the Illinois Second District Appellate Court upheld a county court's order for a hospital to produce documents in the case of a premature infant, despite the hospital's claims that they were protected. *Grosshuesch v. Edward Hospital*, 83 N.E.3d 1185 (Ill. App. Ct. (2017). On October 13, 2013, Abigial Kiersten Grosshuesch was admitted to Edward Hospital in Naperville, Illinois, where at just thirty weeks pregnant, she gave birth to a baby, Isabella Kitsen Zormelo. Isabella suffered from numerous medical issues including necrotizing enterocolitis. She died on November 1, 2013. After Isabella's death, Ms. Grossheusch contacted Edward Hospital's patient advocate and expressed concern about the treatment given to her and Isabella. The matter was referred to the hospital's medical staff quality committee ("MSQC"). Nancy Rosenbery, in her capacity as MSQC liaison, consulted with two expert peer reviewers and entered notes from these consultations into an electronic database on February 24 and 25, 2014. The MSQC considered these notes when it met on March 5 and April 2, 2014 for evaluation of the matter. After Ms. Grosshuesch filed a wrongful death and survival action against Edward Hospital, it refused to release these notes under its interpretation of the Medical Studies Act ("MSA"), which keeps confidential documents generated for the use of a peer-review committee. However, the trial court ruled that the notes did not qualify for protection under the MSA, as they were made before the peer-review process began in the investigation of Isabella's death. "Edward Hospital insists that, because the peer-review policy authorized the investigation, everything that was through that investigation is privileged under the [MSA]," Justice Mary Schostok wrote for the panel. "We find that Edward Hospital's argument is contrary to over [twenty] years of precedent establishing that the [MSA] cannot be used to conceal relevant evidence that was created before a quality-assurance committee or its designee authorized an investigation into a specific incident." The law, which mandates regular formalized staff meetings about investigated medical incidents, draws strength from the confidential nature of the proceedings. However, Justice Schostok wrote, the instant case is not covered by the MSA because the notes "were generated before any peer-review committee or its designee authorized an investigation into a specific incident."

Florida Justices Affirm Access to Adverse Medical Incident Documents

On October 26, 2017, the Florida Supreme Court ("the Supreme Court") held that an amendment approved by voters in 2004 grants patients broad rights to access adverse incident review reports from medical providers, including reports made in anticipation of litigation. *Edwards v. Thomas*, No. SC15-1893, 2017 WL 4837631 (Fla. Oct. 26, 2017). Under Article X, Section 25 of the Florida Constitution, referred to as Amendment 7 ("Amendment 7"), patients can access "any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." In *Edwards*, Amber Edwards sued Bartow Regional Medical Center ("Bartow") and Dr. Larry Thomas for medical negligence, asserting her common bile duct was mistakenly cut during surgery. She asked for certain records regarding adverse medical incidents at Bartow, including reports "relating to attorney requested external peer review." Bartow argued that the records did not relate to adverse medical incidents, were not made or received in the course of business, and were protected by the attorney-client privilege and as opinion work product. In a 5-2 decision, the Supreme Court held that Amendment 7 is meant to be construed broadly and entitles Ms. Edwards to the records. According to the Supreme Court, "the language in Amendment 7 contains no limitation on the types of adverse medical incident reports that are now discoverable. There is also no qualifying provision in Amendment 7 that limits the scope of discoverable records to those previously barred by the Legislature and this Court will not read language into Amendment 7 that was not expressly included." Otherwise, hospitals could "avoid their discovery obligations by outsourcing their adverse medical incident reporting to external, voluntary risk management committees separate from those required by the Florida statutory scheme."

Supreme Court of Ohio Says State Law Protects Doctor's Apology

On September 12, 2017, the Supreme Court of Ohio ruled that Ohio's apology law prevents a doctor's admission of fault from being used as evidence in a medical malpractice suit if made in the context of an apology to a patient, the patient's family, or the patient's representative. *Stewart v. Vivian*, No. 2016-1013, 2017 WL 4082064 (Ohio Sept. 12, 2017). On February 19, 2010, Michelle Stewart attempted suicide. She was admitted to the psychiatric unit at Mercy Hospital Clermont and placed under the care of Dr. Rodney E. Vivian. When her husband, Dennis Stewart, arrived to visit the next morning, she was found hanging in her room. Ms. Stewart was placed on life support and subsequently removed from it three days later. Mr. Stewart then filed a lawsuit against Dr. Vivian, which included a medical malpractice claim. Dr. Vivian filed a motion *in limine* prior to trial, to exclude statements he made to Ms. Stewart's family while she was on life support. Dr. Vivian argued that the statements were inadmissible pursuant to the apology statute, R.C. § 2317.43, because the statements were "intended to express commiseration, condolence, or sympathy." Mr. Stewart testified that Dr. Vivian said he did not know how the incident happened, that it was a terrible situation, and that Ms. Stewart had told him that she wanted to kill herself. The Supreme Court ultimately ruled in favor of Dr. Vivian, stating "[a]pplying the plain and ordinary meaning of the term 'apology,' for purposes of R.C. [§] 2317.43(A), a 'statement [] . . . expressing apology' is a statement that expresses a feeling of regret for an unanticipated outcome of the patient's medical care and may include an acknowledgment that the patient's medical care fell below the standard of care." Ohio's Twelfth District Court of Appeals agreed with this decision, thereby creating a split with Ohio's Ninth District Court of Appeals, which ruled in 2011 that the law protected "pure expressions of apology . . . but not admissions of fault." In resolving the split, the Supreme Court decided that both courts were wrong to say that the statute was ambiguous, ruling that its meaning was in fact very clear. The Supreme Court cited the Webster's Dictionary entry for apology, particularly the definition, "an admission to another of a wrong or discourtesy done him accompanied by an expression of regret." According to the Supreme Court, under that definition, the statute clearly protects doctors who admit fault while apologizing.

"A plain and ordinary meaning of the term 'apology' is a statement that expresses a feeling of regret for an unanticipated outcome of the patient's medical care ..."

Oklahoma Supreme Court Nixes Barrier for Medical Malpractice Claimants

On October 24, 2017, the Oklahoma Supreme Court ("the Supreme Court") ruled that Oklahoma's requirement for expert affidavits when filing professional negligence lawsuits, including medical malpractice actions, is unconstitution. *John v. Saint Francis Hospital*, Inc., No. 115620, 2017 WL 4785324 (Okla. Oct. 24, 2017). The Supreme Court upheld the district court's decision to refrain from dismissing a lawsuit brought by Oklahoma resident Johnson John against Saint Francis Hospital, Inc., and others, after an allegedly botched spinal surgery left him partially paralyzed. When initially filing suit, Mr. John failed to attach an affidavit of merit to the petition pursuant to Okla. Stat. tit. 12, § 19.1. The Supreme Court ruled that this statute interfered with the right to equal access to the courts and infringed on judicial discretion. Additionally, it violated the state constitution's mandate against special laws, statutes that single out less than an entire class of persons for different treatment and place a higher burden on certain types of plaintiffs than others. The Supreme Court stated, "section 19.1 requires a plaintiff to clear all the procedural hurdles before the plaintiff reaches the courthouse steps . . . . At a minimum, section 19.1 operates to delay, and in some instances denies, adjudication of a plaintiff's claims for plaintiff's failure to satisfy the section 19.1 procedural hurdles. Thus, a plaintiff's repeated attempts to gain court access . . . is nothing more than a sisyphean exercise." Furthermore, "[s]ection 19.1 creates the same court access hurdles this Court has repeatedly declared unconstitutional . . . . Like its predecessors, section 19.1 is a costly, meaningless and arbitrary barrier to court access." According to the Supreme Court, the law was similar to those struck down in *Zeier v. Zimmer and Wall v. Marouk*. The small changes previously made, including expanding the terms to include a greater number of plaintiffs and removing a $40.00 indigency fee, were not enough to make the law constitutional.

Oklahoma Supreme Court rules that state law requiring expert witness affidavits in medical malpractice cases is unconstitutional.

"Although a reasonable person or a reasonable licensed clinical social worker might have been able to foresee Keith's suicide, that does not mean that Ortberg (who according to the plaintiff's theory did not act reasonably) would have."

Illinois Appellate Court Reverses Decision on Responsibility For Patient Suicide

On October 31, 2017, the Illinois Second District Appellate Court ("the Appellate Court") reversed a circuit court's decision that found in favor of Rockford Memorial Hospital ("Rockford") and a social worker at the facility who performed a psychological screening on a patient nine days before his suicide, holding that a special interrogatory given to the jury regarding the responsibility of a social worker was unclear. *Stanphill v. Ortberg*, 2017 WL 4926846 (Ill. App. Oct. 31, 2017). In *Stanphill*, licensed clinical social worker Lori Ortberg performed a suicide screening of Keith Stanphill and determined that he was not at imminent risk of harming himself. Nine days later, Mr. Stanphill committed suicide. Mr. Stanphill's son, Zachary Stanphill, proceeded to file a wrongful death and survival action against Ms. Ortberg and Rockford. At the circuit court level, the jury determined that Ms. Ortberg and Rockford were negligent and awarded Zachary Stanphill $1,495,151.00. However, the jury also answered "no" to a special interrogatory asking whether it was foreseeable to Ms. Ortberg that Keith Stanphill would kill himself a little over a week after his evaluation. The interrogatory read, "[w]as it reasonably foreseeable to Lori Ortberg on September 30, 2005 that Keith Stanphill would commit suicide on or before October 9, 2005?" Over Zachary Stanphill's objections, the circuit court ruled that the interrogatory could be given to the jury, and the jury answered "no." Based on the jury's answer to the interrogatory, the circuit court entered judgment in favor of Rockford and Ms. Ortberg. However, the Appellate Court reversed the circuit court's decision, holding that the special interrogatory was not in the proper form, because it did not ask whether Keith Stanphill's suicide was foreseeable as the type of harm that a reasonable person or a reasonable licensed clinical social worker would expect to see as a likely result of her conduct. "Rather, the interrogatory asked whether Keith's suicide was foreseeable to Ortberg," Justice Mary Schostok wrote on behalf of the panel. "By substituting 'Lori Ortberg' for a 'reasonable person' or a 'reasonable licensed clinical social worker,' the interrogatory distorted the law and became ambiguous and misleading to the jury. Although a reasonable person or a reasonable licensed clinical social worker might have been able to foresee Keith's suicide, that does not mean that Ortberg (who according to the plaintiff's theory did not act reasonably) would have. As such, the interrogatory was confusing and should not have been given."

New Mexico Federal Court Precludes Introduction of Staff Ratio Evidence

In a decision issued on August 22, 2017, the United States District Court for the District of New Mexico granted a Motion to Exclude testimony on hospital staff ratios. *Faure v. Las Cruces Med. Ctr., LLC*, 2017 WL 3706369 (D.N.M. Aug. 22, 2017). The wrongful death case involved the alleged death of a patient who plaintiff contends died as a result of the failure of the hospital to follow its stroke protocols after the patient entered its emergency room. Specifically, plaintiff blamed events surrounding the administration of tPA, a medication designed to dissolve blood clots. Plaintiff alleged that a temporary nurse working in the hospital's telemetry unit had not been adequately trained in the hospital's tPA protocol and did not follow it when giving the patient the drug. Plaintiff sought to introduce testimony that staffing levels fell below the standard of care and that inadequate staffing and training contributed to the negligence that caused the patient's death. The defendant moved to exclude the opinions of two witnesses with regard to staffing levels in the telemetry unit, its failure to appropriately hire, train, and orient the nurse, and its systemic or system-wide negligence. In exercising its gatekeeping role, the Court concluded that the lay witness offered to provide testimony on staffing levels would not assist the trier of fact because neither Plaintiff nor the witness held him out as an expert on the appropriate level of staffing in a hospital. With respect to the physician expert that Plaintiff offered to provide testimony on staffing levels, he had experience with staffing levels based upon his role as a physician but he admitted that he was not an expert on staffing levels or the appropriate standard of care in New Mexico. The Court held that his qualifications did not rise to the level of expertise in the area of staffing levels for nurses. The Court concluded that his testimony was not based on sufficient facts and data and that his opinion would not assist the trier in fact. The staffing ratio testimony was, therefore, precluded from trial.

Maryland Federal Court Holds That Insurer is Liable For Judgment Against Uncooperative Physician

In an October 16, 2017 decision, the United States District Court for the District of Maryland concluded that an insured physician's failure to take part in his malpractice trial does not excuse his insurance company from its duty to pay into the $2.6 million judgment entered against him. *Mora v. Lancet Indemnity Risk Retention Group, Inc.*, 2017 WL 4618461 (D. Md. Oct. 16, 2017). The case arose from the death of a patient who suffered a fatal heart attack eight days after being treated by the insured physician in an urgent care clinic the physician owned and operated. The patient's family filed a medical malpractice action against the insured physician and the clinic, alleging that the defendants had negligently failed to refer the patient to a cardiologist for treatment. The physician was insured under a claims-made and reported policy issued by an insurer risk retention group. The policy provided $1 million in limits. The physician did not appear in court or respond either to the lawsuit or attempts by the insurer to contact him in the United States or Pakistan, where the insurer was informed he moved. Counsel was retained for the physician but he never entered an appearance because he was never able to obtain the consent to represent him. The insurer never entered an appearance and a default was entered against the physician. The insurer subsequently sought permission to intervene in a hearing on damages, where the family was ultimately awarded $2.6 million. After the insurer disclaimed coverage for failure to cooperate, the family filed a declaratory judgment action seeking a ruling that the insurer was obligated to contribute toward the judgment. In ruling on the family's summary judgment, the Court concluded that the failure of the physician to show up in court or participate in the case did not handicap the insurer's ability to defend him so severely that it was excused from paying the judgment. The Judge pointed out that, although the insurer chose not to defend the physician, it showed itself capable of contesting the damages after verdict. In so ruling, the Court held that "[the insurer's] own conduct, therefore, belies its argument that it was prejudiced by [the physician's] lack of cooperation. Rather, [the insurer] is prejudiced by its own choice not to defend the action from the outset." The Court further held that the burden of proof was on the insurance company to demonstrate actual prejudice but "because they chose not to participate, they could only speculate what the jury would have done."

Insurer Not Excused from Paying Judgment Against Insured Physician Who Failed to Take Part In His Own Trial

Courts Address Actions That Require Expert Witness Evidence and Testimony

Tennessee - The Court of Appeals of Tennessee issued a decision affirming the dismissal of a lawsuit accusing a hospital's medical staff of negligently giving hot coffee to an elderly patient who spilled it on himself causing burns, concluding that the allegations are essentially medical malpractice claims requiring an expert opinion. *Youngblood v. River Park Hospital, LLC*, 2017 WL 4331042 (Tenn. App. Sept. 28, 2017). In the lawsuit, the Plaintiff alleged that a nurse negligently provided coffee to an 86-year old patient recuperating in an ICU unit when she knew or should have known that he should not be left alone to manage the hot coffee alone. The Appellate Court was asked to address whether the nurse's actions were related to the provision of health care services. In answering "yes," the Court noted that the Tennessee Health Care Liability Act broadly defines health care services to include basic care such as positioning and hydration. Accordingly, the nurse's actions fell within that definition, thus requiring pre-suit notice and a certificate of good faith attached to the complaint.

Kentucky - In a decision issued on October 13, 2017, the Court of Appeals of Kentucky affirmed the dismissal of a suit accusing a hospital of negligently allowing a patient to fall from a bed, holding that the alleged negligence is not obvious to a layperson and, therefore, required an expert medical opinion. *Chamis v. Ashland Hospital Corp.*, 2017 WL 4558459 (Ky. App. Oct. 13, 2017). In a 2-1 decision, the appellate court agreed with the trial court that the suit brought by the estate of the patient, who was allegedly seriously injured after falling from a hospital bed with no rails, is a case of medical malpractice and not "slip and fall" negligence. The majority noted that "whether more measures—other than those routinely applied to all patients—should have been used to protect [the patient] required professional judgment and, therefore, expert testimony." In addition, the Court concluded that "determining whether [the patient] was at a high risk of falling required an exercise in professional judgment," and, thus, expert witness testimony.

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Recent Notable Verdicts and Settlements

Notable Verdicts/Settlements

Broward County, FL—October, 2017. A Broward County jury awarded $15.9 million to a woman who lost a finger and almost all of her toes after a physician at a Fort Lauderdale hospital delayed the administration of medicine needed to curb the inflammation of her blood vessels. The jury awarded $5 million in past and future medical expenses and $10 million for pain and suffering. The woman was 25 years old at the time of the incident.

Monmouth County, NJ—October, 2017. After a six-week trial, a Monmouth County jury awarded $17 million to a 16 year-old girl after the jury concluded that a hospital and pediatrician were negligent in treating her pneumonia in 2008. The girl, who was 7 years-old at the time of treatment, was intubated and placed on a mechanical ventilator for treatment of her respiratory distress. She was removed from the ventilator and suffered cardiac arrest that left her with neurological injuries. Plaintiff alleged the defendants failed to properly wean her from the ventilator.

Richland County, SC — October, 2017. After a week-long trial, a Richland County jury awarded $10 million to the husband of a woman who died of cancer after miscommunication between her doctors resulted in delays in surgery that would have saved her life. The woman was 70 years old at the time of her death.

Providence County, RI — September 2017. Following a two-week trial, a Providence County jury awarded $61.6 million to a patient in a lawsuit in which the patient accused two doctors and a hospital of providing negligent treatment that caused the patient's right leg to be amputated. The defendants accidentally performed a bone marrow biopsy rather than the planned lymp-node procedure. The patient was awarded $40 million in damages and $21.6 million in interest.

Mercer County, NJ—September, 2017. A Mercer County jury awarded $6 million to the estate of a woman who died as a result of paramedic misconduct. The paramedics failed to properly intubate the woman a week after she gave birth to a premature baby in 2014. In order to prevail, the plaintiff had to prove the defendants failed to act in good faith. In a case of first impression, the jury concluded that they did.

Notable Defense Verdicts

Washington State—October, 2017. A Washington state appellate court refused to revive a lawsuit by a patient who claimed that his surgeon was negligent by puncturing his small intestine during gallbladder removal surgery and not catching the error during surgery. The appellate court agreed with the trial court's refusal to allow the plaintiff to support his claims by an expert report from an expert who did not share the same specialty as his surgeon.

Des Moines County, IA — October, 2017. A three judge panel of the Court of Appeals of Iowa affirmed a jury's decision concluding that a physician was not negligent in a case alleging that he caused a baby's severe brain damage by failing to perform a cesarean section. The appellate court held that the trial court properly excluded expert rebuttal testimony relating to heart race tracings on the grounds that the testimony was cumulative.

Prescott, AZ - October, 2017. An Arizona federal jury held that a urologist was not negligent in a lawsuit accusing him of failing to warn a man about the risks of kidney removal surgery, which purportedly contributed to the patient's death. The wrongful death action was filed against the urologist and his practice group. The decedent underwent surgery on his kidney in 2012 to address a renal mass. He allegedly suffered injuries, and later death, as a result of the improperly conducted surgery.

New Jersey — October, 2017. A New Jersey federal jury cleared an orthopedic surgeon of liability in a lawsuit accusing him of botching implantation of medical devices in a woman's spine. The jury concluded that the physician did not deviate from accepted standards of medical care.

Eastern District, PA - July, 2017. After a four-day trial, a jury in Pennsylvania federal court sided with a doctor and a hospital in a lawsuit alleging that a patient's death was caused by the doctor's failure to surgically implant a feeding tube as requested by the patient's son. The son had a power of attorney for healthcare decisions.