

Morris James^{LLP}

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DELAWARE COURTS TIGHTEN EXPERT REPORT REQUIREMENTS

In a recent case, the Superior Court held that a party producing an expert report must make sure the report delineates the opinions specifically to meet the disclosure requirements. In *Dixon v. Batson*, 2015 WL 4594159 (Del. Super. Ct. Jul. 30, 2015), the plaintiffs identified three treating physicians as experts but failed to produce expert reports or their *curriculum vitae*. The plaintiffs likewise made substantially similar disclosures for each expert. The Court held that, while an expert report (rather than a lawyer-prepared disclosure) is “optimal” to comply with Superior Court Civil Rule 26, a party must at a minimum provide the bases for the expert’s opinions with specificity and must obtain a written commitment from the expert to support the bases for his/her opinions. Likewise, the party must provide the *curriculum vitae* of the expert.

DELAWARE COURTS PERMIT MEDICAID-PAID AMOUNTS TO BE RECOVERED IN PERSONAL INJURY LITIGATION

Recently, the Delaware Superior Court held that, where a party in a personal injury case is a Medicaid recipient, only those amounts actually paid by Medicaid (rather than amounts that are claimed before any write-offs) can be claimed. Specifically, in *Smith v. Mahoney*, 2015 WL 10519628 (Del. Super. Ct. Nov. 20, 2015), the Superior Court extended the Supreme Court holding in *Stayton v. Delaware Health Corp.*, 117 A.3d 521 (Del. 2015) and the

Superior Court holding in *Rice v. The Chimes, Inc.*, C.A. No. 01-03-260 CLS (Del. Super. Ct. 2005) and found that only the Medicaid-paid amount (i.e., the Medicaid lien amount) was claimable as past medical expenses. As a result, the Court, after a jury had awarded the larger billed amount to the plaintiff, reduced the amount that could be received by the Medicaid-receiving plaintiff.

By contrast, the Court found that future claimed expenses supported by expert medical testimony would not be reduced merely because a plaintiff is on Medicaid. The Court noted that a person’s future Medicaid status may change and that to suggest that the future amounts would be paid by Medicaid was “speculative.” Said differently, a plaintiff who receives Medicaid can still claim as future medical expenses the actual amounts billed.

DELAWARE COURT HOLDS THAT CHILD CAN CLAIM HIS MEDICAL EXPENSES WHERE PARENT’S CLAIMS ARE TIME-BARRED

Recently, the Delaware Superior Court permitted a minor to claim expenses at a trial for his medical care and held that those claims belonged to the minor, not the parent. In *Broughton v. Wong*, 2015 WL 7776767 (Del. Super. Ct. Nov. 24, 2015), a mother brought a claim on behalf of her minor son for medical negligence and sought to claim, among other things, his past medical expenses. It was undisputed that the claim was timely as to the minor under

the applicable 6-year statute of limitations and that any claim by the mother was untimely under the applicable 2-year statute of limitations. The Court therefore needed to address whether the claim for the minor's medical expenses belonged to the parent (and would, therefore, be time-barred) or belonged to the minor child (and would not, therefore, be time-barred).

The Court noted that the Delaware General Assembly specifically enlarged the statute of limitations applicable to a minor's personal injury claim so that a child would not be penalized by any delay by the parent in filing a claim. Moreover, to bar a minor from recovering his past medical expenses would present a defendant a potential windfall. Therefore, the Court held that, even if where a parent's claim may be time-barred, the guardian of the child can claim his medical expenses if the minor's claim is not time-barred.

IME DOCTORS PROTECTED FROM CLAIMS OF FRAUD

The Delaware Superior Court recently rejected 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 claimed three separate claims for personal injuries were examined by a physician or had their records reviewed at the request of the respective defendants. After the three separate plaintiffs lost their claims, they each filed suit against the physician who had performed their independent medical examinations (IMEs) and alleged that they were victimized by his unethical and fraudulent behavior.

The 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.

DELAWARE ACTS TO PROTECT PARAMEDICS FROM CIVIL LIABILITY FOR FAILURE TO OBTAIN CONSENT IN EMERGENCIES

The Delaware Legislature recently passed, and Governor Markell signed, a law to protect paramedics from civil liability when they act in good faith to treat a patient who cannot give consent in an emergency. As of September 30, 2015, Delaware law protects a paramedic from a claim of acting without patient consent where the paramedic is unable to obtain consent from a patient or someone legally able to give consent on the patient's behalf. However, the paramedic must act in good faith, be unaware of facts that the patient would have withheld consent, and treat the patient without any willful, wanton or grossly negligent conduct. The new statute can be found at 16 *Del. C.* § 9813(b)(2).

DELAWARE ENACTS STATUTORY SCHEME FOR CERTIFIED PROFESSIONAL MIDWIVES

As of June 9, 2015, Delaware passed a law to explain how Certified Professional Midwives (CPM) and licensed Certified Midwives (CM) can become licensed under Delaware law. A CPM is a practitioner certified by the North American Registry of Midwives (NARM) or its equivalent or successor, and a CM is a practitioner certified by the American Midwifery Certification Board or its equivalent or successor. Both CPMs and CMs are distinct from Certified Nurse Midwives, who have a separate licensing scheme. The new law also creates the Midwifery Advisory Council, which will create rules and regulations for CPMs and CMs and will assist with imposing discipline on them. It also establishes the requirements for a CPM or CM to do a home birth delivery and to treat minors. The new laws and amendments can be found at 24 *Del. C.* § 1799FF-NN and 16 *Del. C.* § 3121(e).

NEW MAMMOGRAPHY REQUIREMENTS WHERE PATIENTS ARE FOUND TO HAVE DENSE BREAST TISSUE

Starting on January 1, 2016, a mammography service provider must give specific notice to a patient if a mammogram reveals dense breast tissue. The

requirements, codified at 16 Del. C. § 3201A, require a specific notice to be given to a patient advising the patient of her breast density and its impact on the radiologist's ability to detect cancer. The law further makes clear that the new requirement does not create a cause of action or establish a new standard of care, nor can evidence of a radiologist's failure to give the notice be used in a civil, judicial or administrative proceeding.

ADVANCED PRACTICE NURSES (APNS) ARE NOW ADVANCED PRACTICE REGISTERED NURSES (APRNS)

Delaware recently eliminated Advanced Practice Nurses (APNs) and introduced Advanced Practice Registered Nurse (APRNs). Under the new laws, APRNs now include the registered nurse scope of practice, including performing acts of advanced assessment, diagnosing, prescribing and ordering. The law further updates renewal and reinstatement requirements for advanced practice nursing licensure, clarifies prescription requirements (including the scope of medications APRNs can prescribe), and discusses the requirements for collaborative agreements. The new laws can be found at 24 Del. C. §§ 1902, 1906, 1918, 1920, 1927, 1932 and 1933 and went into effect on September 1, 2015.

NEWBORN SCREENING PROGRAM BECOMES LAW

To better care for newborns, Delaware codified the "Newborn Screening Program" to screen infants for certain metabolic, hematologic, endocrinologic, immunologic and certain structural disorders. The law, codified at 16 Del. C. §§ 801C-806C, requires infants to be screened within 72 hours of birth to detect potential problems that may have long term effects on health, cognitive development and survival of Delaware children. The hope is that, with early detection, these issues can be managed and treated so that the children can have normal growth and development.

RECENT DELAWARE MEDICAL MALPRACTICE JURY VERDICTS ¹

John J. and Terry Lofland v. Surgeon and his practice, Superior Court of the State of Delaware in and for Kent County, C.A. No. K12C-09-044 WLW: The jury returned a hung verdict. Trial has been rescheduled to August 2017. The plaintiff was represented by William Fletcher, Esq. of Schmittinger & Rodriguez, P.A. The defendants were represented by Colleen Shields, Esq. of Eckert Seamans

Cherin and Mellott LLC and Scott Whonsetler, Esq. of Whonsetler & Johnson PLLC (*pro hac vice*).

Jean F. Honey v. Surgeon and Hospital, Superior Court of the State of Delaware in and for Kent County, C.A. No. K13C-05-018 RBY: The jury returned a verdict in favor of the defendants. The plaintiff was represented by William Fletcher, Esq. of Schmittinger & Rodriguez, P.A. The surgeon defendant was represented by Bradley J. Goewert, Esq. and Lorenza Wolhar, Esq. of Marshall Dennehey Warner Coleman and Goggin, P.C. The hospital defendant was represented by James Drnec, Esq. of Balick and Balick LLC.

Robert Rochester; Christopher Rochester; Mary Rochester, Individually and as Executor of the Estate of Robert R. Rochester, Jr. v. Internist, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N13C-07-031 JAP: The jury returned a verdict in favor of the defendant. The plaintiff was represented by Bart Dalton, Esq. and Andrew Dalton, Esq. of Dalton and Associates, P.A. The defendants were represented by John D. Balaguer, Esq. and Lindsey Anderson, Esq. of White and Williams LLC.

Wade Bryan v. Urologist and his practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N14C-03-071 EMD: The jury returned a verdict in favor of the defendants. The plaintiff was represented by Philip Edwards, Esq. and Lauren Cirrinicione, Esq. of Murphy and Landon. The defendants were represented by Richard Galperin, Esq. and Courtney Hamilton, Esq. of Morris James LLP.

Frederick Hessling, Individually and as surviving spouse of Flora Faith Hessling v. Hospitalist, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N14C-04-073 CEB: The jury returned a verdict in favor of the defendant. The plaintiffs were represented by Ben Castle, Esq. of Hudson and Castle LLC. The defendants were represented by John D. Balaguer, Esq. and Lindsey Anderson, Esq. of White and Williams LLC.

Iris and Percy Jones v. Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N13C-09-175 VLM: The jury returned a verdict in favor of the defendant. The plaintiffs were represented by Jason Warren, Esq. of McCann and Wall, LLC. The defendants were represented by Stephen Milewski, Esq. of White and Williams LLC.

RECENT DELAWARE MEDICAL MALPRACTICE CASE FILINGS²

Carolina I. Williams v. Gynecologists and Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-11-168 FWW (filed on 11/19/2015): The plaintiff alleges that Defendants punctured plaintiff's colon in two places during removal of her uterus. The plaintiff further alleges that the punctures caused plaintiff much harm and pain. The case was filed by Bartholomew Dalton of Dalton & Associates, P.A.

Ronnie J. Reed v. Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-11-186 CLS (filed on 11/20/2015): The plaintiff alleges that the defendant failed to take care of plaintiff so that he developed pressure sores. The case was filed by Gary Nitsche of Weik Nitsche & Dougherty.

Susan Orlando v. Podiatrist, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-11-239 VLM (filed on 11/30/15): The plaintiff alleges that the defendant failed to properly treat her left ankle. The case was filed by Bernard Van Ogtrop of Seitz, Van Ogtrop & Green, P.A.

Frank A. Marini; Regina P. Marini v. Vascular Surgeons, their practice, and Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-12-058 (filed on 12/7/2015): The plaintiffs allege that a defendant surgeon botched a procedure on plaintiff's leg and then failed to timely diagnose a leak in his femoral artery. The plaintiffs further allege that the plaintiff's compartment syndrome was then not timely diagnosed, so that his leg had to be amputated above the knee. The case was filed by Bartholomew Dalton of Dalton & Associates, P.A.

Clarence Johnson v. Hospital, Oncologist, Surgeon, Nurses, and Product Manufacturer, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-12-122 FWW (filed on 12/14/2015): The plaintiff alleges that the defendants allowed a chemotherapy drug to leak from its port into plaintiff's chest. The case was filed by Samuel Pratcher, III of Weik Nitsche & Dougherty.

Kathleen L. Phelps, individually and as administratrix of the estate of Anthony O. Phelps; Mark S. Phelps; Matthew A. Phelps; Meghan Phelps Buehler v. Cardiologist, his practice and Hospital., Superior Court of the State of Delaware in and for New Castle County, C.A. No N15C-12-136 FSS (filed on 12/15/2015): The plaintiffs allege that defendants discharged decedent from the hospital

without informing him about his care and without recommending immediate cardiac surgery. The plaintiffs further allege that the decedent died because of defendants' actions and inactions. The case was filed by Kenneth Roseman of Kenneth Roseman, P.A.

Paige E. Cartlidge; Ronald T. Holiskey II; Ronald T. Holiskey III, a minor v. Obstetrician, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-12-162 ALR (filed on 12/17/2015): The plaintiffs allege that the defendant failed to deliver plaintiffs' baby safely. The plaintiffs further allege that their son's shoulder was injured in the delivery. The case was filed by Bartholomew Dalton of Dalton & Associates, P.A.

Sharon Felder, individually and as personal representative of the estate of Darryl Felder v. Family practitioner, his practice and Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-12-204 CEB (filed on 12/22/2015): The plaintiff alleges that the defendants failed to inform the decedent that he may have had a serious heart condition after he reported to the emergency room with breathing and other problems. The plaintiff further alleges that the decedent had a heart attack and died of complications before his scheduled stress test. The case was filed by Gilbert Shelsby, Jr. of Shelsby & Leoni, P.A.

Tanisha Showell; Cordae Showell, as next friends and guardians ad litem for Talayah J. Showell, a minor v. Emergency Medicine clinicians and their group, Radiologist and his group, and Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-12-223 DCS (filed on 12/28/2015): The plaintiffs allege that Defendants failed to timely diagnose plaintiff's osteomyelitis during an emergency room visit. The plaintiffs further allege that the plaintiff will have permanent injuries due to the delay in diagnosis. The case was filed by Bartholomew Dalton of Dalton & Associates, P.A.

Andrew Camponelli v. Dermatologists and their practices, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-12-247 JAP (filed on 12/30/2015): The plaintiffs allege that Defendants failed to timely diagnose and treat plaintiff's melanoma skin cancer. The case was filed by Richard Zappa of Young Conaway Stargatt & Taylor, LLP.

Michael Seney v. Podiatry practice, Hospital, and long-term care facilities, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-01-220 FWW (filed on 1/26/2016): The plaintiff alleges that the defendants failed to provide plaintiff with follow-up medical care after his foot surgery, so that plaintiff's foot became infected and necrotic, requiring amputation. The case was filed by Gilbert Shelsby, Jr. of Shelsby & Leoni, P.A.

Theresa J. Basher v. Plastic surgeon and his practice, Superior Court of the State of Delaware in and for Sussex County, C.A. No. S16C-01-028 MJB (filed on 1/25/2016): The plaintiff alleges that the defendant botched plaintiff's leg surgery and now she suffers debilitating pain and is confined to a wheelchair. The case was filed by Philip Edwards of Murphy & Landon.

Maura Hinckle, personal representative of the estate of Elizabeth Hinckle, and guardian ad litem for Nicholas Deleo, Jr. v. Urgent Care Center, Emergency Medicine group, and Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-01-233 JAP (filed on 1/27/2016): The plaintiffs allege that Defendants failed to timely diagnose and treat decedent's sepsis when she reported to the emergency room. The case was filed by Richard Zappa of Young Conaway Stargatt & Taylor, LLP.

Margaret Gerstley-Trask; Dale Trask v. Dentists, their practices and Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. N16C-02-038 FSS (filed on 2/3/2016): The plaintiffs allege that a defendant botched the plaintiff's dental implant surgery, so that she contracted post-operative infections requiring the removal of the implants, which caused her mandible to break. The case was filed by Gary Nitsche of Weik Nitsche & Dougherty.

Deneen Tickles, individually and as administratrix of the estate of Henrietta Bonner; Jethro Tickles; Daryl Tickles v. Hospital, Anesthesiologists and their practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-02-097 ALR (filed on 2/10/2016): The plaintiffs allege that Defendants failed to evaluate the decedent's medical history to provide her with the proper anesthesia care so that she died during surgery. The case was filed by Timothy Lengkeek of Young Conaway Stargatt & Taylor, LLP.

Richard Drevo v. Plastic surgeon, his practice, and Hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-02-117 DCS (filed on 2/11/2016): The plaintiffs allege that Defendants botched plaintiff's nerve decompression surgery on his right leg by injuring plaintiff's saphenous nerve. The case was filed by Ben Castle of Hudson and Castle Law, LLC.

Alissa Porter v. Hospital, Emergency Medicine physicians and their practice, and Family Practitioners and their practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-02-231 JAP (filed on 2/24/2016): The plaintiff alleges that the Defendants failed to diagnose plaintiff's spinal cord and nerve root

compression, instead diagnosing her with sciatica. Because defendants failed to timely diagnose plaintiff's condition, she now has permanent spinal cord/nerve damage. The case was filed by Robert J. Leoni of Shelsby & Leoni, P.A.

Tyrone Green, individually and as personal representative of the estate of Wyonia Stevens v. Long-term care facility, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-02-232 CLS (filed on 2/24/2016): The plaintiff alleges that the Defendants failed to give decedent Stevens her anti-seizure medications in a timely manner, so that she suffered a seizure and later died. The case was filed by Robert J. Leoni of Shelsby & Leoni, P.A.

Ronnekqua Ross; Estate of Hobart R. Meekins III v. Hospital and Emergency Medicine group, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-03-019 FWW (filed on 3/2/2016): The plaintiff alleges that the Defendants failed to address and treat decedent's respiratory distress when he reported to the emergency room. The plaintiff further alleges that the decedent died of cardiorespiratory arrest just before defendants tried to intubate him. The case was filed by Gilbert Shelsby, Jr. of Shelsby & Leoni, P.A.

Edward Doman, Sr. v. Hospital and nurses, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N16C-03-152 VLM (filed on 3/16/2016): The plaintiff alleges that the Defendants failed to monitor plaintiff while in their care, so that he fell and broke his shoulder. The case was filed by Peter Janczyk of Edelstein Martin and Nelson.

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¹ Defendants' names have been purposefully redacted.

² *Id.*