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Medical Malpractice and Healthcare Quarterly WINTER 2015/2016

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DELAWARE MOVES TO MAKE TELEMEDICINE MORE ACCESSIBLE

On July 7, 2015, Governor Jack Markell signed into law House Bill No. 69 (DE LEGIS 80 (2015), 2015 Delaware Laws Ch. 80 (H.B. 69)), which amends various provisions of the Delaware Code to make telemedicine and telehealth more accessible in the State of Delaware. Telemedicine generally refers to a licensed healthcare provider who offers clinical healthcare services to a patient while the provider is not on-site with the patient. Similarly, telehealth refers to the technologies (such as storage and transmission technologies) used to provide telemedicine. The purpose of the new bill is to allow Delaware citizens to have better access to healthcare, especially where such access was limited due to fewer specialized physicians, through the use of new technologies.

The new laws require that medical providers who clinically treat patients through telemedicine in Delaware be paid the same as those providers who physically treat patients in the State of Delaware. Nonetheless, to protect Delaware citizens, the new laws require that the provider of telemedicine establish a proper physician-patient relationship absent special circumstances, such as an emergency or informal and irregular consult by a physician, to qualify as "telemedicine." 24 Del. C. § 1769D. These are laws consistent with the majority of other states who have enacted laws to protect providers of telemedicine and eliminate discrimination in payment practices against them.

COURTS ONLY PERMIT MEDICARE-PAID AMOUNTS TO BE RECOVERED IN PERSONAL INJURY LITIGATION

The Delaware Supreme Court, in a unanimous decision of all five Justices, recently determined that a plaintiff in a personal injury case may only claim as medical expenses those amounts actually paid by Medicare after its write-offs, not the amounts submitted to Medicare initially. In *Stayton v. Delaware Health Corporation*, 117 A.3d 521 (Del. 2015), a plaintiff suffered severe burn injuries while she was a resident at a nursing facility. The costs for her care were approximately \$3.7 million, but Medicare only paid \$262,550.17 after "writing-off" the remaining expenses. The plaintiff filed a medical negligence suit against the nursing facility and sought to recover the entire \$3.7 million charged for her expenses.

The Supreme Court determined that, because the patient was a Medicare recipient, she was only entitled to recover the amounts actually paid by Medicare, not the additional amounts written-off by Medicare. That is because a patient who is enrolled in Medicare, a taxpayer funded program, is enrolled involuntarily and does not suffer any harm when the Medicare-contracted provider agrees to write-off portions of the claimed expenses. Said differently, the write-offs made by healthcare providers are not a "benefit" to the injured party because those amounts are not owed by anyone. As a result, the Supreme Court adopted a bright-line rule that the amounts paid by Medicare represent the "reasonable value" of the healthcare services provided and are the only amounts that can be claimed with a Medicare recipient in a personal injury case.

More recently, the Delaware Superior Court had the opportunity to apply the Supreme Court's holding in *Stayton* and expand it. In *Honey v. Bayhealth Medical Center, Inc.*, 2015 WL 4594163 (Del. Super. Ct. Jul. 28, 2015), the plaintiff was a member of a Medicare Advantage plan (a "Part C" plan) that had paid for treatment related to complications from a laparoscopic cholecystectomy. The court analyzed the similarities and differences between traditional Medicare plans and held that Part C plans are more akin to traditional Medicare plans than private insurance contracts. As a result, just as in *Stayton*, the plaintiff who has medical expenses paid by Part C plans is limited to recovering only those amounts actually paid by Part C plans and not the additional amounts written off.

Likewise, in *Russum v. IPM Development Partnership LLC*, 2015 WL 4885480 (Del. Super. Ct. Aug. 14, 2015), the Superior Court applied the same holding to future expenses to be covered by Medicare. Specifically, a plaintiff who alleged personal injuries from a slip-and-fall sought to recover future medical expenses for future care. The defendants sought to limit the amounts claimed to those that would be paid by Medicare under *Stayton*. Although the Plaintiff argued that the defendant tortfeasor was the "primary payor" under the Medicare Act, meaning that no Medicare write-off would exist, the Court noted that the Plaintiff's argument was theoretical. Instead, the Medicare Act was intended to serve as a safety net, especially where the tortfeasor might not be able to pay the full amounts claimed and where the healthcare provider bills Medicare directly. As a result, a plaintiff is limited to claiming as future medical expenses only those amounts that will be paid by Medicare, not the amounts charged to Medicare (before write-offs).

DELAWARE SUPERIOR COURT RULES THAT SURVEILLANCE IN PERSONAL INJURY CASES MUST BE PRODUCED AT TIME OF PLAINTIFF'S REQUEST

In a recent decision, the Delaware Superior Court ruled that a defendant could not withhold surveillance of a plaintiff in litigation until after his deposition when it was requested timely and properly before the deposition. In *Hunter v. Bogia*, 2015 WL 5050648 (Del. Super. Ct. Aug. 19, 2015), the plaintiff, who claimed permanent injuries following a truck accident, requested any surveillance from the defendants after filing a personal injury lawsuit. The defendants, who had obtained surveillance before the plaintiff's deposition, agreed that the surveillance was discoverable but sought to withhold production until after the plaintiff was deposed.

The Superior Court held that the defendants could not withhold the surveillance when it was requested during discovery to gain a tactical advantage; instead, the materials must be provided to further the "disinterested search for the truth." As a result, any party who obtains surveillance of a plaintiff in a personal injury case should be aware that the materials need to be produced with a proper discovery request and cannot be delayed.

DELAWARE SUPERIOR COURT FINDS THAT REQUIREMENTS FOR NOTICES OF INTENT TO INVESTIGATE ARE MINIMAL

Recently, the Delaware Superior Court permitted imprecisely drafted Notices of Intent to Investigate to toll the two-year statute of limitations in a medical negligence case because they contained the minimum statutory requirements. In *Verrastro v. Bayhealth Medical Center, Inc.*, 119 A.3d 676 (Del. Super. Ct. 2015), the plaintiff sent Notices of Intent to Investigate (the "Notices") a potential medical negligence claim against various physicians pursuant to 18 Del. C. § 6856(4) to toll the statute of limitations by ninety (90) days.

The plaintiffs filed their complaint within the additional 90 days, but the defendants moved to dismiss and argued that the Notices were deficient because they failed to identify the specific defendants in the body and failed to mention the precise issues being investigated. The Court noted that, despite the notices lacking precision, they were sufficient because they were sent by certified mail, listed the potential plaintiffs, identified the defendants as the addressee, discussed the general claim being investigated (i.e., the facts leading to the death of the decedent), and noted the statute pursuant to which the Notices were being sent. In other words, the Court does not demand the "strictest" compliance with a Notice of Intent to Investigate so long as a plaintiff complies with the requirements of 18 Del. C. § 6856(4).

DELAWARE DISTRICT COURT RULES THAT FORMER DEFENDANT CAN PROCEED WITH CLAIMS AGAINST FORMER CO-DEFENDANT'S INSURANCE CARRIER FOR BAD FAITH FAILURE TO RESOLVE CASE

On November 2, 2015, the U.S. District Court for the District of Delaware permitted a former defendant to proceed with claims against a former co-defendant's insurance carrier for its alleged failure to handle a medical negligence claim appropriately.

The Court in *Christiana Care Health Services, Inc. v. PMSLIC Ins. Co.*, 2015 WL 6675537 (D. Del. Nov. 2, 2015) addressed a claim that PMSLIC Insurance Company, which insured a physician who performed a surgery at Christiana Care Health Services, Inc. (“Christiana”), failed to settle the claim against that physician in bad faith within his policy limits pursuant to his pretrial request. Before trial, the plaintiff made a demand in excess of the insured’s policy limit to the insured and Christiana, and the insured opted to proceed to trial without tendering the policy limits. As a result, the matter proceeded to trial against both Christiana and the physician, and the jury returned a verdict that exceeded the physician’s coverage. Christiana therefore had to pay a much larger portion than it would otherwise have had to pay had the case settled pre-suit. Christiana then filed suit against PMSLIC Insurance Company claiming that its failure to settle within the physician’s insurance policy limits pre-suit constituted a breach of contract, a bad faith breach of contract, and a violation of the Delaware Consumer Fraud Act (“DCFA”).

The Court initially ruled that Christiana had standing to sue on the insured’s behalf against its carrier, despite a policy provision precluding such an assignment. The Court discussed the difference between pre-suit and post-suit preclusions on assignments and held that, in the case where there is a verdict and the insured seeks to assign his rights to another to pursue a bad faith breach of contract claim, he can do so as a matter of public policy. Therefore, Christiana has standing to pursue the action against its co-defendant’s insurer.

The Court then dealt with the specific claims raised by Christiana to evaluate whether they were viable. The Court held that, while a declaratory judgment claim and a DCFA claim were not viable, Christiana could pursue claims that the insured acted in bad faith and breached its contract with its insured when it failed to settle the claims, even though the pre-suit demand exceeded the carrier’s policy limits. Therefore, Christiana could pursue claims that the insurer of its co-defendant in an underlying suit breached its contract to its insured and acted in bad faith.

RECENT DELAWARE MEDICAL MALPRACTICE JURY VERDICTS ¹

Barbara Cohen-Thomas v. Orthopedic surgeon and his practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N14C-03-039 FWW: The jury returned a verdict in favor of the defendants. The plaintiff was represented by Timothy Lengkeek, Esq. of Young Conaway Stargatt & Taylor, LLP. The defendants were represented by Richard Galperin, Esq. and Courtney Hamilton, Esq. of Morris James LLP.

Thomas Baird v. Ophthalmologic surgeon and his practices, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N11C-09-241 RRC: The jury returned a verdict in favor of the defendants. The plaintiff was represented by Bruce Hudson, Esq. and Ben Castle, Esq. of Hudson & Castle Law LLC. The defendants were represented by Gregory S. McKee, Esq. and Lauren McConnell of Wharton Levin Ehrmantraut & Klein, P.A.

Joseph Hineman v. Otolaryngologist and his practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N10C-03-014 CLS: The jury returned a verdict in favor of the defendants. The plaintiff was represented by Bruce Hudson, Esq. and Ben Castle, Esq. of Hudson & Castle Law LLC. The defendants were represented by Richard Galperin, Esq. and Courtney Hamilton, Esq. of Morris James LLP.

David K. Werner v. Emergency department and a hospital, C.A. No. N12C-02-191 JAP: The defendant hospital was represented by Richard Galperin, Esq. and Joshua Meyeroff, Esq. of Morris James, LLP. The defendant hospital group was represented by John D. Balaguer, Esq. and Stephen J. Milewski, Esq. of White and Williams LLP.

Louis M. Haas, individually and as Executor for the Estate of Carol A. Haas; Cynthia Hickey; Connie Wildman; Robert Wildman; Gail Wallace; Mark Wildman v. Cardiologist, his practice and a hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N12C-11-184 JAP:

The jury returned a verdict in favor of the plaintiffs in the amount of \$374,000.00 against the hospital alone as follows: The Estate of Carol Haas - \$164,000; Louis Haas - \$35,000; Ms. Haas’s children - \$175,000. The jury found in favor of the cardiologist and his practice. The plaintiffs were represented by Bart J. Dalton, Esq. and Andrew Dalton, Esq. of Dalton & Associates, P.A. The Cardiology defendants were represented by Bradley J. Goewert, Esq. and Thomas J. Marcoz, Jr., Esq. of Marshall Dennehey Warner Coleman & Goggin, P.C. The hospital was represented by Dennis D. Ferri, Esq. and Joshua Meyeroff, Esq. of Morris James LLP.

Miriam Brooks v. Hospitalists, their practice and the hospital, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N12C-04-035 DCS: The jury returned a verdict in favor of the plaintiff in the amount of \$1,735,000.00 and against the defendants. The plaintiff was represented by Gilbert Shelsby, Esq. and Robert J. Leoni, Esq. of Shelsby & Leoni, P.A. The hospital defendant was represented by Jim Drnec of Balick & Balick, LLC. The hospitalists and their practice were represented by Gregory S. McKee, Esq. of Wharton Levin Ehrmantraut & Klein, P.A.

Kay A. Martin v. Emergency medicine practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N12C-06-087 EMD: The jury returned a verdict in favor of the defendant. The plaintiff was represented by Bruce Hudson, Esq. and Ben Castle, Esq. of Hudson & Castle Law LLC. The defendant was represented by Richard Galperin, Esq. and Courtney Hamilton, Esq. of Morris James LLP.

Dawn M. Johnston, individually and as Executrix of the Estate of Joan A. Ford; Crystal Heintz; Jeffrey S. Ford; Catherine C. Beebe v. Surgeon and her practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N12C-09-114 FWW: The jury returned a verdict in favor of the defendants. The plaintiffs were represented by Bart J. Dalton, Esq. of Dalton & Associates, P.A. The defendants were represented by Jeffrey Austin, Esq. of Elzufon Austin Tarlov & Mondell, P.A.

Natashia Keyes, individually and as the Personal Representative of the Estate of Mary Fuller-Keyes; Joseph Fuller; June L. Smith v. Anesthesia practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N10C-12-080 VLM: The jury returned a verdict in favor of the defendant. The plaintiffs were represented by Gilbert Shelsby, Esq. of Shelsby & Leoni, P.A. The defendant was represented by Bradley J. Goewert, Esq. of Marshall Dennehey Warner Coleman & Goggin, P.C.

James v. Burns v. Radiologist and his practice, Superior Court of the State of Delaware in and for Sussex County, C.A. No. S12C-02-024 ESB: The jury was unable to reach a verdict, and a mistrial was declared. The plaintiff was represented by Shakuntla Bhaya, Esq. of Doroshow Pasquale Krawitz and Bhaya. The defendants were represented by John D. Balaguer, Esq. and Christine Kane, Esq. of White and Williams LLP.

RECENT DELAWARE MEDICAL MALPRACTICE CASE FILINGS²

Andrew J. Napier; Ruthena Napier v. Vascular surgeon and his practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-10-072 FWW (filed on 10/8/2015): The plaintiffs allege that the Defendants failed to assess plaintiff's infection of his wound following amputation of his leg below the knee, which led to sepsis and amputation of plaintiff's other leg. The case was filed by David Culley of Tybout, Redfearn & Pell.

Charles Worley; Lester Worley; Glenn Worley; Nancy Washington, individually and as personal representative of the estate of Mary Worley v. Hospital, Superior Court of

the State of Delaware in and for New Castle County, C.A. No. N15C-10-125 CEB (filed 10/14/2015): The plaintiffs allege that the defendants failed to properly diagnose and treat the decedent, also allowing her to choke and aspirate on food because she was not properly monitored. The plaintiffs further allege that the decedent had a cardiac and respiratory arrest because of the choking and aspirating on food, and this led to multi-organ damage and ultimately death. The case was filed by Gilbert Shelsby, Jr. of Shelsby & Leoni, P.A.

Avoline Love v. Urgent Care physician and practice and pharmacies, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-10-175 DCS (filed 10/20/2015): The plaintiff alleges that the defendants failed to assess the plaintiff's allergies, and she suffered an allergic reaction to prescribed medication that was potentially life threatening. The case was filed by Andrew Dalton of Dalton & Associates, P.A.

Joann Drozdowski v. Psychiatrist, his practice and a pharmacy, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-10-250 JAP (filed 10/28/2015): The plaintiff alleges that Defendants failed to take into account the plaintiff's medical history and prescription drugs that she was taking when defendant Rosenbaum prescribed and defendant Kirkwood filled prescriptions for her diet. The Plaintiff alleges that she passed out while driving and was taken to the hospital where she was incoherent and unable to identify herself. The case was filed by David Culley of Tybout, Redfearn & Pell.

Jeffrey K. Crouser; Rebecca Crouser v. Surgeon and his practice, Superior Court of the State of Delaware in and for New Castle County, C.A. No. N15C-11-009 PRW (filed 11/2/2015): The plaintiffs allege that Defendants left a metal object in plaintiff's body following surgery on his left hip. The case was filed by David Culley of Tybout, Redfearn & Pell.

Joan Kilgore v. Nursing home and physicians practicing there, Superior Court of the State of Delaware in and for Sussex County, C.A. No. S15C-11-003 THG (filed 11/3/2015): The plaintiff alleges that Defendants allowed plaintiff to develop a pressure sore, severe urinary tract infection, dehydration and renal failure while in their care. The case was filed by Chase Brockstedt of Baird Mandalas Brockstedt LLC.

¹ Defendants' names have been purposefully redacted.

² Id.

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