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Bonezzi Switzer Murphy Polito & Hupp Co. L.P.A.

BSMPH Is Pleased To Announce That The Fifth District Court Of Appeals Affirmed The Granting Of Summary Judgment In Favor Of A Physician In A Defamation Action

Several BSMPH Attorneys worked as a team to ensure that the Fifth District Court of Appeals would uphold the trial court's granting of summary judgment in favor of a physician in a defamation action.

Plaintiff, Addie L. O'Bryant, alleged that she suffered emotional injuries after a physician confronted her in a hospital examination room about being addicted to prescription pain medications and being a drug dealer. Plaintiff alleged that several people in the hospital heard these alleged defamatory statements including her husband, Timothy O'Bryant, who was in the examination room.

The evidence established that no one other than Plaintiff's husband heard these alleged defamatory statements. The evidence also proved that Plaintiff was seeking and taking prescription pain medications in excess of what she was prescribed by her treating physicians. Plaintiff admitted that she gave her husband several of her pain medications. The physician denied making defamatory or improper statements.

The Fifth District, in case No. 2010CA0071, held that summary judgment in this defamation case was warranted because the physician had a conditional privilege - a good faith interest in communication with Plaintiff as to her obvious excessive misuse of narcotic medication. The Court also held that the physician did not exceed the scope of his privilege or act with malice.

William D. Bonezzi, Esq.

On May 2, 2011, the firm opened a Florida office d.b.a. Bonezzi Switzer Murphy Polito & Hupp P.A.
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Attorney William D. Bonezzi will manage the Florida office. In addition to practicing in the State of Florida, Mr. Bonezzi will continue his practice in the State of Ohio as well.

Wuerth Revisited

By Jeffrey W. Van Wagner, Esq.

In the September 2010 quarterly newsletter, Bret Perry authored an article regarding vicarious liability and the hospital defendant, and provided an excellent survey as to the evolution of agency by estoppel and the doctrine of *respondeat superior*. At that time the case law was evolving relative to the interpretation of the *National Union Fire Ins. Co. v. Wuerth* (2009), 122 Ohio St.3d 594. Indeed, in the September 2010 article, a case somewhat contrary to the initial understanding of *Wuerth* was cited and discussed at length; to wit, *Taylor v. Belmont Cmty. Hosp.*, Seventh Dist., 2010 -Ohio-3986.

Since September 2010, several other appellate courts have addressed issues pertaining to the immediate holding in *Wuerth* and certain practical applications of the issues raised by the Ohio Supreme Court in the *Wuerth* decision warrant discussion.

In mid-March 2011, the Second District Court of Appeals in *Stanley v. Community Hospital*, 2011-Ohio-1290, examined a trial court ruling in which summary judgment was granted to a hospital due to the plaintiff's failure to individually name a nurse who attempted to inject medication through an IV port causing IV infiltration and the eventual amputation of the plaintiff's left thumb. The lawsuit was timely commenced against the hospital; however, in its motion for summary judgment the hospital relied upon the holding in *Wuerth* and asserted that since the nurse at issue was not individually named as a defendant and since the statute of limitations as against this nurse had expired, a claim for *respondeat superior* liability could not be maintained directly against the nurse's employer. On appeal, plaintiff-appellant argued that the trial court abused its discretion and committed reversible error by dismissing the defendant hospital simply based upon the plaintiff-appellant's choice to sue the employer rather than a specific employee. The appellate court analyzed the specific factual scenario and narrowly applied the *Wuerth* standard in determining that the trial court's decision must be reversed and the cause remanded to the trial court for proceedings consistent with the appellate court's decision. The court held:

"The holding in *Wuerth* must be given a narrow application. Nowhere in the *Wuerth* decision does the Supreme Court conclude, expressly or otherwise, that a medical claim brought against a hospital for the alleged negligence of one of its nurse employees constitutes a claim for malpractice under R.C. 2305.11.

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Wuerth Revisited...Cont.

Further, we have held that a suit against a hospital could proceed where the negligent employee nurse was not named as a defendant. Traditionally, claims such as the one brought by plaintiff against the hospital for the negligence of its employee nurses have been governed by the law of *respondeat superior*. Simply put, *Wuerth* does not preclude a suit against Community Hospital for the negligence of its employee nurses despite the fact that the nurse or nurses were not named as defendants in Stanley's complaint. Thus, *Wuerth* is inapplicable to the instant case, and there being no dispute that the Stanley suit was timely filed against the hospital for the alleged negligence of its employee nurses, *respondeat superior* law applies and the trial court erred when it sustained the hospital's motion for summary judgment."

Less than one month following the Second District opinion, the Eighth Appellate District, Cuyahoga County, Ohio, employed a contrary analysis and held that *Wuerth* did preclude the maintenance of a dental malpractice claim against a dental group where the individual dentist was not sued within the time permitted by the applicable statute of limitations. In *Hignite v. Glick, Layman & Assoc., Inc.,* 2011-Ohio-1698, the Eight Appellate District upheld summary judgment disposition of plaintiff's claim and observed as follows:

"[Plaintiff] contends that the trial court erroneously relied on the Ohio Supreme Court's decision in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, (citations omitted) in granting judgment in favor of the dental practice. In *Wuerth*, the court addressed the issue of a law firm's liability for legal malpractice. Applying this same reasoning used in the context of medical malpractice suits, the court held that (1) a law firm does not engage in the practice of law and therefore cannot commit legal malpractice; and (2) a law firm is not vicariously liable for legal malpractice unless one of its principles or associates is liable for legal malpractice. *Id*. at paragraphs 1 and 2 of the syllabus."

Relying on *Wuerth*, the trial court granted judgment in favor of the dental practice, recognizing that the dental practice "'could not possibly be found vicariously liable for malpractice if [plaintiff] did not sue any of the named dentists individually.'" The trial court further noted that plaintiff could no longer name the individual dentists because the statute of limitations on any action against them had run.

The court applied the *Wuerth* holding quite literally and held that since plaintiff could not demonstrate that any of the individual dentists were liable for dental malpractice the dental practice itself could not be held liable to the plaintiff.

The evolution of appellate case law interpreting the *Wuerth* decision will continue and review of individual appellate districts must be considered as one moves forward in preparing and filing dispositive motions in situations where the plaintiff has failed to join the actual care provider as a party defendant.

The *Wuerth* holding and the eventual decision to strictly or liberally construe that holding will have significant impact on litigation and the involvement of health care providers in lawsuits on a going-forward basis. Quite notably, more and more frequently lawsuits are filed against institutional health care providers, hospitals, long term acute care facilities and nursing homes in which the plaintiff names each individual care provider including physicians, nurses, therapists and every other discipline involved in the rendering of care to a patient. Indeed, in an abundance of caution, lawyers representing potential plaintiffs are issuing 180-day letters to individually identified care providers on a mass scale at times serving as many as 25 individual care providers at a health care facility with 180-day letters.

One of the most practical considerations for institutional care providers, and this is particularly true of long term acute care and nursing home facilities, relates to the signing of certified mail for independent contractors and former employees at a facility creating the impression that proper service of a 180-day letter or a summons and Complaint has been completed. Facilities must vigilantly educate their mailroom and front desk staff to take great care never to sign for a certified mail item from the United States Postal Service unless the individual to whom the envelope is addressed is a current employee of the facility. Mailrooms and front desks at facilities must not sign for certified mail for former employees of the facility or for independent contractors who provide services within the facility. It should

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Are Factual Basis for Affirmative Defenses Discoverable?

By Jason A. Paskan, Esq.

For years, attorneys have been able to shield the factual basis for affirmative defenses from discovery by relying on *Sawyer v. Devore,* (1994), 8th Dist. No. 65306, 1994 WL 614978, unreported. Recently, the Eighth District attempted to limit its holding in *Sawyer* but failed to fully close the door for defense attorneys. *Decuzzi v. City of Westlake,* (2010), 8th Dist. No. 94661, 2010 Ohio 6169.

In *Sawyer, supra,* the plaintiff brought a cause of action asserting numerous claims sounding in employment law against a former employer. *Id.* at 2. The plaintiff sought "the facts upon which [defendants] relied in support of [defendants'] asserted affirmative defenses" in a motion to compel. *Id.,* at 7. The court, in consideration of the discovery request determined that the plaintiff "essentially demanded that [defendants] examine their own body of evidence relevant to [defendants'] affirmative defenses and compile the relevant evidence into a neat little package to be used against [defendants] by [plaintiff]." *Id*.

The Eighth District Court of Appeals affirmed the trial court's denial of the motion to compel the fac-

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Are Factual Basis for Affirmative Defenses Discoverable?...Cont.

tual basis for the affirmative defenses for two reasons: (1) The court determined that the "discovery request sought to obtain a vast amount of general information which was not easily compiled. Therefore, the discovery request *** cannot be logically viewed as anything other than an attempt to conduct a fishing expedition;" and (2) Civ. R. 26 does not provide for the discovery of any facts upon which defendants premised their affirmative defenses. *Sawyer,* at 7. The court noted that they were unable to hold that "the alleged need and the relevancy of such evidence outweighed the hardship which would have been imposed upon [defendants] had the trial court permitted discovery of the information" pursuant to Civ. R. 26(C). *Id*. Further, the Eighth District stated that had the trial court granted the discovery request, the trial court would "have permitted [defendant] to take advantaged of the industry and efforts put forth by [defendants'] counsel" pursuant to Civ. R. 26 (A). Thus, defense attorneys were able to prevent plaintiffs from obtaining the underlying factual basis of affirmative defenses.

The Eighth District Court of Appeals attempted to narrow *Sawyer* in *Decuzzi, supra*, when it revisited the issue of discoverability of affirmative defenses. Specifically, the court stated, "[i]n *Sawyer,* the court found that the plaintiff sought such a vast amount of general information that it could not be viewed as anything more than a 'fishing expedition.'" *Decuzzi,* at ¶13. "*Sawyer* did not address the issue of whether the discovery request sought work-product information. Instead, its holding dealt with the enormity of the plaintiff's discovery request and its implicit demand that defense counsel sift through 'their own body of evidence, determine the elements of that body of evidence relevant to [defendants'] affirmative defenses and compile the relevant evidence into a neat little package to be used against [defendants].' Consequently, we do not read *Sawyer* to prohibit discovery of facts supporting affirmative defenses." *Decuzzi,* at ¶14.

Notwithstanding the Eighth District's holding in *Decuzzi,* the work-product privilege set forth in Civ. R. 26 (B)(3) still permits the court to exercise discretion with regard to the discovery of privileged materials after an in-camera inspection. *See, Huntington Natl. Bank v. Dixon,* (2010), 8th Dist. No. 63604, 2010-Ohio-4668. Where the "work-product" privilege is asserted for "opinion work-product," the privilege is nearly absolute. *See, State v. Hoop,* (1999), 12th Dist. No. CA98-04-017, 134 Ohio App. 3d 627. Where the "work-product" is "fact work-product," there must be a showing of good cause demonstrating a need for the materials set forth in Civ. R. 26(B)(3). *See also, Jackson v. Greger,* (2006), 110 Ohio St. 3d 488. Additionally, the *Decuzzi* opinion does not intrude upon the "attorney-client privilege" codified in R.C. 2317.02(A).

The *Decuzzi* Court took the work-product privilege into consideration, specifically "opinion work-product" when applying Civ. R. 26 to the plaintiff's discovery requests, and found that "[d]iscovery of this nature is asking the [defendant] to divulge *how* it intends to defend its case, and this information can legitimately be considered privileged under the work-product doctrine." *Decuzzi,* at ¶18.

Accordingly, defense counsel has no additional burden to provide a plaintiff with work product information than it had prior to the Eighth District's ruling in *Decuzzi, supra.* Absent good cause as required by Civ. R. 26(B)(3), when the discovery requests seek "fact-work product" and under the near absolute protection afforded "opinion work product," defense counsel need not provide the opposition with a basis for affirmative defenses in a manner that is convenient for the discovering party. *See, Decuzzi,* at ¶15. Stated differently, defendants are not required to provide plaintiffs with "a neat little package to be used against [defendants]." *Sawyer*, at 7.

Wuerth Revisited...Cont.

By Jeffrey W. Van Wagner, Esq.

be a simple matter for the front desk and the mailroom in these facilities to have a list of current employees and to crosscheck a certified mail letter directed to an individual with the current roster of employees so that inadvertent acceptance of certified mail service for a lawsuit or for a 180-day letter cannot happen.

Further, to the extent 180-day letters are hand-delivered, no front desk personnel or anyone else in the facility should sign as the recipient of such a letter or document unless the individual is truly an employee of the facility. Finally, even regular mail service of a 180-day letter on a non-employee, independent contractor, or former employee must be met with a "return to sender" remark on the envelope to avoid the inadvertent acceptance of either a lawsuit or a letter which may unilaterally extend a statute of limitations against an individual without that person's knowledge.

BSMPH is pleased to announce that

Ronald A. Margolis

joined our firm on March 1, 2011,
and is specializing in the areas of
Medical Malpractice and Nursing Home Defense

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Patients and Their Family Members Are Being Advised To Research Hospitals And Nursing Homes

By Jennifer R. Becker, Esq.

According to a recently published study of 40 million Medicare patient records, the quality of care provided by American hospitals varies widely. Patients have a 46% lower risk of experiencing a safety incident at a top rated hospital compared to a poorly rated hospital.

This study was published by HealthGrades, which is one of the largest independent health care ratings companies and has been acknowledged by major news sources, medical publications and medical research companies. Medicaid patient records were analyzed from 2007 to 2009, focusing on common patient safety indicators that help identify preventable medical mistakes that occur during patient hospitalization. These patient safety indicators include incidents such as; foreign objects left inside a body following surgery, excessive bleeding or bruising following surgery, bed sores, catheter-induced bloodstream infections, post-operative respiratory failure and post-operative sepsis.

The frequency in surgical errors and other incidents of medical malpractice was widely differentiated among hospitals. According to the study, there are life-and-death consequences associated with where a patient chooses to seek hospital care. Patients are being advised to do something they rarely ever do, namely, to do comparative research on hospitals before being admitted to one.

Significantly, Cleveland and Toledo are on the list of the 10 U.S. cities nationwide with the lowest incidence of patient safety incidents.

Similar to the great disparity that exists in the quality of care provided by hospitals across the country, the variance is just as likely to occur at nursing homes where reports of malpractice, abuse and neglect are steadily on the rise in virtually all states. This alarming report begs the question - how can families ensure that their loved one will receive the best possible care at a nursing home facility?

Experts who work with the elderly suggest that family members should research nursing homes to greatly increase the likelihood that a nursing home patient is provided with optimal care. This research should include; finding out how much time staff members at a home spend with residents, reviewing the costs, visiting several times and at different times, observing interactions among staff and residents, sitting down and asking hard questions of senior management at each facility, asking for qualifications of management and staff, inquiring about employee wages, the turnover rate and criminal records among staff and asking anything else that seems relevant. The bottom line is that patients and family members are being encouraged to research, make onsite visits and ask pertinent questions.

By Jennifer R. Becker, Esq.

BSMPH Defense Verdicts

BSMPH attorneys, Bill Bonezzi and Don Richardson, obtained verdicts on behalf of two doctors in two separate trials held earlier this year.

In February, the trial team successfully defended an OB/GYN physician in a one week trial held in Erie County. The doctor was sued by a former patient for causing an occlusion to her left ureter during a laparoscopic assisted vaginal hysterectomy ("LAVH"). Plaintiff alleged that the physician's failure to detect and repair the occlusion during the surgery caused her to undergo additional procedures and surgeries that could have been avoided.

Although the jury determined that the doctor's actions fell below the standard of care by not performing a cystoscopy to confirm the patency of the ureter before concluding the LAVH surgery, the jury voted 6-2 in favor of the doctor on causation. The jury ultimately agreed that even if the doctor discovered the injury to the ureter at the time of the surgery, Plaintiff would have still undergone the same re-implantation surgery and recovery that followed. Plaintiff has returned to her normal activities and does not suffer any permanent or long-term effects from the operations.

In April, Mr. Bonezzi and Mr. Richardson represented a family practice doctor in a trial held in Cuyahoga County. The lawsuit was brought by a patient who alleged that the doctor's failure to order additional cardiac testing following an abnormal stress test in August 2005, caused him to suffer a heart attack three months later.

During the trial, the Defense team proved that the doctor met the standard of care by advising Plaintiff to modify his risk factors by improving his diet and by quitting smoking. Nonetheless, Plaintiff continued to smoke and did not seek medical attention when he experienced chest pain for the first time two weeks prior to his heart attack. Defense Counsel proved that Plaintiff's heart attack was due to a plaque rupture which was neither predictable nor preventable through nuclear stress testing or catheterization. The jury found in favor of the doctor after three hours of deliberation.

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