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

Seven Trial Wins and No Losses at BSMPH This Year

Unanimous Defense Verdict in a Breast Cancer Case

In April, BSMPH attorneys, Steven J. Hupp and Ronald A. Margolis, tried a breast cancer case in Cuyahoga County Common Pleas Court and obtained a unanimous defense verdict. The case concerned a 61 year old female whose mother died from breast cancer and who consistently underwent yearly mammograms. Unfortunately, the Defendant Radiologist did not diagnose a mass on her mammogram in 2008. In 2009, the patient returned and was diagnosed with breast cancer. At the time of her diagnosis, the cancer had spread to her lymph nodes. One year later, she had metastatic breast cancer throughout her spine and ribs.

The defense team admitted that the Defendant Radiologist was negligent in 2008. The case was defended on proximate cause only. The defense experts opined that the Plaintiff had a rare form of breast cancer that spread early, and thus, had a statistically poor outcome. The Plaintiff's breast cancer was resistant to chemotherapy as well as hormone therapy. The defense team argued that the Plaintiff's aggressive form of breast cancer was incurable in 2008 because it had already spread to nine lymph nodes and probably seeded the tumor in her bones.

Steven J. Hupp, Esq.

Ronald A. Margolis, Esq.

BSMPH In-House CLE

BSMPH will host an in-house CLE on Ethics, Professionalism and Substance Abuse on Wednesday, September 26, 2012. Registration will begin at 2:00 p.m., presentation at 2:30 p.m. and cocktails and hors d'oeuvres at 5:00 p.m. This event is being held at The DoubleTree by Hilton, 1111 Lakeside Avenue E., Cleveland, Ohio. RSVP to Angela M. Bambrick at 216-658-9501 or abambrick@bsmph.com.

Jury Returns Unanimous Verdict for Anesthesiologist in Brachial Plexus Injury During CABG Surgery

On June 4, 2012, after an eight day trial, a Cuyahoga County Common Pleas Court jury returned a unanimous verdict in favor of an anesthesiologist in a case involving a patient who sustained a permanent brachial plexus injury during an extensive coronary artery bypass graft surgery. The 58 year old Plaintiff claimed that the anesthesiologist, represented by attorney, Donald H. Switzer, did not properly supervise or check the positioning of the Plaintiff's right arm during the almost six hour surgery and/or that a member of the cardiac surgery team was leaning against the patient's right hand or wrist for at least fifteen minutes during his surgery, either one of which caused compression which led to the permanent brachial plexus injury. As a result, the Plaintiff did have a significant right brachial injury which ultimately led to his having to quit his office job with a local grocery chain and go on disability. The Plaintiff claimed almost $1 million in lost income, medical expenses and pain and suffering.

In addition to the lack of evidence that the anesthesiologist did not comply with the standard of care and that the claims against the anesthesiologist were meritless, there was significant evidence introduced by the defense that the cause of the Plaintiff's brachial plexus injury was a well-recognized complication that occurred during performance of the surgery itself; specifically, that the median sternotomy with retractors and the use of an additional retractor to access the right internal mammary artery for the bypass, all of which led to stretching or compression of the brachial plexus, was the cause of the Plaintiff's injuries. The defense also contested the qualifications of the Plaintiff's anesthesiology expert and the lack of evidence to support the Plaintiff's expert's theories on both the standard of care and causation issues. Though returning a unanimous verdict in favor of the anesthesiologist, unfortunately the jury also returned a verdict against the hospital in the amount of $944,377.07, finding that the hospital deviated from the standard of care in causing trauma to the Plaintiff's right hand and/or wrist area.

Donald H. Switzer, Esq.

Unanimous Defense Verdict Obtained on Behalf of an ENT Surgeon

In April, BSMPH attorneys, Donald J. Richardson and Bret C. Perry, obtained a defense verdict on behalf of an ENT surgeon and his practice group in a medical malpractice case tried in Lorain County Court of Common Pleas.

Plaintiff, a 44-year old woman, claimed that the surgeon fell below the standard of care when he breached the lamina paprycea and identified orbital fat during the performance of endoscopic maxillary sinus surgery. Plaintiff claimed that as a result of the surgery she has permanent double vision during extreme rightward gaze.

The jury agreed that the Defendant, ENT surgeon, met the standard of care in that visualizing orbital fat during this endoscopic surgery is a rare, but recognized complication of the procedure and that the surgeon immediately recognized the situation and reacted promptly and appropriately to prevent serious injury to Plaintiff's eye. The Jury returned a unanimous verdict in favor of the Defendant ENT surgeon.

Donald J. Richardson, Esq.

Bret C. Perry, Esq.

Jury Returns Unanimous Defense Verdict for Pain Management Specialist

On June 5, 2012, a lawsuit that had been filed years earlier, finally made its way to a Summit County courtroom. The Plaintiff, a 30 year old female, who had chronic back pain, incurred as a result of a motor vehicle accident in 1997, sought relief from a pain management specialist located in Cuyahoga Falls, Ohio. The Plaintiff had been referred to this specialist in 2004, because her chronic pain had interfered with her ability to work and hampered her daily life. This was literally her last resort for relief from the pain.

Plaintiff underwent epidural injections that brought temporary relief. In 2006, a spinal cord stimulator was surgically implanted, with the generator for the stimulator placed subcutaneously in her right buttock near the surface of the epidermal layer. The generator site appeared to be healing; however, the Plaintiff fell and the generator site appeared to be swollen and red. A decision was made to inject the generator site with Kenalog, a steroid used for calming down inflammation. According to Plaintiff's expert, Kenalog was to be used on a weekly basis. Instead, the Kenalog was injected over a four day period. There was a lack of medical literature on what the pain management specialist did, which came into play during the trial.

Following the injections, Plaintiff reported no relief. At the first office appointment following the injections, the Plaintiff informed her physician that she had been in a minor motor vehicle accident the day before. As time went on, Plaintiff continued to complain of increased pain at the generator/injection site. Ultimately, a decision was made to explant the generator, at which time the site appeared infected. Plaintiff's expert claimed that the use of the steroids over four days caused the infection. Plaintiff complained that the wound failed to heal and she was sent to a general surgeon for debridement of necrotic appearing tissue. Unfortunately, the wound did not heal and Plaintiff underwent a further surgery at the Cleveland Clinic Foundation. The wound ultimately healed.

Plaintiff's claim was that the injections should have been spaced out over a two to three week period, as opposed to a four day period. The only medical literature available suggested that Kenalog was an appropriate steroid to use for inflammation and scar reduction, and the injections should be spaced over a two-three week period. The defense argued that the pain management specialist was treating pain, not scar reduction; and if there was inflammation and trauma, it was due to the fall and auto accident, not the steroids. The defense's best argument was that temporally, there was no association between the steroid injections and the subsequent problems requiring surgery. If the injections set-up infection, then there would have been signs of infection within two to three weeks. The only record available was from the first office visit following the Kenalog injections, which did not mention any infection. Plaintiff also claimed that the explantation was necessary due to the injections, but the defense was able to demonstrate that the generator was removed due to increased pain from the auto accident.

When going through massive records, defense counsel found a telephone call note from the Plaintiff where she told the pain specialist's nurse that the generator site really hurt, was oozing, was swollen etc., and it had gotten worse since the "auto accident". The jury returned a unanimous defense verdict, 8-0 on standard of care.

William D. Bonezzi, Esq.

The Cause Defense in Cancer Cases

By Steven J. Hupp and Ronald A. Margolis, Esq.

There are instances in the defense of a medical negligence case where the standard of care defense is simply not available, such as in the failure of a physician to appropriately interpret a diagnostic study that results in a delay in the diagnosis and treatment of cancer. The plaintiff invariably argues that the defendant's negligence resulted in significant change in the staging of the cancer, which denied the plaintiff the opportunity of life saving cure. By admitting the standard of care error to the jury at the onset, the defense receives significant credibility in the jury's eyes and also limits the potential of aggravating evidence being admissible on the standard of care issues.

In our experience, these types of cases can be won by strongly focusing on the oncology issues, so that the standard of care issues are legally and factually irrelevant. Every successful cause defense in a cancer case revolves around the

Cont'd on page 3

The Cause Defense in Cancer Cases...Con't

plaintiff's specific type of cancer. We focus on the cellular level of the cancer by using subspecialists in pathology. In presenting a causation defense in a cancer case, the role of the pathologist is absolutely essential. By utilizing photo micrographs (actual blowups of a portion of the pathology slide) a pathology expert educates the jury on issues of histology, morphology, mitotic count and the ultimate grading of the cancer. By establishing the significant aggressiveness of the cancer, the foundational evidence has been laid to educate the jury how the unfortunate delay did not impact the ultimate prognosis for cure in a specific plaintiff.

Once the pathologist provides us with the biology of the plaintiff's specific cancer, we build upon these facts with experts in medical or surgical oncology. These experts then rely on the pathology findings to testify that the alleged delay caused no adverse consequence to the plaintiff's prognosis and/or chance of cure.

It is important to focus the cause argument on the specific cancer of the specific plaintiff, which will blunt the plaintiff's argument that an early diagnosis and treatment would have afforded the best opportunity for cure. The biggest benefit of the causation defense is the opportunity to assess and evaluate the specific plaintiff's responsiveness to chemotherapy and/or radiation therapy. By utilizing photo micrographs of the plaintiff's tissue pre and post treatment with exemplars demonstrating what a positive response to chemotherapy and/or radiation looks like, contrasted to the plaintiff's poor response, the jury is able to see and appreciate the fact that if the plaintiff's cancer did not respond when treatment was initiated inclusive of the period of the delay, any earlier response would not have made a difference.

Addressing the biology of the cancer is pivotal in proving to the jury that this specific cancer, with its specific type of behavior (i.e., spreading to lymph nodes early, resistance to chemotherapy and/or radiation) was unfortunately a non-curable cancer and the delay did not adversely affect the plaintiff. Focusing on the severity of the disease and making the disease the "bad actor" and not the defendant-physician, is the key to prevailing on a cause defense. Expert testimony to establish that a percentage of cancers cause death regardless of when they are diagnosed and treated, will cause the jury to conclude that the defendant's actions did not result in any harm to the specific plaintiff.

Do What the Doctor Says

By Patrick J. Murphy, Esq.

From time to time, a physician will raise the question as to how far must he go or how much effort he must expend to insure that a patient is following recommendations made related to preventing, diagnosing and/or treating a particular medical condition. One approach that at least sounds reasonable on the surface would be that the more potentially ominous the medical condition, the more responsibility the physician has to follow up with the patient to make sure that his medical advice was followed. However, this does not necessarily answer the question posed by physicians. There is little case law on this issue, and it was reviewed to determine what guidance it may provide.

Trial attorneys involved with medical malpractice litigation should familiarize themselves with the case of *Striff v. Luke Medical Practitioners, Inc., et al.*, 3rd Dist. No. 1-10-15, 2010 WL 5296941, 2010-Ohio-6261 (Dec. 20, 2010), which was a decision by the Court of Appeals of Ohio, 3rd Dist. Allen County. Mr. Striff, who was 43 years old, received medical treatment from the defendants from early 2003 through December of 2006. *Id*. at ¶ 2. In February 2007, he suffered a fatal heart attack. *Id*. The autopsy revealed that he had coronary artery disease. *Id*. A lawsuit was filed alleging that the defendants failed to appropriately diagnose **and/or follow up** on Mr. Striff's cardiac condition, especially in light of his significant family history of cardiac disease. *Id*.

In February of 2003, Mr. Striff saw Dr. McCullough for the first time with complaints of fatigue, upper chest heaviness and a racing heart. *Id*. at ¶ 4. Dr. McCullough ordered a cardiac work-up including: (1) EKG; (2) stress test; (3) echocardiogram; (4) a fasting lipid profile; (5) referral to a cardiologist; and (6) a follow-up appointment with Dr. McCullough. *Id*. Dr. McCullough received the results of the EKG, stress test and echocardiogram, which were all normal. *Id*. Mr. Striff failed to have a lipid profile done, to see the cardiologist and to keep his appointment with Dr. McCullough. *Id*.

Mr. Striff next saw Dr. McCullough in December 2003, and had four more appointments in 2004. *Id*. at ¶ 5. All of these appointments were non-cardiac related, and no cardiac complaints were voiced during any of them. *Id*. Dr. McCullough testified at trial that he continued to remind Mr. Striff about the need for a lipid profile and a cardiology consultation. *Id.*

In May 2006, Mr. Striff was seen by a certified nurse practitioner as a new patient. *Id*. at ¶ 6. He complained of left shoulder/neck/arm pain as well as back pain. *Id*. He acknowledged a family history of heart disease. *Id*. The CNP wanted to conduct an EKG, but the patient declined. *Id.* at ¶ 7. The CNP ordered a lipid profile and encouraged Mr. Striff to obtain further screening to evaluate his risk for cardiovascular disease. *Id*. A follow-up appointment was scheduled in June, but Mr. Striff neither kept the appointment nor obtained the lipid profile. *Id*.

A jury returned unanimous verdicts in favor of Dr. McCullough and the CNP. *Id*. at ¶¶ 12,14. The jury found 100% of the negligence was committed by Mr. Striff himself. *Id*. at ¶ 63. Plaintiff filed a notice of appeal with 11 assignments of error. *Id*. at ¶ 15. The case is worth reading for the court's analysis on some of these assignments of error involving issues frequently encountered in medical malpractice claims. Two assignments of error related to the decedent's comparative negligence, which was an affirmative defense. *Id*. at ¶ 56. The appellate court cited to numerous Ohio decisions supporting the fact that a patient can be found comparatively negligent in a medical malpractice action. See *id*. at ¶ 57. The court rejected plaintiff's argument that the negligence of a physician

Cont'd on page 4

Do What the Doctor Says...Con't

and the negligence of a patient are incapable of comparison. *Id*. at ¶ 64. Plaintiff also argued that the negligence of the decedent was not contemporaneous with the malpractice of the defendants; and therefore, did not provide a defense. *Id*. at ¶ 59. Plaintiff contended that the decedent's own negligence was negated because the defendants continued to treat him despite his not following medical advice. *Id*. at ¶ 60.

The Third District Court of Appeals affirmed the judgment for the defendants stating: "[plaintiff] has not provided any legal support for the proposition that a medical professional must terminate the doctor-patient relationship with a non-complaint patient or risk being liable for potential malpractice." *Id*. at ¶ 60. Presumably, Mr. Striff never received **written notices** of missed appointments or his failures to obtain the recommended testing, because otherwise the appellate decision would have referred to such **written notices**. The record; however, contained evidence of Mr. Striff's ongoing failure to follow medical advice based upon the testimony of defendants. See *id*. at ¶ 61. Additionally, his medical records were "peppered with" evidence of missed appointments, a failure to quit smoking and multiple failures to follow physician orders. *Id*.

The case of *Sorina v. Armstrong, et al.*, 51 Ohio App.3d 113, 114 (6th Dist. Ct. App. Ohio 1988) involves a patient who had an elective abortion performed by Dr. Armstrong. She was told to return to Dr. Armstrong for follow-up care. *Id*. She responded that she preferred seeing her own physician, and Dr. Armstrong said that would be okay. *Id*. The patient saw her own physician. *Id*.

Dr. Armstrong's office called the patient to check on her condition. *Id*. The patient also contacted his office to advise of symptoms she was experiencing which, according to plaintiff's expert, were consistent with retained products of conception. *Id*. The patient made a couple of post-abortion appointments with Dr. Armstrong, but failed to keep them. *Id*. When she saw her personal physician, he advised her to return to Dr. Armstrong. *Id*. at 115. Without treatment for post-abortion complications, a complete hysterectomy was necessary. *Id*. at 114.

The patient sued alleging that Dr. Armstrong negligently performed the abortion and/or **negligently failed to perform follow-up care**. *Id*. She argued that Dr. Armstrong was negligent by failing to fully warn her of the dangers of foregoing adequate follow-up care. *Id*. at 115. The defendant filed a motion for summary judgment in response to which the plaintiff submitted the deposition testimony of her expert, who was critical of Dr. Armstrong because "he failed to urge" the plaintiff to return for an examination after the abortion. *Id*. He opined that this was particularly true once the plaintiff started to complain of symptoms consistent with retained products of conception. *Id*. He said Dr. Armstrong should have informed his patient about the possible complications when she exhibited related symptoms "so that she would understand that a further check-up was imperative." *Id*. He testified that even had Dr. Armstrong verbally urged the patient to return, this should also be noted in the chart. *Id*. Presumably there was no note charted to this effect. See *Id*.

Finally, plaintiff's expert testified that "the actual cause of injury was the failure of early detection of the retained products." *Id*. In ruling on the motion for summary judgment, the trial court found it was not reasonably foreseeable that the patient would refuse to follow her own physician's advice to return to Dr. Armstrong. *Id*. After her own physician told her to return, she had sufficient information to realize follow-up with Dr. Armstrong was necessary. *Id*. at 116. The court determined that the only conclusion which could be reached by reasonable minds was that the patient's disregard for her health proximately caused her injury. *Id*.

CONCLUSION

There are several lessons to be learned from the *Striff* and *Sorina* cases:

1. A jury does not expect a physician to send written notices to his patient when the patient fails to follow advice.
2. In *Striff*, the actual patient chart was "peppered with" notations of missed appointments, failures to follow physician recommendations and failing to quit smoking. Such charting is important.
3. The negligence of a patient can be compared to that of a physician in deciding comparative negligence.
4. A physician's continuing to see a patient despite episodes of non-compliance does not waive comparative negligence as an affirmative defense. It does, however, extend the Statute of Limitations.
5. It is not reasonably foreseeable to a physician that a patient would not follow his advice.
6. A physician need not terminate the doctor/patient relationship with a non-complaint patient. However, from a risk management standpoint, he may want to.
7. A patient's failure to keep an appointment carries significant weight on the issue of patient non-compliance.
8. If the staffing and operation of a physician's office permits, "no shows" should be charted as such in the patient record.
9. Each patient office note should include a plan for ongoing care. This will evidence what recommendations were made to the patient.
10. For additional analysis of responsibilities for communicating with a patient, the reader's attention is directed to an article "Key Legal Principles for Hospitalists" published in the American Journal of Medicine, Vol. 111 (9B). It can be found at the following website: http://hospitalmedicine.ucsf.edu/improve/literature/discharge_committee_literature/handoff_communication_and_discharge/key_legal_principles_for_hospitalists_alpers_am_j_med.pdf.

Patrick J. Murphy, Esq.

Bonezzi Switzer Murphy Polito & Hupp Co. L.P.A.
Attorneys at Law
1300 East 9th Street, Suite 1950 | Cleveland, Ohio 44114-1501
216.875.2767 | Fax 216.875.1570
100 2nd Ave. South, Suite 502-S | St. Petersburg, FL 33701-4313
727.826.0909 | Fax 727.826.0914 | www.bsmph.com

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