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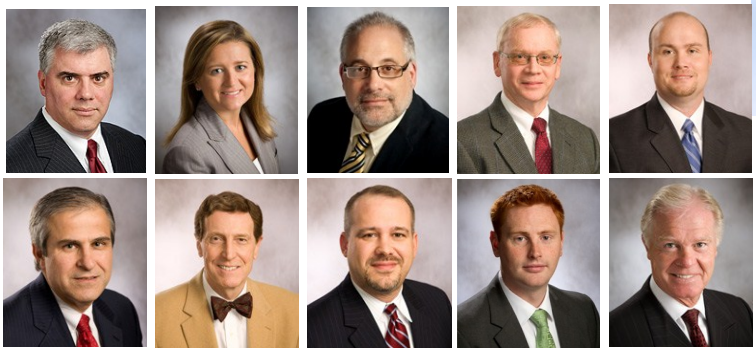
Bonezzi Switzer Murphy Polito & Hupp Co. L.P.A.

TEN TRIAL WINS AT BSMPH IN 2012



Top Row (L to R): Steven J. Hupp, Jennifer R. Becker, Ronald A. Margolis, Donald H. Switzer, Bret C. Perry
Bottom Row (L to R): John S. Polito, Patrick J. Murphy, Donald J. Richardson, Jason A. Paskan, William D. Bonezzi

CUYAHOGA COUNTY

Steven J. Hupp, Esq. and Jennifer R. Becker, Esq., obtained a defense verdict on behalf of a cardiologist in a wrongful death case. Plaintiff claimed that the cardiologist was negligent in not performing a cardiac catheterization. The decedent suffered a fatal myocardial infarction. The jury returned a verdict in favor of the cardiologist finding that he met the standard of care.

Steven J. Hupp, Esq. and Ronald A. Margolis, Esq., obtained a unanimous defense verdict on behalf of a radiologist in a medical malpractice action. The defense team admitted that the radiologist was negligent in failing to diagnose a mass on Plaintiff's mammogram. The case was defended on proximate cause only. The jury returned a verdict in favor of the radiologist finding that the radiologist did not proximately cause Plaintiff's injury.

Donald H. Switzer, Esq., obtained a unanimous defense verdict in favor of an anesthesiologist in a medical malpractice action. Plaintiff claimed to sustain a permanent brachial plexus injury during an extensive coronary artery bypass graft surgery due to the negligence of the anesthesiologist and/or the cardiac surgery team. The jury returned a unanimous verdict in favor of the anesthesiologist, but unfortunately the jury also returned a verdict against the hospital, which was represented by another law firm, in the amount of $944,377.07.

Bret C. Perry, Esq. and John S. Polito, Esq., obtained a unanimous defense verdict on behalf of a general surgeon in a medical malpractice and wrongful death action. Plaintiff claimed that the surgeon was negligent in performing a primary anastomosis to correct a large bowel obstruction instead of opting for an ileostomy with fecal diversion. Plaintiff also claimed that the surgeon was negligent in failing to return to surgery in a timely fashion when the decedent's condition in the post-operative period warranted a return to surgery. Due to the alleged negligence, Plaintiff claimed the decedent suffered fistula and abscess formation ultimately resulting in the decedent's death. The jury returned a verdict in favor of the surgeon finding that the standard of care was met.

LORAIN COUNTY

John S. Polito, Esq. and Patrick J. Murphy, Esq., obtained a defense verdict in favor of a neurosurgeon in a medical malpractice and wrongful death action. Plaintiff claimed that the neurosurgeon negligently cared and treated for the patient after successfully removing a tennis ball sized tumor from the patient's brain, causing his death. The jury returned a verdict in favor of the neurosurgeon finding that he met the standard of care.

Donald J. Richardson, Esq. and Bret C. Perry, Esq., obtained a unanimous defense verdict on behalf of an ENT surgeon and his practice group in a medical malpractice case. Plaintiff 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, causing Plaintiff permanent double vision during extreme rightward gaze. The jury returned a verdict in favor of the surgeon finding that he met the standard of care.

MEDINA COUNTY

John S. Polito, Esq. and Bret C. Perry, Esq., obtained a defense verdict on behalf of a cardiologist in a medical malpractice action. Plaintiff claimed that the cardiologist negligently dissected a coronary artery during a diagnostic catheterization, causing her to suffer heart failure ultimately requiring a heart

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transplant. The jury returned a verdict in favor of the cardiologist finding that the standard of care was met.

STARK COUNTY

Bret C. Perry, Esq. and Jason A. Paskan, Esq., obtained a unanimous defense verdict on behalf of a plastic surgeon in a medical malpractice action. Plaintiff claimed that the plastic surgeon negligently dismissed her complaints of post-operative urinary retention following breast augmentation and abdominoplasty surgery, causing her bladder injuries. The jury returned a verdict in favor of the plastic surgeon finding that the plastic surgeon met the standard of care.

SUMMIT COUNTY

William D. Bonezzi, Esq., obtained a unanimous defense verdict in favor of a pain management specialist in a medical malpractice action. Plaintiff claimed that she was injected with Kenalog over a four day period, but the injections should have been spaced out over a two to three week period. Plaintiff claimed that the injections caused an infection resulting in surgery. The jury returned a verdict in favor of the pain management specialist finding that the pain management specialist met the standard of care.

Donald H. Switzer, Esq., obtained a unanimous defense verdict in favor of an emergency medicine physician and his group in a wrongful death action. Plaintiff claimed that the failure to treat the decedent with Tamiflu for H1N1 flu and pneumonia caused the decedent's death. The jury returned a verdict in favor of the emergency medicine physician and his group finding that the standard of care was met.

Employers Must Consider the EEOC Guidelines Regarding the Use of Arrest and Conviction Records in Employment Decisions or Risk a Charge of Discrimination

By Brian F. Lange, Esq.

The United States Equal Employment Opportunity Commission (EEOC) recently published guidelines with respect to the use of arrest and conviction records in making employment decisions. (EEOC Enforcement Guideline Number 915.002). The EEOC is responsible for enforcing Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e, et seq. The EEOC's Guidelines are based on prior EEOC policy documents and court decisions over the last twenty (20) years.

Criminal history information has become much more accessible over the past ten (10) years allowing employers to easily obtain job applicants' criminal records. Due to the ease of access to this information, an increasing number of employers are likely to consider criminal arrests and convictions when making employment decisions. Although criminal convictions may lawfully be considered in making employment decisions, employers must follow certain guidelines or risk discrimination charges from the EEOC.

In determining whether an employer has discriminated against a potential employee under Title VII of the Civil Rights Act, one of the aspects the EEOC will consider is whether an employer's policy creates a "disparate impact." A potential employee can show "disparate impact" by demonstrating that an employer's policies or procedures resulted in a disproportionate number of Title VII-protected individuals being eliminated from consideration for a position. An employer can defend against a claim by showing that the employer's policy or practice in question was job related to the position and consistent with business necessity.

The EEOC Guidelines set forth three factors to be considered by an employer in drafting a policy or practice that will result in exclusion of potential employees based on their criminal records. Specifically, the following factors are relevant in determining whether criminal records exclusion is job related for the position in question and consistent with business necessity:

1) The nature and gravity of the offense or conduct;
2) The time that has passed since the offense or conduct and/or completion of the sentence; and
3) The nature of the job held or sought.

Accordingly, an employer hoping to ward off potential discrimination charges from the EEOC may wish to consider these three factors in the employer's criminal records exclusion policy.

It is also important to note that an arrest record is not proof of criminal conduct and does not serve as a sufficient basis to exclude a person from employment. An arrest record may lead to an inquiry by the employer into the current or potential employee's actions, but the record itself cannot serve as the basis for an adverse employment action (EEOC Enforcement Guideline Number 915.002).

The EEOC Guidelines additionally set forth what amounts to a "Best Practices" policy to ward off any potential claim for discrimination. These Best Practices include the use of the three factors set forth above to screen applicants and for an individualized assessment of each potential employee excluded under the criminal records policy. The individualized assessment requires that an employer notify potential employees if they are to be excluded based on their criminal records and allow the employees to respond to the exclusion with an explanation of their past conduct. Actions consistent with these Best Practices will not result in a finding of discrimination by the EEOC. (EEOC Enforcement Guideline Number 915.002).

Notwithstanding the EEOC Guidelines, it is important to note that Ohio requires individuals with certain criminal convictions be excluded from employment for positions in-

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Employers Must Consider the EEOC Guidelines…Cont'd

volving contact with children, elderly individuals and individuals with certain disabilities. R.C. 3301.32; R.C. 3712.09; R.C. 5126.28. With that said, to the extent that a potential employee is not specifically excluded by statute, employers would be wise to consider the EEOC Guidelines before making any adverse employment decisions based on criminal records.

Brian F. Lange, Esq.

The History and Origins of Medical Malpractice Litigation

By Patrick J. Murphy, Esq.

The earliest reported medical malpractice case was *Stratton v. Swanlond* decided in 1374. The defendant surgeon attempted to repair plaintiff's traumatically mangled hand. The plaintiff claimed that the surgeon guaranteed to cure her injury for a reasonable fee, but after his treatment her hand remained severely deformed. The lawsuit was dismissed because of a procedural error in the Writ of Complaint; however, the judge set forth principles to follow in future cases which are recognized today. He stated that a physician should be liable when a patient is injured as a result of negligence, however if the physician exercised all due care, he would not be liable even if he did not obtain a cure. [2] The first medical malpractice lawsuit in the United States occurred in 1794, five years after George Washington was inaugurated. The plaintiff claimed the defendant operated on his wife in a most unskillful, ignorant and cruel manner causing his wife to die. He also claimed the physician promised to perform the operation skillfully and with safety. As in the *Stratton* lawsuit above, this was basically a breach of contract claim which plaintiff won receiving 40 English Pounds (£). [5]

The term malpractice comes from the Latin "mala praxis" that was coined by a British Legal Scholar, Sir William Blackstone, in 1765 in his "Commentaries on the Laws of England". He described neglect or unskillful management by a physician as "mala praxis." He categorized a "mala praxis" claim as a private wrong, not as a contract. [10, 12]

"The Lancet", a well-respected British Medical Journal, began in 1823 by Thomas Wakley who became involved in litigation over articles he wrote. A surgeon, Dr. Cooper, obtained a hospital appointment in London primarily because he was from royalty. The patient, Mr. Pollard, came to the hospital for removal of a gall stone. He was tied down on the operating table to prevent movement caused by pain because anesthesia was not yet available. The surgery, normally one to five minutes, required an hour. The surgeon used multiple instruments, severely injuring the patient. Ultimately, despite the patient asking him to stop, he used his finger to remove the stone. The patient died the next day. "The Lancet" learned of this debacle, and Wakley wrote articles describing the surgery. Dr. Cooper sued Wakley for liable seeking £2,000 in damages. Wakley used the trial as a forum to show why medical standards were needed. He admitted that his articles fell short of providing the full truth about Dr. Cooper's incompetence. A verdict was returned in Dr. Cooper's favor, but only for £100. [1]

Many of the early medical malpractice cases were actually breach of contract cases based on a claim that the physician promised to effect a cure. In *Slater v. Baker* and *Stapleton*, a case decided in England in 1769, the court articulated a standard by which physicians' conduct could be measured, which was pro-physician. It was held that a physician could be found liable only if another physician testified that the defendant breached the standard of care, but the court went on to create a significant hurdle for the plaintiff in retaining an expert witness. **The court stated that an expert could only testify if he was from the same locality as the defendant.** In small cities of that time, each physician probably knew all the other physicians in town. In 1832 the Supreme Court of Connecticut defined the standard of care in language that is universally used today. The plaintiff obtained a verdict in her favor and the physician appealed. He argued that it was settled law in Connecticut that nothing short of gross ignorance or gross negligence can subject a surgeon to damages in a malpractice lawsuit. In response to this argument the Supreme Court upheld the jury instructions given by the trial court stating: ". . . that if there was either carelessness or want of ordinary diligence, care and skill then the plaintiff was entitled to recover." [5]

Societal changes as well as changes in medicine combined to provide fertile soil for medical malpractice litigation to take root. Between 1840 and 1860 physicians saw what they considered to be a flood of malpractice lawsuits. The number of cases in state appellate courts increased by 950% while the population increased by only 85%. In 1860, John Elwell, a lawyer physician authored a book on malpractice where he claimed, "there can hardly be found a place in the country where the oldest physicians in it have not been actually sued or annoyingly threatened." The physician's loss of status in society beginning in the latter half of the 18th century contributed to the increase in lawsuits. Also, medical education had little standardization or oversight producing practitioners who were ill prepared to deal with the complexities of the human body. [7, 8, 10, 11]

The majority of Americans in the 17th and 18th centuries believed that physical misfortune was an explicit expression of divine will inflicted to either test of punish. Humble acceptance to the divine will was the proper response to misfortune, not a lawsuit. This fatalistic attitude started to change during the first half of the 19th century. In the place of fatalism there was a growing belief that human actions, not divine will, determined the course of events. It followed that if people, and not God, were responsible for medical outcomes it was less radical to sue one's physician for an adverse outcome. [7, 11, 12]

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The History and Origins of Medical Malpractice Litigation…Con't

Standardization and oversight of medicine did not take hold until the second half of the 19th century. From the late 18th century into the first third of the 19th century was a quiet time with respect to medical malpractice lawsuits. Interestingly, some prominent physicians, including Nathan Smith from Yale and R.E. Griffith from the University of Pennsylvania, actually saw benefits from medical liability cases. They believed that such lawsuits helped to enforce quality standards in a profession that was then poorly regulated. [2, 11]

The American Medical Association (AMA) was founded in 1847 with several goals. It wanted to promote standardization in training physicians and in the practice of medicine. By achieving this goal the AMA hoped to enhance the social and economic standing of the medical profession. It wanted to improve the scientific face of medicine to make it more effective and respected. Ironically, developing standards of practice for physicians to follow created benchmarks by which physicians were judged in medical malpractice litigation. When standards are in place the potential for deviating from them arises. The physicians who aspired to the highest level of medical practice possible were well educated and well trained. They were successful professionally and financially, ironically making them attractive targets for medical malpractice claims. The charlatans who did not claim to follow any standards and who claimed no widely recognized expertise were judgment proof. With the arrival of medical malpractice insurance at the end of the 19th century, all physicians became prospective targets. [8, 10, 11]

Paradoxically, improvements in medical science and medical techniques actually fostered an increase in medical malpractice litigation. In the early 19th century the vast majority of medical malpractice claims were related to treating orthopedic injuries. In 1800 the standard of care for severe fractures was amputation of the affected limb. As late as 1819 a medical treatise opined that amputation was more justifiable than trying to save a limb with a severe injury. A Scottish physician was heard to say, "A man must be very ignorant, who cannot take off a leg, an operation to be performed by any blockhead." In the 1830's new orthopedic techniques and instruments were developed enabling physicians to save limbs that were severely damaged. Amputations became an injudicious approach. This advancement in orthopedic care created inflated expectations in both the profession and the lay public. Often times when a limb was saved, it remained severely deformed, shortened or misaligned. Many of these patients facing permanent disability turned to lawsuits for compensation. The malformed limbs often served as ideal evidence in court. [7, 10, 11]

Prior to becoming the President of the United States, Abraham Lincoln was known to be a prominent litigator in the field of medical malpractice for both plaintiffs and defendants. In the mid-1850's he represented two Illinois physicians in a lawsuit brought by a carpenter who suffered bi-lateral femoral fractures when a chimney fell on top of him. The defendant doctors did not expect the patient to live and therefore, they set his legs in splints. When the splints were removed the right leg was crooked. The plaintiff hired six lawyers to prosecute his case. Public sentiment supported the plaintiff. Lincoln obtained several postponements of the trial on the theory that his best defense was the passage of time. When the trial started it was reported that the plaintiff's attorneys presented 15 physician witnesses and 21 other witnesses. The defense presented the town's 12 other physicians not retained by the plaintiff. The trial resulted in a hung jury and the case was never retried. During trial Lincoln asked plaintiff whether or not he could walk. He responded affirmatively, but complained that his right leg was so short that he walked with a limp. Lincoln responded, "Well! What I would advise you to do is get down on your knees and thank your Heavenly Father and also these two doctors that you have any legs to stand on at all." If Lincoln's cross examination is any indication of the style used in the 19th century, it was probably more fun to try lawsuits then, than it is now. [3, 11]

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