Volume 2, Issue 3

Quarterly Newsletter
September 2010

WWW.BSMPH.COM

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

## Mediation and Arbitration

### Patrick J. Murphy, Esq.

Thirty-two years of civil trial experience in all areas of law.
Available throughout Ohio.
Phone: (216) 875-2067
E-mail: pmurphy@bsmph.com

BSMPH is pleased to announce that

**Jason A. Paskan**

joined our firm on September 1, 2010, and is specializing in the areas of Medical Malpractice, Environmental Law and Appellate Practice

Phone: (216) 875-9535 Email: jpaskan@bsmph.com



## Vicarious Liability and the Hospital-Defendant... the Evolution of the Agency by Estoppel and *Respondeat Superior* Doctrines

By Bret C. Perry, Esq.

The ever increasing competition for patients has led many hospitals to pursue aggressive marketing and advertising campaigns. These advertising campaigns are designed to imply that the hospital staff, nurses and physicians practicing in the facility provide excellent care and that the particular facility should be you and your family's hospital of choice. In concert with the competition for market recognition and patronage, legal implications arise when a claim for medical negligence is asserted due to the conduct of the nursing staff and physicians practicing within the facility. The legal implications being whether the hospital assumes liability for the conduct of the varying healthcare providers whether employees, agents or independent contractors.

Recently, Ohio courts have addressed and reconsidered the common-law legal principles of agency by estoppel and *respondeat superior* in determining whether the hospital-defendant can be held vicariously liable for the care and treatment provided by both employee and non-employee healthcare providers. These recent decisions have caused uncertainty within the plaintiffs' bar and an apparent increase in the number of healthcare providers being individually named in recently filed claims alleging medical negligence. Accordingly, a review of the principles underlying the agency by estoppel and *respondeat superior* doctrines as well as their application in conjunction with the recent legal decisions will prove invaluable in navigating the seas of uncertainty.

In *Albain v. Flower Hosp.* (1990), 50 Ohio St. 3d 251, at paragraph four of the syllabus, the Ohio Supreme Court recognized and adopted the following exception to hospital nonliability for the negligence of independent contractors holding that "[a] hospital may, in narrowly defined situations, under

Cont'd on page 3

## Insurers are Entitled to Contribution From Other Applicable Insurance Policies

By Jason A. Paskan, Esq.

In order to reap the full benefit of your insurance coverage when you are covered by multiple insurance policies, you should notify all carriers that may be called upon for liability coverage. Failure to do so may result in personal liability.

The Supreme Court of Ohio recently affirmed a prior decision entitling insurers to contribution from other applicable insurance policies. *Pennsylvania General Insurance Co. v. Park-Ohio Industries,* (2010), 126 Ohio St. 3d 98, explaining *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.,* (2002), 95 Ohio St. 3d 512. An "applicable" insurance policy is one that applies over a period of time during which a progressive injury took place. *Id.* at ¶1.

Prior to *Pennsylvania General Insurance Co.*, insurers that were not targeted in the original litigation could escape liability if all terms and conditions of the non-targeted policies were not complied with. *Id.,* at ¶10. In other words, if there was a notification provision in an insurance policy of a non-targeted insurer and the non-targeted insurer was not notified, the targeted insurer would be precluded from contribution. *Id.*

In *Pennsylvania General Insurance Co.*, the Supreme Court of Ohio affirmed its adoption of the "all-sums" approach for allocating contribution among insurers. *Id.* at ¶11. The "all-sums" approach is analogous to joint and several liability among tortfeasors, as it allows the insured to seek coverage from one insurer for damages and the targeted insurer is then able to seek contribution from other applicable insurance policies. *Id.*

The Court found that it would be inequitable to prevent the targeted insurer's right to contribution from the other applicable policies because of the actions of the insured. *Id.* at ¶18. In *Goodyear*, the Court failed to discuss how the lack of privity between the insurers would affect the targeted insurer's right to contribution. *Pennsylvania General Insurance Co.* established that the insured must cooperate with the targeted insurer to identify other applicable policies to assist with the contribution

Cont'd on page 4

# Workers' Compensation: Continuing Jurisdiction - Alive and Well?

By Mary E. Purcell, Esq.

Now a days, it seems to be nearly impossible to get the Industrial Commission to exercise continuing jurisdiction. And, while two recent cases seem to indicate that the practice is alive and kicking, questions remain regarding how to obtain such review.

The Industrial Commission was originally granted the right to exercise continuing jurisdiction by Ohio Revised Code 4123.52. However, that power was subsequently defined and limited by case law to: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal.

What constitutes new and changed circumstances for purposes of continuing jurisdiction has long been the subject of debate. For instance, newly acquired evidence may warrant continuing jurisdiction but only if it was previously undiscoverable, there was due diligence in efforts to obtain the evidence and the new evidence shows changed circumstances.

On August 18, 2010, the Ohio Supreme Court addressed an issue of new and changed circumstances in a case where permanent and total disability ("PTD") was based upon a Claimant's "allowed psychological conditions." *State ex rel. Rohr v. Indus. Comm.,* 2010-Ohio-3756, 2010 Ohio LEXIS 1936. During the original hearing, the Staff Hearing Officer ("SHO") relied upon psychologist reports describing the Claimant as "expressionless with noticeably slowed speech and flat affect," "mechanical, robotic mode of speech," "unreliable" short-term memory, and "questionable" long-term memory. Several years after PTD was granted, the employer obtained and utilized video surveillance of the Claimant to support a Motion for Continuing Jurisdiction. Finding that the surveillance revealed an individual with clear, cogent, goal-oriented speech and remarkable short and long term memory, the Hearing Officer determined that the surveillance demonstrated that Claimant's previously disabling psychological condition had significantly improved and that the evidence constituted new and changed circumstances sufficient to invoke continuing jurisdiction. The Commission found that a new examination was appropriate to determine whether the Claimant remained permanently and totally disabled and the Court agreed.

Another continuing jurisdiction issue that is coming to the forefront stems from the new "substantial aggravation" standard. Effective August 25, 2006, an injured worker must prove that a pre-existing condition was "substantially" aggravated in order to have the claim amended to include that condition. The law also provided for an abatement of the substantially aggravated condition once that condition returns to a level that would have existed without the injury. Though the law did not specify a mechanism for abatement, the general consensus is that it should be the subject of a Motion for Continuing Jurisdiction based upon "new and changed circumstances," with medical evidence of a return to baseline as the basis for the motion.

"Clear mistake of fact" and "clear mistake of law" have also been the source of much confusion. Very often, these two criteria are grouped together in a kind of catch-all when there is insufficient evidence of fraud or there are no new or changed circumstances. Throwing an even bigger wrench into the analysis is the fact that case law indicates that a disagreement as to evidentiary interpretation does not mean there was a "mistake" or a "clear error."

On September 7, 2010, the Ohio Supreme Court addressed a "mistake of fact and law" issue that arose, again, out of a PTD case. *State e x rel. McNea v. Indus. Comm., 2010-Ohio-4186*. In *McNea*, the Claimant (McNea) was awarded PTD benefits beginning August 25, 2004. Subsequently, it was discovered that McNea was engaged in the practice of drug trafficking. While there was some indication that the drug trafficking had been taking place since, at least, October of 2003, undercover drug buys confirmed the trafficking occurred in October, November and December of 2005. McNea ultimately pled guilty and was incarcerated on September 5, 2007. A SHO heard the Bureau's Motion requesting termination of PTD benefits and recoupment of same. The SHO agreed that drug trafficking constituted sustained remunerative employment inconsistent with PTD, but did not terminate benefits until the date of McNea's incarceration. The SHO found that there was no evidence of drug dealing prior to the PTD hearing. The Commission agreed to exercise continuing jurisdiction based upon a mistake of fact and law because the SHO failed to address whether McNea had committed fraud and the impact of his admitted drug trafficking on his receipt of PTD compensation.

McNea filed an action in mandamus seeking to have the Commission's decision vacated and the SHO decision reinstated because the Commission improperly exercised continuing jurisdiction. A Magistrate for the Court of Appeals agreed, noting that the reason for exercising jurisdiction must be both identified and explained in the Commission's order. Pointing to the Motion seeking jurisdiction, the Magistrate noted that the only criteria mentioned is fraud. The Magistrate reasoned that the Commission's decision was actually based upon the "new and changed circumstance" prerequisite and since that was not the prerequisite identified in its Order or in the Bureau's Motion, it had abused its discretion by exercising continuing jurisdiction. The Magistrate also commented on, what he believed, was simply a difference in evidentiary interpretation between the Commission and the SHO and concluded that this disagreement could not be the basis for continuing jurisdiction.

Fortunately, in this instance, the Ohio Supreme Court disagreed, finding that the Commission had, in fact, clearly identified and explained the basis for continuing jurisdiction and that the Magistrate had narrowly construed the Bureau's Motion. As a result, McNea's writ was denied and the Commission Order remained in full effect.

The best thing to keep in mind is that, when it comes to continuing jurisdiction, it remains within the sole discretion of the Industrial Commission as to whether a request will be granted. Even if one of the five prerequisites are identified and supported, there is no guarantee that jurisdiction will be accepted. So, while these recent cases seem to indicate that the exercise of continuing jurisdiction is on the rise and is based in fact and law, it remains as rare and random as a yedi sighting.

Mary E. Purcell, Esq.

## Vicarious Liability and the Hospital-Defendant...Cont.

the doctrine of agency by estoppel, be held liable for the negligent acts of a physician to whom it has granted staff privileges. In order to establish such liability, a plaintiff must show that: (1) the hospital made representations leading the plaintiff to believe that the negligent physician was operating as an agent under the hospital's authority, and (2) the plaintiff was thereby induced to rely upon the ostensible agency relationship."

Following the *Albain* decision, the Ohio Supreme Court was again confronted with the issue of hospital liability for independent contractors in *Clark v. Southview* (1994), 68 Ohio St. 3d 435. The Ohio Supreme Court in *Clark* overruled *Albain* providing a less stringent test merely requiring that the hospital "holds itself out to the public as a provider of medical services" and that the patient looks to the hospital, not a particular doctor, for medical care. *Id*. at 444-445.

While the decision in *Clark* weakened the test necessary to establish hospital liability for the conduct of independent contractors, litigants seemingly ignored basic agency by estoppel principles and the concept of vicarious liability in the prosecution of claims against hospital entities. Specifically, litigants departed from basic agency principles asserting that a principal may be liable for the torts of an agent only when an actual agency relationship exists between the negligent tortfeasor (agent) as well as the hospital entity (principal).

Generally, "an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of *respondeat superior,* but not for the negligence of an independent contractor over whom it retained no right to control the mode and manner of doing the contracted-for work." *Clark,* at 438. In the absence of actual agency, courts have resorted to a fictional agency relationship to impose vicarious liability. *Johnson v. Wagner Provision Co.,* 141 Ohio St. 584, paragraph four of the syllabus. An agent who committed the tort is primarily liable for his/her actions, while the principal is merely secondarily liable. *Losito v. Kruse* (1940), 136 Ohio St. 183. The liability for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. If there is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions. *Id.*

In *Comer v. Risko* (2005), 106 Ohio St. 3d 185, the Ohio Supreme Court addressed the issue of whether a viable claim could exist against a hospital under a theory of agency by estoppel for the negligence of an independent contractor physician when the physician could not be made a party because the statute of limitations had expired. The *Comer* court held that a direct claim against a hospital premised solely upon the negligence of an agent who cannot be found liable is contrary to basic agency law. The *Comer* court explained that agency by estoppel is not a direct claim against a hospital, but an indirect claim for the vicarious liability of an independent contractor with whom the hospital contracted for professional services. If the independent contractor is not and cannot be liable because of the expiration of the statute of limitations, no potential liability exists to flow through to the secondary party, i.e., the hospital, under an agency theory.

Following the decision in *Comer*, the issue of hospital liability for the negligent actions of independent contractors seemingly was resolved, but left unanswered were questions relative to liability for the conduct of hospital employees, not independent contractors.

In *Nat'l Union Fire Ins. Co. v. Wuerth* (2009), 122 Ohio St. 3d 594, the Ohio Supreme Court addressed the issue of law firm culpability for the negligent actions of its partners and associates. In *Wuerth* the District Court dismissed plaintiff's claims because National Union had filed its complaint after the expiration of the one-year statute of limitations for legal-malpractice against the attorney responsible for initially handling the case and because National Union had no cognizable claims against the attorney handling the matter. The District Court further dismissed the claims for vicarious liability against the law firm. *Id*., at 912. Finally, the District Court determined that the law firm could not be held directly liable for legal malpractice because it is not an attorney and does not practice law. *Id*., at 913.

On appeal, the Ohio Supreme Court was asked to answer the following certified question: "Under Ohio law, can a legal malpractice claim be maintained directly against a law firm when all of the relevant principals and employees have either been dismissed from the lawsuit or were never sued in the first instance?" When answering this certified question, the Ohio Supreme Court addressed two limited issues: 1) whether a law firm may be *directly* liable for legal malpractice, and 2) whether a law firm may be held *vicariously* liable for malpractice when none of its principals or employees are liable for malpractice or have been named as defendants.

The *Wuerth* court analyzed these issues relying on precedent concerning medical malpractice issues holding that because only individuals practice medicine, only individuals can commit medical malpractice. This precedent concerning medical malpractice is consistent with the general definition of "malpractice" in that "[t]he term 'malpractice' refers to professional misconduct, *i.e*., the failure of *one rendering services in the practice of a profession* to exercise that degree of skill and learning normally applied *by members of that profession* in similar circumstances." *Strock v. Pressnell* (1988), 38 Ohio St. 3d 207, 211. Consistent with precedent, the *Wuerth* court explained that a law firm is a business entity through which one or more individual attorneys practice their profession. While clients may refer to a law firm as providing their legal representation or giving legal advice, in reality, it is in every instance the attorneys in the firm who perform those services and with whom clients have an attorney-client relationship. Thus, in conformity with decisions concerning the practice of medicine, the *Wuerth* court held that a law firm does not engage in the practice of law and, therefore, cannot *directly* commit legal malpractice.

The *Wuerth* court next confronted the issue of whether a law firm may be vicariously liable for legal malpractice when no individual attorneys are liable or have been named. Again relying on precedent addressing medical malpractice issues, the *Wuerth* court explained that an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of *respondeat superior*. *Clark, supra*. Based on the authority in *Comer*, the *Wuerth* court concluded that a law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice.

As expected, the *Wuerth* decision was quickly cited by the defense bar in support of the dismissal of medical negligence

Cont'd on page 4

## Vicarious Liability and the Hospital-Defendant...Cont.

claims levied against hospital entities wherein the individual physicians, whether employees or independent contractors, were not named as individual defendants in the action. The argument asserted was simple: the hospital does not practice medicine and if the individual physicians or nurses are not parties to the action, the hospital entity cannot be vicariously liable for the allegations of negligence. In addition, questions remained as to whether this decision could be extended to all types of healthcare providers including physical therapists, laboratory personnel, licensed practical nurses and the like again leading to an increase in the number of individual healthcare personnel being named as individual defendants in actions alleging medical negligence.

Recently, the issues left unanswered in *Wuerth* were addressed by the Seventh District Court of Appeals in the matter of *Taylor v. Belmont Cmty. Hosp.*, 7th Dist., 2010-Ohio-3986. In *Taylor*, plaintiff filed her medical malpractice lawsuit against the defendant-hospital based on the actions of its "employees." The employees were not sued, and the statute of limitations for claims against said employees had expired. The trial court granted summary judgment in favor of the defendant-hospital relying on the decision in *Wuerth*. On appeal, the *Taylor* court reversed the trial court's decision noting that for the wrong of a servant acting within the scope of his authority, there was a right of action against the master, the servant or both. The *Taylor* court concluded that the *Wuerth* case was inapplicable because a law partner's relationship with a firm was not that of "employer-employee." As to the portions of *Wuerth* that seemingly applied to the acts of law firm associates, the *Taylor* court refused to extend a case regarding law firm liability for the acts of partners and associates to the arena of hospital liability for the acts of its employees.

In analyzing the aforementioned decisions, the following principles underlying the doctrines of agency by estoppel and *respondeat superior* are of significant importance in the defense of hospital-defendants. First, a determination must be made as to the employment status of the healthcare providers at issue, i.e., independent contractor or employee of the hospital. If the alleged negligent healthcare provider was an independent contractor, the analysis set forth in *Clark* is applicable and the doctrine of agency by estoppel will provide for the hospital's vicarious liability should it be established that the hospital "holds itself out to the public as a provider of medical services" and that the patient/plaintiff looked to the hospital, not a particular doctor, for medical care. In addition, the requirements set forth in *Comer* must similarly be established in that agency by estoppel is not a direct claim against a hospital, but an indirect claim for the vicarious liability of an independent contractor with whom the hospital contracted for professional services. If the independent contractor cannot be liable because of the expiration of the statute of limitations, no potential liability exists to flow through to the secondary party, i.e., the hospital.

In the event that the alleged negligent healthcare provider is an employee of the hospital facility, the decision in *Taylor* seemingly provides that the doctrine of agency by estoppel is immaterial and instead, the doctrine of *respondeat superior* applies providing that the "master" is liable for the wrongs of his "servant" acting within the course and scope of his authority. In accordance, and following *Taylor*, if the negligent healthcare provider is an employee, there is no requirement for the individual healthcare providers to be named as defendants in the complaint because the doctrine of *respondeat superior* provides that the hospital facility is directly liable for the conduct of its employees.

While the seas remain uncertain relative to the application of the aforementioned decision as evidenced by the increasing number of physicians, nurses and ancillary healthcare providers being individually named in medical negligence actions, defense counsel must be cognizant of the basic legal principles of agency by estoppel and *respondeat superior* in order to adequately formulate a defense as well as assert the applicable affirmative defenses unique to each theory of recovery. In order to do so, determining the employment / independent contractor status of each potentially liable individual is of utmost importance otherwise your hospital-client could potentially be exposed to liability where none exits.

Bret C. Perry, Esq.

## Insurers are Entitled to Contribution From Other Applicable Insurance Policies Cont.

action. *Id.* at ¶19.

Should the insured fail to cooperate with the targeted insurer, this will not preclude a contribution action. *Id.* However, if the non-targeted insurers are prejudiced by the actions or inactions of the insured or the targeted insurer, the non-targeted insurers will not be liable for contribution. *Id.* at ¶20. Inability to defend interests in the underlying matter, to investigate the claim, choose counsel and participate in litigation and settlement strategies does not amount to prejudice. *Id.* at ¶21. These functions as carried out by the targeted insurer are inherent in the "all-sums" approach.

It is important that insureds cooperate with their insurers so that the targeted insurer may seek contribution from the other applicable policies. Although it is not analyzed in the case, presumably there will be liability actions brought against the insureds by the targeted insurer for the amount of the contribution action otherwise, there would be no incentive or deterrent for the inaction of the insured. By cooperating with your insurance company it will allow you to reap the benefits of your policy premiums and leave the liability allocation in the hands of the insurers. Failure to cooperate may subject you to out of pocket costs to cover the remaining liability for the very claim for which you have insurance.

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 | www.bsmph.com

**Why Not Go Green!** If you prefer to receive this newsletter via email, simply forward your request to newsnote@bsmph.com.