

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

THREE TRIAL WINS OBTAINED IN THE FIRST QUARTER BY BSPH ATTORNEYS



Top row, left to right: Michelle B. Block, Ronald A. Margolis, Bret C. Perry. Second Row, left to right: John S. Polito, Donald J. Richardson, Donald H. Switzer

Nursing Negligence and Wrongful Death Action

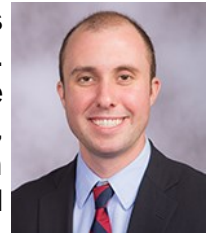
Bret C. Perry and **Donald J. Richardson** obtained a defense verdict in a nursing negligence and wrongful death action following a seven-day trial on behalf of a skilled nursing and long-term care facility. Plaintiff claimed that the decedent suffered from uncontrolled diarrhea for over three months and that the nursing staff failed to investigate the cause or report the frequency of the bowel movements to the attending physician. As a result, Plaintiff asserted that the decedent lost thirty pounds in eleven weeks, became progressively dehydrated, and ultimately died.

The BSPH defense team was able to counter those claims by offering evidence that the attending physician was aware of the uncontrolled diarrhea, that the frequent bowel movements were related to underlying disease processes, and that the death was not due to dehydration. Rather, the decedent died due to multi-system organ failure caused by a recent stroke. Plaintiff's final pretrial demand was \$2,000,000. The jury returned a verdict in favor of the defense in less than two hours.



BSPH Welcomes Geoffrey W. Vance, Esq.

Bonezzi Switzer Polito & Hupp is pleased to announce Geoffrey W. Vance joined the firm's Florida office as an Associate on January 20, 2014. Mr. Vance is specializing in the areas of medical malpractice and nursing home/long-term care defense.



Medical Malpractice Action

John S. Polito and **Michelle B. Block** obtained a dismissal with prejudice of their client, an obstetrician-gynecologist, on the fourth day of trial in a medical malpractice action. The Cuyahoga County lawsuit involved Plaintiff's claim that the physician was negligent in permitting a trial of labor, which involved shoulder dystocia during the course of delivery. Plaintiff asserted that, as a result, there was a permanent brachial plexus injury to the infant.

BSPH presented a strong defense at the start of trial. In response, Plaintiff decided to dismiss the BSPH client physician, rather than permit the matter to proceed to jury verdict.

Cauda Equina Syndrome Case

Donald H. Switzer and **Ronald A. Margolis** obtained a defense verdict on behalf of an emergency medicine physician accused of failing to work up a patient for Cauda Equina Syndrome. Plaintiffs' claimed that the emergency department physician was negligent in failing to appropriately workup and order diagnostic testing, after a sixty-six-year-old male presented to the emergency room with severe

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back pain and a history of spine disorder. According to Plaintiffs, Cauda Equina Syndrome was not diagnosed for a period of twenty-four hours, thereby delaying decompression surgery and leaving Plaintiff with bladder and bowel incontinence, as well as significant gait abnormalities requiring in-patient, occupation and physical therapy.

The defense relied heavily on the expert testimony of spine surgeon, Dr. Lee Riley from Johns Hopkins Hospital. BSPH attorneys were also successful in obtaining significant admissions from Plaintiffs' emergency medicine expert during cross-examination, which narrowed the allegations of negligence. This case presented multiple challenges with the volume of medical records and complexity of the Plaintiff's pre-existing spinal disorder and Cauda Equina Syndrome. Nurse-paralegal **Megan T. Schumacher** developed a computer trial database and medical art, which greatly assisted the defense team throughout trial. The jury returned a defense verdict in less than three hours.

MORETZ V. MUAKKASSA



By Donald J. Richardson, Esq.

A few years ago, I was in a deposition conducted by a plaintiff's attorney. He was deposing one of his client's subsequent treating physicians. Near the end of the deposition, the attorney handed the doctor a stack of medical bills and asked him whether the amount charged for his medical services was reasonable and necessary. The doctor responded by explaining that the amount billed for medical services and the amount paid for those services is the difference between "fantasy and reality." He explained that the initial charge is based on coding by the hospital but the insurance company's payment is based on their contract with the medical provider. The doctor continued, "Unfortunately in medicine, what you

bill is not generally not what you get paid." He concluded his testimony saying, "medicine is so complicated today. I don't know what reasonable values are anymore."

The battle regarding the reasonable value of medical services has been waged for many years. On the one side, plaintiff attorneys have argued that the amount billed reflects the true value of medical services and should be the sole consideration for a jury when determining the economic harm suffered by an injured party. In the years before Tort Reform, plaintiff attorneys relied on the collateral-source rule to shield juries from ever seeing the actual amount that was paid by insurance companies for the services that were provided. All that was required was an expert to testify that the amount billed was reasonable and necessary, which many courts viewed as "an empty ceremonial."

Anyone who has ever reviewed an explanation of benefits ("EOB") from their insurance carrier knows that the amount the hospital bills for a service is rarely, if ever, the amount paid by their insurance carrier. Typically, the amount paid is considerably less (unless you do not have insurance) than the amount charged.

In 2005, along with the avalanche of legislative changes to Ohio tort law, the legislature enacted R.C. 2315.20 which permitted the introduction into evidence of any amount payable as a benefit to the plaintiff. In short, defendants were now allowed to introduce "write-offs" into evidence, which allowed juries to consider the actual amount that was received for medical services compared to the amount that was billed by the provider. Not surprisingly, this change in the rules did not go over well with plaintiff's attorneys, so they took to the courts in hopes of minimizing the application of the new rule.

In 2006, in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, a pre-tort reform case, the Ohio Supreme Court rejected the argument by the plaintiff that the collateral source rule prohibited the introduction into evidence of write-offs for consideration by a jury. In *Robinson*, the Court reasoned that the purpose of the collateral source rule was to prevent a wrongdoer from benefitting from payments made to a victim from another source. Thus, a plaintiff's receipt of benefits from sources

The Not So Wrongful Death of Florida's Wrongful Death Caps



By Geoffrey W. Vance, Esq.

Mark Twain once said, "I didn't attend the funeral, but I sent a nice letter saying I have approved of it." The Florida Supreme Court, however, recently scheduled the funeral and wrote its letter approving the death of Florida's statutory caps on wrongful death noneconomic damages. On March 13, 2014, Florida's highest court handed down a long anticipated ruling in *Estate of McCall v. United States*, Case No. SC11-1148, 2014 WL 959180 (March 13, 2014), that found Florida Statute §766.118 unconstitutional due to its violation of Florida's Equal Protection clause.

In 2003, the Florida Legislature claimed, "Florida is in the midst of a medical malpractice insurance crisis of unprecedented magnitude." In asserting this claim, the legislature relied heavily upon a report prepared by the Governor's Select Task Force on Healthcare Professional Liability Insurance (Task Force). In short, this Task Force purportedly found that the noneconomic damage awards granted by juries were causing a medical crisis that included rising insurance premiums, physicians fleeing Florida due to potential liability, and the consumer left bare with only limited healthcare options. To stem this "crisis," the Legislature enacted Florida Statute §766.118 that limited the noneconomic damages for medical malpractice claims through statutory caps, including a cap of \$500,000 per claimant and \$1 million recoverable from all practitioners for wrongful death claims. Thus, under Florida's statutory cap found in §766.118, one's pain, suffering, and other noneconomic damages were capped at \$500,000 for the wrongful death of a loved one.

After her death during child birth on a military base, Michelle McCall's estate filed a medical malpractice and wrongful death claim against the United States. The district court awarded the petitioners a total of \$2 million in noneconomic damages: \$500,000 for McCall's son and \$750,000 for each of her parents. This award was then reduced to \$1 million with each claimant receiving half of what was originally awarded in accordance with Florida's statutory cap on wrongful death noneconomic damages found in §766.118. On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the application of the statutory cap but granted a motion by the petitioners to certify four questions that challenged the constitutionality of the cap under the Florida Constitution. Because the case revolved around a wrongful death, the

Florida Supreme Court only reviewed the following question: "Does the statutory cap on wrongful death noneconomic damages, Fla. Stat. §766.118, violate the right to Equal Protection under Article I, Section 2 of the Florida Constitution?"

Florida Constitution Article I, Section 2 provides, "All natural persons, female and male alike, are equal before the law" and that "No person shall be deprived of any right because of race, religion, national origin, or physical disability." In a Florida constitutional Equal Protection analysis, Florida's Constitution provides the following four suspect classes: race, religion, national origin, and physical disability. Should a law make a distinction based upon one of those suspect classes, Florida courts will apply a strict scrutiny analysis wherein the law must be narrowly tailored to meet a compelling government interest. However, should the law not make a classification upon a suspect class, the courts will apply a rational basis test that only requires the law to be reasonably or rationally related to a legitimate government interest – a much easier test to satisfy than the strict scrutiny analysis.

The *McCall* court found that §766.118 discriminated based upon the number of claimants, stating that the statute "irrationally impacts circumstances which multiple claimants/survivors differently. . ." For example, the more family a deceased victim has, the less that family can recover. Therefore, the Court ruled that the statute was making a distinction based upon the number of claimants instead of a suspect class, thereby requiring a rational basis analysis.

Contrary to the findings of the Governor's Task Force, the *McCall* court further found that "the number of physicians in Florida were actually increasing, not decreasing," and that there was no medical malpractice crisis in Florida. The Court also took note that a mere 7.5% of Florida cases resulting in awards of \$1 million or more actually involved a jury trial verdict. Without a medical malpractice crisis, the Florida Supreme Court determined that the Legislature did not have a legitimate interest to pass §766.118 capping the noneconomic damages for wrongful death claims. Moreover, the court ruled that even if there was a medical malpractice crisis, the Legislature lacked proof of a rational relationship between §766.118 and the alleviation of that crisis.

While the Florida Supreme Court limited their purview to that of noneconomic damages in wrongful death claims, courts could easily apply the same rationale to the remaining statutory caps in medical malpractice cases. The Florida Supreme Court has already determined that there was no legitimate interest in passing §766.118. Therefore, the Florida Supreme Court seems likely to apply their reasoning to the statutory caps of medical malpractice cases where the victim survives. While the axe has already swung on Florida's wrongful death caps, *McCall* has rung the death knell for the remainder of §766.118.

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other than the tortfeasor was deemed irrelevant and immaterial on the issue of damages so that the tortfeasor was not given an advantage from third-party payments to the plaintiff. However, the Court concluded that because no one actually pays the write-off amount, admitting evidence of write-offs does not violate the purpose behind the collateral source rule. In short, the Court recognized that "either the bill itself or the amount actually paid can be submitted to prove the value of medical services" as the medical bills are *prima facie* evidence of the reasonable value of medical services.

Last October, the Ohio Supreme Court issued a highly anticipated decision, which has hopefully put to rest the debate over the introduction into evidence of "write-offs" in medical bills for a jury's consideration when determining economic damages in a personal injury or wrongful death case. In *Moretz v. Muakkassa*, 137 Ohio St. 3d 171, 2013-Ohio-4656, the plaintiff argued that introduction into evidence of write-offs by a defendant required expert testimony. Plaintiff's position was that RC 2317.421, which had statutorily established that medical bills are *prima facie* evidence of the reasonableness of medical charges, did not extend to write-offs. The Ohio Supreme Court disagreed.

The Court review of RC 2317.412 noted that the language states that "a written bill or statement, or any portion thereof" was evidence of reasonable medical charges. The Court reasoned that the Generally Assembly's inclusion of "or any portion thereof" demonstrated that they intended a broader application of the law beyond just charges. Since R.C. 2317.421 does not specifically exclude write-offs, the Court held that evidence of write-offs in medical bills is admissible to a jury to show the amount which was actually paid for medical care versus the amount originally billed by the provider for those services without the need for expert testimony.

In simple terms, the Court has left the determination of the reasonable value of medical services up to the jury in each case. A jury may decide that the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment or some amount in between. This decision makes the process simple for Courts and attorneys while allowing juries to view all of the evidence in reaching its conclusion on damages.

John S. Polito, Esq. to Be Honored by Saint Ignatius High School



Shareholder John S. Polito has been named to receive the 2014 Cardinal Robert J. Bellarmine, S.J. Award for distinguished alumni of Saint Ignatius High School. A 1970 graduate of Saint Ignatius, Mr. Polito has gone on to have a remarkable legal career. In announcing the award, Saint Ignatius High School wrote, "While pursuing his accomplished career, John has consistently and selflessly served his alma mater for many years. His excellence in the legal field, promotion of fair and ethical principles in law, and exemplary service to Saint Ignatius High School are deserving of recognition." Mr. Polito will be honored at a luncheon at Saint Ignatius High School in April.