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

JURY RETURNS VERDICT FOR NURSING HOME IN RESIDENT'S DEATH FROM SUBDURAL HEMORRHAGES AS A RESULT OF PRIOR FALLS

Beth A. Sebaugh, Esq.

Donald H. Switzer, Esq.

On June 6, 2013, after a six-day trial, a Cuyahoga County Common Pleas Court jury returned a verdict in favor of a nursing home in a case involving a patient who developed subdural hemorrhages after several falls and subsequently expired as a result of complications from surgery to drain the subdural hemorrhages. The plaintiff's nursing expert claimed that the nursing home failed to properly provide for the safety of this dementia patient, who was in rehabilitation. A STNA improperly left the resident in his wheelchair at a sink while she attended to another resident. In her absence, the resident fell in his wheelchair and hit his head on the floor. Subsequent CT scans disclosed the existence of both bilateral chronic subdural hemorrhages, as well as an acute subdural hemorrhage, thus requiring emergent surgery. The patient developed complications from the surgery and ultimately expired twenty-six days later. Plaintiff's experts included a well-known nursing home expert, the former Cuyahoga County Coroner and a neurosurgeon. The plaintiff's attorney asked the jury to return a verdict of $1.5 million.

The nursing home's attorneys, Beth A. Sebaugh and Donald H. Switzer, presented testimony from several nurses and the STNA, as well as the testimony of four expert witnesses: a certified nurse practitioner; a neurosurgeon; a neuroradiologist; and a neurologist. The defense contested the plaintiff's claim that it was improper for the STNA to leave the resident for a few minutes while he was sitting at sink in his wheelchair, washing his face and brushing his teeth, in order to attend to the needs of another resident. However, the major thrust of the defense was proximate cause. The evidence was fairly conclusive that the resident had developed bilateral chronic subdural hemorrhages as the result of a fall that occurred two and a half weeks earlier at home. The evidence supported that those hemorrhages were expanding and that despite the reference to an "acute"

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BSPH ELECTS NEW MANAGEMENT

Bonezzi Switzer Polito & Hupp is pleased to announce that Jeffrey W. Van Wagner has been elected managing shareholder for the firm. John S. Polito was elected Chief Financial Officer. William D. Bonezzi, Bret C. Perry, and Jeffrey W. Van Wagner were elected to the Management Committee and Steven J. Hupp, John S. Polito, and Jeffrey W. Van Wagner were elected to the Finance Committee for the firm.

Jeffrey W. Van Wagner, Esq.

John S. Polito, Esq.

William D. Bonezzi, Esq.

Bret C. Perry, Esq.

Steven J. Hupp, Esq.

PATRICK J. MURPHY, ONE OF FIRM'S FOUNDERS, TO RETIRE

Patrick J. Murphy, one of the founders of this Firm, is retiring from the active practice of litigation and trial work on June 30. He plans to continue his practice as a mediator. Pat has been involved in mediation for a number of years and will now be available for mediation from his home office at 4090 Carroll Blvd., University Heights, OH 44118, 216-659-4510.

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BSMPH BECOMES BONEZZI SWITZER POLITO & HUPP CO. L.P.A.

With the retirement of Patrick J. Murphy, the firm is pleased to announce it has adopted to the new name Bonezzi Switzer Polito & Hupp Co. L.P.A. effective July 2013.

Employer Intentional Tort Claims in Ohio

By Kevin O. Kadlec, Esq.

The ability of an Ohio employee to bypass the worker's compensation system and sue his or her employer for an intentional tort has only been available to Ohio employees since 1982, even though worker compensation in Ohio is now a century old. In *Blankenship v. Cincinnati Milacron Chemicals, Inc*., 69 Ohio St.2d 608, 433 N.E.2d 572 (1982), the *Ohio Supreme Court* held that employers' legal immunity from lawsuits had always been for negligent acts, not intentional conduct. *Blankenship* started a process in Ohio that found the courts and the legislature playing a game of hopscotch giving workers opportunities to sue for "workplace intentional tort" and then limiting them. Substantial jury awards emerged in the next decade. The legislature reacted and altered the law several times to limit the type of workplace accidents or injuries workers could sue for beyond their workers' compensation benefits. But the Supreme Court in 1991 and again in 1999 said those previous laws were unconstitutional.

The legislature in 2005 again passed a law to limit employer intentional tort law suits. The legislature refined the concept of "intent" concerning employers' intentional tort in Ohio when it enacted Ohio §R.C. 2745.01. The definition "intentional tort" now means that an employer shall not be liable to an employee unless the plaintiff proves that the employer committed a tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur. The legislature defined "substantially certain" to mean that an employer needs to act with "deliberate intent" to cause an employee to suffer an injury, a disease, a condition, or death. By entering "deliberation" into the course of action by an employer, the legislature ensured that employers would be protected from jury verdicts, excerpt in very narrow circumstances.

In *Kaminski vs. Metal & Wire Products Co,* 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, the Ohio Supreme Court upheld the 2005 legislation as constitutional. *Kaminski* held that the Ohio Constitution grants the legislature wide authority to enact laws regulating wages, hours and workplace conditions, and to adopt laws in order to balance the rights and obligations of employers and employees in the operation of the state workers' compensation system.

The plaintiff bar's last attempt to loosen up the Ohio legislature, which provides near immunity to employers under R.C. 2745.01, culminated in the recent decision by the Ohio Supreme Court in *Houdek v. ThyssenKrupp Materials*, 134 Ohio St.3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, decided on December 6, 2102. In *Houdek,* the Court confronted the question of whether a claimant bringing an employer intentional tort claim is required to prove that the "employer acted with a deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." The employee worked in the aisle of a warehouse where he sustained severe injuries when a co-worker operating a mechanical mobile side loader struck him. Houdek asserted that the company had deliberately intended to injure him by directing him to work in the aisle with knowledge that injury was substantially certain to occur. The theory was that by "intentionally" not providing reflective vests, orange cones, safety gates and adequate lighting the employer knew an injury was substantially certain to occur. Days before the accident, the company was warned of the danger posed to workers in the aisles. This evidence was insufficient to prove the employer had the intent to injure to plaintiff. The Court rejected the use of an *objective test* – what a reasonable prudent employer would believe; and adopted a *subjective test* – what the employer actually believed. The Court affirmed the need to show that the employer has the specific intent to injure the plaintiff. Thus, even in situations where the employer puts an employee in harm's way resulting in a tragic accident, and the evidence shows that the accident may have been avoided had precautions been taken, that does not prove the employer deliberately intended to injure the plaintiff.

The recent common law interpreting the intentional torts obviously bodes well for employers in Ohio. It creates immunity in practice, because a plaintiff must prove actual specific intent to injure, which is very difficult standard to meet. Our employer clients can rest assured that if accidents occur on the job, even when the employer is at fault, the worker compensation system is in place to provide certainty and protection from excess liability. On the other hand, the fact that employers now have near immunity from intentional torts impacts our practice in asbestos litigation for clients who sold or supplied asbestos containing products to employers, in cases where the plaintiff also sues them for intentional tort, which is very common in asbestos litigation. With these recent statutes and case law, many employers can expect the claim to fail and be dismissed on summary judgment. Thus, one less party would be expected at trial to potentially share in a verdict in an asbestos case, even though employers are under a duty to protect their employees from harm under general welfare statutes in Ohio, state regulations and federal requirements under OSHA.

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Employer Intentional Tort Claims in Ohio…Con't

However, that is not the case in Cuyahoga County where most of Ohio's asbestos cases are tried. The judges have consistently allowed the plaintiff's employer to appear on the jury verdict form, regardless of whether an intentional tort claim is asserted or not. Due to recently enacted statutes that require juries to apportion shares of liability, the judges believe that the employer can be accountable for injuries it had a hand in, even when a defendant asserts employer liability under the *objective test.* Since the 1940s, under the general welfare statutes and regulations, an employer has a duty to warn and protect its employees from hazards that arise from exposure to asbestos that it knew or should have know existed in the plaintiff's workplace. Product liability defendants have successfully named employers on the jury verdict form in Cuyahoga County in an asbestos case. The plaintiffs' bar opposes the practice by asserting that the product liability defendant must prove the new elements of the intentional tort to name the employer on the verdict form. The judges in Cuyahoga County disagree. The judges believe that the compensation the plaintiff is already receiving from his workers compensation claim would amount to double dipping if the defendant at trial were not given the opportunity to prove the employer is at fault in comparison to the alleged harm committed by the sellers of asbestos products the plaintiff was exposed to at work. Also, the court believes that all shares of liability for all the actors that can be proven to have contributed to the plaintiff's injury should be considered in the jury's deliberations. This makes sense, because the employer still has the benefit of the workers compensation immunity and will be protected from excess liability. But the other parties in the lawsuit get a fair chance to prove who should share in the potential liability to the plaintiff under the apportionment statutes.

BSPH IN THE COMMUNITY

BSPH was a sponsor of the 2013 Fuchs Mizrachi School Golf Outing on June 10 at the Beechwood Country Club. Attorneys Jason A. Paskan, Brian F. Lange, and Claire C. Curtis, and law clerk Christopher F. Mars attended. The outing supported the ongoing mission of the Fuchs Mizarchi School to provide a quality Orthodox Jewish education to students from kindergarten through twelfth-grade.

In May, BSPH was awarded the 2013 "Rookie of the Year" by the Cleveland Foodbank based on a substantial increase in donations for 2012. Staff member Morgan E. McKenrick and Attorneys Michelle B. Block and Claire Curtis received the award on behalf of the firm at the Cleveland Foodbank Recognition Breakfast.

BSPH OFFERS COMPREHENSIVE SUPPORT FOR CLINICAL SERVICES IN LONG-TERM CARE AND NURSING FACILITIES

All long-term care and nursing facilities have operations and compliance concerns, and no one knows that fact better that Tammy R. Steele. In addition to superior trial preparation, Ms. Steele assists nursing facilities in maintaining effective and compliant clinical operations.

Education and Training. Ms. Steele is able to administer competencies or skills check lists in many areas of nursing, including medication administration audits, dining observation, day and night care by nursing staff, and skin assessments. Interdisciplinary teams can be trained to use system cues to analyze issues of concern. There is also training available in triaging patients' needs by identifying patient risk, determining priorities, and needs, evaluating actions required, and identifying staff responsibility and task completion.

Compliance. Ms. Steele is available to instruct facility staff on state and federal regulations impacting the Quality Indicator Survey (QIS) process. She can also assist hospitals, nursing homes, and other medical facilities in implementing nursing standards of practice that comply with state and federal regulations. Training is available on how to gather, organize, and analyze data to reflect the success of implemented changes to solve specific problems and monitor outcomes.

Mock surveys help facilities prepare for their annual survey date. A pre-mock survey also helps to provide time to make necessary changes. A facility's window for state compliance is nine to fifteen months from the last annual survey date. A pre-mock survey with Ms. Steele helps to identify the problem areas in a facility before the state conducts its survey. Additionally, a mock survey gives a facility time to correct issues identified in the pre-mock survey, and also provides additional guidance. Additionally, Ms. Steele can provide guidance to facilities in drafting a compliant Plan of Correction.

Risk Management. Staff can be educated to identify problem areas and trigger events in risk management, as well as be given the educational tools to correct the problem with implementation, monitoring, and re-evaluation. Ms. Steele is able to improve the interdisciplinary meeting process for risk identification and resolution at nursing facilities. Better meetings leads to improved identification of high-risk patients and a decrease in unplanned discharges. Ms. Steele will work with a nursing facility to develop an action plan for areas of concern.

PATRICK J. MURPHY TO RETIRE...Con't

Pat started his legal career in the 1970s with the Weston Hurd law firm. In the mid-1980s, Pat left Weston Hurd and joined the Jacobson Maynard law firm, where he focused his practice on defense of hospitals and physicians in medical malpractice lawsuits. When the Jacobson Maynard law firm disbanded in December 1997, Pat, in conjunction with the four other attorneys in the letterhead, started this firm.

At the time of its founding, there were eight attorneys and six administrative staff. Pat was the original managing director and was instrumental in organizing the new firm and moving the firm forward, both with the development of business, as well as the administrative operations of the firm. Pat handled numerous and complex medical malpractice and wrongful death lawsuits for most of the firm clients. Pat is one of the more respected defense attorneys in Northern Ohio. Pat was known for his even temperament, never becoming angry and never saying a bad word about anybody. He tended to confound some of the more aggressive plaintiffs' attorneys, as Pat would never respond other than in a calm manner to some of the shenanigans and unprofessional conduct of these attorneys. Pat enjoys an excellent reputation amongst all the judges and the firm's clients.

Pat advised that he is looking forward to expanding his mediation work, spending more time with his family – particularly his grandchildren, and having time to read, garden, and golf. He is also looking forward to finding some meaningful volunteer opportunities in his community.

It is with great sadness that the firm bids Pat farewell from his practice as a defense attorney, but we certainly expect that Pat will have great success as a mediator.

BSPH GIVES BACK TO SUPPORT CANCER RESEARCH AND TREATMENT

Attorneys Jeffrey W. Van Wagner, Bret C. Perry, Michelle B. Block, and Claire C. Curtis attended the 2013 Five Star Sensation on June 15, 2013. The annual dine-around charity event featuring celebrity chef Wolfgang Puck raises funds for University Hospitals Seidman Cancer Center. This year's event raised over two million dollars for clinical trials, patient education, community cancer screening, and other patient services.

JURY RETURNS VERDICT FOR NURSING HOME...Con't

component by the radiologist who interpreted the brain CT scans after the fall, the reason for the surgery was to drain the pre-existing bilateral chronic subdural hemorrhages and not to address any acute subdural hemorrhage, which did not happen from the fall. The subsequent complications experienced by the resident were a known complication of the burr hole surgery performed by the hospital's neurosurgeon. Therefore, the resident's ultimate death from those complications was not a result of the fall at the nursing home.

After a full day of deliberations, the jury returned a defense verdict – finding in answers to interrogatories that there was negligence but that the negligence did not cause any injury to the resident. The jury also unanimously found that the negligence did not cause the death of the resident.

WELCOME CLAIRE C. CURTIS

Bonezzi Switzer Polito & Hupp is pleased to announce that Claire C. Curtis, Esq. joined our firm on May 6, 2013, and is specializing in the areas of Nursing Home/Long-Term Care Defense, Professional Liability Defense and Insurance Coverage Litigation.

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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