

THE PERRY LAW FIRM

update

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Damages Update

Supreme Court Places Limits On Punitive Damages

The United States Supreme Court recently declared another punitive damages award excessive, and ruled that awards must be reasonable, and proportionate to the plaintiff's harm and to the compensatory damages. In State Farm v. Campbell, 123 S.Ct. 1513 (2003), the Court declared a \$145 million punitive damages award excessive when compared to \$1 million in compensatory damages. The Court instructed courts to carefully follow the guideposts established by BMW of North America, Inc. v. Gore, 116 S.Ct. 1589 (1996), to avoid violating the Due Process Clause of the Fourteenth Amendment, which prohibits arbitrary punishments.

State Farm represented Campbell as the defendant in a wrongful death and tort action and refused to settle the case. State Farm brought the case to trial against the advice of the company's advisors, and the jury returned a judgment of \$185,849 against Campbell. Although State Farm ultimately paid the entire judgment, the insurance company initially refused to pay excess damages of \$135,849.

In Campbell's suit against State Farm, evidence was admitted to show that State Farm was capping payouts on claims to meet fiscal goals. The jury awarded \$2.6 million in compensatory damages and \$145 million in punitive damages, but the trial court reduced the figures to \$1 million and \$25

million respectively. Applying the Gore guideposts to State Farm's nation-wide fraudulent scheme, the Utah Supreme Court reinstated the \$145 million in punitive damages. Granting certiorari, the Supreme Court expressed concern that punitive damages could arbitrarily deprive a litigant of property rights without due process. By directing courts to use the Gore guideposts, the Court emphasized the procedural and substantive due process limitations on the imposition of punitive damages.

The first guidepost measures the reprehensibility of a defendant's conduct and requires courts to consider whether the conduct caused physical or economic harm, whether the conduct was reckless, whether the target of such conduct was financially vulnerable, whether the actor was a recidivist and whether the harm was a result of intentional malice, trickery, or deceit. If only one factor is present or none of the factors are present, then a punitive damage award is suspect. The Court stipulated that out-of-state conduct was not punishable by state courts, and it was error for Utah courts to consider evidence of conduct that spanned twenty years and several states. The Court concluded that the conduct to be punished and the specific harm must have a nexus. Finally, the Court found that State Farm was punished for conduct unrelated to Campbell's harm.

The second guidepost requires a just disparity between the plaintiff's harm and punitive damages. Without capping

punitive damages, the Court stated, "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." As the Court instructed in Pacific Mut. Life Ins. Co. v. Haslip, 111 S.Ct. 1032 (1991), courts are to scrutinize punitive damages that are more than quadruple the compensatory award. Consequently, if ratios exceed those previously upheld, the conduct must be particularly egregious, but producing only a small amount of economic damage. Conversely, if economic damages are substantial, then the punitive damages must be almost equal to the compensatory damages. The Court found that \$1 million was substantial compensation for only one and a half years of emotional distress. Therefore, a ratio of 145-1 clearly violated due process.

The third guidepost compares the punitive damages awarded by the jury and the state's civil penalties for cases of similar conduct. Since out-of-state conduct is irrelevant, and not calculated into the amount of punitive damages to be awarded, the Court easily demonstrated how the \$145 million was extremely disproportionate to Utah's civil sanction of \$10,000 for fraud. Finally, the Court remanded the case to the Utah courts to calculate the punitive damages to be near or the same as the compensatory award.

Mark T. Perry, Esq.

summer 2003

Existence of Outside Influence Alone Can Warrant A New Medical Malpractice Trial Irrespective Of Its Influence On Jurors

After a defense verdict in Pratt v. St. Christopher's Hospital, 2003 WL 1919045 (Pa. Super. 2003), the court received a letter from one of the jurors indicating that some of her colleagues spoke with friends, relatives and their own medical professionals regarding their opinions on the ultimate issue of the case: whether the defendant physicians met the applicable standard of care and timely ordered and reviewed a CAT scan to rule out the minor-plaintiff's subdural empyema. Plaintiffs' counsel, upon learning of the juror's letter, requested an evidentiary hearing and filed motions for post-trial relief. The trial court denied the plaintiffs' request for an evidentiary hearing and post-trial motions, reasoning that none of the jurors would be competent to testify as to how this outside information impacted their opinion in accordance with the "No Impeachment Rule" (a juror may not testify as to how an outside influence

affected the deliberations). Plaintiffs filed an immediate appeal regarding, among other issues, whether the court abused its discretion in failing to assess the potentially prejudicial effect of the jurors' extraneous communications and whether the extraneous communications warranted a new trial.

The Superior Court held that the lower court erred and remanded the case for an evidentiary hearing to determine whether the jurors, in fact, received opinions from outside sources regarding the appropriate standard of care as opposed to the influence of the outside information. The evidentiary hearing would be in accordance to a recognized narrow exception to the "No Impeachment Rule" that permits a juror to testify as to the existence of an outside influence. In support of its decision, the Superior Court held that a juror's decision to go to an outside source in

a medical malpractice case would be prejudicial and that alone warranted a new trial.

In balancing the protections of the "No Impeachment Rule" with the plaintiffs' interests, the court instructed the lower court that if the evidentiary hearing revealed the existence of outside influence, the defense verdict would be vacated and a new trial granted, subject to the defendants' right to appeal. Conversely, if the trial court on remand found no truth to the allegations of outside influence, the plaintiffs' post-trial motions would be denied, with a right to an appeal. As such, it appears that evidence of the existence of an outside influence alone, irrespective of its affect, is enough to warrant a new trial in a medical malpractice case.

Joseph Kelly, Esq.

Institutional Liability

Hospital's Owe Third Parties A Duty Of Reasonable Care In Relation To Employment-Related Drug Testing

On April 28, 2003, the Pennsylvania Supreme Court held, for the first time, that hospitals owe third-parties a duty of reasonable care in the collection and handling of urine specimens for employment-related drug tests. In Sharpe v. St. Luke's Hospital, 36 MAP 2001, the plaintiff, Renee Sharpe, brought a negligence claim against St. Luke's Hospital in Lehigh County after her urine sample was misidentified and/or mishandled resulting in a false positive for cocaine. The false positive caused the termination of her employment with FedEx. The Lehigh County Court of Common Pleas and the Superior Court held that St. Luke's owed no duty to Sharpe (a third-party) when the test was performed as part of an employment drug testing agreement between St. Luke's and FedEx.

The supreme court rejected this reasoning and held that a "sufficient relationship" exists between a hospital and a third-party to impose a duty of

reasonable care in the collection and handling of a specimen despite the absence of a contract between the two parties. The court distinguished two prior cases where there was no duty to the third-party/employee (and therefore no negligence claim) in the context of a pre-employment physical (Tomko, 602 A.2d 892 (Pa. Super. 1992)(no physician-patient relationship) and (Ney, 723 A.2d 719 (Pa. Super 1999)(no legally enforceable duty based upon third-party standing)).

In distinguishing the prior case law, the Supreme Court wrote that there is social utility in accurate drug testing, and, conversely, "substantial harm deriving from inaccurate test results." This harm, termination of employment, is a foreseeable consequence of a breach of the duty of reasonable care. Moreover, the medical facilities are the parties in the best position to ensure the non-negligent collection and handling of the specimen in employee drug screening. Finally, there is a "substantial public interest" in ensuring that the medical

facilities performing the testing use reasonable care to avoid erroneous tests.

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A newsletter on insurance defense law in Pennsylvania
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THE PERRY LAW update is published as a service to insurance adjusters. The content of the articles should not be construed as legal advice. Please consult an attorney for an opinion on specific legal questions.

printed by Universal Printing Company
12 Olive Street • Scranton, PA 18508

Certificate Of Merit And Change of Venue Rules Make It Tougher To File Frivolous Medical Malpractice Claims

On December 16, 2002, the Pennsylvania Legislature enacted 42 Pa. C.S.A. § 5101.1, which changed Pennsylvania law relating to venue in medical professional liability actions. This statute provides that a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in the court in which the cause of action arose. In conjunction with the statute, the Pennsylvania Supreme Court amended Pennsylvania Rules of Civil Procedure 1006 and 2179, regarding venue and change of venue. An addition was made to Pa. R.Civ.P. 1006, which states:

(a.1) Except as otherwise provided by subdivision (c), a medical professional liability action may be brought against a health care provider for a medical professional liability claim only in a county in which the cause of action arose.

Pennsylvania Rule of Civil Procedure 2179, regarding venue over corporations and similar entities, was altered to specify that Rule 1006(a.1) governs venue in

actions against corporate entities for medical professional liability claims. In agreement with amended Rules 1006 and 2179, a medical professional liability action may be brought against corporate healthcare providers, for medical professional liability claims only in a county in which the cause of action arose.

In addition, amended Rule 1006(c)(2) requires that if an action to enforce joint and several liability against a healthcare provider and a non-healthcare provider includes a medical professional liability claim, the action be filed in the county where the cause of action arose. In this regard, amended Rule 1006(c)(2) provides that if an action to enforce a joint or joint and several liability against two or more defendants includes one or more medical professional claims, the action shall be brought in any county in which the venue may be laid against any defendant under subdivision (a.1). The amendments to Rules 1006 and 2179 were rendered effective to cover medical professional liability

actions filed on or after January 1, 2002 by an Amending Order of the supreme court.

The Pennsylvania Supreme Court has also stepped in and approved the new court rule regarding certificates of merit, which will make it more difficult for lawyers to file frivolous medical malpractice claims. The rule requires plaintiff's lawyers to file a "certificate of merit" from an expert physician within 60 days after filing a medical malpractice lawsuit. The expert must state that there is a reasonable probability that the care fell outside acceptable professional standards and that it contributed to the patient's harm. A certificate of merit also will be required from appropriate experts when malpractice cases are filed against other professionals in Pennsylvania. This requirement could reduce the number of malpractice lawsuits by 25 percent. The certificate of merit rule was enacted by a January 27, 2003 Order stating that the rule would apply to "actions commenced on or after the effective date of the Order."

John Hill, Esq.

Pre-Complaint Discovery Will Only Be Allowed Under Strict Circumstances

In the case of McNeil v. Jordan, 814 A.2d 234 (Pa. Super. 2002), the Pennsylvania Superior Court set forth a two-part test that must be satisfied by a party seeking pre-complaint discovery. Specifically, the court held that relevant pre-complaint discovery will be permitted only where: (1) the plaintiff has set forth a prima facie case; and, (2) the plaintiff cannot file a complaint otherwise. Factually, the Decedent's son filed an action against his sister and brother-in-law, alleging that they intentionally interfered with his testamentary expectation. Specifically, he alleged that their mother had reconciled with him prior to her death, that she intended to amend her will to treat all of her children equally, and that she was prevented by the actions of the defendants and the complexity of estate planning documents. The sister and brother-in-law moved for dismissal, which was granted, but the plaintiff was permitted to amend his complaint.

The Plaintiff then filed a motion for

pre-complaint discovery to permit him to properly amend the complaint, and the court denied the request. The Court held that the Plaintiff's original complaint alleged the mother's intention, but without sufficient factual basis (not even including facts alleged on information and belief), and pre-complaint discovery was improperly intended to determine the existence of facts giving rise to the complaint, rather than to fill in details to support facts already alleged. The son was left with his \$2,000,000 bequest, rather than an equal share of the McNeil Laboratories fortune. The State intermediate appellate court affirmed the trial court on both counts.

With this case, it is clear that a plaintiff cannot obtain pre-complaint discovery in order to establish a basic element of the cause of action. The court in McNeil stated that to permit liberal pre-complaint discovery would encourage disgruntled heirs to scrutinize a person's confidential estate planning documents, searching for a reason to sue where none exists.

Further, the court held that the purpose of pre-complaint discovery is to assist the plaintiff in obtaining particular facts, such as "the identity and whereabouts of witnesses," and that depositions may only "aid in the preparation of pleadings," not determine whether pleadings should be prepared in the first instance.

In addition to McNeil's two-prong test, which restrains plaintiffs seeking pre-complaint discovery, a plaintiff who asserts a professional liability claim such as medical malpractice is permitted to engage in only certain types of pre-complaint discovery. Before seeking any discovery other than production of documents and things or entry upon property for inspection and other purposes, a plaintiff must file a certificate of merit pursuant to Pa. RCiv. P. 1042.5. It is expected that the new rule coupled with the McNeil holding will inhibit plaintiffs from forcing defendants to participate in burdensome discovery based on meritless or frivolous claims.

William Aquilino, Esq.

Question

Will a defendant doctor be precluded for providing expert testimony at the time of trial if these opinions

Answer

were not disclosed during discovery?

No. The Pennsylvania Rules of Civil Procedure pertaining to discovery of expert witness opinions “acquired or developed in anticipation of litigation or for trial” are non-applicable to defendant physicians in medical malpractice cases. Katz v. St. Mary’s Hospital, 816 A.2d 1125 (Pa. Super. 2003).

In Katz, after a defense verdict was rendered, plaintiff’s counsel appealed the trial court’s holding permitting the defendant physician to provide expert witness testimony at the time of trial in that the defendant had not identified himself as such during discovery in accordance with Pa R.C.P. 4003.5. In upholding the superior court’s decision in Neal by Neal v. Lu 530 A.2d 103 (Pa. Super.1987), the court reiterated that doctors do not “acquire or develop” their medical opinions of a patients’ condition in preparation for trial and that their medical opinions and knowledge are acquired long before lawsuits are commenced. As such, those opinions fall outside of the scope

of the rules of civil procedure.

The court then, in a footnote, explained that plaintiff’s attorneys were free to explore the defendant doctors’ opinions by way of written interrogatories or deposition, as these are readily available measures that would have precluded any prejudice in not knowing the defendant doctors’ opinions prior to trial. As such, despite the ruling in Katz, plaintiff’s lawyers are still permitted to question defendant physicians regarding their opinions on their care during discovery.

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