

LEGAL ALERT

February 2003

MEDICAL MALPRACTICE UPDATE

Edited by: Douglas G. Powe, Robert W. Tubbs and Jo Beth Earl

RECENT MEDICAL MALPRACTICE SUCCESSES AND NEWS:

- **John Kruis** obtained a defense verdict for LakeView Community Hospital in a one week medical malpractice trial in February 2003. The plaintiff alleged that the co-defendant emergency department physician failed to diagnose meningococemia in a seven month old, and alleged that LakeView was vicariously liable for the physician's actions. Meningococemia is a serious, quickly developing, bacterial infection which often results in death. As a result of the disease, the child underwent several surgeries, and sustained tissue loss to some of his fingers and toes. With excellent expert support from a number of emergency physicians and a pediatric infectious disease expert, the defense established that the child did not have any of the signs and symptoms of meningococemia when he presented to the hospital, and that even if antibiotic therapy had been started during that presentation, the child would still have sustained residual tissue damage due to the nature of the infection. The jury was out for less than one hour.
- In January, 2003, **Bill Jewell, Kevin Lesperance** and **Cindy Boer** obtained summary disposition for a hospital client on the issue of damages in the Kent County Circuit Court. Plaintiff, a stroke patient, alleged that the defendants failed to treat his stroke with the so-called "clot busting" drug t-PA, and as a consequence, he became severely disabled. The plaintiff's expert testified that the plaintiff had a greater than 50% chance of "some improvement" with t-PA. The hospital argued that plaintiff could only speculate what the damages would be, and the trial judge agreed. The court found that there was no basis for a reasoned assessment of damages by the jury, and summary disposition followed.
- In February, 2003, **Bill Jewell, Kevin Lesperance,** and **Brian Molde** obtained summary disposition for a hospital in Oceana County Circuit Court. Plaintiff conceded the issue of vicarious liability for the treating physician after the motion was filed based on a preexisting relationship. Regarding plaintiff's remaining claims against the hospital's obstetrical nurses, the court held that each of plaintiff's experts failed to support a finding in his favor on the element of causation, and granted summary disposition.
- **Kevin Lesperance** has been appointed to the MSHRM Education Committee, and **Jo Beth Earl** has been appointed to the MSHRM Governmental Affairs Committee.

PLEASE WELCOME

The Medical Malpractice Law Department at Smith Haughey Rice & Roegge is pleased to announce that the following individuals have joined our Section:

- **Ms. Cindy C. Boer**, Attorney, Grand Rapids office, 616.458.1331, cboer@shrr.com
- **Ms. Jennifer Skriba**, Legal Assistant, Grand Rapids office, 616.458.9291, jskriba@shrr.com

Cindy C. Boer recently joined Smith, Haughey as a medical malpractice associate. Cindy comes to us from Denver, Colorado, where she practiced for five years in the areas of medical malpractice and products liability defense, specializing in drug and medical device claims. Cindy received her undergraduate degree from Calvin College in Grand Rapids, Michigan. She graduated *summa cum laude* from Thomas M. Cooley Law School, where she was an editor for the law review and an intern for federal judge David McKeague. Cindy and her husband, Charlie, live in Sparta, Michigan with their two children, Jake and Trevor.

Jennifer Skriba recently joined the Grand Rapids office as a medical malpractice paralegal. She obtained her associates degree in Legal Assistance in 1997, and has worked in medical malpractice defense for the last five years on behalf of both hospitals and physicians. Jennifer has also worked in the Michigan House of Representatives and the Michigan Department of Management and Budget, Director's office. She has been a member of the State Bar Legal Assistant's Section since 1999.

Out and About

Members of the medical malpractice and health law departments at SHRR frequently present seminars and teaching sessions for clients and other health care organizations. Here's where you can find us this quarter:

- **Veronica Marsich** is presenting a program entitled "The Final Form of HIPAA's Standards" to the MSHRM Winter 2003 Meeting, which will be held on March 11, 2003 in Lansing, Michigan.
- **Bill Jack** is teaching a course on Advanced Trial Advocacy for The National Institute of Trial Advocacy in Tempe, Arizona from March 30 through April 3, 2003.
- **Richard Kraus** is making a presentation at the Michigan Professional Insurance Exchange's Spring meeting from 6:00 to 8:30 p.m. on April 24, 2003 at Duba's Restaurant, Grand Rapids. The program is entitled "State of Michigan Licensing Investigations and Disciplinary Actions".
- **Bill Jewell** is teaching a course entitled "Health Law and Ethics" for the Master of Public Administration program at Grand Valley State University during the winter semester. This is Bill's fifth year teaching the course.
- **Jim Chadd**, an emergency medicine resident at the Kalamazoo Center for Medical Studies, will be doing a medico-legal rotation at Smith Haughey's Grand Rapids office in March, 2003.
- **Bill Jewell** is doing a presentation for regional nurses regarding EMTALA. It will take place at noon on March 13, 2002 at Holland Community Hospital.

Prior engagements include the following:

- **Jack O'Loughlin** presented a closed case review to the general surgery residents and teaching staff of Spectrum Hospital and St. Mary's Hospital on February 19, 2003 in conjunction with the Michigan Professional Insurance Exchange.

If you are interested in having one of SHRR's Medical Malpractice or Health Law Department attorneys present at your organization, please contact Wendy Passineau, Client Services Director, for a list of topics and to locate a speaker.

2003 MEDICAL MALPRACTICE ADJUSTED DAMAGE CAPS

The Michigan Department of Treasury issued its annual adjustment for the noneconomic damage caps. For causes of action arising after September 30, 1993, the new caps are:

- Lower Cap: \$359,000 [up from \$349,700]
- Higher Cap: \$641,000 [up from \$624,500]

For causes of action arising before October 1, 1993:

- Single Cap: \$376,900 [up from 367,400]

A NEW WRINKLE IN THE MICHIGAN PEER REVIEW STATUTE: CENTENNIAL HEALTHCARE MANAGEMENT CORP. V. MICH. DEPT. OF CONSUMER INDUSTRY SERVICES, KATHLEEN M. WILBUR, SAHRELEEN BOWER, ET AL.,

The Court of Appeals recently issued their opinion in the case of Centennial v. Mich. Dept. of Consumer Industry, et al. The Court was asked to determine several issues, including whether a Michigan nursing home was required to produce incident and accident reports (“I & A reports”) to the Michigan Department of Consumer Industry Services (“MDCIS”) as part of its annual survey of the facility. MDCIS argued that they were entitled to the documents pursuant to state administrative rules and federal statutes which require a nursing facility to keep and make available I & A reports containing basic factual information about incidents and accidents. In contrast, the nursing home argued that the documents were protected under MCL 333.20175(8), the Michigan peer review statute, and argued that the state regulations were unenforceable because they directly conflicted with the peer review statute. The Court of Appeals affirmed the trial court’s decision requiring production of the I & A reports, even though the documents had been submitted to a peer review committee. In reaching this ruling, however, the Court noted that while the administrative rules and federal statutes require a nursing home to prepare I & A reports, they do NOT require it to report on the peer review committee’s internal deliberative process to MDCIS. In addition, this case does not address whether a plaintiff’s attorney will be able to obtain I & A reports in a civil action.

We believe that surveyors for the MDCIS and Medicare will use the case as justification in attempting to force medical facilities to produce I & A reports. The case leaves open the possibility of protecting much of the information obtained in the peer review process, although doing so may require modifying institutional forms used to satisfy the federal statutes and state regulations. For a more detailed summary of the case, the full text of the case, or to discuss its ramifications on the peer review process, please feel free to contact a member of the SHRR Medical Malpractice or Health Law Departments.

SHINHOLSTER V. ANNAPOLIS HOSPITAL: THE COURT OF APPEALS (FINALLY) EXAMINES DAMAGE CAPS IN A WRONGFUL DEATH ACTION....BUT DID THEY GET IT RIGHT??

In this multi-faceted opinion involving three separate hospital presentations, the Court of Appeals affirmed a jury verdict entered for plaintiff. In Estate of Shinholster v. Annapolis Hospital, 2003 WL 348944 (___ Mich.App. ___ (2003)), the defendants claimed that the plaintiff’s decedent contributed to a massive stroke by failing to take her blood pressure medication for more than a year prior to her first hospital presentation, but they were prevented from introducing this evidence at trial. They were, however, permitted to admit evidence that plaintiff’s decedent failed to take her medication as prescribed after her first hospital presentation to defendants. The Court of Appeals affirmed the trial court’s ruling limiting the evidence, noting that “most jurisdictions that have considered the issue have followed the rule that in a medical malpractice case, the defendant may not argue that the plaintiff was comparatively negligent by creating the condition that caused him to seek treatment.” The Court ultimately adopted the majority rule in foreign jurisdictions that “those patients who may have negligently injured themselves are nevertheless entitled to

subsequent non-negligent medical treatment and to an undiminished recovery if such subsequent non-negligent treatment is not afforded.” In this case, because plaintiff’s failure to take her blood pressure medication was relevant only to the extent it interfered with defendants’ attempts to render non-negligent treatment, only her actions which interfered with defendants’ treatment were relevant to the comparative fault analysis.

The Court then addressed defendants’ argument that the trial court erred in applying the higher damage cap for non-economic damages. Defendants asserted that because the damage cap statute was written in the present tense, and because the plaintiff’s decedent died before the trial started, plaintiff could not satisfy the statutory requirements for the higher cap. The Court of Appeals disagreed with defendants’ argument, holding that “the point of reference for determining whether the injured person fits within [the requirements of the statute] is *any time after and as a result of* the negligent action”. [Emphasis in original]. Therefore, because plaintiff’s decedent had been hemiplegic while she was comatose after the negligence occurred but before her death, she fit the requirements of the statute and the higher cap applied. Significantly, the Court stated in a footnote that it believed “an argument could potentially be made that in a lawsuit involving death brought under the wrongful death statute, the damage caps . . . do not apply at all.” However, this issue was not decided in the opinion.

The Court also rejected defendant’s argument that Medicaid benefits were subject to setoff under the collateral source rule, finding that the fact that Medicaid is part of the Social Security Act does not make it a collateral source, especially where Medicare, which is also included in the Social Security Act, is included in the definition of collateral source in the statute.

ZDROJEWSKI V. MURPHY; **A DISCUSSION OF POTENTIAL PITFALLS FOR DEFENDANTS**

The Michigan Court of Appeals recently affirmed the judgment of the trial court in a decision which could have far-reaching effects on medical malpractice law in Michigan. The plaintiff was referred to Defendant Dr. Murphy for treatment of a cancerous thyroid tumor. Dr. Murphy, with the assistance of other physicians who were not named as defendants, removed the tumor and the laryngeal nerve (which was encased by the tumor) at defendant Beaumont Hospital. Dr. Murphy’s dictated report referenced removal of the nerve, but his written note did not. After discharge, the plaintiff had difficulty breathing, swallowing and eating, and was admitted to another hospital with aspiration pneumonia. She then learned that her laryngeal nerve had been removed during the first operation. Plaintiff alleged that Dr. Murphy and the hospital, through its agents, were negligent. Trial was held and a judgment was entered in plaintiff’s favor.

On appeal, defendants claimed that the trial court erred in denying their motion for directed verdict on plaintiff’s claim that Dr. Murphy was negligent for failing to timely dictate his operative note. While the Court agreed that internal policies of an institution, including a hospital, cannot be used to establish a legal duty, it held that external rules promulgated pursuant to law must be viewed differently. The Court noted that defendants failed to cite any authority that the rules of an external regulatory agency such as JCAHO could not be used to establish defendant’s duty to plaintiff. While the Court of Appeals held that the trial court erred in denying defendants’ motion for directed verdict because the plaintiff failed to show she was injured by the delay in dictating the note, it refused to reverse the verdict, finding that there was no evidence that the verdict was inconsistent with substantial justice for defendants. The Court noted that the jury returned a general verdict finding that defendants were negligent and that plaintiff’s injuries were caused by this negligence, but the verdict was not detailed enough to determine whether it was based on the delayed dictation theory or one of plaintiff’s other theories. As such, the Court could not say that defendants were denied substantial justice, and refused to reverse the denial of defendant’s motion for directed verdict. It is anticipated that this portion of the ruling may open the floodgates for plaintiff’s claims alleging non-compliance with JCAHO rules.

The hospital also claimed that the trial court erred in denying their motion for summary disposition on vicarious liability because Dr. Murphy was not an ostensible agent of the hospital. The hospital argued that plaintiff had been referred to Dr. Murphy by another physician, and plaintiff did not establish that the hospital committed an act or omission causing her to reasonably believe he was the hospital's agent. The Court held that the trial court erred in denying summary disposition regarding the hospital's vicarious liability for Dr. Murphy. There was evidence, however, to support such a claim as to the other physicians participating in plaintiff's care, and there were issues of fact as to which one of these physicians caused plaintiff's injury. As such, the trial court did not err in denying the hospital's motion for summary disposition on this issue. Further, the defendants did not object to a jury instruction stating that the physicians who participated in plaintiff's care were the hospital's agents. By failing to object, the hospital effectively waived its claim of error arising out of the denial of its summary disposition motion.

CASE LAW UPDATE

Affidavit of Merit

Watts v Canady, M.D., et. al.,
____ *Mich App* ____ (2002)

An affidavit of merit signed by a physician is sufficient if counsel reasonably, albeit mistakenly, believed that the physician was qualified under MCL 600.2169. In this case, the Court of Appeals held that the attorney's belief that the expert was qualified was reasonable. The physician was not a board-certified pediatric neurosurgeon, but was instead a board-certified neurosurgeon. However, the physician had executed an affidavit stating that she spent more than 50 percent of her professional time in the clinical teaching of neurosurgery. The Court did not address whether the physician was qualified to testify as to the standard of care for a pediatric neurosurgeon.

Wineland v Adam, M.D., Mich. Ct. App.,
January 31, 2003 (unpublished).

Plaintiff's complaint was properly dismissed because it was accompanied by an unsworn affidavit of merit. The unsworn affidavit did not comply with MCL 600.2912d and plaintiff's efforts to correct the deficiency by filing a notarized affidavit after the period of limitation had expired were ineffective.

Young v Sellers, D.O.,
____ *Mich App* ____ (2002).

Although clearly displeased with the result, the Court of Appeals followed the holdings in *Scarsella v Pollack*, 461 Mich 547 (2000) and *Holmes v Michigan Capital Medical Center*, 242 Mich App 703 (2000), and held that plaintiff's claim was barred because the affidavit of merit was not filed prior to

the running of the statute of limitations. The complaint was timely filed and the affidavit of merit was executed prior to the running of the statute of limitations, but due to a clerical error, the affidavit was not filed with the complaint. By the time the mistake was realized, the statute of limitations had run. The Court held that filing the complaint without the affidavit does not toll the statute of limitations, but invited the Michigan Supreme Court to revisit and distinguish *Scarsella* so that "clearly inadvertent errors no longer have such a harsh result."

Informed Consent/Evidence of Prior Lawsuits/Credentialing

Stage v Mt. Clemens General Hospital, et. al., Mich. Ct. App., November 26, 2002 (unpublished).

The Court of Appeals affirmed a no cause against the defendant hospital, holding that it is the physician's duty to inform the patient of the risks associated with treatment, not the hospital or its personnel. The Court also held that the trial court did not abuse its discretion in allowing plaintiffs to present evidence of prior lawsuits against defendants, while prohibiting introduction of the actual complaints in those cases. The Court also affirmed the trial court's ruling that the hospital's credentialing file on the defendant physician was not discoverable under the peer review privilege, and that defendant did not waive the privilege by testifying generally about the physician's reappointment application while refusing to comment on, or produce, documents in the credentialing file.

Joint & Several Liability/Setoff

Markley v Oak Health Care Investors of Coldwater, Inc., et.al., ___Mich App___ (2003).

Defendants appealed from a judgment entered in favor of plaintiff after a jury trial, contending that the judgment should have been reduced to reflect plaintiff's earlier settlement with a non-party in a separate action. The Court of Appeals agreed, and held that in a medical malpractice action where the plaintiff is without fault, the liability of each defendant is joint and several. As a result, defendants were entitled to a setoff of the earlier settlement amount. However, the Court held that because defendants did not request a verdict form distinguishing past and future damages, they could not later claim error when prejudgment interest was allowed for the entire amount of the verdict. In this case, however, prejudgment interest should have been based on the amount of the judgment after setoff.

Lost Opportunity

Magnotta v Bon Secours Hospital, et. al., Mich. Ct. App., December 17, 2002 (unpublished).

Plaintiff claims that as a result of defendants' failure to administer proper antibiotics, she lost a greater than 50 percent chance to save her prosthetic knee. MCL 600.2912a(2) provides in part that, "[i]n an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%." Plaintiff's surgeon's affidavit stated that, more likely than not, any type of antibiotic therapy would have failed and the result would have been the same. Plaintiff's expert testified upon deposition that the likelihood of successfully treating plaintiff's infection without removal of the knee was about 20%. Because plaintiff presented no evidence that she would have had greater than a 50% opportunity to achieve a better result if proper antibiotics had been administered, there was no genuine issue of material fact and summary disposition was appropriately granted.

Notice of Intent/Statute of Limitation

Fournier v Mercy Community Health Care System-Port Huron, et. al., ___Mich App___ (2002).

Where plaintiff sent notices of intent to all defendants via overnight mail to the last known address of an ultimately unnamed physician, rather than to each individual defendant, plaintiff did not comply with the notice requirements of MCL 600.2912b(2) and the statute of limitations was not tolled. As such, plaintiff's complaint was filed after the statute ran, and therefore should have been dismissed by the trial court. It is immaterial that plaintiff may have acted in good faith or that the defendants could not show prejudice or delay.

Agency

VanStelle v Macaskill, et. al., ___Mich App___, (2003).

In this fact intensive case, an emergency physician at Bon Secours Hospital referred the plaintiff patient to Dr. Tha "Thomas" U. Prior to scheduling an appointment, the plaintiff's spouse called the referral center at St. John Hospital to verify that Dr. U was a "St. John doctor". She was told that Dr. U was "absolutely" "at St. John." The appointment with Dr. U occurred at his office located in the Riverview Medical Offices, which was owned by defendant Detroit Riverview Hospital. Summary disposition was appropriate as to defendant Riverview Hospital because plaintiffs did not look to Riverview for a treating physician and the site of the alleged malpractice was simply leased from the hospital to the physician's employer. Furthermore, the hospital made no representations that would reasonably create in plaintiffs' minds that Dr. U was acting on behalf of Riverview Hospital. With respect to St. John Hospital, the referral service simply informed plaintiffs that Dr. U worked out of St. John Hospital. The initial referral was not made by St. John but rather by a physician at Bon Secours. In this case plaintiff looked to Dr. U for treatment and the call to the referral service was aimed only at determining the doctor's qualifications.

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