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INSURANCE BROKER LIABILITY

No Breach of Fiduciary Duty Where the Plaintiff Alleged That the Defendant Insurance Agency Procured an Inadequate Policy

*SEVEN BRIDGES FOUND v. WILSON
AGENCY*

(Conn. Super., September 12, 2013)

The defendant insurance agency and agent in this case served as the plaintiff's agent for many years. In conformance with the plaintiff's business, it entered into a contract to construct a new building. Around the time that it entered into the contract, the plaintiff approached the defendant to obtain builder's risk insurance policy as required under the contract. The plaintiff explained the nature of the construction contract to the defendant and purportedly relied on the defendant to obtain the appropriate insurance to cover the risks associated with the construction of the premises and the obligations of the contract.

The defendant procured a \$6.5 million builder's risk policy and an applicable builder's risk principal known as coinsurance on behalf of the plaintiff. The principal of coinsurance states that when a building is insured for less than its full value, and is damaged by risk covered by the policy, the insurance company is only responsible for the portion of the loss which bears the same relationship as the full value of the building bears to the policy limits. At the time the policy was procured, the plaintiff was unaware of the existence and these implications of coinsurance.

After the majority of the construction contract was completed, the plaintiff asked the defendant to reduce its coverage. Following the reduction in coverage, the building suffered severe fire damage, requiring \$5.2 million in repairs. As a result of the reduction in insurance coverage, and the application of the coinsurance principle,

the insurer only paid \$2.1 million to the plaintiff for the loss. As a result, the plaintiff had to bear the remaining \$3.1 million.

After learning that it was not completely covered for the entire loss, the plaintiff brought suit against the defendant alleging breach of fiduciary duty. The plaintiff claimed that had it been advised of the risks associated with lowering the level of insurance coverage, and the concept of coinsurance, it would not have reduced its level of insurance coverage and would not have suffered the loss. The plaintiff alleged that the defendant had a fiduciary duty to provide sound advice, appropriate insurance recommendations, and policies satisfying the plaintiff's insurance needs.

The plaintiff also alleged that the defendant was dishonest and disloyal in procuring the new lower priced policy without fully disclosing the limitations. It also claimed that the defendant failed to fully disclose the limitations in coverage in an attempt to curry favor and enhance its reputation with the plaintiff, so as to further secure business opportunities by giving the plaintiff the false impression that it had lowered its insurance premiums.

The defendant moved to strike the plaintiff's claims on the grounds that it failed to set forth a breach of fiduciary duty claim and instead only set forth a claim sounding in negligence. The plaintiff objected, arguing that its allegations that the defendants acted dishonestly in an effort to curry favor with it were sufficient to set forth a cause of action for breach of fiduciary duty. The court rejected the plaintiff's argument and agreed with the defendant.

The court first noted that not every claim of professional negligence will give rise to a breach of fiduciary duty and that a plaintiff must allege something beyond negligent conduct, such as dishonesty or fraud. Thus, according to the court, mere allegations that a defendant insurance agent failed to

procure an adequate insurance policy or advise a client that he or she has adequate coverage would not arise to breach of fiduciary duty claims. The court noted that while the allegations may have sufficiently set forth conduct amounting to professional negligence, the claims did not allege a breach of fiduciary duty — the essence of the plaintiff's claims were that the defendant failed to procure adequate insurance and adequately advise as to coverage.

The court went on to state that the plaintiff must do more than just plead the words "dishonest" and "disloyal" to state a claim for breach of fiduciary duty. Rather, a plaintiff must plead facts demonstrating fraud and dishonesty. The court found that when it looked past the verbiage included in the plaintiff's complaint to the factual *gravamen* of their claims, all the plaintiff had set forth was a failure on the part of the defendant to explain the concept of coinsurance, and it would be illogical to view these facts as implicating the morality of the defendant's conduct. Thus, the court found that no breach of fiduciary duty claim was set forth.

Impact: This case solidifies the well-established principle in Connecticut law that mere allegations of a failure to procure adequate insurance or advise of insurance coverage will not give rise to a breach of fiduciary duty claim. Additionally, it makes clear that the court will look past the mere verbiage of a complaint and look to see whether the essence of claim sounds in negligence or sets forth something more. Further, this case makes clear that mere allegations that an agent procured inadequate insurance to enhance its reputation by providing a superior rate will not support a claim of a breach of fiduciary duty.

MEDICAL MALPRACTICE

Disclosure of Medical Records From Patients Other Than the Plaintiff Denied by Court

LYKES V. YATES

(Pa. Super., September 25, 2013)

In this medical malpractice matter, the plaintiff alleged Dr. James Yates, a plastic surgeon, improperly instructed her to use Gold Bond powder for post-surgical wound care after breast reduction surgery. The plaintiff claimed using this powder caused the wounds to heal improperly, resulting in additional treatment and therapy. Prior to trial, the plaintiff filed discovery motions to compel the production of records for Dr. Yates' prior patients who used this powder after surgery. The motion was denied by the trial court.

On appeal, the court noted that HIPAA permits a healthcare provider to disclose medical information if served with either a court order or formal discovery request accompanied by certain required assurances that privacy will be protected. However, courts must conduct a balancing test to determine if disclosure may cause potential harm to the patient. The plaintiff argued she could not adequately conduct cross-examination without access to these records. The appellate court disagreed.

The appellate court found the plaintiff could have established the defendant deviated from the standard of care through expert testimony. The credibility and weight given to these experts was for the jury to decide. Moreover, there was no compelling state interest at stake to justify revealing privileged patient information.

Impact: This case demonstrates that HIPAA requirements are strictly adhered to by the courts and that evidence of pattern and practice — while admissible in most contexts — is difficult to establish in medical malpractice claims absent an expert witness.

Improper Reference to Smoking History in Medical Malpractice Case Leads to New Trial

SUTCH V. ROXBOROUGH MEM'L HOSPITAL

(Ct. Comm. Plea Pa., May 28, 2013)

In a medical malpractice case, the plaintiff-decedent had a chest X-ray at defendant Roxborough Memorial Hospital which revealed a suspicious nodule. However, the results of the study were not conveyed to the decedent at that time. Twenty months later it was discovered she had an eight centimeter malignant nodule in her left lung that metastasized to other areas of her body. She was subsequently diagnosed with stage IV lung cancer and died six months later. Her estate brought forth a claim against the hospital, among other defendants.

Prior to jury selection the trial court entered an order by agreement granting the plaintiff's motion *in limine* to preclude the defendants from mentioning the decedent's smoking history. Eight days into the trial one of the defendants called his "emergency medicine" expert as a witness. On direct examination he was asked whether the decedent had any cardiac risk factors, to which the expert responded by stating the plaintiff was a smoker. After the jury was excused, the trial judge asked the expert whether he was aware of the preclusion order. The expert responded that he could not recall. The plaintiff's counsel then moved for a mistrial, which was denied. Instead, a decision was made to issue a curative instruction to the jury advising that they may not consider the decedent's smoking history in their deliberations. The jury awarded \$190,000 in damages.

The plaintiff filed post-trial motions for a new trial, which were granted. The defendants appealed, and the appellate court found that reference to the decedent's smoking history was irrelevant and highly prejudicial. Furthermore, the court found there was

no curative instruction that could have offset the prejudice caused by the smoking reference. Hence, a new trial was ordered.

Impact: When a trial court enters an order precluding a defendant from referencing a plaintiff's prior medical condition in a medical malpractice matter, an expert's reference to that condition on direct examination can warrant a new trial. This case shows the importance of witness preparation.

Expert Gastroenterologist Should Have Been Permitted to Testify as to Causation

WARD V. RAMSEY

(Conn. App. Court, October 29, 2013)

The defendant, a gastroenterologist, treated the plaintiff's decedent for dysphagia by inserting a feeding tube that perforated the decedent's bowel. The plaintiff alleged that the defendant failed to monitor the decedent following the procedure and thus failed to recognize that the decedent was exhibiting signs and symptoms of a perforated bowel. The plaintiff also alleged that because of the defendant's failure to monitor the decedent postoperatively, and his failure to recognize the complications arising from the insertion of the feeding tube, the defendant failed to obtain a timely surgical consultation and thereby caused delay in further treatment. As a result, the plaintiff asserted, the decedent developed sepsis, suffered multi-organ failure, and died.

The plaintiff disclosed an expert gastroenterologist to testify as to the standard of care and causation. At the expert's deposition, he testified that if the defendant had examined the decedent within a few hours after the procedure, he would have realized that the decedent's bowel had been perforated, which would have allowed the decedent to have been treated and avoid peritonitis, multi-organ failure, sepsis, and death.

The defendant filed a motion to partially preclude the testimony of the expert. The

defendant argued that the expert, who was not a surgeon, was not qualified to testify as to causation because only a surgeon could competently testify as to the decedent's likely surgical outcome. The trial court agreed, and granted the motion to preclude. The defendant subsequently moved for summary judgment, arguing that the plaintiff could not make out a *prima facie* case because he did not have an expert to testify as to causation. The trial court agreed and granted the defendant's motion for summary judgment.

The plaintiff appealed, arguing that the trial court improperly precluded the expert's testimony as to causation. The plaintiff argued that the expert was qualified to render an opinion regarding the necessity to close a hole that has been created by the gastroenterologist, and that without closing the perforation, the toxins and bacteria would continue to seep in to the abdominal cavity and infect the decedent's systems. As a board-certified gastroenterologist, the plaintiff argued that the expert was familiar with the prognosis of patients who have a perforated bowel diagnosed and repaired in a timely fashion, as opposed to patients whose diagnosis and repair is delayed.

The appellate court agreed, and reversed the decision of the trial court. The appellate court disagreed with the trial court's determination that this was a "surgical outcome case" which required a surgical expert's testimony as to causation. The court noted that although the legislature has set forth specific requirements for an expert who is offered to testify as to the standard of care, it has not done so with regard to causation testimony. The court noted that on the basis of the expert's knowledge and experience as a board-certified gastroenterologist, the expert opined within a reasonable degree of medical probability that the defendant's negligence in failing to monitor the decedent adequately and to obtain a timely surgical consult resulted in a delay that ultimately led to the decedent's

death. Thus, the trial court abused its discretion by precluding the expert from testifying on the issue of causation on the ground that he was not a surgeon.

Instead of treating the lack of that credential as dispositive, the trial court should have examined the full range of the expert's professional familiarity with the cause of, proper treatment for, and likely prognosis of patients timely diagnosed with perforated bowels to determine if he was competent to offer expert testimony, and that the defendant's failure to monitor the decedent proximately caused his sepsis and resulting death. Had the trial court done so, it should have denied the defendant's motion to preclude and, accordingly, the subsequent motion for summary judgment.

Impact: This case illustrates that because there are no statutes that govern the requirements as to an expert's testimony as to causation in medical malpractice cases, counsel and trial courts should analyze the expert's professional familiarity with the cause of the alleged injuries, proper treatment, and prognosis to determine whether the expert is qualified to opine regarding causation.

Dispute Over Date of Discovery of Actionable Harm Prevents Defendants From Obtaining Summary Judgment

MICHAUD V. HAUSER

(Conn. Super., September 5, 2013)

After complaining of chest pain and fatigue, the plaintiff was referred to the defendant, a cardiologist. Between November 20, 2006, and January 31, 2007, the defendant and others in his group performed various tests and studies on the plaintiff. On February 25, 2007, the plaintiff suffered an acute anteroseptal myocardial infarction caused by the total occlusion of the proximal left anterior descending artery. As a result, the plaintiff required an emergency cardiac catheterization and coronary artery stent.

The plaintiff filed suit against the defendant and his group on July 27, 2009. The defendant moved for summary judgment, claiming that the action was barred by the applicable statute of limitations as set forth in Conn. Gen. Stat. § 52-584, and arguing that the statute of limitations began to run on February 25, 2007, the date of the plaintiff's heart attack. The plaintiff argued that the determination of the date of actionable harm was fact-specific and, thus, a question for the jury. He claimed that the statute of limitations began to run on May 3, 2007, the date on which a physician's assistant told him that his heart attack likely would have been prevented by certain diagnostic procedures and treatment options, i.e., the date the plaintiff claimed he discovered an actionable harm.

The court stated that when applying § 52-584 to determine whether an action was timely commenced the court has held that an injury occurs when a party suffers some form of actionable harm. This occurs when the plaintiff discovers that he or she has been injured and that the defendant's conduct caused such injury. The focus is on the plaintiff's knowledge of facts, rather than on discovery of applicable legal theories.

In the present case, although it was undisputed that the plaintiff suffered a heart attack on February 24, 2007, the statute of limitations did not begin to run until there was no issue of fact that he discovered a causal relationship between his heart attack and the defendant's alleged malpractice. The issue, therefore, is whether the plaintiff, in the exercise of reasonable care, should have discovered the actionable harm on the date of his heart attack.

The defendant argued that a reasonable person should have known the defendant committed malpractice after suffering a heart attack because the plaintiff had previously complained of chest pains and fatigue. The plaintiff argued that suffering a heart attack did not automatically place him on notice that malpractice had occurred.

In siding with the plaintiff, the court noted that the defendant did not present any evidence that suffering a heart attack should automatically place the plaintiff on notice that malpractice had occurred. The court concluded that an issue of material fact existed as to when the date of actionable harm occurred and denied the defendant's motion for summary judgment.

Impact: This case reminds practitioners that a statute of limitations defense in a medical malpractice case is not always clear-cut, and a summary judgment motion may not always determine the issue. If there is a dispute as to when "actionable harm" occurred, such decision will be left to the trier of fact to determine.

LEGAL MALPRACTICE

A Defendant's Counterclaim Alleging Legal Malpractice Is Not Justiciable When the Plaintiff Cannot Prove a Legal Injury

BECK & BECK, LLC v. COSTELLO
(Conn. Super., September 27, 2013)

The plaintiff brought suit for payment of an alleged outstanding balance of \$1,980 for legal services. The defendant filed four counterclaims alleging breach of contract, breach of covenant of good faith, professional malpractice, and violation of the Connecticut Unfair Trade Practices Act.

The action underlying this fee collection case was an application by the defendant for appointment of a receiver for a condominium association. The plaintiff filed a motion on behalf of the defendant in that litigation, which the court denied. Thereafter, the defendant terminated the legal services of the plaintiff and filed a *pro se* appearance. The defendant filed three motions in that action which were scheduled for a hearing and the case remained pending with no activity for over one year, at which time the court dismissed the action for failure to prosecute.

The court stated that with respect to the defendant's counterclaims, the defendant failed to submit any facts that would support a finding that the plaintiff attorneys' actions resulted in the dismissal of the underlying action. The court further stated that even upon dismissal of his case, the defendant was not without remedy, as Connecticut law provides a statutory remedy to reinstate a dismissal under the savings statute. The trial court informed the defendant that he could bring another action, but could not claim that he was harmed by the court's decision to dismiss the action. Rather than follow the court's suggestions, however, the defendant maintained his assertion against his former attorneys and claimed the attorney's actions excused him from having to pay according to the terms of the retainer agreement.

The plaintiff filed a motion to dismiss the counterclaims, arguing that the claim was not justiciable because there was no actual controversy and therefore, the defendant could not satisfy the justiciability requirements. Under Connecticut case law, justiciability requires that there be an actual controversy, that the interests of the parties be adverse, that the matter in controversy be capable of being adjudicated by the judicial power, and that the determination of the controversy will result in practical relief to the complainant. Because it was the defendant's fault that his own action was dismissed, the trial court agreed that there was no actual controversy. The court stated that it would not be possible for the defendant to prove that the negligent legal services actually caused a legal injury. The court further stated that the defendant was not damaged nor was he precluded from asserting his rights or prosecuting his claim as a result of the court's dismissal of his action.

Impact: This case presents an interesting approach of disposing a professional negligence action when the former client has caused his own damages. While the

reasoning in the decision is sparse, the focus on legal injury is key to the analysis and a quick disposition.

FEATURED ARTICLE

Nursing Home Litigation: The Importance of the Defense Trial Theme

With the rise of the elderly population came the regulation of nursing home facilities that provide care for the elderly. These regulations — Omnibus Budget Reconciliation Act of 1987 amended 1990 under Title 42, §483 et seq., and the corresponding state regulations — evolved from establishing standard of care to providing for broad resident rights such as dignity and respect.

The corresponding rapid rise in nursing home litigation has revealed that the plaintiff's trial themes have likewise evolved from focusing on violation of the standard of care provided by the facility to exploiting societal anxieties regarding aging with dignity and respect. In litigation, counsel for the plaintiffs know that the potential juror may experience feelings of guilt when thinking about leaving a parent in a nursing home, or fear when thinking about what may happen to the juror when he gets older. Therefore, the plaintiff's counsel can depend on the ready sympathy of the juror.

In light of this, it is particularly important for the defense attorney tasked with defending nursing homes to understand the anxieties that lead to bias of potential jurors and develop a credible trial theme that counteracts it. Defending a nursing home requires first that the defense attorney considers the facts particular to the case and anticipate the theme(s) most likely to be used by the plaintiff's counsel.

The plaintiff's counsel will point out any violation of regulations but will also know

that compensatory damages are limited by the age and life expectancy/wrongful death claim of the resident who is elderly, retired, and unlikely to be financially supporting anyone. A skilled plaintiff's attorney is aware that a large verdict (inflated compensatory damages or punitive damages) is more likely when the jury is at once sad and inflamed. Common trial themes used by plaintiffs include vulnerability/frailty of the elderly person (statistically more likely to be female than male) and breach of trust or "profit over people," in which the nursing home is cast as a corporation caring more for the bottom line than the elderly resident.

The defense theme should essentially be the defense case encapsulated in a sentence that the jury cannot ignore or forget because it is introduced at *voir dire*, reinforced as the case develops and clearly supported by closing arguments. It does not have to be catchy, but it does have to be credible and credibly repeated.

In a nursing home case, while much of the trial may be consumed with details of assessments and regulations, charts, entries, and staffing time sheets, the effective defense trial theme is better focused on the humanity of providing care. In thinking of humanizing the nursing home defendant, it should be remembered that jurors are likely to have experienced nursing in other settings and are likely to view a nurse as a noble, caring person. Jurors are also likely to think favorably of the idea of "home" as the best place for anyone to be. The concept of these two terms can form a significant part of an effective defense trial theme which should also directly refute the plaintiff's claim.

The defense trial theme should be focused on empathy and consistently present at trial. It should be supported by evidence of the personalities that provide care and a clear picture of the community that supported the resident. This should go a long way in eliminating any juror bias and persuading the juror to see the story from the nursing home's perspective.

PROFESSIONAL LIABILITY MATTERS

(Click on the headlines below to read the full blog post from Professional Liability Matters)

Off the Clock, On the Hook: Unintended Consequences Of Working Remotely

Sitting down to dinner but still have a long to-do list from the office? Hear your work e-mails pinging as you watch the game? Not a problem that you can't handle with your smartphone or tablet. Whatever your take on this 24/7 connectivity, it is undeniable that the proliferation of mobile devices has made working away from the office easier and perhaps expected by employers (and clients). While such a policy may result in an increase in productivity, it can also create a legal risk for employers, namely, unexpected claims for overtime pay.

Who Can Sue Me? Liability to Non-Clients

Generally an attorney only owes a duty of care to her client. Thus, a predicate to a meritorious legal malpractice action is the existence of an attorney-client relationship. But identifying this relationship and determining to whom that duty extends is not simple. A recent decision demonstrates that an attorney may be exposed to malpractice based on the expectations of non-clients.

When Does a Professional Liability "Claim" Arise?

Professional liability insurance policies cover professionals for claims arising within the agreed upon policy period. At first blush this appears to be a relatively simple concept, but there is plenty of room for confusion which can result in a lack of coverage. The fact that a lawsuit was filed within a policy period does not necessarily mean that the "claim" giving rise to the

lawsuit is covered under a professional liability policy. A perfect example of this issue was presented to the court earlier this month in *Regency Title Co. v. Westchester Fire Ins.* (E.D. Tex. Nov. 15, 2013) during which the United States District Court for the Eastern District of Texas considered the date on which a claim arises for purposes of triggering coverage.

The ENDA Is Near: Proposed LGBT Law in the Works

On November 7, 2013, the Senate voted to pass the Employment Non-Discrimination Act, which would prohibit employers from discriminating against LGBT employees. The biggest obstacle facing ENDA is passage in the House of Representatives, which has yet to schedule it for debate. In most states, it is still permissible to discriminate against LGBT individuals in the workplace. If it becomes law, sexual orientation would be added to the list of protected classes and, as a result, ENDA could have significant impact on the workplace. Therefore, employers must take note.

Tripartite Relationship Put to the Test

The so-called "tripartite" relationship exists when an insurer retains defense counsel to represent the interests of the insured. Against this backdrop, it is relatively uncommon for an insurer to maintain a successful claim against defense counsel.

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