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MALPRACTICE ALERT!

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LEGAL MALPRACTICE DECISION MAY CREATE PROBLEMS FOR PLAINTIFF MEDICAL MALPRACTICE CLAIMANTS

The Ohio Supreme Court recently determined that a legal malpractice claim must be filed against the lawyers individually who committed the malpractice. Filing suit against a law firm, without naming the lawyers for which the firm may be vicariously liable, was not adequate, *Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, et al.*, 2009-Ohio-3601 (decided July 31, 2009).

We understand that some hospitals are now using *Wuerth* to argue that since the hospital or medical facility is only vicariously liable for the acts or omissions of its staff, failure to have timely sued the hospital staff involved in treatment therefore bars any claim against the hospital or medical facility. At least for new claims not yet filed, it may be possible for the hospital or medical facility to agree that it accepts liability, thus relieving the claimant from filing suit naming every person, including technical staff and nurses, who appear on the treatment – medical charts of the facility who may have given treatment to the claimant. The other alternative is to name numerous Doe defendants when filing a complaint, and then bring in the responsible persons, if any, but this procedure may not be acceptable if the name of the staff appears in the medical records for the claimant, and the statute of limitations was not preserved against such staff persons. A case now accepted for review by the Supreme Court demonstrates this potential problem.

In *Erwin, Admin. of the Estate of Erwin v. Bryan, M.D., et al.*, 2009-Ohio-758 (5th Dist.) the plaintiff named Doe defendants when the complaint was filed. Later in time, the primary defendant, Dr. Bryan, claimed that another doctor involved in the treatment of the deceased, Dr. Swoger, had responsibility for the medical condition ultimately leading to the death of Mr. Erwin. The complaint was amended pursuant to Civil Rule 15, and Dr. Swoger brought into the case. In a 2-1 decision, the Court of Appeals for Tuscarawas County held that the discovery of the alleged malpractice of Dr. Swoger did not occur until he was implicated during discovery in the case. Therefore, the amended complaint was timely filed. However, the dissenting judge noted that Dr. Swoger's name was in the medical records, was known prior to the time he was brought into the case, and therefore, the statute of limitations has run regarding any claim now filed. Again, this case has been accepted for review by the Ohio Supreme Court, so relying on the appellate case as precedent is subject to question at this point in time.

One other note area regarding plaintiffs' medical malpractice claims is continued concern with actual service of a "180-day letter" on potential defendants. In *Edens v. Barberton Area Family Practice Ctr.* (1989), 43 O.S.3d 176, the Supreme Court held that a 180-day letter extending the statute of limitations for medical malpractice claims was effective upon *receipt* by the *intended recipient.* If service is attempted by certified mail, for example, and a signature is obtained that is not that of the intended recipient, it is possible that the defendant will contend that they were not provided the letter timely, and that the person signing the receipt was not authorized to do so. *Fulton v. Firelands Community Hosp., 2006-Ohio-111,* (6th Dist.). Therefore, it is good practice to serve in a

manner that is likely to provide for actual receipt by potential defendant.

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LIABILITY FOR PAYMENTS RECEVIED BY A CLIENT FOR WHICH MEDICARE CLAIMS REIMBURSEMENT

Attorneys who represent claimants in personal injury actions need to keep in mind that if any medical treatment was paid for by Medicare, then Medicare has an interest in proceeds of a settlement, and in addition, has very broad claims for reimbursement of the same. The regulations implementing the government's right of recovery state that the Center for Medicare Services (CMS) has "a right of action to recover its payments from any entity, including a beneficiary provider, supplier, physician, attorney, State agency or private insurer that has received a primary payment." 42 C.F.R. Sec. 411.24(g).

In *United States v. Harris,* no. 5:08CV102 (U.S. Dist. Ct., N.D. Virginia), the government sought reimbursement of $11,367.78 from an attorney who settled a claim involving injury to his client. The attorney argued that since he had given the government notice of the settlement, he should not be liable for payment of the amount claimed. The District Court disagreed under the plain language of the federal regulation noted above in denying the motion to dismiss filed by the defendant-attorney.

Starting with settlements received in 2010, liability insurers have to report claims involving potential Medicare issues directly to the relevant government agency on a quarterly basis. Claims where such issues may be involved include those where a claimant is 65 years of age or older, or claimants who are receiving Social Security disability, or who have renal failure. Because the new reporting requirements may alert the CMS to claims that otherwise might have gone without review by the CMS, attorneys settling personal injury claims involving possible payment of expenses by Medicare should be particularly careful to be certain that any interest claimed by the government is considered and resolved.

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