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This Health Law Newsletter was prepared by SPvG's southern Illinois office, including Kathleen Pine, Reona Daly, and Jennifer Miller-Louw.

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Governor Signs Amendment to Allow Recovery for Grief Under Wrongful Death Act

On May 31, 2007, the Governor signed House Bill 1798, amending the Wrongful Death Act to include a provision allowing the jury to award damages for grief, sorrow, and mental suffering to the surviving spouse and next of kin of the deceased. Until now, this was an element which was specifically excluded from recovery in a wrongful death action. While plaintiffs could recover for the loss of companionship, they had been precluded for the most part, from putting on evidence of emotional suffering. Passage of this bill will significantly increase damage awards, although these damages should be subject to caps on non-economic damages. This amendment will apply to causes of action accruing on and after its effective date.

Plaintiffs Limited to Recovering Medical Bills Paid by Medicare / Medicaid *Wills v. Foster*, 2007 WL 1192144 (4th Dist. April 18, 2007)

The Fourth District has held that payments made by Medicaid and Medicare are not "collateral sources," and plaintiffs are limited to recovering only those amounts paid by these government services rather than the full amounts billed by the provider.

The Illinois Supreme Court held in *Arthur v. Catour*, 216 Ill. 2d 72, 833 N.E.2d 847, 295 Ill. Dec. 641 (2005) that plaintiffs whose medical bills were paid by private insurance could recover the billed amount even where the insurance company had paid the medical provider less than the billed amount. The theory was that since the plaintiff contracted with the insurance company which in turn negotiated a discounted rate with the medical provider, the benefit of that bargain should go to the plaintiff.

In *Wills*, the plaintiff's medical expenses billed totaled over \$80,000; however, the amount actually paid by Medicaid was only \$19,000. The jury entered a verdict for plaintiff for all medical charges billed as well as pain and suffering. On defendant's post trial motion the court reduced the jury's award to reflect only the amount paid by Medicaid. On appeal, the Fourth District found that because the benefits conferred upon plaintiff did not result from a bargained-for exchange with the third party who provided the benefits, the collateral source rule did not apply. The court cited the Supreme Court case of *Peterson v. Lou Bachrodt Chevrolet Company*, 76 Ill. 2d 353, 392 N.E.2d 1 (1979), in which the court forbade recovery when the plaintiff had not incurred any liability. The issue in that case was care provided free of charge. Likewise, in *Wills*, the court's decision hinged on the fact that the plaintiff did not pay for Medicaid's coverage and, by accepting Medicaid payments, the providers agreed such payments constituted full satisfaction of their fees.

Recommendation: Surprisingly, no appeal has been filed. Assuming the case remains good law, jury verdicts will be significantly less in cases where Medicaid or Medicare paid the past medical expenses. Medicare/Medicaid often pays as little as one third of the amount billed. This reduction in the amount of medical expenses plaintiffs can recover applies to pending and future cases.

For an insightful analysis of this issue, we recommend a law journal article written on this issue by Natalie Kussart, who will be joining Sandberg, Phoenix & von Gontard, P.C. as an associate. Natalie J. Kussart, Note, *Paid Bills v. Charged Bills: Insurance and the Collateral Source Rule* *Arthur v. Catour*, 31 So. Ill. U. L.J. 151 (2006).

Forum Non Conveniens: Illinois Supreme Court Takes a Step Back *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 848 N.E.2d 927, 302 Ill. Dec. 363 (2006)

In a 4 – 3 decision, the Illinois Supreme Court weakened what had appeared to be stronger court positions against forum shopping. The Court allowed plaintiff to pursue a wrongful

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death action in St. Clair County instead of Clinton County despite the fact that the accident occurred in Clinton County, plaintiff resided in Clinton County, the decedent's friends and relatives who were potential witnesses resided in Clinton County, and the sheriff who investigated the scene resided in Clinton County. Only two witnesses and the railroad company resided in St. Clair County, and one of those witnesses was an expert hired by plaintiff. Moreover, the fact that it took more than a year longer to get a case to trial in St. Clair County than in Clinton County was not ever discussed by the majority. Instead the Court relied on the St. Clair County trial judge's comment that he would have no difficulty trying the case timely.

Recommendation: The railroad company's agent for service of process resided in St. Clair County, a fact which the Court's majority emphasized. If companies want to avoid litigating in a certain county, they should not have agents for service of process in that county. Also, the defense will have a difficult time meeting its burden of proof to establish the county is an inconvenient forum to try the case where the defense is simply seeking to transfer to an adjacent county. The Supreme Court was not too impressed with the little bit longer drive witnesses would have going to St. Clair as opposed to Clinton County.

No Relation Back Means Statute of Limitations Bars the Plaintiff's Claim

***Grove v. Carle Foundation Hospital*, 364 Ill. App. 3d 412, 846 N.E.2d 153, 301 Ill. Dec. 191 (4th Dist. 2006)**

In *Grove v. Carle Foundation Hospital*, plaintiff was admitted to the defendant Hospital for a routine colonoscopy. During the procedure, a wire snare became incarcerated around a tumor in plaintiff's colon; the doctor could not remove the wire snare. As a result of that complication, emergency surgery was performed by two surgeons. Owing to the emergency nature of the surgery, plaintiff was not treated prophylactically with antibiotics and developed a postoperative wound infection. Plaintiff's wife subsequently filed a complaint for personal injuries against the hospital and the two surgeons under the theory of *respondeat superior*. The original complaint did not allege any negligence on the part of the doctor who performed the colonoscopy. Almost a year later, after the statute of limitations had run, plaintiff filed a motion to amend the complaint to add a count against the hospital for the alleged negligent acts of the doctor who performed the colonoscopy. Plaintiffs argued the amendment should be allowed pursuant to the relation-back exception to the statute of limitations. 735 ILCS 5/2-616(b).

The Fourth District Court of Appeals noted that while Illinois law supports a liberal policy of allowing amendments to pleadings, there is no absolute right to amend a complaint. Illinois law states a cause of action in an amended complaint will not be time barred and will be said to relate back to the original complaint if (1) the original complaint was filed timely, and (2) it appears the newly asserted cause of action grew out of the same transaction or occurrence. 735 ILCS 5/2-616(b).

Here, the Court found that the amended complaint would require defendants to produce different testimony than required to defend the original complaint. The original complaint alleged no negligence on the part of the doctor who performed the colonoscopy. Therefore, the appellate court affirmed the trial court's decision to deny the amended complaint; plaintiffs sought leave to appeal, but the Illinois Supreme Court denied review.

Recommendation: Plaintiffs' motions to amend their complaints to add new theories are pretty routinely granted by trial courts. Here, the hospital, defending the surgeons for the second surgery, was faced with defending yet another surgeon for yet another surgery. The court found this a little too dissimilar to relate back. Nonetheless, all the parties knew of the prior surgery and the prior doctor's involvement, and the two surgeries were very interrelated both in time and nature. *Grove v. Carle Clinic Foundation Hospital* will be an important case to cite when defendants in a medical malpractice case, especially hospitals, want to prevent plaintiffs from adding new theories against new agents or employees after the statute of limitations has run.

SPvG News . . .

June 20-22, 2007 **Teresa Bartosiak** and **Tony Martin** attended the Medmarc Defense Counsel meeting in Colorado Springs, Colorado.

June 27, 2007 **Russell Makepeace**, **Sara McAvoy**, **Tim Dugan**, **Chellie Butel**, **Bobbie Moon**, and **Bryan Cavanaugh** presented "The Risks of Risk Management" at SPvG in St. Louis, Missouri.

June 29, 2007 **Kathy Pine**, **Reona Daly**, and **Jennifer Miller-Louw** spoke at the annual meeting of I.S.H.R.M. in Peoria, Illinois about recent Centers for Medicare and Medicaid Services (CMS) changes.