THE PASCHOS LAW UPDATE NEWSLETTER
THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

March 1, 2010

I. FIRM NEWS

1. On March 19, 2010 firm member, Thomas F. Gallagher, Esquire gave a presentation in Mount Laurel, New Jersey on relevant statutory immunities for community based youth sports organizations in the State of New Jersey.
2. Recently, Thomas Paschos & Associates, P.C. was successful in a number of litigation matters, and we would like to report to you on some of these victories.
    - In the United States District Court for the District of New Jersey, the firm secured a major defense victory on a motion for summary judgment in an ERISA matter, and subsequently successfully resolved the matter on appeal while it was pending in the Third Circuit Court of Appeals.
    - The firm, on behalf of the manufacturer, secured the dismissal of a Philadelphia County products liability suit, and subsequently quashed Plaintiff's appeal to the Pennsylvania Superior Court.
    - In a professional liability action brought in the New Jersey Superior Court, the firm secured summary judgment on behalf of two life insurance brokers and their agency.
    - In the New Jersey Superior Court, the firm secured a partial summary judgment, dismissing consumer fraud act claims and punitive damages claims against an insurance broker.
    - In the United States District Court for the District of New Jersey, the firm secured dismissal of a civil rights action against a private correctional facility and its warden.

II. LEGAL MALPRACTICE LITIGATION

Affidavit of Merit Not Always Required to be from a Licensed Professional Practicing in the Same Specialty

In Scott v. Calpin, 2010 WL 743903 (D.N.J. March 2, 2010), a slip opinion, Defendant, an attorney licensed in New Jersey, represented Plaintiff Norman L. Scott in a divorce proceeding before the New Jersey Superior Court for a period of approximately ten day. Subsequent to the representation, Plaintiff filed a Complaint alleging professional malpractice against Defendant. Plaintiff filed an Affidavit of Bruce P. Friedman, Esquire, an attorney licensed in the State of Pennsylvania who practices family law and has "represented hundreds of divorce clients."

Defendant filed a Motion to Dismiss for failure to acquire an Affidavit of Merit from an attorney admitted to practice in the State of New Jersey.

Defendant argued that because N.J.S.A. 2A:56A-26, which defines “licensed person” for purposes of the Affidavit of Merit Statute, includes “an attorney admitted to practice law in New Jersey,” that therefore “an Affidavit of Merit must be executed by an attorney licensed to practice in the State of New Jersey.” Plaintiff acknowledged that Mr. Friedman is a licensed attorney in Pennsylvania but noted that N.J.S.A. 2A:53A-27 states “the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area of specialty involved in the action ... for a period of at least five years.”

The court found that contrary to Defendant's position, the Affidavit of Merit Statute authorizes an appropriate licensed person to hold an out-of-state license. The court noted that if Defendant's reading of N.J.S.A. § 2A:53A-27 were correct, that the licensed attorney opining in a legal malpractice case must be licensed in New Jersey, the phrase “the person executing the affidavit shall be licensed in this or any other state” would be read out of the statute. Rather, the court found it must give meaning to all of the words of a statute.

The court noted that Defendant's confusion over the application of N.J.S.A. 2A:53A-26, which defines “licensed person” under the Affidavit of Merit Statute, appeared to stem from the fact that the phrase “licensed person” is used both to define the class of persons where an Affidavit of Merit would be required to maintain an action for malpractice or negligence and to define the types of persons who may provide the Affidavit.

The court held that although N.J.S.A. § 2A:53A-26(c) states that a “licensed person,” as used in the Affidavit of Merit Statute, “means any person who is licensed as ... an attorney admitted to practice law in New Jersey,” this language did not require that any affidavit submitted in support of a legal malpractice action must be submitted by an attorney admitted to practice in New Jersey. Such a result would clearly conflict with the legislature's direction in N.J.S.A. § 2A:53A-27, which permits affidavits from a person “licensed in this or any other state.”

Applying the factors of the Affidavit of Merit statute, the court found that Plaintiff satisfied the Affidavit of Merit Statute: Plaintiff produced an affidavit from an appropriately licensed attorney with over thirty years of experience in the areas of family law and divorce proceedings and who has attested to the “reasonable probability” that Defendant's representation of the Plaintiff fell below “the acceptable standard of care” required of attorneys in divorce proceedings.

III. PROFESSIONAL LIABILITY LITIGATION

Affidavit of Merit from an Attorney Licensed in a Another State is Sufficient in a Legal Malpractice Case

In Jorden v. Glass, 2010 WL 786533 (D.N.J. March 5, 2010), a slip opinion, plaintiff filed suit based on defendants' allegedly negligent medical treatment of decedent's medical condition. Dr. Glass is a board certified psychiatrist who at the time of the decedent's death was conducting a "Phase I Clinical Trial concerning the dosage and food effects of a new medicine for schizophrenic patients." Decedent was part of the clinical trial. Plaintiff alleged she was told the decedent had some kind of panic attack, seizure, or stroke at co-defendant Lourdes Medical Center. Plaintiff further alleged the decedent died, according to the death certificate, of acute myocardial infarction. Plaintiff filed suit to recover damages for the decedent's allegedly negligent medical treatment and lack of informed consent.

On July 22, 2009, plaintiff served an affidavit of merit prepared by Joyce R. Rubin, M.D., doctor specializing in general internal medicine. Dr. Glass sought to dismiss plaintiff's claims because plaintiff's affidavits of merit were not prepared by a doctor who specializes in psychiatry. Dr. Glass argued that the complaint against him should be dismissed for failure to comply with N.J.S.A. 2A:53A-41. Dr. Glass contended the statute requires plaintiff to obtain an affidavit of merit from a psychiatrist, specifically a psychiatrist who deals with phase I clinical trials, and because plaintiff obtained affidavits from an internist, the claims against Dr. Glass should be dismissed.

Plaintiff opposed Dr. Glass's motion arguing his cause of action is not directed to Dr. Glass's specialty in psychiatry but rather to the general treatment of chest pains. Plaintiff argued that the only claim of medical malpractice that is brought against Dr. Glass relates to the treatment of the decedent's chest pains. Thus, plaintiff alleged because his medical malpractice claim is directed to the decedent's chest pains and not to how Dr. Glass conducted his psychiatric clinical trial, affidavits of merit authored by an internist is sufficient.

Because Dr. Glass is board certified in psychiatry, the court was required to determine whether the care or treatment at issue "involves" the specialty of psychiatry. The court noted that this issue was recently addressed in two unpublished New Jersey Appellate Division cases. These cases held that there may be appropriate circumstances where a general practitioner is an appropriate licensed person to issue an affidavit of merit directed to the care provided by a specialist.

The court did not accept the argument that regardless of the nature of plaintiff's medical malpractice claim that only a psychiatric specialist can address Dr. Glass's standard of care. The Court found that plaintiff's malpractice allegation, that the decedent's chest pains were not properly treated, fell under the general skill and knowledge of a general practitioner. Thus, the Court held that plaintiff submitted a competent affidavit of merit.

IV. EMPLOYMENT LAW LITIGATION

Individuals May be Held Liable Under the Family and Medical Leave Act

In Narodetsky v. Cardone Industries, Inc., 2010 WL 678288 (E.D.Pa. February 24, 2010), a slip opinion, Plaintiff Dmitry Narodetsky was employed by defendant Cardone Industries, for approximately twelve years. On or about August 19, 2009, plaintiff was diagnosed with a leg injury and was informed he would need surgery. Plaintiff's wife contacted defendant Kelly Stigelman, Cardone Industries' manager of health benefits, and informed her that plaintiff would need time off for the anticipated operation. During this conversation, plaintiff's wife requested that plaintiff be given short-term disability for the upcoming medical leave. On or about the next day, defendants conducted a forensic computer search of plaintiff's computer. Plaintiff alleged that defendants performed the search to find a reason that would justify his termination and thereby obviate the need to grant the requested leave.

On or about August 31, 2009, plaintiff informed his supervisor that he would need to take ten days off from work following the surgery. On or about September 9, 2009, plaintiff was called into a meeting at which defendants Dan Bosworth, Shannon Sarracino and William Bond were present. They showed plaintiff an email which they alleged he had forwarded to another employee in July 2008. At the meeting, he was terminated for allegedly sending this email.

Plaintiff filed a complaint against corporate defendant Cardone Industries, Inc. and five individual defendants-Michael Cardone, Jr., William Bond, Kelly Stigelman, Shannon Sarracino and Dan Bosworth alleging, among other things, that defendants violated FMLA by interfering with his FMLA rights and retaliating against him after he provided notice to them about his need to take FMLA leave. Defendants' argued that plaintiff failed to plead sufficient facts to establish that the individual defendants are “employers” as that term is defined under the FMLA.

The Family and Medical Leave Act makes it “unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.” 29 U.S.C. § 2615(a)(1). The FMLA defines “employer” in relevant part as “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.”

The court noted that while the Court of Appeals has not addressed whether individuals may be held liable under the FMLA, the FMLA implementing regulations explain that

[t]he definition of ‘employer’ in the Fair Labor Standards Act similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers ‘acting in the interest of an employer’ are individually liable for any violations of the requirements of FMLA.
29 C.F.R. § 825.104(d). Furthermore, the court noted that courts in this Circuit have found individuals may be held liable under FMLA.

The court found that plaintiff’s allegations that defendants participated in the forensic search of his computer with the goal of finding a reason to justify his termination because he had requested FMLA leave were sufficient to state a claim against defendants. The court held that the facts plaintiff alleged supported a finding that each of the individuals is a “person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer” in accordance with 29 U.S.C. § 2611(4)(A)(ii)(I). The court provided:

As the president, Cardone is a corporate officer with operational control over Cardone Industries' and is therefore an employer along with the corporation. It is reasonable to infer that Bond, Sarracino and Bosworth had authority to fire employees because it is alleged that they terminated plaintiff at the September 9 meeting. Furthermore, I find it is reasonable to infer that Stigelman also had the authority to terminate employees because it is alleged that she is a manager and fired plaintiff.

The court held that plaintiff's allegations support an inference that each of the defendants exercised control over plaintiff in the decision to terminate him and, therefore, each defendant could be individually liable under FMLA.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.